EMPLOYMENT TRIBUNALS
BETWEEN

Claimant	**AND**	**Respondent**
Mr W Garnett		Seminar Components Limited

HELD AT: Swansea **ON:** 28, 29 & 30 August 2019

EMPLOYMENT JUDGE N W Beard (Sitting Alone)
Representation:

For the claimant: In Person
For the respondent: Miss Wheeler (Solicitor)

JUDGMENT

The judgment of the tribunal is: The claimant's claim of unfair dismissal is not well founded and is dismissed.

REASONS

1. This is a judgment in four parts. The first part is an introduction which deals with preliminary matters; the second part sets out the facts; the third part sets out the law and the fourth part is my analysis of the application of the law to the facts.

Part 1 - The Preliminaries

2. The claimant claims unfair dismissal. The respondent admits that it dismissed the claimant but denies the dismissal was unfair. At the outset of the hearing I discussed with the parties the issues that I am required to resolve; they were agreed as follows:
   2.1. The claimant contends that the real reason for his dismissal was not his conduct but because the respondent was dissatisfied due to its perception that the claimant was at fault for a missing order which cost the respondent money (the claimant denies he was at fault) and there was a conspiracy to remove him.
   2.2. The claimant contends that the disciplinary process was flawed in the following ways:
      2.2.1. During the investigation stage the claimant raised matters which were not appropriately followed up with witnesses, and not all witnesses suggested by the claimant were interviewed.
      2.2.2. The respondent failed to provide to the claimant, prior to the disciplinary hearing, all of the material relied upon by the respondent to dismiss the claimant.
      2.2.3. That the claimant was not permitted to question or call witnesses at the disciplinary hearing contrary to the ACAS code.

2.2.4. The claimant contends it was unreasonable for those making decisions at the disciplinary hearing and on appeal not to be present at the hearings but to rely on written reports.

2.2.5. That there was no further investigation at the appeal stage.

2.3. The claimant also contended that the dismissal was substantively unfair.

2.3.1. The contention was that the conduct found by the respondent did not amount to gross misconduct, as his conduct was representative of general conduct tolerated by the respondent in the workplace.

2.3.2. The claimant also contended that there was an inconsistency in treatment of the claimant in comparison to the way in which others had been previously been disciplined for similar conduct.

2.4. The respondent argues that the reason for dismissal was the claimant's conduct in the sending of emails, sexual harassment of a member of staff, harassment of another member of staff, inappropriate reference to a director which would undermine respect of the director and making references to a group of staff which was degrading. These specific complaints were encompassed in an overall allegation that the claimant had bullied others.

2.5. The respondent contends that the process adopted to dismiss the claimant was fair.

2.6. The respondent argued that, if the procedure adopted was unfair, then it was appropriate to consider that the claimant would have been dismissed in any event if a fair procedure was followed.

2.7. The respondent also contended that, if the dismissal was found to be unfair the claimant had contributed to his dismissal.

3. The claimant represented himself and he told me he had no experience of tribunal cases. In order to assist the claimant, I outlined the process and order of evidence and submissions that would be followed. In addition to this I gave the claimant guidance on the purpose and limits of cross examination. The respondent was represented by a solicitor, Miss Wheeler.

4. I was provided with a bundle of documents running to in excess of 457 pages and the claimant attached some documents as exhibits to his witness statement. However, I was only referred to a small minority of these documents during evidence and submissions.

5. I heard oral evidence from the claimant on his own behalf. The claimant also provided written evidence from two former colleagues who had signed those statements attesting to the truth but did not appear to be cross examined.

6. The respondent called 2 witnesses to give oral evidence: Philip Lempriere, a director of the respondent and the person who dismissed the claimant and Stephen Hale who was the Decision Maker following the claimant's appeal.

Part 2 - The Facts

7. The claimant was employed in a senior management role with the respondent which involved work as a production planner and a section leader. He commenced employment on 8 March 2004 and was dismissed on 24 September 2018. The respondent is a manufacturer. A part of the respondent's workforce are former employees of Remploy and disabled with learning difficulties.

8. There is no dispute that there was some problem with a missed order. The claimant contends that this was something consistently raised with him in reviews from the Spring of 2018 and he contends that Mr Hale would not accept that the claimant was not at fault. Mr Hale was not questioned by the claimant about this issue specifically. However, the claimant, during the disciplinary procedure, made the point that he had never had a bad review. In response to questions in cross examination about this the claimant indicated that the reviews had lasted about an hour and most of the review was positive. I did not find the claimant a convincing witness on this point, it appeared to me he was trying to justify an obvious inconsistency between his conspiracy thesis and the information he had given at the time. Even if I were wrong about the claimant's accounts of reviews and it was mentioned that would only have been as a minor point in a generally positive review. In those circumstances the matter of the missed order being raised by Mr Hale, would represent a minor matter. That being the case, on either basis, it does not support the claimant's contention that it formed a foundation reason for removing him from the business.

9. The claimant contends that the respondent's approach was compounded by advertising his role and giving him only one day's notice that it was going to do so. In addition, he argues that the respondent did not inform him that his position was safe for a further five weeks after this.
   9.1. The respondent indicates that it was carrying out a restructure for the needs of the business. The claimant was aware of this restructure if not the detail. I was told and accept that the respondent was splitting the claimant's role. This was to remove production planning from his current role but leaving the section leader part of the role in place.
   9.2. I was also told and accept that others with partial involvement in production planning also had that planning aspect removed from their roles. This was done to create a specific production planning post.
   9.3. Further to this the respondent employed an individual to take up a specific human resources role; the claimant was aware of this.
   9.4. The claimant indicated that he had informed one of the directors, Mr Phillipart, that he was considering as constructive dismissal claim and that he was starting his own business with the intention of leaving within 12 to eighteen months. Despite this Mr Phillipart continued to encourage the claimant to apply for the planning role.
   9.5. During evidence the claimant accepted that it had been suggested to him, more than once, that he should apply for this planning role. This does not fit with the claimant being singled out and the respondent attempting to remove him from the business.
   9.6. The claimant was, I accept, disconcerted by the restructure and the respondent should have given more thought to the amount of information it provided to the claimant given that his role was due to substantially change. However, this does not support the contention that the respondent was deliberately creating a limited reorganisation solely to remove the claimant.

10. In my judgment, based on the findings above, I reject the claimant's thesis, that the respondent was trying to manage the claimant out of his job. The respondent was engaged in a genuine reorganisation. The contention that this was a manufactured situation because the respondent considered the claimant had missed an order is, in my judgment, far-fetched.

11. The respondent had a meeting with a major customer (referred to from now on as "R") on 31 July 2018. The claimant was not present at the meeting but disputes that the respondent's witnesses are accurate when they say that there was a complaint about emails the claimant had sent to a former employee of the customer (referred to from now on as "A").
    11.1. In this respect I have been referred to page 403 of the bundle. There is a letter which contains an earlier email, both from R. This reveals the following: there was a meeting on 31 July 2018; R made comments about a member of the respondent's staff, the comment also set out that another member of the customer's staff (referred to from now on as "B") felt uncomfortable in relation to what had been communicated to her by A about the claimant. B's discomfort was in relation to A asking her "could he talk to her the way he talked with A".
    11.2. It is clear from the earlier email that the claimant had not made B uncomfortable with his comments. However, Mr Lempriere and Mr Hale told me that the customer was not happy with the content of the emails and wanted no more to be sent.
    11.3. Having been shown some of the emails in question I am fully convinced that this was something raised by R. In my judgment, having found emails of the type I have seen, and given the expressed discomfort of B it would be astonishing if R did not raise this with the respondent.
    11.4. I am bolstered in my judgment that R raised the issue of emails with the respondent because the claimant gave evidence that Mr Philipart had spoken to him about the emails and that a search was to be conducted. This was only likely to happen if the respondent had been made aware of their existence. In my judgment it is highly unlikely that the respondent, which does not monitor emails, would carry out a trawl of the claimant's emails going back many years on an entirely speculative basis. The search was specific and related to emails between the claimant and A.

12. At this point it is worth dealing with the earlier email from R. The claimant complained that this had not formed part of the disciplinary evidence. However, the reason it had not was because the claimant was never accused of having made the request to speak to B in the same way, it simply did not feature as an allegation in the disciplinary process.

13. The emails I have seen are entirely inappropriate for a senior manager to send to someone in a different organisation as business communications. The emails in question contain sexual and lascivious comments and innuendo. The claimant in cross examination told me that he knew they were not appropriate now, but did not know that they were at the time they were written or during the disciplinary process. In my judgment the claimant did not tell me the truth in this regard. It would be obvious to anyone, let alone a manager of the claimant's seniority, that such sexualised communication between individuals who were meant to be engaging in business communication would be totally inappropriate. My judgment as to the claimant's dishonesty is strengthened by the claimant's admission that he deliberately deleted these emails once Mr Phillipart made him aware of the respondent's concerns about them. The claimant's explanation that this was because of marital problems does not hold water in respect of work emails. There was some evidence about the numbers and length of emails and therefore the time likely to be spent composing and responding to them. However, I accept the respondent's analysis that the emails show that the claimant was engaged in

"conversations" and simply considering the time to compose and respond would not reflect the time spent by the claimant engaged in this activity. The respondent came to the conclusion that significant time was spent on these conversations, this was a conclusion open to them on the evidence

14. On the 1 August 2019 an employee of the respondent (referred to from now as D) raised a complaint with Mr Lempriere about the claimant posting on Facebook. D had accidently broken a mug belonging to the claimant. The claimant's posting "*thegapwastoosmallforyourbody*" and referring to clumsiness and disregard for others' belongings. D is overweight and was upset by this posting and considered that the claimant was "fat shaming" him. On the following day D came forward with a further complaint that the claimant had told him to "fuck off out of welding" when he was there for a legitimate purpose. The claimant accepted in evidence before me that he had posted the Facebook entry and that he had also sworn at D as alleged. The claimant also accepted that when he spoke to D, he was angry, and it would have appeared aggressive. However, he said he would have used the same words on another occasion even if he were not angry. This was also what he explained in the disciplinary process.

15. A newly appointed employee (referred to from now on as E), had made notes, some of which were about the claimant's conduct. It is apparent the claimant became aware of these by 2 August 2018 as he had obtained a copy of them, the claimant said that someone else had copied them but did not name that person. I reject the claimant's evidence on that, it appears to me highly unlikely that anyone else would have copied these notes as they would not have been of importance to anyone else. However, the claimant was considering bringing a constructive dismissal claim and would have considered this document potentially important evidence.

16. On 3 August 2018, a new employee, E drew Mr Hale's attention to other aspects of the claimant's conduct of which he had made notes. There is a dispute as to whether Mr Hale told E to covertly observe the claimant. In my judgment it would be highly unlikely that Mr Hale would instruct an employee who had only worked for the respondent for a short time to conduct covert observation. However, it does seem likely to me that Mr Hale, who on his own account was busy and about to go on holiday, would say that he would deal with matters on his return and for E to carry on, which E would take as an instruction to carry on making notes. However, I see nothing sinister in this response and I certainly do not consider it supports the claimant's thesis that there was a conspiracy in operation to end his employment.

17. On 7 August 2018 E approached Mr Lempriere. He informed Mr Lempriere that he had been taking notes of the claimant's conduct. He spoke of the claimant speaking to a female employee (referred to from now on as C) and asking her to "get her minge out" (a reference to female genitals). He also told of the claimant pointing to his own genitals and saying "you love it" directed towards C. E told Mr Lempriere that the claimant referred to a certain group of employees (which included the learning disabled) as "pond life" and of calling Mr Phillipart "Fuckface" in front of others when Mr Phillipart was not present.

18. Mr Lempriere carried out an initial investigation taking statements from staff. These statements tended to support E and D's accounts. Mr Lempriere took advice from external HR providers and as a result decided it was appropriate to suspend the

claimant. This he did by letter on 8 August 2018. The basis of the suspension did not include the emails but did relate to the other complaints. The letter suspending the claimant told him that he should not contact anyone at the respondent. In breach of this the claimant spoke to employees who were friends of his and who he was later to refer to in the investigation as people he would like to be interviewed. The claimant told me during cross examination that he did not discuss the allegations against him with these individuals. I did not accept the claimant's evidence, I considered it highly unlikely that he would take the risk of contacting these individuals unless it was to discuss the allegations against him.

19. The respondent considered the difficulty it might have in dealing with a disciplinary process. The claimant was a senior manager. If dismissal was warranted because of gross misconduct only a director would be authorised to dismiss (as set out in the respondent's employee handbook). There were only three directors. The respondent was also aware, because of the claimant's discussions with Mr Phillipart, about the claimant's views as to constructive dismissal and poor treatment. There was in addition concern about Mr Phillipart being involved because he had conducted meetings with the claimant where the claimant had made allegations about his treatment by the respondent. It was decided that the best method of dealing with the claimant would be to employ an independent organisation to conduct the investigation and any subsequent hearings. However, because the decision to dismiss could only be taken by a director, it was also decided that reports should be provided from the investigation and any hearings to a director who would then make the decision. Mr Lempriere was to be the director making the decision as to whether there was a case to answer and any outcome on the disciplinary level and Mr Hale would deal with any appeal. It is to be noted that all of the interviews held and the statements gathered from them were recorded and the recordings transcribed as were the interviews and hearing with the claimant. Those transcriptions formed part of the various reports provided as set out below.

20. Mr Hall carried out the investigation. He re-interviewed those who had been spoken to by Mr Lempriere and interviewed the claimant. In respect of those matters alleged against the claimant during interview the claimant admitted that he had sent the emails in question, that he had posted the Facebook comment, that he had made the comment to D on the 2 August and that he was furious at the time. He also admitted that he referred to the group of staff as "pond life" and had called Mr Phillipart Fuckface behind his back. The claimant denied having made the comments as alleged to C and further denied that he had pointed to his genitals. The claimant, as part of his explanation, said that a number of people used expletives as this was a factory. He specifically said that Mr Phillipart used bad language to him and that he would call Mr Phillipart expletives to his face. The claimant also said that he had spoken to C and she had denied that he had said the things alleged to her. It is important to note that C had been interviewed twice by Mr Hall and had become distressed during the interviews.

21. The claimant complains that Mr Phillipart was not spoken to despite the matters that he raised. In response to this Mr Lempriere, in evidence said it was not necessary as the respondent did not deny the use of industrial language, but it was the claimant referring to a director in this derogatory way to staff which was in issue. As such it was not necessary to speak to Mr Phillipart about this particular matter. Similar responses were given about the failure to do this at disciplinary and appeal hearing

stages. In respect of the conversation with C the respondent considered that this was also unnecessary as C had been clear about the position. In any event by the end of the process the claimant had identified a further employee as having witnessed the conversation between him and C, that person was interviewed and denied the conversation took place.

22. The investigation report included all statements gathered and expressed the investigator's views on the evidence. Mr Lempriere read all aspects of the report and conducted his own analysis of the evidence gathered. After reading the investigation report and considering its contents Mr Lempriere considered that there was a case to answer. In my judgment this is unsurprising as the claimant had admitted most of the allegations but was putting forward reasons for that conduct which would have to be explored as a defence. In respect of the complaints which he had denied the respondent had conflicting evidence which it would be necessary to resolve. The claimant was invited to attend a disciplinary meeting by letter, having been provided with the full investigation report. The claimant did not request the attendance of any witnesses.

23. At the disciplinary hearing the claimant was allowed an opportunity to put forward his version of events. In respect of questioning others in relation to matters he raised he agreed to Rebecca Dennis, the independent person conducting the hearing, asking questions of those individuals. She did so. The report prepared was passed to Mr Lempriere, who having reviewed all the documentation decided to dismiss the claimant. He rejected the claimant's account of the incident with C preferring the evidence provided by her. Mr Lempriere told me that he had considered the matters raised but came to the conclusion that the accounts provided by C and others were more believable. He decided to dismiss the claimant for all matters considering that individually and collectively they amounted to gross misconduct. The conclusions reached by Mr Lempriere arose from the evidence, there were no compelling reasons for him to prefer the claimant's account over the accounts of others.

24. The claimant appealed the decision to dismiss him. His grounds of appeal set out the following matters: that there were many discrepancies in the statements taken along with untruths; that the people he asked to be witnesses were not interviewed until the disciplinary stage so he did not have the opportunity to question them; that C had lied and that Facebook posts brought her character into question; the E had lied in alleging the claimant had made a racist comment.

25. The appeal hearing was dealt with by Kuldeep Chehal, from the HR organisation assisting the respondent. The claimant accepted that the hearing had covered the points of appeal raised by him. The report, which again had all the was provided to Mr Hale who upheld the dismissal.

26. The discrepancies referred to me by the claimant were of the type one would expect from a number of individuals being interviewed about events. There was no clear indication of lying, although this is the view the claimant took of the discrepancies. In my judgment the views that the respondent took of the evidence were views that were available to it. There was nothing in that evidence which so obviously pointed to the claimant's view being correct, so that the respondent could not reasonably come to the conclusions that it did. An example is that C gave a confusing account of who she had told about events. However, that confusion could have arisen, as the

respondent decided it did, because she responded differently when dealing with questions which talked of her complaining to someone compared to those where she spoke of telling somebody of events. Similarly, she was less clear as to when particular things she was talking about was mentioned to people, it was open to the respondent to decide, as it did, that she was talking about telling these people on different occasions about a type of comment that had been made on a number of occasions.

27. The claimant raised the issue that an employee had previously been disciplined for calling a colleague "a wanker". In that case only a warning had been given to the employee. The claimant also raised the complaint that Mr Phillipart in informal meetings would refer to individuals in derogatory terms using bad language and had not been disciplined. The respondent did not argue that this was not the case. However, the claimant also said that Mr Hale behaved in a similar way. Having heard from both the claimant and Mr Hale I am of the view that there would be occasions when each would robustly refer to one and other when dealing with each other and I have no doubt that bad language would be involved.

28. Finally, I consider that the claimant during the disciplinary process showed no insight, remorse or contrition into the conduct he had admitted. In addition to this, in my judgment, the claimant had attempted to pre-empt and later to manipulate the disciplinary process, first by deleting the emails and later by speaking to fellow employees.

Part 3 - The Law

29. Section 98 of the Employment Rights Act 1996 provides:

> *(1) "In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, the Tribunal shall have regard to—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it is ---- a reason falling within subsection (2)".*
>
> *(2) A reason falls within this subsection if it-*
> *(b) relates to the conduct of an employee*
>
> *(4) where the employer has fulfilled the requirements of subsection (1) the determination of the question of 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".*

30. ***Sandwell & West Birmingham Hospitals NHS Trust v Westwood [2009] UKEAT 0032/09*** and f ***Wilson v Racher [1974] ICR 428*** demonstrate that gross misconduct must be either deliberate wrong doing or gross negligence. It is a question of mixed fact and law upon which the Tribunal must draw its own conclusions.

31. I now outline the general approach to be taken unfair dismissal, particularly related to conduct. I remind myself that in ***Mitchell v St Joseph's School*** in the Employment Appeal Tribunal, a decision made after the change to a situation where unfair dismissal cases are dealt with generally by an Employment Judge alone His Honour Judge McMullen QC made it clear that the law remains as it was. It is not the subjective view of the Employment Judge that is important, what is important and what is being examined is the employer's reason for dismissal and the objective reasonableness of that decision. It is a review of the employer's decision. That proposition was set out very clearly in ***Turner v East Midlands Trains [2013] IRLR 107***. The Judge in Turner said:

> *"For a good many years it has been a source of distress to unfair dismissal claimants that, with rare exceptions, they cannot recanvass the merits of their case before an employment tribunal. In spite of the requirement in s.98(4)(b) that the fairness of a dismissal is to be determined in accordance with the equity and the substantial merits of the case, a tribunal which was once regarded as an industrial jury is today a forum of review, albeit not bound to the Wednesbury mast".*

32. Guidance has been given to Tribunals in dealing with conduct cases, beginning with that given in ***Burchell v British Home Stores [1978] IRLR 379***. This requires me to consider the following: firstly, whether the respondent has a genuine belief in the misconduct; then whether that belief is sustainable on the basis of the evidence that was before the respondent at the time; thereafter, whether that evidence was gained by such investigation as was reasonable in all the circumstances of the case; finally, I must consider whether the punishment fits the crime, in other words, whether dismissal was a reasonable decision to take given the conduct itself and the evidence upon which it was based. ***Sainsbury's Supermarket v Hitt [2003] IRLR 23*** makes it clear that the test to be applied to the extent of an investigation carried out by an employer is also one of applying the band of reasonable responses. ***Whitbread Plc (Trading As Whitbread Medway Inns) v Hall [2001] IRLR 275*** makes it clear that even where there is admitted misconduct the investigation must fall within the band of reasonable responses. However, the extent of a reasonable investigation, where conduct is admitted, is likely to be related to the circumstances in which the conduct occurred.

33. Therefore, the process I must engage in is to look at the evidence as it was before the respondent at the time of the decision. Decide whether that evidence is sufficient for a reasonable employer to hold the belief in this claimant's misconduct. Then to ask whether the investigation was reasonable in a ***Sainsbury*** sense. To

ask myself whether or not that decision was reasonable in all the circumstances at that point in time and on that evidence. I am warned, in particular, to avoid what was referred to by Lord Justice Mummery in ***London Ambulance Service NHS Trust v Small [2009] IRLR 563*** as the substitution mindset, where he held:

> *"It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charge made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question- which is whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal".*

That of course all the circumstances must include reasonableness as is set out in ***A v B*** and ***Crawford*** as I have already indicated. Lord Justice Mummery said in ***Post Office v Foley [2000] ICR 1283*** that:

> *"The band or range of reasonable responses" approach to the issue of the reasonableness or unreasonableness of a dismissal, as expounded by Browne-Wilkinson J in Iceland Frozen Foods Ltd v Jones [1983] ICR 17 and as approved and applied by this court (see Gilham v Kent County Council (No 2) [1985] ICR 233; Neale v Hereford & Worcester County Council [1986] ICR 471; Campion v Hamworthy Engineering Ltd [1987] ICR 966; and Morgan v Electrolux [1991] ICR 369), remains binding on this court, as well as on the Employment Tribunals and the Employment Appeal Tribunal. The disapproval of that approach in Haddon (see p.1160E-F) on the basis that (a) the expression was a "mantra" which led Employment Tribunals into applying what amounts to a perversity test of reasonableness, instead of the statutory test of reasonableness as it stands, and that (b) it prevented members of Employment Tribunals from approaching the issue of reasonableness by reference to their own judgment of what they would have done had they been the employers, is an unwarranted departure from binding authority".*

Making it clear therefore that the position is that substitution is not ever appropriate

34. However, I am also to consider the limits that are set out by Lord Justice Longmore in ***Bowater v Northwest London Hospital NHS Trust [2011] IRLR 331***, he said:

> *"I agree with Stanley Burnton LJ that the dismissal of the appellant for her lewd comment was outside the range of reasonable responses open to a reasonable employer in the circumstances of the case. The EAT decided that the ET had substituted its own judgment for that of the judgment to which the employer had come. But the employer cannot be the final arbiter of its own conduct in dismissing an employee. It is for an ET to make its judgment always bearing in mind that the test is whether dismissal is within the range of reasonable options open to a reasonable employer. The ET made it more than plain that that was the test which they were applying".*

That case in my judgment makes it clear that the decision as to the answer to the question of whether it is an objectively reasonable decision on the part of the employer remains mine to make. Thus I am required to assess whether this respondent's decision to dismiss this claimant for this reason falls within the range of decisions that an employer acting reasonably could have made.

35. I was referred to the ACAS code of practice on disciplinary and grievances which sets out at 12:

> *-------- The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses.---------*

36. The claimant has raised a complaint about disparity of treatment ***Hadjioannou v Coral Casinos Ltd [1981] IRLR 352*** sets out that tribunals must take care when considering such matters. Employees may be led by an employer to believe that certain categories of conduct will be overlooked or will be more mercifully treated in the light of the way that other employees have been dealt with in the past. Or disparity may show that the dismissal in the instant case is not for the reason put forward, ie that the asserted reason for dismissal is not the real or genuine reason. Evidence as to decisions made by an employer in two truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances. However, the EAT emphasised that:

> *"It is only in the limited circumstances that we have indicated that the argument (ie the disparity argument) is likely to be relevant and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar or sufficiently similar to afford an adequate basis for the argument."*

Part 4 – The Analysis

37. The claimant contends that conduct was not the real reason for his dismissal. The claimant considers that there was a conspiracy because of a missed order attributed to him. In my judgment this is not supported by the evidence. The claimant was not disciplined for the missed order, which one would expect if the respondent took the issue seriously. Further, on my findings it was not raised with the claimant regularly as he argues but even if it were raised was not raised as a serious issue. As a source of the respondent's discontent it is unconvincing.

38. Beyond that the respondent's approach to restructuring does not support the claimant's contentions. There was obviously a more detailed restructure than the claimant would have had me believe, he indicated that it related solely to his role, the evidence did not support that. The employment of two new staff and the removal of the planning element to create one of those roles, points to a detailed restructure. In addition to this the respondent was asking the claimant to apply for a role despite being aware the claimant had discussed constructive dismissal and starting his own business, that does not point to the respondent managing the claimant out of the business.

39. Further, for the claimant to be right C, D and E would have had to be involved in the conspiracy and have given entirely false accounts to support a dismissal. The accounts were demonstrably not false in a number of instances because the claimant admitted them. The claimant's contention requires an appalling vista of Machiavellian manoeuvres by the respondent to oust him, I consider the contention that the respondent took such an approach to be improbable in the extreme and I reject it.

40. The claimant contends that the disciplinary process was flawed:
    40.1. The first complaint relates to not following up evidence during the investigation stage. This, in essence, relates to not speaking to Mr Phillipart and not challenging C's evidence.
        40.1.1. In respect of the position with Mr Phillipart the claimant contends that it was important for the respondent to know how they spoke to one and other. He further argues that it was important to understand the industrial language culture in the factory. The respondent did interview Mr Phillipart but on other matters. It would have been possible for the respondent to ask questions at that time on all matters raised by the claimant and, in my judgement, it would have been prudent to do so. However, the question I must answer is this: did the failure to ask Mr Phillipart those specific questions fall outside the band of reasonable approaches an employer could take to this investigation. The respondent accepted that there was a culture of swearing in the factory and so did not need evidence on that. The respondent was concerned about the insult "Fuckface" undermining respect for that director amongst staff; it did not need to interview Mr Phillipart about that as he did not witness the use of the phrase. In my judgment the decision not to ask questions about the relationship between the claimant and Mr Phillipart in respect of swearing was one a reasonable employer could arrive at.
        40.1.2. In respect of C not being spoken to, I found no foundation to the claimant's complaint. C was not spoken too after the claimant had alleged a conversation had taken place between them where she had denied the complaint being investigated. In addition to this when the whole process was

examined had already been distressed by the first two interviews. It was, in my judgment a reasonable decision for the respondent not to interview this employee for a third time given the distress already exhibited by C. In addition to this the respondent had in the process as a whole approached another employee identified by the claimant who did not support the claimant's account.

40.2. The claimant complained that the respondent failed to provide to the claimant, prior to the disciplinary hearing, all of the material relied upon by the respondent to dismiss the claimant. On the evidence I heard this was simply not the case. The claimant refers to the email from R. However, the claimant was not disciplined for the issue that the email would exonerate him for and this contention is irrelevant to the issues.

40.3. The complaint that claimant was not permitted to question or call witnesses at the disciplinary hearing contrary to the ACAS code is not borne out on the facts. The claimant did not seek to call witnesses and did not ask to question witnesses himself. There was no breach of the code in these circumstances he was not denied the opportunity he simply did not seek to do these things.

40.4. The claimant argues that the decision makers not being present at the disciplinary and appeal hearings and to rely on written reports was unfair. He contends that they would not have seen reactions, witnessed demeanour or have been able to assess evidence. In my judgment, in the specific circumstances of this case the approach, although not typical, was one which a reasonable employer could take for the following reasons.

40.4.1. The respondent was concerned that the process should not appear biased in any way, because of the claimant's expressed discontent with treatment by the respondent, and therefore arms-length examination of the evidence was appropriate.

40.4.2. The requirement that only a director could make the decision to dismiss the claimant meant that they considered that they could not be completely removed from the process.

40.4.3. The hearings were transcribed and therefore the decision makers had, with the report, a record of what had been said by whom. In addition to this they had within the report the views of the person holding the hearings as to the conduct of the hearing.

40.5. The claimant complains that there was no further investigation at the appeal stage, in my judgment it was reasonable for the respondent to approach the appeal stage as it did. The claimant's complaints about no further investigation are essentially the same that have been advanced about the level of investigation at earlier stage. For the reasons I have already given I considered the investigation and approach was within the scope of reasonable employers.

40.6. The claimant also contended that the dismissal was substantively unfair on the basis that the conduct found by the respondent did not amount to gross misconduct. In my judgment the extent of complaints against the claimant taken together are sufficient for a finding of gross misconduct. Taken alone I consider that the following are sufficient to amount to gross misconduct: the sending of emails, the sexual harassment of C, the aggressive approach to D on the factory floor, the reference to a group of workers (which included those with learning difficulties) as "pond life".

40.6.1. The claimant contends that this conduct was representative of general conduct tolerated by the respondent in the workplace. I do not

accept that to be the case. In respect of the emails there was no evidence that such emails had been tolerated previously. In respect of sexual harassment, there was no evidence that the type of conduct directed at C had been replicated and tolerated previously. In respect of insulting language directed aggressively at an individual the evidence showed that the respondent had disciplined an individual for this type of behaviour and given some sort of a warning.

40.6.2. The claimant's contention that there was an inconsistency in outcome for similar conduct does not stand up to scrutiny. Firstly, the claimant was dealt with for a number of matters not just one, therefore based on ***Hadjiannou*** these were not extensively similar circumstances. Secondly, the claimant was a senior manager where expectations would be different.

41. If I were wrong about the procedural aspects of this case, then in my judgment had a procedure been followed where Mr Phillipart and C were interviewed and where Mr Lempriere and Mr Hale were present at the disciplinary and appeal hearings respectively the outcome would not have differed. There was a 100% prospect that the claimant would have been dismissed in any event.

41.1. Even had Mr Phillipart given the evidence the claimant expected this would not have impacted on the specific allegation against the claimant. It would simply have added to the conclusion that the respondent had already drawn that bad language was used on the factory floor, it would not have had relevance to whether the claimant had undermined a director.

41.2. If C had been further interviewed, I believe it improbable that she would agree she had spoken to the claimant in the way described. I base this on the fact that an independent employee relied on by the claimant did not support his contention.

41.3. The evidence and the claimant's admissions would have remained the same had Mr Lempriere and Mr Hale been present at the Disciplinary and appeal hearings.

42. Further, if I were wrong, and this dismissal was unfair I find that the claimant contributed to his dismissal to the extent of 100% and all awards should be reduced by that extent. The claimant admitted a number of the aspects of the misconduct and, in my judgment, those aspects amount to gross misconduct. The claimant engaged in further misconduct during the disciplinary process in attempting to manipulate it. Those aspects and the conduct during the disciplinary process led to his dismissal. There is no mitigation which could have meant that the claimant should not have been dismissed.

43. The claimant's claim of unfair dismissal is not well founded and is dismissed.

Judgment posted to the parties
13 September 2019

……

For Secretary of the Tribunals

EMPLOYMENT JUDGE N W BEARD

Dated: 12 September 2019