



EMPLOYMENT TRIBUNALS

Claimant: Mr D Haddrick
Respondent: The Phoenix Partnership (Leeds) Limited
Heard at: Leeds **On:** 23, 24 & 25 October 2019
Before: Employment Judge Rogerson (sitting alone)

Representation

Claimant: Mr C Alan (Solicitor)
Respondent: Mr T Croxford (QC)

RESERVED JUDGMENT

The complaint of unfair dismissal fails and is dismissed.

REASONS

1. The claimant complains of unfair dismissal. The respondent advances two potentially fair reasons for the claimant's dismissal: conduct or some other substantial reason. It relies upon a mutual loss of trust and confidence that manifested itself in conversations between the 8 February 2019 and 14 February 2019. In his claim form the claimant asserts that the circumstances '*he found himself in*' did not amount to a breakdown of trust and confidence and the reason for dismissal was therefore not a fair one.
2. It is for the respondent to prove the reason for the dismissal (section 98(2) of the Employment Rights Act 1996). It is then for the Tribunal to determine whether the employer acted reasonably or unreasonably in treating the reason, as sufficient to dismiss the claimant and whether the decision to dismiss falls within the band of reasonable responses (section 98(4) of the Employment Rights Act 1996).
3. If the claimant was unfairly dismissed he seeks a declaration and compensation of £34,792.56. The agreed issues identify two questions in relation to compensation. Firstly, what losses are attributable to the dismissal and secondly to what extent (if any) should compensation be reduced by reason of contributory fault, polkey or any failure to mitigate.

4. Even though the case had been listed to determine liability and remedy, the claimant's witness statement did not address remedy at all. On the second day of the hearing the claimant provided a supplemental witness statement.
5. The Tribunal heard evidence for the respondent from:
 - a. Mr Frank Hester (Chief Executive Officer);
 - b. Ms Charlotte Knowles (Managing Director);
 - c. Miss Charlotte Russell (Clinical Imports Officer and the dismissing officer)
 - d. Dr Christopher Bates (Director of Research and Analytics and the appeals officer).

For the claimant from the claimant. The Tribunal also saw evidence from an agreed joint bundle. From the evidence the Tribunal saw and heard the following findings of fact were made:

Findings of fact

1. The claimant was employed as a software developer (coder) for the respondent from 29 September 2014 until his summary dismissal with pay in lieu of notice on 20 March 2019.
2. He was earning £60,000 with benefits, having doubled his salary during his four years of employment. He was a valued and trusted employee. He accepts that for this employer trust and honesty were critical requirements of the employment relationship.
3. The respondent is a health care technology company responsible for looking after 15 million electronic patient records used by NHS England. The records contain sensitive information that needs to be accessed immediately by hospital, GPs and other healthcare professionals. Security and the performance of the system must be maintained, to the highest standard. The system is considered part of the 'critical' national infrastructure by the UK government. In that context the respondent considered trust and honesty in all employees was critical for the business.
4. The first core value the respondent sets in the employee code is 'honesty'. The employee is expected to *"always be honest no matter what you are discussing. Lying will not be tolerated and will be dealt with seriously. Don't cover up, be open about mistakes. As a company we openly discuss mistakes so that we can learn from them and you will not get into trouble for making a mistake"*. The employee code also refers to 'empowering' employees. If an employee approaches someone with an idea they must be able to stand behind it and explain it fully. Employees were expected to be able to stand behind the idea and fully explain it in an open and honest way.
5. The respondent has 150 employees. It has a completely flat, non-hierarchical structure with no management reporting heads or direct reports. It has six directors and the Chief Executive Officer (CEO) and founder of the business, Mr Frank Hester.
6. The business does not have a separate HR function and does not outsource HR. Instead it manages HR internally via 4 employees with that function added to their role.

7. Charlotte Russell is the clinical imports officer with HR responsibilities. She has dealt with 15 disciplinary hearings as the dismissing officer covering different disciplinary issues including honesty and trust allegations. She has never been influenced by the other directors or the CEO in her decision making previously. She gave examples of occasions when she had made decisions which departed from the outcomes suggested by others.
8. Beth Cole is the other deployment assistant and she was the investigating officer in this case. The team worked closely with Charlotte Knowles who is the Managing Director whose responsibilities include the general welfare of staff and overseeing personnel issues.
9. Whilst it is accepted the claimant has no prior formal disciplinary record there was a note on the claimant's personnel file. This related to an annual sailing trip in 2015, involving the consumption of alcohol, when the claimant's conduct had caused some concern to Mr Hester. He believed that conduct warranted disciplinary action. Ms Knowles had made a note of that incident in the claimant's file but no disciplinary action was taken.
10. Although not directly relevant to the claimant's dismissal it was helpful background in considering the claimant's assertion that Mr Hester controlled or influenced decisions on disciplinary matters. Ms Knowles summarises the incident which she said could have been treated as a serious incident but was not treated as such despite Mr Hester's strong feelings about the claimant's conduct at the time. No formal action was taken, hence the claimant's clean disciplinary record. Her evidence on this issue was not challenged by the claimant.
11. Another example of an incident prior to the claimant's dismissal, when Mr Hester was not able to exercise any influence at all in the outcome was in relation to his son Michael, who was dismissed for persistent lateness. Even when the outcome impacted on him personally and he felt some pressure from his wife he could not influence the outcome. The decision was left to the decision maker, Dr Bates, to make.

Friday 9 February 2019

12. Mr Hester contacted Ms Knowles on Saturday 9 February 2019, to report an incident with the claimant following a night out in the pub on Friday 8 February 2019.
13. Staff often visit the local pub on a Friday night and the respondent pays for the drinks. Mr Hester told Ms Knowles how the claimant was with a group of coders (some current, some who were leaving and some former employees) and he thought it was strange when the claimant had ignored him. He spoke to the claimant about this and reported to Ms Knowles a comment made by the claimant to him that the respondent did not use new technologies (unit testing) or make good technical decisions, saying that Mr Hester was able to control people. From those comments, Mr Hester was concerned that the claimant was being negatively influenced by ex-employees and he was concerned about the claimant's attitude towards management and the company.
14. Ms Knowles and Mr Hester agreed to meet with the claimant on Monday 11 February 2019 to address the issue. The intention was to try and resolve any

concerns the claimant might have and to give him some time to reflect on matters.

Monday 11 February 2019

15. The meeting took place between the claimant, Mr Hester and Ms Knowles. Mr Hester recounted the conversation he recalled at the pub on the Friday and told the claimant the comments that had caused him some concern. Ms Knowles and Mr Hester wanted the claimant to be open and honest with them but felt that the claimant was not being open and was being unreceptive.
16. In relation to new technology, the claimant had referred to “unit testing” at the pub and he said that he had learnt about this at the ‘JAVA 1’ conference he had attended in America in September 2018. Ms Knowles asked him for examples to explain his concerns but found the answers given were vague and she did not think he was expressing his own opinion, but may have been expressing an opinion fed to him by his former colleagues.
17. A further meeting took place on Thursday 14 February 2019, between the claimant, Mr Hester and Ms Knowles. In her witness statement (paragraphs 18 and 19) Ms Knowles deals with this meeting and there was no challenge to her evidence.
18. Ms Knowles said she tried to get to the bottom of why the claimant thought that Mr Hester could “control people’s minds” as this comment had not been tackled in the first conversation. She attempted to diffuse the situation by describing what this might mean in her own words as “Jedi mind tricks on employees”. The claimant corrected her and said he had never said that Mr Hester could control people’s minds but had said that Mr Hester was ‘charismatic’ and had a good response. Ms Knowles did not feel the claimant’s response was genuine. It was robotic and appeared rehearsed and was the first time he had used the word ‘charismatic’.
19. At paragraph 19 of her witness statement Ms Knowles said she attempted to discuss the list of issues regularly brought up by disgruntled employees. But the claimant did not appear interested in discussing it. She thought this demonstrated a lack of interest in resolution. Ms Knowles was worried that if the claimant no longer trusted the respondent and was not willing to fix the problem he had, he could, given, his access to highly sensitive information put the business at risk.
20. Ms Knowles was asked in cross examination what resolution she was hoping for. She said: “I wanted Dale to be honest about how he felt and have an open discussion so we could resolve his concerns”.
21. On Sunday 17 February at 23:21, Ms Knowles received a text from Mr Hester stating: “*I’m going to sack Dale*” Her reply was “*fine by me asleep*”. It was put to Ms Knowles that when she got this text she must have thought Mr Hester was going to sack the claimant. She said she did not think that because Mr Hester could not sack him. When she replied to the text she was just agreeing that it was appropriate to escalate the matter and wanted to discuss it later because she was asleep.
22. On 18 February 2019, Mr Hester spoke to Charlotte Russell and suggested that the claimant should be dismissed because he believed the claimant had lost trust and confidence. He says she told him his rationale was “flaky” and

that the proper procedures would be implemented before any decision was made. He agreed and understood this is what would happen, based upon his previous experience. HR would take over and not just do as he wished.

23. Ms Russell recalls this in her statement and agrees telling Mr Hester that on the face of it, from what he told her, it sounded a bit 'flimsy'. She told him HR would investigate it further and follow the HR process to decide the outcome. Often HR do not have all the information which is why they would follow a disciplinary process, investigate it to find the relevant information and put that before the decision maker.
24. Ms Russell recalls two occasions when Mr Hester had expressed his view that someone should be dismissed where she had decided differently (see paragraph 9 of her witness statement). She has dealt with 15 disciplinary hearings herself. The respondent has a flat hierarchy and nothing from the evidence the tribunal heard supported the claimant's case that she was not acting on her own accord but was acting on Mr Hester's instruction.
25. Although she is criticised in closing submissions, for her lack of formal training in HR it was clear that she understood the importance of her role as decision maker. She understood that as the disciplinary officer she had to act fairly and was the person accountable for the decision she made at the time.
26. Beth Cole was appointed as the investigating officer. She did not give evidence but the documentary evidence of her investigation was not in dispute.
27. Miss Cole suspended the claimant on 19 February 2019. The letter of suspension is at page 108. It states that the reason is conduct related and alleges the claimant has *"been involved in recent conversations where you have raised that you believe Frank Hester CEO blocks the use of new technologies and is manipulative towards his employees. We have been aware of these issues as your colleagues believe this displays a possible breakdown in trust and confidence"*.
28. On 21 February 2019, the claimant was invited to a disciplinary hearing. He was informed the main concerns were:

"that there may have been a breakdown in trust and confidence due to recent conversations where it seemed you think Frank Hester CEO is manipulative towards employees and blocks the use of new technologies.

When we spoke about the points raised you explained that you didn't think Frank was manipulative and in fact thought he was charismatic which you told him. You were complimenting him. Frank believes that due to your tone and how you came across when you spoke to him about controlling people's minds it was not said in a complimentary way.

You told me that you didn't accuse Frank of blocking new technologies. You had conversations about new technologies which you thought were resolved. Your understanding was that you suggested unit testing and this was something that we were going to look into. Frank has a different opinion and that you gave him no impression to think it was resolved. I thought it would be appropriate to speak to Will Wilson regarding the technologies we use and found we do use modern technologies. Frank

believes that you may have your own agenda which isn't in the best interest of the company.

From reviewing all the information and speaking to your colleagues I feel there are different versions of the events and these should be addressed formally under the disciplinary procedure”.

29. The disciplinary hearing had been arranged to take place with Amy Hutchinson but had, due to her sickness, been rearranged to take place with Ms Russell. The claimant did not object to her involvement in the process at the time.
30. The claimant was provided with all the evidence gathered from the investigation and was warned that due to the seriousness of the concerns if proven, one possible outcome was dismissal.
31. The disciplinary hearing took place on 26 February 2019. During the hearing Ms Russell decided there were some discrepancies in the accounts which she wanted to clear up. The claimant was accompanied by a note taker and his notes although handwritten were more detailed than the respondent's typed notes.
32. He was taken to his notes in cross-examination. He accepted from those notes that:
 - He understood prior to the disciplinary hearing exactly what the allegations were from all the documentation that he had been provided with including the suspension letter and the investigation report.
 - He had all the documents and was ready to meet the case he was required to answer;
 - He expected to receive an outcome letter following the meeting;
 - He understood that there were conflicts between the 2 accounts for the alleged comment of 'manipulative' versus 'charismatic'. One was a criticism the other was praise and a distinction had to be resolved;
 - Probing questions were asked to explore the context of the charismatic comment alleged by the claimant. The answers he gave at the time record that he gave very limited information about the context;
 - For each point raised at the hearing the claimant had the opportunity to respond or present evidence in explanation or mitigation of the allegation;
 - Ms Russell went through the process very carefully and did not show any signs of predetermination in her handling of the hearing. She listened and responded to his answers rather than carrying out a tick box exercise of predetermined questions.
 - The claimant had no questions to ask.
 - Ms Russell carried out her own enquiries after the disciplinary hearing by speaking to Mr Hester, Ms Knowles, Ankit Sharma and Chris Moore to test the accounts that had been given.

The claimant's grievance

33. On 12 March 2019, the claimant raised a grievance in relation to the disciplinary process raising four concerns:

- *"I have been subjected to a disciplinary process when I clearly have not committed a disciplinary act of misconduct. Neither have I damaged the relationship of trust and confidence with the company.*
- *The allegations raised against me are spurious and unsubstantiated. They do not on any reasonable interpretation warrant a disciplinary hearing or a disciplinary sanction.*
- *The fact that a disciplinary process has commenced suggests that a decision has been made by a senior manager to exit me from the business and that the outcome is pre-determined.*
- *The disciplinary process has been unnecessarily intimidating and stressful".*

34. On the same day Ms Russell received an email from the claimant's solicitors requesting a stay of the disciplinary process. She carefully considered the request and decided that given that the two processes were closely linked she would deal with them together. She confirmed the claimant would have the opportunity to appeal that outcome. She received no further correspondence from the claimant's solicitors after this communication.

35. The respondent's disciplinary procedures at paragraph 14 (page 81) refers to circumstances when there is a connection between the grievance and the disciplinary process. It allows the respondent discretion to deal with both matters at the same time. Ms Russell decided to do that, allowing a right of appeal against the decisions she made.

36. Her outcome letter dated 20 March (page 150-152) attached the statements of interviews she had conducted following the disciplinary hearing. The claimant had all the information that Mrs Russell had considered in reaching her decision.

37. Her outcome letter firstly responds to the claimant's 4 grievances as follows:

- *"As per the disciplinary procedure it is considered a misconduct generally to fail to conduct yourself in the best interest of the company which is the primary basis of the concerns raised.*
- *The allegations have been raised and confirmed by another colleague as a result of further investigation following the disciplinary hearing, therefore I do not agree that they are spurious and unsubstantiated.*
- *We follow a fair process and no decision is made until all the information presented is assessed following the disciplinary hearing. The disciplinary hearing officer, which on this occasion is myself, is the only person who can make this decision and senior management do not have a say in this.*
- *I do not agree that the process has been unnecessarily intimidating and stressful as we have followed a fair process. I agree it isn't nice to have to go through this, however we have to do our jobs and investigate and hear the concerns raised".*

38. Ms Russell then deals with the disciplinary outcome setting out her reasons for dismissal. She gives detailed and clear explanations for concluding that the allegations were “well founded, serious and supported her belief that trust and confidence had been lost”. She states:

“When you were given the opportunity to properly voice your opinion and present your views on why you believe unit testing being such a good idea for the company you were unable to form your argument. You were evasive in your answers and it was clear you hadn’t put any effort into looking into whether it would actually work. It appeared as though you had simply said something out loud without giving it much thought. Even when the opportunity to go and look into it, you still hadn’t put any effort into this and was still unable to answer questions directly.

This led Frank Hester and Charlotte Knowles to believe you were speaking on behalf of ex-employees, given that this is one of the subjects they seem to discuss negatively about the company. The primary reason for giving you the opportunity to revisit the conversation was to give you the chance to be truthful about where the comment had come from and to work through any issues you had as a result of being friendly with bitter ex-employees.

To give this some context another coder who is still relatively new to the company had a similar conversation as a result of making some negative comments which transpired to come from ex-colleagues. However, he reacted positively and admitted hearing such negative comments had affected him and this was the result Frank and Charlotte had hoped to achieve with yourself.

In addition, during a conversation with Frank in the pub on Friday 8 February you also accused him along with Charlotte of being manipulative towards staff and able to control their minds. Whilst you told me at the hearing you meant this in a complimentary way and that you think Frank is charismatic I do not believe you would have mentioned this in such a way to Frank if this were true. You also explained it in this way to Frank and Charlotte but not until the second conversation you had together and they both didn’t believe you were being genuine. As this is another comment which appears on many views on Glass Door from our ex-employees then again it feels as though you have been either affected by these comments from hearing your friends talking about it or that you believe them to be true yourself. This leads me to believe you do not trust the company and its decisions.

Having given careful consideration to all of the information, I concluded that the allegations are well founded and serious and I believe the trust and confidence has been lost. Therefore, I believe it is appropriate to terminate your employment with immediate effect with payment in lieu of your notice”.

39. The dismissal was effective immediately with a payment in lieu of notice. The tribunal was satisfied that the reasons why Ms Russell came to her decision to dismiss were as set out in her letter. She analysed all the evidence carefully having explored the claimant’s explanation and having heard for herself the different accounts of events. She concluded the claimant had not been truthful. She also took note of the fact that the claimant had the opportunity to revisit the conversations that had occurred on more than one occasion but had chosen not to be truthful. She gave the example of another employee who had used that opportunity positively resulting in a different

outcome. Her conclusion on the claimant's credibility was supported by his insistence that he had said 'charismatic' not 'manipulative' with no context to explain why his account should be preferred. This left Ms Russell with the claimant's disputed account not fitting in with the rest of the conversation. The claimant chose to close off her line of enquiry and did not seek to try and persuade her that trust and confidence had not been broken.

40. Ms Russell made her decision without any influence from Mr Hester or anyone else. She explored matters further to satisfy herself that she had all the information she needed before making any decision. It is odd that she would go onto interview so many people after the disciplinary hearing, if she did not in her own mind, as the decision maker, have further questions that needed to be answered.

Appeal

41. By a letter dated 26 March 2019, the claimant appealed the dismissal and grievance outcome. By this stage he had all the evidence the respondent relied upon for the dismissal and had Ms Russell's reasons for dismissal. He relies upon eight appeal grounds. He does not attack the conclusion reached by Ms Russell about his credibility. At paragraph 7 of his grounds of appeal. He says:

"Turning again to the conversation on Friday 8 February 2019 (a conversation conducted after everybody present had had quite a lot to drink) I denied that I accused Frank, Charlotte and Kit and Chris of being manipulative towards staff and being able to control their minds. I did indeed say that I thought Frank was a charismatic leader and I did ask him what attributes he thought a director needed".

42. He attacks each conclusion reached and concludes that he did not believe his words or conduct could on any reasonable interpretation lead Ms Russell to believe trust and confidence had been lost.
43. Before his appeal the claimant vacated his accommodation in Leeds. He had a pre-planned ski trip from 23 to 30 March 2019 and was back in Doncaster from 7 April 2019.
44. The ski trip was with friends who are his former colleagues. Some of them work for other IT businesses in Leeds and are working for the respondent's competitors. Former employees of the respondent have found it easy finding IT work after leaving. The claimant's friends also had the incentive of a finder's fee if the claimant joined them. In cross examination, the claimant said that despite having just lost his job and having good prospects of getting another job with a comparable salary with a finder's fee, no discussions took place. His evidence about this was unconvincing. So was his evidence that any search for work was limited to Doncaster only because of the travel time to Leeds. He admitted he could have gone back to Leeds and lived where he had lived previously, if he had wanted to.
45. The reality was that shortly after his ski holiday the claimant decided he wanted to pursue an alternative job as a ski instructor earning £1000 a month instead of a job as a coder, earning £5,000 a month.
46. Mr Croxford raises a valid point, that the claimant has chosen to pursue this alternative career which might be more enjoyable, when he could (having

received pay in lieu of notice) return to comparable well-paid work if he wanted to. The respondent has produced evidence in the joint bundle (pages 182-216) of available jobs. The claimant does not dispute that he could have walked into an IT job without any loss of earnings if he had wanted to,

47. The claimant had already left his accommodation and decided prior to his appeal, that he wasn't going back. This was relevant to his approach to that appeal and whether he was actively pursuing his appeal to overturn the decision.
48. The appeal hearing notes are at page 156 to 159 and Mr Alan's criticism of them is that only nine questions were asked of the claimant (the respondent says 12). Whether it is 9 or 12 the claimant accepts that his answers were not offering any new evidence or a different explanation for the events as found by Ms Russell. He was reiterating his earlier stance (see paragraph 42 of the claimant's witness statement).
49. Dr Bates was the manager that had dismissed Mr Hester's son. He had no knowledge of the text message between Mr Hester/Ms Knowle's which refers to 'sacking' the claimant. He spent 4 days considering his decision. He broke the grievance down into the eight parts and answered each part before dealing with the dismissal. In his decision he identified 28 points and considered every angle presented by the claimant. The claimant's comment on the '17' page outcome letter dated 16 April 2019 is:

"On first appearance this is a detailed letter but actually on closer examination shows Chris adopting Frank's stance on every point".

The difficulty with this criticism is that there was no challenge on 'closer examination' to the substance of the letter or the reasoning of Dr Bates. The only challenge was to the fact that it was "voluminous" and that Dr Bates was appointed instead of an "independent external officer". That criticism might be valid if what Dr Bates did/did not do was challenged on its merits.
50. Dr Bates did not speak to Mr Hester. He made his own decision for his own reasons. He was approaching the appeal with a fresh pair of eyes assessing the facts without any prejudgment. He was an impressive witness who left no stone unturned. He independently and carefully dealt with each point raised in the appeal. The detailed outcome letter supports the time care and attention given to his decision. If the evidence had not supported the dismissal decision, Dr Bates would have overturned it.
51. In the appeal outcome letter, Dr Bates reviews the ACAS Code of Practice and addresses the claimant's challenge about the identity of appeals officer. He states: "the guidance recommends that the appeal should be heard by someone who has not been previously involved in the case and is more senior than anyone who has carried out part of the case previously". He confirms he has had no previous involvement. In a company with a flat hierarchy, although difficult to distinguish seniority, he considered his '12' years' experience and his previous experience as an appeals officer meant that he fit the bill.
52. Dr Bates went through the ACAS code points 1- 31 and found no evidence that the guidance was not followed. His conclusion is supported by these findings of fact that no breaches of the ACAS code have been found.

53. The letter also addresses the discrepancy in the statements between the claimant and his colleagues. Dr Bates sets out the different accounts given and analyses them. He concludes *"this evidence stacks against your view that the content of this conversation was complementary and that you were just telling Frank he was charismatic"*. He upholds the decision that the claimant's conduct led to a serious breakdown in trust and confidence between the claimant and the company and that the sanction of dismissal was appropriate.
54. Mr Croxford suggests that by the appeal stage the claimant was going through the motions because he did not want the decision overturned, he did not want his job back and he has attempted to hide that fact. The claimant's approach in not providing in advance, any evidence of loss since dismissal was similarly reticent. If he had, it would have revealed matters to the respondent which were unhelpful to his case. The respondent, had at disclosure, disclosed the text message from Mr Hester about sacking the claimant, even though it was unhelpful and the claimant would not otherwise have known about it. Contrasting the two approaches, it is the claimant that has not been open or transparent.
55. Much of the claimant's case relies upon Mr Hester being the decision maker for the dismissal but that assertion is not made out. Ms Russell is right to point out that whether her decision was right or wrong she was the person who had to answer for it, on any challenge made. If it was not her decision, she would not have been able to do that.

Conclusions on the law

56. The law for unfair dismissal is set out in section 98(1)(2) and (4) of the Employment Rights Act 1996. Section 98(1) provides that "it is for the employer to show (a) the reason (or, if more than one, the principal reason) for the dismissal and (b) that it is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
57. Subsection 2(b) identifies a reason related to the conduct of the employee as one of the potentially fair reasons for dismissal an employer can rely upon. The respondent relies upon the breach of the term of trust and confidence in the alternative as some other substantial reason to justify the dismissal of the claimant in his role as a 'coder' (software developer).
58. A reason for dismissal is a set of facts known to the employer or beliefs held by him which cause him to dismiss the employee.
59. In **Leach v Office of Communications** [2012] ICR 1269 the Court of Appeal confirmed that the mutual duty of trust and confidence is an obligation at the heart of the employment relationship and its significance should not be diminished. However, it *"is not a convenient label to stick on any situation in which the employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever a conduct reason is not available or appropriate. The circumstances of dismissal differ from case to case. In order to, decide the reason and whether it is substantial and sufficient to justify the dismissal, the ET has to examine all the relevant circumstances: the nature of the organisation, the claimant's role in it, the nature and source of the allegations and the efforts made to clarify and confirm, the responses of*

the claimant and what alternative courses of action were reasonably open to the respondent”.

60. Mr Croxford refers, in his closing submissions, to the case of **Perkins-v- St Georges NHS Healthcare Trust (2006) ICR 617** where the Court of Appeal considered the situation of a breakdown in trust and confidence where the breakdown had occurred by reason of the employee’s actions. In that case the ET had categorised the reason as a reason relating to conduct rather than some other substantial reason but the Court of Appeal did not consider the error in categorisation as sufficient to vitiate the conclusions reached. The Court also considered that a Burchell approach was a perfectly sensible approach to both a conduct dismissal and a breakdown in trust and confidence dismissal.
61. In closing submissions both parties have addressed us on the basis that the Burchell test applies: was there a genuine belief that the claimant was guilty of the alleged misconduct based upon reasonable grounds and a reasonable investigation? The claimant contends the test has not been satisfied the respondent contends it has.
62. If the employer has shown a potentially fair reason section 98(4) provides that *“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.*
63. The Tribunal must consider if the process overall including the appeal was fair. The appeal process can cure an earlier defect in the process if it rectifies that defect (Taylor-v- OCS Group Ltd 2006 IRLR 613 CA)

Conclusions

64. The claimant’s main line of attack in this case was that Mr Hester was the decision maker deciding or influencing Ms Russell and Dr Bates. That view was not supported by the findings of fact made. The decision maker for the dismissal was Ms Russell. She genuinely believed the claimant had by his conduct caused the loss of trust and confidence. As a coder his position in the company was one where trust was critical because a loss of trust had serious implications for the business. Every employee knew that honesty and transparency were critical. The respondent encouraged employees to own up when a mistake was made because of the potential consequences if mistakes were hidden. It encouraged employees to express disagreement and offer different views. There was a flat structure with no direct reports. The claimant understood the expected and required standards set by the business, having progressed his career very quickly to earn a very good salary.
65. In making her decision, Ms Russell was not focusing on the discussion that took place in the pub but instead on the meetings subsequently when clarification was being sought from the claimant with a view to resolving concerns. The claimant had the chance to be ‘truthful’ about the comments he made to explain why they were made and where they had come from. Ms Russell found that the claimant had chosen not to be truthful. The claimant knew there was a discrepancy about the comments made (‘manipulative-v-

charismatic') which had to be decided by her but he did not help her to decide that conflict in his favour. When she tried to clarify and confirm his position, by exploring the context of the comment, the claimant did not help her or himself. She carried out further investigations and provided a reasoned letter setting out her rationale for concluding that trust and confidence had been lost by the claimant's conduct.

66. Ms Russell genuinely believed trust was lost irretrievably based on the findings she had made following the disciplinary hearing. She had reasonable grounds for her belief based on Ms Coles investigation and her own further investigation. A reasonable investigation was carried out at the stage she formed her belief that the claimant was not being truthful. Had the claimant persuaded Ms Russell that trust had not been lost irretrievably, a different outcome might have been possible. She gives an example of such a case in her letter. Nothing the claimant said or did persuaded her that another course of action was more appropriate. She found the allegations well founded and were serious. She believed trust and confidence was lost irretrievably and that was the reason she dismissed the claimant.
67. For the appeal stage, Dr Bates was the decision maker. He carried out a thorough and comprehensive appeal hearing. He left no stone unturned in the process. Dr Bates reviewed the procedure that had been followed against the ACAS code. He was satisfied a fair process had been followed. The claimant's complaint that an external appeals officer should have been appointed and his complaint that the statements taken by Ms Russell, were only disclosed in the outcome letter. He had expected an outcome letter after the disciplinary hearing. The statements were part of the further investigations Ms Russell conducted after the hearing. She was right to disclose them giving the claimant the opportunity at the appeal to deal with any issues arising from them. Dr Bates explained why he was an appropriate person to hear the appeal. His detailed appeal outcome letter comprehensively addresses all the points raised by the claimant. Any procedural failings alleged in the disciplinary process were addressed and rectified at the appeal.
68. Dr Bates had a genuine belief that the claimant's conduct had resulted in a breakdown of trust and confidence between the claimant and the respondent. He conducted his own review over 4 days, considering all the matters raised by the claimant in his appeal. He had reasonable grounds after that review for upholding the decision made by Ms Russell that there was a serious breakdown in trust and confidence, between the claimant and the respondent, caused by the claimant's conduct.
69. The respondent has proved the reason for dismissal related to the claimant's conduct and was potentially fair. The tribunal considered the requirements of section 98(4) to decide whether the respondent acted reasonably in treating that conduct related reason as a sufficient reason to dismiss the claimant. The claimant is critical of the HR officers involved, suggesting they were lacking in knowledge/experience and the respondent should have engaged an external HR officer. That is an unjustified criticism of Ms Russell who very carefully and conscientiously carried out her role as the disciplinary officer. No issues were raised about Ms Coles as the investigating officer. Neither of them displayed any lack of knowledge or experience in their handling of the disciplinary process or the investigation process. The other criticism made is that the appeal officer, Dr Bates should not have heard the appeal it should

have been an external appeals officer. Again, looking at what he happened the appeal was conducted fairly, thoroughly and impartially. There was no reason for the respondent to appoint an external officer.

70. The second question to consider is whether the decision to dismiss was within the band of reasonable responses. Although the claimant did not have any previous disciplinary record and this his first offence it was a serious one, which the respondent reasonably concluded broke trust and confidence irretrievably. Although the claimant does not agree that his conduct had that effect, it is what the respondent reasonably concluded. The employment relationship could not continue once trust and confidence was lost. Having reached that conclusion dismissal was a reasonable response for a reasonable employer faced with these circumstances. Dismissal was not outside the band of reasonable responses. Trust and honesty were critical to this relationship and the respondent reasonably concluded that it was lost because of the claimant's conduct. It is not for this Tribunal to substitute its view of what it would do for that of the employer. The dismissal was fair and the complaint of unfair dismissal fails and is dismissed.

Employment Judge Rogerson

Date 16 December 2019