EMPLOYMENT TRIBUNALS

Claimants: Mr C Daley

Respondent: Vodafone Automotive Ltd

HELD AT: Manchester **ON:** 23 & 24 October 2019

BEFORE: Employment Judge Tom Ryan
Mr D Wilson
Mr A J Gill

Appearances:
Claimant: Mrs C Barton, Claimant's daughter
Respondent: Mrs M Peckham, Solicitor

JUDGMENT having been sent to the parties on 14 November 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim presented to the Tribunal on 14 January 2019 Mr Daley complained of unfair dismissal and disability discrimination in relation to his role as a Warehouse Supervisor at Vodafone Automotive Limited in Burnley. The respondent defended the claims. The claims both arose out of an incident that occurred on 4 October 2018.

2. The case was considered at a preliminary hearing by Employment Judge Sherratt and the issues in the case were identified. They have been captured succinctly in the respondent's skeleton argument at paragraphs 1-8 as follows:

   2.1. Whether the respondent treated the claimant unfavourably by dismissing him because of something arising in consequence of his disability;

   2.2. If it did, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim, with that legitimate aim being set out in the respondent's response (page 26 of the bundle)?

2.3. What was the reason for the claimant's dismissal? Was it a reason related to his conduct?

2.4. Did the dismissing officer believe that the claimant was guilty of the conduct alleged against him?

2.5. Did the employer have in his mind reasonable grounds upon which to sustain that belief?

2.6. Had the employer carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

2.7. Was the decision to dismiss the claimant fair in all the circumstances, in particular was the decision within the range of reasonable responses open to a reasonable employer?

2.8. Was the process followed, including the appeal, fair?

Evidence

3. The claimant gave evidence in support of his own case. The respondent called Mr Stephen Watkinson, the investigating officer; Mr Mark Oldham who dismissed the claimant; and Mrs Michelle Harvey who conducted the appeal.

4. We were provided with witness statements from all those witnesses, a bundle of documents and in addition on behalf of the claimant we were provided with a copy of the case of **Sadeghi v TJX UK** (Case 2200211/2017) heard at London Central, and in the course of final submissions Mrs Barton referred us to a decision of the Employment Appeal Tribunal in **Baldeh v Churches Housing Association, Dudley District UKEAT/0290/18/JOJ**.

5. We should say that in addition to the issues within the respondent's skeleton argument Mrs Peckham also set out in summary the rationale of a number of cases. It is sufficient to say that we consider that the law as set out there accurately summarises the tests we have to apply.

Findings of Fact

6. On 4 October 2018 Mr Daley went to the office to make an enquiry of Mr Ainsworth who worked in IT. The topic of the enquiry is not relevant. It concerns, in essence, whether some request that he had made legitimately, and everyone agrees that it was a legitimate request, for some software licensing had been carried out after a period of three weeks. When it transpired that it had not, Mr Daley became frustrated. As recounted that very same afternoon in a meeting, he said that in the discussion it was Mr Ainsworth who "lost it" (i.e. his composure) first. He, Mr Daley had raised the issue of the license some three weeks earlier. It was a simple job, now Mr Ainsworth was saying that they needed a ticket (i.e. a written request for it). The claimant said, "Why wasn't that said three weeks ago? Now we need a ticket". Mr Ainsworth said he had a heavy workload and had to refer it to another employee, Linda. The claimant said, "what is this ticket shit all about and why say nothing for three weeks?".

7. According to the claimant in that first statement, Mr Ainsworth was becoming agitated and Mr Daley suggested he calm down. According to the claimant Mr Ainsworth clearly had something he wanted to say so Mr Daley suggested that if he could "talk about it here we could do it outside". He said he felt that Mr Ainsworth's attitude "stinks". It was simple to transfer the license. He had been asking for three weeks and now they needed a ticket.

8. This was stated to Mr Watkinson and Ms Evans who were investigating the fact that Mr Ainsworth had complained that Mr Daley had been offensive, threatening and intimidating towards him, repeatedly directing foul and abusive language at him, making personal insults and challenging him, stating "what are you going to do about it?" and "Go on then, let's go outside".

9. This was said in the office where Mr Smith was on the phone but was able to observe what happened. Mr Smith was interviewed. He spoke about Mr Daley becoming increasingly annoyed; Mr Ainsworth becoming more stressed; the tone of the conversation becoming louder, and then Mr Watkinson recorded that Mr Ainsworth said he had a lot of work on and needed a ticket, which seemed to draw Mr Daley in further, demanding he needed it doing. Mr Ainsworth said that Mr Daley should not speak to him like that in work, and although the claimant disputes these comments, according to another witness Mr Dunn, Mr Daley was now clearly angry and came right up to Mr Ainsworth and said, "So come on, outside then". Mr Ainsworth was described by Mr Smith as "shell shocked". Mr Daley stormed out of the office, according to Mr Smith, swearing, and made some comment about makeup.

10. We explain the significance of the comment about makeup. Mr Daley had been in the army and the expression in the army "Go and fix your face," or "Go and fix your makeup," is there used in a mildly insulting way to mean "Go and calm down". In fact, although it may not have been known to Mr Daley, Mr Ainsworth is a young man with very bad acne for which he used makeup to conceal the condition. So he took the remark personally.

11. Mr Smith was asked to put his recollection in a witness statement, which he confirmed he would do.

12. Mr Dunn, who had also been there and on the phone, said he did not witness what happened but heard loud voices. He heard something of the conversation and he described Mr Daley as being "loud and seeming angry and threatening". When Mr Dunn went over to see what was happening Mr Daley looked very angry and Mr Ainsworth was extremely pale and looked very upset. He said he did not hear all that was said but did hear Mr Ainsworth say "We are in work", and "You should not be saying that". Mr Dunn said he would provide an email setting out his account.

13. Mr Dunn also suggested to the investigators they should speak to Ben Scott and Steve Waddington who actually worked downstairs and were not in the office at the time, because Mr Scott had come up and asked what had been going on as Mr Daley had come down and said something about Mr Ainsworth. So that is

what the investigators did. Mr Scott said that Mr Daley had come down into Production and that Mr Scott had asked him what was up. The note reads:

> "CD stated he had had a run in with IT as CD had been waiting for three weeks for a job to be done and Linda had not signed it off. It had ended up with CD said he would take him outside."

14. Mr Scott could not say what the tone was as he was not there.

15. Mr Waddington was asked about this. He said that Mr Daley had come into Production and something about moving a printer and nothing had been done for two weeks or more; the situation had got heated. Mr Ainsworth said something like "you can't say that to me" when CD said he would take him outside. Mr Watkinson asked Mr Waddington what the tone was and Mr Waddington said it was "aggressive" and could see how it could have been seen as threatening if CD had actually said it in the way recorded. In other words, Mr Waddington was describing the tone which Mr Daley used when describing what he had said, so it clearly was not observing anything in the office but was speculating that it would be seen as threatening if it was said in the same way.

16. Mr Daley was suspended on full pay because of the allegation that we have recorded. He was to go to an investigation meeting.

17. After the suspension meeting Mr Daley had a conversation with Mr Watkinson and Ms Evans which he said would be off the record. They said they would have a discussion with him, and Mr Watkinson was later to record this in a statement (168) in which, having said that, Mr Daley said to him:

> "If I would have known it would come to this I should have just fucking punched him."

18. Mr Watkinson said that he had not given a copy of that comment to Mr Oldham, the dismissing officer, or made him aware of that comment. It later came to the attention of Mrs Harvey at the appeal stage. In his evidence Mr Daley said that he had not said "I should have just fucking punched him" but words to the effect of "I might as well have punched him". The distinction between two is probably of little significance. What is important is that it was brought to the attention of Ms Harvey.

19. Before the investigation meeting Mr Smith had written a statement. He gave details about discussions about the ticket and why he waited for three weeks. The relevant part of the statement, it seems to us, is this:

> "Chris appeared to be angered by Adam's bluster and was abusive back to him, although I cannot recall the exact words. He did swear on more than one occasion. Adam became more emotional and raised his voice saying something like 'I'm not standing for this' and 'you cannot talk to me like this at work'.
>
> At that point Chris leant forward[ed] and said, 'Ok then, let's take this outside then'. Adam said, 'I cannot believe you just said that to me. You are crazy'.

> Adam was clearly shocked by this and again said something like, 'You cannot talk to me like that'. Chris left the office in a cloud of swear words and made some reference to Adam wearing makeup as he left the office. Adam was clearly very emotional at this point, even telling himself to calm down under his breath. I believe he rang Linda to explain what had happened but was struggling to contain himself. Shortly afterwards he said he could not work here with him around, took his stuff and returned to Burnley."

20. Mr Ainsworth's statement of the same day, so far as the words are concerned, he described Mr Daley as being aggressive when he said "what are you going to do about it?". He said as I replied:

> "What do you mean what am I am going to do about it? We are in a workplace. Are you honestly going to speak to me like that?
>
> Chris then walked towards me at my desk at a fast pace and leant forward with his face in close proximity to mine. At this point he said, 'come on them, let's go outside'. It was clear to me that he was insinuating he wanted to fight. In disbelief I said I can't believe you are doing this in a place of work. This is unacceptable."

21. For a second time he said Chris repeated "come on, let's go outside". He then left the room. He then described the effect upon him.

22. Mr Dunn in an email wrote to Mr Waddington and Ms Evans and he said this:

> "I was sat at Mike's desk. I was on the telephone. I didn't overhear all that was said. I heard Adam say he needed to raise a ticket. He did say it twice, and yes it was loud, not threatening in my view but loud. I then heard Chris' voice which was loud and in my view did seem angry and threatening, especially when I went over to see what was happening. He did look very angry and Adam was extremely pale and looked very upset. I didn't hear all he had said but I did hear Adam say 'we're in work, you shouldn't be saying that'. It happened very fast so can't really say any more than that."

23. The claimant was spoken to at an investigatory meeting on 10 October. He persistently denied that he had spoken in an aggressive of threatening way to him. He denied that he had sworn and he omitted that he had said they speak outside but that was because he wanted to have a private conversation. It was not a threat. He made reference to his health, saying that:

> "Aside from this my health as you are well aware is not the best. What I am getting at here is:
>
> (1) I cannot make a fist;
>
> (2) If I bend down I cannot get back up;
>
> (3) I would not fight with a kid."

24. Mr Watkinson confirmed it was not the claimant's intention to fight but said the the claimant, "you did say come on, let's go outside". The claimant said, "if I would have said let's sort this out in the boardroom or kitchen we would not be in the same situation", and the claimant answered "correct." That was consistently the claimant's account throughout the proceedings.

25. Mr Smith was spoken to again on that day. He was asked if Mr Daley used foul and abusive language, and she said "it is as my statement. CD did swear and left the office in a cloud of swearing".

26. The claimant submitted a grievance on the same day (10 October). He went into some detail as to what happened. He maintained his account of the way in which he spoke to Mr Ainsworth and what he said, but he said in addition:

> "You are aware of my extremely poor current health condition of severe arthritis in my hands and my spine which make simple everyday tasks a struggle, and this is clear to see. It would make it impossible for me to engage in any physical altercation, nor would I want to I'm far too professional for that. I find this accusation defamation of my character and I do not accept this."

27. The disciplinary hearing took place on 18 October 2018. The notes are at pages 173-176, at the conclusion of which Mr Oldham adjourned and considered it and then came back and gave his decision. We make this point only in relation to the notes of the hearing. Mr Oldham asked Mr Daley why should Mr Smith make up a statement against him because he [Mr Oldham] through that Mr Smith was an honest man. The claimant was in fact to say that he thought that because Mr Smith's son, Tom (who was a poor employee, was managed by him and he had reported him on a number of occasions) that Mr Smith had told lies about him. At all events, the submission made on the claimant's behalf was that Mr Oldham did not, because of this fact, properly consider the witness statements. We consider that that submission has no foundation. It is clear from the notes, which the claimant accepted were a reasonably accurate record, that there was discussion about all of the witnesses and what they had said and the claimant was given a chance to respond to it.

28. In the meeting that took place shortly thereafter Mr Oldham said he had taken on board all points of view. He recapped that Mr Scott and Mr Waddington both stated that Mr Daley was heated after the altercation and that the claimant agreed he was in a raised state. He took on board that the claimant had stated that Adam was the instigator and he said, "I don't believe this to be true. In my view you came into the room and started a conversation which became heated, the tone of the discussion was raised but Adam did not get aggressive, you did". He said he believed Mr Ainsworth's raised voice was in response to the claimant's raised voice. He said:

> "Taking into account David's statement, the bit about wanting to take him outside, I don't believe your version of events at this point. You were, in your own words 'heated'. I believe you were confrontational and could be perceived as aggressive. Why would you say 'let's go outside' other than to escalate the situation? It is my opinion that when you stated 'let's go outside'

> this was perceived to be more than for a quiet chat. You made Adam feel threatened by your comment. He was so threatened that he did not feel comfortable at the warehouse or working at Blackburn and had to return to Burnley. In my mind the investigation undertaken proves this beyond reasonable doubt."

29. He informed the claimant he had been found guilty of gross misconduct and would be dismissed with immediate effect. He told him of his rights of appeal.

30. In a letter at page 179 written on 24 October 2018 Mr Oldham confirmed his substantive reasoning in slightly different terms.

31. The claimant submitted a long appeal notice restating his position and making comments about the evidence of the other witnesses. In the course of that at page 181 he talked about his ill health problems, including depression and arthritis. He referred again to Mr Smith not being an impartial witness.

32. At page 185 in the first paragraph for the first time he said that the company was aware from his sick notes that he had been suffering with severe depression since April 2017, that he was on strong doses of sertraline to help manage the condition and some of the side effects of the depression are anger, frustration, irritability and anxiety, and that the medication also has similar side effects. He said "if at any point the company asked me about my condition I would have openly discussed this", but he went on to say:

> "I do not accept I behaved in an inappropriate way and that what happened that day should not [sic] have resulted in dismissal. I would like to highlight with this medication it can make you react differently to situations which I may not be aware of."

33. The appeal was dealt with by Mrs Harvey on 28 November 2018. It was re-hearing. The notes at page 197 state that. The notes were taken by Mr Morris. The claimant again accepted it was a reasonably accurate record. He did not suggest at any point that he had not had a fair opportunity to put across his side of the matter.

34. The appeal discussed the claimant's health issues as well as the circumstances which led to the decision to dismiss, and at the conclusion of the appeal he confirmed there was nothing else that he wished to add.

35. The outcome of the appeal was a letter of 10 December 2018 in which Mrs Harvey sets out her grounds for dealing with it. In that for the first time (page 205) when she was dealing with raised voices she said this:

> "On further investigation it has come to light that you stated off the record 'if I'd known it would have come to this I would've hit him' to both Mick Evans and Steve Watkinson. Whilst they have a moral obligation to treat such statement in confidence such a statement is not legally binding and with the potential of an Employment Tribunal claim we would have no other option but to record this discussion."

36. The rider is clearly something, as she admits, that has been provided by Human Resources, but that is the first time when the claimant was made aware of his "off the record" discussion, as he believed it to be, having been notified to the employer.

37. Mr Watkinson could not recall specifically how it came to Mrs Harvey. Mrs Harvey's evidence, which we accepted on this point, was that together with the pack (i.e. containing the previous documents) Mr Morris had also provided Mr Watkinson's note that we have recited already and that is how she became aware of it. At no point did Human Resources suggest to her, this being her first appeal, that before she conducted the appeal she should make the claimant aware of it and it did not occur to her to do so. She recognised that it was a piece of material evidence that would be corroboration of the accounts given by the witnesses, because in the terms in which it was expressed it suggests that beyond the possible making of a threat the claimant was also stating that beyond the threat he might as well have carried out the action that was threatened.

38. In her appeal decision at the penultimate bullet on page 205 Mrs Harvey dealt with the question of the ongoing medical condition. She said:

> "On further investigation this was not an issue raised by you during the investigation or the disciplinary hearing. We discussed this during your appeal and again on the balance of probabilities I felt there has [sic] been no trigger points during the past 18 months that have raised concerns to the company that would have required a medical assessment to be undertaken. The company has been extremely supportive towards you, particularly around the issue of arthritis.
>
> What I find difficult is that on the one hand you are denying that your behaviour was inappropriate at any stage during this incident, yet are seeking to explain the alleged behaviour that you did display was because of a medical condition. You did provide the documentation that amongst arrange [sic] of possible side effects, the behaviour was one of those side effects. You did raise the question of investigations with other members of staff as to your behaviour and there is consensus that they had not seen any significant change in your behaviour during the last 18 months, which confirms the point that there is no evidence of trigger points that would have warranted further investigation."

39. Mrs Harvey came to the conclusion that notwithstanding everything she had read she considered that the appeal must be rejected and she confirmed the dismissal stood, but decided that as a gesture of goodwill the claimant should be paid a sum equivalent to one month's notice, which normally would not be the case for somebody who was dismissed for gross misconduct.

The Law

40. The relevant provisions are to be found, so far as unfair dismissal is concerned in s 98 of the Employment Rights Act 1996 and the cases of:

British Home Stores v Burchell [1978] IRLR 379 EAT (the test of genuine belief upon reasonable grounds after a much investigation as is reasonable);

Iceland Frozen Foods v Jones [1982] IRLR 439; (dismissal must be within the range of reasonable responses) and

Sainsburys Supermarkets Ltd v Hitt [2002] EWCA Civ 1588 (the "reasonable range" test extends to the investigation element).

41. We also remind ourselves of the need diligently to avoid substituting our decision for that of the employer. See: **Burchell** and **Hitt** above and **London Ambulance Service NHS Trust v Small** [2009] IRLR 563, **Orr v Milton Keynes Council** [2011] ICR 704 and **Turner v East Midlands Trains** [2013] IRLR 107 CA.

42. It is also necessary to consider sections 122(2) and 123(6) of the Employment Rights Act 1996 and **Polkey v A E Dayton Services Ltd** [1987] IRLR 503 HL in relation to remedy.

43. So far as the claim under section 15 of the Equality Act 2010 is concerned, the section provides that a person discriminates against a disabled person if he treats a disabled person unfavourably because of something arising from or in consequence of the disabled person's disability, and he cannot show that the treatment is a proportionate means of achieving a legitimate aim. Section 15(2) disapplies section 15(1) if it shows that the person did not know or could not reasonably be expected to know that the claimant had a disability.

44. In the case of **Secretary of State for Justice v Dunn [2016]** UKEAT/0234/16/DM the EAT identified the requirement of section 15(2): there must be unfavourable treatment, something that arises in consequence of the disability; the treatment must be because of it and the discriminator cannot show the unfavourable treatment is a proportionate means of achieving a legitimate aim.

45. In terms of the issues in respect of the section 15 claim they are these:

    45.1. Dismissal was unfavourable treatment. There was no dispute about that.

    45.2. The respondent acknowledged the claimant was a disabled person at the material time.

    45.3. No point at all has been argued before us in relation to section 15(2) (knowledge) because clearly the medical evidence was available, as Ms Harvey accepted, which showed depression and osteoarthritis which are the basis of disability.

    45.4. The "something" that arises in consequence of the claimant's disability was identified by Employment Judge Sherratt at the case management hearing on 15 April 2019 as this: that the respondent did not take into

account that someone with his disability would not offer to take someone outside with physical violence in mind.

46. The respondent did not accept that the claimant merely wanted to talk to the third party outside where it was quiet and/or private. Therefore it is necessary for the Tribunal to find that the "something" that arises in consequence of the disability is that someone with his disability would not offer to take someone outside with physical violence in mind, and the unfavourable treatment must be "because of" that "something" arising in consequence.

47. Finally, can the employer show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

Conclusion

48. The claimant's case in relation to section 15 causation is difficult. He is saying that the threatening behaviour and language did not occur. But submits to the Tribunal that if it finds that it did occur, or if the respondent was correct to find it did occur, the respondent should have taken into account that the reason for it (or part of the reason, more than a trivial reason) was because of something that arises in consequence of the disability.

49. It is possible that depression can cause outbursts of anger. The medical evidence supports that. We have seen a medical report from 2019 after the event, and the claimant said it as well to Mrs Harvey. It is possible that the medication itself may cause that as a side effect. There was no evidence before the employer at either stage when the decisions were taken that would enable them to form the conclusion that that was *why* the claimant acted as he did. In other words, the "because of" element of the test is not established.

50. In addition, the "something that arises", namely the propensity to carry out a threat, is different from the "something that arises" identified by Employment Judge Sherratt, that is he would not offer to take someone outside with physical violence in mind. The claimant himself, we think, probably would acknowledge that the mere fact that a person was not in a physical position to carry out a threat of violence would not stop them, perhaps in an act of bravado or just to make the point more strongly, from uttering the threat.

51. In any event, the respondent's defence to this is that if, as we find it did, conclude on reasonable grounds, that the threatening behaviour occurred, the legitimate aim would be a statutory as well as contractual obligation to provide a safe working environment for staff.

52. Against that the claimant can advance no argument. Once those matters are established then a dismissal and the upholding of a decision to dismiss, it is argued, are a proportionate response in achieving that legitimate aim.

53. If you employ someone who, either through ill health or disability or temperament, as the case may be, utters threats to another member of staff when they become frustrated, then what response (the respondent asks rhetorically) short of

dismissal can be provided to fulfil the contractual and statutory obligations to provide a safe working environment for staff?

54. In our judgment that is a powerful argument. It has been raised properly, and on the balance of probabilities it is made out.

55. Therefore, even if the claimant had satisfied the earlier stages of section 15 then, in our judgment, the defence would have been made out. For that reason, we do not uphold the claim for disability discrimination.

56. We return to the claim for unfair dismissal. The first question for the Tribunal is: did the respondent have a genuine belief in the misconduct alleged? Of that there is little doubt, and in truth there is no substantive argument about that. Although later the claimant and his daughter were to say that Mr Oldham was biased, which would suggest it was not a true belief, that was not a point that was properly explored in evidence and in any event there was no basis for doing so. The fact that both Mrs Harvey and Mr Oldham genuinely believed that the claimant had committed the conduct in our judgment is well made out.

57. The arguments from the claimant in respect of reasonable grounds and the thoroughness of the investigation overlap. Suffice it to say that on the basis of the evidence that we have recited it seems to us that it provides, at the very least, a reasonable ground for the belief that Mr Daley on this occasion overstepped the mark and committed the conduct that was alleged against him.

58. The argument that Mrs Barton puts forward on behalf of the claimant at several stages is that different employers could have done different things. She makes a point for example that we will come to in relation to sanction. Another employer could have adopted the procedure this employer had in its handbook as, short of dismissing for gross misconduct, suspending without pay for five days and placing someone on a final written warning. She also prays in aid, for example, the severity of the sanction.

59. All these are good points, but the test that we have to apply in relation to the reasonable range of responses, which we come to next and will return in a moment to investigation, was this: can the Tribunal say that given the findings of reasonable grounds and genuine belief no reasonable employer could reasonably have dismissed for this misconduct?

60. Put in that way, and it is not a way in which Mrs Barton engages with it, it cannot be said that that is the case.

61. The remaining ground, on which we think that the claimant does succeed, is one of investigation. The requirement is that the investigation must be one which a reasonable employer could reasonably have carried out. We come down on the side of the claimant in this argument for the reasons we set out below. But we make clear at the outset that this was a fine balance. It was not a conclusion that we reached without considerable debate. It is based simply on that short statement from Mr Watkinson, about the “off the record” conversation.

62. Mr Watkinson, in our judgment, rightly did not place that before Mr Oldham. We say "rightly" because he acknowledged the moral obligation behind an "off the record" conversation, and we make no criticism of him for that. But it was placed before Mrs Harvey and it appears to have been done so by HR. Mr Watkinson wanted to put it on the record, recognising that I think probably Tribunal proceedings might ensue if the claimant's dismissal were upheld. Whatever the reason for doing it, it was there in writing.

63. Had it been before Mr Oldham on the same basis we do not think that the employer could have been criticised for that, because it was at least in part capable of amounting to an admission. Had it been placed before Mr Oldham the claimant would have known that and could have argued about it, and if that had occurred then at the point when it was put before Mrs Harvey he would have known about it.

64. It is suggested by the respondent that it was only a small point of corroboration and it would have made no difference to the outcome. The problem with that argument is that the submission is contrary to the decision of the House of Lords in **Polkey.** The fact that a procedural irregularity could have made no difference does not entitle the Tribunal to say that the dismissal was not unfair.

65. Section 98(4) requires the Tribunal to engage with the question in the round. Not every procedural irregularity will render a dismissal unfair. But the more serious or significant the procedural irregularity is found to be the more likely it is that a tribunal may say it renders the prodecure unfair.

66. The reasons why we consider that placing that document before Mrs Harvey and yet not putting it to the claimant for his answer and investigation comes down on the side of rendering the investigation outside the range of reasonable investigations is as follows.

    66.1. A decision had been taken to dismiss the claimant without that information being considered by Mr Oldham.

    66.2. Clearly Human Resources at that stage did not think it was vital to their case to put it forward.

    66.3. It is material that goes directly to the issue in the case, namely the gravity of the behaviour of the claimant.

    66.4. If it was going to go just on the claimant's file pending the day of this hearing that would be one thing but somebody, decided that Mrs Harvey should have it at the appeal stage. We do not know why that occurred. The obvious inference is to bolster a case which might, or might not, need bolstering. There could be no other reason for doing it. Any competent Human Resources person must know that if you are going to put forward a significant piece of evidence, which might go to the heart of a decision and speaks of the very subject of the dispute itself, that, as a matter of fairness, is something that an employee ought to be able to see and prepare to answer.

66.5. Regrettably, Mrs Harvey did not think to show it to the claimant, and had she not referred to it in her outcome letter the claimant might never have known about it. The fact of the matter is that she did read it. She was not advised about it by Mr Morris. It does not appear to have occurred to Mr Morris or anybody at the latter stage to consider that the claimant had never seen it.

66.6. It was referred to only in the outcome letter. The claimant is entitled to say that this was a significant piece of evidence. He thought it was confidential. He disagreed with the way in which his language had been recorded. It might well have been that in those circumstances Mrs Harvey would have thought it was not right to take it into account or refer to it in the outcome letter but at least the claimant would have had a fair opportunity to deal with it.

67. In our judgment taking those matters together that is sufficient to take this, even though it is a single point and we acknowledge it might not make any difference at the end of the day, out of the range of reasonable investigations, and it renders the dismissal unfair. The claimant on that basis is entitled to a declaration that his dismissal was unfair.

What are the consequences?

68. So far as it being a procedural irregularity is concerned, we consider first the question of **Polkey** and the question of whether, if the employer had not committed this procedural irregularity, the claimant would have been dismissed fairly, and if so at what stage. Because it was, in the analysis, a corroborative piece of evidence, we do not accept that it would have made any difference to the outcome. Regrettably for the claimant we find that he would have been fairly dismissed in any event.

69. Neither can it affect, even if it would have taken some time for the respondent to raise it and then hear the claimant on the point, affect the financial outcome of the case.

70. Even if there had been an adjournment of the appeal for a week to sort out, although we do not think it would have taken more than half an hour to sort out, the claimant was not being paid at that stage.

71. This was not at the dismissal stage whereby it would have put the dismissal back by a week. It was at the appeal stage. There is no effect on compensation by this irregularity.

72. Moreover, we consider that in terms of any possible compensatory award section 123(6) is in play:

> "Where the Tribunal finds that dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable."

73. Turning to the basic award, a similar but slightly differently phrased provision at section 122(2):

> "Where the Tribunal considers any conduct of the employee before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

74. We invited Mrs Barton on this point to say why compensation should not be reduced in the light of our findings, which we adumbrated to her. Her argument was that Mr Oldham should have looked into the witness statements more, he took the statement of Mr Smith as it was, and matters of that sort. "They could have not dismissed", she did. "They didn't act reasonably, didn't follow up on the piece of information from Mr Watkinson, they could have given the claimant an opportunity to regain his trust, they should have sent him to Occupational Health to understand the background, his previous good record was not taken into account, and if he could have been given a final written warning it would have been a better approach". Whilst all those matters might be relevant to some part of the claim, in our judgment they are just not relevant to the question of reduction.

75. In short, whilst we recognise the claimant's sense of grievance by not having had this information disclosed, we consider firstly that in respect of both elements of the award his conduct was the cause of his downfall and in those circumstances, and not having criticised the respondent, we find that there should be no basic award and no compensatory award.

Employment Judge Tom Ryan

Date 29 January 2020

REASONS SENT TO THE PARTIES ON

31 January 2020

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FOR THE TRIBUNAL OFFICE