Case Number: 2302232/2019

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE TRUSCOTT QC**

BETWEEN:

Mr G Cousins-Ingram **Claimant**

AND

Burgess Glass Limited **Respondent**

ON: **22 January 2020**

Appearances:

For the Claimant: **Mr R Cifonelli of Counsel**
For the Respondent: **Mr K Wilson of Counsel**

JUDGMENT

1. The claimant's claim of unfair dismissal brought under Part X of the Employment Rights Act 1996 is well founded.

2. The case will be listed for a remedy hearing.

REASONS

PRELIMINARY

1. The respondent was represented by Mr K Wilson, barrister who led the evidence of Mr D Burgess, Managing Director. The claimant was represented by Mr R Cifonelli, barrister and gave evidence on his own behalf. Evidence proceeded on the basis of written statements but as the statements were lacking in detail on several material points, the following findings derive also from oral evidence and the

documents in the bundle. Where the findings derive from the latter, the bundle page reference is given.

ISSUE

2. The issue was whether the claimant was unfairly dismissed.

FINDINGS OF FACT

3. The respondent is a domestic and commercial glass and glazing company which has been in operation for 44 years. It supplies and fits, amongst other things, glass and glazing; mirrors; shower screens; glass splashbacks and fire-resistant glass. It is a small, family run business which Mr Burgess took over from his father in 1996. He has worked in the business for 36 years. It employs five members of staff including his wife and son.

4. The claimant commenced employment with the respondent as a glazing assistant on 24 May 2010. In 2015, he was promoted to glass cutter/glazier. The claimant was the most senior employee in the company and when Mr Burgess was on annual leave or otherwise not available, he deputised for him. Generally, he measured the medium sized jobs. Prior to his employment with the respondent, he was employed by Chelsea Artisans from 2005 to 2007 as a labourer and thereafter Surbiton Glass Ltd during 2007- 2010 where he started to learn the trade.

5. Mr Burgess has known the claimant for most of his life and considered that he had a close personal friendship with him. He said this was the reason he did not operate the disciplinary procedure when he identified errors in the claimant's work in 2018. This was contradicted by the claimant who thought that if Mr Burgess had identified a problem with his performance in 2018, he would have used his firm's disciplinary procedure [245-246].

6. Training in the industry happens on the job and, as one proceeds, the training should also apply to the business processes as well as the technical skills side. The supervisor needs to take time, check, advise and go over the work done in a positive manner. The claimant said that Mr Burgess did not act in this way, he was brusque, usually hurrying to get jobs finished and quickly became abusive if there was any perceived flaw. The claimant said that he was not trained properly but was blamed when matters went wrong. In the investigation meeting [87-111 at 94] and in evidence by reference to 118 and 119, Mr Burgess emphasised the training which the claimant received. When considered in detail over the 9 year period the claimant was employed, the claimant said it was not a great deal. The Tribunal did not consider that it was necessary to come to a concluded position in relation to the evidence on training because there was no doubt that the claimant had carried out his work to a high standard for a long period [67]. Mr Burgess said at the investigation meeting "Some of the most successful jobs we have done over the last few years have been with you behind it" [73 and 108]. In relation to fitting showers, an issue which Mr Burgess raised as a potential issue of gross misconduct because of a customer complaint. Mr Burgess accepted at the disciplinary hearing [237] that three or four hundred showers had been fitted satisfactorily. It was more likely that the claimant was suffering from stress because of the work at Heath Park and the site agents there [222-4].

7. The employees of the respondent, including the claimant, were subjected to a great deal of swearing by Mr Burgess. Mr Burgess considered this to be banter as the employees also swore, but this was not banter. Mr Burgess swore repeatedly at the claimant and he did so in an intimidating way which caused him upset and stress [95 and 256]. Mr Burgess was, on occasion, dictatorial, losing his temper rapidly and being repeatedly abusive. The statements to the contrary do not reflect the true position (see Mrs Burgess, Jack Burgess, Andrea Gjini and Jason Gilliard [112-116]).

8. For the last ten years or so, the respondent has worked for Consero, London, who build high value homes in London and the home counties. The work carried out by the respondent includes the supply and fitting of frameless glass shower screens, glass screens around swimming pools and home gyms and also the supply and fitting of mirrors of various sizes and designs. This work is required to be of the highest standard. In 2018, Consero awarded the respondent the glass package for Heath Park, a home being built in Hampstead Heath to the value of £60 million which had a value to the respondent of £70,000. The work included the supply and fitting of shower screens, glass doors and screens around the entertainment area (gym, pool, games room etc.). Mr Burgess said that Consero are sometimes a challenging client, with strong, demanding site managers [W/S para 15].

9. From around mid-2018, Mr Burgess considered that the claimant's performance had been deteriorating. He was making more and more avoidable errors which were resulting in delays to customers and in some cases, financial loss to the business. He did not discipline him, at the time, but kept a personal note of the instances [127-130]. He did not show the claimant this note.

10. In December 2018, the site agent at Heath Park had said that a very large double glazed unit the respondent had supplied and glazed around the swimming pool needed to be moved along in its frame somewhere between 10mm to 20mm. The claimant considered that this was not a good idea as the unit was likely to get broken. On 9 December 2018, there was a meeting in the office where Mr Burgess was telling his employees the work schedule for the next day. The claimant and Andrea Gjini (a fellow employee) were to attend Heath Park and carry on with various items of work which were listed by Mr Burgess. Number 4 on the list was a strict instruction not to move the unit. Mr Burgess knew that if the unit was damaged, there was no chance of getting a replacement before Christmas. When the claimant attended the site the following day, the site manager informed the claimant that he needed to move the unit. The claimant knew that the glass was likely to break. The claimant knew he had been told by Mr Burgess not to move the unit. The claimant knew that Mr Burgess was unavailable as he was at a hospital appointment with his wife [198]. When he refused to carry out the instruction, the site agent said that they would get another contractor in to complete the entire job. The claimant decided to move the unit and he instructed Andrea to assist. The unit broke. The claimant called Mr Burgess and left a message which said "call me we're in big trouble". Mr Burgess called the claimant once he had listened to the message and told him he needed time to think about how to get out of this. Mr Burgess sent the claimant a text message [185] "You was told not to move it by me" "This will cost me thousands". The claimant says "No one feels a bigger cunt than me right now that I can promise you" [187]. "I know I should have listened to you" [191]. In evidence, Mr Burgess said he had decided not to deal with this as a disciplinary issue.

11. From 26 December 2018 until 10 January 2019, Mr Burgess was on holiday in the USA. The claimant and the other employees had returned to work on 2 January. During this time, the claimant was effectively in charge of the business, however, he knew that he could contact Mr Burgess if necessary. Several calls and many text messages were exchanged over this period.

12. On 4 January, the claimant telephoned Mr Burgess because he was having difficulties with the "toxic" Heath Park job [62, 107 and 224].

13. The claimant and Mr Burgess had several other conversations regarding work that required to be completed at Heath Park. Mr Burgess asked the claimant why he couldn't start fitting the glass screens and a door in the hallway which had been ordered. The claimant said that the supplier, C R Lawrence, did not have the fittings which were needed urgently but there were ones available in Sweden. This would add to delay in completing the job. Mr Burgess then checked his emails and found that the claimant had placed an order with C R Lawrence for the fittings which they did have in stock. Mr Burgess subsequently asked him what was happening here and the claimant confirmed that he realised that he had ordered the wrong fittings earlier and C R Lawrence had plenty of the correct fittings in stock and he had ordered the correct fittings.

14. Mr Burgess also received a text on 9 January 2019 [195] informing him that "Pool stairs door-glass fitted and 2 panels need to re order my mistake apologies will try and sort it ASAP for Friday and beg to see if they can get it done." When Mr Burgess called him to ask why this had happened, he replied "I don't know". As part of the communications Mr Burgess told him to "Read the fucking text you cunt" [202].

15. Mr Burgess returned from the USA on the morning of 10 January 2019 and called the claimant to make sure he had made 2 mirrors that were to be fitted at Heath Park that day. During the call, the claimant informed Mr Burgess that Andrea Gjini had gone over to one of the suppliers, SOLAGLAS, to collect the mirror stock so he could make them and fit the next day. Mr Burgess asked why this was as the claimant had said in phone calls a few days earlier that he had the stock delivered to the workshop, Mr Burgess asked him why he was then going to collect more stock. The claimant explained that the stock he had ordered was not big enough to do the job – he had made an error in the order. This resulted in the respondent being chased to complete the mirrors by Consero. This conversation became very heated and Mr Burgess started swearing at the claimant. He told the claimant to get out of his business before he destroyed it. He wanted him out of the business for two weeks. He was not going to be paid. Mr Burgess said in evidence that he still wanted to work with the claimant. Mr Burgess said that he did not use the word suspended in this conversation [252]. The claimant asked him to put what was happening in writing. Mr Burgess replied by saying "you've made the biggest mistake of your life" and "you've just lost your best friend". He told him to lock the shop and leave or he would call the police. The Tribunal finds that Mr Burgess had decided to dismiss the claimant at this point.

16 The claimant received a text from a customer [207] on 10 January at 11.37 where she said that she had been told by someone at the shop that he had been sacked. The Tribunal considers that this message reflects what Mr Burgess had done although he denied it.

17 The claimant handed in a note the next day. There was no evidence about the contents. Mr Burgess says he used the word suspended in response to the note [252].

18 There was contradictory evidence on whether or not the respondent had a disciplinary procedure. Mr Burgess said there was none in the disciplinary hearing [72] yet in evidence he said there was. The tribunal finds that the procedure had been in place at least since the claimant was promoted. The disciplinary process proceeded on the basis that the procedure was in existence [80-81]. The procedure envisages a warning for performance or conduct issues.

19 Mr Burgess sought HR advice and a formal letter of suspension was prepared for Mr Burgess dated 22 January 2019 [77-79] which confirmed that the claimant would receive his normal pay. It narrates that Mr Burgess "told you to take two weeks off work to clear your head" Five areas of concern are set out, in short, poor quality of work over six months, incorrect pricing leading to the loss of an £8000 job, moving the double glazed unit in December, failing to place orders for fittings and completing a job to an unsatisfactory standard. The next section is headed Gross Misconduct Allegations and list, again in short, serious and persistent breach of the contract by failing to carry out duties to the best of ability, serious insubordination as you are failing to comply with all reasonable requests and instructions, failing to serve the company well and to the best of your ability, failing to conduct yourself in a way which does not detract from the performance of your duties, serious breach of trust and confidence in your behaviour and conduct at the respondent and actions which could bring the respondent's reputation into disrepute.

18. A letter was sent to the claimant on 29 January 2019 inviting him to a disciplinary investigation meeting on 8 February 2019 [82-84]. A further letter dated 6 February 2019 [85] was sent to the claimant where the purpose of the meeting is narrated as establishing the facts, hearing the claimant to gain a response to the allegations and to determine whether a formal disciplinary hearing is necessary. The letter also notified the claimant of an additional area of concern regarding his incorrect reading of a drawing in relation to Heath Park Gym resulting in short shower screens being fitted [86].

19. The investigative meeting took place on 8 February 2019 which was attended by Mr Burgess, Sandra Burgess, Debra Kerby acting as HR Manager from Sussex HR and the claimant [87-111]. Ms Kerby said "So you understand this isn't a disciplinary hearing this is an investigation." [87]. The broken double glazed unit is discussed [92]. The claimant's reason for not contacting Mr Burgess is set out [93].There is discussion of Mr Burgess's style of communication [95] such as " read the fucking text you cunt" to which the claimant makes his point that this is how he has been spoken to for the last eight and a half years. Mr Burgess agrees. The distinction between being given a verbal warning and being called a fucking cunt is discussed [97]. The claimant set out his experience of stress at work [98]. Eight specific instances are considered [99] and Mr Burgess takes over the questioning. Mr Burgess makes the point [105] that the Health Park job has been completed successfully without the clamant. There is further discussion of the telephone conversation when the claimant described the job as toxic, he discussed the Heath Park job and in particular Robin from Concero and Mr Burgess states "He's a dominating Site Agent just like the other Site Agents" [107]. Discussion of the suspension telephone argument has Mr Burgess saying [108] "Had you just gone

away and just got your head down for two weeks we wouldn't be having this conversation now because I would've dealt with things and it wouldn't be in the position we're in now." The claimant answers "It doesn't matter the reason why where we went to. It was because you told me I wasn't getting paid suspension". It was explained to the claimant that the purpose of the meeting was to investigate the concerns raised and to provide him with a full opportunity to explain why errors had taken place. The claimant had prepared a statement and read through it [120-126]. He claimed he had never received any form of training while at the respondent, but Mr Burgess remined him of the number of different types of training opportunities he had received [117-118]. A full transcript of the meeting can be found at pages 87 to 111 of the Bundle. The Tribunal finds that this was not truly an investigatory meeting. Mr Burgess was determined to find gross misconduct through an apparently neutral medium. The evidence of Mr Burgess that it became evident through the investigation that the claimant was making too many mistakes and costing him too much money is not accepted as Mr Burgess was well aware of the detail of the errors prior to the 10 January with the exception of the short shower screens.

21. A decision was taken that there was a case to answer and a formal disciplinary meeting was convened by letter dated 4 March 2019 to be held on 11 March 2019 [173-175]. Six areas of concern are listed and it is narrated that "it has been decided that there is no other alternative than to proceed to a disciplinary hearing so that the following gross misconduct allegations can be considered. The Tribunal is satisfied that Mr Burgess decided on the course of action. The areas of concern identified were:

(a) Over the last six months the quality of your work has been poor. You have regularly failed to measure correctly resulting in cost to the business and unnecessary delays to the customers.
(b) You incorrectly specified and priced for fire resistant glass which resulted in Burgess Glass Limited losing a job worth £8000.
(c) In December 2018 you ignored a reasonable instruction not to move a large double-glazed unit costing £3950 which was then broken.
(d) You have failed to place orders but told management that these orders have been placed.
(e) You completed a job to an unsatisfactory standard leaving a client with a leaking shower screen and door resulting in BGL having to reattend.
(f) You incorrectly read a drawing in relation to Heath Park Gym resulting in two shower rooms being fitted with shower screens which are too short. The potential cost of replacing these is £3550.

22. The disciplinary investigation findings are set out in the management statement of case [60-76] which was also sent. The Management Case narrates: "1.1 Darren Burgess Managing Director, Burgess Glass Limited undertook the role of Investigating Officer and was supported by Debra Kerby (HR Consultant, Sussex HR) to investigate allegations of gross misconduct". Paragraph 1,2 repeats the five original areas of concern and 1.3 adds the further area of concern. A second paragraph 1.3 lists six allegations of gross misconduct. These were-

a. Serious and persistent breach of your terms and conditions of employment in that you are failing to carry out your duties to the best of your ability.

b. Serious insubordination as you are failing to comply with all reasonable requests and instructions from the company.

c. Failing to serve the company well and to the best of your ability and use your best endeavours to promote its interests.

d. Failing to conduct yourself in a way that does not detract from the performance of your duties or the attention given to your work and therefore bringing us into disrepute with customers.

e. Serious breach of trust and confidence in your behaviour and conduct at BGL.

f. Actions which could bring BGL's reputation into disrepute.

24. Paragraph 3.3 narrates a work-related concern in connection with hinges for a screen and door at Heath Park. Para 3.5 describes a conversation between Mr Burgess and the claimant where the latter described the Heath Park job as toxic and Mr Burgess sought to reassure him. At 3.9, it is acknowledged that glass is a difficult medium to work in and there is an acceptance of a degree of breakage and error. The paragraph goes on to give the implications of breakages and errors. Para 4.1 [64] narrates that "The allegations regarding George's conduct required his suspension from work to enable a full and thorough investigation to be undertaken because it was believed that these concerns could potentially be deemed as gross misconduct."

25. The claimant's errors are set out at Para 4.2.1 [65] Error 1 took place 14 December 2018 and caused a loss of £65.48. Error 2 took place in July 2018 and narrates an incorrect order which was admitted by the claimant. Error 3 took place on 4 January 2019 and concerned hinges, the return of which cost £20. Error 4 concerns a call which took place on 4 January 2019 concerning fittings which is said to have caused a delay of three weeks to the job over Christmas. Error 5 concerns measurements and orders in August and September 2018 which caused loss of £289 and £140.72. There is then a section [66] narrating evidence from colleagues. It is not said how this evidence was obtained and the Tribunal treated it as of little value as it was largely opinion and vague and general and likely to have been influenced by Mr Burgess. It also includes the claimant's position about errors at bullet point 6. It is recommended that these errors are to be considered as gross misconduct under a number of different heads. The broken double glazed unit incident is rehearsed at the investigation meeting is narrated [68]. The allegation at 4.5 which was introduced later [69] is found established against the claimant, there having been a dispute about who actually took the measurements, the cost being £3550 and at 4.5.3 the recommendation is made that it should be treated as gross misconduct and sets out five reasons as why this should be so [70]. Para 4.6 sets out the allegation in relation to the unsatisfactory work the recommendation is that it is gross misconduct. Para 4.7 sets out an allegation of losing a job worth £8000 which is recommended to be considered as gross misconduct. At para 5, reference is made to the claimant's written statement and the various points he raises are addressed. Para 5.1.1 [72] narrates that Darren (Mr Burgess) acknowledged that there was no disciplinary policy. In essence, the claimant makes two points that he had not been trained and that he was subjected to verbal abuse. "Darren has confirmed that 'some of the most successful jobs we have done over the last few years have been done with you (George) behind it'. It is narrated [75] "Darren is aware of the issues associated with working with Site Agents who can be difficult

but he has told staff that' if you don't agree with it (what you are being asked to do) you refer it back to me and let me deal with it like I have done on many occasions." 5.4.1 makes some findings on behavioural issues. Para 7 records that the allegations are established and potentially amount to gross misconduct.

26. The disciplinary hearing took place on 14 March 2019 with Lisa Philpot of Sussex HR in the chair. From a transcript of this meeting [216 – 260], the claimant can be seen to be responding to each error in turn. He refers to his stress at Health Park [222].and the site agents [223] and the toxic job [224]. Mr Burgess's language and how that causes the clamant stress is not accepted by Mr Burgess [226] The broken double glazed unit is discussed [226] The claimant explained that Robin (the owner of Consero) told the claimant "I will find somebody, if you are not capable I'll find someone else and I'll have you kicked off site."[227]. The debate between Mr Burgess and the claimant continues at the meeting [228]. Robin seemed to have some involvement in the mismeasuring of the of the Heath Park shower screens [231] in that he wanted something done urgently. The mismeasured shower screens came to light after the suspension [234] Mr Burgess denies telling anyone he was sacked on 10 January. The leaky shower is discussed [237] and having fitted 300 or 400 showers how unusual a call back is. The lost job referred to a fire-resistant screen [238] and relates to May to September 2018, Mr Burgess sees this as impacting the reputation of the respondent [241]. There is discussion about the disciplinary policy [244] The claimant sets out his position [245] A Google review is discussed which refers to the Burgess's aggressive and uncompromising behaviours [246]. The claimant's representative points out that he is only being judged by his errors [247] Mr Burgess sets out his position that he has lost trust and confidence [248-9]. Mr Burgess thinks the suspension conversation is not relevant [251] what was said is set out. Mr Burgess explains his position by saying that he never said the word suspended but used it afterwards it "with the thing what he put through my door on the Monday morning" [252]. The final incident is not gross misconduct itself [253[it is the last straw [254]. The suspension was 9/10 weeks. [255].

27. The decision to dismiss was conveyed by telephone on 15 March 2019. Mr Burgess says that the HR consultant independently prepared the dismissal letter which ultimately, he approved and confirmed the decision to dismiss the claimant. The Tribunal does not accept his evidence. It was Mr Burgess's decision to dismiss and he had decided on this course of action on 10 January. He says "I had no option but to agree to dismiss him for gross misconduct" but this is not so. In evidence, Mr Burgess identified moving the double-glazed unit and ordering the wrong mirrors as being of equal importance in the dismissal but the mirrors are not contained in the list of errors being investigated and might have been of more importance than the earlier errors which had been identified as gross misconduct, some of which might have been more important than others, yet each was characterised as gross misconduct. In none of the instances had a disciplinary warning been issued. In evidence, Mr Burgess said that he would have been prepared to continue the claimant's employment if he had responded to his warning but the Tribunal is not aware that the claimant had received a warning, under the disciplinary procedure although it was likely he would have been sworn at. The Tribunal does not accept that Mr Burgess was compelled to dismiss the claimant for gross misconduct.

28. The disciplinary outcome letter [176-184] sets out six allegations of gross misconduct. The letter deals with each one separately. The nine errors are referred

to as examples of the type of mistake the claimant was making. Mr Burgess is narrated as stating that the errors are not due to capability but lack of concentration. A serious breach of contract [177] is found in relation to templating incorrectly, ordering incorrect types of products, ordering the wrong sized products, informing Darren Burgess of incorrect material costs so that the respondent make (sic) a loss on the work they have carried out, not ordering the products until Darren has questioned you about the delay in ordering and client's (sic) being unhappy with the fitting of the glass product. It is said that the mistakes have resulted in unnecessary and unacceptable delays to the clients, clients not paying for the work which has been carried out, client's (sic) cancelling their orders, additional costs to the respondent as they had to purchase replacement glass and couldn't return the bespoke glass incorrectly purchased by you, caused other members of staff to work overtime to correct the errors which damaged their trust in you and damage to company reputation. The mismeasured showers screens are addressed under this head [178]. The broken double-glazed unit is rehearsed under the heading of failing to comply with a reasonable instruction. It is said that Consero owes Burgess Glass £56,000. Failing to serve the company well is addressed [179] by reference to nine errors. The same errors and results are listed as in section 1 on serious breach of terms of employment. Failing to conduct yourself so as not to detract from the performance of your duties [180] is addressed by reference to the same nine errors and results. Serious breach of trust is addressed [181] by reference to the nine errors. Bringing the respondent's reputation into disrepute is addressed by reference to the same nine errors [181]. The claimant's explanations are found to be unsatisfactory [182] where in essence Darren Burgess's viewpoint is restated.

29. The claimant was provided with the opportunity to appeal against the decision, but, he did not. He had already had two fairly abrasive meetings with Mr Burgess. He considered that Mr Burgess would not uphold any appeal by him. The Tribunal consider that he was correct to do so.

SUBMISSIONS

30. Due to shortage of time, the Tribunal heard only brief oral submissions from both parties with a skeleton argument for the respondent.

LAW

31. In determining whether or not a dismissal is fair, there are two stages. First, the employer must establish the principal reason for the dismissal and show that it falls within the category of reasons which the law specifies as being potentially valid reasons.

32. The list of potentially fair reasons is set out in section 98 of the Employment Rights Act. Misconduct is a potentially fair reason as is capability.

33. In this first stage of determining the reason for the dismissal, the burden of proof is on the employer. But he does not at this point have to establish that the principal reason did justify the dismissal, merely that it was the reason he in fact relied upon and that it was capable of justifying the dismissal. The question of whether it did in fact justify it will depend upon whether the tribunal is convinced that the employer acted reasonably in all the circumstances in treating the reason as sufficient, i.e. whether section 98(4)– (6) has been complied with.

34. In **West Midlands Co-operative Society Ltd v. Tipton** [1986] ICR 192 HL in a passage of the judgment of Lord Bridge, with whom Lords Roskill, Brandon, Brightman and Mackay concurred, justified this approach as follows:

> "Under [s 98 of the Act of 1996] there are three questions which must be answered in determining whether a dismissal was fair or unfair:
> (1) What was the reason (or principal reason) for the dismissal?
> (2) Was that reason a reason falling within [subsection (2) of s 98] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held?
> (3) Did the employer act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee?"

35. As to question (1), Cairns LJ said in **Abernethy v. Mott, Hay and Anderson** [1974] ICR 323 CA in a passage approved by Viscount Dilhorne in **W Devis & Sons Ltd v. Atkins** [1977] AC 931 HL.

> ''A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason. He may knowingly give a reason different from the real reason out of kindness …''

36. In **Kent County Council v. Gilham** [1985] ICR 233, CA, Griffiths LJ summed up the position as follows:

> 'The hurdle over which the employer has to jump at this stage of an enquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the enquiry moves on to [ERA 1996 s 98(4)–(6)], and the question of reasonableness'.

37. However, in cases of alleged mixed motivations, once the employee has put in issue with proper evidence a basis for contending that the employer has dismissed out of pique or antagonism, it is for the employer to rebut this showing that the principal reason is a statutory reason. If the Tribunal is left in doubt, it will not have done so. Obviously if the employer manufactures an artificial reason in order to conceal the true reason, no Tribunal should simply accept the manufactured reason. As the Employment Appeal Tribunal commented in **Maund v. Penwith District Council** [1982] IRLR 399 EAT at 401:

> 'If an admissible reason is engineered in order to effect dismissal, because the real reason would not be admissible, the true view in our judgment must be that the employer fails because the underlying principal reason for the dismissal is not within [section 98(1), (2)]'.

DISMISSAL FOR GROSS MISCONDUCT

38. In common law gross misconduct is conduct by an employee which fundamentally repudiates his contract of employment and justifies summary dismissal. There are several authorities *inter alia* **Laws v. London Chronicle Ltd** [159] 1 WLR 698 and **Wilson v. Racher** [1974] IRLR 114 which confirm that gross

misconduct is misconduct of such a nature that it fundamentally breaches the contract of employment. In the case involving the organist of Westminster Abbey, **Neary v. The Dean of Westminster** [1999] IRLR 288, who was summarily dismissed for gross misconduct, the Queen's Special Commissioner, Lord Jauncey, at paragraph 22 stated that:

> "…conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment."

39. This test for gross misconduct or repudiation was endorsed by the Court of Appeal in **Briscoe v. Lubrizol Ltd** [2002] IRLR 607 CA.

Reasonableness of the dismissal

40. The determination of the question whether the dismissal was fair or unfair, is established in accordance with section 98(4) of the Employment Rights Act, which states:

> (4)Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

41. In the context of misconduct, the test of a fair dismissal is that it is sufficient if the employer honestly believes on reasonable grounds, and after all reasonable investigation, that the employee is committed the misconduct. In considering reasonableness in this context, the judgment in **British Home Stores Ltd v. Burchell** [1980] ICR 303 contained guidelines, cited in most tribunal cases involving dismissal for misconduct and are contained in the following quotation from the Employment Appeal Tribunal's judgment at paragraph 2:

> "What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the

> circumstances of the case. […] It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before him, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being sure' as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter beyond reasonable doubt'. The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."

42. In **Scottish Daily Record & Sunday Mail [1986] Ltd v. Laird** [1996] IRLR 665, the Inner House of the Court of Session said, as regards the application of the **Burchell** test, that if the issue between the employer and the employee is a simple one and there is no real dispute on the facts, it is unlikely to be necessary for the employment tribunal to go through all the stages of the **Burchell** test.

43. The Court of Appeal further considered **Burchell** in **Graham v. Secretary of State for Work and Pensions (Jobcentre Plus*)*** [2012] IRLR 759 by Aikens LJ at paragraphs 35-36:

> "35 …once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.
>
> 36 If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee."

44. The Tribunal considered the cases of **Sandwell & West Birmingham Hospitals NHS Trust v. Westwood** 2009 UKEAT/0032/09 and **Eastland Homes Partnership Ltd. v. Cunningham** 2014 UKEAT/027/13 and considered the nature of the misconduct and whether the characterisation by the respondent that it was gross misconduct was reasonable.

45. It may be that the foregoing issue is contained within consideration of sanction. In relation to sanction, there are, broadly, three circumstances in which dismissal for a first offence may be justified:

a. where the act of misconduct is so serious (gross misconduct) that dismissal is a reasonable sanction to impose notwithstanding the lack of any history of misconduct;
b. where disciplinary rules have made it clear that particular conduct will lead to dismissal; and
c. where the employee has made it clear that he is not prepared to alter his attitudes so that a warning would not lead to any improvement.

46. In relation to capability, Sir John Donaldson delivering judgment for the NIRC in **James v. Waltham Holy Cross UDC** [1973] ICR 398 stated that:

> "An employer should be very slow to dismiss upon the grounds that the employee is incapable of performing the work which he is employed to do without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity to improve his performance."

47. The procedural stages break down into three steps:
(1) The employer should carry out a careful appraisal of the employee's performance and discuss his criticisms with the employee.
(2) He should warn the employee of the consequences of there being no improvement.
(3) He should give him a reasonable opportunity to improve.

In addition, it will be relevant to consider whether the employer has fulfilled its responsibilities in creating the conditions which enable the employee to carry out his duties satisfactorily, for example, by providing adequate training and supervision.

48. The ACAS Code of Practice on Disciplinary and Grievance procedures states (at para 1) that: 'Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure, they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted'. It is worth emphasising therefore that the basic principles of fairness set out in the Code may be taken into account by tribunals when assessing the reasonableness of a dismissal on the grounds of capability (section 200 TULR(C)A 1992). This will include those matters set out in para 4 of the Code as follows:

— 'Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.

— Employers and employees should act consistently.

— Employers should carry out any necessary investigations, to establish the facts of the case.

— Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.

— Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.

— Employers should allow an employee to appeal against any formal decision made.'

49. In considering procedural fairness the Employment Appeal Tribunal in **Clark v. Civil Aviation Authority** [1991] IRLR 412 laid out some general guidelines as to what a fair procedure requires. But even if such procedures are not strictly complied with a dismissal may nevertheless be fair – where, for example, the procedural defect is not intrinsically unfair and the procedures overall are fair: **Fuller v. Lloyd's Bank plc** [1991] IRLR 336.

50. An employment tribunal must take a broad view as to whether procedural failings have impacted upon the fairness of an investigation and process, rather than limiting its consideration to the impact of the failings on the particular allegation of misconduct, see **Tykocki v. Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust** UKEAT/0081/16 dated 17 October 2016.

51. Whilst there was some suggestion that the 'range of reasonable responses' test applies only to the decision to dismiss, not to the procedure adopted, this was rejected by the Court of Appeal in **Sainsbury's Supermarkets Ltd v. Hitt** [2003] ICR 111 CA. The Court of Appeal held in this case (at paragraph 30) that the 'range of reasonable responses' – or the need to apply the objective standards of the reasonable employer – applies:

> "…as much to the question of whether the investigation into the suspected misconduct was reasonable in the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."

52. Procedure is part of the overall fairness to be considered by the tribunal and not a separate act of fairness – see Langstaff J in **Sharkey v. Lloyds Bank plc** UKEAT/0005//15 (4 August 2015, unreported):

> …procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together.

53. Procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness: **Taylor v. OCS Group Ltd** [2006] IRLR 613.

54. The Employment Appeal Tribunal in **Iceland Frozen Foods Ltd v. Jones** [1982] IRLR 439 summarised the way in which tribunals should approach the statutory question, saying at paragraph 24:

> "(1) The starting point should always be the words of section 57(3)[1] themselves;
>
> (2) In applying the section, an industrial [employment] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the employment tribunal) consider the dismissal to be fair;

[1] Said provisions of the Employment Protection (Consolidation) Act 1978 having been superseded by section 98(4) of the Employment Rights Act 1996.

> (3) In judging the reasonableness of the employer's conduct, an employment tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
>
> (4) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
>
> (5) The function of the industrial [employment] tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair: if the dismissal falls outside the band, it is unfair."

Polkey reduction

55. If the evidence shows that the employee may have been dismissed properly in any event, if a proper procedure had been carried out, the Tribunal should normally make a percentage assessment of the likelihood and apply that when assessing the compensation: **Ministry of Justice v. Parry** [2013] ICR 311 EAT. However, this approach is not mandatory and there may be cases where it is more logical for the tribunal to fix a date by which it is confident on a balance of probabilities that the employee would have been dismissed anyway, and to limit compensation to the period up to that date: **O'Donoghue v. Redcar and Cleveland Borough Council** [2001] IRLR 615. **Contract Bottling Ltd v. Cave** [2015] ICR 146 EAT provided general guidance on applying **Polkey** which included an acceptance that either method may be applied, subject to the caveats that: (1) the percentage method is likely to remain the normal practice; and (2) even if applying the dating method it may be necessary to assess the percentage likelihood of the employment ending by the date in question.

Caused or contributed to by any action of the complainant

52. **Steen v. ASP Packaging Ltd** [2014] ICR 56, EAT advised Tribunals (in relation to reductions of both basic and compensatory awards) to address in their deliberations and their judgment four questions—(1) what was the conduct in question? (2) was it blameworthy? (3) (in relation to the compensatory award) did it cause or contribute to the dismissal? (4) to what extent should the award be reduced? **Rawson v. Robert Norman Associates Ltd** UKEAT/0199/1**3** (28 January 2014, unreported*)* confirmed that, in relation to the alleged employee contributory conduct, the test here is whether it actually occurred, not the more general unfair dismissal test of whether the employer reasonably believed it happened.

DISCUSSION AND DECISION

Reason for dismissal

53. The Tribunal concluded that the reason the claimant was dismissed was that he had asked to be told in writing what was happening to him during the telephone argument on 10 January. This request was said by Mr Burgess to have destroyed the friendship. There are two slightly different versions of the discussion given by Mr Burgess. In the investigation meeting, he says: "Had, had you just gone away and just got your head down for two weeks we wouldn't be having this conversation now because I would've dealt with things and it wouldn't be in the position we're in now" [108]. In the disciplinary hearing, Mr Burgess says, "if he had gone away and kept his head down and not started this we would have been happily working to together again … for the past 2 1/2 months…" [251]. It is not clear what the "this" is to which Mr Burgess refers but the claimant was asking for something in writing because what Mr Burgess was saying was not clear [252]. At this point, Mr Burgess made up his mind to dismiss the claimant and must have told someone in the shop who told the claimant on 10 January.

54. It is not known what was in the note the claimant sent the next day but it may have asked for clarification of his position [251]. By then the die was cast.

55. The Tribunal notes that, as the respondent had no contractual right to suspend without pay, the effect of what Mr Burgess did might have been treated by the claimant as a dismissal whether intended or not. At a later stage, Mr Burgess agreed to pay for the period of suspension [77].

56. To dismiss an employee for asking for clarification of what might have been a disciplinary sanction in writing is not a potentially fair reason for dismissal. Having regard to the reason for dismissal found by the Tribunal which was neither misconduct nor lack of performance, dismissal for gross misconduct was not justified. There was no loss of trust and confidence.

57. The Tribunal went on to consider the position had it held that the reason for dismissal was conduct in relation to the incident on 10 December and capability in relation to the errors in 2018 and 2019 on the basis that these might be potentially fair reasons.

Reasonableness of the dismissal

58. The Tribunal has only reached this stage in its reasoning on an alternative basis. The Tribunal was reminded a number of times that it should not substitute its decision for that of the employer. It will not do so. The Tribunal considered the procedure and concluded its characterisation of the errors as gross misconduct fell outwith the range of reasonable responses open to a reasonable employer. The Tribunal considered that the dismissal fell outwith the band of reasonable responses. No reasonable employer would have dismissed for the capability errors when no proper prior warning had been given. No reasonable employer would have dismissed for the act of misconduct in December. Viewing the whole situation in the round, no reasonable employer would have characterised the various offences as misconduct under a variety of different headings of gross misconduct and concluded that they merited summary dismissal.

59. This case is not concerned with the adequacy of the investigation or the reasonableness of any belief in the misconduct of the claimant by the respondent.

Mr Burgess had the detail of the errors and misconduct in December at the time of his telephone discussion with the claimant on 10 January except for the mismeasured shower screens. The case is concerned with the categorisation and treatment by the respondent of the errors. Errors 1-5 are set out in paragraph 25 hereof and are said to be gross misconduct. The additional errors can be described shortly as a leaky shower screen, the loss of a job worth £8000 in May/September 2018 and short shower screens discovered after 10 January 2019. These are described as gross misconduct in each instance. The errors which occurred in 2018 were noted by Mr Burgess at the time [127-130] so the Tribunal infers that he did not consider that the errors were significant enough for the disciplinary procedure to be operated at the time they occurred.

60. In relation to the broken double glazed unit in December, this incident might be characterised as misconduct, Mr Burgess did not discipline him at the time although the claimant was well aware of his displeasure. While he had an explicit instruction from Mr Burgess, the claimant succumbed to the threat that his employer would be put off the site. The unit is referred to as costing £3950 but the cost to the business was £1200 together with whatever additional business costs there were. There was said to be delay to the project, the dismissal letter says that Consero has not paid the respondent £56,000 with the inference that this was entirely the fault of the claimant. The Management Statement of Case [75] provides the figure of £33,000 which was said to be because of delay the claimant had caused and the effect of penalty clauses. Mr Burgess said the job was finished satisfactorily without the claimant [105]. The Tribunal does not consider the actions of the claimant to be characterisable as gross misconduct. Neither does the Tribunal consider the action to be conduct meriting dismissal with notice.

61. The trigger for the telephone argument on 10 January was the ordering of the wrong size mirrors, Mr Burgess said that it was a last straw [254] rather than an act of misconduct and it did not feature in the list of errors. The relative cost of the errors which were listed did not impact their categorisation as gross. The Tribunal concluded that the errors were gathered up by Mr Burgess in order to support his case for the dismissal of the claimant. These errors should not have been characterised as misconduct far less gross misconduct, they were poor performance. The December misconduct was not treated by Mr Burgess as such until he started the process of bolstering his case.

62. Mr Burgess instigated the disciplinary procedure involving an HR consultant which was dominated by him. He had predetermined the outcome. The letter of suspension makes reference to gross misconduct even before the investigation starts.

63. Both the investigation and the disciplinary hearing lack focus and have substantial contributions from Mr Burgess where he emphasises the seriousness of the various errors and their financial effect. Mr Burgess accepted at the disciplinary hearing that the matters raised were not individually gross misconduct but an accumulation [253 and 254].

64. Notwithstanding what Mr Burgess said at the disciplinary meeting, the nine errors are taken together and characterised under six different categories of gross misconduct in the dismissal letter of 24 April 2019 [177-184]. With the exception of the double glazed until in December, the errors are about performance,

notwithstanding the respondent said the errors were caused by lack of concentration [177], even if they had been, this was no reasonable basis to categorise them as conduct and not issue a warning. There was no reasonable basis for considering the errors under six different categories of gross misconduct. The letter appears to fail to take into account what was said at the disciplinary hearing and leave the amount claimed by Consero from £56,000 without explanation.

65. The Tribunal finds that there was no serious loss of trust and confidence between the claimant and the respondent in any of the manifestations relied upon by the respondent. Mr Burgess was prepared to continue with the employment of the claimant.

66. The Tribunal was asked to decide whether to make any deductions for **Polkey** and for contributory conduct. The Tribunal concluded that there was no basis for doing so. On the evidence of Mr Burgess, if the claimant had kept this head down for a couple of weeks the he would have continued in employment. The claimant should not have been dismissed for the reason he was or for the errors relied upon and had Mr Burgess continued to act in the manner he had done in 2018, the claimant would still have been in employment.

67. The claimant's decision not to appeal the decision to dismiss him was not unreasonable. Mr Burgess's conduct towards him was such that he could be confident that his attitude towards him as displayed in the investigation and disciplinary meetings would persist to the appeal stage and no different result would emerge. This was not an unreasonable failure to follow the ACAS Code (see para 26). The Tribunal does not propose to made a deduction to the claimant's compensation pursuant to section 207A of TULR(C)A.

68. The claimant was unfairly dismissed and a remedy hearing will be fixed.

_____

Employment Judge Truscott QC

Date 2 March 2020