

EMPLOYMENT TRIBUNALS



Claimant

Mr. D. Brown

v

Respondent

Sussex Turnery & Moulding Company
Limited

Heard at: London South (Ashford)

On: 18 February 2020

Before: Employment Judge Mason

Representation

For the Claimant: Miss S Brown (Claimant's sister) (lay)

For the Respondent: Mr. A Johnston, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant was not unfairly dismissed and his claim for unfair dismissal fails and is dismissed.
2. The provisional Remedy Hearing listed for 23 March 2020 is cancelled.

REASONS

Background, issues and procedure at the Hearing

1. In this case Mr. Brown ("the Claimant") claims that he has been unfairly dismissed. The Respondent denies that the Claimant was unfairly dismissed and says that he was fairly dismissed following a fair procedure.
2. The Claimant presented this claim on 4 September 2019. The Respondent lodged a response on 5 November 2019

3. I agreed with the parties at the outset that the issues to be determined by the Tribunal are as follows:
 - 3.1 Was the Claimant dismissed for a potentially fair reason in accordance with s.98(1) of the Employment Rights Act 1996 (“ERA”)? The Respondent relies on conduct which is a potentially fair reason (s.98(2)(b) ERA).
 - 3.2 Did the Respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the Claimant? This is to be determined in accordance with equity and the merits of the case (s98(4) ERA).
 - 3.3 In accordance with the test in ***British Home Stores v Burchell [1980] ICR 303***, has the Respondent shown that:
 - (i) it had a genuine belief that the Claimant was guilty of misconduct?;
 - (ii) it had in its mind reasonable grounds upon which to sustain that belief?; and
 - (iii) at the stage at which that belief was formed, it had carried out as much investigation into the matter as was reasonable in the circumstances?
 - 3.4 Did the procedure followed and the decision to dismiss fall within the range of reasonable responses open to a reasonable employer in the same circumstances, which include a previous final written warning? The Tribunal must be careful not to substitute its own view.
 - 3.5 If the Claimant’s dismissal was unfair, is the Claimant entitled to a basic award and/or compensatory award, and, if so, should there be:
 - (i) any reduction in the compensatory award on the basis the Claimant has failed to take all reasonable steps to mitigate his loss?;
 - (ii) any adjustment to either award as a consequence of any failure to follow procedure under the ACAS code?;
 - (iii) any reduction or limit in the award to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors accordingly made no difference to the outcome in accordance with ***Polkey?***; and/or
 - (iv) any reduction to reflect any contributory fault on the Claimant’s behalf towards his own dismissal?
4. Both parties were ably represented, the Claimant by his sister, Miss Brown, and the Respondent by Mr. Johnston, counsel. I am grateful to them both for their courtesy throughout.
5. I was provided with an agreed bundle of documents [1-193] and the witness statements. Mr. Johnston also provided a copy of the case of ***Wincanton Group Plc v Stone [2013] IRLR 178***.
6. Having agreed the issues with the parties, I retired to read the witness statements and the bundle. I then heard from Mr. Stuart Curtis (Operations Director) and Ms. Louise Tainsh (Appeals Officer) on behalf of the Respondent, and then from the Claimant and his witness Mrs. Sutton. The Claimant provided additional witness statements from Michael Taylor, Clare Idle, Nicholas Wilde, Jennifer Hunt and Julian Randall; none of these witnesses attended the hearing and I explained to the Claimant that their absence significantly reduced the weight to be placed on these statements.

7. On conclusion of the evidence, I heard submissions from both Ms. Brown and Mr Johnston. I reserved my decision which I now give with reasons.

Findings of fact

8. Having considered all the evidence I make the following findings of fact having reminded myself that the standard of proof is the balance of probabilities.
9. The Respondent supplies building materials to business and individuals. The Respondent trades as STAMCO and has three trading divisions: Builders Merchants (operating in Rye, Hastings, Eastbourne, Hove and Worthing); Timber Merchants (solely in Hastings); and Inspired Home Interiors (“Inspired”) (mainly in Eastbourne with a shop and small warehouse in Hastings). At the time of termination of the Claimant’s employment, the Respondent employed between 150 and 170 staff.
10. On **26 November 2013**, the Claimant commenced employment with the Respondent. He was initially employed as a Van Driver. On **18 December 2013** he signed a letter of offer setting out main terms and conditions of employment [35-37]. He was assigned to the Inspired Team.
11. His initial hourly rate was £7.50; on 1 May 2015, this increased to £8.00 [43A-B]; on 1 October 2016 this increased to £10.00 [47A]. By the time his employment ended, his gross monthly salary was £1,950 and his net monthly salary was £1,563.
12. November 2015 complaint
 - 12.1 In **November 2015**, a complaint was made against the Claimant with regard to the way he spoke to colleagues.
 - 12.2 On **19 November 2015** the Respondent wrote to the Claimant inviting him to a disciplinary hearing to take place on **23 November 2015**.
 - 12.3 There is a dispute as to whether or not a formal disciplinary hearing took place. There are no notes of that hearing in the bundle but there is a copy of a letter dated **23 November 2015** from Nicholas Wilde (former Company Secretary) (“NW”) to the Claimant [47]; this is headed “Outcome of Disciplinary Hearing” and refers to “*your disciplinary hearing today*”. However, it is not necessary for me to determine this point for the purposes of these proceedings.
 - 12.4 The Claimant was not formally sanctioned but was required to apologise for his behaviour and warned that any “*further instance*” where he failed to meet the company standards in his work or behaviour would result in further disciplinary action.
13. The Claimant’s role was subsequently expanded to include responsibilities for aspects of warehouse operations. In **October 2017**, NW told the Claimant that although he could not increase the Claimant’s salary, he would endeavour to ensure sure the Claimant’s overtime money was “secure” and said he would review the Claimant’s salary in February 2018. There is evidence in the bundle [48-51] that the Respondent was pleased with the Claimant’s performance in his expanded role and in December 2017 he was given a bonus of £250.00 [51]

14. On **13 February 2018**, the Claimant's Line Manager Julian Randall ("JR") left the Respondent and Amanda Porter ("AP") (formerly NW's Personal Assistant) was appointed Director of Inspired and became the Claimant's new Line Manager. NW also left at this time and the February review of the Claimant's salary never took place.
15. Sometime in **early March 2018**, the Claimant met with John Cornelius (Managing Director) ("JC") and AP. There are no notes of that meeting in the bundle, but I accept that the purpose of the meeting was to discuss the Claimant's salary and overtime and that JC and AP refused to review his salary as there was, in their view, insufficient evidence that the Claimant's role had significantly changed.
16. On **9 March 2018**, the Claimant wrote to AP [52-53] to follow up on the meeting:
 - 16.1 He raised the following issues: -
 - (i) He referred to his previous discussions with NW about his position and salary and said he was waiting for a proposal from NW which had never materialised.
 - (ii) He said he had been doing regular overtime since he started, and that NW had told him his overtime money was secure.
 - 16.2 He concluded "*I still feel that my hard work and commitment deserves a review of my salary and overtime*".
17. Also on **9 March 2018**, five employees in the Inspired Team, including the Claimant, wrote to Roger Brightiff, shareholder and Director) ("RB") to express concerns about Inspired [54-55]; their concerns included staff changes, staff levels, the direction of the business and the need for an overall Manager/Director with relevant previous experience.
18. **15 June 2018 complaint**
 - 18.1 In June 2018, an anonymous complaint was made [63] about the Claimant's conduct towards a colleague, Barry Owens (Inspired Team) ("BO").
 - 18.2 On **18 June 2018**, BO gave a statement confirming that the Claimant had shouted and sworn at him in front of staff and customers on 15 June [60-61].
 - 18.3 On **18 June 2018** the Claimant signed a statement [59] in which he said:
"I admit that I have been very unprofessional, and should not have sworn at him ..."
"All I can say is sorry for my actions and it will not happen again."
 - 18.4 On **19 June 2018**, AP wrote to the Claimant to invite him to a Disciplinary Hearing to be held on 21 June 2018 [62].
 - 18.5 I have not been provided with notes of the disciplinary hearing but I accept a meeting took place as on **25 June 2018**, Carl Cooksey (Finance Director ("CC")) wrote to the Claimant to give him a final written warning [65] and referred to "*your recent disciplinary hearing*"; the Claimant also accepted in verbal evidence that a meeting of some kind had taken place.
 - 18.6 CC makes it clear in the letter that the Claimant's behaviour was unacceptable and that he was being given a final written warning which would remain on his file for 18 months. The Claimant accepts that he received this. In the bundle [64] there is another version of this letter dated **22 June 2018** purporting to give him a written

warning to remain on his file for 12 months; this letter was only disclosed during these proceedings and the Claimant accepts he never received it so I have disregarded it.

18.7 The Claimant did not appeal this warning and said in evidence that he did not do so because he accepted, he was in the wrong. In his witness statement [para. 9] he says he acted “... *in a way which I readily admitted was unprofessional*”.

18.8 On **25 June 2018**, the Claimant signed a letter/memo from the Respondent to all employees headed “Standards of Behaviour” [44-45] dated 7 August 2015. This sets out in 11 numbered paragraphs the standards of behaviour “*expected from every employee at all times*”. Relevant extracts include:

“3. *Courteous behaviour and treating each other with respect at all times. ...*”

“4. *No mickey taking, horseplay, banter, ribbing, etc. ...*”

“5. *No personal attacks, verbal or physical. Do not swear under any circumstances. Do not use foul or abusive language at any time.*”

The memo makes it clear that any such conduct would be considered a breach of company policy “*and as such subject to the full range of disciplinary procedure*”. There is then reference to the Company Handbook (which I have not been provided with).

19. On **25 July 2018**, the Claimant met with Stuart Curtis (Operations Director) (“SC”); Chris White (Branch Manager, Eastbourne) (“CW”) also attended.

19.1 The notes [68-69] show that the Claimant’s concerns were discussed specifically:

(i) His job description.

(ii) The need for clarity with regard to his pension due to multiple accounts.

(iii) He felt that AP “*has it in for him*”.

(iv) Kurt Simmonds (Sales, Inspired Team) (“KS”) had it “*in for him*” as he is AP’s partner.

19.2 The “...*wider range of issues that appear to surround*” the Claimant were then discussed including “*a few reports from customers & colleagues alike that his demeanour and comments ...*” were unacceptable. The Claimant denied making such comments.

19.3 The topic of AP was discussed again and the notes record that the Claimant said “*he felt the urge to run [AP] over with his car after work when he saw her crossing the road...*”. The Claimant denies making this comment but I accept SC’s evidence that he did in fact make this statement. CW denied later in the appeal process hearing the Claimant make such a comment but CW signed the notes which is a clear indication he accepted them as an accurate record. I also accept SC’s evidence [w/s para. 6] that he did not interpret the Claimant’s comment as a real threat to AP but a “*mere throw away comment*”.

19.4 These notes are signed by SC and CW but not by the Claimant. I accept the Claimant’s evidence that he did not receive a copy of these minutes until disclosure in these proceedings. SC accepts this was an oversight on his part.

19.5 SC circulated the notes of the meeting to the other Directors; the Claimant’s comments were discussed at the Directors’ weekly meeting and the Directors decided SC should base himself at Eastbourne to keep an eye on things. SC then moved to the Eastbourne site around August 2018.

20. On **7 August 2018**, the Claimant met with SC again [notes 70-71] regarding *“comments being made in the showroom in Hastings”*. SC dealt with this informally:
- 20.1 The Claimant was reminded of the Standards of Behaviour policy in the company handbook and of the terms of the Standards of Behaviour memo he had signed on 25 June 2018.
- 20.2 The notes record that the Claimant admitted he had made some comments; he said he was *“only having some fun”* with KS.
- 20.3 SC concluded by urging the Claimant to *“consider his actions & comments to avoid any future shortcomings in the standards of behaviour as based on what we have spoken about would leave him below the standards in a number of areas”*.
- 20.4 These notes are signed by SC but not by the Claimant. I accept SC’s evidence that they are accurate if not verbatim. I accept the Claimant’s evidence that he did not receive a copy of these minutes until disclosure in these proceedings.
21. On Monday **3 September 2018**, the Claimant sustained a knee injury at work. He worked the rest of the week and then took two weeks’ holiday. His knee did not recover and from **24 September 2018 to 17 March 2019**, he was signed off sick. He was paid Statutory Sick Pay (“SSP”) whilst off sick. He has made a personal injury claim which is still ongoing.
22. On **18 March 2019**, on his return to work, he attended a Return to Work (RTW) Meeting with AP and SC:
- 22.1 The notes [79-80] record that the Claimant raised concerns about his pension and his pay whilst off sick.
- 22.2 The Claimant was given and signed a Job Description [81-82].
- 22.3 His contract was amended to reflect an agreed 45-hour week [76].
- 22.4 He was given guidance on Manual Handling [83-86] and refresher training [87]
23. On **1 April 2019**, the Claimant had an informal meeting with AP. AP then emailed Jodie Forbes (HR) (“JF”) about her informal discussion with the Claimant which she said was *“about his negative comments to other members of staff as 3 members of staff have reported to me how he is continually talking negatively about the Company, department figures, warehouse practices and also how he has alluded about his dislike to management. He also stated in front of customer who was asking about work opportunities that they “were alright to work for until you have an accident and then you’re treated differently” “[88].*
24. Later in April 2019, CC took steps to resolve the Claimant’s pension concerns [89-92]
25. In **late April 2019**, SC was informed by AP that further complaints had been made about the Claimant’s behaviour. SC was sent the following statements/emails from staff regarding the Claimant:
- 25.1 On **23 April 2019**, Ellie Milespeak (Inspired Team) (“EM”) emailed AP [93] to advise her of 8 comments she had heard made by the Claimant [93-94] including to the effect that he would seriously hurt AP one day, probably kill her *“and it scares him so that’s why he’ll leave”*; he said to KS that he had a shotgun set up ready to shoot him

- if he was participating in the Hastings half marathon. AP forwarded this the same day to JC, John Mannering (Commercial Director) ("JM") and SC [93]
- 25.2 On **24 April 2019**, Simon Guyatt (Inspired, Sales Rep) ("SG") emailed JM [95]. He reported that the Claimant had said he *"needed to find a new job before he kills [AP]. He said he would like to kill her and will end up punching her or "do her in".* SG described the Claimant as *"all mouth"*.
- 25.3 On **29 April 2019**, Aaron Miles (Inspired, Kitchen Designer) ("AM") emailed SC cc JC [96]. He says the Claimant is constantly negative about Inspired and he had overheard him making *"what could be deemed as threatening comments about some staff at Inspired"*.
- 25.4 On **30 April 2019** Mandy Mitchell (Finance Assistant) ("MM") emailed JC cc SC [p98] to say that she had overheard the Claimant making comments on several occasions about AP and KS relating to *"doing one or both of them some harm"*.
- 25.5 The Claimant questions the veracity of these emails and Miss Brown says it is significant they are not digitally signed. However, I accept SC's verbal evidence that (i) the Respondent does not routinely digitally sign internal emails and (ii) SC saw these emails at the time. On the balance of probabilities, I accept that they were genuine.
26. On **13 May 2019** (Monday) the Claimant met with SC for a Welfare/ Review Meeting [notes 99-101].
- 26.1 The Claimant said he was demotivated and explained his reasons and that he was looking for another job.
- 26.2 With regard to AP, he said he did not like her and *"...in fact I hate her"* [100].
- 26.3 SC asked the Claimant if he had made any comments about AP; the Claimant replied that he may have made some comments when he first returned to work as he was unhappy for various reasons. SC reminded him that he could not say *"anything that could be deemed as rude or derogatory"* and reminded him he was on a warning for falling short of the Standards of Behaviour. The Claimant assured him that he would not do so and that he had *"moved on"* [100].
- 26.4 The notes of that meeting are not signed and were not sent to the Claimant. However, I accept SC's evidence that they were made contemporaneously and accurately reflect the gist of the discussions and specifically that the Claimant said he hated AP.
27. On **14 May 2019**, SC was informed that there had been a further incident involving the Claimant; the Claimant had allegedly made derogatory comments about the paternity of AP's child speculating that the child's father could be JC or AG. [SC w/s para. 10].
28. On **16 May 2019** (Thursday), SC sent to RB and CC copies of the notes of his meeting with the Claimant on 13 May. He says in that email [102]:
"In addition to this I am just heading over to Eastbourne as [the Claimant] has allegedly made some more comments on Tuesday evening I am hoping that Mick [Mick Taylor, Inspired Team Member ("MT")] will confirm what [AP] has reported to

me, if so I was going to get [MT] to put this in writing and then suspend [the Claimant] pending an investigation/discipline hearing?"

29. I accept SC's evidence that MT did not want to get drawn into things and did not in fact provide a statement and has not done so since.
30. SC was appointed by RB to investigate the allegation against the Claimant. SC says [w/s para. 15] that he interviewed 11 witnesses but I do not accept this as he later says he can only recollect 7 witnesses [w/s para. 18].
31. Evidence in the bundle relating to SC's investigation is as follows.
 - 31.1 On **17 May 2019** in a handwritten statement, EM made an allegation that on Tuesday 14 May 2019 the Claimant had made a comment to her and MT questioning the paternity of AP's child [105]:

"Dave questioning the paternity of [AP]'s child, saying he hopes [KS] has all his strings tied up and that the baby is in fact his. That if it comes out with a bald patch we would know it is [JC]'s or potentially it would be a little baby AG or "Baby Garmo"."
 - 31.2 On **17 May 2019**, AP made a formal written statement of Allegation of Harassment and Bullying [106-108] in which she set out a number of comments including the following:
 - (i) A colleague told her that the Claimant told him that the Claimant *"...was going to punch me [AP] so hard in the face if he saw me out and even kill me as he is a 3 shot bird as I had reduced his money".*[107]
 - (ii) The Claimant had said to colleagues *"how he was watching the Hastings half marathon and waiting for my partner [KS] to run past so he could shoot him with a gun from his window"* . [107].
 - (iii) The Claimant, having seen AP and KS in the supermarket, subsequently told colleagues that *"... they should've told me they were shopping in there I would've poisoned their food before they bought it"*.
 - (iv) The Claimant had made comments to colleagues questioning the paternity of her child.
32. On **17 May 2019** SC met with the Claimant and handed him a letter inviting him to an investigation hearing to take place on 21 May with SC and RB to discuss the allegation of *"Harassment and behaviour contrary to the company standards of behaviour"* [103]. SC gave no further details of the alleged harassment and behaviour. The Claimant was also advised that he was suspended [104] pending the investigation meeting.
33. On **20 May 2019**, the Claimant sent the Respondent a grievance letter [110-111]. His specific grievances included:
 - 33.1 The Respondent's failure to increase his salary and job responsibilities pursuant to an alleged verbal agreement with NW and the *"very aggressive and unprofessional manner"* he was spoken to at a meeting with AP and JC to discuss this. He felt he was being victimised by AP and JC.

- 33.2 His pension position which still required clarification and AP's "*aggressive manner*" when he has asked her for assistance.
- 33.3 AP being "*instrumental*" in him being given a warning "*regarding my so called unacceptable behaviour towards another member of staff*".
- 33.4 Following his knee injury, he received no support from the Respondent and received only SSP unlike another member of staff who was on full pay for six weeks.
- 33.5 He felt like he had been effectively demoted on his return to work
- 33.6 He felt victimised by AP, SC and JC and since AP's appointment his career had gone "*backwards*".
- 33.7 He wanted his grievances resolved before the disciplinary investigation.
34. On **21 May 2019** KS emailed SC [118]. He refers to "*the continued verbal abuse*" from the Claimant and said the previous Friday, the Claimant had said to him something along the lines of:
"*I'd get that baby tested if I was you and check it's yours*".
35. Disciplinary Investigation Meeting
- 35.1 On **21 May 2019** an Investigation Meeting took place [notes 119–122]. Present at that meeting were RB, SC, JF (HR), John Valentine (Despatch Manager, Hastings) ("JV") and the Claimant. JV was present to accompany the Claimant. RB chaired the meeting and I accept SC's verbal evidence that "*[RB] took over the investigation*".
- 35.2 RB explained that the purpose of the meeting was to discuss a "*serious allegation of harassment and bullying*" on 12 April 2019 at Eastbourne and another incident on 14 May 2019 at Hastings. The focus was on the latter.
- 35.3 RB said the incident on 14 May 2019 was a conversation between the Claimant, MT and EM at the Hastings Showroom. The Claimant was not provided with copies of any witness statements.
- 35.4 RB read out an unattributed "testimony" that he had received which stated that the Claimant had questioned the paternity of AP's child as follows:
"*If the baby comes out with a bald patch it will be [JC]'s or if its holding a protein shake it will be a baby Garmo (Andy Garman).*"
The Claimant said he could not remember but that he would not say anything like that and that this was a witch hunt by AP [120].
- 35.5 RB then said KS had said the Claimant had said to KS "*you ought to get the baby tested to see if it's yours*". The Claimant denied this.
- 35.6 The Claimant referred to his grievance and said it needed to be dealt with before he was disciplined.
- 35.7 The meeting was adjourned to allow the Respondent time to seek legal advice with regard to the incident on 12 April 2019.
- 35.8 RB, SC, JF and JV signed the notes [122]. The Claimant was not provided with a copy until 12 June 2019 (after his dismissal). He does not accept they are an accurate record of what was said but does not explain why and on the balance of probabilities I accept they capture the gist of what was said.
36. Following the meeting, on **22 May 2019**, Penny Newman (Finance Administrator, Eastbourne) ("PN") emailed SC [123] at his request following an earlier discussion.

She said that more or less every day the Claimant mentioned that he hated AP; that he had said he would run AP over if she was crossing the road in front of him; on 16 May he had said he was going to ask KS who the father was of AP's baby.

37. Resumed Investigation Meeting

37.1 On **28 May 2019**, the Investigation Meeting was reconvened [notes 134-137]. Present at that meeting were RB, SC, JF (HR), JV and the Claimant. JV was present to accompany the Claimant. RB again chaired the meeting.

37.2 At the meeting, the Claimant provided a written statement [125-126] in which he disputed all allegations against him and denied any wrong doing:

- (i) He said AP was trying to build a case of gross misconduct against him.
- (ii) He demanded to see copies of written statements from members of staff.
- (iii) He had reported AP's "*bullying behaviour and attitude*" and been ignored.
- (iv) He said there "*are jokes and banter every day in the work place*" and CW had used obscene language but had not been subjected to disciplinary action.
- (v) He concluded:

"In summary I believe that these proceedings are nothing to do with anything that I may or may not have done or said, but everything to do with [AP]'s wish to hound me out my job at Inspired ..."

37.3 The notes show that RB told the Claimant that a "*number of people*" had given written statements but that he was not prepared to disclose the names as they wished to remain anonymous as they were scared of the consequences.

37.4 RB read out a statement that on 17 May 2019 the Claimant had commented to KS (overheard by another member of staff): "*I'd get that baby tested to check if it's yours*". He also read out a statement from another member of staff who heard the Claimant saying: "*I heard [AP]'s pregnant ... are you going to do a line up of dads?*". RB told the Claimant that "*four or five people have said the same or similar things*". RB asked the Claimant if had made these comments. The Claimant said "*Everyone's had a joke, Leigh Barnes [Branch Manager, Eastbourne, ("LB")] asked me if I was taking a paternity test. There's always banter and people messing around*" [134]. He said; "*I have had a joke about it yes*". [135]

37.5 RB then read from another statement about a comment the Claimant had allegedly made about KS running the marathon and that if he did so he would shoot him. The Claimant denied this [135].

37.6 RB asked the Claimant about an alleged comment he had made about poisoning AP and KS's food and said he had two statements which stated he had said this. The Claimant denied he said this [135].

37.7 The Claimant denied saying that he would punch AP in the face if her saw her outside of work or even kill her. [136].

37.8 The Claimant accepted he could be negative "*but everyone is*".

37.9 RB informed the Claimant that he would "*make a decision on his grievance and then make the decision on this disciplinary*" [137].

37.10 RB, SC, JF and JV signed the notes [137]. The Claimant did not sign. The Claimant was not provided with a copy of the notes until 12 June 2019 (after his dismissal). He does not accept they are an accurate record of what was said but does not explain

why and I accept on the balance of probabilities that they accurately reflect the gist of what was said.

37.11 After this meeting, SC met with RB and told him that he thought there was a case to answer. SC explained in evidence that he did not provide RB with a formal report but provided RB with copies of the witness statements/emails and the notes of the meetings.

38. Grievance Hearing

38.1 On **30 May 2019**, the grievance meeting took place [notes 138-148]. Present at that meeting were RB, Linda Moss (Purchasing Director, ("LM")), JF (HR), JV and the Claimant. JV was present to accompany the Claimant. RB again chaired the meeting.

38.2 RB explained the purpose of the meeting was to discuss the Claimant's grievances set out in his letters of 20 May and 28 May 2019

38.3 The Claimant said that he was doing well until AP took over; he felt bullied by her and treated differently. He was unhappy that NW's offer of an increase in salary had not materialised and when he had raised this and payment for overtime with AP and JC they were aggressive towards him. He was unhappy that he was only paid SSP when off sick and had received no support on return. His pension position required clarification.

38.4 RB, JF and JV signed the notes [148]. The Claimant did not sign. Again, I accept on the balance of probabilities that they accurately reflect the gist of what was said.

39. On **1 June 2019**, the C provided a "*Report of Warehouse Humour*" [149-150]. He refers to various incidents including one on 17 May when AP announced her pregnancy and LB "*jokingly asked if I was going to take a paternity test*". He concludes:

"Finally, I would just like to say that throughout my working life at Inspired, I have been made fun of and teased in various situations. I have always taken it as a joke and as warehouse banter, but I now realise that I should have reported it to management". [150]

40. On **3 June 2019**, I accept the Claimant's evidence that he met with RB at RB's request off the company premises. SC confirmed in evidence that he had "*heard a rumour*" to this effect. I accept that RB asked him to drop his grievances and in return the Claimant would receive only a final warning. The Claimant refused to do so. JC has provided a statement [171K] which confirms this meeting took place and I have no reason to disbelieve the Claimant as to what was discussed.

41. On **6 June 2019**, RB wrote to the Claimant to invite him to a disciplinary hearing on 10 June 2019 [151A].

42. Disciplinary Hearing

42.1 On **10 June 2019**, the Disciplinary Hearing took place [notes 152-153]. The notes show that present at that meeting were RB, LM, JF (HR), JV and the Claimant. JV was present to accompany the Claimant. SC says in his witness statement that he

also attended [w/s para 21] but on cross-examination clarified that he did not in fact attend and was confused because he perceived the hearing on 21 May to be "*the hearing*". RB again chaired the meeting

42.2 SC says [w/s para. 18] that he can recollect conducting 7 interviews: AM, EM, SG, MM, PN, AP and KS and that as far as he is aware the statements were sent to the Claimant prior to the Disciplinary Hearing as he had passed them on to JF (HR). However there is no evidence of them being provided to the Claimant and I accept his evidence that he was not provided with copies of any witness statements prior to this meeting.

42.3 RB handed to the Claimant a letter from him dated 10 June 2019 advising him of the outcome of his grievance [154-157]. None of his grievances were upheld. He was advised he had 7 days within which to appeal.

42.4 The meeting then moved on to the disciplinary hearing. RB said he did not have a "*lot more to say*" and asked the Claimant if he had anything to say; he said "no". The hearing was then adjourned for around 45 minutes.

42.5 After the adjournment, RB advised the Claimant that the decision had been made to dismiss him with immediate effect and handed him a letter (from RB) dated 10 June confirming this [158]:

"Having made careful consideration of evidence supplied by other members of staff and evidence you have supplied during the two investigation meetings we have had, I am satisfied that your conduct relating to [AP]'s baby is clearly gross misconduct and therefore I have decided to terminate your contract of employment with immediate effect.

During the investigation of this matter you raised a grievance with me over various issues, and whilst some of the points you raised did relate to your relationship with [AP], it is my opinion that none of the points raised would constitute any reason for you to have spoken about [AP] in the way that you did".

42.6 Only RB and JF signed the notes [153]. The Claimant did not sign. The Claimant did not receive a copy until 12 June 2019. He does not accept that they are accurate but I accept on the balance of probabilities that they accurately reflect the gist of what was said.

43. On **10 June 2019**, RB wrote to the Claimant [158] to inform him that his employment was being terminated:

"Having made careful consideration of evidence supplied by other members of staff and evidence you have supplied during the two investigation meetings we have had, I am satisfied that your conduct relating to [AP]'s baby is clearly gross misconduct and therefore I have decided to terminate your contract of employment with immediate effect".

44. On **11 June 2019**, RB wrote to the Claimant advising him of his right to appeal the decision to dismiss to the Board of Directors within five days [159].

45. On **13 June 2019**, the Claimant received from the Respondent minutes of the investigation and disciplinary meetings and some emails with the senders' names

deleted. The documents did not include witness statements from MT and EM. The Claimant enquired about this; he was told all documentation had been sent.

46. On **13 June 2019**, the Claimant appealed the decision to dismiss [160-161]. He stated:
- 46.1 The minutes of meetings were not an accurate record and were *“irrelevant”* as they were not handed to him at the end of each meeting.
- 46.2 The emails *“could have been fabricated by anyone, and do not make any valid points, or give any clear facts.”*
- 46.3 The Respondent had still not provided him with the documentation he had requested including the original hand written statements from MT and EM and *“copies of the “tick box” questionnaire that was given to each member of staff with regard to them commenting on my conduct at work”*.
- 46.4 The Respondent had not followed proper procedures and failed to answer the points raised in his grievance.
- 46.5 In an informal conversation with RB, RB had tried to dissuade him from pursuing his grievance in return for not being dismissed and accepting a final warning. The Claimant did not agree.
47. On **19 June 2019**, the Respondent (HR) wrote to the Claimant inviting him to an appeal hearing on 25 June to be conducted by Louise Tainsh (Interim HR Business Partner) (“LT”) and inviting him to submit a written statement detailing his full grounds of appeal by 24 June [161A].
48. On **25 June 2019**, LT met with the Claimant [notes 162A-162I]. Present at that meeting were LT, JF (note taker), JV and the Claimant. JV was present to accompany the Claimant. The notes show:
- 48.1 The purpose of the meeting was to *“investigate the facts ...”* [162A] and LT describes this as an interview as *“part of her investigation”* [w/s para. 5].
- 48.2 LT asked the Claimant if he wished to appeal the termination and/or the grievance decisions. The Claimant replied:
“To be honest I don’t want to go back to Hastings as long as [AP] is in charge. I have requested 2 statements that haven’t been given because they don’t exist. There are emails sent in April that were far worse than what was said, and they weren’t dealt with.”
- 48.3 He confirmed that the two statements he was referring to were from EM and MT. LT said she had a statement from EM but not from MT.
- 48.4 LT said *“The process we can take is if we open the case back up again and re-hear it”*. The Claimant replied:
“I don’t see the point if I’m honest, all the time [AP] is in charge”.
LT asked him about another branch; the Claimant said *“I don’t know...”*.
Having asked the Claimant several times what he wanted from the process, LT concluded that, as his responses were unclear, the case should be re-opened and there should be a rehearing [162B].

48.5 LT explained that the process would be as follows:

- (i) The grievance would be re-opened and they would go through the points raised in the Claimant's grievance letter.
- (ii) LT would then *"go away and investigate the scenarios and people u talk about, we will then come back together and share this with you and give you a decision on whether we uphold this or not"*. [162B].
- (iii) They would then *"go back to the disciplinary and look at that"*.

48.6 LT and the Claimant then discussed the Claimant's grievances in some depth.

48.7 LT and the Claimant also discussed the disciplinary procedure. The Claimant pointed out he had asked for statements.

48.8 LT said: *"So process now is we will reinvestigate all of this and we will interview all people you spoke about in your notes, so anyone you think we need to speak to who aren't in the notes you need to let me know"*.

The Claimant said LT should speak to CC, CW, LB, JC, SC, AP, MT, MM and Vince Barber (Inspired Team, Tiles) ("VB"); also AM but he acknowledged AM was off sick.

48.9 JF provided him with a barely legible copy of EM's handwritten statement anonymised; LT would not confirm that the writer was EM. The Claimant asked why he was not provided with this sooner; LT replied that it was not available when he had asked.

48.10 LT concluded by explaining she would go away and investigate and asked the Claimant if he had any questions. He replied: *"Nope, it seems to be doing it properly this time"* [162G].

48.11 The notes are signed by LT and the Claimant on 25 June 2019. The Claimant does not accept that he signed these notes but on the balance of probabilities I find that he did and they capture the gist of what was said.

49. Following the appeal meeting, LT conducted 6 interviews as follows:

49.1 AP [171A -171G]:

The majority of AP's statement focuses on the Claimant's grievances. Reference to the disciplinary issues is at the end:

"[The Claimant] said to SG that he knew where [AP] lived and would get a shot gun – witness statement documents all this".

"Came as a bit of a shock, very different to how he comes across. Wants to instil fear in others"

"AP thought he would start harassing again as he had done this the year before – AP felt like it was escalating again, talking about AP in the showroom."

"AP thinks that [the Claimant] wants her and her family to feel threatened." AP described a situation when the Claimant said *"What goes around comes around"*.

49.2 JC [171H-171K]:

Again the majority of JC's statement focuses on the Claimant's grievances. He refers to the Claimant having made *"rude comments to others"* but says he did not hear these personally. He said the Claimant can be *"intimidating to others"*. AP had been approached by other members of the team *"saying they were sick of [the Claimant's] attitude"*. The team were asked to put this in writing, there was no questionnaire. JC was asked about the *"killing/harming"* allegations; he said he did not hear these personally, it was *"all hearsay"* [171K]

49.3 CC [172-174]

The focus of the statement is on the Claimant's grievance about his pension issue; CC acknowledged that the Claimant could have been kept better informed – "*better communications could have helped*". He said his dealings with the Claimant had always been "*fair and persistent*" and he had always been professional.

49.4 CW [181A-181D]

ATM said the problems with the Claimant started beginning of 2018. ATM said the Claimant was "*very unapproachable*". ATM said:

"I've not personally heard him say that he's going to run them [SC, AP, JC and KS] over, but I have heard from others, everyone knows he said it. It doesn't surprise me. He hates them. If I put my mortgage on it, I would say he would have said that. He may not like me, but I've not heard anything. We've never had a HR Department which probably didn't help. I have no hard evidence for you. If it shoots me in the foot, at least I've been honest."

49.5 LB [179-181]

LB described the Claimant as "*a bit of a miserable bugger*" but had a limited relationship with him and said he was a hard worker. He said the Claimant moaned about KS and AP "*F'ing and blinding about it*" but "*nothing specific*". He said he had heard the Claimant "*mention the topic*" of the paternity of KS and AP's baby. He said he had heard the Claimant talk negatively about AP and KS.

"I had heard from other people how he vocalises his displeasure towards AP to an extreme level. ... He vocalised quite aggressively what he would do. I heard him say things like he would kill her. ... There obviously was a breakdown in their professional relationship" "I heard it myself and I heard it second hand and I told [AP] about it"

49.6 SC [182-187]

SC said he always had a good working relationship with the Claimant. He referred to the Claimant's "*campaign against [AP]*" and his tendency to be "*short and aggressive*". He said the Claimant had said that "*he wanted to run [AP] over] or along the lines of "I saw her crossing the road and I thought about running her over"*". He accepted that when he suspended the Claimant he did not tell him why.

50. LT did not speak to SG, AM, MM, KS or PN who had provided statements considered at the original disciplinary hearing as she took the view that she would only speak to the witnesses the Claimant wanted her to speak to. LT did not interview AM as he was off sick and MT was on holiday. It is unclear why she did not speak to VB.
51. On **4 July 2019**, LT sent only 4 witness statements to the Claimant [188]; she sent statements from CW (anonymised), SC, LB and CC. She did not send statements from JC, CW and AP as they had told her they did not want their statements to be seen by the Claimant as they feared potential repercussions.
52. On **6 July 2019**, the Claimant wrote to LT to advise her of his intention to present a claim to the Employment Tribunal [189-190]. He sets out in that letter his reasons under three headings: (1) Disciplinary Procedure, (2) Grievance Procedure and (3) Rehearing of Disciplinary & Grievance.

52.1 Disciplinary Procedure

- (i) He says he never received signed copies of statements from individuals prior to meetings; EM's statement was only sent to him recently; he has never seen MT's statement; he has not received copies of the other statements.
- (ii) SC suspended him but is now a witness which is a conflict of interest.
- (iii) He never received signed minutes of the meetings until after his dismissal.
- (iv) At an unofficial meeting outside work RB tried to coerce him into dropping his grievance.

52.2 Grievance Procedure

- (i) His grievances have not been fully investigated.
- (ii) JC has referred to him as Warehouse Manager in an email.
- (iii) His concerns about AP's "*dubious accounting practices*" have not been addressed.
- (iv) There are examples of others being treated differently regarding disciplinary action.
- (v) AP's "*aggressive and unprofessional behaviour*" towards him.

52.3 Rehearing of Disciplinary & Grievance

- (i) SC refers to "*meetings/events that happened over a year ago*". "*If this was so serious why was it not raised as a disciplinary matter at the time and why is it being raised now?*"
- (ii) The statement from CW confirmed he did not directly hear him make a comment about AP so this is just his personal opinion.
- (iii) The statement from LB is not accurate
- (iv) "*No rehearing investigation notes from the remaining eight anonymous team members, MT & EM*"

Outcome of Appeal Meeting

53. On **17 July 2019**, the Claimant attended an "Outcome of Appeal Meeting" with LT; [notes 191A -191E). JV also attended as the Claimant's companion. The meeting lasted from 08.00 to 08.24. The notes show:

53.1 The purpose of the meeting was "*outcome of grievance and disciplinary*" [191A].

53.2 LT told the Claimant that she had re-investigated his grievances; none were upheld.

53.3 With regard to the dismissal, LT says "*I think it's clear there is a breakdown in a relationship with your manager*". She said:

"... I had to anonymise one statement and 3 others didn't want theirs included so that demonstrates to me that you are aggressive in the workplace and I have found that and so have my colleagues in the HR department."

53.4 The Claimant agreed there had been a breakdown in the relationship with AP.

53.5 The Claimant said there was no signature on the notes of the [RTW] meeting with SC; LT said it did not need to be signed – he had access to his file at any time.

53.6 LT said: "*I have made no reference regarding your RTW, other than with SC. I only investigated what you told me. I haven't used this RTW statement in my investigation or to come to my decision*"

53.7 LT concluded: "*You have a disciplinary on file for inappropriate behaviour last June. I am upholding the decision to terminate your contract*". LT asked the Claimant and JV if they wished to add anything; neither did.

54. Appeal outcome letter

54.1 On **17 July 2019**, LT wrote to the Claimant confirming the outcome of the appeal meeting.

54.2 LT explained why his various grievances were not upheld.

54.3 LT then explained her decision to dismiss:

"We went on to discuss your Termination of Employment on the grounds of Gross Misconduct. You had received a final warning on 25th June 2018 for using inappropriate language towards another member of staff and this behaviour being contrary to the Company's Standards of Behaviour. Your termination on 10th June 2019 was with regards to your conduct towards [AP]'s pregnancy. During my investigation, I found one witness that was prepared to confirm that he had heard you making inappropriate comments about the paternity of [AP]'s baby.

I interviewed 6 people in relation to my investigation and 3 asked not to have their statements included and one asked for their statement to be anonymised as they were concerned about your negative reaction and how this may have onward negative repercussions for them and their families. This information is very telling as to how you are perceived in the workplace. The statements I have received also bear this out, therefore the outcome to the re-hearing of your termination is to uphold your termination on the grounds of Gross Misconduct in accordance with the Company Disciplinary Procedure"

54.4 LT advised the Claimant he had the right to appeal within 5 working days.

55. At the Tribunal hearing, the Claimant told me he thought the appeal process was "pretty fair" apart from LT not speaking to VB and AM. He said he also thought some of his grievances were not investigated properly.

56. The Claimant did not appeal LT's decision in respect of his grievance or dismissal. At the Tribunal hearing, he told me he felt there was no point as it was "*the same decision all the time*".

57. On **18 July 2019** the Claimant contacted ACAS and an EC certificate was issued on **18 August 2019**. He presented this claim on **4 September 2019**.

58. On **22 July 2019**, the Claimant commenced new employment on a temporary basis until 4 October 2019 earning £250.00 (net) per week [Schedule of Loss 33]. He has not found employment since but I accept his evidence [w/s 32] that he has made efforts to do so.

The Law

59. Section 98 (1) ERA:

In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show:

- the reason (or if more than one the principal reason for the dismissal); and

- that it is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

60. Section 98(4) ERA:

60.1 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 reasons shown by the employer):

- (i) 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
- (ii) shall be determined in accordance with equity and the substantial merits of the case.

60.2 In accordance with the tests set out in **Burchell** the Tribunal must consider:

- (i) did the Respondent believe the Claimant was guilty of misconduct?
- (ii) did the Respondent have in its mind reasonable grounds upon which to sustain that belief? and
- (iii) at the stage at which that belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances of the case?

60.3 Range of reasonable responses:

- (i) When assessing whether the **Burchell** test has been met, the Tribunal must ask whether dismissal fell within the range of reasonable responses of a reasonable employer and this test applies both to the decision to dismiss and to the procedure. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
- (ii) The starting point should always be the words of s98(4). In applying the section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer; it is not for the Tribunal to impose its own standards. The Tribunal has to decide whether the dismissal and procedure lay within the range of conduct which a reasonable employer could have adopted.
- (iii) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether 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.

60.4 The fairness of the disciplinary process is to be assessed as a whole and in the round. Defects in the original disciplinary hearing and pre-dismissal procedures can be remedied on appeal. This does not have to be in the nature of a full rehearing (**Taylor v OCS Group Ltd [2006] ICR 1602**) and may be by way of a review. The

Tribunal should have regard to the nature and extent of the flaws at the earlier stages and go through those points when assessing the appeal process.

60.5 Where there is an earlier warning, the EAT gave the following guidance in ***Wincanton Group Plc v Stone [2013] IRLR 178***:

- (i) The Tribunal should take into account the fact of that warning.
- (ii) The Tribunal should take into account any proceedings (such as an internal appeal) that may affect the validity of the warning.
- (iii) Unless the Tribunal is satisfied as to the invalidity of the warning, the Tribunal should not go behind a warning.
- (iv) The factual circumstances giving rise to the warning may be taken into account. A degree of similarity between the circumstances giving rise to the first warning and those now being considered will tend in favour of a more severe penalty.
- (v) It is not wrong for a Tribunal to take account of the employer's treatment of similar matters.
- (vi) A final written warning always implies that any misconduct of whatever nature will often and usually be met with dismissal and it is likely to be by way of exception that that will not occur.

60.6 Where disciplinary and grievance issues are related, it may be appropriate to deal with them concurrently (Acas Code of Practice); however, an employer might be expected to complete a grievance procedure before starting or continuing disciplinary proceedings where not to do so would cause clear prejudice to the employee.

61. Compensation

61.1 In addition to a basic award (section 119 ERA), **Section 123(1) ERA** provides for a compensatory award: "*... the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".

61.2 Contributory conduct:

- (i) Section 122(2) ERA states:
"*Where the tribunal considers that any conduct of the complainant 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*"
- (ii) Section 123(6) ERA states:
"*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complaint, it shall reduce the amount of the compensatory award by such proportion regard to that finding*".

61.3. Mitigation:

Section 123(4) ERA requires a claimant to mitigate their loss and a claimant is expected to explain to the tribunal what actions they have taken by way of mitigation. This includes looking for another job and applying for available state benefits. The tribunal is obliged to consider the question of mitigation in all cases. What steps it is reasonable for the claimant to take will then be a question of fact for its determination.

61.4 Polkey:

Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a tribunal could make. In some cases it may be clear that the employee would have been retained if proper procedures had been adopted. In such cases the full compensatory award should be made. In others, the tribunal may conclude that the dismissal would have occurred in any event. This may result in a small additional compensatory award only to take account of any additional period for which the employee would have been employed had proper procedures been carried out. In other circumstances it may be impossible to make a determination one way or the other. It is in those cases that the tribunal must make a percentage assessment of the likelihood that the employee would have been retained.

61.5 ACAS Code:

- (i) Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 (“the ACAS Code”) provide that if it appears to the Tribunal that—
 - (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
 - (b) the employer has failed to comply with that Code in relation to that matter, and
 - (c) that failure was unreasonable,the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.
- (ii) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
 - (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
 - (b) the employee has failed to comply with that Code in relation to that matter, and
 - (c) that failure was unreasonable,the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

The Parties’ Submissions

The Respondent’s case

62. Mr. Johnston submits that the Claimant was fairly dismissed for gross misconduct:
- 62.1 The disciplinary process and the decision to dismiss must be seen in the context of a live final written warning (***Wincanton***). The final written warning was valid: the Claimant accepted his behaviour merited a final written warning and he did not appeal. The existence of a final written warning implies that further misconduct will lead to dismissal.

62.2 The **Burchell** test is met:

(i) Original disciplinary process:

- a. There was no sensible alternative to dismissal. RB accepted the Claimant's misconduct; RB had a genuine belief in that misconduct; and he had reasonable grounds on which to base that belief.
- b. There was evidence from more than one source (EM, PN and AP) which painted to a similar picture of comments made by the Claimant which were deeply unpleasant.
- c. A reasonable investigation was carried out. There was corroboration that the Claimant had made these comments; PN and EM gave different versions of events but had a common thread of stating that the Claimant had questioned the paternity of AP's baby.

(ii) Appeal process:

- a. The appeal was by way of a rehearing. The Claimant takes no issue with LT as the appeals officer. LT had a genuine belief in the Claimant's misconduct; she had reasonable grounds on which to base that belief, a further witness having corroborated that the Claimant had made comments about the paternity of AP's baby.
- b. LT carried out as much investigation as was reasonable in the circumstances. It is accepted that VB and AM could have been spoken to but even if they did not hear anything, LT had a witness who said that she did hear the comments and in fact further comments (such as threats of physical harm to AP and her partner) which would also amount to gross misconduct.

63. If the Tribunal concludes that the dismissal was unfair (which the Respondent does not accept) then compensation should be reduced to nil for the following reasons:

63.1 If the dismissal was procedurally unfair: the Claimant would have been dismissed in any event even if a fair procedure had been followed.

63.2 If the dismissal was substantively unfair: the Claimant would have been dismissed in the very near future. His relationship with AP was untenable and he made it clear at the appeal stage that he was not prepared to work with AP.

63.3 The Claimant contributed towards his own dismissal 100% by making these comments.

The Claimant's case

64. Miss Brown submits on behalf of the Claimant as follows.

65. The Claimant was hardworking and reliable; he had a good relationship with his colleagues. He had pay rises. Then AP took over in March 2018 and all the team had issues with the consequent changes - many people left. The Claimant remained but AP targeted him and made up allegations against him and orchestrated events that followed. Her plans to get rid of the Claimant were thwarted when he had an accident at work but she still targeted him by paying him only SSP and as a result the Claimant had to bring a PI claim.

66. The Claimant was not shown the evidence against him at the meetings on 21 May, 28 May and 10 June 2019. This is a clear breach of the Acas code. He was told there

were 11 witnesses but he was not provided with the statements on 21 May or 28 May and the Respondent has never at any time provided a witness statement from MT. None of the emails are digitally signed and the Respondent has not proved that these emails are genuine.

67. RB was involved in both the investigation and the disciplinary hearing whereas they should have been kept separate. The process and procedures were always skewed against the Claimant.

Conclusions

68. Applying the relevant law to my findings of fact and having considered together all the circumstances of the case, I have concluded that dismissal was fair as both the procedure and the decision to dismiss fell within the range of reasonable responses of a reasonable employer for the following reasons.
69. I am satisfied, on the balance of probabilities, that the Respondent has shown that the reason for the Claimant's dismissal was a potentially fair reason, specifically his conduct (s98(1) ERA). The Claimant suggests that the allegations have been fabricated and matters orchestrated by AP but I do not accept this in view of the number of witnesses who have provided statements and the number of prior occasions when concerns have been expressed about his (similar) conduct (including the final written warning on 25 June 2018 [65]).
70. I have then moved on to consider the fairness of the Claimant's dismissal (s98(4) ERA) and whether in the circumstances (including the size and administrative resources of the employer's undertaking) the Respondent acted reasonably or unreasonably in treating the Claimant's conduct as a sufficient reason for dismissing the Claimant in accordance with equity and the substantial merits of the case. I have reminded myself that I must not substitute my own decision as to what was right or impose my own standards.

The initial investigation and disciplinary hearing:

71. The Claimant is understandably concerned about the fact he was not shown the witness statements prior to the disciplinary hearing and that the Respondent has been inconsistent about the number of witnesses interviewed. By the time of the disciplinary hearing, seven witnesses had provided statements and whilst none of these witness statements were provided to the Claimant prior to or at the disciplinary hearing, I have concluded this was not unfair for two reasons:
- 71.1 the witnesses wished to remain anonymous; and
- 71.2 whilst it is odd that the Respondent should then send copies of anonymised emails/statements from witnesses to the Claimant after the disciplinary hearing, RB summarised key parts of the statements to the Claimant at the hearing.
72. However, the initial disciplinary process did certainly fall short in the following respects:

- 72.1 SC was appointed as Investigating Officer and made some investigations by obtaining further statements from EM, AP, KS and PN. However RB then chaired the Investigation Meetings on 21 May 2019 and 28 May 2019. RB then also chaired the Disciplinary Hearing on 10 June 2019. Given the size and administrative resources of the Respondent, these two functions should have been kept separate.
- 72.2 The Investigation Meetings became in effect the Disciplinary Hearing as demonstrated by:
- (i) the respective lengths of these meetings;
 - (ii) RB's comment on 19 June that he "*did not have a lot more to say*"; and
 - (iii) SC's confusion when he said he was present at the Disciplinary Hearing when in fact he meant the Investigation Meetings.
- 72.3 RB's independence and impartiality was further undermined by unwisely meeting with the Claimant on 3 June to encourage him to drop his grievances in return for a final warning.
- 72.4 Having concluded that to all intents and purposes the disciplinary hearing took place at the Investigation Meetings on 21 May and 28 May, it follows that the Claimant's grievances were not therefore resolved beforehand. Given that one of the Claimant's grievances concerned AP's attitude towards him, this was particularly relevant.
73. For these reasons, pausing at this point, the initial process was clearly unfair as it fell outside the band of reasonable responses. However, I must consider the entire process in the round, including the appeal.

Appeal investigation and hearing

74. The Claimant takes no issue with LT as the Appeal's officer.
75. On 25 June 2019, LT had a preliminary meeting with the Claimant. Following a discussion with the Claimant, LT's decision as a result of that meeting to treat the appeal as a rehearing, rather than a review of the original decision to dismiss, was entirely right given the shortcomings in the initial disciplinary process. LT was fair and sensible in taking her cue from the Claimant as to how he wished her to deal with matters and who he wanted her to speak to.
76. Following the meeting on 25 June, LT spoke to AP, JC, CC, CW, LB and CC. The only people she did not speak to who the Claimant asked her to were MT, MM and Vince Barber. However, her investigation was sufficiently thorough to fall within the band of reasonable responses of a reasonable employer.
77. Following the investigation, on 4 July 2019 LT sent four witness statements to the Claimant. This was not unfair as the other witnesses wished to remain anonymous and she did not rely on the witness statements not disclosed. She relied on LB's statement which was disclosed.
78. LT then met with the Claimant at an "Outcome of Appeal Meeting" on 17 July 2019 and at that meeting the Claimant was advised of LT's decision. Whilst ideally, there

would have been an interim meeting when the Claimant would be given the opportunity to comment on the statements, he had effectively taken this opportunity by writing on 6 July 2019 commenting on the statements which had been disclosed. He was therefore given and took the opportunity to state his case prior to LT making her decision.

79. LT was careful to properly investigate and consider the Claimant's grievances prior to the 17 July 2019 meeting. Again, the Claimant was provided with the witness statements and in his letter of 6 July 2019, he had the opportunity to comment before LT reached her decision.
80. In conclusion, in accordance with the tests set out in **Burchell**, the dismissal was fair as the procedural defects at the initial stage were cured on appeal:
 - 80.1 LT genuinely believed the Claimant was guilty of misconduct and had in her mind reasonable grounds upon which to sustain that belief and, at the stage at which that belief was formed, she had carried out as much investigation into the matter as was reasonable in the circumstances of the case.
 - 80.2 The procedure overall was certainly not perfect but it fell within the range of reasonable responses of a reasonable employer.
 - 80.3 Dismissal fell within the range of reasonable responses of a reasonable employer given all the circumstances of the case in particular the final written warning and previous discussions about the Claimant's conduct. The dismissal was fair and the Claimant's claim of unfair dismissal must fail.
81. In view of my conclusion that the Claimant was not unfairly dismissed, it is not necessary to consider compensation and the Remedy Hearing provisionally listed for 23 March 2020 will be cancelled.
82. For the purposes of rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues identified as being relevant to the claim are at paragraph 3 all of these issues which it was necessary for the Tribunal to determine have been determined; the findings of fact relevant to these issues are at paragraphs 8 to 58; a statement of the applicable law is at paragraphs 59 to 61 how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 68 to 80.

Employment Judge Mason

27 February 2020