EMPLOYMENT TRIBUNALS

Claimant: Mr D Boulter

Respondent Robert Pochin Limited

HELD AT: Leicester **ON:** 19 + 20 February 2020

BEFORE: Employment Judge Batten (sitting alone)

REPRESENTATION:

For the Claimant: Ms G Crew, Counsel
For the Respondent: Ms A Reindorf, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. the claim of unfair dismissal is well-founded;

2. the claim of wrongful dismissal fails as the claimant was guilty of gross misconduct; and

3. the claim shall proceed to a remedy hearing on a date to be fixed.

REASONS

1. The claimant presented complaints of unfair dismissal and breach of contract for notice pay, arising out of his dismissal by the respondent on 6 March 2019.

2. The hearing of the evidence took place over 2 days and was completed only at the very end of the second hearing day. Accordingly, the Tribunal reserved its Judgment.

Evidence

3. An agreed bundle of documents was presented at the commencement of the hearing in accordance with the case management Orders. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

4. The claimant gave evidence from a witness statement and was subject to cross-examination. The respondent called 4 witnesses: Mr P Trickett, the respondent's sales director and a line manager of the claimant; Mr S Skeemer, the respondent's head of trade sales and a line manager of the claimant; Mr S Froggatt, the respondent's commercial director and the dismissing officer; and Mr D Pochin, the respondent's managing director who handled the claimant's appeal against dismissal. Each of the respondent's witnesses gave evidence from witness statements and were subject to cross-examination.

Issues to be determined

5. The parties had agreed a list of issues to be determined by the Tribunal. This was reviewed at the start of the hearing and the issues were agreed to be as follows: -

Unfair dismissal

5.1 Has the respondent shown that the genuine reason for the claimant's dismissal was a reason related to his conduct within section 98(2)(b) of the Employment Rights Act 1996 ("ERA"), namely that he had committed gross misconduct by:

5.1.1 sending to a customer a text message which was disrespectful and abusive about two of the claimant's senior colleagues; and

5.1.2 attempting to misrepresent the facts when questioned about the text message; and

5.1.3 breaching the trust placed in him to present the company and its management in a positive manner?

5.2 If so, was the respondent's decision to dismiss the claimant for that reason fair or unfair having regard to all the circumstances of the case including the size and administrative resources of the employer (section 98(4) ERA)? In particular:

5.2.1 did the respondent have in its mind reasonable grounds upon which to sustain its belief that the claimant had committed the misconduct? The claimant argues that there was insufficient evidence to uphold the second and third allegations (the first allegation being admitted).

5.2.2 Did the respondent carry out as much investigation into the matter as was reasonable in all the circumstances of the case? The claimant avers that:

a) the respondent sought solely to compile evidence against him; and

b) the respondent failed to investigate the statement made by the claimant at the investigation meeting on 27 February 2019 to the effect that other employees had not agreed with Shane Skeemer that the claimant had been aggressive and undermining at a meeting on 30 January 2019; and

c) the respondent failed to investigate the claimant's assertion that bad language was used on a daily basis by many of the other employees; and

d) during the investigation process the respondent referred to feedback that the claimant was not representing the company positively, but failed to provide the claimant with details or evidence of the same.

5.2.3 Was dismissal a fair sanction? The claimant avers that:

a) the first allegation was insufficiently serious to warrant dismissal; and

b) one allegation had already been informally addressed by the respondent some months previously and had not been categorised as a disciplinary offence; and

c) the respondent failed to take properly into account his long service and clean disciplinary record; and

d) the respondent failed properly to consider the claimant's mitigation; and

e) the respondent failed properly to consider whether another sanction would have been more reasonable; and

f) the decision to dismiss the claimant was inconsistent with previous disciplinary decisions taken by the respondent in respect of other employees, namely:

i) Joanna O'Keefe;

ii) John Collins;

iii) Gavin Coshell; and

g) it was unfair for Simon Froggatt to conduct both the investigation and the disciplinary hearing; and

h) Simon Froggatt was biased; and

i) the decision to dismiss was predetermined; and

j) the appeal was biased; and

k) the appeal was predetermined.

5.3 If the claimant was unfairly dismissed:

5.3.1 would he have been dismissed in any event even if a fair procedure had been followed, such that the Tribunal should reduce any compensation due to him on the *Polkey* basis?

5.3.2 did the claimant contribute to or cause his dismissal by any action, such that the Tribunal should reduce the amount of compensation due to him to the extent that it considers just and equitable?

5.3.3 has the claimant taken reasonable steps to mitigate his loss?

5.3.4 is the claimant entitled to an uplift under the ACAS Code on Discipline and Grievance?

Wrongful dismissal

5.4 Did the respondent summarily dismiss the claimant in breach of his contract of employment?

Findings of fact

6. The Tribunal made the following findings of fact on the basis of the evidence before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. The findings of fact relevant to the issues which have to be determined are as follows.

7. The claimant was employed by the respondent from 6 September 2004 as a Plumbing and Heating sales representative.

8. The respondent has a disciplinary procedure which appears in the bundle at page 38 to 40 and provides as follows:

8.1 Misconduct is defined to include: Foul or abusive language; abusive, objectionable or insulting behaviour; and misrepresentation of fact – lying.

8.2 Gross misconduct is defined to include: Harassment or discrimination of any kind; and refusal to carry out reasonable management instructions.

9. In 2018, the respondent decided to reorganise the sales department including senior management. This resulted in the Trading Director, Stuart Press, becoming the respondent's Purchasing Director while Shane Skeemer was appointed as Head of Trade Sales and, from 1 January 2019, Mr Skeemer reported to the Sales Director, Peter Trickett. The claimant (who had previously reported to Mr Press) and all other sales staff were thereafter to report to Mr Skeemer. The claimant was not happy about the changes and the change of his manager in particular. Reports began to circulate of the claimant talking about individual managers in negative and derogatory terms.

10. On 4 October 2018, the respondent's Managing Director, David Pochin, met with the claimant to discuss the changes, in an effort to encourage a positive attitude in the claimant. During the meeting, the claimant told Mr

Pochin that if he did not like the new arrangements, he would leave the respondent.

11. On 11 January 2019, the claimant attended a one to one meeting with Mr Trickett to discuss his performance and targets. Mr Trickett opened the meeting by explaining to the claimant that one purpose of the meeting was for the claimant to "clear the air" about negative comments that had been fed back. The claimant said that he was frustrated and hated work due to the changes in sales. He also said that he did not trust Mr Trickett. Mr Skeemer joined the meeting and the claimant was asked by Mr Trickett to ensure that he introduced Mr Skeemer to the claimant's key accounts. At the end of the meeting, the claimant agreed to work together with senior managers.

12. During January 2019, the respondent received further reports that the claimant had spoken in a derogatory manner about senior sales staff and was undermining management.

13. On 30 January 2019, Mr Skeemer spoke to the claimant in the respondent's boardroom about his attitude and told him to reflect on what he had been saying and to desist.

14. In February 2019, the respondent's managing director, Mr Pochin, received feedback from staff who told him that the claimant was negative and seeking to undermine management, and about the adverse effect of the claimant's behaviour on staff morale.

15. On 26 February 2019, Mr Skeemer visited a customer, CV Lane. During his visit, Mr Skeemer saw a text that was sent from the claimant to the customer, at the time, saying "Are twit and twat still there or have they gone?" Upon return to the respondent's offices, Mr Skeemer was challenged by the claimant to explain why he had visited "one of my [the claimant's] accounts" without telling the claimant. The claimant also declared that he would not be part of any trip, which was planned by the respondent to take place outside of working hours.

16. The respondent's management were concerned about the continuing number and content of reports on the claimant's behaviour and attitude. Simon Froggatt, the respondent's Commercial Director, was therefore tasked with meeting the claimant to discuss matters.

17. On 27 February 2019, Simon Froggatt held what was called an 'investigatory meeting' with the claimant to discuss his behaviour and his attitude to the changes in the sales department management. Mr Trickett also attended. The meeting discussed the claimant's comment about Mr Trickett, when he had called the Sales Director a 'bastard' to colleagues. The claimant did not deny this and said that he did not know Mr Trickett, that he had said it to other people in the office and not to Mr Trickett, and

that he considered it was normal to be distrustful of people that he did not know. The claimant went on to say that he considered that Mr Skeemer was not the right person for the job of Head of Trade Sales and that Mr Skeemer was out of his depth. The claimant also said that, although he had not understood the changes before, he now thought that he was giving customers the right message about the changes in the respondent's sales management. The claimant's behaviour in the meeting on 30 January 2019 was raised and the claimant was told that Mr Skeemer considered that the claimant had been aggressive and undermining. The claimant denied this and said that he did not understand why Mr Skeemer thought so. The claimant said that he had spoken to colleagues who agreed that his behaviour had been fine. The claimant was asked if he had ever called Mr Skeemer a "cunt" to a customer and the claimant denied saying this.

18. The claimant was then asked about sending a text to a customer, CV Lane, when Mr Trickett and Mr Skeemer had been visiting the customer. The claimant denied doing so. The claimant was asked twice more about the text and he was asked to think carefully about his answer, at which point the claimant said that it was a private message. It was pointed out to the claimant that he had used a business phone to send the text in question. When the words used were again read out to the claimant, he then admitted to sending the text but said it was not necessarily about Mr Trickett and Mr Skeemer although the claimant was unable to explain the context. The claimant went on to say that he felt "totally undermined" and marginalised. The claimant was asked if he had talked to an employee of the customer, in terms of asking if "Dumb and Dumber" were still there and the claimant said he did not say this. The claimant said that he felt singled out. The respondent pointed out that the claimant was the highest paid member of the sales team and that the respondent had higher expectations of him which might be justified, to which the claimant agreed. Mr Froggatt told the claimant that the feedback the respondent was getting was that the claimant was not representing it in a positive manner and that instead the claimant was expressing his own dissatisfaction to colleagues and customers. The respondent said that the text sent to the customer, CV Lane, was a serious matter. At this, the claimant asked if it was a "sackable" matter. Mr Froggatt said that the respondent would need to investigate further and consider what if any action it would take.

19. At the end of the meeting, the claimant was suspended on full pay.

20. Following their meeting with the claimant, Mr Frogatt and Mr Trickett interviewed a number of the sales team, all of whom described the claimant as unhappy about the changes in the sales team and as venting his frustrations in a disruptive manner, causing a bad atmosphere at work and "bad-mouthing" the respondent to colleagues and customers. Several of the sales team confirmed the reports which the respondent had

received of specific comments by the claimant about management and to customers which the claimant had sought to deny in his meeting.

21. On 4 March 2019, the respondent invited the claimant to a disciplinary meeting to consider allegations which it described as serious misconduct. The allegations were:

    21.1 That the claimant had behaved in a disrespectful and abusive manner in relation to the respondent's management team;

    21.2 That the claimant had attempted to misrepresent the facts when questioned about a text message he had sent to a customer on 26 February 2019; and

    21.3 That the claimant had breached the trust placed in him to represent the respondent and its management team in a positive manner.

22. The claimant was sent copies of the respondent's notes of previous meetings with him of 13 September 2018, 11 January, 30 January and 26 February 2019 together with notes of the investigatory meeting on 27 February 2019. He was not sent copies of any of the statements that Mr Froggatt had gathered from interviewing the sales staff. The claimant was told that if he wanted to call witnesses or bring documents he could do so and the letter of invite said that if the claimant was found guilty of gross misconduct, the respondent may decide to issue a final warning or dismiss without notice or pay in lieu of notice. The claimant was told that he must come to the hearing ready and prepared to explain his conduct.

23. On the morning of 6 March 2019, before the disciplinary hearing took place, the respondent's managing director, Mr Pochin, emailed Mr Frogatt with what he described as "a few key points" from his meeting with the claimant on 4 October 2018. These confirmed the respondent's rationale for the changes in sales, how that presented an opportunity and challenge for Mr Press and how Mr Skeemer had been Mr Pochin's choice to lead in sales. Mr Pochin said that he thought the October meeting had been positive.

24. On 6 March 2019, a disciplinary hearing took place, chaired by Mr Frogatt. Mr Trickett attended to take notes and the claimant was accompanied by a colleague, Linda Kirman. The allegations were each put to the claimant. The claimant admitted sending the text. He said that, when he called Mr Trickett a "bastard", it was a term used in the office, as banter and had been taken out of context; it was not meant maliciously and he regretted it. The claimant acknowledged that he had made errors but said that he did not think that he had been unsupportive of Mr Skeemer although the claimant then described Mr Skeemer as difficult to work with. The claimant accepted that his comments had undermined Mr Trickett and Mr Skeemer

and agreed that he had been disrespectful to the senior management team but said that it was never his intention to do so. The claimant acknowledged that he had "done things wrong" but explained that he had felt marginalised, that he would perhaps do things differently on reflection and he said that he would show the respondent what he could do if he had another chance.

25. The claimant was asked why he had lied about the text message to CV Lane, and he said that he had panicked. When asked why he sent the text, the claimant said that it was not meant to be malicious, that it was a "big mistake" and that he would have been upset to receive it. However, the claimant continued to deny other comments and bad language that he was reported to have made. The claimant apologised and said he was disappointed with himself.

26. At the end of the meeting, after a break, the claimant was dismissed for gross misconduct with immediate effect. Mr Froggatt told the claimant that he was being dismissed for being disrespectful and abusive to management, sending a text to a customer referring to a manager in a derogatory fashion and for lying about the text on 2 occasions, which caused Mr Froggatt to question the claimant's credibility. Mr Froggatt concluded that the claimant's behaviour had breached trust and confidence. The claimant was advised of his right to appeal the decision.

27. At the end of the afternoon, the respondent notified its staff of the claimant's departure by email.

28. On 7 March 2019, the respondent sent the claimant a letter confirming his dismissal for gross misconduct.

29. On 11 March 2019, the claimant wrote to the respondent to appeal his dismissal. The claimant's grounds of appeal included that his comments had been taken out of context, that Mr Skeemer was as much to blame as him for the breakdown in communication between them although he said that he did not have a problem with Mr Skeemer, that the sanction of dismissal was too harsh, that his clean record had not been taken into account, and that he considered he had been treated inconsistently to other employees whom he named as Joanne O'Keefe, John Collins and Gavin Coshell.

30. On 13 March 2019, the respondent acknowledged the claimant's appeal and arranged an appeal hearing to be chaired by Mr Pochin. Although the hearing was arranged at short notice, the claimant raised no objection to that.

31. On 14 March 2019, the appeal hearing took place. Mr Pochin was accompanied by the respondent's Finance Director, Glynn Barrington, who took notes. The claimant was accompanied to the appeal meeting by

Mr Press, his former manager. The points made in the claimant's appeal letter were considered in turn. The claimant explained that the text had been a "knee jerk reaction" to his discovering that Mr Trickett and Mr Skeemer were visiting his customer and he was feeling marginalised. The claimant confirmed that, despite being asked to introduce Mr Skeemer to his customers, he had failed to do so and the claimant sought to justify this by suggesting that the customers were "raw" and so he had chosen not to arrange any introductions. The claimant also maintained that he had lied about the text as a panic reaction because he had sent it in anger. However, Mr Pochin suggested that the claimant had lied because he had been caught out. The claimant continued to assert that his language, including calling Mr Trickett a "bastard" had been taken out of context and was banter. The claimant sought to counter a suggestion that he may have been aggressive by suggesting that Mr Skeemer might be sensitive about the word aggressive and, when asked about the introductions which the claimant had been tasked to arrange, the claimant countered by questioning how many other sales staff had introduced Mr Skeemer to their customers.

32. In relation to the treatment of Joanne O'Keefe, John Collins and Gavin Coshell, which the claimant had raised as examples of employees who had been disciplined but not been dismissed for what the claimant considered to be similar conduct to his, Mr Pochin said that he could not discuss these other employees. Mr Pochin said that he would revisit those disciplinary decisions and take them into consideration when he deliberated on the appeal.

33. On 15 March 2019, Mr Pochin sent the claimant a letter turning down his appeal. Mr Pochin rejected the claimant's explanations of banter and panic which he considered were neither justifiable nor acceptable explanations, and Mr Pochin stated that he considered that the claimant's admission that his conduct was 'extremely disrespectful' ignored the abusive and undermining nature of such conduct. Mr Pochin considered that the claimant had seriously misrepresented the respondent to customers to the extent of putting at risk a longstanding trading relationship and that the claimant's actions breached the trust and confidence that the respondent had placed in him as a senior employee. The letter also stated that Mr Pochin had considered the claimant's service and good disciplinary record and also the disciplinary outcomes of the 3 employees named by the claimant but that he had decided to uphold Mr Frogatt's decision to dismiss the claimant.

The Law

34. A concise statement of the applicable law is as follows.

Unfair dismissal

35. Section 98 of the Employment Rights Act 1996 sets out a two-stage test to determine whether an employee has been unfairly dismissed. First, the employer must show the reason for dismissal or the principal reason and that reason must be a potentially fair reason for dismissal. The respondent contends that the reason for dismissal was the claimant's conduct. Conduct is a potentially fair reason for dismissal under Section 98 (2) (b) of the Employment Rights Act 1996.

36. If the employer shows a potentially fair reason in law, the Tribunal must then consider the test under section 98 (4) of the Employment Rights Act 1996, namely whether, in all the circumstances, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or unreasonably in treating that reason, i.e. conduct, as a sufficient reason for dismissing the claimant and that the question of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case.

37. In considering the reasonableness of the dismissal, the Tribunal must have regard to the test laid out in the case of British Home Stores -v- Burchell [1978] IRLR 379 and consider whether the respondent has established a reasonable suspicion amounting to a genuine belief in the claimant's guilt and reasonable grounds to sustain that belief and the Tribunal must also consider whether the respondent carried out as much investigation as was reasonable in the circumstances. Where misconduct is admitted or the facts are not in dispute, it may not be necessary to carry out a full investigation: Boys and Girls Welfare Society v McDonald [1996] IRLR 129.

38. The issue of the reasonableness of the dismissal must be looked at in terms of the set of facts known to the employer at the time of the claimant's dismissal, although the dismissal itself can include the appeal; so, matters which come to light during the appeal process can also be taken into account: West Midlands Co-operative Society Ltd -v- Tipton [1986] IRLR 112.

39. The Tribunal must also consider whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer in the circumstances of the case: Iceland frozen Foods Ltd -v- Jones [1982] IRLR 439. The range of reasonable responses' test applies both to the decision to dismiss and to the procedure by which that decision is reached: Sainsbury's Supermarkets Ltd –v- Hitt [2003] IRLR 23.

40. Employers should act consistently when dealing with comparable acts of misconduct or where employees had been led to believe that certain conduct would not lead to dismissal: Hadjioannou v Coral Casinos Ltd [1981] IRLR 352.

41. Where a fair procedure has not been followed, a compensatory award for unfair dismissal may be reduced if the Tribunal finds that a claimant would have been dismissed even if a fair procedure had been followed – section 123(1) of the Employment Rights Act 1996. The Tribunal must consider what would have happened had the unfairness not occurred and may reduce an award on a just and equitable basis: Polkey v A E Dayton Services Ltd [1988] ICR 142 HL.

42. The ACAS Code of Practice on Disciplinary and Grievance Procedures contains guidance on the procedures to be undertaken in relation to a dismissal for conduct. Although compliance with the ACAS Code is not a statutory requirement, a failure to follow the Code should be taken into account by a Tribunal when determining the reasonableness of a dismissal. The amount of any compensation to be awarded may be adjusted by up to 25% to reflect any failure to comply with a material provision of the ACAS code.

43. The basic award and also the compensatory award for unfair dismissal may also be reduced, or further reduced, by a percentage if the Tribunal finds that a claimant has caused or contributed to their dismissal, under sections 122(2) and 123(6) of the Employment Rights Act 1996.

Wrongful dismissal – Notice pay

44. Section 86 of the Employment Rights Act 1996 provides that an employer is required to give minimum notice to an employee to terminate his/her contract of employment. The minimum period of notice which an employer is required to give to an employee is one week's notice for each completed year of service up to a maximum of 12 weeks' notice. Notice requirements under a contract of employment may be greater. However, an employer is entitled to terminate the contract of an employee without notice in circumstance of gross misconduct.

45. The Tribunal was referred in submissions to the following case law authorities:

Gray Dunn & Co v Edwards [1980] IRLR 23
Slater v Leicestershire Health Authority [1989] IRLR 16 CA
Securicor Ltd v Smith [1989] IRLR 365 CA
Procter v British Gypsum Ltd [1992] IRLR 7
Sartor v P7O European Ferries [1992] IRLR 271 CA
United Distillers v Conlin [1992] IRLR 503
Paul v East Surrey District Health Authority [1995] IRLR 305 CA
Harrow London Borough v Cunningham [1996] IRLR 256
Graham v Secretary of State for Work and Pensions [2012] IRLR 759 CA
Robinson v Combat Stress UKEAT/0310/14
Shrestha v Genesis Housing Association [2015] IRLR 399
Sharkey v Lloyds Bank plc UKEAT/0005/15

NHS 24 v Pillar UKEAT/0005/16

The Tribunal took account of the authorities but not in substitution for the relevant statutory provisions.

Submissions

46. Counsel for the claimant made a number of detailed submissions which the Tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:- the claimant accepted conduct was shown to be the reason for dismissal; that the respondent had a genuine belief on reasonable grounds in respect of the claimant's behaviour around the sales management in light of the admitted text message; that the claimant took issue with the grounds for belief in respect of the second and third allegations which Counsel said lacked detail so that the factual allegations were unclear; that the investigation was unreasonable – Mr Froggatt had investigated and also dismissed, he did not provide the claimant with all the evidence or detail so it was hard for the claimant to understand the substance of the allegations and he did not look at the claimant's points of defence to the allegations; that the appeal did not resolve procedural flaws as there was no investigation of the claimant's points of appeal; that it was not apparent that the respondent had looked into the comparative cases which the claimant raised; and that dismissal was not within the band of reasonable responses and was predetermined. In addition, Counsel for the claimant contended that, if Polkey and/or contributory fault was to be considered any reduction in compensation should be of a low order, suggesting 20% would be appropriate.

47. Counsel for the respondent handed up a written skeleton consisting of a summary of the relevant law and also made a number of detailed submissions orally which the Tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:- there was an issue as to the credibility of the claimant's evidence; that the third allegation was included because of the claimant's attempts to deflect responsibility for his actions and the respondent contended that the claimant had shown this again in his oral evidence to the Tribunal; that the suggestion of banter is irrelevant - it was childish and unacceptable for a senior employee to bad-mouth management because he felt marginalised when the respondent was entitled to reorganise its staffing; that it was perfectly proper for Mr Frogatt to conduct the investigation even though the text wording was plain and was admitted, as Mr Froggatt heard and took account of what the claimant said about it and other matters; that the respondent has a small management team with a limited number of people who could handle the disciplinary process; that the evidence against the claimant was unrelenting and at issue with what the claimant's said were his colleagues' views; that the respondent had not disclosed the statements of colleagues so as to avoid damaging working relations in the event the claimant was not dismissed; that the respondent took account of

the claimant's long service and that the cases of other employees can be distinguished from the claimant's situation; and that at appeal, the managing director approached matters with an open mind. Further, the respondent argued for a 100% Polkey reduction and the same reduction for contributory fault given the claimant's conduct and his evidence to the tribunal disclosing his continuing attitude.

Conclusions (including where appropriate any additional findings of fact)

48. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

49. The respondent's case was that it dismissed the claimant for conduct. That is a fair reason in law. The reason for dismissal advanced by the respondent was the misconduct described in the 3 allegations. The respondent's reason, conduct, was not challenged by the claimant. In those circumstances and in light of the evidence, the Tribunal considered that the respondent had shown the reason for dismissal was conduct and a potentially fair reason.

50. The Tribunal then considered the test under section 98(4) ERA and in British Home Stores -v- Burchell. The Tribunal concluded that the respondent had a genuine belief, on reasonable grounds, that the claimant was guilty of misconduct. The respondent had been entitled to reorganise its sales management structures to its advantage in terms of efficiency. It was also reasonably entitled to expect that employees would work to the new structures and that senior employees such as the claimant would set a good example by their conduct. The claimant had given assurances to the respondent that he would accept the changes to the sales department management and behave positively. Despite those assurances, the claimant had continued, behind management's back, to seek to undermine the respondent's management and be abusive of the respondent and its senior personnel, to junior colleagues and to customers. The text to a customer was admitted only after repeated questioning but the text was not the only instance of such behaviour. Other instances were confirmed by a number of the claimant's colleagues. In addition, given that the claimant had expressed his opposition to the changes in the sales management, there were reasonable grounds for the respondent to form a view that the claimant was guilty of the misconduct alleged.

51. The Tribunal noted the claimant's submissions that the 3 allegations against him, which are set out in the letter of 4 March 2019, lacked detail as to the substance of the allegations and the nature of the claimant's conduct complained of. They are expressed in general terms. This was compounded by the fact that the respondent did not give the claimant copies of the employees' statements. However, the Tribunal considered that the claimant was at all times aware of what he was accused. The documentary evidence before the Tribunal showed that the respondent

had put a number of instances and comments to the claimant at the investigatory interview and the claimant had engaged in discussions, displaying a reasonable understanding and recall of the matters in question. The claimant sought to explain his conduct, and the names he had used to describe senior managers, as “banter”, and he said that the fact that he did not know or trust Mr Trickett, was justification for calling Mr Trickett a “bastard” behind his back to colleagues.

52. The claimant accepted that the text to the customer, CV Lane, was inappropriate (once he had admitted to it) but he sought to avoid responsibility by suggesting that it was private and then sought to justify it by saying that he felt undermined because managers were visiting “his” customers without reference to him. He also sought to suggest that Mr Skeemer had dealt with the text informally on the morning of 26 February 2019 and therefore the respondent was not entitled to revisit it in the disciplinary allegations. The Tribunal disagreed with this contention. It was not apparent from the evidence that the text had been mentioned by Mr Skeemer on 26 February 2019. If it had been so mentioned, the claimant would have been aware that the respondent knew about the text and there would have been little point in him denying it at the investigatory meeting. The Tribunal concluded that the claimant initially sought to deny the text at the investigatory meeting in the belief that the respondent did not know of it and/or did not know that it was from him.

53. The second allegation concerned the claimant’s conduct in denying, (phrased in the allegation as that he had “misrepresented”) the text message to CV Lane, when the respondent questioned him about it. The claimant understood this allegation to be about his conduct at the investigatory interview. The Tribunal considered that further detail was not required. The claimant was fully aware of the substance of this allegation and the seriousness of such conduct. He had been caught out, hence he panicked as he said, and sought to deny the text, expressing some remorse but then attempting to justify the text by saying that he sent it because he had felt singled out. In those circumstances, the Tribunal rejected the submissions on behalf of the claimant, whereby it was suggested that it was difficult to see what the claimant was in fact guilty of and that the respondent should have considered the claimant’s service and clean record against its conclusion that the claimant had lied.

54. In light of the evidence and taking account of the testimony of the claimant, the Tribunal considered that the claimant had provided unreasonable and unsustainable responses to questions from the respondent in the course of the disciplinary process. When he could not deny something, the claimant resorted to saying that things were ‘private’ or ‘taken out of context’ or were “misconstrued”. Despite those contentions or because of them, the Tribunal considered that the claimant knew what the disciplinary allegations concerned and that it was serious – that the respondent had grounds to believe that he had been misbehaving.

55. In essence, the claimant's representative's submissions focussed on procedural flaws in the investigation. First it was submitted that Mr Froggatt's role as the investigator and then dismissing officer was not in accordance with the ACAS code and led to the possibility that he would simply follow the findings of his investigation. In addition, and for reasons never clearly explained by the respondent, Mr Trickett, the subject of certain allegations, was present throughout. Mr Trickett apparently took the notes, despite that a secretary could have done so. The claimant said that he felt intimidated by Mr Trickett's presence and the Tribunal accepted that to be the case. The respondent sought to explain the way the investigation and disciplinary hearing was conducted by pointing out that it did not have a dedicated HR department and that it had wished to keep the matter confidential within a small number of managers. However, it was apparent that other senior managers or Directors could have conducted the disciplinary hearing – that would have provided an appropriate separation between the investigation and the decision to dismiss, thereby providing for objectivity. Likewise, the appeal was handled by the respondent's managing director although, given the number of senior personnel in the respondent, that was not necessary. In addition, Mr Pochin had some involvement and knowledge of the investigation and disciplinary process prior to the appeal – he was informed at each stage and contributed his comments on the morning of the disciplinary hearing. The Tribunal did not accept that this was necessary or appropriate. It displayed a degree of interest in the proceedings which should have caused the respondent to reflect and consider that another Director should more appropriately handle the appeal.

56. The claimant contended that the investigation had been conducted with the prime purpose of compiling evidence against the claimant. At the investigatory hearing, the claimant suggested that the respondent should ask his colleagues for their view of his conduct because he said this would reveal that nobody had a problem with his behaviour, although the claimant provided no names. The Tribunal considered that Mr Froggatt did as asked by the claimant and proceeded to interview a number of the claimant's sales colleagues. However, Messrs Cooper, O'Keefe, Frost, Shipley and Morrey consistently painted a wholly negative picture of the claimant, with many confirming instances of poor behaviour which the claimant had sought to deny. In those circumstances, the Tribunal did not accept that Mr Froggatt had failed to follow up on the claimant's suggestion; he did so albeit that, for the claimant, it did not produce the evidence that the claimant believed such enquiries would produce. The Tribunal did however consider that the claimant should have been provided with the statements from colleagues. He was entitled to know the extent of the case against him and he might then have understood that his view of his behaviour was not shared as he had hoped. Alternatively, this might have prompted him to give the names of any colleagues that

might be supportive of his position. He was invited to do so but did not provide any names or call witnesses in support of his position.

57. The Tribunal considered that the appeal did not correct the flaws of the disciplinary investigation or process and, on the evidence available, the appeal was conducted unreasonably. There was no, or no apparent investigation at the appeal stage into, for example, the claimant's suggestion that his comments were "banter". The claimant was never provided with the evidence which Mr Pochin considered at the appeal stage and it remained entirely unclear to the Tribunal how Mr Pochin had addressed the claimant's point about 3 other employees being treated differently. The letter of 15 March 2019, turning down the claimant's appeal, merely states that the 3 comparators' disciplinary outcomes were considered. It does not explain how they were considered, nor on what basis the respondent decided they were not comparable examples and Mr Pochin's oral evidence shed no further light on this aspect.

58. The claimant's case for unfair dismissal also rested on the contention that he was treated differently to a number of employees. The employees concerned were: Joanne O'Keefe who was abusive to a Director of the respondent in front of management and received a warning; John Collins who had threatened a customer and received a warning; and Gavin Coshell, who had threatened to assault a manager and received a warning. Consistency of treatment as between employees in disciplinary matters is very important but, to make a comparison, the circumstances of the employees have to be comparable - the circumstances must be truly parallel. The Tribunal did not find that any of the comparators brought forward had been responsible for as many allegations or instances of misconduct as the respondent had found the claimant to be. They all were disciplined for single instances of misconduct, in contrast to the claimant's conduct which was repeated and deliberate despite informal warnings. The Tribunal considered that the respondent had given the claimant considerable leeway over a period of time until the respondent reasonably concluded that the claimant could only be managed through a formal process. Following the decision in the case of Paul v East Surrey District Health Authority, the Tribunal did not find the comparators relied upon to be in the same position as the claimant.

59. The Tribunal also considered the case of Hadjioannou v Coral Casinos Limited which is mentioned in the case of Paul and noted that Hadjioannou concerned a situation where an employee has been led to believe they would not be dismissed for certain conduct. That is not the position in this case. The claimant was at all material times aware of the seriousness with which the respondent viewed his repeated misconduct. For example, in the course of the investigatory interview, the claimant had asked if it was a "sackable" matter.

60. Further, in the case of Paul**,** it was held that an employee who admits that the conduct proved is unacceptable and accepts advice to avoid a repetition, can be regarded differently from an employee who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions. The Tribunal considered that the claimant's attitude was displayed in his answers to questions at the investigatory interview, at the disciplinary hearing and, again, in his letter of appeal and at the appeal hearing. For example, in his letter of appeal the claimant sought to blame Mr Skeemer for a breakdown in communications rather than take responsibility for his own actions. The claimant has sought to argue in these proceedings, as in his appeal, that he had been marginalised, that he felt he had been treated poorly by the respondent's management, and that he used the sort of bad language that was used by other employees. The Tribunal did not agree that the claimant's contentions were reasonable in the circumstances of the case and, in any event, the Tribunal considered that a continuing sense of grievance by an employee cannot justify or excuse continued misconduct to the extent displayed by the claimant, or at all.

61. In light of all the above, the Tribunal considered that the allegations against the claimant were understood by him to relate to a number of incidents of his repeated misconduct, in undermining management to colleagues and to a customer. Such misconduct justified the respondent pursuing a disciplinary process. The claimant's case can be distinguished from that of the comparators cited. However, the way in which the respondent went about the disciplinary process together with its conduct of the claimant's appeal, fell short of a fair process as required in all the circumstances. As a result, the Tribunal considered that the claimant's dismissal fell outside the band of reasonable responses available to the respondent in the circumstances of this case – on procedural grounds - and therefore the Tribunal has found that it was an unfair dismissal.

62. The Tribunal has considered its powers under section 123(1) of the Employment Rights Act 1996 and the question of whether the claimant would have been dismissed if the respondent had followed a proper procedure. The Tribunal has decided that the claimant could nevertheless have been dismissed in those circumstances, and that it would therefore be just and equitable for the compensatory award to be reduced to the extent that a 50% reduction shall be appropriate. In setting this percentage reduction, the Tribunal took account of the fact that Mr Froggatt had investigated and also dismissed the claimant and also that he did not provide the claimant with all the evidence which he had together with the fact that there was no evidence of any further or corrective investigation of the claimant's points of appeal. All of these aspects were considered by the Tribunal to be matters which, if addressed properly by the respondent, might nevertheless have resulted in the claimant's dismissal.

63. The ACAS code of practice provides guidance on the proper conduct of disciplinary procedures. The respondent has failed to comply with the ACAS code. However, the Tribunal has decided that it would not be just and equitable to exercise its discretions to order any adjustment to the compensatory award for such breach (which would necessarily be an increase to that award), given the 50% reduction ordered above on a just and equitable basis.

64. The Tribunal also considered that the claimant had caused or contributed to his dismissal, by his actions in terms of misconduct and also by the manner in which he conducted himself during the disciplinary and appeal process, in seeking at each stage to avoid responsibility for his actions and effectively blaming the respondent for much of his behaviour. The claimant was a senior and long serving employee who should have known better. His text to the respondent's customer, CV Lane, was unprofessional and entirely inappropriate, whether personal or private. The claimant said in his witness statement that "had I received a warning, I would have ensured that I would not have acted in the same manner ever again". However, the claimant had received a number of informal warnings over several months which he had failed to heed and he had behaved as if he was untouchable and above criticism by his managers. His lack of respect for Mr Skeemer, the claimant's line manager, was not a matter that the respondent could reasonably have tolerated, particularly as the claimant had continued to demonstrate that he had a problem with Mr Skeemer despite the 'clear the air' meeting on 11 January 2019 and throughout the disciplinary process. In light of the actions of the claimant, the Tribunal has determined that there should be a reduction of 50% in any compensation awarded to reflect the claimant's contributory fault.

65. The claimant has also claimed wrongful dismissal, for payment of his notice pay entitlement. This claim is based on an argument that the claimant was not guilty of gross misconduct and so was dismissed in breach of his contractual entitlement to notice of dismissal or a payment in lieu. The respondent's disciplinary procedure lists foul or abusive language, and abusive, objectionable or insulting behaviour, and misrepresentation of fact as misconduct. A refusal to carry out reasonable management instructions appears under the heading of gross misconduct. The Tribunal considered the substance of the allegations and the evidence against the claimant and has concluded that either allegations 1 or 2 constitute gross misconduct. This conclusion is reached taking account of the claimant's repeated refusal to follow the respondent's reasonable management instructions, to a senior employee, to work together harmoniously with his managers and to accept the changes which the respondent had made in the sales management team. These were changes which the respondent was entitled to make and which it was reasonable to expect senior staff to accept. The claimant demonstrated by his conduct that he refused to carry out what was a reasonable management instruction. In addition, the claimant lied to the

respondent about the text which he had sent, possibly believing that the respondent could not prove it. His various actions, taken together and repeated over time, constitute gross misconduct. The claimant is not therefore entitled to notice and his claim of wrongful dismissal must fail.

_____
Employment Judge Batten
Date: 15 May 2020

JUDGMENT SENT TO THE PARTIES ON:
22 May 2020

_____

_____
FOR THE TRIBUNAL OFFICE