



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Kavanagh

**Respondent:** Strata Products Limited

**Heard at:** Tribunals Hearing Centre, 50 Carrington Street, Nottingham, NG1 7FG

**On:** 9, 10, 11 December 2019 and 1 June 2020 (judgment signed)

**Before:** Employment Judge Adkinson sitting alone

## Appearances

**For the claimant:** Mr N Bidnell-Edwards, Counsel

**For the respondent:** Mr J Boyd, Counsel

## JUDGMENT

For the reasons that I set out below, it is the Tribunal's judgment that

1.
  - 1.1. The respondent unfairly dismissed the claimant, and so that claim succeeds, but
  - 1.2. there is an 80% chance that had a fair procedure been followed the respondent would have dismissed the claimant in any event, and
  - 1.3. the claimant's compensation should be reduced by 60% to reflect his contributory fault;
2. The claimant was guilty of gross misconduct. The respondent therefore did not wrongfully dismiss the claimant. The claim for breach of contract is dismissed.

## REASONS

3. The claimant, Mr Kavanagh, brings claims for unfair dismissal and breach of contract that arise from his summary dismissal on 8 November 2018 for alleged gross misconduct. He alleges that he was dismissed not because of any conduct issue, but because he had provided evidence in relation to an investigation concerning the respondent's managing director, Mr Ilsen,

and he had raised challenges to Mr Ilsen's decisions regarding health and safety.

4. The respondent, Strata, says that the dismissal was fair and that in any case Mr Kavanagh was guilty of gross misconduct. Strata says, alternatively, that if Mr Kavanagh is entitled to compensation, then it should be reduced to reflect the possibility he would have been dismissed in any event had a fair procedure been followed, and to reflect his own contributory fault.

### **Hearing**

5. At the hearing Mr Kavanagh was represented by Mr N Bidnell-Edwards, Counsel, and Strata was represented by Mr J Boyd, Counsel.
6. There was an agreed bundle of documents and I have taken account of those to which the parties and witnesses referred me.
7. I heard live evidence from Mr J Kavanagh on his own behalf.
8. I also heard from Ms Denise Millington (Strata's financial controller who dealt also with human resources), Mr Michael Ilsen (Strata's managing director), Mr James Tagg (Strata's head of finance and the line manager of Ms Millington), and Ms Jill Jones (an independent human resources consultant who conducted the appeal) on behalf of Strata. I have taken their evidence into account when making my decision.
9. The case was allocated a 3-day hearing. Unfortunately, it took those 3 days to hear all the evidence. Therefore, I adjourned the case so the parties could return and make oral submissions and I could deliver a judgment and reasons orally.
10. That has not proved possible. In early 2020, there was a pandemic caused by a virus called Covid-19. In March and April 2020, the Tribunals suspended all in-person hearings. The Tribunals were not able deal with video hearings at that time. The result was that the adjourned hearing could not take place as scheduled.
11. The parties of their own initiative suggested to the tribunal that they make written submissions and that I therefore decide the case based on those submissions and the evidence I had heard and read. I agreed to that suggestion. It seemed to me a sensible way of progressing the case, avoiding delay and proportionate to the issues in dispute. Apart from a few amendments to their proposed directions made with the hope it would make the task easier for the parties and for the Tribunal, I made an order that gave effect to their helpful suggestion. I am very grateful for their suggested way forward, and for the submissions that they have made. I have taken their submissions into account when making my decision.
12. The submissions referred to various cases and legislation. I have considered all of it. However, in the interests of clarity, I have referred only to cases and legislation that are necessary to explain my decision.

### **Issues**

13. I believe that the issues that I must decide are as follows

***Unfair dismissal***

- 13.1. Has Strata established the potentially fair reason for dismissal, namely conduct?
- 13.2. If so, was the dismissal fair or unfair in accordance with the equity and merits of the case taking into account Strata's administrative resources and size and considering
  - 13.2.1. if there was a reasonable basis for Strata's belief?
  - 13.2.2. that based upon a reasonable investigation?
  - 13.2.3. if the procedure that Strata followed within the "range of reasonable responses" open to the employer?
  - 13.2.4. if the decision to dismiss summarily within the "range of reasonable responses" open to Strata?
- 13.3. If the dismissal was unfair should there be a reduction to take into account
  - 13.3.1. the chance that Strata would have dismissed him fairly had a fair procedure been followed?
  - 13.3.2. any culpable and blameworthy conduct that it is just and equitable to take into account?

***Wrongful dismissal***

- 13.4. Objectively judged on the facts as found, has Strata proven on balance of probabilities that Mr Kavanagh was guilty of gross misconduct so that they were entitled to dismiss him summarily?
- 13.5. If so, did Strata affirm the contract before it dismissed him?

**Findings of fact**

- 14. I have made the following findings of fact that I believe are necessary for me to decide the issues that arise in this case.
- 15. In doing so, I have looked at all the evidence in the round and also at each allegation individually. I have remembered that findings of fact in relation to one matter may shed light on another matter. At the same time, I have remembered that it does not follow that if one allegation is proven, so the others are also proven.
- 16. Where I have made findings of fact that require explanation, I may have referred to events that come later on in the reasoning. That is merely because I have tried to make my reasoning easier to follow chronologically.
- 17. Strata is a manufacturing business. It manufactures home, office, garden and baby products that it sells in the UK and abroad. The business is seasonal.
- 18. At all times relevant to this claim Strata was owned by RPC Group PLC ("RPC"). Strata had 4 offices, employed 180 people who worked in the offices and another 23,000 staff. Strata also had access to human resources advice from RPC and contacted them at various points for advice in relation to Mr Kavanagh.

19. Strata employed Mr Kavanagh from 1 January 2008. Mr Kavanagh was also a director of Strata as defined under the **Companies Act 2006**. I do not need to concern myself with director's duties or the powers available to shareholders or other directors to remove him as a director of Strata.
20. Clause 12 of his contract of employment entitles Strata to terminate his employment without notice or payment in lieu of notice if Mr Kavanagh commits any act of gross misconduct.
21. Strata had an employee's handbook. The parties agreed both Strata and its employees expected each other to abide by it.
22. One of the policies in the handbook relates to stress. The policy says as follows (the handbook refers to Strata as The Company)

"6.24 Stress is a matter of legitimate concern, be it physical or mental, and Strata is committed to assisting by providing a support system that will help minimise any alleviate stress within the workforce. Where work suffers because of stress related matters, the Company will not treat this as a disciplinary matter but may treat it as a capability/sickness issue.

"6.25 If you feel that your work is suffering because of stress related matters occurring outside the workplace you may raise this informally with your Line Manager who will do everything in his/her power to assist. This may include referring to more senior management who will consider what they can do to assist and will handle matters in a sympathetic and helpful way. If you do not tell the Company that you have a problem, we cannot help you.

"6.26 The same applies where stress is caused by matters within the working environment. If you consider there to be a problem you may take the same approach as set out above. Alternatively, if you think it more appropriate you may invoke the grievance procedure."
23. The handbook also sets out the dismissal procedure. The handbook confirms that an employee who is guilty of gross misconduct can be dismissed summarily.
24. At paragraph 11.28 of the handbook, it provides examples of gross misconduct

"11.28 The Company regards certain conduct as sufficiently serious to justify summary dismissal (i.e. dismissal without notice). Such conduct includes, but is not limited to, the following

" ...

"11.28.6 Assault, verbal or physical, on any individual

" ...

"11.28.15 Conduct (whether inside or outside working hours) likely to bring the Company into disrepute.

" ..."
25. The handbook also provides for a grievance procedure that its employees may follow if they have concerns in the workplace.

26. At the relevant times Mr Kavanagh was Strata's Operations Director. Mr Ilsen had promoted him to that role on 1 July 2015 because of his strong performance.
27. It is agreed that, prior to the events that are the subject of this claim, Strata had never subjected Mr Kavanagh to any disciplinary proceedings or sanctions. It is also agreed that prior to these events Mr Kavanagh had never raised any grievance or taken any action under Strata's stress policy.
28. In February 2018, Strata employed a person known as Mr Martin Clark as a Warehouse Manager. Mr Kavanagh says that he advised against Mr Clark's employment but Mr Ilsen rejected that advice. The parties seem to agree that Mr Clark's management of the warehouse was somewhat disastrous.
29. In May 2018 he was dismissed because of his incompetence.
30. Mr Martin Clark was not called as a witness and I had no statement from him. He was not given any opportunity to address the allegations of his incompetence or mismanagement. Therefore, out of fairness to Mr Clark I make it clear that I make no finding of fact one way or the other about the accuracy the allegations of his incompetence or mismanagement. Besides, I do not think it relevant to the issues I have do decide. However, it is apparent that this is what the parties thought of his performance. It is also an importance piece of contextual information to this case. Therefore, for the purposes of this case only, I proceed on the assumption that what the parties say about Mr Clark's mismanagement and incompetence is correct.
31. After Mr Clark's departure there were significant difficulties in the warehouse. It was not functioning correctly. Products were not in the right place. The warehouse had difficulties meeting demands from Strata's customers. Because of the seasonal nature of the business, what they sell in summer is not what they sell in winter. Having the right items in stock and in the right place at the right time was important. There were errors in "pick lists". These lists tell warehouse operatives how many items they need to move from one position (e.g. long-term store) to another (e.g. the part of the depot with goods ready to go out).
32. The responsibility for resolving the issues that were left over from Mr Clark's short tenure as Warehouse Manager fell to Mr Kavanagh as line manager.

**5 and 6 June 2018**

33. On 5 June 2018, one of Strata's employees, Ms Sian Langham, emailed Mr Ilsen making a complaint about Mr Kavanagh. She wrote

"For the last four weeks I have worked most days from the Factory helping where I can with Sales & warehouse functions because the business is struggling. I have been getting behind in my own workload and not prospering in my new role for the overall good of the business. I have sat for four hours today allocating B&M orders after being given the go ahead by James Kavanagh – to then be told he never said that, all of the pick lists have to be cancelled and started again.

"Today I have been called a liar, been shouted and screamed at and told that everything is sales' fault. I will under no circumstances be spoken to

and threatened in the way I have today inside or outside the workplace. Never in my professional life have I witnessed such idiocy and abuse. It is totally unacceptable that a man with director's authority who is twice my age and three times my size deems it necessary to act in this manner. [Mr Kavanagh] has had both myself & Vanessa in tears (my tears were through anger) and I am not of a sensitive nature. It was clear to me through his ramblings that he has no idea what he is doing. Telling me he is the only one taking any flack when I have to deal with angry customers all day every day with no solid explanation or resolution in sight."

34. After receiving an invite to a grievance meeting, Ms Langham followed up this complaint with another letter of 14 June 2018. In that letter, Ms Langham wrote as follows

"On Tuesday 6th June 2018, I was asked to go and have a conversation with James Kavanagh and Charlie Swithenbank in the finance office regards the allocations and picklists for B&M. Earlier on in the day [Mr] Kavanagh had given Vanessa Fletcher a verbal instruction that we could undertake the process of beginning to allocate the ... orders received last week. This was witnessed by Rachaél Heverin. Upon entering the office, it was clear that the mood was tense due to recent events at Strata."

35. She goes on to describe a conversation that took place. She then says

"... During this conversation [Mr Kavanagh] repeatedly raised his voice and shouted at me and Vanessa. His demeanour was very threatening standing very close to me and looking down on me. He called me a liar, told me he had worked all weekend and that if this went wrong it would be our threes "fuck up". He also said he was the only one receiving any flack for the current situation. I advised this was untrue as I was receiving many calls a day from our customers that are repeatedly being let down – he said this was irrelevant. His conduct and conversation were completely unacceptable which led to both myself and Vanessa leaving in tears.

"The whole episode has left me feeling very vulnerable as a young woman who has been treated awfully by a director of the company who is twice my age and size. It was also degrading to be spoken to in this manner in front of two other colleagues. I felt [Mr Kavanagh] was out of control and could not control his own temper. I would not in any circumstances feel comfortable in a room alone with him nor would I feel comfortable approaching him in the future.

"...

"[Mr Kavanagh] called me on the 6th June to apologise. I responded with if you knew you were sorry you wouldn't have done it in the first place. Dean Revill then asked me how I felt about receiving an apology. I feel the apology was made for the benefit of others and not because it was sincere...."

36. Mr Kavanagh agreed that he telephoned Ms Langham.

37. As part of the investigation into the incident on 5 June, a Ms Sarah McCullough prepared a statement on 26 July 2018. In that statement, she

describes the background to issues there were going on with the computer system and the incorrect recording of stock. She said

“... [Mr Kavanagh] raised his voice somewhat nastily to them all saying – well when you lot fuck it up, and you will, you lot can come in at the weekend and sort it out, I came in last weekend to sort it out, and you lot don’t get the hassle from the customers. At this point Sian replied firmly by saying that he was wrong and that she and Vanessa and all the ladies in the sales department get hassle from the customers on a daily basis....”

38. Charles Swithenbank also prepared a statement on 31 July 2018 as part of the investigation into the incident on 5 June 2018. He described how he received a telephone call from Mr Kavanagh requesting that they meet in the warehouse to participate in a stock counting exercise. He described a similar series of discussions about the computer system and errors within it and how it was being used. He said that Mr Kavanagh began to raise his voice and then stated the following in an aggressive manner

“...’You three, will be in this fucking weekend, sorting this fucking mess out. I have to come in at the weekend so why shouldn’t you. It’s me that has to take all the flack for this’. [Mr Kavanagh] said this in the presence of two other members of staff Sarah McCullough and Kirsty Hartshorn.”

39. I find as a fact that on 5 June 2020 Mr Kavanagh behaved as Ms Langham described. In particular that at that meeting he shouted and screamed at those present, calling them liars, and was threatening and aggressive in his demeanour. I find as a fact that he swore when addressing the members of staff.

40. I find also as a fact that on 6 June 2018 he behaved in a similar way, leaving one member of staff in tears.

41. I come to that conclusion for the following reasons

41.1. There is a striking similarity in the reports from the members of staff relating to the 5 June 2018;

41.2. In turn there is a striking similarity to what is alleged to have occurred on 6 June 2018;

41.3. They all bear a striking similarity to what Mr Clark reported to Mr Ilsen about Mr Kavanagh’s behaviour;

41.4. Both events are strikingly similar to the evidence and events of 4 July 2018;

41.5. These events are strikingly similar to the findings of the SMETA Audit in relation to Mr Kavanagh’s behaviour;

41.6. Mr Kavanagh was suffering stress and anxiety at the time and the behaviour is not inconsistent with someone suffering from those conditions. Though I accept that this alone is not enough to conclude he behaved as alleged, I believe that it supports the other evidence;

41.7. Mr Kavanagh is in my judgment an unreliable historian for reason I set out below relating to Ms Blakely’s grievance;

- 41.8. Mr Kavanagh admitted he phoned Ms Langham. I conclude that it must have been to apologise because there is no other obvious reason for the call. The fact he felt the need to apologise implies that he considered he had behaved improperly in some way. The alleged conduct is the only explanation of in what way he behaved improperly;
- 41.9. Mr Kavanagh admitted in cross-examination he swore from time to time when on the shop floor. He alleged it was simply part of the manner of communication. Considering the totality of the evidence I accept that he swore but not that it was limited in the way he described;
- 41.10. In the course of cross-examination, Mr Kavanagh accepted that at the time of this conversation he was “hopping mad”. The alleged behaviour is consistent with someone in this mood; and
- 41.11. He also accepted that none of the witnesses to those events had any particular reason to take against him nor could he think of any motive as to why they might want to get him into trouble.

**Mr Clark’s report**

42. In parallel and independently, on 7 May 2018 Mr Clark contacted Mr Ilsen through LinkedIn. The contact was unsolicited. The result was a telephone conversation between the two. That telephone conversation took place on 7 June 2018. Mr Ilsen made a note of the conversation. It is not verbatim. However, I am satisfied that it correctly records the gist of the conversation because I was given no reason to doubt it and because the complaints within it are strikingly similar to those which others raise independently. Furthermore, the complaints arguably reflect badly on Mr Ilsen because he runs Strata and bears ultimate responsibility for what happens in the workplace. I can see no reason for Mr Ilsen to exaggerate what Mr Clark said.
43. In the conversation Mr Clark has said that he was not looking to get his job back and that he was not seeking compensation. However, he felt he had a moral duty to report what he described as  
“an atmosphere of fear at [Strata]”.
44. The note records as follows  
“Specifically, [Mr Clark] described the ‘bullying and unreasonable behaviour’ of the Operations Director [Mr] Kavanagh. [Mr Clark] had spoken to Michael Ilsen last week with his concerns about [Mr Kavanagh]. He said he would speak to [Mr Kavanagh]. However, a few days later [Mr Ilsen] told [Mr Clark] that the company would be ‘parting ways’ with him  
“ ....  
“... [Mr Clark] said that he had witnessed [Mr Kavanagh] on two occasions screaming and shouting and ‘F-ing and blinding toward the female transport co-ordinator’. She had left the business telling [Mr Clark] that she couldn’t take the bullying anymore.  
“ ...



"...[Mr Clark] said he had witnessed [Mr Kavanagh] physically pulling an employee off a forklift truck, dragging him into [Mr Clark's] offices and threatening him with the sack if he did not work more quickly. And if he did leave he wouldn't get a reference."

45. The note records that Mr Clark believed Mr Kavanagh was good at his job but  
"rules by fear on a daily basis."
46. The note also records that Mr Clark was left with the impression that  
"Mr Kavanagh thinks of the place as his own empire and his management style means that people are coming into work each day scared."
47. I conclude that Mr Clark was telling Mr Ilsen the truth and that Mr Kavanagh behaved generally in a bullying and unreasonable way. I also accept that Mr Kavanagh swore generally. The evidence is strikingly similar to the other allegations against Mr Kavanagh and fits with the fact he had stress and anxiety.
48. I am conscious that Mr Clark may have had an ulterior motive (such as hostility towards Mr Kavanagh). However, on balance I do not believe such a motive existed. This was months after he left and as he made clear he did not seek compensation or reemployment. But, even if he did have an ulterior motive, I still accept the evidence because of its similarity in character to the other evidence about Mr Kavanagh's conduct.

***Mr Kavanagh's stress and anxiety***

49. On 19 June 2018, Mr Kavanagh emailed Mr Ilsen saying that due to what he perceived as a lack of management structure at Strata, he had felt a lot of work-related anxiety and stress, and that he was working seven days per week to rectify the damage that Mr Clark had inflicted on the warehouse and the customers. This is the first time that he raised issues about stress. He suggested that there be contact made with RPC (human resources division) to discuss a recruitment strategy. He said he wanted to make it clear that he was not resigning from his position but would like RPC to understand that he does not consider his long-term future belonged with them. In the email he said  
"Therefore it would be best for all concerned if they could resource my replacement for a smooth transition and we could discuss an appropriate exit package."
50. Mr Ilsen replied on 20 June 2018. He says that the potential concerns that Mr Clark had had about Mr Kavanagh were quite properly referred to him. He also said  
"There are managers in place at Strata and if these managers are not capable of running their departments then it is their line manager and ultimately my responsibility to ensure that those managers who are not capable are replaced. If you wish me to look at the management structure and change it I will gladly do so. Please let me know the areas where you think there is a weakness other than planning which I have already hopefully solved with the appointment of Matthew Ward."

51. He goes on to describe how he and others are also involved in dealing with complaints and difficulties that the Company was facing in its stock management and production systems. He goes on to suggest that Mr Clark's employment was difficult. He continued:
- "I did recruit [Mr] Clark and as I have said on numerous occasions he will have a chapter in my book on ex-employees. However you are the Operations Director so the sorting out of the mess that Mr Clark created is down to you in the first instance and then if you were not capable then ultimately down to me.
- "If you wish to hand in your notice I need your official resignation letter giving 6 months' notice as per your Directors Agreement."
52. Mr Kavanagh replied to that on the same day. He repeats that they need to replace managers and, in his opinion, strengthen the management team. He described what he perceives as health and safety issues to consider with staff working excessive hours and there being surface, drainage and lighting issues at one of Strata's sites. He then said
- "I'm offering succession planning prior to my resignation but if you feel as though it is not necessary I will give you a six month notice period and I can leave on 31st December."
53. Mr Kavanagh does not actually resign in that email. Mr Ilsen does not reply to that until later in July asking Mr Kavanagh to confirm his intentions and Mr Kavanagh confirmed that he is not resigning.
54. I do not understand why Mr Ilsen did not reply until July. He did not seem to have any real explanation. However Mr Kavanagh did not follow it up. I cannot see how it has any real impact on events in this case.
55. I conclude that at the time Mr Kavanagh was suffering from stress and anxiety. He openly made reference to it in the letter. Later sick notes appear to support it. His mention of resignation, succession planning and moving on supports the fact he was feeling stress and anxiety.
56. I conclude that the emails in the surrounding circumstances could not be read as formal grievances. He would have known of the policy and process because he is a director. He would have the sophistication to know how to raise a grievance and what to do if he wanted to raise issues informally. He did not insist on a formal grievance procedure when in his position as a director he would have been able to do so.
57. However, I conclude his email invokes Strata's stress policy because he is clearly raising his stress and anxiety as an issue and the issue is being raised informally as the policy contemplates.
58. I conclude that the suggestion from Mr Ilsen that he could look at management structure was a reasonable response. I come to that conclusion because this is a discussion between people at the top of the company. The scope for action and their responsibilities are of an order of magnitude different to those employees who are not directors or not in such senior positions.

**4 July 2018**

59. On 4 July 2018, Rachaél Heverin resigned. Her resignation letter is addressed to Mr Ilsen and Mr J Ilsen, who was a fellow Director. In her resignation letter, she wrote:
- “It has been a pleasure working with both of you and it is with regret that I find myself in this position. Unfortunately, I feel I can no longer work in an environment whereby it is deemed acceptable for people whom work hard and contribute to Strata’s success to be treated in such an inappropriate manner by one individual.
- “To have to witness such behaviour is effecting me, I find it distressing and just unnecessary but more importantly very unacceptable that someone in a high position of authority should behave in such a way.”
60. In cross-examination, Mr Kavanagh admitted that Ms Heverin was talking about him.
61. On 27 July 2018 as part of the investigation, Ms Heverin gave more detail about what caused her resignation. She said that during a production meeting on 4 July, Mr Kavanagh spoke to her and many members of staff in an aggressive manner. She described the conversation as follows:
- “... There was an issue with some Factory shop deliveries and stock shortages and [Mr Kavanagh] wouldn’t listen to the information he was being given in response to his concerns and continued to tell Svetlana that she wasn’t performing her role correctly and that she was making life impossible for the warehouse staff. When Svetlana tried to defend her actions, she was told she must “get off her backside” and go to the outside storage units to check for stock. [Mr Kavanagh] wasn’t prepared to listen to Svetlana’s concerns or opinions and Svetlana left the office and meeting upset.
- “Alex was questioned regarding missing labels and was shouted at and told ‘he hides the real problem that is to do with bullying by blaming missing stock and used labels’. When Alex tried to speak he was spoken over and seemed to give up trying to defend himself.
- “Richard was questioned on some tasks he was working on and when he tried to explain his updates he was shouted at and talked over to the point [Mr Kavanagh] shouted at him (in an aggressive manner manner (sic) that he would go and do “his fucking job for him”. At which point [Mr Kavanagh] left the office without ending the meeting and slammed the office door. Richard tried to follow [Mr Kavanagh] and could be heard shouting [Mr Kavanagh] down the factory, asking for him to return so they could discuss the matter further. ...”
62. A Mr Lancashire also provided a statement. It confirms a similar version of events to that set out in the statement of Ms Heverin.
63. A Mr Dilks also provided a statement as part of an investigation into the events on 4 July 2018. Mr Dilks said however that there was no swearing or shouting from Mr Kavanagh and that all the questions Mr Kavanagh asked were appropriate. This is obviously in contrast to what has been said by the other witnesses. However, even Mr Dilks in his statement confirmed

that two individuals left the meeting and they appeared to be upset. In his statement, he provides no explanation as to why they would have left the meeting upset.

64. Mr James Tagg also gave evidence to the tribunal about what happened at that meeting on 4 July 2018. It is set out in his witness statement at paragraph 4. He said that he felt he had no choice but to make Mr Ilsen aware of what had happened because he was aware that two members of staff had left the site upset because of what had happened, and one member of staff had informed him of their intention to resign. In his evidence to the tribunal, Mr Tagg said that he felt Mr Kavanagh's behaviour had "crossed the line".
65. I conclude that at that meeting Mr Kavanagh was aggressive in his manner when dealing with the staff. I am satisfied he shouted over people and that he swore. I prefer the evidence of the employees because
- 65.1. There are 3 witnesses who give a strikingly similar version of events;
- 65.2. There are differences in their recollections, but their recollections are broadly similar. There is nothing to suggest collusion or collaboration. There is nothing to suggest an ulterior motive to undermine Mr Kavanagh;
- 65.3. One person resigned over what happened. That suggests it was extreme if it caused resignation. There was no evidence Ms Heverin is unreasonably sensitive;
- 65.4. Mr Dilks's report is in contrast. However, he says that 2 people left upset. That matches the evidence of the other witnesses. There is however nothing in his evidence that would explain why they left upset. That is an unexplained inconsistency. That, coupled with the other clear evidence means I do not accept what Mr Dilks says about Mr Kavanagh's conduct;.
- 65.5. Mr Kavanagh is in my judgment an unreliable historian for reason I set out below relating to Ms Blakely's grievance;
- 65.6. Similar comments appear about Mr Kavanagh's behaviour in the SMETA Audit;
- 65.7. It is similar to the incidents in June 2018;
- 65.8. It is similar to the conduct Mr Clark described to Mr Ilsen; and
- 65.9. It is of the type of behaviour that is not inconsistent with someone with anxiety and stress.

***Ms Blakely's grievance***

66. In the meantime, on 22 June 2018, a Ms Karen Blakely raised a grievance against Mr Ilsen. The grievance was not against Mr Kavanagh though it mentioned events to which he was a witness.
67. On 9 July 2018, Mr Ilsen emailed Mr Kavanagh asking him for comments about Ms Blakely's statement insofar as it concerned Mr Kavanagh.
68. Mr Kavanagh replied on 10 July 2018.

69. On 14 July 2018, Mr Kavanagh sent a follow up email asking Mr Ilsen if he needed a separate statement of his opinion in relation to an issue Ms Blakely raised relating to planning. The details do not matter.
70. Two days later, Mr Ilsen replied  
“No” (sic.)
71. The email and the reply were in the bundle and clearly had formed part of the disclosure exercise that took place both before the preparation of the bundle for the hearing and writing of the witness statements.
72. In his witness statement at paragraph 25, which he confirmed on oath as true without correction on this issue, he says the reply that Mr Ilsen gave was  
“NO!” (sic.)
73. Comparing this however to the most cursory glance at the email simply confirms this is not the case.
74. Mr Ilsen reply is written as “No” – capital ‘N’ because it is the first word sentence and then a lower case ‘o’. There was in fact no punctuation that follows whatsoever, let alone any exclamation mark.
75. I have considered this carefully because the respondent relies on it to call Mr Kavanagh’s credibility into question. Mr Kavanagh has clearly exaggerated and misrepresented objectively verifiable facts. The addition of the capitals and the punctuation put a very different slant on what was written. They suggest an aggressiveness and dismissiveness that objectively judged simply is not there in the original text.
76. I cannot decide if it is a deliberate exaggeration that is an attempt to mislead or an accident. I do not believe it matters however. What is clear is that it was deliberately written in the statement when it would have been easy to check. When Mr Kavanagh gave evidence, he had a chance to correct anything in his statement. He did not correct or clarify this. Taken at its best I leads me to conclude that Mr Kavanagh puts a gloss or spin on matters that makes the behaviour of others appear worse than it was. In my judgment it is a clear example of him being an unreliable historian.
77. As part of that grievance investigation, Mr Ilsen sent his reply to the investigator on 3 August 2018. He attached to it Mr Kavanagh’s comments in full. There is no suggestion that he had any concern whatsoever in doing so. If the situation was as Mr Kavanagh alleges, that is, that his replying to the grievance was motive for orchestrating his dismissal, then it stands in stark contrast to the documentary evidence. There is nothing that suggests it in any way, shape or form had any impact on the decision-making process in this case. Mr Ilsen’s oral evidence caused me no doubt either.
78. I conclude that this is another example in which Mr Kavanagh seeks to suggest that others are guilty of ulterior motives or bear grudges that somewhat undermined by the objective evidence of what actually happened. Again this suggests to me that Mr Kavanagh is an unreliable historian.

***Request for investment***

79. Around 19-20 July 2020, Mr Lancashire, who was the Technical Shift Leader at the time, emailed Mr Ilsen and copied Mr Kavanagh in. The email can be described as a lengthy description of problems that he was having ensuring that the various shifts were covered. In the last paragraph, he said
- “... I realize that this is an unprecedented busy spell due to the good weather but is there any change of investment for more machinery that could be run in the week so we wouldn't Have to use sub-contractors. ...”
80. Mr Ilsen replied the next day
- “... Yes I am pushing hard for RPC to make an investment in 4 new machines and I will use this current position as a further example of how their lack of investment is leading to a fall in profits.
- Everyone's efforts are very much appreciated even though they do not always appear to be! ...”
81. Mr Kavanagh has suggested another motive for dismissing him was that he had raised issues about requiring further investment and health and safety issues. I have alluded to these previously.
82. This exchange between Mr Lancashire and Mr Ilsen leads me to conclude that it cannot have been a relevant factor. Mr Ilsen's email to Mr Lancashire seems very much to appreciate the suggestion and indeed suggests that he in fact is trying to get the parent company to invest in Strata. There is nothing on the evidence adduced by Mr Kavanagh, or elsewhere in the bundle, that leads me to believe that Mr Ilsen would have had a different reaction to such a suggestion if it had come from Mr Kavanagh rather than from Mr Lancashire. In my view whether his observations were related to health and safety or to investment, they had no bearing whatsoever on what happened in this case.

***SMETA Audit***

83. While all of this had been going on, Strata had requested an audit be carried out into them. This report is known as the SMETA Report or SMETA audit and the full report was in the bundle. The date of the audit was 19 and 20 July 2018. The report involved analysing processes, procedures and speaking to members of staff. It is very similar to the quality assurance reports that one sees into companies to see whether or not they are complying with various technical or ethical standards. Large customers rely on them when deciding from whom to make purchases because the poor behaviour of a supplier could adversely reflect on the customer too.
84. The conclusions of the report are set out in a table, in which there are a number of items identified where it is felt that Strata could improve. One of the items relates to the treatment that staff receive from management. It reads as follows under the heading
- “Non-Compliance Number”
- “No Harsh Treatment or inhumane treatment is allowed.”

85. That is a reference to the standard to which the report is referring and measuring its findings against.
86. The report then identifies this as being a new issue. Under the heading “Details of Non-Compliance”, it says as follows
- “It was reported during interview one member of senior management regularly shouts and swears at members of staff in an aggressive manor (sic). It was reported that workers felt fearful for their jobs should they attempt to escalate the issue and had been left in tears, physically shaking or humiliated by ‘public attacks’. Workers did state they did not believe it was personal against them but rather a ‘management style’.
87. Under Preventative and Corrective Actions, it says
- “It is recommended that all senior management are given formal training in relation to Bullying and Harassment or Discriminatory practices. All inappropriate behaviour and intimidation should cease with immediate effect.”
88. The report then goes on to recommend that this should be effected immediately.
89. Mr Kavanagh accepted that what was alleged in the SMETA Audit was a serious matter. He also agreed that there would be something in the order of 25 or 26 people to whom the auditors would have spoken and that the auditors would typically speak to people in groups of three to five people.
90. At no point have I been presented with any evidence that suggests that the person being referred to in this extract from the SMETA Audit is anyone other than Mr Kavanagh. In fact, given that the striking similarity between the allegations in relation to the incident in June and in July and Mr Clark’s observations, I conclude that it was Mr Kavanagh about whom the SMETA Audit was talking. I also am fortified in that conclusion by the fact that Mr Kavanagh himself has provided no evidence or suggestion as to who else it could possibly be referring to. There was a small senior management team so identification of an alternative alleged perpetrator should be easy to do.
91. To the extent that Mr Kavanagh says it cannot be a reference to him, I reject that suggestion. It seems from the papers before me that the only other possible person to whom it could refer to is Mr Ilsen. I say that simply because he is the only other person in senior management against whom a grievance appears to have been made during this relevant time. However, having seen that grievance, there is nothing in it that suggests that Mr Ilsen’s behaviour could be described as anything like that described in the SMETA Report.

**26 July 2018**

92. During that investigation stage, one further allegation that came to light was from a Sian Langham. She wrote a letter dated 26 July 2018. She says that she cannot sure of an actual date but what happened was as follows:

93. "... I was out on the shop floor in full PPE Safety wear including a high visibility vest, safety shoes and ear plugs. [Mr Kavanagh] was above me on the walkway to his office, he shouted to me "Sian, where are your ear plugs?". In fairness my hair was hiding my ear plugs, I showed [Mr Kavanagh] that I did indeed have my ear plugs in to which he replied, "I am watching you". I just walked away and continued back through to the Sales Office.
94. On balance I conclude that this did happen at some point. I cannot draw any conclusion as to when it happened. The conversation is one that would seem perfectly in keeping with the situation in which it occurred. I can see no reason for her to make it up.
95. I conclude this conversation however had no impact on Ms Langham or on the atmosphere in the workplace. Even in her own words she walked away. It was only in the general investigation that she decided to raise this. I can see no reason not to have raised this earlier if she was affected adversely by it, like she had with the more serious allegations.

**Mr Ilsen's emails**

96. I have considered emails that Mr Kavanagh relied upon to show Mr Ilsen's conduct was similar to his own behaviour.
97. During Mr Kavanagh's employment Mr Ilsen would regularly email members of staff. Some of these emails appear in the bundle. Mr Kavanagh relies on them as demonstrations of how Mr Ilsen communicated with staff as a comparator against which to assess his own alleged behaviour. Some of these emails are directly relevant to the events that I have to consider. A lot are not – they act purely as background.
98. I was referred to a number of them. The following are background emails perhaps best described as samples:
99. On 5 August 2015 where Mr Ilsen wrote  
"We have no Smart Box Lid samples in the Tint colours. I want the samples being made today as these have been requested for weeks.  
No samples, no sales, no jobs!"
100. On the same day he also wrote  
"You need to speak to Jamie about this as I am sure that the 3% was too dark. It is not my job to sort out the samples. If I have to do this then all the brain surgeons that I employ are redundant.  
Please sort or I will."
101. On 25 May 2018 Mr Ilsen sent an email that said (so far as relevant)  
"A customer is waiting for this information, unless we get it to him he will go elsewhere.  
No orders no jobs!"
102. Similarly, an email on 19 July 2018 into which Mr Kavanagh was copied where Mr Ilsen wrote



“...I gave clear instructions about 2 weeks ago that we should already ask for volunteers to work weekends up until the end of August rather than do it on a week by week basis.

“This instruction was totally ignored and we now find ourselves having to shut production down at Sunday lunchtime until Monday morning.

“With the current stock against orders position we are unable to fulfil the orders in hand and by losing a day’s production now means that we have to sub-contractor a larger number of products to other moulders.

This will have a major impact on profits and could in turn lead to job losses....”

103. There is also an email on 20 June 2018 that Mr Kavanagh relies on. I have set that out above.
104. What I note about all these emails is that, whilst they might be described as blunt or direct, and while some might question whether they are good or bad style for a boss to use, none of them contained swearing or what I could consider objectively to be described as verbal abuse or bullying.
105. None of the emails that Mr Kavanagh has referred to (or others that I have seen) could in any way be described as the sort of conduct that SMETA are describing in their audit. They are very different in character to Mr Kavanagh’s behaviour.

***Investigation and invitation to disciplinary hearing***

106. On 25 July 2018, Mr Kavanagh was signed off work because of hypertension and work-related stress. That fit note was then subsequently renewed to cover him until the end of his employment.
107. On 12 July 2018, Denise Millington wrote to Mr Kavanagh inviting him to a disciplinary investigation meeting. She said at the meeting the following issues would be discussed. The letter reads as follows (so far as relevant)
- “At the meeting the following will be discussed with you:-
- “Your behaviour and attitude towards colleagues in the work place which could amount to bullying or harassing behaviour
- “Your outbursts in the workplace which have and can cause upset to others, which are unprofessional and not the behaviour expected of someone in your position within the Company
- “Events during and after the Production Meeting on Wednesday 4 July 2018
- “At the meeting you will have the opportunity to put forward your version of events and respond fully to the allegations against you....”
108. The disciplinary investigation meeting took place on Monday 23 July 2018. Mr Ilsen, the Managing Director, was present at the meeting and acted as the chairman of the meeting. He was accompanied by Denise Millington as the note taker. Mr Kavanagh was present and there was also a Newton Stewart who was present as a witness.
109. There were discussions about various issues and discussion about how long it would take for a decision to be made as to whether or not there would

be a disciplinary process. Mr Ilsen suggested it would take 10 days, to which Mr Kavanagh complained because the matter had been going on for 7 to 8 weeks already. That comment struck me as curious because there is no reason to believe that Mr Kavanagh would have been aware of any complaints during the 7 or 8 weeks preceding and certainly I see nothing in the bundle, either produced by him or Strata, that suggests any of those matters were raised with him. It tended to suggest to me he was aware that his own conduct was not satisfactory.

110. On 17 September 2018, Mr Ilsen wrote to Mr Kavanagh inviting him to attend a disciplinary hearing. There were six allegations that were presented in that invitation. Allegation number 1 was the finding in the SMETA Audit, to which I have already referred.

111. Allegation number 2 is as follows

“A grievance has been raised against you by a fellow colleague following an incident where you acted in a bullying and/or harassing manner which resulted in your making this person and others upset – the incident that occurred was on 5 June 2018 where there was a conversation between Sian, you, Vanessa and Charlie. During the conversation, which was also witnessed by other members of staff, you raised your voice repeatedly towards Vanessa and Sian in an intimidating manner. During this your body language was threatening and you made one or more of the people you were talking to feel very uncomfortable. Swear words were used and your behaviour was unprofessional and not something we would expect to see from any Manager within the Company. The conversation ended with two of the people you were speaking to leaving in tears. We consider the behaviour displayed by you is that of bullying and harassment which we take very seriously.”

112. The letter goes on to say that Strata does not tolerate any member of staff upsetting others or making them cry. Even where a manager is warranted in speaking to a member of staff about something, they must behave in a respectful and polite manner. It says

113. “The behaviour displayed by you on the day is very short of what is expected of a Manager and/or Director of the Company.”

114. The letter also then says

“The Company is aware that this is not a one off event and that you have also previously displayed similar behaviour and that since this date you have also been witnessed displaying similar behaviour which has resulted in other employees becoming upset.

“It is noted that you did apologise to one or more of the employees that had been involved in the conversation on 5 June 2018 although one or more of the employees who were party to the conversation did not feel this excused your behaviour or made it acceptable. Nor did they feel the apology was made with genuine remorse. They felt it was being given for the benefit of others who overheard it.”

115. Allegation number 3 is as follows

“That one person has resigned from their employment and cited your behaviour as a reason for leaving. This behaviour was described as bullying and/or harassing type behaviour and where you had been shouting, blaming others and in the opinion of the Company this behaviour falls far short of that what is expected from a Manager or Director within the Company.”

116. Allegation number 4 was

117. “The meeting on 4 July 2018 which resulted in you upsetting more than one member of staff by your behaviour and attitude.

“This incident was reported to me on the day by a Senior Manager and we have also had statements to say that your behaviour was not acceptable and that it was of a bullying and/or harassing nature and/or unprofessional. “We have not produced the statements in full in order to protect those who have given them as there is a fear or repercussions.

“I have considered the statements you produced in relation to this, however, on balance based on all the facts and circumstances and evidence available I consider currently that your behaviour appears to have fallen short of what is expected of a Manager and/or Director and that your behaviour has resulted in one member of staff resigning and other members of staff being unwell and unable to attend work and that as such there is a case to answer in this regard.

“This is of course subject to anything you have to say at the disciplinary meeting and any further evidence that you wish to submit which will of course be considered in full before any finding is reached.”

118. Allegation 5 was

“Your general failure to act professionally in the work place in the way you speak and communicate with others. This includes those things mentioned above, but also other instances where you speak in a raised voice, do not take staff members to the side to speak to them which could result in a breach of confidentiality and/or them being demeaned in front of other staff members by way of examples.”

119. Allegation 6 was

“That since being made aware of the grievance against you, you have made the member of staff who raised the grievance, Sian Langham, very uncomfortable in the work place making a comment that you were ‘watching her’ or words to that effect. This behaviour could amount to victimisation.”

120. Allegation 7 was an allegation that he had been discussing confidential matters with other members of staff.

121. Allegation 8 was that his actions had placed Strata at risk of losing custom and work because of the SMETA Audit’s findings in relation to his behaviour.

122. Allegation 9 involved transport invoices to Taylor Transport. The letter enclosed copies of those emails and invoices. This allegation was found not proven later.

123. The letter did not contain any of the statements or notes that formed part of the bundles and which I have referred to above. As Mr Ilsen said, he withheld them because of fears of repercussions.
124. I do not accept that Mr Ilsen either genuinely believed that to be the case or, even if he did, that he had any good reason to do so. In none of the documents that the parties have provided is there anything that even begins to suggest that the complainants or witnesses in this case have expressed to Mr Ilsen that they had a fear of repercussions should their identities be disclosed to Mr Kavanagh. I would have expected that to be evidenced in writing somewhere. It is not. Alternatively, I would expect there to be a clear note arising from the investigation processes that showed they feared repercussions and, briefly, explaining why. There is nothing to that effect. The first time there is a suggestion of the fear and a need for anonymity is in this letter. It appears to have come therefore only from Mr Ilsen.
125. I also find as a fact that Mr Ilsen had made up his mind at this point that Mr Kavanagh was guilty of the allegations against him. I have come to that conclusion based on the objective reading of the letter. The above text contains statements of fact rather than allegation. Their status as Mr Ilsen's conclusions is supported by his expression of his disappointment or disgust at the behaviour of Mr Kavanagh.
126. I accept that under allegation 5, Mr Ilsen did write that this was subject to any evidence Mr Kavanagh may have. However, in view the only reasonable reading the letter as a whole shows that remark is a token gesture surrounded by conclusions to which Mr Ilsen had already come. It does not demonstrate a genuine open mind to the case.
127. Because of the nature and number of the allegations, and the tone in which Mr Ilsen wrote the letter, I conclude that Mr Ilsen had already concluded that he would dismiss Mr Kavanagh summarily.
128. Both of these conclusions are supported by the fact the disciplinary meeting appears to have been brief and cursory. There was no follow up investigation from anything that Mr Kavanagh raised.

### ***Disciplinary hearing***

129. The disciplinary hearing took place on 25 September 2018 and Mr Ilsen chaired the meeting. Ms Millington again acted as the notetaker.
130. The notes suggest the various allegations were glanced over. There does not appear to have been a detailed discussion about the allegations.
131. Mr Kavanagh attended accompanied by James Tagg as a witness. He was unaware that Mr Tagg at this point had given evidence that in essence supported the case against him. I do not accept that this is Strata's fault. Had the witnesses not been anonymous, Mr Kavanagh would know and I doubt would choose Mr Tagg. There is nothing to suggest Mr Tagg was acting a spy for Strata. However, Mr Kavanagh is entitled to choose whom he likes to accompany him. It is doubtful Strata could have stopped him having Mr Tagg in any event. In my view the fault lies with Mr Tagg for agreeing to accompany Mr Kavanagh having given evidence against him already.

132. During the disciplinary meeting, the points which I have referred to were discussed in relation to the SMETA Audit. Mr Kavanagh offered nothing that would suggest that the person to whom SMETA were referring was someone other than him.
133. In relation to item 2, Mr Kavanagh accepted that the matter had escalated. He described his demeanour as being a firm, determined approach. He says  
“Don’t recall swear words”.
134. He explained that  
“[He] went back to office and called [Ms Langham] to calm situation down.”
135. He says that she was aggressive. He called her to offer a reconciliation not a  
“bollocking”.
136. He says that far from being tearful, she was in fact  
“belligerent”  
and says that Ms Fletcher (one of the witnesses) was not in fact there.
137. In relation to allegation 3, Mr Kavanagh said he had no knowledge of the allegation and could not offer any useful insight into it at all. When he asked who it was who resigned, he was told by Mr Ilsen that he was not allowed to ask.
138. In relation to allegation 4, which was the production meeting on 4 July 2018, he agreed with the suggestion from Mr Ilsen that maybe holding the meeting in the main office had led to great distress but his ultimate explanation was that he had been holding meetings for 10 years and nobody had spoken to him and said he was out of order. He said: “Questions have to be probing. Stress is not caused by one situation. Needs to be managed better”. This is page 245 of the bundle.
139. In relation to allegation 5, he made the point that it was a very vague allegation.
140. In relation to allegation 6, he denies saying to Ms Langham that he was watching her at any point.
141. Mr Ilsen considered matters and wrote to Mr Kavanagh on 12 November 2018 with the outcome of the disciplinary process. The delay between the disciplinary hearing and the outcome appeared to be attributed to discussions that otherwise would fall within **section 111A of the Employment Rights Act 1996** and to which of course I have no regard and which neither party has attempted to rely upon.
142. In the letter he concluded that Mr Kavanagh was guilty of the alleged conduct (except in relation to allegations involving Taylor Transport).
143. Mr Ilsen reflected on the fact that Mr Kavanagh had described himself during the disciplinary meeting as being under stress, but said
144. “...On only one previous occasion, 19 June 2018, have you ever mentioned your workload or ‘stress’ before going off sick and submitting sick notes

referring to work-related stress. Indeed in your role as a Director/Manager of the business you were able to control your own work load and those around you as well as discussing it with me at any time. I would also add that the facts concerning these allegations are not only post March this year but also before March 2018 and even during earlier years we had discussed your management style. I would also add that one other person that has been absent through stress was as a result of your actions and not stress at work generally. The fact is here your behaviour fell short of what is expected in many ways and this has been happening for a relatively long period of time not something that has only happened recently as a result of stress or workload.

145. He concluded there was gross misconduct and dismissed Mr Kavanagh summarily.

***The appeal***

146. On 13 November 2018, Mr Kavanagh lodged an appeal. In his appeal, he raises a number of grounds though perhaps only two points that really need to be emphasised for present purposes:

146.1. he was not provided with any witness statements to corroborate any of the allegations against him, despite his repeated requests.

146.2. he was suffering from work related stress before any allegation was made against him and that this stress has been the cause of his behaviour.

147. The appeal meeting took place on 30 November 2018. An HR consultant who is independent of Strata called Jill Jones was appointed to hear the appeals meeting. Ms Millington attended as a notetaker. Mr Kavanagh attended and had with him Mr Tagg.

148. It is quite apparent from the notes of the meeting that Ms Jones embarked upon a detailed analysis of Mr Kavanagh's complaints. The meeting began at 11 o'clock and finished at 12:48. Mr Kavanagh had provided her with notes relating to the disciplinary process which are quite detailed in their length. It seems to me quite apparent from reading the transcript that Ms Jones has taken some account of them and also taking into account his summary of events. At Ms Jones's request, Mr Kavanagh sent through extra documents that he had on 3 December 2018.

149. On 6 December 2018, Ms Jones emailed to Strata through their Solicitor, Amy Hallam, a series of questions that arose from the appeal, copies of the notes with question that had been inserted and some further notes that she had compiled herself.

150. Those documents are quite lengthy but it is quite easy to see from reading them that this is not a case of an appeal that has proceeded on what could only be described as a cursory glance. Ms Jones asks approximately 24 questions within the document which relates to the appeal meeting and then asks a series of further questions based on notes that Mr Kavanagh himself had provided in a separate document. Those further questions amount to another 23 questions. She asks for example Strata's view on various points

that Mr Kavanagh was making such as the allegation that Mr Ilsen’s decision to dismiss him was for raising health and safety issues or requirements for extra capital expenditure. She asked questions about how Strata came to the conclusions about the anonymous comments in the SMETA Audit relating to Mr Kavanagh. She asked about when the last audit was conducted. She asks why resignations that were attributable to Mr Kavanagh’s behaviour were not raised in a disciplinary investigation. She asked what investigation had been done to substantiate grievances that had been raised and were alleged to be against Mr Kavanagh and why statements against him had not been shared.

- 151. She asked about informal conversations that Mr Ilsen said he had had and never resulted in any disciplinary action. She asked why Mr Ilsen was so heavily involved in the investigation and the decision-making process.
- 152. There are many other questions that she asked of Strata. It would be excessive for me to go through them but it is quite apparent it seems to me that Ms Jones is approaching this with an open mind and conducting an appeal where she is properly and thoroughly investigating all the issues that Mr Kavanagh has raised in the appeal process and that nothing as far as she is concerned is a foregone conclusion. The Company responded in detail to the questions that Ms Jones had asked.
- 153. On 15 January 2019, Ms Jones issued her decision. Her letter is detailed, thorough and in my view is one that shows that Ms Jones has done her best to weigh up Mr Kavanagh’s grounds for appeal with the Company’s explanations and come to a reasoned conclusion. There is no suggestion that Ms Jones has paid lip service to the appeal process or that she has approached it on the basis that her job is to dismiss the appeal.
- 154. The appeal however was not a rehearing. It was more like a detailed review.

**Law**

***Unfair dismissal***

- 155. The **Employment Rights Act 1996 section 111** entitles a person who has been employed for a sufficient period to bring a claim for unfair dismissal
- 156. The **Employment Rights Act 1996 section 98** provides (so far as relevant)
  - “(1) In determining ... whether the dismissal of an employee is fair or unfair, it is for the employer to show—
  - “(a) the reason (or, if more than one, the principal reason) for the dismissal, and
  - “(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
  - “(2) A reason falls within this subsection if it—
  - “ ...
  - “(b) relates to the conduct of the employee,
  - “ ...

“(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

“(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

“(b) shall be determined in accordance with equity and the substantial merits of the case.

“ ... ”

157. The employer bears the burden of proving on the balance of probabilities that Mr Kavanagh was dismissed for misconduct. If the if the employer fails to persuade the tribunal that had a genuine belief in the employee's misconduct, then the dismissal is unfair.
158. When it comes to reasonableness the burden of proof is neutral. The tribunal should consider all the circumstances including the employer's size and administrative resources.
159. The tribunal has had particular regard to **British Home Stores Ltd v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Ltd v Jones [1993] ICR 17 EAT; Foley v Post Office [2000] IRLR 82 CA** and **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA**.
160. The tribunal understands of the effect of these cases is as follows:
- 160.1. Was there a reasonable basis for the respondent's belief?
- 160.2. Was that based upon a reasonable investigation?
- 160.3. Was the procedure that the employer followed within the “range of reasonable responses” open to the employer?
- 160.4. Was the decision to dismiss summarily within the “range of reasonable responses” open to the employer?
161. The Tribunal is not entitled to substitute its own view for that of the employer.
162. The **ACAS Code of Practice on Disciplinary and Grievance Procedures** sets out the basic requirements for fairness applicable in most conduct cases.
163. The code identifies the following key steps in any disciplinary procedure:
- 163.1. carry out an investigation to establish the facts of each case;
- 163.2. inform the employee of the problem;
- 163.3. hold a meeting with the employee to discuss the problem;
- 163.4. allow the employee to be accompanied at the meeting;
- 163.5. decide on appropriate action; and
- 163.6. provide employees with an opportunity to appeal.
164. Paragraph 9 of the code says



“9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.”

165. **The Trade Union and Labour Relations (Consolidation) Act 1992 section 207A** requires a Tribunal to have regard to the code.
166. Despite the code of practice and guidelines in the cases, ultimately each case must turn on its own facts and be broadly assessed in accordance with the equity and substantial merits: **Jefferson (Commercial) LLP v Westgate UKEAT/0128/12; Bailey v BP Oil Kent Refinery [1980] ICR 642 CA.**

***Unfair dismissal and anonymous witnesses***

167. In **Linfood Cash & Carry Ltd. v Thomson and Others [1989] ICR 518 EAT**, Wood J gave guidance on how to deal with anonymous witnesses

“Every case must depend upon its own facts, and circumstances may vary widely — indeed with further experience other aspects may demonstrate themselves — but we hope that the following comments may prove to be of assistance:

“1. The information given by the informant should be reduced into writing in one or more statements. Initially these statements should be taken without regard to the fact that in those cases where anonymity is to be preserved, it may subsequently prove to be necessary to omit or erase certain parts of the statements before submission to others in order to prevent identification.

“2. In taking statements the following seem important: (a) Date, time and place of each or any observation or incident. (b) The opportunity and ability to observe clearly and with accuracy. (c) The circumstantial evidence such as knowledge of a system or arrangement, or the reason for the presence of the informer and why certain small details are memorable. (d) Whether the informant has suffered at the hands of the accused or has any other reason to fabricate, whether from personal grudge or any other reason or principle.

“3. Further investigation can then take place either to confirm or undermine the information given. Corroboration is clearly desirable.

“4. Tactful inquiries may well be thought suitable and advisable into the character and background of the informant or any other information which may tend to add to or detract from the value of the information.

“5. If the informant is prepared to attend a disciplinary hearing, no problem will arise, but if, as in the present case, the employer is satisfied that the fear is genuine, then a decision will need to be made whether or not to continue with the disciplinary process.

“6. If it is to continue, then it seems to us desirable that at each stage of those procedures the member of management responsible for that hearing should himself interview the informant and satisfy himself what weight is to be given to the information.

“7. The written statement of the informant — if necessary with omissions to avoid identification — should be made available to the employee and his representatives.

“8. If the employee or his representative raises any particular and relevant issue which should be put to the informant, then it may be desirable to adjourn for the chairman to make further inquiries of that informant.

“9. Although it is always desirable for notes to be taken during disciplinary procedures, it seems to us to be particularly important that full and careful notes should be taken in these cases.

“10. Although not peculiar to cases where informants have been the cause for the initiation of an investigation, it seems to us important that if evidence from an investigating officer is to be taken at a hearing it should, where possible, be prepared in a written form.”

168. The decision and approach on anonymity (including whether providing the gist of the allegations is sufficient) must be judged by the “range of reasonable responses” test: **Now Motor Retailing Ltd v Mulvihill 0052/15 EAT and Surrey County Council v Henderson 0326/05 EAT.**

### **Gross Misconduct**

169. Dismissal without notice (or with inadequate notice) is wrongful unless the employer can show that summary dismissal was justified because of the employee’s repudiatory breach of contract.
170. Gross misconduct is conduct that  
*‘must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment’.* See **Briscoe v Lubrizol Ltd 2002 IRLR 607 CA.**
171. Put another way, the employee’s behaviour must disclose a deliberate intention to disregard the essential requirements of the contract: **Laws v London Chronicle (Indicator Newspapers) Ltd 1959 1 WLR 698 CA.**
172. Unlike unfair dismissal, the Tribunal must be satisfied that there is actual gross misconduct, and can take into account all the evidence available, including that which comes to light after dismissal: **Williams v Leeds United Football Club 2015 IRLR 383, QBD, Boston Deep Sea Fishing and Ice Co v Ansell 1888 39 ChD 339, CA.**
173. The employee’s conduct must be viewed objectively, so he might commit gross misconduct even without an intention to do so: **Briscoe v Lubrizol Ltd 2002 IRLR 607 CA.**
174. When assessing the conduct, factors such the nature of the employment and the employee’s past conduct will be relevant: **Pepper v Webb 1969 1 WLR 514 CA, Wilson v Racher 1974 ICR 428, CA.**

175. Motive for dismissing for gross misconduct is irrelevant: **Williams v Leeds United Football Club 2015 IRLR 383, QBD.**
176. If there is gross misconduct of which the employer is aware, then the employer must decide whether to dismiss or not promptly after becoming aware of it. If they delay unduly, do not act, or act in a manner that is inconsistent with seeking to end the contract, then the tribunal may conclude they affirmed it: **Williams v Leeds United Football Club 2015 IRLR 383, QBD; McCormack v Hamilton Academical Football club [2012] IRLR 108 CSIH**

***“Polkey” reductions and contributory fault***

***“Polkey” reductions***

177. The rule in **Polkey** requires a Tribunal to consider the prospect that an employee might have been dismissed in any event.
178. The approach to the assessment is set out in **Software 2000 Ltd v Andrews [2007] IRLR 568 EAT:**
- “The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed.”
179. Furthermore, in **Hill v Governing Body of Great Tey Primary School [2013] ICR 691 EAT**, the Tribunal said
- “[24] A ‘Polkey deduction’ has these particular features. “First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly, though it did not do so beforehand.”
180. The assessment may be that a dismissal would have occurred by a fixed date or that there was a percentage chance it may have happened at some point.

***Contributory fault***

181. The **Employment Rights Act 1996 section 126(3)** compels the Tribunal to consider the issue of contributory fault in any case where it was possible

that there was blameworthy conduct on the part of the employee relating to the unfair dismissal. This is so regardless of whether the issue was raised by the parties: **Swallow Security Services Ltd v Millicent UKEAT/0297/08 EAT**.

182. The focus can be only on the employee's conduct before dismissal and not that of others: **Parker Foundry Ltd v Slack 1992 ICR 302, CA; Mullinger v Department for Work and Pensions 2007 EWCA Civ 1334, CA**.
183. Before any reduction can be made, the Tribunal must be satisfied that the relevant conduct is "culpable and blameworthy": **Nelson v BBC (No2) [1980] ICR 110 CA**. It includes foolish or "bloody minded" conduct (as described in **Nelson**) as much as conduct that is properly described as tortious or misconduct warranting a disciplinary sanction.
184. It is not necessarily the case the employee should know the conduct is culpable or blameworthy. The Tribunal can also consider the employee ought to have known it was culpable or blameworthy: **Allen v Hammett [1982] ICR 227 EAT; Department for Work and Pensions v Coulson UKEAT/0572/12 EAT**.
185. However the conduct must have taken place before the dismissal, the employer must have been aware of the conduct and it must be a contributory factor to the dismissal. An employment tribunal cannot simply point to some misbehaviour by the employee and reduce compensation on that count: **Hutchinson v Enfield Rolling Mills Ltd 1981 IRLR 318 EAT**.
186. There should only be a reduction if it is just and equitable to reduce compensation because of the relevant conduct.
187. A failure to appeal is not relevant because it occurs after the dismissal and so cannot have contributed to it: **Hoover Ltd v Forde [1980] ICR 239 EAT**.
188. The basic award and compensatory award can be reduced by different amounts, but normally it should be the same amount: **G McFall and Co Ltd v Curran [1981] IRLR 455 NICA**.
189. The amount of the deduction depends on the facts of the case. However in **Hollier v Plysu Ltd 1983 IRLR 260 EAT**, the EAT suggested that the contribution should be assessed broadly and should generally fall within the following categories: wholly to blame (100%); largely to blame (75%); employer and employee equally to blame (50%); slightly to blame (25%).
190. Making a reduction for under the **Polkey** principle and for contributory conduct is not a double penalty. However if I make a reduction for contributory conduct I should bear in mind that I have made a reduction under the **Polkey** principle already: **Rao v Civil Aviation Authority 1994 ICR 495, CA**.

## Conclusions

### *Unfair dismissal*

*Has Strata established the potentially fair reason for dismissal, namely conduct?*

191. Yes. The correspondence clearly shows that Strava believed that Mr Kavanagh was guilty of misconduct. There were no ulterior motives.

*Was it a reasonable belief?*

192. In my view there was a reasonable basis for Strata's belief. Strata had received witness statements and complaints from a number of members of staff. These related to 2 or 3 separate incidents. The staff concerned had no motive to lie, exaggerate or to seek to get Mr Kavanagh dismissed.
193. While there was evidence in relation to the July incident to the contrary, Strata was entitled to conclude as it did based on all the evidence available. The allegation is similar to the allegation arising from June 2018, and it was a conclusion open to it.
194. The evidence was also supported by the SMETA Audit. Strata were entitled to conclude that the member of senior management who it criticised was Mr Kavanagh. Strata also had the evidence of Mr Clark.

*Was it based upon a reasonable investigation?*

195. In my opinion it was not.
- 195.1. Although Strata had obtained corroborating evidence, there is no evidence that I have seen to support the conclusion that the complainants or witnesses feared retribution if their identities were disclosed as part of the disciplinary process. That seems to be no more than a presumption on Strata's part unjustified by any objective evidence.
- 195.2. If there were genuine reason to maintain their anonymity, at no point does Strata appear to have made the tactful inquiries into the individuals who complained to assess for itself whether they were capable of belief, whether there was anything to undermine their evidence or if there were any other information which may tend to add to or detract from the value of what the complainants and witnesses had told them.
- 195.3. There is no investigation into whether any fear (if it existed) was genuine.
- 195.4. Mr Ilse does not appear to have interviewed the complainants or witnesses himself either before or after the investigation meeting to satisfy himself what weight or credibility is to be given to the information they provided.
196. I am also concerned that the investigation meeting is brief and appears cursory.
197. The investigation does not appear to cover the allegations made at the disciplinary stage. There is no reason for this. There was nothing at the disciplinary stage that could not have been covered in the investigation, i.e. there is nothing new.
198. In my judgment this leads to important and significant gaps in the investigation process. There was no reason for Strata not to have carried out these enquiries.

*Was the procedure that the employer followed within the “range of reasonable responses” open to the employer?*

199. In my view it was not.
- 199.1. I appreciate that Mr Ilsen is the most senior member of Strata’s management and Mr Kavanagh is his deputy. However, I cannot ignore that there was a co-manager at Strata, Mr J Ilsen, and that Strata was part of RPC. They had access to RPC’s advice at the very least. I see no reason why RPC could not provide a separate investigator or disciplinary officer, or why Mr J Ilsen could not have been the investigator. The appointment of Ms Jones for the appeal clearly shows that Strata was also receptive to and was able to appoint external persons to conduct the disciplinary hearing and/or the investigation process. Therefore, I can see no reason why they could not have appointed an external investigator. Because Mr Ilsen had conducted the investigation, it was outside the range of reasonable responses for Mr Ilsen also to hear the disciplinary hearing.
- 199.2. Mr Ilsen had already made up his mind about the conclusions and sanction before the disciplinary hearing. That cannot be the mark of a fair process.
- 199.3. In addition, the failure to provide the written statements of the complainants and witnesses is in my view outside the range of actions of a reasonable employer. I have noted above there appears no evidence to support the need for anonymity. Alternatively, there is no evidence of any consideration of whether the statements could be provided if necessary with redactions. The failure to provide the statements is a breach of paragraph 9 of the ACAS Code.
200. I do not accept that the delay had any impact on the fairness. There is some explanation for the delay that suggests both parties agreed to some of it.
201. I do not accept that Mr Tagg accompanying Mr Kavanagh to the disciplinary hearing was unfairness on Strata’s part either.

*Was the decision to dismiss summarily within the “range of reasonable responses” open to the employer?*

202. If a reasonable employer had reached the same conclusions that Strata reached, it would have been a reasonable response to dismiss summarily for gross misconduct.
203. I do not accept there is any unfairness because of the lack of disciplinary proceedings in relation to his conduct beforehand or that he was not given a warning. He is a director of the company and a very senior manager. He should not need telling that shouting and swearing at members of staff is unacceptable. Besides, the employee handbook makes clear such behaviour would be unacceptable, and he did not suggest he was unaware of its contents.
204. I do not accept that the anxiety and stress mean that summary dismissal was unfair. Assuming Strata had come to a fair conclusion on the facts, I

am of the opinion Strata could reasonably further conclude that he was a director and his conduct was wholly unacceptable for someone in such a senior position regardless. Strata's recognition that stress and anxiety was mentioned only once in June but that the allegations covered a longer period was a reasonable one open to it. I am of the opinion that Mr Ilsen's reply to the informal way that Mr Kavanagh raised the issue was also reasonable, in line with the stress policy and one open to Strata.

*If the dismissal was unfair should there be a reduction to take into account, the chance that Strata would have dismissed him fairly had a fair procedure been followed?*

205. If the issues that lead to unfairness had been addressed, there was in my judgment a very significant chance that Strata could have fairly dismissed Mr Kavanagh looking at the amount of evidence against Mr Kavanagh, the nature of his stress and anxiety and his senior position. I cannot say it would be 100% certain. It is possible the stress and anxiety or previous good conduct would have greater weight in a fair procedure. I cannot put a date on when the dismissal might have occurred.

206. In my view there should be a reduction of 80%.

*If the dismissal was unfair is there any culpable and blameworthy conduct that it is just and equitable to take into account?*

207. Strata were clearly aware of the evidence and allegations that Mr Kavanagh had been bullying and swearing at staff. It is clear that his conduct was the reason that Strata started the disciplinary process and dismissed him. He is a senior manager and director in the company that aggravates the situation and was clearly a factor too.

208. It is just and equitable to take it into account. I conclude that the award should be reduced by 60%. I believe that Mr Kavanagh is substantially responsible for his dismissal. However, he was suffering stress and anxiety, and there were problems in the warehouse. I also recognise I have also made a reduction under the **Polkey** principle.

### ***Wrongful dismissal***

*Objectively judged on the facts as found, was Mr Kavanagh guilty of gross misconduct that entitled Strata to dismiss him summarily?*

209. Yes. Based on my findings of fact above his conduct was such that it fundamentally undermined the trust and confidence between Strata and him. He was a senior member of staff and a company director. Even if he were suffering from stress and anxiety, he did not raise this until June and his poor behaviour appeared to predate that by some time. He was verbally abusive and aggressive towards junior members of staff repeatedly and behaved towards them in a threatening way. It was bullying. He swore. It is inappropriate for someone of his position. In addition, it met the definition in paragraph 11.28 of gross misconduct. In the context of his role, his behaviour and Strata's policies, he was guilty of gross misconduct.

*If so, did Strata affirm the contract before it dismissed him?*

210. No. While there was some delay it cannot objectively be described as such to show that they affirmed the contract. There is nothing else to infer that they affirmed the contract.

**ACAS code**

211. Mr Kavanagh raises the issue of breach of the ACAS code. I will deal with that at the remedy stage.

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Employment Judge Adkinson

Date: 1 June 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

**Notes**

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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