Case No. 2503704/2019
Code V

EMPLOYMENT TRIBUNALS

Claimant: Mr S J Graham

Respondent: Oakenclough Buildings Limited

HELD AT: Manchester **ON:** 15-16 September 2020

BEFORE: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr G Brady, Managing Director

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed;

2. Applying *Polkey*, the claimant would have been dismissed in any event and the compensatory award is reduced by 100%;

3. It is just and equitable to reduce the amount of the claimant's basic award because of blameworthy and culpable conduct before the dismissal, pursuant to section 122(2) of the Employment Rights Act 1996 and the award should be reduced by 100%;

4. It is just and equitable to reduce the amount of the claimant's compensatory award as the claimant did cause or contribute to his dismissal and therefore his compensatory award should be reduced by 100% pursuant to section 123(6) of the Employment Rights Act 1996.

REASONS

Introduction

1. The claimant had continuity of employment with the respondent from 16 June 2008. He was employed as a shed installer. On 2 August 2019 he was dismissed by the respondent for gross misconduct, following an incident which occurred on 5 July 2019. The claimant claimed that his dismissal was unfair. The respondent contended that the dismissal was fair by reason of conduct, or, in the alternative, for some other substantial reason being a breakdown in the duty of trust and confidence.

Issues

2. The issues were identified by Employment Judge McDonald at a Preliminary Hearing held on 5 March 2020. Those issues were recorded at paragraphs 15 and 16 of the case management order made following that hearing (155). At the start of the final hearing it was confirmed with the parties that the issues to be determined remained those previously identified.

3. Accordingly, the issues to be determined were as follows:

a. Can the respondent show a potentially fair reason for dismissing the claimant? The respondent puts forward two potentially fair reasons:

i. conduct;

ii. some other substantial reason, namely the breakdown of the relationship of trust and confidence between the employer and the employee because of the claimant's conduct towards Joanne Brady.

b. Did the respondent act reasonably or unreasonably in treating that potentially fair reason as sufficient reason for dismissing the employee? Specifically, in relation to the decision to dismiss the claimant for gross misconduct:

i. Did it genuinely believe the employee to be guilty of misconduct?

ii. Did it have reasonable grounds for that belief?

iii. At the stage at which it had formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

c. The claimant says that the procedure followed was not fair. He says that the investigation was carried out by a person who was biased, i.e. Mr Arthur Kaye who is a good friend of Mr Glen Brady, Managing Director of the respondent. He also says that he was not given any opportunity to speak at

the investigation and disciplinary meetings and therefore had no opportunity to put his case.

d. Was the respondent's decision to dismiss within the band of reasonable responses to the claimant's conduct (as found)? – this was recorded at paragraph 16 of the case management order;

e. If the Tribunal finds that the dismissal was procedurally unfair, would the claimant have been fairly dismissed in any event leading to a reduction in any compensation the Tribunal will award him? – this is known as a *Polkey* reduction;

f. Did the claimant otherwise contribute to his dismissal to such an extent that the compensatory or basic award should be reduced?

4. In noting issue (d), Employment Judge McDonald quite correctly explained in the case management order that the Tribunal is not allowed to substitute its own decision for that of the respondent. The question for the Tribunal was not whether the Tribunal would have dismissed the claimant in the circumstances shown by the evidence.

Procedure and evidence heard

5. The claimant appeared in person at the hearing. The respondent was represented by Mr G Brady, managing director.

6. The code V in the heading records that the hearing took place by CVP remote video technology. Both parties and all witnesses attended and gave evidence remotely. Members of the public were able to attend the hearing, albeit that in practice all attendees were those connected to the parties.

7. The parties had exchanged witness statements prior to the hearing. On the first day of hearing the Tribunal read the statements prepared by each of the witnesses.

8. The respondent had prepared statements for: Mr G Brady, managing director; Ms J Brady, company secretary and salesperson for the respondent (who is Mr G Brady's ex-wife); and Mr C Brady who undertakes work for the respondent (and is Mr G Brady's son). Mr A Kaye; a retired Police detective who had undertaken the investigation for the respondent (and was acknowledged to be a friend of Mr G Brady's), had not prepared a separate statement of evidence for the Tribunal hearing, but attended able to give evidence and did so by reference to the document which he had prepared summarising his investigation (93-95). Each witness confirmed the truth of their statement under oath and was cross examined, as well as being asked questions by the Tribunal.

9. The claimant had prepared a witness statement for himself and had also provided a statement for Mr L O'Brien, a former employee of the respondent. As with the respondent's witnesses, each person confirmed the truth of their statement under oath and was cross examined, as well as being asked questions by the Tribunal. It

was agreed with the parties that Mr O'Brien should give evidence prior to the claimant doing so, because that enabled his evidence to be heard on the first day of the hearing meaning that he did not need to return for the second day.

10. The Tribunal was also provided an agreed bundle which ran to 261 pages. The Tribunal read only the documents to which it was referred either in witness statements or in the course of the hearing. During the hearing the claimant also identified a few pages which had previously been included by him in a bundle prepared for the occasion when the case had previously been due to be heard, and those pages were read and considered by the Tribunal.

11. There was discussion in the hearing about whether the Tribunal should hear the recording of the interview undertaken by Mr Kaye and Mr G Brady with Mr O'Brien on 31 July 2019, or parts of the recording. The Tribunal was provided with a complete transcript of what was said in the interview (indeed the Tribunal was provided with two versions of the transcript – one from each party – 74-92 and 205-238). After considering this over night, the claimant confirmed on the second day that he was happy to rely on what was said in the transcript (and in particular 234-236), and did not need the Tribunal to hear the recording.

12. The parties each made oral submissions. At the end of submissions, the Employment Tribunal reserved judgment and accordingly provides the judgment and reasons outlined below.

Facts

13. The claimant was a long-serving employee of the respondent. The respondent is a small family business which is owned by Mr G Brady, who is the managing director and the only officer of the company, other than Ms J Brady.

14. The respondent currently has ten employees and at the relevant time had **[x]** employees. The respondent designs, manufactures and installs timber buildings and supplies members of the public. The respondent has two sites: North Shields – its main site; and Catterall.

15. The claimant worked with Mr O'Brien as a team installing timber buildings sold from the sales office at Catterall, based at the Catterall site. Ms J Brady managed the Catterall site and was the only other employee based there. The site at Catterall is located alongside Catterall coach-house, which is the home of Ms J Brady and her children. Mr G Brady described the site as being effectively part of the garden of the house, and the Tribunal was shown a photograph (175) which showed the site and the distance from the house to the place where the relevant events occurred.

Background

16. The claimant had a period of ill health absence in 2019. He attributed that illness to work he had undertaken for the respondent and the absence of PPE (such as masks) being provided to him or being used on a particular job. Mr G Brady contended that the respondent had engaged a health and safety consultancy in response to the issues the claimant raised. It is certainly the case that by July 2019

the claimant felt very strongly about this issue. Whilst the Tribunal heard some evidence about this, it does not need to make findings as it is not necessary for the issues before the Tribunal.

17. On 24 June 2019 there was a disagreement at the site between the claimant and Ms Brady at a back to work interview. The claimant alleged that this related to a contract which had been presented to the claimant and then taken away. Ms J Brady's evidence was that this arose as part of completion of a return to work form.

18. The disagreement (or at least a part of it) was witnessed by Mr C Brady. The claimant, in answer to a question from the Tribunal, described Mr C Brady as being someone who at that time was a very good friend of his out of work, and someone he had known for a long time, since Mr C Brady had been five or six years old.

19. At 17.01 on 24 June 2019 the claimant sent a text message to Mr C Brady (102) which said the following:

> "*Alright cha soz about the way I spoke to ya mum this morning in front of you. Yeah she's my boss but your mum and as ya mate I'm soz to you n ed x*"

20. The claimant accepted that there had been a confrontation and he had needed to make an apology to his friend as a result.

5 July incident

21. The claimant's evidence was that he recorded in the respondent's accident book his issue. He recorded that he had suffered a chest infection as a result of not being provided with proper PPE when fitting insulation. His view was that the accident book needed to be signed by someone from the respondent. The claimant and Ms J Brady spoke about this in early July, Ms J Brady's evidence being that she said she needed to speak to Mr G Brady.

22. On 5 July the claimant raised the accident book with Ms J Brady. It is not in dispute between the parties that this led to a disagreement between the claimant and Ms J Brady and voices were raised. The disagreement concluded outside the office – before the claimant left the site in a van with Mr O'Brien.

23. Ms Brady recorded an account of what occurred in a memo raising a complaint on 5 July. She described the claimant as "*becoming very aggressive shouting and pointing his finger at me*". Outside the office, she described him as "*jabbing his finger at me and waving his arms about, his face looked really angry*". She was worried how the incident was going to end.

24. The claimant's own account differed fundamentally from Ms J Brady's on the key elements, that is about whether he was aggressive or pointed at her as alleged. He alleged that Ms J Brady shouted at him. He stated that he did not point at Ms J Brady, but rather pointed at the shed where his tools were kept as part of highlighting the lack of PPE which he said should be stored in the shed. The claimant's statement to the Tribunal said "*At no point in this dispute did I swear, threaten or*

point in Joanne's face. Yes there were raised voices on both sides and I did point towards my tool shed, but certainly not at Joanne in an aggressive [manner]".

25. In his evidence at the hearing, the claimant maintained his denial that he was aggressive to Mrs J Brady or pointed in her face. He did however apologise to Ms J Brady and, when asked about this by the respondent, explained that it was the first opportunity he had to do so since the incident had occurred.

26. The Tribunal also heard evidence from Mr C Brady. His evidence was that he had witnessed the end of the disagreement, from the house. It had been brought to his attention by his sister, who was twelve years old at the time, who asked about what was going on outside. He saw the claimant "*standing in front of [Ms Brady] leaning forwards and pointing his finger towards her face….I saw that Mr Graham was red in the face and I would say he looked aggressive."* He went out towards the confrontation after seeing, what he described as, further aggressive pointing by the claimant. When cross-examined, Mr C Brady provide a detailed explanation of what he saw. The claimant's contention was that Mr C Brady could not have seen what he alleged from the distance he was away. The Tribunal found Mr C Brady to be a very credible witness and accepts his evidence about what he saw and why he left the house and walked towards the disagreement. Mr C Brady was clear about what he could see, even from some distance.

27. The Tribunal also heard evidence from Mr O'Brien. His evidence was that he had witnessed the end of the disagreement, and at that time the claimant was not aggressive and pointed at the shed (not Ms J Brady). He was interviewed during the respondent's internal procedures by: Ms Hernandez on 12 July; Mr Kaye on 23 July; and in detail and at length by both Mr Kaye and Mr Brady on 31 July. The transcript of the latter interview records Mr O'Brien being vigorously challenged about the accounts he had provided and the discrepancies which Mr Kaye and Mr Brady identified in those accounts. Mr Kaye's evidence was that Mr O'Brien's account shifted fundamentally from, initially, not having seen or heard much of what occurred, to later providing a more detailed account which supported the claimant's own account. Mr O'Brien's answers to questions put to him at the Tribunal, was that his answers differed because the questions asked differed, but what he said and the account he gave was true and did not change. The Tribunal does find that there are variations in the accounts provided by Mr O'Brien. However, the Tribunal does not find that Mr O'Brien's accounts differed as significantly as Mr Kaye suggested.

28. The Tribunal was provided with three other accounts of what occurred on 5 July, albeit not from witnesses who were called to give evidence at the hearing. These accounts were contained in transcripts of interviews undertaken by Mr Kaye on 29 July 2019.

29. The daughter of Mr G Brady and Ms J Brady, who was twelve years old at the time, was spoken to. She described that she had seen the claimant shouting at, and pointing at, Ms J Brady. She was worried for Ms J Brady.

30. Ms L Tyson, a friend of Ms J Brady's, was interviewed as she was in the house at the time of the incident, with Mr C Brady and his sister. She described the person arguing with Ms J Brady as being red faced with a really screwed up face,

throwing his arms around. She said it looked like he was throwing a dart. She feared something would happen to Ms J Brady because the person was so angry. She said the person was aggressive and it was quite scary. There was some confusion in her statement about who was the claimant and who was Mr O'Brien and her statement includes an account of the claimant visiting the house with a nose-bleed. This does raise questions about the reliance which can be placed on the accuracy of the account, as it was common ground between the parties that the person who visited the house was in fact Mr O'Brien and not the claimant. Nonetheless there was no dispute that the person seen disagreeing with Ms J Brady could only have been the claimant.

31. Ms R Mufema was also interviewed, being Mr C Brady's girlfriend and someone who was also present in the house on 5 July. She described what she saw as "*he was like talking to her like shouting he seemed like he was fuming, he was using a lot of hand gestures and sort of pointing at her yeah he just seemed agitated*".

The investigation and disciplinary process

32. The claimant was suspended on Sunday 7 July 2019. The claimant was unhappy that Mr G Brady visited his house to give him the suspension letter. The claimant did not complain that the respondent had not complied with its procedure when suspending him.

33. A Ms C Henandez of Croner Face 2 Face undertook an investigation for the respondent which involved speaking to the claimant on 12 July, Mr O'Brien and Ms J Brady. She prepared a report which summarised what she had been told. Mr G Brady's evidence was that he did not utilise her further for financial reasons, her initial report was provided as part of the service but further work would have needed to be paid for. The Tribunal finds that was the reason why Mr G Brady did not use her further for the investigation. The report was provided to the claimant.

34. Mr G Brady instead asked Mr A Kaye to undertake the investigation for him. Mr Kaye is a friend of Mr G Brady's and did this work without payment. Mr Kaye has no experience at all of undertaking employment-related investigations and used the respondent's disciplinary procedure as the basis for doing so. As a former police detective, he has vast experience of investigating criminal matters. The way the investigation was undertaken and the documentation prepared, clearly reflect Mr Kaye's background and experience.

35. The investigation process was delayed as a result of witnesses being on holiday during the relevant period. Mr Kaye spoke to Mr O'Brien on 23 July. He spoke to the claimant briefly on the same day. As confirmed above, he spoke to others on 29 July. The claimant was critical of the time taken for the investigation to be undertaken, but the Tribunal accepts the respondent's submissions that it was done without undue delay in the circumstances where the relevant witnesses were away on holiday. There was no disadvantage identified by the claimant which arose as a result of any delay.

36. Mr Kaye and Mr G Brady undertook a second lengthy interview with Mr O'Brien on 31 July. Mr O'Brien, from his evidence to the Tribunal, clearly found this interview very difficult, describing it as an interrogation. Both Mr G Brady and Mr Kaye are former police officers and this is reflected in the transcript in the way that they challenged and explored with Mr O'Brien the perceived discrepancies in his accounts.

37. The Tribunal had the benefit of a full transcript of this meeting. Towards the end of the meeting, Mr Kaye said the following to Mr O'Brien (being the most notable example of how he approached Mr O'Brien, but being broadly reflective of the latter parts of the interview generally) (90 and 235):

> "*coz you know Scott is in the sh*t"*
>
> and in answer to Mr O'Brien asking why that was the case
>
> *"Because Scott stepped over the mark and has been in Joanne's face that's why and you saw it happen"*

38. Mr G Brady subsequently said the following to Mr O'Brien (91 and 236):

> "*I've not seen this and I've not witnessed this I've just dealt with the after effects of people phoning me up both my sons saying dad blahdy blahdy blah, I'm not having this anymore this is where we live, Scott has gone over the mark this time, I like Lee and Scott but he has gone too far over the mark this time and I'm not having it"*

39. The claimant was due to attend an investigatory meeting on 31 July, but it was re-arranged to 1 August as he had not been notified of the date in writing. At 7 pm on 31 July, the claimant received the statements obtained during the investigation by email. He was able to read them, but unable to print them off to refer to at the disciplinary hearing.

40. The respondent's handbook contains a disciplinary procedure. Mr G Brady and Mr Kaye's evidence was that they followed that process. The claimant had not read that procedure prior to it being disclosed for the Tribunal proceedings. That provides, in summary, for the following (131-133):

a. Formal investigations should be carried out by the most appropriate manager who is not directly involved with the incident being investigated. That manager may involve others to assist with the investigation process;
b. Relevant facts should be gathered promptly and statements should be taken at the earliest opportunity;
c. A report should be prepared which outlines the facts of the case;
d. An investigatory hearing should be set up chaired by the appropriate senior manager/director, accompanied by another manager;
e. The investigating manager would present his findings, witnesses should be called and the employee allowed to question those witnesses;

f. Following full presentation of the facts and the opportunity afforded to the claimant to state his side of the case, the hearing should be adjourned, and the senior manager/director and other manager would decide the appropriate option, which can include to proceed to a disciplinary hearing;
g. The parties should be brought back and informed which option has been chosen;
h. If the decision had been taken to proceed to a disciplinary hearing, this may follow on immediately from the investigatory hearing (if certain criteria were met, which the claimant did not dispute applied);
i. The manager should inform the employee that the hearing would now become a formal disciplinary hearing, and invite them to say anything further in relation to the case;
j. In a list of non-exhaustive examples of potential gross misconduct, the list included "*physical assault, breach of the peace or verbal abuse*"; and
k. An appeals process provided the opportunity to appeal the outcome and for appeals to be heard by the appropriate director or chief executive.

41. The claimant did not dispute that the stated procedure was followed, save that he objected to Mr Kaye, as a friend of Mr G Brady's, being appointed as the investigator. Each of the steps outlined was undertaken, save for (e) about which the claimant did not complain. It was also not in dispute that in the respondent organisation, Mr G Brady was the only person who could be the appropriate manager to instigate the investigation, chair the investigatory meeting and disciplinary hearing and consider the appeal.

42. An investigatory meeting was conducted with the claimant on 1 August 2019, chaired by Mr G Brady and with Mr Kaye also in attendance. The claimant was offered the opportunity to be accompanied but did not take the opportunity to do so (he referred in his evidence to the Tribunal to being unable to afford to be represented). Notes were provided to the Tribunal (98-101). Unlike the other meetings undertaken as part of the investigation, a full transcript was not available. The claimant alleged this was because the respondent did not want the Tribunal to see a full record of what was said. The respondent denied this and stated that the recording had been lost as a result of a change of phones and the way in which it was stored and transmitted making it inaccessible. The claimant contended that the record of Mr O'Brien's interview the previous day showed the manner in which his own meeting/hearing was conducted. There was no suggestion that the claimant asked for the meeting/hearing to be postponed so that he could have more time to prepare.

43. In the meeting the claimant denied that he had raised his voice, been abusive, or pointed in Ms J Brady's face. In response to the statements provided, he alleged that the family members had colluded and it was a stitch up.

44. During a break, Ms J Brady was spoken to and she provided a photograph which she said showed the page from the accident book which she had photocopied for the claimant screwed up as she had found it on the ground following the

discussion. In the Tribunal the claimant did not deny screwing up the copy of the accident book provided – but said this was because it was incorrectly dated and he said it had been left on the table, not thrown to the ground. Mr C Brady was spoken to and showed the text message apology referred to above. The meeting reconvened and the allegations were further discussed. The meeting concluded with the claimant stating that at no time had the incident happened in the way the witnesses described.

45. There was a break. Mr G Brady concluded that the matter should proceed to a disciplinary hearing. The disciplinary hearing then commenced. The claimant was advised of his right to be accompanied/represented, but he declined. The claimant continued to deny what was alleged. Mr G Brady asked the claimant if he would apologise and he said he would not do so as he had done nothing wrong. The notes record that Mr G Brady concluded that on the balance of probabilities the incident had occurred as outlined by the witnesses, that the claimant had been aggressive and threatening towards Ms J Brady and that amounted to gross misconduct. The claimant was informed that he was to be dismissed, Mr G Brady discounted any other options for reasons he explained.

46. The dismissal was confirmed in a relatively brief letter sent by Mr G Brady and dated 2 August 2019 (143). That recorded that "*Following your dismissal hearing on 1st August 2019, the outcome was reached that you are to be dismissed from employment with [the respondent] with immediate effect on the grounds of gross misconduct".* By way of explanation for the decision it said "*Statements were taken from witnesses an investigation was carried and the act of gross misconduct was established following an incident on the 5th July 2019 at Caterall Coach House*". The claimant's right to appeal was confirmed. No mention was made in this letter of a breakdown in trust and confidence.

47. In his evidence to the Tribunal, Mr G Brady stated that on the balance of probabilities and taking account of all the witnesses' accounts, he concluded that the incident did take place as described by Ms J Brady and that the claimant's conduct amounted to gross misconduct. In the absence of other options (particularly in the light of the fact that the claimant had denied the event and refused to apologise), he felt that dismissal was the only option left. Mr G Brady felt that the procedures were followed to the best of his abilities. He acknowledged that the investigation took longer than he would have liked, but he felt it was necessary to gather information from all the witnesses who were present. In respect of his decision, Mr G Brady emphasised that: Ms J Brady lived and worked at the same premises; his daughter had witnessed the incident; Ms J Brady had been left shocked by the incident; and he did not feel he could expose staff and their families to this conduct. In explaining why he did not accept the claimant's account, Mr G Brady explained certain issues which he felt undermined his account.

The appeal

48. The claimant appealed in a letter dated 13 August 2019 (144). He stated that he thought it was an unfair decision. He said "*I admitted throughout my suspension I had a dispute with Mrs J Brady but I was not violent or aggressive in any way both myself and Mrs J Brady was raising our voices*". He stated that the respondent had

made him feel that it wanted to end his employment. He felt the investigation "*was one sided as the decision was made by 5 statements from people related to yourself or friend of your relatives who was more than 100 yards away from the dispute in question behind a closed door. I also feel the statements were talked about before they were made*". The claimant contrasted the approach of Ms Hernandez with Mr Kaye, who he said had treated him like a criminal. The appeal letter concluded with the statement that the claimant did not feel like he could come back to work for the respondent, he was seeking a redundancy payment for his service.

49. An appeal hearing took place on 4 September 2019 chaired by Mr G Brady and attended by Mr E Brady (Mr G Brady's son). There was no complaint from the claimant that Mr G Brady conducted the appeal (although the claimant did not feel the Mr E Brady should not have attended and he complained about his conduct in the meeting). In the appeal hearing there was a disagreement about whether the claimant had seen notes of the interviews with Mr O'Brien. The claimant asked Mr G Brady to reconsider dismissal for redundancy as he said that having an argument with someone was not gross misconduct. The Tribunal were provided with notes of the appeal, which was a relatively brief meeting (146-147). The claimant stated that he did not want his job back.

50. The appeal was not upheld. Mr G Brady provided his decision in a letter of 6 September 2019 (148). Mr G Brady explained that the claimant was not redundant.

51. In his evidence Mr G Brady denied that he had wished to force the claimant out of the company. In particular, he explained that the incident had occurred at the busiest time of the year. His evidence was that he would have preferred to still have the claimant and Mr O'Brien working for him.

The Law

Unfair dismissal

52. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

53. The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for a fair reason. Here the respondent relies upon two alternative fair reasons: conduct; or some other substantial reason (namely the breakdown of the relationship of trust and confidence). If the respondent fails to persuade the tribunal that it had a genuine belief in the claimant's misconduct and that it dismissed him for that reason, or that it dismissed him for some other substantial reason being the breakdown in trust and confidence, the dismissal will be unfair.

54. If the respondent does persuade the tribunal that it held the genuine belief and that it did dismiss the claimant for one of those reasons, the dismissal is only potentially fair. The Tribunal must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably

in treating the reason relied upon as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

55. In conduct cases, when considering the question of reasonableness, the tribunal is required to have regard to the test outlined in **British Home Stores v Burchell [1980] ICR 303**. The three elements of the test are:

(1) Did the employer have a genuine belief that the employee was guilty of misconduct?

(2) Did the employer have reasonable grounds for that belief?

(3) Did the employer carry out a reasonable investigation in all the circumstances?

56. The additional question is to determine whether the decision to dismiss was one which was within the range of reasonable responses that a reasonable employer could reach.

57. It is important that the tribunal does not substitute its own view for that of the respondent, **London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220** at paragraph 43 says:

> "*It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question- whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal*"

58. The appropriate standard of proof for the respondent's decision-maker, is whether on the balance of probabilities they believed that the misconduct was committed by the claimant. They do not need to determine or establish that the misconduct was committed beyond all reasonable doubt (nor do they need to do so on any other more onerous basis than the balance of probabilities).

59. In considering the investigation undertaken, the relevant question for the Tribunal is whether it was an investigation that fell within the range of reasonable responses that a reasonable employer might have adopted. Where the Tribunal is considering fairness, it is important that it looks at the process followed, as a whole, including the appeal.

60. The Tribunal referred to the ACAS code of practice on disciplinary and grievance procedures, to which it is required to have regard. The Tribunal considered all of the ACAS code but one thing within the ACAS Code which was identified as being of particular note (which was highlighted to the respondent during submissions) was that it says (with the Tribunal's emphasis added): "*Employers*

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

Polkey

61. In *Polkey* the House of Lords held that the fact that the employer can show that the claimant would have been dismissed anyway (even if a fair procedure had been adopted) does not make fair an otherwise unfair dismissal. However, such evidence (if accepted by the Tribunal) *may* be taken into account when assessing compensation and can have a severely limiting effect on the compensatory award. If the evidence shows that the employee *may* have been dismissed properly in any event, if a proper procedure had been carried out, the Tribunal should normally make *a* percentage assessment of the likelihood and apply that when assessing the compensation. In applying a *Polkey* reduction the Tribunal may have to speculate on uncertainties to a significant degree.

62. In ***Hill v Governing Body of Great Tey Primary School*** **[2013] IRLR 274** the EAT explained *Polkey* as follows:

> *"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 been dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the 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) … 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."*

63. That Judgment emphasises that the issue is what the respondent would have done and not what a hypothetical reasonable employer would have done in the circumstances.

64. The onus is on the respondent to adduce evidence to show that the dismissal would (or might) have occurred in any event. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the claimant. There will be circumstances where the nature of the evidence on which the respondent seeks to rely, is so unreliable that the Tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. (***Software 2000 Ltd v Andrews*** **[2007] IRLR 568**).

Contributory fault

65. Section 122(2) of the Employment Rights Act 1996 provides that the basic award shall be reduced where the conduct of the employee before dismissal was such that it would be just and equitable to do so. It is important to note that a key part of the test is determining if it is just and equitable to do so.

66. Section 123(6) of the Employment Rights Act 1996 provides that if the Tribunal finds that the claimant has, by any action, to any extent caused or contributed to his dismissal, it shall reduce the amount of the compensatory award as it considers just and equitable having regard to that finding. This test differs from the test which applies to the basic award.

67. There are three factors required to be satisfied for the Tribunal to find contributory conduct: the conduct must be culpable or blameworthy; it must have cause or contributed to the dismissal; and it must be just and equitable to reduce the award by the proportion specified. (**Nelson v BBC (No 2) [1979] IRLR 346**).

Discussion and conclusions

68. The Tribunal finds that the claimant was dismissed by reason of his conduct. The Tribunal accepts Mr G Brady's evidence about why he dismissed the claimant. The Tribunal does not find that the claimant was dismissed because the respondent wished to force him out. The incident of 5 July 2019 and Mr G Brady's perception of the claimant's conduct towards Ms J Brady on that day, were the reason why the claimant was dismissed.

69. The Tribunal does not find that the real reason for the claimant's dismissal was a breakdown in trust and confidence. Whilst there is clearly an overlap between the respondent's reason for dismissal – conduct – and the extent to which the respondent had trust and confidence in the claimant, the real reason for the dismissal was conduct. This was, in particular, evidenced by the words used in the letter confirming the dismissal of 2 August 2019 which records only gross misconduct as being the reason and makes no reference to trust and confidence. The entire focus of Mr Kaye's investigation, and that of the investigatory and disciplinary hearings, was an allegation of misconduct. The Tribunal finds that the reason for Mr G Brady's decision to dismiss the claimant was misconduct and not some other substantial reason.

70. Mr G Brady did believe that the claimant was guilty of misconduct for the reasons given. Based upon the five statements and evidence obtained from Ms J Brady, Mr C Brady, his daughter, Ms Tyson and Ms Mufema, Mr G Brady had reasonable grounds for that belief. Whilst the evidence of the claimant and Mr O'Brien was contrary to the evidence of those five witnesses, nonetheless those statements and evidence provided reasonable grounds for the decision reached. Mr G Brady explained why he discounted the evidence of the claimant and Mr O'Brien, and that is a decision he was able to reach based on the evidence before him – it is not the role of the Tribunal when deciding whether there were reasonable grounds for the belief to decide whether it would have reached the same decision.

71. The claimant maintained before the Tribunal the argument which he had put forward in his appeal – that is that he believed that he had been stitched up by a collusion between a group of five people who were family members or close friends of the family. It was a notable aspect of the facts of this case that the five people who provided statements/evidence about the events of 5 July 2019 were all related or closely associated. However, the Tribunal has not heard any evidence which genuinely substantiates collusion. The Tribunal has heard the evidence of Mr C Brady and Ms J Brady under oath. It found both individuals to be genuine in the evidence they gave. As confirmed above, Mr C Brady in particular was found to be a credible witness and it is noted that prior to this incident he was a friend of the claimant's. The Tribunal does not find that Mr C Brady colluded with others – it finds that his evidence about what he believed he saw on 5 July was his true account.

72. The investigation undertaken by Ms Hernandez was somewhat limited. The investigation undertaken by Mr Kaye was extremely thorough. He spoke to all of the witnesses to the events, prepared full transcripts of exactly what everybody said (save for the claimant himself) and obtained the limited evidence available (or at least such evidence had been obtained before the end of the investigatory meeting with the claimant). The respondent carried out as much investigation as was reasonable, indeed there was no suggestion of anything else which could have been done.

73. The Tribunal can understand the claimant's criticism of Mr Kaye as investigator and his perception that he was too close a friend of Mr G Brady's to fairly investigate. However, there is nothing in the ACAS code or the respondent's procedure which requires an investigator to have any particular distance from the respondent's managing director or to be unknown to or unconnected with him. Mr Kaye's evidence was that he believed he conducted a full investigation and this is evidence which the Tribunal accepts. Mr Kaye certainly conducted the investigation in a way which reflected his experience as a police detective and his approach to questioning witnesses was more robust than would be the usual approach from an HR professional. Nonetheless the Tribunal does not find Mr Kaye to have been biased in his investigation. He was forthright and prosecutorial in his questioning of what he perceived to be contradictions in a witness' account.

74. The claimant did have the opportunity to put forward his own case. He was interviewed as part of the investigation. He had the opportunity at both the investigatory meeting and subsequent disciplinary meeting. He was able to explain himself in his appeal letter and was given the opportunity to expand upon those grounds at the appeal hearing. He may have felt intimidated at the hearings on 1 August 2019, but he was still able to put his case in response to the allegations made. His response was: it didn't happen as the five witnesses said; their accounts were not true; and the accounts of himself and Mr O'Brien should be preferred to the accounts of the five others. Mr G Brady understood that – it was just that on the balance of probabilities he did not agree with the claimant.

75. However, in applying equity and the substantial merits of the case, the Tribunal finds the dismissal to be unfair. The ACAS code makes clear that the individual's opportunity to put their case must be before any decisions have been made. The way in which Mr G Brady conducted himself in the interview with Mr O'Brien on the day before the investigatory meeting and disciplinary hearing and, in

particular, the things that Mr G Brady said (see paragraph 38 above) make it very clear that Mr G Brady had made up his mind about what had occurred on 5 July 2019 by 31 July 2019 and therefore before the claimant had been given the opportunity to put forward his case (which only occurred the following day).

76. The Tribunal has taken into account the limited size of the respondent and the limited senior management available. As a result, the Tribunal does not find that it was unfair for Mr G Brady to have undertaken the roles which he did: part investigator; disciplinary decision-maker; and person who heard the appeal. However, in order for the dismissal to be fair, it was incumbent upon Mr G Brady to have an open-mind when he attended the investigatory meeting with the claimant on 1 August and he did not.

77. When making submissions, Mr G Brady was offered the opportunity to explain the respondent's position on this potential issue which the Tribunal had identified. His explanation highlighted the absence of any apology from the claimant and emphasised that the fact that the claimant did not accept what had occurred and was not willing to apologise for it, meant that there were no other options open besides dismissal. Mr G Brady's explanation was that he did not know what the claimant would say until the meetings on 1 August. Whilst these matters are clearly important for the appropriate sanction and the Tribunal accepts that Mr G Brady had not closed his mind to an alternative sanction when he attended the meetings on 1 August – he had determined what had occurred on 5 July in the light of the statements of others, without first giving the claimant the opportunity to state his case. In that respect, the outcome of the meeting and hearing on 1 August were pre-determined.

78. On the basis of the claimant's answers to questions asked of him, there was not really any dispute that the decision to dismiss was within the band of reasonable responses to the claimant's conduct as found. The claimant denied that what was alleged had occurred, but if it had occurred as alleged/found it was conduct for which a reasonable employer could dismiss. The respondent's handbook identified verbal abuse as potentially gross misconduct. The accounts of Ms J Brady, Mr C Brady and Ms Brady's daughter, all record conduct which, if accepted, was clearly conduct for which a reasonable employer could reasonably decide to dismiss. The fact that the place of work was also the home of Ms J Brady and the residence of a child, also support such a decision being entirely reasonable.

Polkey

79. As identified in the law section above, the application of *Polkey* requires the Tribunal to determine what would the outcome have been had a fair disciplinary hearing have been conducted by this employer – in practice that means by Mr G Brady. On the assumption that Mr G Brady had acted fairly (without having already made up his mind about what occurred) what would have been the outcome? Taking account of all the evidence, the Tribunal finds that this is a case which falls at one of the extremes described in the *Hill* Judgment, as cited above. The claimant would still have been dismissed had Mr G Brady weighed the five statements against the evidence of the claimant and Mr O'Brien, and had he given the claimant a fair opportunity to put his case before reaching a decision. Accordingly, applying the *Polkey* principles, the compensatory award should be reduced by 100%.

Contributory fault

80. As a result of that finding, the issue of contributory fault has practical relevance only to the basic award. The Tribunal has however considered how it should apply to both awards.

81. The issue to be determined as identified was: did the claimant otherwise contribute to his dismissal to such an extent that the compensatory or basic award should be reduced? The Tribunal's decision is that yes he did and both awards should be reduced by 100%.

82. Applying the three factors in *Nelson*: the Tribunal finds that the claimant's conduct on 5 July 2019 was culpable and blameworthy; it caused or contributed to the dismissal; and it is just and equitable to reduce the award by the proportion specified – 100%. In reaching this decision, the Tribunal relies particularly upon the evidence of Mr C Brady and the account he gave, which corroborates the account of Ms J Brady (for the reasons explained at paragraph 26 above).

83. That conclusion is also supported by the following (none of which are central to the decision but each of which reinforce the decision made): the text message in which the claimant apologised to Mr C Brady for his conduct towards Ms J Brady on a previous occasion; the claimant apologising to Ms J Brady in the Tribunal hearing; the inconsistencies in Mr O'Brien's accounts; and the three other statements/transcripts which supported Mr C Brady's and Ms J Brady's account.

84. Whilst the wording of Section 122(2) of the Employment Rights Act 1996 in respect to the basic award differs from that which applies to the compensatory award, nonetheless the Tribunal finds the conduct to be blameworthy and culpable and it to be just and equitable to apply the same reduction.

Conclusions

85. As outlined above and for the reasons given, the claimant succeeds in his claim that he was unfairly dismissed by the respondent.

86. Applying the principles in *Polkey* and as a result of the findings on contributory fault, the claimant's basic award and compensatory award are both reduced by 100%.

Employment Judge Phil Allen

18 September 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

25 September 2020

FOR THE TRIBUNAL OFFICE