



EMPLOYMENT TRIBUNALS

Claimants: Mr M Popa
Ms E Cazan

Respondent: Headset Sales Limited

HELD AT: Liverpool **ON:** 20 and 21 July 2020

BEFORE: Employment Judge Aspinall
(sitting alone)

REPRESENTATION:

Claimants: Each in person, supported by the other
Respondent: Ms Cummings of Counsel

JUDGMENT having been sent to the parties on 3 August 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Mr M Popa's claim

Introduction

1. By a claim form dated 18 December 2019 the claimant brought claims for unfair dismissal, for a redundancy payment and he claimed reimbursement of the cost of driving lessons, a failed driving test and reimbursement of the cost of a missed flight. The claimant had contacted ACAS for early conciliation and achieved a certificate number R806190/19/84 on 9 December 2019.

2. The claimant commenced proceedings against four respondents. The first respondent was Headset Sales Limited for whom he worked from 5 August 2015 until he was dismissed on 28 November 2019. The second respondent was Mr Keith Swindell. The third respondent was Emma Phillips and the fourth respondent was Chris Phillips. Emma and Chris Phillips are the owners of the business and Mr Swindell is their Operations Manager. On 2 January 2020 the claims against Mr Swindell, Ms Phillips and Mr Phillips were rejected under Rule 10(1)(c) of the Employment Tribunals Rules of Procedure 2013 because the claimant had not got

ACAS early conciliation certificates against those respondents. The claimant asked for a reconsideration of the rejection. Employment Judge Shotter, on 19 February 2020, decided that it was not in the interests of justice to reconsider the rejection decision. The claim proceeded against the first respondent.

3. The claimant's claim against the first respondent was that despite a promise from the owners that nothing would change Mr Swindell, when he became operations manager, had tried to make changes to the rate and times of overtime payments and to the claimant's working hours, (in the event no changes were imposed) and had moved the location of the business from Unit 40 to Unit 5 within the same Business centre.

4. The first respondent defended the claims in its response form. It says the claimant refused to follow reasonable and lawful requests and was argumentative, confrontational and unreasonable, and that he had brought a grievance, alleging bullying, maliciously. It conducted an investigation and appointed an HR Consultant who conducted a disciplinary hearing and dismissed the claimant on the grounds of "some other substantial reason" following a breakdown in the working relationship. There was an appeal by way of a review by the dismissing officer of his own decision. The review upheld the decision to dismiss.

The Hearing

5. The hearing took place over two days on 20 and 21 July 2020 at Liverpool Employment Tribunal in person with social distancing measures in place. The respondent had prepared a bundle (Bundle 1) which ran to 164 pages. During the course of the hearing the respondent added more pages to the bundle, so that by consent it became a bundle of 185 pages.

6. The claimant confirmed at the outset of the hearing that his claim is for unfair dismissal and that reference to a redundancy payment and to the costs of his driving lessons, failed test and missed flight all relate to how much he says he should be awarded if he wins his claim.

7. The respondent had prepared a List of Issues which was agreed by the claimants at the start of the case.

7.1 Was the claimant dismissed for one of the 5 potentially fair reasons as per section 98(1) and 98(2) of the Employment Rights Act 1996 ?

7.2 Did the respondent act reasonably in treating reason is a sufficient reason for dismissal in accordance with section 98(4) ERA 1996 ?

7.3 Did the respondent follow a fair procedure?

7.4 Did the respondent's decision to dismiss the claimant fall within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted ?

7.5 What remedy is the claimant entitled to ?

- 7.6 Was the claimant's conduct before dismissal such that it would be just and equitable to reduce the claimant's basic award ? If so, by what proportion will the basic award be reduced ?
- 7.7 Did the claimant's conduct contribute to his dismissal such that the claimant's basic and compensatory award ought to be reduced? If so by what proportion would it be just and equitable reduce the claimant's award?

Evidence

8. I heard evidence from Mr Popa. He gave his evidence in a straightforward way but lacked insight into what the case was about. He wanted to persuade me to enforce the "no changes" promise that he says was made to him. Even when it was explained to him what the focus of the claim would be, with reference to the list of issues, he persisted in wanting to demonstrate that Mr Swindell was a bully and a liar because he had broken the "no changes" promise.

9. I heard evidence from Mr Swindell on behalf of the respondent. I had witness statements from Chris Phillips, Emma Phillips, Laura Cross and Andy Cross. It was agreed that as the witnesses would not be called it would be a matter for me as to how much weight if any I would attach to the witness statements.

10. I heard evidence from Mr Swindell. I found Mr Swindell to be credible when he told me that the claimant had been persistently aggressive and argumentative, had refused to accept his authority, had mimicked him called him a bully and a liar, had repeatedly attempted to contact the Phillips', in rejection of Mr Swindell's authority and that Mr Swindell had become afraid of the claimant. I accepted that Mr Swindell had been tearful at home on occasion and reluctant to come to work because of the atmosphere created by the claimant. Mr Swindell gave credit for the claimant being a good worker. I found him able to maintain a balanced view of the claimant despite the aggression he had experienced from the claimant.

The Facts

11. The claimant worked for the respondent as a Technical Engineer fixing headsets from 5 August 2015 until 28 November 2019. The respondent business was owned by Mr Chris Phillips and Mrs Emma Phillips. The claimant got on well with them. He was a valued employee. He had started work at a rate of £8.30 per hour but in February 2019 it was increased to £9.50 per hour. He worked overtime as and when needed and his hours of work were 8.30am to 4.30pm.

12. The claimant loved his job. From childhood he had been interested in fixing things and he enjoyed working as a Technical Engineer and fixing the headsets. It was his intention to remain employed with the respondent, where his partner Ms Cazan also worked, and in time to seek British citizenship.

13. In May 2019 Mr and Mrs Phillips introduced the claimant to Mr Keith Swindell. He was to be their new manager and the plan was that he would in time buy the business and become its owner. Mr and Mrs Phillips would oversee the business but Mr Swindell was clearly the day to day manager. Mr and Mrs Phillips assured

the claimant that his job was safe, in fact so secure that they told him he could, for example, go to the bank and take out a loan confident that his job was safe going forward. This was echoed by Mr Swindell. Mr and Mrs Phillips and Mr Swindell met with the claimant in May 2019 and again assurances were given about job stability. The claimant mistakenly took those assurances to mean that there would be no changes at all in his employment, but that is not what Mr Swindell had said.

14. The claimant and Mr Swindell worked happily together and both described the workplace as having been a friendly and happy environment. The claimant noticed that the workload had increased and in August 2019 he approached Mr Swindell and asked for a pay rise, and he raised the issue of lunch breaks being paid: sometimes he had to stay in the office during lunchtime to receive deliveries. Mr Swindell considered but refused the request for a pay rise, but he said that lunch breaks would be paid if the claimant had to remain on site to take deliveries. After this conversation the relationship between the claimant and Mr Swindell changed.

15. In September 2019 the claimant raised an issue about unfairness in holiday entitlement. He said that he had noticed another employee (JM) was taking more than his share of annual leave. The claimant had plotted JM's leave on a calendar.

16. On 13 September 2019 Mr Swindell and the claimant discussed a potential change to the hours of the working day. The respondent wanted to change the hours to be 9.00am to 5.00pm hours. The claimant resisted this change. He resisted on the basis that his partner Ms Cazan liked to go to the gym and start classes promptly at 5pm and that in the winter she should not have to go home in the dark after 5pm. Mr Swindell sought to persuade the claimant of the business reasons for a move to 9.00am to 5.00pm, but again the claimant resisted the change and during the course of what became a heated exchange the claimant called Mr Swindell a liar. Mr Swindell did not change the hours. He acceded to the claimant's objection so that the claimant and Ms Cazan remained on 8.30 -4.30 hours.

17. There was also a discussion in September 2019 about overtime. The respondent offered to increase the rate of overtime pay to 1½ times the hourly rate provided that overtime would only be undertaken when it had been previously authorised in writing by Mr Swindell. The claimant resisted this change. He said he had been told there would be no changes. Again, later that day he called Mr Swindell a liar. The claimant phoned Mr Phillips and accused Mr Swindell of being a liar and of laughing at him. The claimant's overtime rate of pay was increased and he was instructed only to do overtime when authorised in writing by Mr Swindell.

18. A meeting had been set up with HR for Wednesday 18 September but after the events of 13 September the meeting was brought forward to Monday 16 September.

19. On 13 September Mr and Mrs Phillips had been so concerned about tension in the relationship between the claimant and Mr Swindell that they had come to the business premises to support Mr Swindell but they had remained in the car park and not come into the office. They met with Mr Swindell in the car park to discuss the incident with the claimant. The claimant saw the meeting taking place and was hurt by it, and he questioned Mr Swindell about it, and he again accused Mr Swindell and Mr Phillips of being liars because of the promise he had had about no change.

20. On 16 September in the normal course of his work Mr Swindell asked the claimant to do some work on a wireless headset. The claimant refused to do the task asked of him and told Mr Swindell that he would not do anything that he told him to do. Mr Swindell said that if the claimant continued like this he would have to ask him to leave the office. The claimant mimicked Mr Swindell and again called Mr Swindell a liar. The claimant was abusive to Mr Swindell on other occasions that day. The claimant was shouting and yelling. The claimant repeatedly asked Mr Swindell as to whether or not he had spoken to Mr Phillips that day.

21. On 17 September Mrs Phillips came to the office and said that she had CCTV footage that would prove that the claimant had been shouting and yelling the previous day. The claimant was saying this could not be the case as the cctv system did not record audio. Mr Swindell could hear the way in which the claimant was speaking to Mrs Phillips and he interjected to say, "you shouldn't speak to a director like that". The claimant told Mr Swindell to shut up and to keep out of it. Mrs Phillips told Mr Swindell that she found the claimant to be loud and aggressive to her that day, and to be repetitive in continuing to go over old issues. This exchange so upset Emma Phillips that she left the office. Mr Swindell went to look for her, he was concerned for her welfare, and he found her in tears. He spoke to Laura Cross from HR and found out that he could ask the claimant to leave so as to let matters cool down. He conveyed this to Mrs Phillips and it was agreed that he would ask the claimant to leave work early so as to go home and calm down. Mr Swindell was concerned at what the claimant might do and so he asked the claimant to leave and he took the claimant's keys from him.

22. Later on 17 September Mr Swindell messaged the claimant to tell him to come back to work the next day, 18 September, as usual and it was agreed that Ms Cazan would bring the office keys to Mr Popa so that he could come back in with the keys the next day.

23. On 3 October 2019 there was a discussion between the claimant and Mr Swindell about clock cards. The claimant was resisting Mr Swindell's instruction that the cards must be signed to authorise overtime. The claimant's position was that he did not want an increase in his overtime pay: what he wanted was an increase in the basic rate of pay. This had already been considered by Mr Swindell and rejected but the claimant was trying to revive his request for an increased rate of basic pay.

24. On 9 October Mr Swindell gave the claimant a letter of apology about having sent the claimant home on 17 September. He gave it to the claimant in an attempt to settle what had become an increasingly difficult working relationship. The claimant did not welcome this letter of apology. He waved it at Mr Swindell and said that it was not good enough and he mimicked Mr Swindell.

25. Mr Swindell observed on 9 October an exchange between the claimant and Mrs Phillips. The claimant had known that Mrs Phillips was coming into the office that day and had complained to Mr Swindell about the way in which he and his partner, Ms Cazan, were being treated. Mr Swindell attempted to outline the changes that were being brought into the company in order to grow the business and move the business forward, and again Mr Swindell said that there was a secure role for the claimant in the business going forward, but the claimant mimicked him. Mr

Swindell told the claimant that he was not being rational and that he was therefore not prepared to continue the conversation. Mr Swindell observed the conversation between the claimant and Mrs Phillips which then took place. The claimant complained to Mrs Phillips that the apology letter had not been good enough. The layout of the office was such that the claimant was speaking across the room to Mrs Phillips and Mr Swindell was in the middle. Mr Swindell tried to join the conversation, which was about the apology letter and other things, and was told by the claimant to shut up and stop interrupting. When Mr Swindell and Ms Phillips told the claimant he was being unreasonable the claimant accused Mr Swindell and Ms Phillips of being racist.

26. On 10 October the claimant instructed Mr Swindell to start cleaning the tools in the office. The claimant complained that Mr Swindell did not clean up enough himself and that the claimant was sick of cleaning up after him. He complained also that Mr Swindell had made an error on some paperwork and the conversation descended into the claimant criticising Mr Swindell and refusing to obey his instructions and complaining about matters from the past.

27. At around 2.20pm that day the claimant approached Mr Swindell to say he had been trying to get hold of Mrs Phillips but she was not returning his calls. He asked if he and his partner, Ms Cazan, could leave the office early that day at around 3.30pm but still be paid until 4.30pm. Mr Swindell agreed that they could but said that he would need them back in work the next day. The claimant then turned the conversation to question and criticise Mr Swindell's working hours.

28. On 11 October Mr Swindell gave the claimant a letter attempting to respond to the various issues the claimant was raising. The claimant did not accept the letter and said he would put his own letter together. He walked to Mr Swindell's desk and threw the letter at Mr Swindell. Mr Swindell warned the claimant that, "if you continue to behave like that you'll have to be sent home". The claimant's response was that even if sent home he would not go and that Mr Swindell had better make sure that he could speak to Mr and Mrs Phillips. The claimant accused Mr Swindell of being a bully. Mr Swindell then had calls from Laura in HR saying that the claimant had been trying to reach her and Mr and Mrs Phillips. Mr Swindell overheard the claimant speaking with Laura. Laura subsequently called Mr Swindell and told him that the claimant had been so irrational during the call that she had become exasperated and had to end the conversation.

29. On 11 October Mr Swindell gave an instruction to the claimant about work on wireless headsets. Mr Swindell brought up the issue of a move to another unit. This had been under discussion for some weeks and the claimant had been resisting a move. Mr Swindell tried to reassure the claimant that the move would happen and that the claimant would remain as an employee of the company for many years to come. The claimant was not receptive to the reassurances and told Mr Swindell "this is not the way this will end, it will not end the way you want it to". Mr Swindell found the claimant to be threatening.

30. The claimant decided for himself that from Monday 14 October he would take over responsibility for opening the post. The relationship between Mr Swindell as manager and the claimant had so broken down by this point that Mr Swindell, who

did not want the claimant to open the post, did not resist. The claimant also said he would make sure that Mr Swindell would go back to where he came from (meaning another business and not run or own the respondent's business). The claimant was again insistent that he should speak to Mr Phillips.

31. On 14 October the claimant came into the office and he told Mr Swindell that he would refuse to move to Unit 5. Mr Swindell pointed out that the claimant's actions and words were upsetting a lot of people, and the claimant's response was that it was Mr Swindell who was responsible for the problems that were taking place in the workplace.

32. Around this time the claimant started to make covert audio recordings of Mr Swindell. They have not been available to the Tribunal but the claimant admitted that he made those recordings. He says that they are on a laptop that is now broken and therefore inaccessible.

33. On 14 October 2019 the claimant lodged a grievance on the basis that he was being bullied by Mr Swindell. The grievance letter said

“Formal letter of grievance – bullying

In line with the ACAS code of practice on disciplinary and grievance procedures please consider this correspondence to constitute a formal letter of grievance.

The issue which has led to me nodding this grievance concerns bullying and began on (*date is missing from the letter*). Trying to change the contract after 4 months when they said the contract isn't going to change and treating others the employees that we have no right and talking to us like we do not matter.

I have previously tried to resolve these problems at work informally.

We had a few meetings with the HR and nothing happened the treatment continued the HR laughed yesterday when I told her that the bullying keeps happening and I stopped her asking her why she is laughing

one of the persons that is in charge doesn't want to talk to was they are meeting with the person that is bullying those because the bully Keith Swindell said that he needs to be protected and that's why he had a meeting with the owners of the company after we asked for a meeting with the same people and the answer was no multiple times.

I have received and letter of apology that mentions towards the end of the letter that I have anything to say about the things in the letter I should tell Keith Swindell, the one who wrote the letter when I did say that I have a few things to say about the letter I was being told that the letter is the only one I'm going to get and I have no say in it. However, I have not had any success trying to resolve matters in this way so I'm now pursuing a more formal route.

I would like very much to address the problem internally without the need for any legal action I would like to propose the following method of resolving the current situation that I can focus on my job without being affected by these issues:

Keith Swindell should be dismissed and things should be taken on a path that creates a safer workplace

We the employees should be compensated for the inaction of the people that knew and didn't do anything about the way the bullying has affected me and other people that work in this company"

34. HR wrote to the claimant on 15 October 2019 inviting him to a grievance meeting on Thursday, 17 October 2019 off-site at the Price Business Centre. The respondent arranged for the company accountant Mr Donnan to also attend. The claimant was told of his right to be represented and/or accompanied at the meeting and was asked to confirm his attendance.

35. On receipt of the grievance meeting invitation letter on 15 October 2019 the claimant wrote

"I would like to formally withdraw my grievance letter. It was written in the heat of the moment and English is not my first language. Kind regards"

36. Laura Cross of HR responded, acknowledging withdrawal of the grievance but saying

"my concern is that you clearly have concerns of your employment which need to be resolved. The allegation of bullying is an extremely serious one to make, and the company has a duty to investigate that in full. Please can you explain in more detail why you have decided to withdraw the grievance and how you propose to resolve the current situation between you and Keith. Specifically, please can you confirm whether you still allege that Keith has bullied you. We can then make an informed decision as to whether tomorrow's meeting should go ahead."

37. The claimant did not respond. HR chased a response on 16 October 2019 saying

"we need to know 1) full reasons why you have decided to withdraw the grievance 2) confirmation as to whether you still allege that you been bullied by Keith Swindell or not."

38. On 25 October Mr Swindell, who is a foster carer and had brought a teenage child in his care with him to work to help with the move, were moving boxes from Unit 40 to unit 5. Mr Swindell had shown the claimant the new unit some weeks before the move. The claimant was refusing to move and on 25 October 2019 said, "I won't be moving" and he criticised Mr Swindell and again said that he had lied about the no change promise. The claimant again said that Mr Swindell does not respect them (him and his partner) and does not listen to them, and said that Mr Swindell would regret his decisions and that this would not end the way he wanted it to.

39. Mr Swindell expressly instructed the claimant not to use the office phone line to contact Mr Phillips that day. The claimant wanted to contact Mr Phillips using the office line because Mr Phillips had not been picking up calls from the claimant's mobile. The claimant disobeyed this instruction and used the phone and made the call.

40. Mr Swindell was so distressed by events at work that day that he was trembling at his desk. He made contemporaneous notes of what had happened.

41. Over the following weekend Mr Swindell received numerous text messages and phone calls from the claimant.

42. The relationship between the claimant and Mr Swindell had so deteriorated by the end of October that there was conflict at every exchange. The claimant refused to accept Mr Swindell's authority as his manager. The claimant however continued to work well in the sense of the quality of his work on the headsets and to have a good work ethic, but he continually brought up his complaint that Mr Swindell was a liar as he had broken the no change promise.

43. The relationship with Mr and Mrs Phillips was by now so damaged that Mr Phillips had not been into the office for a long time, and after 9 October Mrs Phillips stopped coming in whilst the claimant was there. The claimant bombarded Mr and Mrs Phillips with phone calls and they stopped answering the claimant's calls.

44. By 28 October 2019 Mr Swindell felt that it was an impossible situation in which to work. There had been occasions on which he had remained at home and been tearful himself because he was afraid of coming into work and facing confrontation from the claimant. In consultation with HR a decision was made that day to suspend the claimant. Mr Phillips wrote to the claimant,

“re-suspension from work

- I write to confirm that you are suspended on full pay pending an investigation into allegations of potential gross misconduct. The allegations that we intend to investigate are as follows:
- you have refused to follow reasonable and lawful requests and instructions relating to the use of the office phone and the current office move
- you have behaved in an offensive and abusive manner towards Keith Swindell Emma Phillips and I including sending abusive text messages/voicemail messages and accusing Keith and Emma of being racist
- that you have persistently demonstrated argumentative, confrontational and unreasonable behaviour towards Keith and Emma
- that you have raised a grievance regarding alleged bullying by Keith which you subsequently withdrew without explanation, and which we therefore grounds to believe was malicious in nature

I have decided to suspend you pending a full investigation of the allegations outlined above. The decision to suspend you was taken following careful consideration as a result of the degree of intimidation which is felt by Emma, Keith and I, and which is currently making it very difficult for us to run the business. This suspension is in no way a form of disciplinary action against you.”

The letter went on to explain the terms of the suspension and to inform the claimant in the next steps in the process. It provided that any contact should be by email and asked for the return of the keys.

45. On that same day a without prejudice settlement proposal was made to the claimant. Both the claimant and respondent were content for the terms of the offer that was made to be included in the documents I saw. They were part of the bundle at pages 39A, B and C. The claimant did not accept the offer.

46. On 29 October the claimant was out of the office. He was taking a driving test that day. He had seen the letter of suspension telling him that he should not come to the office. The claimant came into the office after his driving test. He became confrontational at having been suspended and again confronted Mr Swindell and accused him of being a liar and a racist. Mr Swindell told the claimant that he was finding the behaviour threatening and ended the conversation because he told the claimant that he was becoming rude.

47. On 30 October the respondent changed the locks on its premises.

48. On 8 November Mr Phillips sent the claimant a letter to confirm that an investigation had taken place and that disciplinary action was being taken. The allegations, as in the suspension letter above, were set out in a letter to the claimant which was at page 40 of the bundle. The claimant was informed of the date and time of the disciplinary meeting, the identity of the disciplining officer, Andrew Cross. Laura Cross was not conducting the disciplinary hearing as the claimant had complained that she had laughed at him. At his request the respondent appointed independent HR Consultant Andrew Cross to chair the disciplinary hearing.

49. Statements were enclosed with 8 November 2019 letter, from Chris Phillips, Emma Phillips and Keith Swindell, and correspondence was also enclosed including communications with Laura Cross.

50. The letter warned the claimant that his conduct may amount to potential gross misconduct and that therefore the outcome could be a summary dismissal. The claimant was referred to the respondent’s disciplinary policy and procedure and was again informed of his right to be represented or accompanied.

51. The disciplinary hearing took place on 13 November. The meeting was conducted by Mr Cross and Mrs Maureen Lim was present. She is also an HR consultant but was present as a notetaker. At that hearing the allegations were put to the claimant as was the evidence. The claimant had been notified of his right to be accompanied at the hearing and he brought with him Ms Cazan as his workplace colleague. The notes of the disciplinary hearing, in the form of transcripts, appeared at pages 53 to 64 of the bundle.

52. The disciplinary hearing was adjourned for Mr Cross to make his decision. Minutes of the meeting were provided to the claimant and on 28 November Mr Cross wrote the claimant a three page letter in which he set out in detail his reasoning for his decision to dismiss the claimant. Mr Cross found

- 52.1 the claimant had acted unreasonably in refusing to move office
- 52.2 the claimant had demonstrated persistent argumentative, confrontational and unreasonable behaviour towards Keith Swindell and Emma Phillips. The claimant's actions were driven by anger and upset at proposed changes based on his belief that a conversation with Chris Phillips in May 2019 and amounted to a promise that nothing would change.
- 52.3 The claimant's refusal to accept that anything would ever change within the business was unreasonable and has led to assistant confrontation.
- 52.4 The allegation of bullying, subsequently withdrawn, was the final straw in creating an irrevocable breakdown in the working relationship between the claimant and Mr Swindell.

53. Mr Cross decided that the claimant's conduct did not amount to gross misconduct but that the working relationship between the parties had broken down irretrievably. Mr Cross confirmed that he had consulted Mr Swindell and Chris and Emma Phillips as to whether or not the relationship could be rebuilt with mediation, but he recorded that there was a deep mistrust not just of the claimant for Mr Swindell but of Mr Swindell for the claimant. Mr Cross considered that in the context of the size of the business and the need for them to all work closely together mediation was not going to be an option. His conclusion was that the claimant was to be dismissed on the grounds of "some other substantial reason" and specifically a serious and irrevocable breakdown in working relationships.

54. The claimant was notified of his right to appeal. Mr Cross said that given the size of the business it was unable to offer a right of appeal to a different person. He said

"If you believe my decision is unfair you should write to me outlining the reasons within 5 working days and I will consider your appeal"

55. The claimant appealed in writing on 29 November. The grounds for his appeal can be summarised as follows:

- (1) He had not been given access to CCTV footage which it was alleged proved him to be shouting and yelling, and he has refuted that at every step of the way;
- (2) The minutes do not mention that Laura from HR had been laughing when he was talking and the allegation here is that she had not taken his allegations about bullying seriously;

- (3) That even though he had withdrawn his grievance for good reasons he had been bullied by Mr Swindell;
- (4) He argued that HR throughout had not been impartial.

56. Mr Cross considered the appeal.

57. Mr Cross invited the claimant to a meeting but the claimant declined to attend the meeting and so Mr Cross telephoned him to consult with him and discuss the grounds of his appeal. Mr Cross offered to have an appeal meeting on a different date, the next working day, but the claimant refused to attend on the basis that it was taking too long.

58. In a letter dated 4 December Mr Cross set out the outcome of his consideration of the claimant's appeal. He decided to uphold the original decision to dismiss the claimant for "some other substantial reason" and he set out his rationale for that decision again in writing. On the CCTV footage point he confirmed that the tapes had been overwritten after 48 hours and that as the claimant had not requested them until after that point, there was no footage available. On the issue about Laura from HR laughing at the claimant Mr Cross found that this referred to a telephone conversation on 10 October. Laura Cross said that the claimant was angry and in an emotional state during that call. Laura Cross said that she gave a small laugh out of bemusement or exasperation and lack of her ability to be able to reason with the claimant during call. Mr Cross found that Laura had taken the claimant's allegations seriously but that the claimant's behaviour was such that she could no longer reason with him. It was her suggestion that he bring a formal grievance as a way of ensuring that his complaints were taken seriously.

59. On the bullying allegation Mr Cross found that the claimant chose to withdraw the grievance and despite chase up did not explain his reason for withdrawing it.

60. Mr Cross found that the process had been impartial. He had been called in as decision-maker because the claimant had made a complaint against Laura Cross. Mr Cross found that the company tried in good faith to give the claimant an opportunity to have a grievance heard independently but the claimant chose not to take that opportunity. Mr Cross found that the company disciplinary procedure allowed the claimant to have an appeal meeting in person and that despite Mr Cross inviting the claimant a meeting he had chosen not to attend.

61. Mr Cross found there was nothing in the appeal which changed his view that the working relationship between the claimant and Keith Swindell had broken down irretrievably. He upheld the decision to dismiss for some other substantial reason.

The Law

62. The claimant claimed unfair dismissal. The relevant legal principles that the Tribunal must apply are not in dispute.

63. Section 98 of ERA provides, so far as is relevant:

- (1) In determining for the purposes of this Part 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 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.**

...

(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.

64. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA.

65. Where the reason for dismissal is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held the reason must be substantial and not frivolous or trivial. In Harper v National Coal Board 1080 IRLR 260 EAT the Employment Appeal Tribunal said that an employer cannot claim that the reason for dismissal is substantial if it is a whimsical or capricious reason which no ordinary person would entertain. Where the belief is "one which is genuinely held, and particularly is one which most employers would be expected to adopt, it may be a substantial reason".

66. The employer is required to show only that the substantial reason for dismissal was a potentially fair one. In order to amount to a substantial reason to dismiss, there must be a finding that the reason could, but not necessarily does, justify dismissal. In Cobley v Forward Technology Industries plc 2003 ICR 1050 the Court of Appeal confirmed that identification of a substantial reason for dismissal does not require consideration of fairness. Fairness falls to be considered at a later stage.

67. A breakdown in working relations can amount to a substantial reason for dismissal, provided the employer can show a genuinely held belief that the relationship has broken down and cannot be retrieved.

68. It is not necessary for a Tribunal to find some action on the part of one of the parties to suggest a breakdown of trust and confidence. Lord Justice Underhill, then president of EAT commented in McFarlane v Relate Avon Ltd 2010 ICR 507 referring to trust and confidence in this context is unhelpful as in almost all cases

where an employee is dismissed as something he or she has done, the employer will have lost trust and confidence in him or her. In Leach v Office of Communications 2012 ICR 1269 the EAT emphasised the importance of identifying why the employer considered it impossible to continue to employ the employee.

69. In Handshake Ltd v Summers EAT 0216/12 the EAT held that a disagreement about salary and bonus did not of itself amount to a breakdown of trust and confidence so as to amount to some other substantial reason for dismissal. The manner in which such a dispute is conducted could amount to a breach of trust and confidence sufficient to be some other substantial reason for dismissal.

70. In Ezsias v North Glamorgan NHS Trust 2011 IRLR 550 EAT the Tribunal made the important distinction between dismissing the claimant for his conduct in causing the breakdown of his relationships and dismissing him for the fact that those relationships had broken down. The Tribunal was entitled to find that it was the fact of the breakdown which was the reason for the claimant's dismissal and that his responsibility for that breakdown was incidental.

71. The Tribunal can have regard to the circumstances leading up to the breakdown in the relationship.

72. In applying the test of reasonableness, the Tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the Tribunal can interfere.

73. Dismissal without following procedures may nonetheless be fair, but only where the employer reasonably takes the view that procedures would be futile: Polkey v A E Dayton Services Ltd [1987] UKHL 8. Where an employer has failed to follow procedures, and the Tribunal is considering whether the dismissal is fair or unfair, one question that the Tribunal must *not* ask itself is whether the claimant would still have been dismissed had the procedures been followed. However, that question is relevant in determining any compensatory award under section 123(1) of ERA: Polkey v A E Dayton Services Ltd [1988] ICR 142. The Tribunal is required to speculate as to what would, or might, have happened had the employer acted fairly, unless the evidence in this regard is so scant it can effectively be disregarded: Software 2000 Ltd v Andrews [2007] IRLR 568.

74. Where the Tribunal considers that the conduct of an unfairly dismissed employee, before the dismissal, was such that it would be just and equitable to reduce the basic award of compensation to any extent, section 122(2) of ERA requires the Tribunal to reduce the basic award accordingly.

75. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, section 123(6) of ERA requires the Tribunal to reduce the compensatory award by such amount as is just and equitable having regard to that finding.

76. To justify a reduction in the basic or compensatory awards, contributory conduct must be culpable or blameworthy and must have caused or contributed to

the dismissal: Nelson v BBC No.2 [1980] ICR 110, CA. The Tribunal must in addition be satisfied that it is just and equitable to reduce the award.

77. In deciding upon a contributory fault reduction, the Tribunal must consider only the conduct of the employee and not that of the employer.

78. The amount of a reduction is a matter of discretion for the Tribunal. Guidance as to the exercise of such discretion was given in Hollier v Plysu Ltd [1983] IRLR 260. Contribution should be assessed broadly. Without fettering the Tribunal's discretion, the EAT suggested the following categories: wholly to blame (100%), largely to blame (75%), equally to blame (50%) and slightly to blame (25%).

Applying the law to the facts

Was the claimant dismissed for one of the 5 potentially fair reasons as per section 98(1) and 98(2) of the Employment Rights Act 1996?

79. The dismissing officer was Mr Cross. The reason for dismissal was the breakdown in the relationship between the claimant and Mr Swindell. Applying Harper v National Coal Board Mr Cross had a genuine belief at the date of the dismissal that the relationship between the claimant and Mr Swindell had broken down irretrievably. That belief was formed having seen the statements of Emma Phillips, Chris Phillips and Mr Swindell and having spoken to them and having seen the claimant's statement and having spoken to him at the disciplinary meeting. The claimant himself accepted that the parties could no longer work together.

80. The breakdown in relationship amounts to **some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held** within section 98(1)(b)

Did the respondent act reasonably in treating reason is a sufficient reason for dismissal in accordance with section 98(4) ERA 1996?

81. The reason for dismissal was not trivial. Mr Swindell was avoiding coming in to work, had been tearful at home and had been accused of bullying. The claimant was refusing to accept Mr Swindell's instructions, refusing to move unit, insisting on contacting the Phillips' though they were no longer answering his calls. The breakdown in relationship was so bad that the Phillips' stopped coming in to the office. The breakdown in relationship was substantial and justified dismissal of the claimant.

82. I find that the reason for dismissal was a fair reason.

Did the respondent follow a fair procedure?

83. I accept the respondent's submission that in "some other substantial reason" type cases the provisions of the ACAS Code may not need to be looked at so stringently. I find however that there was a fair procedure followed here.

84. The claimant was given written notice of the allegations he was to face, he was given the evidence against him, the statements, he had time to prepare for the

hearing, and he was allowed to bring a colleague with him to the hearing, and he did bring a colleague, choosing Ms Cazan to support him. I find that the ACAS Code was complied with and that there was no procedural flaw in the way in which this dismissal was handled.

85. I reject the claimant's argument that HR had not been impartial throughout. Mr and Mrs Phillips appointed Laura Cross as an external HR Consultant to address the conflict in the relationship early on. The claimant made an allegation that Laura Cross had laughed at him. Laura Cross in her statement admitted having laughed but said it was out of bemusement at how unreasonable the claimant was. I accept the evidence of Mr Swindell who spoke to Laura Cross that this was why she had laughed. The respondent accepted the claimant's objection to Laura Cross and appointed a second independent HR Consultant Mr Andrew Cross to conduct the disciplinary hearing and arranged for a third HR Consultant Ms Maureen Lim to be present as notetaker. The respondent's business is a small business. It arranged for an independent decision maker, it arranged for meetings to take place off site at a neutral venue. It went to considerable cost and effort to ensure, so far as possible, independent and impartial decision making.

86. Mr Cross as decision maker on dismissal went on to hear the appeal. This was not ideal, it would have been preferable for someone else to hear the appeal, but I find it would have made no difference if it had been heard by someone else. The claimant introduced no new evidence at appeal stage, he chose not to attend a meeting. Mr Cross telephoned him so as to ensure he participated to some extent in his own appeal. The claimant admitted at appeal that the working relationship had irretrievably broken down. This is evidenced by the fact that he had been calling for Mr Swindell's dismissal. The claimant's oral evidence was that one or other of them had to go. For those reasons I find that it made no difference that Mr Cross heard the appeal against his own decision.

Did the respondent's decision to dismiss the claimant fall within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted ?

87. Mr Cross' decision fell within the range of reasonable responses of a reasonable employer of this size. The claimant himself accepted that the relationship had broken down so that the parties could not work together anymore. This was a small business with just the claimant, his partner and one off site worker doing the work of the business. Mr Swindell had tried to manage the claimant. He had sent the claimant home and afterwards offered a letter of apology in an attempt to make a fresh start. He had tried to build bridges with the claimant in offering reassurance about ongoing job security. The respondent had tried to hear the claimant's grievance but the claimant (for his own good reasons) withdrew it. Mr Cross considered mediation but concluded, reasonably, that the relationship was already irretrievably broken down beyond the point at which mediation may assist.

88. Whilst it is not necessary for me to make a finding as to the reason for the breakdown in the relationship, it is the fact of the breakdown that amounts to a substantial reason justifying dismissal, I will explain what, in my view, caused the

relationship to break down because it may assist the claimant in understanding my decision. I conclude that the relationship broke down because:-

- 88.1 of the claimant's unreasonable insistence that there should be no change at all in the working practices. The claimant held, honestly but wrongly, to the belief that assurances that had been given to him about job security meant that there would be no change whatsoever to any working practice at the respondent's business.
- 88.2 the claimant also unreasonably refused to accept the authority of Mr Swindell as his manager and called for him to be dismissed
- 88.3 of the way in which the claimant expressed his concerns about change; angrily, confrontationally, unreasonably, in a way that undermined Mr Swindell and became intimidating.
- 88.4 the claimant's reactions were excessive: Mr Swindell's attempt to consult about the rate for overtime pay, to increase it and to require the overtime to be authorised in writing in advance, was a reasonable and lawful request to make a change. The decision to move premises was reasonable and lawful, again a change that the claimant refused to accept. Mr Swindell's attempts to consult the claimant about a change to the shift patterns was a reasonable step for the employer, not to impose the change, but it did not impose the change in hours, it consulted the claimant. I find nothing in this case that the employer did that could justify the extent of the claimant's reactions which were excessive.

89. There was a potentially fair reason for dismissal within section 98. The dismissal was reasonable in all the circumstances of the case. The proper procedure was followed, the ACAS Code was complied with, and the employer's response fell within the range of reasonable responses to a breakdown in working relationships in an organisation of this size.

90. I find for the reasons set out above the claimant was fairly dismissed by the respondent.

What remedy is the claimant entitled to ? Was the claimant's conduct before dismissal such that it would be just and equitable to reduce the claimant's basic award ? If so, by what proportion will the basic award be reduced ? Did the claimant's conduct contribute to his dismissal such that the claimant's basic and compensatory award ought to be reduced? If so by what proportion would it be just and equitable reduce the claimant's award ?

91. The claimant's claims fail and so no compensation is appropriate.

92. It is not necessary for me to consider whether or not the claimant's conduct amounted to gross misconduct. However, in relation to the allegation that the claimant brought his grievance maliciously I accept the claimant's oral evidence that the reason he withdrew the grievance was because he knew Mr Swindell was a foster carer and he did not want to get Mr Swindell into trouble or prejudice his ability

to care for children. The claimant brought his grievance in good faith and he withdrew it for compassionate reasons.

93. It is also not necessary for me to consider whether or not the claimant's conduct was such that any compensation would have been reduced. However, if the claimant's claim had succeeded, for example on the basis of any procedural failing, then I would have found that his conduct wholly contributed to his dismissal and would have reduced his award, on just and equitable grounds, by 100% for the reasons set out at paragraph 70 above.

94. Even if the claimant had succeeded in his claims the Tribunal would not have had jurisdiction to make an award for the cost of his driving lessons, or his failed driving test or for his missed flights.

Ms E Cazan's claim

Clarifying her claims

95. Ms Cazan brought a claim in the Employment Tribunal contained within the same claim form as Mr Popa. She was given case number 2416648/2019. Ms Cazan's claim therefore relied on the narrative attached to Mr Popa's claim.

96. Ms Cazan confirmed that she brought a claim for unfair dismissal and potentially a claim for breach of contract in relation to notice pay and/or holiday pay. I had very few documents in front of me for Ms Cazan. Despite Ms Cazan having made every effort to send the documents to the Tribunal, they had not been sent across from Manchester to me so that on 20 July 2020 I did not have the Tribunal file. I am grateful to all the parties in this case for the pragmatic way in which we moved ahead with the evidence on 20 July 2020 and kept Ms Cazan's claims alive until I saw the files on 21 July 2020. We were then able to collate documents into a bundle called C2 which everyone saw.

Unfair dismissal claim struck out

97. On 21 July 2020 it became clear that Ms Cazan's claim for unfair dismissal must fail because she does not have two years' service. Everyone agreed that Ms Cazan started working for the respondent on 7 May 2019 and that her employment came to an end by resignation on 3 January 2020.

98. Ms Cazan had been given notice of strike on 31 March 2020 and had written to give reasons why her claim should not be struck out. I saw those reasons and I went through them with her on 21 July 2020. The reasons related to her emotional wellbeing and to the bullying of Mr Popa by Mr Swindell and the allegations in Mr Popa's claim. None of those reasons were sufficient to give me jurisdiction to hear an unfair dismissal claim for Ms Cazan. Ms Cazan's claim for unfair dismissal was struck out.

Holiday pay claim clarified

99. In the narrative to the claim form lodged by Mr Popa, reference is made to a claim for outstanding holiday pay for Ms Cazan. Ms Cazan had not gone to early

conciliation herself about that claim but she was entitled to bring that claim under Mr Popa's early conciliation certificate.

100. We then discussed how to proceed in relation to the holiday pay claim. The final payslip recorded that Ms Cazan had been paid five days' holiday pay for her last working month, December 2019. At page 3 of bundle C2 I saw Ms Laura Cross' schedule of the dates of employment and the dates of annual leave taken by Ms Cazan. At page 9 of bundle C2 Ms Cross confirms that there were five days outstanding to be paid on termination of employment and that this was paid to Ms Cazan.

The hearing for the holiday pay claim

101. I heard oral evidence from Ms Cazan. I find that Ms Cazan was truthful in her evidence. She was not able to recollect directly which days she had actually taken as annual leave. Ms Cazan told me, "Mr Phillips told me I could have 8 days". Ms Cazan showed me a letter that Mr Phillips had written to her telling her on 2 December, "you still have 8 days of holiday left to take including Christmas Day and Boxing Day and these will be paid to you upon termination of employment".

102. The respondent was able to show Ms Cazan that part of that time (the 8 days) was given in days taken, so actual annual leave was taken and a payment was made for the five days that were outstanding (untaken) as at the date of termination.

103. Ms Cazan was unable to refute the claimant's calculation and she accepted that she had received 5 days outstanding annual leave pay on termination of employment.

104. Ms Cazan's claim for holiday pay brought in case number 2416648/2019 must fail and stands dismissed.

Employment Judge Aspinall
Date: 30 September 2020

REASONS SENT TO THE PARTIES ON
8 October 2020

FOR THE TRIBUNAL OFFICE

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