EMPLOYMENT TRIBUNALS

Claimant: **Mr C Preston**

Respondent: **Eurocell plc**

JUDGMENT

The claimant's application dated 5 and 18 February 2020 for reconsideration of the judgment sent to the parties on 1 July 2020 is refused.

REASONS

Background

1. I have undertaken a preliminary consideration of the claimant's application for reconsideration of the judgment dismissing his claim.

2. At a hearing lasting 2 days, on 3 and 4 February 2020, the claimant's claim of unfair dismissal was heard. Previous case management had resulted in the parties working together to agree a bundle for the hearing.

3. The hearing lasted both days and following an adjournment to consider the evidence and the parties' submissions, an oral judgment was issued.

4. The claim was dismissed, oral judgment having been given on 4 February 2020.

5 February 2020 email from claimant

5. On 5 February 2020 the claimant sent an email to the Tribunal asking for an appeal (or reconsideration). The claimant alleged that the respondent had withheld a letter dated 5 September 2018 from him (at the time) and he said that if that letter had been disclosed to him, he would have been able to show that his most senior manager, Mr Dixson, had lied throughout the disciplinary process that led to his receiving a final written warning. He said that he had not appealed against the decision Mr Driscoll made on 20 September 2018 but would have done had he been in possession of that communication which he only received on 31 January 2020.

6. The claimant stated in his email that at the start of his case he was told

that he could only rely on matters that related to his dismissal from the respondent, rather than the background matters behind the final written warning he had been given some time earlier. The claimant indicated that such matters were only one quarter of his case, the remainder being in relation to past events.

7. He argued that had he seen the letter at the time, there could have been a different outcome, accepting that he cannot say for certain that the outcome would have been different. He stressed that if he had seen the letter at the time of his grievance in 2018, he would have appealed against the grievance outcome.

11 February 2020 email from claimant

8. On 11 February 2020 the claimant sent a further email to the Tribunal stating that the respondent had withheld other important documents from him. This time he referred to a document from 4 June 2019, which the claimant said he had asked for at the time. He said that this had only been disclosed to him on 31 January 2020 with the September 2018 letter. He repeated his comments from his earlier email stating that if he had seen the September 2018 letter at the time the case "could have gone a different way". He said he would never have accepted the final written warning and would have appealed and he may not have been dismissed. He asked for a rehearing because of the respondent withholding evidence.

18 February 2020 email from claimant

9. On 18 February 2020 the claimant sent a further email to the Tribunal, copied to the respondent. He asked for a rehearing because the respondent withheld 2 documents from him, dated 5 September 2018 and 4 June 2019. He said that had he known this at the time he would have appealed against the decision he said led to his final written warning (although it was in fact an earlier grievance outcome, which was separate from the disciplinary process, in respect of which the claimant did appeal).

10. On 19 March 2020 the claimant asked for written reasons.

11. Having received the earlier emails from the claimant in March 2020, the claimant was told that his email of 18 February 2020 was being treated as an application for reconsideration of the judgment and the respondent was asked for comments on the above communications, particularly with regard to the allegation that the respondent withheld documents and the outcome would have been different.

20 March 2020 – the respondent's response

12. On 20 March 2020 the respondent replied. This had been sent to the claimant too and stated that the claimant had not set out why reconsideration of the original judgment was necessary since the complaints were about timing of disclosure and content of the bundle which the respondent said ought to have been raised at the start of the Hearing. The claimant had not asked for further time to prepare his case and the Hearing proceeded.

13. The respondent stated that the email of 5 September 2018 was an email with attached note of an interview Mr Dixson had with Mr Driscoll in connection with the claimant's grievance. The respondent noted that the claimant said if he had seen this at the time he would have appealed the outcome of his grievance. The respondent submitted that the claimant is suggesting the outcome of the grievance was connected to the claimant receiving a final written warning. The respondent said these were 2 separate processes and it did not follow that if the claimant had appealed against the outcome of his grievance, a final written warning would not have been issued. The processes were separate. The respondent also noted that this point was not put to Mr Driscoll at the Hearing.

14. The respondent also noted that the handwritten investigation notes were of a meeting with the claimant that took place on 4 June 2019. This was a handwritten note that had been typed up with the typed document already featuring in the bundle. Reference had been made in the original bundle to the handwritten document. The claimant had not asked for that document during the disclosure process despite now claiming that it is important and despite the document being consistent with the typed document. Further the respondent noted there was no explanation as to what the alleged disadvantage to the claimant was.

15. The respondent stated no documents were "withheld" from the claimant.

16. The respondent also noted that the claimant said he was "only allowed" to run one quarter of his case because he had not appealed the grievance outcome which he says he would have done had he seen the document of 5 September 2018. The respondent said that it is not correct to say the claimant was "not allowed" to do so, since at the start of the Hearing the claimant accepted that a final writing warning existed and that he could not make any challenge to it within the limits permitted by law and as such the Hearing focussed on the fairness of the dismissal.

17. The respondent noted the claimant did not assert that he would have raised any appeal against the decision at the time in the way that is now contended.

18. The respondent concluded by stating that this is not a case where new evidence has appeared. All the evidence was previously available. The claimant could have raised issues about timing of disclosure at the Hearing but did not. He also could have made the assertion about appealing the grievance outcome and thereby challenging the final written warning but he did not. Instead it was confirmed at the Hearing that the final written warning was not being challenged. It was not therefore in the interests of justice to reconsider the judgment.

10 June 2020 email from claimant

19. On 10 June 2020 the claimant sent a further email to the Tribunal. He said that there was "a dialogue" between the respondent's representative and the Employment Judge at the start of the case which he said he did not understand which led to him being unable to refer to anything other than the events that led to his dismissal. He said that this was because he had not appealed against the final written warning. The claimant did appeal

against the final written warning that was issued; he did not appeal against an earlier grievance outcome.

20. The claimant said that he had always maintained the whole disciplinary process was unfair and biased and that he had been found guilty of bullying behaviour without being able to defend himself. He said that Mr Driscoll found him guilty before seeing the colleague statements and that the email of 5 September 2018 shows untruths when Mr Dixson was asked questions by Mr Driscoll. The claimant said he only got the email on 31 January 2020 and that Mr Dixson "required to explain his lies".

21. The claimant repeated that he was unable to bring up matters that related to issues other than his dismissal.

22. On 11 June 2020 the claimant's comments were sought in relation to the respondent's email and the respondent's comments were sought in relation to the claimant's email.

23. On 22 June 2020 written reasons were issued to the parties and the claimant was asked to confirm whether he still maintained his request for reconsideration.

24. On 10 August 2020 the Employment Judge was provided with a number of emails as follows.

1 July 2020

25. On 1 July 2020 the claimant emailed the Tribunal asking for a complete rehearing which should proceed on the assumption that in all probability he would have appeared such that he could refer to matters arising before the issues that led to his dismissal. He asserted that his dismissal was "in the making since 2017".

26. On 17 and 28 July 2020 the claimant sent 2 lengthy emails setting out his comments in relation to each paragraph of the written reasons. These are dealt with further below. He concluded by asking for a complete rehearing which was to proceed on the assumption that he would have appealed. He concluded that "I am the victim of lies and collusion because I decided to stand up for myself".

27. On 10 August 2020 the respondent was asked for its comments in relation to the claimant's detailed emails.

28. Unfortunately, due to pressure of business and the workload of the administrative team, the Employment Judge was not advised as to the position in relation to any response to the foregoing requests.

29. Within the last month or so, the parties were advised that the Employment Judge was seeking time to consider the reconsideration request and that a written outcome would be provided. An apology was issued for the delay.

The law

30. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70).

31. Rule 72(1) of the 2013 Rules of Procedure empowers me to refuse the application based on preliminary consideration if there is no reasonable prospect of the original decision being varied or revoked.

32. The importance of finality was confirmed by the Court of Appeal in **Ministry of Justice v Burton and anor [2016] EWCA Civ 714** in July 2016 where Elias LJ said that:

> **"the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board 1975 ICR 395) which militates against the discretion being exercised too readily; and in Lindsay v Ironsides Ray and Vials 1994 ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review."**

33. Similarly, in **Liddington v 2Gether NHS Foundation Trust EAT/0002/16** the Employment Appeal Tribunal chaired by Simler P said in paragraph 34 that:

> **"a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or by adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered."**

34. In common with all powers under the 2013 Rules, preliminary consideration under rule 72(1) must be conducted in accordance with the overriding objective which appears in rule 2, namely to deal with cases fairly and justly. This includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay. Achieving finality in litigation is part of a fair and just adjudication. It is also important to recognise that fairness and justice applies to both parties – the claimant and the respondent.

The application

35. In the claimant's emails of 17 and 28 July 2020 the claimant raises a number of points in connection with the written reasons that were issued following the oral judgment ("the reasons"). It is appropriate that I consider these points and then consider the claimant's application generally. It is important I ensure any errors in the judgment (as identified by the claimant and me) are fully considered which would then allow me to consider his application fairly to consider whether it is in the interests of justice to reconsider the decision.

36. I have gone through the detailed points made by the claimant and I raise

the points below that are material or could have a bearing on the application. This is because the claimant has provided his comment in relation to many of the findings and conclusions set out in the reasons. These were matters there were considered at the time. The issues the claimant raises in his communications with the Tribunal largely comprise his arguments that were raised at the Hearing (which were points made by the claimant during the disciplinary process) and duly considered. The material issues arising are set out below.

Comments in relation to the reasons

37. In relation to **paragraph 9** of the reasons I stated that the claimant noted in his appeal against his final written warning that he felt it was "a bit extreme" and that in his view a verbal or written warning would have been "fairish" and sufficient. In his emails he says that if he had seen the "withheld" email of 5 September 2018 the "lies" from Mr Dixson would have led to him appealing (against the grievance outcome).

38. This is a key part of the claimant's reconsideration request, namely the fact that he was unable to challenge the final written warning at the Hearing which focused on the fairness of the claimant's dismissal. This was a matter that was dealt with at the start of the Hearing in some detail when a discussion took place with the claimant and the respondent's barrister as to what the claims were and the legal issues that required to be determined. Contrary to the claimant's suggestion that there was a "discussion" between the respondent's barrister and the Employment Judge, the discussion around this issue involved both the respondent's barrister and the claimant. It was part of the preliminary issues that was being discussed with both parties. It was a detailed discussion.

39. The respondent's barrister raised the issue as a preliminary point arguing that this did not appear to be a case which was covered by the authorities with regard to reopening the final written warning.

40. I explained the position as set out in the authorities to the claimant and took care to ensure he understood the position. The claimant is an articulate and intelligent person who engaged in the discussion and understood the position. The guidance given by Langstaff, then President in **Wincanton v Stone** 2013 IRLR 178 was discussed and examined (as set out at paragraph 69 of the reasons).

41. As set out at **paragraphs 8 to 13** of the reasons, the claimant accepted that the issuing of the final written warning was not alleged by him to manifestly inappropriate, nor was he suggesting it was issued in bad faith nor was he arguing that there were no grounds to raise it. His position was that the final written warning was "a bit extreme". He denied that he had been a bully but conceded that there was conduct justifying the application of a disciplinary sanction, perhaps a warning (in his view).

42. On that basis, the claimant agreed that the Hearing would proceed on the basis of his challenge to the dismissal, given the extant final written warning. He was arguing that there was no basis for the misconduct for which he had been dismissed and he was content to argue that (with the

final written warning as background). That was a position the claimant had arrived at having considered his case and all the issues arising. He had understood the legal position and agreed upon what the legal issues were that required to be determined. In his view the final written warning was essentially irrelevant since he had done nothing wrong and so his dismissal was unfair.

43. It was his position that as he was not guilty of any misconduct, and so the dismissal was unfair. The final written warning to which he was subject was not an issue and was not being revisited and therefore no evidence would be led in relation to it as it was not argued to fall within the exceptions permitted by law that would allow it to be reopened. The claimant was comfortable with this position and confident that matters could proceed. He had clearly understood the position and was clear in this approach.

44. Given the claimant's acceptance of the position, following consideration of other preliminary matters, the Hearing was adjourned to allow reading of the witness statements with evidence being heard a few hours later.

45. At the Hearing the claimant had understood the authorities in relation to when a final written warning could be "reopened" and he had fairly and candidly accepted the position. He did not raise the matter further when the evidence was heard nor suggest that he did not understand the position. There was no further suggestion from the claimant, upon his reflection, that he had made an error in conceding that issue, including during the course of the second day nor during his submissions. I was satisfied the claimant had properly understood the position and had made a fair and reasonable concession given what he said.

46. While there were a few occasions where the claimant had asked questions about matters unconnected to issues to be determined, he understood why those questions were not relevant and focused on the issues in dispute. It was important that the evidence focused on the issues the parties had agreed required to be determined such that a fair hearing could take place.

47. The claimant argued in his application that the final written warning should never have been issued. He says that if he had seen the "withheld" document of 5 September 2018, which he says contain lies from Mr Dixson he would have appealed against the warning. He argues that "suddenly" he is alleged to have become a bully.

48. The document of 5 September 2018 was not, however, withheld from the claimant. It was provided to the claimant prior to the Hearing, albeit a few days before its commencement. It also relates to the claimant's grievance rather than the disciplinary process that led to the final written warning. It is not certain that either the claimant would have appealed against the grievance outcome if he had that document. He chose not to appeal at the time from the information he had and in his appeal email of 4 October 2018 the claimant stated: "Although I have MANY reasons to appeal the bullying decision, to be blunt, I can't be bothered to. This is because, despite my immediate work colleagues, I actually enjoy my job and I

KNOW I am not a bully. I feel a verbal, maybe written warning would be sufficient and dare I say it, fair'ish."

49. Even if the claimant would have appealed against the grievance outcome there is no evidence to suggest the outcome would have been different given how his conduct was viewed at the time (and taking account of the claimant's own admission as to its seriousness).

50. The claimant had been provided with this document prior to the commencement of the Hearing and had time to consider it. He did not argue this was an issue nor did he seek more time to consider matters.

51. From the information before the Tribunal, the final written warning had been issued (as set out at paragraph 9 of the reasons) and, as accepted by the claimant at the Hearing, the circumstances set out in law that allow the final written warning to be reopened were not present in this case. As a matter of fact he *did* appeal against the final written warning which considered his arguments fully.

52. In relation to **paragraph 10** of the reasons, the claimant says that he was given the final written warning because he was told it was the severest sanction that could have been given to him and that dismissal could not have been effected because he did not do anything wrong, other than stand up for himself. The reasons noted (at paragraph 10) that the outcome of the disciplinary hearing had been lessened from dismissal due to the nature of the conduct in question. Mr Williams in his witness statement had stated in dealing with the appeal against the final written warning, the claimant had believed the sanction (the final written warning) to have been harsh but that it would (in the claimant's view) have been "fair-ish" to have been issued with a written or verbal warning. Mr Williams's evidence was that the offence was potentially gross misconduct and the sanction had been reduced because he wished to improve standards in the branch.

53. In the appeal outcome letter following the claimant's appeal against the final written warning, the appeal officer, Mr Williams, stated that it had been alleged by the claimant that his responses had been dismissed during the disciplinary hearing. Mr Williams checked the position and did not agree with the claimant. He stated that: "The disciplining officer took into account that you intended your behaviour to be banter and that you intended the outcome of this banter to be better standards within the branch. He therefore lowered the sanction to a final written warning. I found no evidence your comments were dismissed and I consider that they were very much taken into account when reaching the disciplinary decision." It was not correct therefore to assert (as the claimant does) that he was given the most severe sanction following that disciplinary process. It was possible that dismissal could have ensued, but the disciplining (and appeal) officer took account of the claimant's position and issued him with a final written warning.

54. At **paragraphs 11 to 13** of the reasons I summarised the discussion that took place with regard to the law in this area. The claimant states in his application that "what the judge said on the day was in no way clear". I explained the position carefully to the claimant and gave the respondent's

agent the chance to make any comment. The claimant understood the legal position and accepted that the warning had been issued and that while he considered it harsh, he did not consider it manifestly inappropriate or fall within any of the other grounds allowing it to be reopened. The claimant was articulate and intelligent and in no sense gave the impression (or said) that he did not understand what was being discussed. He contributed to the discussion and having considered matters confirmed his position.

55. The claimant stated that he referred to documents which he had received which he stated would have resulted in an appeal against the final written warning. He did appeal against the final written warning and that was taken into account. I checked with the claimant that he understood the circumstances when a final written warning could be reopened, and he confirmed that the facts of this case did not fall within those parameters. From the information presented to the Tribunal by the claimant, that was a reasonable position to adopt.

56. There was no suggestion from the claimant before the Tribunal that he considered the final written warning to be manifestly inappropriate, issued in bad faith or without there being a basis for the warning to be issued. His criticism was that the warning was "harsh" when set against his admitted conduct. He accepted he had done wrong but argued the outcome was harsh. The matter had, however, been considered both at an original hearing and an appeal hearing. He accepted, having considered matters, that the matter could not be reopened given the authorities, with particular reference to President Langstaff's guidance in **Wincanton v Stone** 2013 IRLR 178, as set out in full at paragraph 69 of the reasons. In light of that concession the Hearing proceeded on that basis.

57. It was important that I took account of the overriding objective and was fair to both the claimant and the respondent. Given the admitted position of the claimant in relation to the warning and his concession, which was reasonable in the circumstances, it was fair and just to focus on what the claimant considered the main aspect of his case, that he had done nothing wrong such that his dismissal was unfair (irrespective of any warning).

58. Throughout the claimant's application he reiterated his position, which is that the events that led to his dismissal were "minor" and "exaggerated" and "blown out of all proportion". That was his position before the dismissing officer and the appeals officer (and the Tribunal). His position in relation to the incident in question was taken into account by both the disciplining and appeal officers and fully considered. The claimant believes that his colleagues saw this as an opportunity to "stitch him up". His correspondence during the process was very clear that this was his view and this was something that the disciplining and appeals officer considered carefully.

59. The claimant pointed out that at **paragraph 30** of the reasons I stated that the claimant had barred a member of staff with Asperger's syndrome from leaving the room which caused anxiety. The claimant correctly points out that this individual was outside the room at the time. That was my mistake in writing the reasons. The statement that had been obtained from this individual had referred to an earlier confrontation involving the claimant

and the statement obtained from him during the disciplinary process had stated: “As I suffer from Asperger’s syndrome this sort of confrontation creates anxiety and I get confused which leads to getting upset”. He referred to being upset as a result of that incident and of the need to get fresh air. My error did not affect the issues in this case. That employee had been outside the room during the incident in question, which was a point the claimant had made during the disciplinary process and Hearing, which was taken into account.

60. The purpose of the unfair dismissal claim is not to rehear the evidence and decide what outcome the Tribunal would impose but rather consider the information before the respondent at the time and assess the actions and response. I took into account what information the respondent had obtained via the investigation process, which included the claimant’s position (which was very clearly presented and at great length during the process) together with the other witness evidence. I assessed the position as against that information.

61. The claimant repeated his position in relation to this, when he commented about the facts found at **paragraphs 31 to 36**. The claimant argued that he “disputes they were facts” but ultimately the respondent reached a decision based on the information before it. While he disputed the facts, I decided that the conclusion the respondent reached with regard to the facts before them was a conclusion that a reasonable employer could reach in the circumstances, taking full account of each of the claimant’s criticisms of the facts and given his very clear rebuttal. That included the points the claimant had made in his letter of 7 June 2019. It is not accurate to say that the claimant was not allowed to refer to any of its content while the respondent was. I sought to help the claimant focus on the issues relevant to determination as to the issues before the Tribunal in light of the time allocated for the Hearing and the issues in dispute applying the overriding objective.

62. The claimant was able to challenge the witnesses as to the matters that led to his dismissal, and he did so thoughtfully and fully. The letter the claimant had sent set out (amongst other things) the claimant’s response to the allegation in question, which was a matter that the claimant fully put to each of the witnesses. The background information with regard to the circumstances leading to the final written warning was background and not relevant with regard to the issues to be determined by the Tribunal. Both parties were able to focus on the facts that led to the dismissal.

63. At **paragraphs 46 and 47** I noted the claimant’s position which was that he believed there was a concerted attempt to stitch him up. I noted that the claimant had not presented any specific evidence to substantiate the suggestion (and it was essentially the claimant’s word as against his colleagues’ words). In his application he states that his written statement and the documents he provided did provide “proof” but his statement provided the background material, all of which was before the respondent. The respondent did consider each of the points the claimant made, which included the reasons why the claimant believed his colleagues were seeking to “stitch him up” and have him dismissed. These were all considered and the respondent decided, on balance, to reject that evidence and prefer the evidence presented by the claimant’s colleagues.

The claimant is and was not happy with that decision but the decision was a reasonable one on the facts.

64. The claimant has also asked why he was not required to read out his witness statement. As agreed at the commencement of the Hearing, following the preliminary matters having been dealt with, it was agreed that I would read each of the written witness statements and evidence would then be heard. That was what happened. There was no reason to read it aloud (which was not something the claimant expressly sought). The claimant's witness statement was read prior to evidence being heard orally and he had the opportunity to provide any supplementary evidence on his own behalf. He was then cross examined and answered fully.

65. The respondent took into account the information the claimant had presented at each stage of the disciplinary process. There was no concrete "proof" as such of the claimant's position as it was his belief that he had been "stitched up". Each of the claimant's communications was taken into account by the respondent's witnesses but they chose to accept the other individuals' accounts, which was an option I considered open to them and one which fell within the range of responses open to a reasonable employer (see paragraph 143 of the reasons).

66. The claimant also stated in his comments in relation to **paragraph 49** (which deals with the outcome of the appeal) that he did give reasons to contradict the reason for his dismissal in his appeal letter. The claimant was not asked about that matter since it was a matter that the respondent considered in reaching its decision. The respondent did put its case to the claimant who was given the chance to present his response. The respondent considered each of the points the claimant raised in reaching its decision but that did not alter their decision. The claimant's arguments that he was "stitched up" were considered by the respondent. The respondent chose not to prefer the claimant's position.

67. The claimant referred to my quoting his witness statement at **paragraph 51** where he accepted the allegations could warrant dismissal. His admission shows the seriousness of the allegations. While he disputes that he was guilty of the conduct in question, his position was taken into account by the respondent but rejected. The respondent chose to prefer the evidence of the claimant's colleagues. Looking at matters objectively, if it was fair for the respondent to accept that evidence (and I consider that it was), it was relevant to note that the claimant accepted that such conduct could justify dismissal. The statement was not "used against" the claimant but was quoted to show that the claimant accepted how serious the conduct was. He was right to concede that since the conduct was of a nature to (potentially) justify dismissal.

68. With regard to **paragraph 52** of the reasons I stated that the claimant asked that his appeal be heard by the manager who had conducted the investigation. Given that individual had been involved in the disciplinary process, it was not appropriate he deal with matters. (The inappropriateness arises obviously from having investigated matters rather than having upheld the final written warning, which was not something he had done, which was stated by me in error and did not affect my decision).

69. With regard to who was to hear the claimant's appeal, he argued in relation to **paragraph 53** that his comments that the CEO hear his appeal were "tongue in cheek" but that was not something about which the respondent could have been aware at the time. The claimant was in communication with HR around his appeal and Mr Driscoll had been appointed as the appeal manager. The claimant had been asked whom he would be comfortable hearing his appeal if Mr Driscoll was unavailable. The claimant replied stating: "That is a shame. Unless Mark Kelly [CEO] was able to take the meeting I'm afraid I wouldn't be comfortable with anyone else." That showed that the claimant was comfortable with Mr Driscoll conducting the appeal hearing. The claimant did not raise any concern during the appeal hearing with Mr Driscoll dealing with it.

70. The claimant had stated by email that he would have expected the appeal to be heard by his 2 main regional managers. While the precise correspondence raising this issue could not be located by the claimant during cross examination, the point was taken into account by me in assessing the fairness of the dismissal. He had pointed out to the respondent (in email correspondence), after his dismissal but before his appeal (on 28 June 2019), that if he had known he could have objected, he would have objected to Mr Williams dealing with his disciplinary hearing, since he had rejected the appeal against the final written warning.

71. However, the claimant had not raised any issue with Mr Williams hearing the matter at the time of the disciplinary hearing and the respondent had (reasonably) understood that the claimant wished Mr Driscoll to hear his appeal. He did not raise any objection or suggest Mr Driscoll was not an appropriate person to hear his appeal. Mr Driscoll considered the matter fully upon appeal and did not uphold the appeal.

72. The claimant alleged in his correspondence that he was not "allowed to bring in new evidence" at the submissions stage. That was correct since the claimant had concluded his case and had not specifically put the relevant document to the respondent's witnesses (and no application had been made to do so) but the claimant's decision to challenge the individuals had been noted and taken into account. Ultimately the respondent had been able to make arrangements to ensure the person the claimant asked hear his appeal (Mr Driscoll) did hear his appeal. Mr Driscoll had heard his appeal and had done so fairly and reasonably.

73. In relation to **paragraph 54** of the reasons, the claimant stated that he did raise an issue with Mr Driscoll hearing his appeal. He refers to 2 pages in the bundle. These are the emails to which I refer above. The claimant raised an issue with an HR after he had been dismissed saying that he would have objected to Mr Williams dealing with his disciplinary hearing if he had known he could object. He did not object at the time of the hearing with Mr Williams (having experience of dealing with disciplinary matters) and the hearing proceeded. In relation to the appeal hearing the claimant did wish Mr Driscoll to deal with matters. He did so and the claimant did not challenge this. In this regard the respondent acted fairly and reasonably. This was dealt with at paragraph 129 of the reasons. Both the disciplinary and appeals officers considered the evidence before them and reached a decision that fell within the range of options open to a

reasonable employer in the circumstances facing the respondent. The investigation was reasonable in the circumstances.

74. In relation to **paragraph 56** the claimant argued that he could have explained why one of the statements that had been produced at the investigation stage could have been "dismissed". The claimant argued that the events from the day were greatly exaggerated. The purpose of the unfair dismissal hearing was to assess what the respondent did in relation to the information before it. The claimant stated that he was prevented from proceeding to show that statements should have been dismissed. That is not accurate. I explained to the claimant that the focus of his questions were around the information available and whether they acted fairly and reasonably from the information before them, rather than re-enacting the events before the Tribunal. The respondent took account of the information before it, including the claimant's very clear account and challenges to the evidence that had been obtained. While the approach was not perfect, it was reasonable. The Tribunal must not substitute its view for the employer but instead must consider the information before the respondent and assess the steps taken on that basis.

75. The claimant also noted that the reasons state that the claimant did not provide any evidence and he refers to his appeal letter. His appeal letter was taken into account by the respondent. Ultimately there is no direct evidence supporting the claimant's contention as to exactly what happened on the day in question and it was his word against those who were also present (whose position different from his but were broadly consistent).

76. The background information the claimant presented was taken into account and it is not correct to state, as the claimant contends in relation to **paragraph 57**, that the evidence was always available and no one was interested in hearing it. The Tribunal's task is to assess the reasonableness of the respondent's actions in light of the information before it. The Tribunal assessed what the respondent did from the information before it. There was no "new evidence" in the sense that the claimant was unable to provide any conclusive proof by way of evidence that supported what he had said that showed why his position was correct. The respondent had to choose whose position to prefer. The respondent did so. That action was one which a reasonable employer could take. An equally reasonable employer might have taken a different view but the test is whether what the respondent did in the circumstances was fair and reasonable taking account of all the circumstances.

77. Each of the points raised by the claimant in relation to the allegation and his dismissal was taken into account by the respondent during the disciplinary process, which included the points raised in his appeal letter. The appeal hearing took account of the issues the claimant raised. The respondent chose to prefer the claimant's colleagues' position. That act was an act that a reasonable employer in the circumstances could have taken, taking account of the claimant's position and each of the points he makes. The respondent required to make a decision. It did so and it acted reasonably in this regard.

78. At **paragraph 69** the claimant alleged that he was given a final written warning because Mr Dixson, the claimant says, wanted to dismiss the claimant but could not and so issued a final written warning. While this was not a matter for the Hearing to determine, as the claimant had conceded the circumstances the law allows a final written warning to be reopened did not exist in this case, there was no obvious reason if the claimant was correct, why Mr Dixson did not proceed to dismiss. If the desire was to have the claimant dismissed, it was possible for this to have happened in relation to the conduct that led to a final written warning.

79. In the disciplinary appeal outcome letter of 18 October 2018 it is stated: "I have found that the hearing considered whether your actions constituted gross misconduct and that the result was that the allegations were found to be untrue. However, the disciplining manager, Mr Dixson, took into account that you intended the behaviour to be banter and that you intended the outcome of this banter to be better standards within the branch. He therefore lowered the sanction to a final written warning." Thus the outcome of that original hearing could have been dismissal due to the nature of the claimant's conduct, but due to the claimant's explanation, the outcome was lowered to a final written warning. That does not support the claimant's contention that he was given the most severe penalty; He was not dismissed and his representations successfully reduced the penalty.

80. The claimant referred to his not being able to read out his submissions at **paragraph 73**. We had discussed how the Hearing was to be conducted on the first morning. The claimant understood what submissions were and he chose to provide a written submission which he could supplement. I offered both parties a break following conclusion of the evidence but both parties were ready to proceed to submissions. The respondent's agent set out his submissions verbally giving the claimant the opportunity to hear their position. The claimant's written submission was fully taken into account and he was given the opportunity to make any further submissions. Each of the claimant's submissions was fully considered (as set out at paragraph 73 of the reasons).

81. I note in passing that the claimant states in relation to **paragraph 93** that he "was not prepared for submissions". That was contrary to what the claimant stated during the hearing and is not consistent with the way in which he was able to deal with the issues arising and present his response to both the respondent's submissions but also questions I asked of him. It is also incorrect to state, as he does in relation to **paragraph 95**, that the claimant was unable to elaborate on his written submissions. He was given a full opportunity to present all the points he wished and to supplement his written submissions, all of which were taken into account.

82. The claimant noted in relation to **paragraph 75** that had he been able to refer to the full acts of the respondent, and not just the acts leading to his dismissal, he says he would have shown that the respondent was not a reasonable employer. The test in relation to unfair dismissal focusses on the reason for the dismissal and the respondent's actions in relation to its dismissal of the claimant for that reason. That was the focus of the Tribunal's inquiry and not in relation to other actions.

83. At *paragraph 76* I repeated a submission from the respondent's counsel who submitted that the "actual truth is not relevant since it is what was in the respondent's mind at the time which is to be considered". As a matter of law that is correct. The assessment as to whether or not the respondent acted fairly and reasonably is made from the information known to the employer at the time and not from information that is produced subsequently. The legal test in relation to the fairness of a dismissal, by reason of conduct, is set out in **BHS v Burchell** 1978 IRLR 379.

84. It is also useful to set out what the editors of Harvey on Industrial Relations and Employment Law (at Division D1, paragraph 6(f) at paragraph 863) say: "In determining the principal reason for the dismissal, the tribunal must not take account of events occurring subsequent to the dismissal, or even of events which predated the dismissal if they were not known to the employer when he dismissed the employee (**W Devis & Sons Ltd v Atkins** [1977] 3 All ER 40). Consequently, as the Devis case itself indicates, an unfair dismissal will not be rendered fair if the employer subsequently discovers grounds of misconduct which would have justified the dismissal had they been known earlier. The converse of the Devis principle is that if the employer decides on reasonable grounds, and after a proper inquiry, that an employee has committed a particular act of misconduct, and he dismisses the employee for that reason, the dismissal will not be rendered unfair if it subsequently transpires that the employee was innocent after all. It is not unlawful for the employer to be wrong, only to act unfairly."

85. **Paragraph 76** also noted that it is not what the Tribunal believes that is relevant but rather the focus is on what the respondent knew at the time and how it acted. That is a correct summary of the legal position. The claimant was seeking to show that his position was the correct one and that his colleagues were wrong. However, the issue for the Tribunal is not to assess whether the claimant was right in that regard but rather assess whether or not the respondent acted reasonably in reaching the conclusion it did from the information it had before it. I concluded that the actions of the respondent in all the circumstances of this case were fair and reasonably. They knew what the claimant's position was, they considered it fully but chose, reasonably, to prefer the position set out by his colleagues. An equally reasonable employer might well have chosen to accept the claimant's position but that did not mean the respondent did not act reasonably.

86. The claimant alleged that his evidence was ignored (in relation to his comments regarding **paragraph 85**). His position was considered but ultimately the respondent preferred the evidence of his colleagues. That was within the range of responses open to a reasonable employer on the facts of this case.

87. In relation to **paragraph 87** the claimant pointed out I incorrectly referred to the fact that it was a year since Mr Driscoll had dealings with the claimant. It was in fact 9 months. This was an error on my part as the grievance outcome was in September 2018 and the appeal against dismissal was in July 2019. I have taken into account the claimant's correction. I do not consider that the period of time makes any difference to the position. The claimant accepted that there was 9 months during

which he had no relevant dealings with Mr Driscoll. The process that was adopted fell within the range of reasonable responses open to a reasonable employer.

88. The claimant alleged (in his reconsideration application) that those hearing his disciplinary and appeal hearing were not impartial. There had been no criticism of Mr Williams at the time of the disciplinary hearing and he considered matters fairly and reasonably. The fact that the claimant's appeal against the final written warning had not been upheld by Mr Williams did not, in itself, suggest that Mr Williams could not fairly deal with the dismissal hearing. He had not been involved in the disciplinary process that led to the dismissal and was able to fairly consider those matters and there was no evidence put to him to suggest that he acted unfairly and no reason found for him not to be able to fairly consider matters. The claimant may have preferred another manager but that individual had been the investigator. Having investigated matters it was not appropriate to deal with the hearing. It was not unreasonable on the facts for Mr Williams to deal with the disciplinary hearing.

89. In relation to the appeal, the information before the respondent, including the claimant's emails to HR, showed that he was comfortable with Mr Driscoll dealing with the appeal hearing. There was no evidence to show that either Mr Williams or Mr Driscoll did not fairly and reasonably consider all the facts in reaching their decision. Mr Driscoll considered matters afresh in relation to the claimant's appeal and reached a decision that was reasonable on the facts.

90. The claimant again referred to his position in relation to the issues before the dismissing and appeals officer in relation to **paragraphs 96 to 103**. As indicated above the test is whether the respondent acted fairly and reasonably in relation to the decision to dismiss in light of the information before the respondent at the time the decisions were taken. The Hearing in relation to unfair dismissal is not a rehearing of the evidence and it would be wrong to do so. The focus was on the allegation that led to the dismissal. That was why the claimant's questions which focused on acts unrelated to the act that led to his dismissal was not permitted to the extent they were not relevant to the issues to be determined. The claimant was fully able to challenge the basis for his dismissal and the facts that led to his dismissal, which he did fully.

91. The collusion and alleged lies referred to by the claimant at **paragraph 109 to 113** were all matters that the respondent understood during the disciplinary process. It was matters weighed in the balance. The claimant sought to reargue the facts that were before the disciplinary processes (such as in relation to **paragraph 111 and 112**) and had been rejected.

92. The claimant alleged that his position ought to have been preferred in contrast to the other witnesses (such as in relation to **paragraph 114**) but there was no specific reason why those chairing the disciplinary and appeal hearing would unfairly choose to prefer the claimant's colleagues as opposed to the claimant. While the claimant believed his colleagues were not telling the truth, his position was considered but ultimately not preferred. There was no reason why those making that decision did so unfairly. They considered the evidence before them and weighed all the

factors in the balance, including the lengthy and detailed points made by the claimant (much of what is repeated in his application). They reached a decision which a reasonable employer could have reached.

93. While an equally reasonable employer might well have chosen to prefer the claimant's position, as might have the Tribunal, ultimately the question is whether an employer, acting reasonably, could have did what the respondent did. The decision and process that was followed was within the range of responses open to a reasonable employer.

94. The claimant again suggested the Tribunal did not refer to all the evidence (see **paragraph 115**) but that is incorrect. All the evidence presented to the Tribunal was considered. This was not a rehearing of the matter that led to the claimant's dismissal but an assessment of the fairness of the respondent's actions.

95. The claimant in relation to **paragraph 117** again asserted that those who dismissed him (and his appeal) "dismissed the evidence and accepted lies from colleagues". He also asked whether the Judge dismissed his evidence because the claimant did not appeal against he final written warning. The claimant did appeal against the final written warning and all the facts were taken into account. In deciding that the dismissal was fair, the role of the Tribunal was not to consider who was telling the truth during the disciplinary process but assess the actions of the respondent in light of the statutory test of unfairness. Thus the claimant's evidence was not "dismissed". Rather, the Tribunal had to assess (and did assess) whether the respondent acted fairly and reasonably in all the circumstances.

Not in the interests of justice to allow reconsideration

96. The points raised by the claimant are attempts to re-open issues of fact on which the Tribunal heard evidence from both sides and made a determination having considered the facts presented during the hearing and applied the law. In that sense they represent a "second bite at the cherry" which undermines the principle of finality. Such attempts have a reasonable prospect of resulting in the decision being varied or revoked only if the Tribunal has missed something important, or if there is new evidence available which could not reasonably have been put forward at the hearing. A Tribunal will not reconsider a finding of fact just because the claimant wishes it had gone in his favour.

97. That broad principle disposes of all the points made by the claimant. There is no evidence that shows the Tribunal has missed something important or that new evidence is being presented that could not reasonable have been put forward at the time. The claimant was given a fair opportunity to present his case and challenge the respondent which he did. The claimant fairly and candidly conceded that the final written warning was based on his misconduct at the time and although harsh, it did not fall within the circumstances provided by the authorities that would allow the Tribunal to reopen the final written warning. That was a reasonable concession to make and the claimant engaged with the process and agreed that the main purpose of his unfair dismissal claim was to show that he was not guilty of any misconduct and that the decision to dismiss was accordingly

unfair, irrespective of the final written warning.

98. The Hearing concluded and the judgment was issued on the basis of the information before it with both parties having been given a fair opportunity to present their case and hear each other's submissions and present any response.

99. As paragraph 5 of the reasons records, the claimant was advised of the need to ensure that all relevant evidence was placed before the Tribunal to ensure it had all the information on which to make its decision. Time was spent during the Hearing discussing this and the rules as to evidence and how a Tribunal reaches its decision. The claimant was given a fair and fully opportunity to present his case and challenge the respondent's witnesses (on the issues to be determined), which is what he did. The Tribunal carefully considered the facts and reached a conclusion in light of those facts whilst applying the law.

100. The claimant's application for reconsideration is based on the fact that he argued he may not have been dismissed if he had appealed a grievance outcome that (he says) led to a final written warning. He relies on documents obtained close to the Hearing. However, the claimant did appeal against the issuing of a final written warning at the time. The claimant accepts that it is possible the sanction would have remained in place even if he did appeal. He also accepts that he was guilty of conduct that would have fairly led to some disciplinary sanction, albeit he says a final written warning was "harsh". He accepted that it was not possible to reopen that issue. While he seeks to do reopen this after judgment has been issued, it is not just and fair to do so.

101. The claimant did in fact appeal against the final written warning and his points were taken into account. It was clear that his submissions at the disciplinary hearing that led to the sanction were fully taken into account (such that the outcome was a final written warning rather than dismissal) and that the appeal against the sanction was robust and considered the claimant's points fully. It is unlikely that an appeal against an earlier grievance would have altered the position (since the claimant made his relevant representations during the disciplinary process).

102. The claimant's application for reconsideration is also based on the fact that he argued his colleagues did not tell the truth in the disciplinary process and ultimately his position should have been preferred such that he would not have been dismissed. The Tribunal considered his arguments carefully but concluded that the respondent considered that the claimant's colleagues' position was preferred to that of the claimant. They did so after having carried out a reasonable investigation and a reasonable disciplinary process.

103. Ultimately the procedure that was followed and the decision to dismiss the claimant that was taken as a result all fell within the range of responses open to a reasonable employer. While some employers might have preferred the claimant's position or undertaken a different procedure, an equally reasonably employer could have done what was done in this case.

Documents

104. I do not consider that the respondent withheld documents such that it would be fair and just to reconsider the decision as asserted by the claimant.

105. Firstly, the documents were in the claimant's possession before the Hearing and he had an opportunity to consider these and seek further time if needed. No further time was sought and the claimant was able to conduct his case and do so thoroughly and fairly. This is not a claim whereby new evidence has emerged following the Hearing. The claimant had possession of the documents before the Hearing and the issues arising were dealt with as a preliminary matter with the parties' agreement.

106. Secondly, in relation to the particular documents, the September document was handwritten notes of an interview in relation to a grievance meeting. The claimant did not appeal against the grievance outcome and it is not certain that any appeal would have altered the subsequent disciplinary process that led to the claimant receiving a final written warning, against which he did (unsuccessfully) appeal.

107. No issue had been raised in connection with the letter of 24 September 2018.

108. Finally, the handwritten investigation notes from 4 June 2019 were the handwritten notes of the typed transcript that had already been disclosed to the claimant (and was referred to in the bundle). There was no explanation as to why the later production of this document created a particular disadvantage to the claimant.

Conclusion

109. I considered the overriding objecting in reaching my decision to ensure the decision taken was fair and just. That applies to both the claimant and the respondent since justice requires to be achieved for both parties. I have done so carefully.

110. Having considered all the points made by the claimant I am satisfied that there is no reasonable prospect of the original decision being varied or revoked. The points of significance were considered and addressed at the Hearing. It is not in the interests of justice to reconsider the decision the Tribunal reached.

111. The application for reconsideration is therefore refused under rule 72(1) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Apology for delays

112. Unfortunately the Tribunal system has been suffering from significant administrative delays which seriously impacted the passing of correspondence to the Employment Judge and thereafter the allocation of

judicial time for the consideration of this application.

113. The initial emails from the claimant raising these issues were not passed to the Employment Judge until around March 2020. The claimant's request for written reasons was not passed to the Employment Judge until May 2020. There were further delays in passing the information to the Employment Judge due to the impact of the ongoing pandemic.

114. Unfortunately due to a very significant (and unprecedented) backlog of cases and lack of judicial time, it has only just been possible to properly review matters and issue this judgment.

115. I apologise to the claimant (and respondent) for these delays which are regrettable but sadly unavoidable.

_____

Employment Judge Hoey

Dated: 8 December 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

18 December 2020

FOR THE TRIBUNAL OFFICE