EMPLOYMENT TRIBUNALS

Claimant: Mr C Preston

Respondent: Eurocell PLC

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the reasons sent to the parties on 1 July 2020, are corrected as set out in strike out and bold type at paragraphs 30, 52, 87 and 116.

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Employment Judge Hoey
Dated: 21 December 2020

SENT TO THE PARTIES ON
21 December 2020

Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.

EMPLOYMENT TRIBUNALS

Claimant: Mr C Preston

Respondent: Eurocell PLC

Heard at: Manchester **On:** 3 and 4 February 2020

Before: Employment Judge Hoey

REPRESENTATION:

Claimant: In person
Respondent: Mr Braier, Counsel

JUDGMENT having been sent to the parties on 4 February 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

CORRECTED REASONS

1. This is a case for unfair dismissal. The claimant was representing himself and the respondent by Counsel. At the end of the hearing I was able to issue an oral judgment.

2. Written reasons were subsequently requested and these are now provided.

3. Due to the ongoing health pandemic and administrative matters, with the request for written reasons only relatively recently having been received, issuing of the reasons was delayed, for which the Tribunal apologises.

Preliminary matters

4. I began the hearing by emphasising to the parties the overriding objective set out in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, namely to ensure that all decisions that are taken are made justly and fairly taking account of all the circumstances with due regard for justice. I also emphasised to the parties the need to ensure that the parties were placed upon an equal footing and that they should work together to achieve this.

5. I also explained the importance of evidence and how a Tribunal makes findings on the basis of evidence that it hears and that it was important for the claimant to ensure that any documents and information that he requested the Tribunal to consider be fairly put in evidence.

6. The parties had worked together to arrive at a bundle of 294 pages and the parties had produced three witness statements, one from the claimant and one each from the Dismissing and Appeals Officers. The claimant also produced a supplementary document on day 2 which was taken into account. Each of the witnesses confirmed that their statements were accurate.

The Issues

7. I focussed upon the issues that required to be determined in this case in light of the claims that had been made and in particular in the absence of any case management. Before turning to the issues, a preliminary issue arose which related to a final written warning the claimant had received that was taken into account when he was dismissed.

Final written warning issue

8. This was a case where the claimant had previously been issued with a final written warning. There was a discussion around the law pertaining to final written warnings and in particular the legal position as to the opening up of previous final written warnings in the course of unfair dismissal proceedings. The discussion centred around the case of **Wincanton -v- Stone** [2013] IRLR 178 and in particular President Langstaff's judgment.

9. The claimant noted in his appeal letter that he felt the final warning was "a bit extreme". He denied that he was a bully and said that he felt a verbal or written warning would have been sufficient and "fairish". The final written warning was in respect of alleged bullying behaviour. Although the claimant admitted certain things and certain conduct, he denied that he was a bully.

10. There was an appeal meeting in respect of that final written warning. His position at the appeal hearing was that he thought the sanction was harsh. The respondent upheld the final written warning and found that while the claimant had been found guilty of gross misconduct and bullying behaviour, because he had intended the behaviour to be "banter", the sanction and outcome had been lowered from dismissal to a final written warning. The appeal therefore failed and the final written warning stood.

11. I explained the effect of the authorities to the claimant and the 3 circumstances where a Tribunal in considering an unfair dismissal claim in respect of a claimant who had been subject to a final written warning can revisit or "open up" that final written warning.

12. The claimant candidly and fairly accepted that the issue with the final written warning was (1) not that it was manifestly inappropriate (2) nor that it was issued in bad faith, (3) nor that there were there no grounds to issue it. Instead he disputed the severity of it. He accepted that there was some form

of misconduct but that it was too harsh to issue a final written warning. He describes the issuing of a final written warning as “extremely harsh”.

13. In light of the facts and having set out the legal position, the claimant accepted that the final written warning was not capable of being reopened in the course of this hearing and the basis of his challenge to the dismissal was that he was not guilty of the conduct which led to his dismissal. His position was that the individuals who complained against him had fabricated or exaggerated the circumstances, such that dismissal was unfair in light of all the circumstances, which included the final written warning to which he was subject. That approach was agreed with both parties and the final written warning was not a matter which was being “re-opened” in the course of the hearing.

Issues

14. The parties agreed that there were therefore three main issues to be considered in this claim.

15. Firstly, what was the reason for the dismissal in the respondent’s mind that led to the claimant’s dismissal and was it a potentially fair reason, namely matters relating to the claimant’s conduct.

16. Secondly, whether the claimant’s dismissal in all the circumstances was fair which would require a consideration as to whether the employer genuinely believed in the claimant’s guilt, whether that belief was honestly held, whether there was as much investigation as was reasonable and finally, whether in all the circumstances dismissal was a reasonable sanction falling within the range of responses open to a reasonable employer.

17. Thirdly, and if the claimant’s dismissal was found to be unfair, what reduction should be made to any compensation on the grounds that the respondent argued the claimant would have been dismissed in any event and/or that he in some way contributed to his dismissal.

18. The claimant confirmed that re-instatement was his principal remedy in this case and it was agreed that a separate remedy hearing would be fixed in the event the claimant’s dismissal was found to be unfair.

Facts

19. I now turn to my findings of fact which I make on the basis of the evidence that was led before this Tribunal. I only make findings so far as necessary to determine the issues which the parties have agreed and I make my findings based on the balance of probabilities, namely whether or not the particular facts are more likely than not to have happened.

20. The Tribunal heard evidence from the Dismissing Officer, Mr Williams, the Appeal Officer, Mr Driscoll, and the claimant. Each individual was appropriately questioned with the claimant being given assistance where necessary to ensure that relevant questions were put to each witness. The

focus of the questions was in relation to the issues the Tribunal had to determine as agreed with the parties.

Background

21. The respondent is a manufacturer, distributor and recycler of building products with a number of branches throughout the country. It supplies products to the trade and to the public and the claimant's branch had around six staff. The claimant was employed as an Operative to serve customers and deliver goods. He was employed from 9 November 2015 until his dismissal.

22. The claimant was subject to a contract of employment and a disciplinary policy. The process in respect of a final written warning and dismissal is set out in the policy and "gross misconduct" is stated to include harassing or bullying colleagues or encouraging or engaging in any form of physical, verbal abuse or threatening behaviour to other staff.

23. Following a grievance that had been raised in around August 2018 a disciplinary process was instigated in respect of potential misconduct on behalf of the claimant. The grievance was heard by Mr Driscoll on 30 August 2018 and an outcome was issued on 24 September 2018.

Claimant given a final written warning in light of his conduct

24. The disciplinary process that followed resulted in a final written warning being issued to the claimant in September 2018. The allegation was that the claimant had displayed bullying behaviour to colleagues as a result of alleged comments the claimant had made to colleagues, some of which the claimant had admitted. The claimant admitted that he engaged in banter and that he had raised his voice, albeit he did not believe he was bullying his colleagues.

25. A final written warning was issued for twelve months and he was warned that any future misconduct could result in his dismissal.

26. The claimant appealed against the severity of the sanction feeling it was harsh but he accepted that a warning would have been appropriate.

27. His appeal was refused on the basis that the outcome had already been reduced from dismissal to a final written warning. The appeal was heard by Mr Williams.

Incident on 4 June 2019

28. The claimant's dismissal stems from an incident that happened on 4 June 2019. This involved the claimant in an altercation with two of his colleagues. The claimant and the parties are in dispute as to what precisely happened on that day, albeit the claimant admits that there was an altercation.

29. The claimant accepts that he was concerned about his colleague's parking and that he attended an office with two colleagues. The claimant accepted that he leaned on the door during the discussion and that almost immediately following the incident a senior manager was telephoned by one of his colleagues to complain. As a result of that telephone call, a senior manager

attended site a few hours later to take statements from the individuals, including the claimant.

Investigation

30. The investigating manager's position was that it was alleged the claimant had barred an employee from leaving the meeting following a verbal confrontation. ~~That member of staff who suffered from Asperger's Syndrome had suffered anxiety as a result.~~

31. As a result of the call that was made, an investigation was undertaken and within a few hours statements were taken. The claimant provided his statement on the 4 June 2019. He accepted that he had leaned on the door and the statement said he would only let the employee out after his questions were satisfied. The claimant adjusted the written record to say he wanted answers at the meeting and that the individuals were free to leave the meeting at any time.

32. The claimant accepted that the employee said he was phoning the Police and the claimant said the individual should "do it". The claimant accepted that the colleague threatened to call the colleague's brother who was a Police Officer.

33. The statement of Mr Roddy, one of the colleagues, which was taken at the time, stated that there was a discussion with the claimant earlier in the morning and the claimant subsequently followed the individual into the office and closed the door standing behind it. That individual said that the claimant made it clear he was not leaving until the situation was resolved. He alleged that the claimant was confrontational and that he felt trapped because he believed that the claimant was preventing him from leaving the office. He said that he phoned the Police and when the call did not connect he phoned his brother who was a Police Officer. He said he felt intimidated and that he believed the claimant refused to let him leave, such that he texted his girlfriend to state this.

34. The statement of Mr Greenhalgh, the other colleague in the office, that was taken at the time, confirmed that the claimant followed the individual into the office and he believed that the claimant stood as if blocking the door. He said that the claimant did not allow the individual to leave and that the colleague tried to call the Police.

35. The final statement taken (from a colleague who was outside the room, Mr Halligan) stated that he could see the claimant blocking access to the door. He remembers this as he had tried to distract customers with whom he was dealing at the time.

36. The claimant disputed a number of the facts which were found in the statements.

Disciplinary hearing

37. A disciplinary hearing was convened, following a disciplinary invite letter. This hearing was convened for 10 June 2019 with the specific allegation that on 4

June 2019 the claimant prevented an employee from leaving the office which could be considered threatening behaviour and thereby potentially amounted to gross misconduct. With the invite letter the claimant was given a copy of the investigation minutes following his own meeting and the three other statements that had been provided together with the disciplinary policy.

38. The claimant made a number of written annotations to these statements which he provided to Mr Williams who was to chair the disciplinary hearing.

39. The claimant did not raise any issue with Mr Williams hearing the disciplinary hearing.

40. The claimant made a number of comments, including that he did not dispute the fact that he leaned on the door. He also made no adjustment to the comment in Mr Halligan's statement where it was alleged that the claimant had "blocked the door".

41. There was no comment on Mr Greenhalgh's statement by the claimant when Mr Greenhalgh alleged that the claimant was not allowing the individuals to leave the office, albeit there are other parts of the statement that the claimant disputed.

42. Finally, in Mr Roddy's statement where Mr Roddy alleges that he tried to leave the office and the claimant prevented him from so doing, the claimant made no comment other than that Mr Roddy did not actually call the Police as he failed to dial the number properly.

43. The claimant sent a very detailed letter challenging a number of issues on 7 June 2019. This is a detailed letter whereby the claimant alleges that this was an attempt by his colleagues to "stitch" up the claimant and have him dismissed. He provided detailed narrative about the background.

44. At page 9 of the letter the claimant accepted (1) that he closed the door, (2) that his colleague said he would call the Police and (3) that a senior manager was called by the individual to come and sort matters out.

45. He said that he noted one of the individuals claimed that the claimant locked the individual in the office. The claimant said that "Lee was free to push past me at any time if he was really desperate to get out".

46. The claimant stated that each of these individuals knew his final written warning was still in place and he believed they would do anything to get him dismissed.

47. The disciplinary hearing took place on 24 June 2019 and at the hearing the claimant stated that he did not stop the individuals from leaving as they could have gone at any time. He repeated his assertion that he believed he was being stitched up in an attempt to have him dismissed. There was no specific evidence provided by the claimant to substantiate the suggestion of being stitched up, other than the email he sent on 7 June 2019.

48. Prior to receiving the outcome of the disciplinary hearing, the claimant sent a further email on 20 June 2019 to HR commenting that after he had been issued with the final written warning when he had allegedly bullied a colleague, he had worked with this colleague with "no issues". The claimant referred to his colleagues as "a pair of weasels" and made reference to another as "another colleague's bitch" and that another colleague was another colleague's "puppet". The claimant repeated the fact that he believed he was being stitched up by these individuals but was unable to provide any substantive evidence to support that assertion.

Outcome - dismissal

49. The outcome letter was provided to the claimant late on 20 June 2019. This states:-

> "During the hearing we discussed your behaviour since you received a final written warning in September 2019. You submitted written notes prior to the meeting in which you described scenarios where you believed your colleagues to be provoking you into confrontational situations. You believed they were doing this as they wanted you to leave the business.
>
> We discussed the incident on 4 June 2019. You explained that you have requested on multiple previous occasions that the van is parked at the bottom left of the car park. You believe that Jason, Branch Manager, had asked Lee to park the van where you prefer to park your car in order to antagonise you. I found no evidence that it was done to antagonise you and I was presented with a justifiable reason why the van was parked there which was to enable the relocation.
>
> You deny that you were standing to block the office door and you maintained that it was a convenient place for you to stand. You stated that you did not consider the situation to be confrontational. You did not believe you were stopping Lee from leaving the office, however, you acknowledge that your actions were not appropriate and the situation should not have happened.
>
> You also stated that your colleagues are all intimidated by you.
>
> You asked me to consider that you had not received any customer complaints. I do not deem that an absence of customer complaints is particularly relevant to the allegations.
>
> In order to draw my conclusion, I considered whether the incident itself occurred, having reviewed the witness statements I have no doubt that it occurred, although I acknowledge that you have a different perspective to the event to that of your colleagues.
>
> I have considered the impact that this had on everyone who was present. One colleague was so upset that he needed to leave the branch to compose himself, another felt he was intimidated and sat in his car. While I expect provisional disagreements occasionally occur I

> deem it extremely unhealthy and unprofessional for people to be so troubled that they leave the premises. I would consider this reaction to indicate the individuals to be experiencing stress. I acknowledge you are passionate about achieving high standards and positive outcomes for the branch, however, the evidence indicates to me that that your passion can be misplaced and manifests itself in inappropriate behaviour when you find that others are not in agreement with you.
>
> At the point where your final written warning was issued in September 2018 you were requested "where you are concerned about the standards of work of a colleague please raise this with a manager for them to deal with, additionally where you do not agree with a management decision please challenge it constructively and do not enter into any arguments".
>
> Whilst you raise your concerns with a manager it does not appear to me that you allow them to deal with the matter and instead try to force the issues, additionally you did not present your concerns constructively and you entered into an agreement.
>
> Therefore, I deemed that you failed to meet the instruction that followed your final written warning. As such, I concluded your actions amounted to misconduct within the context of the final written warning you will therefore be dismissed for threatening behaviour".

50. The claimant was found guilty of the allegation against him and he was dismissed, with the claimant being paid in lieu of notice.

51. In passing I record that the claimant states at the introduction to his witness statement that "While I accept the charges against me are serious and would warrant a dismissal, I am innocent of all charges."

Appeal

52. The claimant sought to appeal his dismissal and asked following the dismissal that his appeal be heard by the manager who carried out the investigation. It was then suggested this manager might not be impartial as he had **investigated matters.** ~~upheld the final written warning that was issued to the claimant.~~

53. The claimant then asked that his appeal be heard by either Mr Driscoll (Northern Manager) or the Chief Executive. When the claimant was advised that Mr Driscoll might not be able to hear the appeal on the date that was fixed the claimant stated that unless the Chief Executive can hear the appeal "he wouldn't be comfortable with anyone else".

54. The appeal was subsequently heard by Mr Driscoll. The claimant did not raise any issue with this.

55. In the claimant's email of 26 June 2019 he apologises for his part in the incident. He notes that it would not have happened had the colleague parked

correctly. He repeated his assertion that he did not stop anyone from leaving the office and that both colleagues were free to leave at any time.

56. The appeal meeting took place on 1 July 2019, during which the claimant emphasised that he believed the events to have been exaggerated. He stated that he felt the outcome was harsh for what happened but did not provide any further information on any additional information following the dismissal meeting.

57. The outcome letter was issued on 2 July 2019. Mr Driscoll found that the several witness statements indicated that the individuals felt intimidated and scared to leave the room. There was no new evidence provided by the claimant and as such, his appeal was dismissed.

Law

58. Section 98 (1) of the Employment Rights Act 1996 states that:-

> "In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show: -
>
> (a) the reason (or if more than one the principal reason for the dismissal); and
>
> (b) that it is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

59. Section 98(2) of the Employment Rights Act 1996 states that:-

> "A reason falls within this subsection if it… relates to the conduct of the employee".

60. Section 98(4) of the Employment Rights Act 1996 contains the test in this area:

> "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 reasons 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".

61. In accordance with the tests set out in ***British Home Stores Ltd v Burchell*** 1980 ICR 303 the Tribunal must consider:-

(i) Did the respondent believe the claimant was guilty of misconduct?

(ii) Did the respondent have in its mind reasonable grounds upon which to sustain that belief? and

(iii) At the stage at which that belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances of the case?

62. Range of reasonable responses:-

(i) When assessing whether the **Burchell** test has been met, the Tribunal must ask whether dismissal fell within the range of reasonable responses of a reasonable employer and this test applies both to the decision to dismiss and to the procedure. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

(ii) The starting point should always be the words of section 98(4) themselves. In applying the section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer; it is not for the Tribunal to impose its own standards. The Tribunal has to decide whether the dismissal and procedure lay within the range of conduct which a reasonable employer could have adopted.

(iii) In many cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair. However, the band is not infinitely wide and is not a matter of procedural box ticking

63. The Employment Tribunal must not substitute its decision for that of the employer and must look at the matter through the lens of a reasonable employer: could a reasonable employer have carried out the procedure that was undertaken, and could a reasonable employer have dismissed for the reasons relied upon in this case? In other words, it is important not to substitute the Tribunal's decision for that of the employer, and the matter must be looked at in the round to decide whether or not the respondent acted reasonably: **Sainsburys v Hitt** 2003 IRLR 23.

64. As it is not a criminal trial, the employer does not need to prove the guilt of the employee beyond reasonable doubt – it is sufficient that the employer acted

reasonably in treating the misconduct as a sufficient reason to dismiss in the circumstances known to the employer at the time.

65. It is important to emphasise that in determining whether the procedure was carried out was fair and whether or not the decision itself was fair must be considered from the perspective of a reasonable employer. In order words, could a reasonable employer in the position of the respondent with the information that was before the respondent at the time have fairly dismissed taking account of size, resources, equity and the merits of the case.

66. It is important to emphasise that the Tribunal must not substitute its decision for the employer and decide whether it would have dismissed but rather focus on the matter from the perspective of a reasonable employer.

67. In particular, the Tribunal must consider the information that was available to the respondent at the time and not information that is provided subsequently.

68. The Tribunal also takes into account the comments of then President Langstaff in the **Wincanton -v- Stone** 2013 IRLR 178. At paragraph 37 the court emphasised that the Tribunal should take into account the fact that a final written warning has been issued, and in particular not go behind a warning to take into account factual circumstances giving rise to the warning.

69. It is worth quoting that paragraph from the judgment in full:

> "We can summarise our view of the law as it stands, for the benefit of Tribunals who may later have to consider the relevance of an earlier warning. A Tribunal must always begin by remembering that it is considering a question of dismissal to which section 98, and in particular section 98(4), applies. Thus the focus, as we have indicated, is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a Tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with *prima facie* grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently. Where the earlier warning is valid, then:
>
> (1) The Tribunal should take into account the fact of that warning.
>
> (2) A Tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal. This case is one in which the internal appeal procedures were exhausted, but an Employment Tribunal was to consider the underlying principles appropriate to the warning. An employer aware of the fact that the validity of a warning is being challenged in other proceedings may be expected to take account of that fact too, and a Tribunal is entitled to give that such weight as it sees appropriate.
>
> (3) It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser

category of warning would have been appropriate, unless the Tribunal is satisfied as to the invalidity of the warning.

(4) It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore Tribunal should be alert to give proper value to all those matters.

(5) Nor is it wrong for a Tribunal to take account of the employers' treatment of similar matters relating to others in the employer's employment, since the treatment of the employees concerned may show that a more serious or a less serious view has been taken by the employer since the warning was given of circumstances of the sort giving rise to the warning, providing, of course, that was taken prior to the dismissal that falls for consideration.

(6) A Tribunal must always remember that it is the employer's act that is to be considered in the light of section 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur.''

Compensation

70. In addition to a basic award (Section 119) Employment Rights Act 1996, Section 123(1) Employment Rights Act 1996 provides for a compensatory award which is such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer (capped at a year's pay).

71. Contributory conduct:-

(i) Section 122(2) Employment Rights Act 1996 states:

> Where the Tribunal considers that any conduct of the claimant before the dismissal ... was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly

(ii) Section 123(6) Employment Rights Act 1996 states:

> Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion regard to that finding.

Polkey

72. Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a Tribunal could make. In some cases it may be clear that the employee would have been retained if proper procedures had been adopted. In such cases the full compensatory award should be made. In others, the Tribunal may conclude that the dismissal would have occurred in any event. This may result in a small additional compensatory award only to take account of any additional period for which the employee would have been employed had proper procedures been carried out. In other circumstances it may be impossible to make a determination one way or the other. It is in those cases that the Tribunal must make a percentage assessment of the likelihood that the employee would have been retained.

Submissions

73. The parties presented very detailed and professional submissions in this matter. The Tribunal has carefully considered the submissions from both parties.

Respondent's submissions

74. Counsel noted this was a claim for unfair dismissal only. It was a claim where the claimant had been issued with a final written warning in circumstances where the claimant had accepted it was not open to him to re-open that warning.

75. In terms of the reasonableness of the sanction it was argued that the dismissal is only unfair if the approach that was taken was one that no reasonable employer could have taken, which applies to procedure, to investigation, belief in guilt and reasonableness of sanction.

76. Counsel argued that the actual truth was not relevant since the question is what was in the mind of the decision maker at time. Similarly what the Tribunal believes is not relevant. The test is one of reasonable responses.

77. In this case the focus is solely on the solitary incident on 4 June 2019. It was an incident of such seriousness that Mr Greenhalgh considered it necessary to call a senior manager to come and deal with it.

78. A senior manager investigated those present. It was agreed that during the course of the incident one of those present attempted to make a call to the Police and then his brother, a Police officer. The claimant accepted this at the time albeit challenged it now (but the evidence before the respondent at the time shows he accepted it).

79. The witness statements are consistent in that the claimant refused to allow the individuals to leave the office and prevented them from doing so. This is found in the witness statements. The claimant was blocking access to the door at all times.

80. The claimant's position before the respondent was not clear. In his investigation meeting he said he "leaned on the door" but he said that he

would only let the individual leave once his questions were answered. When he wrote notes on the transcript he said “not quite true. Wanted answers but free to leave at any time.” That freedom was seen from the claimant’s letter of 7 June when the claimant said the individual “was free to push past me at any time if he was really desperate to get out”. Then in the disciplinary meeting the claimant confirms he was standing against the door. These comments gain a context from the suggestion in the claimant’s letter his colleague was “free to push past if really desperate get out”, ie he could have forced his way out.

81. It was also submitted that while the claimant made various comments on the statements (showing his disagreement), at no point did he write anything when they asserted the claimant prevented Mr Roddy from leaving the room or as one witness says, the claimant was blocking the door at all times.

82. It was submitted that while the claimant said his colleagues were “stitching him up”, this is not backed up with anything of substantive. There is nothing before the decision makers to show any stitch up.

83. Moreover the claimant’s credibility was in issue given he argued the witness outside could not see anything and yet the claimant conceded in cross examination that it would have been possible to see the claimant was standing at the door.

84. This issue is not what the claimant believes but whether the respondent acted reasonably. There is clear witness evidence to sustain reasonable grounds in the belief, 2 witnesses within the room and 1 outside with the claimant providing no evidence to challenge their position. All he argues is that they are not telling the truth but gives no evidence to support that.

85. Ultimately the respondent takes account of all the circumstances, the witness evidence, the call to Police and brother and contact to girlfriend together with the call to senior management.

86. There was no further steps the respondent could have taken to test the matter. There was nothing else to put to them and nothing was suggested by the claimant.

87. The respondent act**ed** fairly in dealing with the disciplinary issue. Those hearing the **disciplinary** hearing and appeal **we**re impartial and fair. The fact a**round 9 months** ~~year~~ before the disciplinary chair conducted previous process of itself does not “count them out” since that was a separate process in a separate matter. There was no suggestion of any ongoing contact and he had not been involved in the matter in question. There was no suggestion of collusion and there was no issue raised about Mr Williams acting as disciplinary officer before or when he conducts the hearing.

88. There is also no issue raised by the claimant as to Mr Driscoll hearing the appeal which is not surprising since the claimant asked that he hear it.

89. It is clear that dismissal falls within the range of reasonable responses. In **Wincanton** at paragraph 35 the court makes it clear that although not inevitable, the reasonable expectation or usual result of misconduct following

the issuing of a final written warning, wil be dismissal which is consistent with the disciplinary handbook.

90. The claimant himself was aware of the risk of dismissal if there was further misconduct during the subsistence of the final written warning. The misconduct in this case is related given it is about interaction with fellow employees making dismissal so clearly in the range of reasonable responses.

91. The claimant was not summarily dismissed but paid in lieu of notice.

92. Counsel also argued for a 100% reduction on the ground that the claimant was guilty of contributory conduct and would have been dismissed in any event. His conduct was such that dismissal was inevitable given the outstanding final written warning.

Claimant's response

93. The claimant was prepared to provide his submissions and did not need any further time to respond.

94. In his submission he argued that the witness did not ring his policeman brother but said he considered ringing him. In his submission the witnesses wanted the claimant dismissed.

95. The claimant argued that there were many inaccuracies in the statements, such as in the suspension meeting.

96. In short the claimant argued that the decision was outwith the range of reasonable responses. He argued that he was telling the truth and did not act in such a way as to justify dismissal in his view.

Decision and reasons

97. I took the time to consider the submissions of both parties very carefully and all the evidence led before the Tribunal together with the statutory language and legal tests and authorities in this area as I set out above. I approach matters in line with the issues that were agreed to be determined.

Was there a potentially fair reason for the claimant's dismissal

98. There was not real dispute that the reason for the dismissal related to the claimant's conduct. This is clearly set out in the allegation in the invite letter in connection with the incident on 4 June.

99. This was an incident that was of sufficient seriousness that a senior manager was called immediately at the time (by a witness) and for statements to be taken within hours of that call being made. It was also of sufficient seriousness for one of the individuals present to suggest the Police be called and that he contact his brother, a Police Officer. He also contacted his girlfriend about the incident (saying he felt intimidated by the claimant).

100. The two employees present at the time (other than the claimant) gave consistent accounts as to what happened in their statements which information was before the employer at the time. Both individuals stated that the claimant sought to prevent them from leaving the room and a third employee who was present outside at the time, who was able to see through the frosted glass door, could confirm the claimant stood at the door, a fact subsequently accepted by the claimant. The claimant accepted and conceded during cross examination that his outline could be seen.

101. The claimant also accepted that he had leaned on the door during his first investigation statement and he stated that the others were free to "push past him at any time if they really desperate to get out".

102. The information before the employer at the time therefore was that the claimant sought to prevent his colleagues from leaving the room. The claimant did not dispute the comments made by the individuals on their statements, albeit he focussed on the fact that he believed that these individuals were seeking to persuade the respondent to dismiss him by stitching him up.

103. The claimant accepted that he had no substantive evidence to support his assertion and there was no specific evidence he had in order to challenge the witness statements these individuals provided. His position was that he believed the individuals were exaggerating and that they were seeking to have him dismissed.

104. I am satisfied that the reason why the respondent dismissed the claimant was for matters relating to the claimant's conduct.

Did the respondent genuinely believe in the claimant's guilt

105. I have considered this question carefully and looked at the evidence that was presented to the Tribunal. Mr Williams and Mr Driscoll both considered all of the evidence that was provided to them, including not just the statements obtained during the investigation but also the detailed evidence the claimant provided, both in terms of the challenges to the statements obtained as part of the investigation and the claimant's detailed communications setting out his position.

106. While the claimant strongly believes he is telling the truth (and even if he were), that is not the issue for the Tribunal to determine since the question for the Tribunal is whether or not the respondent reasonably believed that the claimant was guilty of the misconduct that was alleged at the relevant time. The Tribunal must take into account the evidence before the respondent in assessing the fairness of the dismissal, not evidence that is produced subsequently.

107. In these types of cases the respondent must make a choice. It must decide whom it believes between two competing accounts. The respondent in this case considered the fact that the witnesses may "have it in" for the claimant, that is, they may seek to fabricate evidence and seek to exaggerate what had

happened. The difficulty in this case was the absence of any justification or any evidence that supported that assertion.

108. There was no substantive evidence provided by the claimant that would allow the claimant to substantiate his assertion that these individuals were not telling the truth. There were no further efforts or steps that could be taken to verify either position and nothing was suggested to the respondent at the time. The claimant's position was that the information the witnesses provided was exaggerated and that his position should be preferred.

109. Ultimately the respondent had to decide whether to accept the claimant's position or that provided by the other statements.

110. The claimant's evidence that he provided to the respondent during this process did not challenge the fact that the individuals did not leave the room and that the claimant stood at the door. He argued that they were not forcibly held back but he accepted to standing at the door.

111. There was no evidence the claimant could provide to challenge what the witnesses had said other than he believed he was telling the truth and they were not.

112. It was accepted by the respondent that one of the individuals tried to call the Police and his brother (a Police officer) and that a senior manager was called almost immediately to try and sort it out. It was also accepted that one of those present felt so intimidated by the claimant not letting him leave, such that he texted his girlfriend to state this.

113. There was also no suggestion by the claimant that the individuals in question would have provided any different evidence had they been spoken to further. There was no suggestion that there was any further evidence or matters that ought to have been put to these witnesses, which would have yielded a different result.

114. There was also no specific issues or positions set out that Mr Williams or Mr Driscoll would have changed his view in respect of any other evidence that the claimant had.

115. There was no suggestion that Mr Williams or Mr Driscoll did not properly consider the evidence before them. There was no evidence to challenge the decision of Mr Williams or Mr Driscoll and they considered the position and made a decision on the basis of the information they had before them.

116. Both the dismissing and appeal officers sought reasonably to assess the evidence they had and reach a view. There was no evidence that they acted unreasonably, nor that they were not independent or impartial. The previous matter involving the claimant and Mr Driscoll had happened **around 9 months** ~~over a year~~ before when they worked in a different area of the business and the claimant had specifically asked that Mr Driscoll deal with it. The respondent agreed to the claimant's request in that regard.

117. The Tribunal accepted the evidence led that these individuals properly considered all of the evidence before them. The claimant had accepted that he was standing in front of the door. He said the individuals could have pushed past him if desperate to get out. While the claimant may believe that he acted properly, from the evidence before the respondent, they reasonably concluded that the claimant had not acted appropriately. The individuals looked at the evidence and reached a view that was based on the information before them.

118. The claimant did not like the fact that his position was not preferred, but there was no evidence to suggest that the conclusion reached by the respondents in not accepting his evidence was unreasonable.

119. The test is one of reasonableness and whether the respondent acted reasonably in all the circumstances. The respondent acted reasonably in the specific circumstances of this case by preferring the evidence of the claimant's colleagues.

120. The Tribunal therefore concluded that the respondent did believe in the guilt of the claimant and that the respondent acted reasonably in so believing.

Was the belief honestly held

121. The Tribunal considered all of the evidence and was satisfied from the evidence presented to the Tribunal that the respondent did genuinely and honestly believe in the claimant's guilt.

122. Even if the claimant was telling the truth, the respondent had to make a decision as to whom it believed given the information that the respondent had before it at the relevant time.

123. In all the circumstances I am satisfied that the respondent acted in a fair way, balancing the evidence the claimant provided with that provided by the other witnesses in this case. Having assessed the evidence presented to the Tribunal and carefully considered the position I am satisfied that the respondent honestly believed in the claimant's guilt.

124. The respondent did take into account the points made by the claimant. It had, for example, granted the claimant's request that Mr Driscoll deal with the matter. The evidence clearly showed that the respondent before dismissing the claimant balanced the evidence that had been obtained from both sides and ultimately genuinely and honestly believed in the claimant's guilt.

Was the claimant's dismissal fair in all the circumstances

125. The claimant accepted that he knew that he was subject to a final written warning and in the event of further misconduct he could be dismissed. In this case the misconduct that was alleged was similar to that which had led to the final written warning, namely interaction with colleagues.

126. The respondent carefully considered the competing evidence before it. It also considered the claimant's position in detail and assessed whether or not there

was any reasonable basis upon which the claimant's position could be sustained in preference to that advanced by the witnesses.

127. In the Tribunal's view the respondent reached a view which a reasonable employer could have arrived at. Ultimately, the process and procedure that was carried out was not perfect but this is not a counsel of perfection. The procedure and outcome was reasonable, one which a reasonable employer in all the circumstances could have carried out.

128. The Tribunal must consider the information that was before the respondent at the time of dismissal (and appeal), and not subsequently. On the basis of the information before the respondent at the time, the respondent acted fairly and reasonably.

129. There was no specific challenge by the claimant Mr Williams dealing with the hearing and the claimant specifically asked for Mr Driscoll to deal with the matter. Further, there was no suggestion that either individual did not properly consider the competing evidence that was before them. The claimant's position has always been that the witnesses exaggerated the position.

130. Both the disciplinary officer and appeal officer properly balanced the perspectives that were presented and reached a conclusion which was reasonable in the circumstances from the information in their possession. The procedure that was followed was reasonable, falling within the range of responses open to a reasonable employer.

131. The claimant was given the opportunity to present his position (and he did so at length). This was fully considered.

132. Having considered all the evidence I am satisfied that the procedure that was followed by the respondent that led to the claimant's dismissal fell within the range of responses open to a reasonable employer.

The decision to dismiss

133. The Tribunal carefully considered the decision to dismiss and assessed this against the statutory requirements within the Employment Rights Act 1996 and the authorities set out above.

134. The claimant accepted he was subject to a final written warning which had been issued following his conduct, which the claimant accepted was inappropriate, even if he disputed the seriousness of it. The Tribunal has taken all the facts of this case into account, in light of the size and resources of the respondent and equity and substantial merits of the case.

135. The full factual matrix was considered and balanced by the respondent. All evidence was examined and a decision was taken in light of the information known to the respondent at the time, including the information the claimant communicated to the respondent during the disciplinary process.

136. The Tribunal understands that the claimant strongly maintains his innocence. Ultimately, however, the issue is whether the decision to dismiss was fair in all the circumstances. As the claimant concedes in the preamble to his witness statement, the charges against him were serious and could warrant dismissal.

137. In the preamble to his witness statement the claimant states that he was innocent of the charges "which I aim to prove". The assessment of the decision to dismiss is based on the information that was available to the respondent at the time and not subsequently. The purpose of the Tribunal Hearing was to consider whether or not in all the circumstances (at the time of dismissal and appeal) the respondent acted fairly and reasonably in all the circumstances in dismissing the claimant. Information provided by the claimant after his appeal was concluded (such as information provided at the Tribunal hearing) is not relevant to assessing whether the decision to dismiss at the time was fair, if that information was not available to the respondent at the time.

138. The Tribunal has carefully considered all the information that was before the respondent at the time in its assessment of the fairness of the claimant's dismissal.

139. The claimant knew that the behaviour which was alleged was categorised as serious in terms of the respondent's disciplinary policy and that it was potentially gross misconduct. Dismissal was a possibility given the prevailing facts.

140. The respondent carefully considered the evidence before it, including the claimant's assertions and challenges to the evidence presented. Ultimately the other witness evidence was preferred. That was an option open to the respondent on the facts of this case. The evidence that was accepted included both individuals present with the claimant and the witness who was outside the room, who observed the location of the claimant. It was reasonable for the respondent to prefer that evidence to the claimant's in the circumstances.

141. In reaching its decision the Tribunal has taken into account and applied the law as set out by Langstaff, P in **Wincanton** as set out above. The claimant was subject to a final written warning which had been issued as a result of the claimant's (inappropriate) interaction with his colleagues. While that warning may be considered harsh or even extreme by the claimant, it was issued as an alternative to dismissal, the respondent having considered the mitigation presented by the claimant. The claimant had accepted that he was responsible for some of the conduct in question but argued the final written warning was extreme.

142. The claimant fully understood the consequences of the final written warning. He was warned that further misconduct could result in his dismissal. The respondent reasonably concluded from the information before it (both from the claimant and the other witnesses) that there had been further misconduct. In all the circumstances, it was reasonable to dismiss the claimant.

143. The Tribunal has concluded in light of all the facts of this case that the decision reached by the respondent to dismiss the claimant was a decision that a reasonable employer could have made in all the circumstances.

Claimant's dismissal was fair

144. The Tribunal is satisfied, having carefully considered all the facts, that the decision to dismiss the claimant was fair and reasonable in all the circumstances, taking account of the size and resources of the respondent, equity and substantial merits of the case.

145. In all of the circumstances therefore the Tribunal finds that the claimant's dismissal was fair and his unfair dismissal claim was not well founded.

Employment Judge Hoey

Original date: 22 June 2020
Corrected reasons: 21 December 2020

Original reasons sent to the parties on 1 July 2020
Corrected reasons sent to the parties on 21 December 2020

FOR THE TRIBUNAL OFFICE