EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Badger	**v**	**London United Busways Limited**

Heard at: London Central
On: 9 – 11 February 2021

Before: Employment Judge Hodgson

Representation

For the Claimant: Mr J Neckles, union official
For the Respondent: Mr E Nuttman, solicitor

JUDGMENT

The claim of unfair dismissal fails and is dismissed.

REASONS

Introduction and issues

1. By a claim form presented to the London Central employment tribunal on 8 November 2019, the claimant alleged he had been unfairly dismissed.

2. At the hearing, we considered the issues. Any allegation that the claimant had not been allowed to be accompanied at a disciplinary hearing was abandoned. The only claim pursued was that of unfair dismissal. The respondent confirmed that the reason for the dismissal was the

accumulated absences which invoked the attendance procedure, led to oral and written warnings, and ultimately to dismissal. This was put forward as a conduct reason, and in the alternative as some other substantial reason. Mr Neckles, on behalf of the claimant, objected to this being cited as some other substantial reason. It was clear that it had been specifically pleaded, and I accepted the respondent could rely on it.

3. Mr Neckles indicated there had been a breach of the ACAS code of practice on disciplinary and grievance procedures 2015. He relied on paragraph six which states "In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing." He relied on no other paragraph, initially. However, during final submissions he also alleged there had been a breach of paragraph five of the ACAS code.

4. The hearing could not proceed as an in-person hearing. All parties agreed to a video hearing and I considered it just and equitable to proceed.

The evidence

5. The respondent called evidence from Ms Kelly Rahman; she was the person who dismissed the claimant. The respondent relied on a statement from Mr Andrew Evans, who dealt with the appeal. Mr Evans who was the general manager of the respondent's south garages did not give oral evidence for the reasons I will explain below.

6. The claimant relied on a statement and gave oral evidence.

7. I received a bundle of documents.

8. The respondent filed initial submissions which were supplemented by subsequent amended submissions and a bundle of authorities.

9. The claimant produced a bundle dealing with remedy. He filed written submissions and a number of authorities.

Applications

10. Prior to the hearing the respondent sought an adjournment citing two grounds. First, the claimant had failed to disclose witness evidence until the Friday before the hearing and second, Mr Evans had suffered a bereavement on Friday. His mother died in hospital from Covid 19. Mr Evans did not feel able to participate. Clearly Mr Evans's position was understandable, and I offered my condolences. However, having reviewed the papers, I noted Mr Evans was only concerned with the appeal. It did not appear that any allegation of unfairness revolved around matters about which Mr Evans could give evidence. It was very unlikely that the claimant could be disadvantaged by Mr Evans failing to give oral evidence. It was possible the respondent could be disadvantaged, but the

risk appeared small, as the respondent alleged that the original dismissal was fair and the appeal was not alleged to have rectified any unfairness. If the original dismissal was unfair, the claimant would succeed. The respondent's theoretical ability to argue rectification of defects at the appeal stage could be materially diminished in the absence of Mr Evans oral evidence, but the claimant's position would not be weakened. I was conscious that this case was now becoming stale. Moreover, if I adjourned it may take six months to a year before the case could be heard again and that was undesirable. I refused the initial application prior to the hearing. I made it clear that the application to adjourn would be considered further in the final hearing.

11. At the final hearing, the application to adjourn was renewed. Mr Neckles confirmed that he did not oppose the application. However, it appeared he was under the misapprehension that the claimant had the burden of proving the unfair dismissal, and that, in some manner, his inability to cross-examine Mr Evans would materially weaken his position.

12. The respondent alleged that the original dismissal was fair and did not need to rely on a finding of rectification at the appeal stage. At best, any rectification argument might be advanced as an alternative argument. The respondent said it believed that the claimant may be seeking to allege the dismissing officer was biased because she had dealt with the appeal against the third written warning. It was unclear if the claimant accepted that this was how the argument was put, but Mr Neckles put forward no alternative position.

13. I read the statements, I noted that it appeared that the appeal was not a full rehearing and it was unclear how far it could have rectified any fundamental difficulty, such as bias. In the circumstances, I refused the adjournment. There could be no prejudice or hardship to the claimant. Any potential hardship was the respondent's, but this did not appear to be realistic. However, I confirmed that I would hear the remainder of the evidence and if the respondent considered that it was necessary for Mr Evans to give oral evidence, I would consider hearing his evidence at a later date. I would hear any further submissions after the evidence.

14. Following the evidence, Mr Nuttman withdrew his application to adjourn and elected to rely only on the written statement of Mr Evans. I did not need to consider the matter further.

15. I should note that Mr Neckles indicated, initially, that he had a right to cross-examine a witness and a failure to call the witness would be breach of the right to a fair hearing pursuant to Article 6. I do not agree. Any party may seek to put in evidence a witness statement at any time. There is no obligation to call the witness to give evidence. The tribunal is entitled to decide the weight to be given to such evidence. The tribunal treated will treat it as untested evidence, and may give it little or no weight. The respondent elected not to call Mr Evans; it does not prevent a fair hearing.

The facts

16. The respondent is a bus company. It employed the claimant in the full-time position of PSV/PCV bus operator from June 2003, until he was dismissed on by letter of 8 July 2019.

17. Ms Kelly Rahman took the decision to dismiss the claimant. At the time she dismissed the claimant she had been promoted to general manager of the Stamford Brook garage, where the claimant was based. The respondent employs approximately 4000 individuals, but dismissals of this nature are dealt with locally, in each garage, by the local management.

18. The claimant had a contract of employment. The respondent recognises a trade union, Unite. The respondent collectively agrees a number of procedures with the union. The contract refers to the disciplinary policies. I accept the claimant was, at all material times, given all relevant policies. The disciplinary policy, as agreed with the union, expressly states that it is not contractual. Whilst the claim form asserts that the policy is contractual, the claimant advanced no evidence in support of this argument. The clear documentary evidence demonstrates that it was not contractual. I find that neither the disciplinary policy nor the attendance at work policy, both of which were agreed with the union, were contractual.

19. Section 2(h) of the disciplinary policy states"… No manager may deal with more than one stage of the disciplinary procedure in respect to a specific incident."

20. There is an attendance at work policy. This provides for three warning stages, prior to considering dismissal. The first stage is an oral warning, the second is a written warning, and the third is a final written warning; thereafter, dismissal is considered.

21. For each stage, the policy set out clearly the trigger points. The procedure is triggered by an individual being absent for more than a total of 14 days, or on more than four occasions, in a rolling 12-month period. If a warning is issued, there is a requirement to inform the individual that failure to maintain satisfactory attendance may result in further action. In order to trigger stage 2, there must be a further two absences, or seven days in a six-month period. To trigger stage 3, the final written warning, there must be a further four separate absences, or 14 days absence in the next 12 months. To trigger a dismissal hearing, it is necessary to be absent on more than four occasions, or for a period of 14 days, in a rolling 12-month period. The final warning stays in place for two years. At each stage, the employee has a right of appeal.

22. There has been some suggestion that the claimant did not understand the policy or know, at any time, what improvement was required. I do not accept his evidence. At each stage of the procedure, it was explained to him why he had triggered the procedure and what he must do to avoid triggering the next stage. Had he been in any doubt, he could have asked for a further copy of the procedure; he could have asked his union to explain; he could have asked management to explain. The claimant did nothing. The respondent did all that was reasonable to ensure that the claimant understood what he needed to do. If the claimant failed to understand, it is because he failed to engage with the process, or to seek clarification. On the balance of probability, I find the did understand, at all times, what was required of him. Had he not understood, he would have sought clarification.

23. The claimant was given an oral warning by Mrs S Biddle, staff manager, on 20 September 2017. She referred to the attendance at work policy, confirmed the number of absences, and confirmed what he would need to do to avoid triggering the next stage.

24. He was given a written warning by Mrs Biddle on 6 March 2018. She undertook a thorough analysis of recent absences and the claimant was able to give his explanation. The claimant had taken seven periods of absence amounting to 66 days in the six months following the oral warning. This clearly exceeded the trigger points on the agreed procedure. She confirmed that his attendance had always been an issue since he started employment. She concluded his attendance had got worse. She explained what he must do to avoid triggering the next stage.

25. Mrs Biddle gave the claimant a final written warning on 29 November 2018. She reviewed the claimant's absences and gave him an opportunity to explain. Since the first written warning, he had had seven spells of absence amounting to 11 days within the 12-month period. She reiterated that four spells or 14 calendar days in a rolling 12-month period is below the standard required. Her letter of 29 November 2018 confirmed that the final written warning would stay on his record for 24 months and would be taken into account should his performance not improve. She referred to the attendance at work policy, which she had already explained in the hearing. The letter specifically confirmed that failure to improve performance would lead to the possibility of dismissal. She explained the right of appeal.

26. The claimant did appeal the final written warning, and this was considered by Ms Rahman. At the appeal, Ms Rahman noted he had had seven further absences which she records in her statement as follows:

- **10 March 2018 – due to a bad headache;**
- **16 April 2018 – due to eczema and stress from his personal life as he separated from his partner;**
- **2-5 August 2018 – due to gastroenteritis;**
- **28 August 2018 – due to a disturbed sleep given the carnival;**

- **25 October 2018 - he was late for work due to his partner, who he was separated from but living with, who he said disturbing his sleep**
- **;4 November 2018 – due to him not attending his shift, he was aware of it but did not attend, or arrange to swap his duty; [and]**
- **13 November 2018 – due to a 'domestic' issue with his partner.**

27. At the appeal hearing, the claimant did not dispute his earlier warnings, or the seven absences in question. He argued the penalty was too severe. (I should note that the claimant accepted before me that the respondent recorded each relevant absence accurately, and with the possible exception of a reason for a single absence, each of the reasons was recorded accurately.)

28. Ms Rahman was satisfied that the trigger point had been met and that a final written warning was appropriate. She noted that the claimant's history of attendance throughout was poor and she saw no reason why he should not be required to meet the standard agreed with the union. She confirmed her decision by letter 21 January 2019. She rejected his appeal and reiterated that any further unsatisfactory non-attendance may lead to further disciplinary action.

29. The claimant then had five further sickness absences. After the third absence Mrs Biddle specifically warned the claimant that any further absence would trigger the next stage of the procedure, which could lead to his dismissal.

30. After the fifth absence, the respondent proceeded to a disciplinary hearing before Ms Rahman on 8 July 2019. Each of the absences was discussed. He stated his absence on 3 December 2018 was because of dermatitis, but it had been inaccurately recorded as asthma. His absence on 10 December 2018 was because of a sore throat. His absence on 22 December 2018 was because he had a bad nosebleed. His absence on 12 April 2019 was because of a bad cold and he felt sick with a headache. His absence on 30 June 2019 was because he had a headache.

31. Ms Rahman concluded the claimant had had a further five absences within the rolling 12-month period and that his attendance had remained unsatisfactory. She considered that he had been issued with an oral, a written, and a final written warning. She considered that it was reasonable to dismiss.

32. Her letter of dismissal, dated 8 July 2019, refers to the fact the claimant alleged he had improved. She noted that since he joined in 2003. He had received eight oral warnings, four written warnings, and three final written warnings, all about unsatisfactory attendance. In addition to the fifteen formal hearings, she believed there had been many occasions when he was informally advised of the standard required

33. The dismissal was appealed. The claimants written appeal of 21 January 2019 appealed only on the basis of severity of award. Mr Neckles from PTSC Union represented the claimant and sought to raised further matters

at the appeal. The appeal was heard by Mr Evans, a more senior manager. Mr Evans identified the points of appeal as follows:

- **that the sanction was too high;**
- **that Ms Rahman had shown a "closed mind" in her decision;**
- **that there was a potential breach of the health and safety or disciplinary policies when making a decision (although the details of these alleged breaches were not set out); and**
- **that Ms Rahman took account of matters which had expired.**

34. Mr Evans found the basis of the appeal confusing, as under the respondent's procedure an appeal based on severity indicated an acceptance that the alleged conduct has occurred. This was a reasonable position for Mr Evans to take. The claimant has confirmed to me that he did, at all times, accept the conduct had occurred.

35. It is clear that Mr Evans consider carefully each of the points raised by the claimant and dismissed them. He found the sanction was fair. He found there was no reason why Ms Rahman should not have dealt with the dismissal hearing and she had not considered irrelevant matters. There was clear evidence in support of the dismissal and no evidence that Ms Rahman had a closed mind. He sent the appeal decision by letter of 13 August 2019.

The law

36. Section 98 of Employment Rights Act 1996 provides, in as far as it is applicable.

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show**
>
> **(*a*) the reason (or, if more than one, the principal reason) for the dismissal, and**
> **(*b*) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it--**
>
> **… (*b*) relates to the conduct of the employee, ..**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—**
>
> **(*a*) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> **(*b*) shall be determined in accordance with equity and the substantial merits of the case. ..**

37. Under section 98(1)(a) of the Employment Rights Act 1996 it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b), if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

38. In considering whether the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in **British Home Stores v Burchell [1980] ICR 303**, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the **EAT in Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09**.

39. In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones [1982] IRLR 439** and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal consider the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case 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 that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

40. The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (see **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**.)

41. The ACAS code of practice on disciplinary and grievance procedures 2015, in as far as it is applicable, provides:

> **5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.**
>
> **6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.**

42. Paragraph 207 of the Trade Union and Labour Relations Consolidation Act 1992 provides:

> **207(1) A failure on the part of any person to observe any provision of a Code of Practice issued under this Chapter shall not of itself render him liable to any proceedings.**
> **(2) In any proceedings before an employment tribunal or the Central Arbitration Committee any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question…**

Conclusions

43. The principles to be applied are straightforward. It is for the respondent to establish the reason, or the principal reason for dismissal. That reason must either be one of a number of reasons including conduct or should be some other substantial reason. "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."[1]

44. An honest belief is enough to establish the reason. At this stage, the burden rests with the employer.

45. Once the reason is established, it is necessary to consider reasonableness by applying section 98(4) Employment Rights Act 1996; the burden is neutral.

46. There is considerable body of case law, but a tribunal should not lose sight of the fact that it is applying the statutory test to individual circumstances. The claimant has referred to numerous cases. I will refer to any relevant cases, if necessary. I do not need to review the extensive case law cited by the parties. Such an exercise would be unnecessary and disproportionate.

47. I deal first with the reason for dismissal. At the time she dismissed, Ms Rahman knew that there was an attendance at work policy which was agreed with the union and had been in place since 2007. That policy, as

[1] *Abernethy v Mott, Hay and Anderson* [1974] ICR 323

described above, set out standards for attendance. Any employee who fell below the standards within the time periods specified is first receive an oral warning, then a written warning, then a final written warning, and finally, may be dismissed. At the time she dismissed, she believed the claimant had progressed through the first three stages and was subject to a final written warning. She had no reason to believe that any of those warnings have been given improperly, or were based on any false information. She considered dismissal as the claimant had, within a further period of 12 months following the final written warning, been absent on five occasions. The claimant accepted he had been absent on each of those occasions. He explained his absence. His attendance fell below that required and dismissal was an option. She dismissed because of his continuing poor attendance record. It is clear that she believed that his attendance was inadequate and that he had fallen below the minimum standards envisaged by the policy. I doubt that it is necessary to refer to **Burchell** in this case. This is not a case where the conduct is disputed. However, despite the clear admission that the conduct occurred, Mr Neckles has continued to allege there was a failure to investigate. This assertion is inconsistent with the admission and would suggest that the conduct is in dispute. Therefore, I will consider the relevant stages. It is clear that she believed the conduct, namely the absences, had occurred. It is clear that she considered this to be a matter of conduct. The respondent discharges the burden of establishing the reason.

48. The next stage is to consider reasonableness. The burden is neutral. I will first consider the nature of any investigation.

49. It is the claimant's case the following should have been investigated: whether any objective targets were set; if so what were the targets; and were those targets are met.

50. It appears to be the claimant's case that in all circumstances there must be some form of formal investigation, and presumably some form of formal report, which is then considered, in some manner, by the person who dismisses. I do not accept this. An investigation is reasonable if it is one which is open to a reasonable employer. During submissions, the claimant sought rely on paragraph 5 of the ACAS code of practice 2015. It states the following:

> **5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.**

51. An investigation must collect evidence for use at the disciplinary hearing. It is at the disciplinary hearing that the evidence is assessed. The disciplinary hearing may decide it is necessary to obtain further evidence. There are different forms of investigation. Sometimes the conduct is denied, for example if there is a disputed allegation of theft or violence. A

denial of conduct may dictate the form of investigation. It may be necessary to hold interviews with the employee accused of misconduct and with witnesses. Equally, where the conduct is agreed, the investigation may be more limited, and may be limited to collating the relevant information. It may also identify surrounding circumstances, including any mitigating factors.

52. It is suggested, in this case, that there was no investigation stage. I do not agree. It is not necessary to produce some form of formal report to establish there has been an investigation. Here the conduct in question was the claimant's continuing absences. The investigation stage consisted of gathering the relevant material, so it could be considered at the disciplinary. Exactly who did that and how, has not been set out. However, Ms Rahman did have all the relevant material before her, and someone collated it. Ms Rahman needed to know the history of the warnings, and the details of the further absences since the final written warning. She had all that information. There was no need for any further investigation prior to the disciplinary hearing. It was an investigation open to a reasonable employer.

53. I do not accept the claimant's contention that there should have been some additional or extra investigation concerning whether objective targets have been set, the claimant's knowledge of them, or whether they had been met. At no time did the claimant suggest that he did not understand the targets, or that he had failed to meet the targets. The policy was precise and clear. It was agreed with the union. The claimant had union representation. There was no dispute over the number of absences. There was no continuing dispute, at the dismissal stage, about the reasons for issuing any of the warnings. Had the claimant raised an issue concerning his understanding, or lack of understanding, it may have been reasonable to investigate further. However, all of the relevant letters, and the supporting minutes, made it absolutely clear that the claimant had, at all stages, been referred to the attendance policy. There is no merit in the suggestion the claimant did not understand the improvement required. The expectation was simple. The claimant was expected to attend for work reliably. The standard expected was to remain within the trigger points. This was fewer than four periods of absence, or a total of 14 days, within the rolling 12-month period. To the extent the claimant suggests that he did not understand this, I reject his evidence. In any event, Ms Rahman had no reason to believe that the claimant was, at any time, confused.

54. The final question to consider is whether the dismissal was fair. It is not for the tribunal to substitute its view. The tribunal must consider whether the dismissal was within the band of reasonable responses of a reasonable employer.

55. There are a number of important elements. The attendance procedure was agreed with the union. It was a clear and comprehensive procedure. There can be no doubt about when each stage was triggered. The

claimant had been through all stages up to, and including, the final written warning. His attendance record remained poor, and below that required by the policy. I accept that, even in those circumstances, the person dismissing should still consider all the circumstances and consider whether there is any mitigation.

56. Ms Rahman had in mind that the respondent operated on narrow margins. Absenteeism, particularly unpredictable regular short-term absence, is a serious problem because it leads to expense and can disrupt the service. This difficulty is recognised by the trade union, and hence the union's agreement to the policy. The policy itself is generous. There are three stages before dismissal is even considered, and the trigger points are generous.

57. This is not a case where there is any suggestion that there is an underlying medical condition or that it should be considered as a lack of capability. There has been no suggestion to me that it would be necessary to obtain a medical report, and I cannot see how a medical report would have assisted. Ms Rahman was entitled to consider this as a conduct issue. She was entitled to consider whether the claimant's attendance was likely to improve. The best predictor of future attendance was the claimant's past attendance. There was no evidence to suggest that his attendance would improve. In those circumstances, and given the careful application of the agreed attendance procedure, I cannot say that dismissal was outside the band of reasonable responses. I find that the dismissal was fair.

58. There have been a number of matters raised before me which I should deal with specifically. The letter of dismissal refers to the claimant's previous attendance record, including three final written warnings. I do not accept that Ms Rahman took those previous lapsed warnings into account when dismissing. I find as a fact that the sole or principal reason for dismissal was the failure to improve following the final written warning. Ms Rahman did not take into account any previous spent warnings as part of the reason for dismissal. She considered the circumstances leading to he spent warning because the claimant asserted over the course of his entire employment his attendance had been good and he asked her to consider his good record. This was by way of mitigation and was a possible factor which could be considered when determining whether it was reasonable to dismiss.

59. Consideration of questions of mitigation raised by the claimant do not affect the reason for dismissal. They did not form part of a reason. In order to persuade Ms Rahman that dismissal was too harsh a sanction, the claimant prayed in aid his previous good attendance record. In that context, Ms Rahman considered his previous record and she found that it had also been poor. Whilst it may be wrong, in principle, to rely on lapsed warnings as a reason for dismissal, it may not be inappropriate to consider the overall picture when deciding on the sanction. It would be unfortunate if a respondent company were to refuse to consider all of the potential

mitigation put forward, lest a tribunal find that it tainted the reason for dismissal. It is clear in this case that the two were separate. The reason for dismissal concerned the further five absences following the final written warning. To the extent that the previous absence record was considered, it was at the claimant's request and in the context of reasonableness.

60. There has been some suggestion that others were treated better than the claimant. There is no evidence for that. The claimant suggested that he had been told that others were treated better, but he could cite no names, he did not know the detail, and he has produced no evidence.

61. It was suggested that Ms Rahman failed to consider adequately or at all whether dismissal was a reasonable sanction, instead her approach was alleged to be mechanical. I do not agree. The fact that she considered the claimant's submissions about his previous attendance record, and looked at that carefully, demonstrates that she considered whether dismissal was an appropriate sanction. She did exercise her discretion.

62. It is suggested that there were no objective criteria. That submission is unsustainable. The attendance policy is clear and precise. It set out in detail the minimum attendance requirements that must be met. I do not accept either that it was unclear, or that the claimant did not fully appreciate, at all times, what was required of him.

63. It has been suggested there was a failure to conduct a fair or reasonable investigaton. For the reasons I have set out above, I reject this.

64. The claimant relies on paragraphs 5 and 6 of the ACAS code. I have already dealt with paragraph 5. The investigation was appropriate and was one open to a reasonable employer.

65. Paragraph 6 states that different people should carry out the investigation and the disciplinary hearing, where practicable. Here, the underlying facts were clear and agreed. The investigation consistsed, in essence, of collating that information. It matters not whether that information was collated by Ms Rahman or someone else. The claimant was given an opportunity to explain his absences at the disciplinary hearing. It is clearly a reaonable process.

66. Had Ms Rahman failed to give the claimant the opportunity to explain his absences at the disciplinary hearing, it is likely that the disciplinary hearing itself would have been unfair. I do not accept there is any breach of paragraph 6.

67. The final point I need to consider is the appeal. The claimant alleges in his written submissions that the respondent failed to

> **comply with Stage 1 & 2 of the established Burchell Test as follows, thus rendering his dismissal wholly unfair, which was not rectified at the Respondent's Appeal Hearing by way of a rehearing due to the fact that the Respondent instead conducted the said appeal by way of a review instead.**

68. I reject this submission. It is clear that Ms Rahman believed that the conduct occurred and that honest belief established the reason for dismissal. At the stage when she formed her belief, the investigation had occurred, and that investigation was one open to a reasonable employer.

69. The claimant's evidence to me was the only matter he raised on appeal the severity of sanction. The respondent's policies would suggest that severity can only be considered where the underlying conduct is conceded. However, I do not need to consider the effect of that policy further; the claimant concedes that the absences were accurately recorded. The claimant did not appeal on the basis that the alleged conduct was not made out, or the investigation was inadequate. There was no need to consider it on appeal. There was no unfairness to rectify.

70. The second point the claimant relies is put as follows:

> **Ms Kelly Rahman had a closed and bias[ed] mind and a personal stake in the negative outcome of the Claimant's future employment. In that given the size and resources of the Respondent, she was the Officer who adjudicated on the Claimant's continued unsatisfactory attendance of the Claimant at his Appeal Hearing held on the 21st January 2019 and was the dismissing Officer at his Disciplinary Hearing held on the 8th July 2019. Justice was not done or seen to be done by her prior involvement in the said matter which was of a continuing nature (continued unsatisfactory attendance) in breach of the principles of natural justice and did not act in good faith equally. That her involvement as described herein and above rendered an unfair process/procedure in her handling of the charges/allegations which led to the Claimant's dismissal contrary to Stage 2 of the Burchell Test...**

71. It is the claimant's case that because Ms Rahman had dealt with the appeal against the final written warning, that she should not have dealt with the dismissal. The disciplinary policy does provide that no manager should deal with more than one stage of the disciplinary procedure in respect of any specific incident. However, the incidents which led to the final written warning were not the same as the incidents which led to the dismissal. There was no reason under the respondent's policy why Ms Rahman should not deal with the dismissal. The fact that she dealt with the appeal against the final written warning, did not preclude her from dealing with the dismissal, whether by reason of the respondent's policies or natural justice. She gave full and cogent reasons for dismissing the appeal against the final written warning. She gave full and cogent reasons for dismissing. In no sense whatsoever was there an indication of bias. There is no evidence to suggest that Ms Rahman had any ulterior motive. She was not precluded from dealing with the dismissal.

72. In any event, her alleged bias was not the reasons for the appeal. In the circumstances, there was no reason for it to be investigated. The appeal took place. It is clear from the documentary evidence that Mr Evans considered the claimant's appeal carefully and gave cogent and rational reasons for refusing it. The refusal is objectively justified. Whilst it would

be possible for an unfair appeal to render an otherwise fair dismissal unfair, there is no basis for arguing that occurred in this case.

73. For all the reasons I have given I find the dismissal was fair and I dismiss the claim of unfair dismissal

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Employment Judge Hodgson

Dated: 2 March 2021

Sent to the parties on:

02/03/2021

For the Tribunal Office