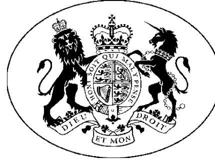

EMPLOYMENT TRIBUNALS

Claimant: **Anthony Robinson**

Respondent: **Royal Mail Group Ltd**

Heard at: **London East Hearing Centre** **On: 3 March 2021**

Before: **Employment Judge S Knight**

Representation

Claimant: Gareth Price (Park Lane Plowden Chambers)

Respondent: Laura Roberts (Weightmans LLP)

JUDGMENT having been sent to the parties on 4 March 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

The parties

1. The Claimant was employed by the Respondent between 19 July 2004 and 29 June 2020 as an Operational Postal Grade (which means he was a postman). The Respondent employs 139,000 people across Great Britain. The Claimant was employed at the Respondent's Whitechapel site.

The claims

2. The Claimant claims for unfair dismissal, arising out of his dismissal on 29 June 2020 for alleged gross misconduct. The alleged gross misconduct related to an

altercation involving the Claimant, his colleague Mr Jeffery, and his line manager Mr Hussain.

3. On 7 September 2020 ACAS was notified of the claim under the early conciliation procedure. On 7 October 2020 ACAS issued the early conciliation certificate. On 15 October 2020 the ET1 Claim Form was presented in time. On or around 16 November 2020 the ET3 Response Form was sent to the Tribunal.

The issues

4. At the start of the hearing, the parties agreed to a list of issues. It appears at Annex 1 to these Reasons.

Procedure, documents, and evidence heard

Procedure

5. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was "***V****: video whether partly (someone physically in a hearing centre) or fully (all remote)*". A face-to-face hearing was not held because it was not practicable due to the COVID-19 pandemic and no-one requested the same. The documents that I was referred to are in a bundle, the contents of which I have recorded.

6. All participants attended the hearing through the Cloud Video Platform.

7. At the start of the hearing I checked whether any reasonable adjustments were required. Those in attendance confirmed that none were required.

Documents

8. I was provided with an agreed Hearing Bundle comprising 189 pages.

9. Witness statements from the Claimant, Ben Jeffery, Vinnie Micallef (the Claimant's trade union representative), Luke Buaka (the dismissing officer) and Steve Potter (the appeal officer) were provided separately.

Evidence

10. At the hearing I heard evidence under affirmation from Mr Buaka, Mr Potter, the Claimant, Mr Jeffery, and Mr Micallef. Each of the witnesses adopted their witness statements and added to them.

Closing submissions

11. Both parties made helpful detailed closing submissions.

Relevant law

Unfair dismissal – liability

12. Section 94 of the Employment Rights Act 1996 ("**ERA 1996**") provides that an

employee with sufficient qualifying service has the right not to be unfairly dismissed by their employer.

13. Section 98 of the ERA 1996 provides insofar as is relevant:

> “(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> > (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> >
> > (b) that 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. […]”

14. In the case of *British Home Stores v Burchell* [1980] I.C.R. 303; 20 July 1978 the Employment Appeal Tribunal set down the test that the Tribunal applies in cases of unfair dismissal by reason of conduct. The burden of proof within the test was later altered by section 6 of the Employment Act 1980. As a result, the test applied by the Tribunal is as follows:

(1) The employer must show that it believed the employee to be guilty of misconduct.

(2) The Tribunal must determine whether the employer had in mind reasonable grounds upon which to sustain that belief.

(3) The Tribunal must determine whether, at the stage at which that belief was formed on those grounds, the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances.

15. This means that the Respondent does not need to have conclusive direct proof of the employee’s misconduct: the Respondent only needs to have a genuine and reasonable belief, reasonably tested. Further, there is no requirement to show that the employee was subjectively aware that their conduct would meet with the Respondent’s disapproval.

16. In *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401; [2017] IRLR 748; 23 May 2017 Lord Justice Underhill stated that the "reason" for a dismissal is the factor or factors operating on the mind of the decision-maker which causes them to take the decision to dismiss or, as it is sometimes put, what "motivates" them to dismiss.

17. In *Shrestha v Genesis Housing Association Ltd* [2015] EWCA Civ 94; [2015] IRLR 399; 18 February 2015 Lord Justice Richards noted at ¶ 23:

"To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole."

18. In considering the case generally, and in the Tribunal's assessment of whether dismissal was a fair sanction in particular, the Tribunal must not simply substitute its judgment for that of the employer in this case. Different reasonable employers acting reasonably may come to different conclusions about whether to dismiss. As Mr Justice Phillips noted when giving the judgment of the EAT in *Trust Houses Forte Leisure Ltd v Aquilar* [1976] IRLR 251; 1 January 1976:

"It has to be recognised that when the management is confronted with a decision whether or not to dismiss an employee in particular circumstances, there may well be cases where more than one view is possible. There may well be cases where reasonable managements might take either of two decisions: to dismiss, or not to dismiss. It does not necessarily mean, if they decide to dismiss, that they have acted 'unfairly,' because there are plenty of situations in which more than one view is possible."

19. It is therefore not for the Tribunal to ask whether a lesser sanction would have been reasonable in this case. The Tribunal asks itself whether dismissal was reasonable. The question is also not whether the Claimant committed misconduct, but whether the Respondent had a reasonable belief that the Claimant had committed misconduct.

20. Fairness does not mean that similar offences will always call for the same disciplinary action. Each case must be looked at in the context of its particular circumstances, which may include health or domestic problems, provocation, justifiable ignorance of the rule or standard involved, or inconsistent treatment in the past. In *Paul v East Surrey District Health Authority* 1995 IRLR 305; 27 October 1994, the Court of Appeal held as follows:

"Thus an employee who admits that the conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely."

Unfair dismissal – remedy

21. When a claimant succeeds in an unfair dismissal claim the three remedies available are reinstatement, re-engagement, and compensation (sections 112 to 126 ERA 1996). The provisions in relation to reinstatement are insofar as is relevant as follows:

> "114.— Order for reinstatement.
>
> (1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.
>
> (2) On making an order for reinstatement the tribunal shall specify—
>
> (a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement,
>
> (b) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and
>
> (c) the date by which the order must be complied with.
>
> (3) If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.
>
> (4) In calculating for the purposes of subsection (2)(a) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of—
>
> (a) wages in lieu of notice or ex gratia payments paid by the employer,
>
> or
>
> (b) remuneration paid in respect of employment with another employer,
>
> and such other benefits as the tribunal thinks appropriate in the circumstances."

22. Section 116 of the ERA 1996 sets out restrictions on the making of an order for reinstatement. It provides insofar as is relevant as follows:

> "(1) In exercising its discretion under section 113 [whether to order reinstatement or reengagement] the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—

(a) whether the complainant wishes to be reinstated,

(b) whether it is practicable for the employer to comply with an order for reinstatement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

[…]

(5) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of subsection (1)(b) or (3)(b), whether it is practicable to comply with an order for reinstatement or re-engagement.

(6) Subsection (5) does not apply where the employer shows—

(a) that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement, or

(b) that—

(i) he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and

(ii) when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement."

Findings of fact

The altercation

23. On 21 March 2020 the Claimant arrived at work. The Claimant had been drinking the night before. However, as Mr Buaka found in the disciplinary process, this was not a cause of the Claimant's subsequent actions.

24. The Claimant was mumbling to himself and being a nuisance. Mr Jeffery is a friend of his. Mr Jeffery said to another employee and friend words to the effect of "*sort your mate out*". The Claimant took exception to this. He started shouting and swearing at Mr Jeffery. Mr Jeffery gave back as good as he got. The Claimant got in Mr Jeffery's face. He was aggressive and shouting. However, Mr Jeffery did not fear violence, and the Claimant did not threaten it. The Claimant's co-workers did not need to intervene to prevent things becoming physical, but the Claimant was ushered away. He was called into Mr Hussain's office, and was told to go home. After this, he returned to the main office floor and continued his shouting and swearing at Mr Jeffery, before leaving. At no stage was any violence threatened or likely to occur. The Claimant may have accidentally brushed Mr Hussain's hand when he got in the Claimant's way, but this

was a trifling matter and was viewed as such by Mr Hussain at the time.

25. After the incident, in Mr Hussain's office Mr Hussain said to Mr Jeffery words to the effect of "*I saw what happened and you didn't do anything wrong, it's okay*". Nonetheless, Mr Jeffery was sent home.

The dismissal and appeal process

26. On 23 March 2020 Mr Hussain conducted an investigation meeting with the Claimant. Mr Micallef was the Claimant's trade union representative. The Claimant fully accepted what he had done, and completely exonerated Mr Jeffery. He explained that he was stressed out, and admitted he was unprofessional and "exploded". He accepted he could not behave in that way.

27. On 30 March 2020 Mr Hussain conducted an investigation meeting with Mr Jeffery. Mr Micallef was also Mr Jeffery's trade union representative. It was noted at this meeting that Mr Hussain had said on the day of the incident that Mr Jeffery "didn't do anything wrong, it's okay". Mr Hussain left this out of the notes of the meeting. However, it was added by Mr Jeffery and Mr Micallef, and these amended notes were used later in the disciplinary process.

28. On 27 April 2020 Mr Hussain conducted a second investigation meeting with the Claimant. Having this second meeting was contrary to the Respondent's policy on investigations. On this occasion, Bob Armitage was the Claimant's trade union representative. Mr Hussain stated that the purpose of the meeting was "*to clear any mistakes from the previous meeting to move for the investigation*". There was no reason to think there were mistakes in the previous meeting, given that the Claimant had made all necessary material admissions. The Claimant immediately remarked that he was not very comfortable recalling events that happened 5 weeks before. Mr Hussain changed the language of the allegations, to being that the Claimant had verbally confronted or assaulted Mr Jeffery. Mr Hussain for the first time accused the Claimant of pushing his hand away during the altercation. The Claimant noted that this was not intentional. The tone of the meeting was radically different to the investigation meeting on 23 March 2020. It was accusatory. The Claimant continued to explain he was at fault, and to exonerate Mr Jeffery. He further explained that he had a drinking problem and was now getting help for it.

29. On 15 May 2020 the Respondent invited the Claimant to a disciplinary hearing. The allegation had become "*Gross Misconduct of unacceptable internal behaviour of threatening or violent behaviour against another member of staff*".

30. On 22 May 2020 at 07:40 Mr Buaka conducted a disciplinary hearing with Mr Jeffery. On this occasion Mr Jeffery's trade union representative was Bob Armitage. The amended notes of the investigation meeting of 30 March 2020, as provided by Mr Jeffery and Mr Micallef, were accepted as the correct notes of that meeting. Mr Buaka conducted the hearing by questioning Mr Jeffery, putting the management case. The tone of the questioning was accusatory. Mr Jeffery was subsequently dismissed.

31. On 22 May 2020 at 11:05 Mr Buaka also conducted a disciplinary hearing with the Claimant. His trade union representative was also Bob Armitage. Mr Buaka again conducted the hearing by questioning the Claimant, putting the management case.

The tone was again accusatory. The Claimant continued to exonerate Mr Jeffery. He noted that he was already receiving help for his alcohol consumption.

32. On 29 June 2020 Mr Buaka summarily dismissed the Claimant. In his report justifying this he stated that the Claimant "*was involved in a violent verbal altercation with another member of staff Mr Ben Jeffery*" and that he "*had a violent heated argument with Mr Ben Jeffery*". The use of this language, in particular the word "violent", was tendentious. Mr Buaka also concluded that if Mr Hussain had not been present then the Claimant's behaviour would have been worse. There was no sufficient basis in the evidence for this finding.

33. Following the dismissals of the Claimant and Mr Jeffery, on Monday 29 and Tuesday 30 June 2020 over 100 members of the CWU trade union at the Whitechapel Delivery Office took unofficial industrial action and walked out in support of the Claimant and Mr Jeffery, to protest against the severity of the sanction. They returned to work following advice from the CWU when the Respondent threatened to take legal action.

34. On 7 July 2020 Mr Potter invited the Claimant to an appeal hearing.

35. On 14 July 2020 at 10:00 Mr Potter conducted the appeal hearing by telephone. Mr Micallef was the Claimant's trade union representative. On the same day, Mr Potter sent to Mr Micallef the notes of the hearing.

36. On 14 July 2020 at 12:00 Mr Potter conducted the appeal hearing of Mr Jeffery by telephone. Mr Micallef was also Mr Jeffery's trade union representative. Mr Jeffery was subsequently reinstated with a 2-year suspended dismissal, and a transfer to another site.

37. On 16 July 2020 Mr Micallef responded to the notes of the Claimant's appeal hearing with a series of corrections in track-changes. These added considerable further detail to the Claimant's case, and included concessions made by Mr Potter. Part of the amendments related to the Claimant's case that Mr Buaka was unsuitable to hear the appeal because he had been involved in a similar incident previously and had not been punished, and also that this showed an unfair inequality of treatment. Mr Micallef's amendments were based on his contemporaneous handwritten notes. Mr Potter refused to accept the amendments, and to include them within the notes considered for the appeal. In writing by email he said "*If you wished to have a more forensic set of notes you should have presented this in a type written format so I could have referenced and included it within the notes of appeal. I said this to you at the time.*" Mr Micallef states that during a telephone call Mr Potter said to Mr Micallef words to the effect of "*I never accept amendments because I don't have to. A lot of appeal managers fall for that. But don't worry, if it goes to tribunal, your amendments will sit next to my notes*". There is a striking similarity between Mr Potter's clear intention in the email and the telephone call. I accept Mr Micallef's account of what was said on the telephone call.

38. On 27 July 2020 Mr Potter emailed further statements to the Claimant and Mr Micallef. Those statements were taken by Mr Potter for the purpose of providing evidence at the appeal.

39. On 29 July 2020 and 30 July 2020 the Claimant sent to Mr Potter his comments on the further statements.

40. On 27 August 2020 Mr Potter refused the Claimant's appeal.

The reason for the dismissal

41. The question of what the reason for dismissal was falls to be determined by me weighing up the competing witness evidence. The Respondent says that the reason for dismissal was conduct. The Claimant and his witnesses say that "conduct" is just a fig leaf that covers up the real reason for the dismissal: that the Claimant was dismissed as a pretext to allow the dismissal of Mr Jeffery, and that the Claimant's appeal was refused because allowing the appeal would make the Respondent look weak, and like it was bowing to industrial pressure. For the reasons I set out below, I prefer the evidence of the Claimant and his witnesses on this point. I do not believe the evidence of the Respondent's witnesses.

42. The Claimant and Mr Jeffery were co-workers. They were, and remain, good friends. They are also committed trade unionists. Mr Jeffery was known to management at his workplace as a worker who would challenge Royal Mail management over workplace issues. This made him unpopular with management.

43. The Respondent used Mr Hussain as its investigating officer. This was despite Mr Hussain being a witness, and a complainant. The Respondent must always have known that this was inappropriate. Mr Buaka, in considering the results of Mr Hussain's investigation, must have been aware of this inappropriateness. Mr Potter certainly was aware of this.

44. Mr Buaka claimed to have concluded that the Claimant's behaviour would not improve if he was allowed to return to work. However, the reasoning provided by Mr Buaka for his conclusion that the Claimant's behaviour would not improve was tendentious. Mr Buaka accepted that the Claimant was seeking help for alcohol consumption. Mr Buaka also accepted that the Claimant's actions were not caused by alcohol. However, Mr Buaka then claimed that "*there was no indication that [the Claimant's] behaviour would improve or change if he continued to come into work whilst under the influence of alcohol*". Mr Buaka was on the one hand saying that the Claimant's actions were not caused by alcohol, but on the other hand saying that he would reoffend because of alcohol consumption. He was saying this all while accepting that the Claimant was reducing his alcohol consumption. This does not stand up to any scrutiny. It does not stand up to scrutiny because in reality it played no part in Mr Buaka's reasoning. The fact that Mr Buaka would put forward such obviously wrong evidence as to his reasoning leads me to question his reliability as a witness.

45. Mr Potter was a deeply unsatisfactory witness. His actions were plainly motivated by hostility towards the CWU trade union. He demonstrated this hostility in his comments in the appeal decision at page 156, in which he stated:

"Indeed, as much as Tony and the CWU claim that management have embellished or by use of words heightened the seriousness of the events, it is clear to me that all the CWU graded people I interview have tried to downplay the incident into just a minor argument."

46. In this passage, Mr Potter was dismissing the evidence of witnesses on the basis of their trade union affiliation. This was a clear manifestation of his bias. Mr Potter repeated that bias in his oral evidence before me, when he told me that he felt the CWU had got witnesses to change their evidence to downplay what had happened, despite him having no evidence of this. He said that witnesses accounts had changed, but the fact is that witnesses' accounts had not changed: Mr Potter just did not believe any of the CWU members who gave evidence to him, and decided that where their evidence was contradicted by managers, the managers were telling the truth.

47. Further, Mr Potter acted unreasonably in dealing with the notes of the appeal hearing. Having compared his account with that of Mr Micallef, I prefer that of Mr Micallef. It is supported by the contemporaneous documentary evidence. Mr Potter was trying to create a false picture of what occurred at the appeal hearing by manipulating what notes were on record. This could then be used to justify the appeal decision and to manipulate any subsequent proceedings.

48. After the dismissal of the Claimant and Mr Jeffery, the workers at their site took unauthorised industrial action in solidarity with them. I found it surprising that neither Mr Buaka nor Mr Potter, in their witness statements, saw fit to refer to this. Mr Potter denied that this influenced his decision at all. I find that it did.

49. The Respondent saw fit to suspend and then dismiss Mr Jeffery, and then when allowing his appeal to transfer him to another site and give him a 2-year suspended dismissal. This was all despite the Claimant having fully exonerated Mr Jeffery from the first investigatory meeting with Mr Hussain on 23 March 2020. Mr Buaka was aware of this when he dismissed Mr Jeffery. Mr Potter was clear in evidence that he was of the view that Mr Jeffery was "unfairly dismissed". This is why he reinstated Mr Jeffery. However, he could not give a coherent explanation for why he transferred Mr Jeffery to another site. He said that Mr Jeffery had to be transferred to get him away from the people at the site with whom he got into trouble. However, the only such person was the Claimant, and the Claimant was dismissed. The fact is, the transfer was a punishment, and it was intended to remove Mr Jeffery from the location where he was acting as an effective trade union member.

50. The Claimant's altercation with Mr Jeffery was no more than was often seen at the Claimant's workplace. Although it was not an everyday occurrence, it was not unusual. Similar incidents had happened previously, and the Respondent had not disciplined those involved. Shouting and swearing was commonplace. Mr Potter accepted this in his reasons for rejecting the Claimant's appeal. However, both Mr Potter and Mr Buaka denied this in their oral evidence. When they denied this, they were not telling the truth. Mr Potter was flatly contradicting himself.

51. Mr Buaka had previously been involved in a similar incident with another member of staff. However, he was not subject to dismissal as a result, despite his more senior status. This is indicative of how seriously the Respondent generally treated these matters. That is to say, it did not usually resort to formal disciplinary processes to deal with them. I am left asking why they did on this occasion.

52. It was obvious that in the altercation between the Claimant and Mr Jeffery, Mr Jeffery was not the instigator. Indeed, Mr Jeffery reacted in a way that could be expected by someone in his position, in that particular workplace. As such, when Mr

Jeffery's dismissal reached the appeal stage, it was apparent to the Respondent's appeal officer Mr Potter that he would have to be reinstated, as any Tribunal claim by him would be likely to succeed. As Mr Potter conceded in evidence, the dismissal had been unfair. However, the Respondent was still able to achieve its aim of being rid of Mr Jeffery from the Whitechapel site by moving him to a different site and giving him a 2-year suspended dismissal.

53. However, the Respondent did not want to appear weak in front of its workforce. Reinstating the Claimant would give the workers the impression that industrial action could succeed. Therefore, the Respondent refused to reinstate the Claimant.

54. In light of this, the Respondent has failed to show that the reason for dismissal was conduct. In this regard I do not believe the Respondent's witnesses, and prefer those of the Claimant. It is more likely than not that the reason for the dismissal of the Claimant was to give the Respondent a pretext on which it could dismiss Mr Jeffery. Mr Buaka knew that the Respondent could not dismiss Mr Jeffery for this incident without also dismissing the Claimant. Conduct was a fig leaf for the real reason for the dismissal.

Reinstatement

55. The Claimant wants to be reinstated. The Respondent has been aware of this since service of the ET1 at the latest. This has been reiterated in the witness statements. The Respondent has served no evidence on the practicability of complying with an order for reinstatement. The Claimant has provided evidence of this. The Claimant was not cross-examined on this evidence. I find as a result that it would be practicable to reinstate the Claimant, given the size of the Whitechapel site. There is no evidence of the Respondent having engaged a permanent replacement for the Claimant.

Conclusions

Unfair dismissal – liability

56. As the Respondent has not proven that the reason for the dismissal was a potentially fair one, the dismissal was unfair.

Unfair dismissal – remedy

57. Having found that it is practicable for the Respondent to comply with an order for reinstatement and that the Respondent has not engaged a permanent replacement, I turn my attention to the question of the Claimant causing or contributing to some extent to his dismissal. He plainly did act inappropriately. The argument he had with Mr Jeffery gave the Respondent the pretext on which to unfairly dismiss him. However, that is against the background of 16 years of loyal good conduct. I also bear in mind the difficulty that the Claimant will find in obtaining equivalent work in the future elsewhere, and that only reinstatement is likely to put him in the position he should have been in had he not been unfairly dismissed. Weighing all the factors in the case, I conclude that it would be just to order reinstatement.

58. The Respondent is a large organisation. It can comply with the order for reinstatement with ease. It is ordered to do so by 16:00 on 5 March 2021.

59. I turn to consider compensation. The Claimant's gross pay was £673.92 per week. The Claimant's net pay was £587.48 per week.

60. The Claimant has therefore lost 35 weeks of wages at £673.92 per week. This is £23,587.20.

61. The Claimant in this period earned £5,500.15. He obtained new appropriate work and took all reasonable steps to mitigate his loss.

62. The Claimant also received £417.30 in benefits.

63. The Claimant has therefore suffered a loss of income of £18,087.05. The recoupment provisions apply in relation to the benefits he received.

64. I have considered the question of whether the Claimant caused or contributed to his dismissal. I take into account the Claimant's actions, but also that the Respondent cynically used the Claimant's conduct as a pretext to unfairly dismiss him. Such contribution as he could be said to have made was minimal, and was superseded by the Respondent's cynical actions. He did not materially cause or contribute to his own dismissal. I conclude that it would not be just and equitable for his compensation to be reduced as a result.

65. The Respondent will be ordered to pay the Claimant £18,087.05 (calculated gross).

Employment Judge S Knight
Date 19 March 2021

ANNEX 1: LIST OF ISSUES

Unfair dismissal – liability

1. Was the reason for dismissal a potentially fair one?

   (1) The Respondent relies on conduct.

   (2) The Claimant says he was dismissed as a pretext to allow the dismissal of Mr Jeffery, and that his appeal was refused because allowing the appeal would make the Respondent look weak, and like it was bowing to industrial pressure.

2. Was the dismissal fair pursuant to section 98(4) ERA 1996 (taking into account the size and administrative resources of the Respondent, and the equity and the substantial merits of the case)? In considering this the Tribunal will consider:

   (1) Did the Respondent believe that the Claimant was guilty of misconduct?

      (a) The Respondent says yes.

      (b) The Claimant says no.

   (2) If so, did the Respondent have in its mind reasonable grounds upon which to sustain that belief?

      (a) The Respondent says yes.

      (b) The Claimant says no.

   (3) If so, when the Respondent formed that belief, had it conducted a sufficient investigation into the matter as was reasonable?

      (a) The Respondent relies on the investigation of Shaan Husain.

      (b) The Claimant says no, based on procedural discrepancies.

3. Was dismissal within the range of reasonable responses open to a reasonable employer?

Unfair dismissal – remedy (only to be considered if the Claimant wins on liability)

4. Should the Tribunal order reinstatement, reengagement, or compensation? (s 113 ERA 1996)

5. In considering whether to order reinstatement:

   (1) Does the Claimant wish to be reinstated? (s 116(1)(a) ERA 1996)

   (2) Is it practicable for the Respondent to comply with an order for

reinstatement? (s 116(1)(b) ERA 1996) and

(3) Did the Claimant caused or contributed to some extent to the dismissal, and if so, would it be just to order reinstatement? (s 116(1)(c) ERA 1996)

(4) Has the Respondent engaged a permanent replacement for the Claimant (s 116(5) ERA 1996), and if so

(a) Whether it was not practicable for the Respondent to arrange for the Claimant's work to be done without engaging a permanent replacement (s 116(6)(a) ERA 1996); or

(b) Whether the Respondent:

(i) Engaged the replacement after the lapse of a reasonable period, without having heard from the Claimant that he wished to be reinstated or re-engaged (s 116(b)(i) ERA 1996), and

(ii) When the Respondent engaged the replacement it was no longer reasonable for the Respondent to arrange for the Claimant's work to be done except by a permanent replacement (s 116(b)(ii) ERA 1996).

6. What is the **basic award**?

7. What is the **compensatory award**? In particular:

(1) Has the Claimant failed to mitigate his loss pursuant to section 123(4) ERA 1996, and so his award needs to be reduced accordingly?

(2) What is the chance that the Claimant could and would have been fairly dismissed in any event and when would this have occurred (*Polkey*)?

(3) Does the Tribunal find that the dismissal was to any extent caused or contributed to by any action of the Claimant and if so by what just and equitable proportion should the award be reduced?

8. Did the Respondent or the Claimant unreasonably breach the ACAS Code of Practice on Disciplinary and Grievance Procedure?

9. If so, is it appropriate for the Tribunal to increase or decrease any award?