EMPLOYMENT TRIBUNALS

Claimant: Mr D Buchholz

Respondent: GEZE UK Limited

Heard at: Birmingham by CVP
On: 11TH & 12TH March 2021

Before: Employment Judge Connolly

Representation
Claimant: In Person
Respondent: Mr J Forrester (Solicitor)

JUDGMENT having been sent to the parties on 15 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

1. This is a claim of unfair dismissal by Mr Buchholz. He was dismissed by the respondent, GEZE, on 6 April 2020. By a Claim Form presented on 4 May 2020, he brought a single claim of unfair dismissal. A period of early conciliation started on 21 March 2020 and concluded on 29 April 2020.

2. The issues were discussed and identified at the outset of the hearing as follows:

   2.1 What was the reason for Mr Buchholz's dismissal?

   2.2 Was the dismissal fair or unfair within the meaning of section 98(4) of the Employment Rights Act 1996 (the 'ERA'), having particular regard to whether

      (a) GEZE had a genuine belief that he had misconducted himself in the manner alleged

(b) GEZE had reasonable grounds to believe he had misconducted himself as alleged
(c) GEZE had conducted a reasonable investigation
(d) whether dismissal was a reasonable sanction and (e) whether GEZE had followed a reasonable process.

2.3 If the dismissal was unfair, I was invited to consider whether any award should be reduced to reflect Mr Buchholz's conduct and/or the possibility that he would have been fairly dismissed in any event.

3. It is fair to say that, at the conclusion of the case, the central issue was whether dismissal was within the range of reasonable responses open to a reasonable employer in the circumstances. There were also, however, some limited issues as to precisely what GEZE believed Mr Buchholz had done and as to the reasonableness of and grounds for that belief and and whether they followed a reasonable process.

RELEVANT LAW – UNFAIR DISMISSAL

4. The relevant statutory provision is section 98 of the ERA 1996, in particular s.98(4) which provides that:

"…the determination of 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."

5. It is for GEZE to establish why they dismissed Mr Buchholz and that the reason falls within one of the potentially fair reasons set out in s.98(2) ERA 1996.

6. As to whether the dismissal is actually fair, the burden of proof is neutral. In considering whether a dismissal is fair the test which I apply is that set out in s.98(4) above and the relevant factors to which I have regard are those set out in paragraph 2.2 above which are derived from British Home Stores v Burchell [1980] ICR 303 and Iceland Frozen Foods Limited v Jones [1983] ICR 17.

7. In applying s.98(4) I have kept in mind the guidance given by the Court of Appeal in HSBC Bank plc v Madden [2000] ICR 1283, originally set out in Iceland Frozen Foods (above), namely that:

7.1 the starting point should always be the words of the section itself
7.2 in applying that section, I must consider the reasonableness of GEZE's conduct not simply whether I would have done the same thing
7.3 I must not substitute my decision as to what was the right course to adopt for GEZE's

7.4 in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another employer quite reasonably take another,

7.5 the function of the Tribunal, sitting as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fail 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.

8. Thus, what I have to consider is whether GEZE acted reasonably in what it did and the test is an objective one. I therefore ask myself, what would a hypothetical reasonable employer have done? I remind myself that I must not ask whether I personally would have done what GEZE did because, if I analyse fairness in that way, I would substitute my views for GEZE's and I would not be applying the objective test.

9. All that said, it is also important to bear in mind that the employer / GEZE is not the sole arbiter of what is reasonable. There is an important role for an employment tribunal in identifying the limits of what is reasonable in any particular circumstances (Newbound v Thames Water Utility [2015] EWCA Civ 677, §61; Bowater v NW London Hosp NHS T [2011] EWCA Civ 63). Furthermore, it is important to bear in mind that, even if there is a range of reasonable responses in any situation, that must not be misunderstood or misapplied such that nothing short of a perverse decision will be held to be unreasonable (Iceland Frozen Foods (above)).

10. In deciding whether dismissal is reasonable / falls within in the band of reasonable responses (as is the focus in this case), the tribunal has to take into account all the surrounding circumstances such as any evidence it may have on the employer's practice, the Disciplinary Policy and definitions of Gross Misconduct contained in it, the knowledge of the employee and the seriousness of the conduct, objectively judged. What conduct amounts to gross misconduct depends on the facts of an individual case but, generally, it is conduct which fundamentally undermines the contract of employment and is a deliberate and willful repudiation of that contract or it amounts to gross negligence (Sandwell and West Birmingham Hospitals NHS Trust v Westwood UKEAT/ 0032/09, paragraphs 110 to 112).

11. The Acas Code of Practice paragraph 24 points out that what may be regarded as gross misconduct:
"may vary according to the nature of the organisation and what it does, it might include things such as theft or fraud, physical violence gross negligence or serious insubordination."
That gives some sense of the gravity of the conduct which is generally considered to fall into this category. That list is elaborated upon in the Acas Guide which accompanies the Code. It emphasises that
"Acts which constitute gross misconduct must be very serious….examples might include….
 bringing the organisation into serious disrepute"

RELEVANT LAW – ADJUSTMENTS TO ANY AWARD

12. Where I am invited to reduce an award to a claimant, the relevant statutory sections are sections 122(2), 123(1) and 123(6) ERA 1996. The first and last of those relate to conduct and second encompasses what is sometimes called a Polkey reduction to reflect the risk of a fair dismissal in any event.

13. When I am considering a reduction in any award on the basis of an employee's conduct, my approach is entirely different to that when assessing the fairness of the dismissal. When considering the conduct of an employee for the purpose of reducing any award, it is for me to decide whether, on the balance of probabilities, on the evidence I have heard the claimant has conducted himself in a matter which is

    (a) Culpable or blame worthy
    (b) preceded the dismissal (s.122(2)) or caused or contributed to the dismissal (s.123(6))
    (c) such that it just an equitable to reduce the award.

    If so, I have to decide to extent any award should be reduced.

14. In some cases it might be appropriate to reduce compensation to reflect the risk that an employee would or might have been fairly dismissed in any event.

THE EVIDENCE

15. GEZE called 3 witnesses: Mr Marshall (the Operations Director to whom the incident was first reported), Mr Iredale (the National Sales Manager who carried out the investigation and disciplinary hearing) and Ms Boxall (the Finance Director who carried out the appeal). Mr Buchholz himself gave evidence. I was provided with an agreed bundle of some 142 pages and, very helpfully, Mr Forrester, on behalf of GEZE, also provided a written Skeleton Argument which was much appreciated and of significant assistance in using the time effectively.

RELEVANT FACTS The Parties

16. GEZE is a company which supplies products, systems and services related to door, window and safety technology. It is of a medium size, employing some 250 people. It has an in-house HR Department. Mr Buchholz was employed by them from 9 January 2006 until he was dismissed on 6 April 2020. Latterly, he was employed as a Technical Product Manager. Mr Buchholz had therefore been working for GEZE for some 14 years when the dismissal took place.

The Incident in February 2020 and the Investigation

17. The relevant incident occurred on 28 February 2020. On that date, GEZE's offices were undergoing a deep clean conducted by their usual third party contractor to whom cleaning was out-sourced. That evening one of the cleaning company's managers, Ms Hughes, drew Mr Marshall's attention to one of the desks where she had found a small clear plastic bag containing

white powder, two lines of loose powder and something that had been rolled into a cylinder or straw like shape.

18. She asked Mr Marshall whether he thought it was a joke and he said, knowing whose desk it was, it probably was a joke. She said she thought she should check. Mr Marshall asked her to clear it away and apologised to her to which she replied 'not to worry she had seen worse'.

19. Shortly afterwards Mr Marshall thought better of disposing of the material, retrieved it from the bin and locked it in a cupboard over the weekend. On Monday morning he called the police to check it was not drugs. They attended and subsequent tests revealed it was not drugs. It seems agreed that the white powder was, in fact, sherbet powder.

20. Mr Downes, who is the Health Safety and Quality Manager and was the contact for the cleaning company, also spoke to Ms Hughes that evening and attended the premises. In interview, he explained that she told him she thought it was a joke. Mr Downes, himself, said he knew it was Mr Buchholz 'playing silly sods' when he saw whose desk was involved. He referred to it being Mr Buchholz's 'mentality to play a silly joke' and reassured Ms Hughes it was indeed a joke.

21. Ms Poulton, a HR professional, carried an initial investigation with Mr Marshall and Mr Downes. They told her what I have set out above. She also obtained an email statement from Ms Hughes in which Ms Hughes confirmed she had assumed it was a practical joke but, just in case, she brought it to the attention of Mr Marshall. She also confirmed Mr Marshall's first reaction was to say that it was probably a joke and Mr Downes reaction was the same: it was probably a joke knowing the person whose desk it was.

22. Mr Buchholz, in the meantime, was on a weeks' holiday starting on the working day immediately after the evening on which the items were found. When he returned to work, he found he was 'locked out' of the GEZE IT system. He was informed that Mr Marshall had requested his password be changed. He waited for hour to find out what was going on and was then asked to attend a meeting with HR. When he did attend, Mr Iredale was present with Ms Poulton (HR). Mr Iredale asked Mr Buchholz if he had left anything on his desk. Mr Buchholz said he had not, other than his usual equipment. Mr Iredale informed him that the cleaner had found a bag and some pieces [arranged] to look like drugs. Mr Buchholz was asked if he knew who had done that and he responded he had no idea. He told Mr Iredale he had had a bag of sherbet that day and he gave some answers about the bag having split. Those answers can, I find, fairly be described as vague. It can also fairly be said that he was not wholly co-operative or forthcoming during that interview. He did, however, consistently maintain that the items had not been left intentionally for the cleaners to discover and he repeated that on a number of occasions.

23. Mr Buchholz told me, and I accept, that he asked for the cleaner's details at this meeting in order to apologise. GEZE declined to provide them at that stage (and there is no criticism of them for that).

24. Mr Iredale went on to interview two members of staff from the relevant department. The first, slightly confusingly, also called Ms Hughes (Ms K Hughes). She said that she had brought in the sherbet. She had given it to Mr Buchholz and, when he was eating it, it had led to 'banter' in the team about the powder. She said one had to 'appreciate Mr Buchholz and his jokes'. She also said it was a silly thing to do and she didn't think he would leave it there for the cleaners. She thought Mr Buchholz was unhappy about having to clear his desk. It was unclear to me, on an objective reading of the notes of her interview, if she was saying that she thought this was not something Mr Buchholz would do or she was saying that, despite the fact she thought it was not something he would do, he had in fact done it. If she was expressing an opinion on what she thought he had or not done, it wasn't clear to me whether she was saying it was deliberate or inadvertent or on what facts her opinion was based.

25. Mr Iredale then interviewed another employee also called Hughes, Mr Keiron Hughes. He said that Mr Buchhloz had joked with the sherbet; it was what the Technical and Estimating Department did i.e. they had fun and banter. He also specifically said that Mr Buchholz was working away from his desk so he may have forgotten about the items on it.

Policies and Procedures

26. I leave the chronology, temporarily, to deal with GEZE's Disciplinary Policy on this issue. It provides examples of matters which are normally regarded as gross misconduct. Those examples include at section 2.8 (h) 'bringing the company into serious disrepute'. The policy also makes it clear that the matters listed are intended as a guide and it is not an exhaustive list.

The Disciplinary Hearing

27. Mr Iredale decided that the matter should progress to a disciplinary hearing. Mr Buchholz was invited to such a hearing by letter dated 13th March. The letter informed him that the company considered that the 'compilation of items on your desk consisting of or portraying an illegal substance and the possession of illegal substances in the workplace is unacceptable and breaches company policy'. It further advised him that GEZE considered the act 'as causing damage to the companies' reputation and bringing the company into disrepute'. The letter explicitly referred Mr Buchholz to section 2.8(h) and summarised it as providing that 'bringing the company into serious disrepute ….<u>will</u> be dealt with as gross misconduct' (my emphasis).

28. Mr Buchholz was supplied with records of all the interviews that had taken place, the email from Ms Hughes, the cleaner, and the Disciplinary Policy. When he saw the contact details of Ms Hughes he emailed her. He, firstly, apologised for his behavior and, secondly, explained that what she had seen was the result of banter in the office during the day; he had started to clear it up but he got distracted by various calls and work and left the office in a bit of

a rush as he was starting a weeks' holiday. He explained it was not intended to be left there and he was truly sorry. She replied that his apology was very much appreciated.

29. The Disciplinary Hearing took place on the 18 March. It was conducted by Mr Iredale. In evidence he said his appointment as the Disciplinary Manager was last minute and had occurred because Mr Buchholz's Line Manager (who was supposed to hear the disciplinary) was unwell on the day. It seemed to me his evidence could not be correct in that regard as the invitation to the Disciplinary Hearing sent out five days before the hearing identified Mr Iredale as the person who would conduct it. I do not find he was attempting to mislead me in any way. He was doing his best to recollect matters but I took the view, in light of the invitation letter, that his recollection was flawed.

30. At the disciplinary hearing Mr Buchholz accepted he had set up the items broadly as described to look like drug use during the day. He explained that a colleague had brought in the sherbet, he had spilled it, he had been covered in white powder, it looked like he had been taking drugs and he set it up like that as a joke following on from the spillage. He thought he had cleared it up. He had done the preparation for the deep clean on the Thursday afternoon not the Friday and so the fact that a clean was scheduled was not uppermost in his mind when he left on the Friday. He said had a stressful week, so much so, that he booked the following week off at short notice. He was keen to get away; he was distracted; he had been working away from his desk and he had not given his desk much thought before he left. He had apologised and explained to the cleaner. He said he felt GEZE's reaction was out of proportion to the incident and I understood from his evidence that he meant it was disproportionate that they were considering dismissing him for this.

31. Mr Iredale, in reply, drew Mr Buchholz's attention to what Mr Iredale said was the risk that this could have been put all over Social Media and the impression conveyed that GEZE condoned drug use or had drugs in the building.

32. During the disciplinary hearing, Mr Buchholz made reference to the email to Ms Hughes. Mr Iredale had not seen it and requested a copy so it was therefore available for him to consider. Mr Iredale adjourned to reach his decision. The decision was communicated by letter dated 20 March 2020. Mr Iredale summarised Mr Buchholz's position as set out in paragraph 30 above. Mr Iredale stated that 'the company is satisfied the act itself was as a result of playing jokes with the team and was misjudged on your behalf however this does not negate the seriousness of it. You ran the risk of damaging the company's reputation by committing this act' He specifically referred to the section 2.8(h) of the Disciplinary Policy; noted that it expressly stated that bringing the company in to serious disrepute <u>will</u> be dealt with as Gross Misconduct and concluded that, in line with the disciplinary policy, the decision had been taken to terminate Mr Buccholz's employment with immediate effect (my emphasis).

33. Mr Iredale told me in evidence that he found the crux of Mr Buchholz's conduct was a joke but he had also formed the view that he intended to leave his desk

like that for the cleaners to find. When asked what he based that conclusion on, he said that Mr Buchholz 'kept referring to different situations which were not relevant to what happened, talking about other employees and I felt he had an air of contempt for the company. This was what I pieced together in making my decision.' He made no reference to the evidence of other employees on this point.

The Appeal

34. Mr Buchholz appealed this decision by email dated the 20 March 2020. He said, amongst other things, that he was appealing because he had been dismissed for something that was not intentional and for the potential of something which could happen which didn't happen. I understood this latter reference to be a reference to the potential social media reputational damage to the company which had not, in fact, materialised.

35. Ms Boxall heard the appeal on the 1 April. Mr Buchholz's position in that hearing is adequately summarised in her outcome letter:
'You admitted setting up the scene to look like drug taking on your desk. You advised this was not done maliciously and it was a result of joking around earlier in the day. You apologised for your conduct and admitted you had made an error.'
When Mr Buchholz made the point in the hearing that his conduct was not malicious but, as found by Mr Iredale, was the result of joking around during the day, Ms Boxall did not challenge Mr Buchholz or engage in any discussion about how the items came to be left on his desk. Instead, she asked him whether he understood that why the conduct he had described could bring the company into disrepute.

36. Furthermore, in her outcome letter she concluded as follows:
'Whilst I have considered your response and acknowledged the remorse you have now shown I do not feel the company can condone this type of behavior in the workplace or that I can overturn the decision to dismiss thereby rendering the act acceptable'.

37. In evidence to me, Ms Boxall stated that she, too, had formed the impression that Mr Buchholz left the items on the desk deliberately. Unlike Mr Iredale, she did not think they had been left as a joke; she thought had been left to cause trouble. It was, however, unclear what trouble she meant or for whom. She based her conclusion on the fact that she felt Mr Buchholz's story as to precisely what had occurred had changed on a number of occasions. Like Mr Iredale, she made no reference to other witness evidence at this point.

The claimant's evidence to the Tribunal

38. In his evidence to me Mr Buchholz stated the following:

    38.1 he accepted that during the day he had staged the items to look like drug use
    38.2 he had done so as part of an ongoing joke with his colleagues which had originated from spilling the sherbet and the joke took various

different forms in terms of different 'paraphernalia' added at different times

38.3 he had been distracted and under pressure that day, he had worked away from his desk, rushed to leave on holiday and had not appreciated the items were left out for the cleaners to discover.

38.4 he denied that he had done it because of irritation with or to get back at the Managing Director about whose conduct he felt aggrieved that day.

38.5 he accepted it was neglectful or blameworthy to have left it in that way and he regretted that.

38.6 he didn't think the joke itself went over the line and

38.7 he could understand GEZE being angry or upset by his conduct which he accepted could have, potentially, merited some form of disciplinary investigation or sanction but not dismissal.

CONCLUSIONS Reason for Dismissal

39. It is clear to me (and it has not been the subject of any real challenge by Mr Buchholz) that the reason for his dismissal was that Mr Iredale genuinely believed Mr Buchholz had arranged the sherbet the bag and something resembling a straw on his desk to look like drug taking and that Mr Iredale believed he had done so as part of a joke with the team on the 28 February.

40. I was surprised when Mr Iredale and Ms Boxall said that they had also formed the view Mr Buchholz left it deliberately for the cleaners to find. If that was part of their conclusion and a relevant part, I would have expected it to be clearly set out in their letters. I do not find it to have been clearly set out in either letter. In Mr Iredale's letter he explicitly finds that the act was the result of playing jokes with the team and he makes no mention at all of whether Mr Buchholz intended to play a joke on the cleaners or otherwise. Ms Boxall makes no mention of the matter at all in her letter.

41. It seemed to me that there was real risk that Mr Iredale and Ms Boxall were subconsciously now emphasising something that was not specifically in their minds at the time. I noted that Mr Iredale's recollection as to how he came to be the disciplinary manager was flawed. Overall, however, I accept Mr Iredale's evidence that he formed the impression Mr Buchholz intended to leave the items on his desk as part of the joke. I do not accept that Ms Boxall expressly found at the time that Mr Buchholz did this to cause trouble in the absence of any discussion about that issue in her hearing or any statement to that effect in her outcome letter.

42. In any event, I am satisfied that the question of whether the items were left inadvertently or deliberately, as part of a joke or as an irritant, was not a significant part of the reason for dismissing Mr Buchholz. The logic, as set out in Mr Iredale's letter, is that, having deliberately staged his desk to look like drug taking as a joke with his colleagues, the result that it was found by a cleaner; whether that was an intended or an inadvertent result, the consequence was (as Mr Iredale perceived it) a risk that the company would be brought into disrepute.

43. Thus, I find that the reason for dismissing Mr Buchholz was that Mr Iredale genuinely believed he had staged his desk with items to look like drug taking as a joke and they had subsequently been found by a cleaner. This is a reason relating to conduct and, potentially, a fair one (under s.98(2) ERA 1996).

Reasonable Grounds and Reasonable Investigation

44. I find that GEZE conducted a reasonable investigation into who put the items on the desk in first place and why. I take the view Mr Iredale had reasonable grounds for his conclusion that Mr Buchholz had arranged the items as a joke with his colleagues, not least because Mr Buchholz admitted that.

45. I do not accept that Mr Iredale or Ms Boxall's conclusions that the items were left there deliberately for the cleaners was a reasonable one. Mr Buchholz was consistent in his explanation it started as a joke and they were left inadvertently. He was consistent in what he said from the investigatory meeting through his emails to Ms Hughes (the Cleaning Manager), in the disciplinary hearing and in the appeal hearing. He gave plausible evidence of being away from his desk and distracted that day. There was support for his evidence in Mr K Hughes' witness statement where he said Mr Buchholz had worked away from his desk and could have forgotten about the items. There was arguably some support for this in Ms K Hughes' witness statement depending on how one interpreted it or, at the very least it required some clarification.

46. Objectively judged, a reasonable employer, in my view, would have had to accept that evidence. Alternatively, if they were contemplating a finding against the weight of that evidence, it was incumbent on a reasonable employer to ask Ms K Hughes for further details of what she meant and to consciously weigh up Mr Keiron Hughes' evidence. Mr Iredale did not seem to have applied his mind to this evidence at all. If an employer was to go even further and find that it was not only deliberately left for the cleaners but the purpose in so doing was to cause trouble then, in my view, it was incumbent upon Ms Boxall (as a reasonable employer) to explore that matter specifically with Mr Buchholz in her hearing. Mr Iredale said he decided Mr Buchholz's actions were deliberate because Mr Buchholz referred to irrelevant matters; Ms Boxall said she decided it was deliberate because Mr Buchholz had changed his story about what precisely had been left between the investigator in the disciplinary. Neither of those lines of logic seem to me to be a sufficient or reasonable basis for a reasonable employer to jump to the conclusion that the items were left deliberately rather than inadvertently. Neither Mr Iredale nor Ms Boxall adequately considered the witness evidence from Mr K Hughes or Ms K Hughes on this point.

Reasonable Sanction

47. For the purpose of this Judgment, however, it matters not whether GEZE concluded that Mr Buchholz's conduct started as a joke and he left the items inadvertently or whether he left them deliberately as a continuation of the joke or, even to cause some sort of trouble or inconvenience, I am satisfied that no reasonable employer would have concluded that this merited summary dismissal for this employee in these circumstances.

48. Both Mr Iredale and Ms Boxall decided the conduct merited summary dismissal because they took the view that Mr Buchholz had run the risk of damage to the company's reputation. Their decisions were not based on Mr Buchholz's subjective intention when the items were left out. In coming to the conclusion that sanction for this conduct for this employee was disproportionate, objectively judged, I have taken into account the following.

    48.1 The type of conduct identified in the Acas guide as conduct which reasonable employers would generally consider to merit summary dismissal is actually 'bringing the organisation into serious disrepute.
    48.2 GEZE's own Disciplinary Policy follows the Acas guide and identifies actual and serious reputational damage as the type of conduct which would be considered to merit dismissal at 2.8(h). Further and importantly, it was this provision on which GEZE relied in coming to the decision to dismiss.
    48.3 It is an agreed fact that there had been no reputational damage still less any serious reputational damage. The items had never been circulated on social media or otherwise.
    48.4 Everyone involved from those employed by the company to the cleaner, external to the company, all understood from the outset that this was overwhelmingly likely to be intended as a joke.
    48.5 The risk of reputational damage therefore identified by GEZE, namely, that this have been put on social media and the message conveyed that GEZE condoned drug use was low when judged objectively in the situation where everyone understood that this was a joke.
    48.6 Mr Buchholz had 14 years' service, no live warnings and a single written warning for some disrespectful communications which is conduct very different to this conduct and which was almost 18 months previously.
    48.7 He had apologised to the cleaner if the items had caused her any concerns or distress.
    48.8 Finally, I find that GEZE failed to adequately consider imposing a lesser sanction to reflect that such conduct was unacceptable. I noted there was no mention of any such consideration in the evidence. Further, in the disciplinary invitation and outcome letter, it was stated that this conduct 'will' lead to dismissal; in the appeal outcome letter (as set out in §36 above), Ms Boxall stated that she could not overturn the dismissal because that would thereby render Mr Buchholz's actions acceptable. Of course, overturning and substituting a lesser sanction (but a sanction nonetheless) would not render his actions acceptable and would not constitute condoning the conduct.

49. Objectively judged, in my view, this sanction was disproportionate to the conduct found proved in the circumstances of this particular employee.

Reasonable Process

50. Turning to the process followed by GEZE. It is right to say that Mr Buchholz did not make any particularised criticism of the process. Everyone was, however, agreed that GEZE should comply with the Acas Code of Practice. It

is right to note that the Code provides in Paragraph 6 that, where practicable, a different person should carry out the investigation and the disciplinary.

51. There is a reason for that division of functions: it is recognised as an important indicator of impartiality in the decision making. There is a risk that if the same person conducts the investigation and takes the decision, they will be unduly influenced by impressions created during the investigation.

52. I find it was reasonably practicable for someone other than Mr Iredale to have conducted the hearing: the Investigating Manager should not have been appointed as the Disciplinary Manager as set out in the invitation letter. I find that aspect, that non-compliance with the code contributed to rendering this dismissal unfair.

Overall Conclusion

53. I find the dismissal unfair on three bases: there were no reasonable grounds for the conclusion that Mr Buchholz deliberately left these items on the desk for the cleaners to find; in any event, the sanction was outside the range of reasonable responses for this conduct in these particular circumstances and thirdly, there was a failure to follow a reasonable process by failing to maintain a separation between in the Investigating and Disciplining Manager.

THE CLAIMANT'S CONDUCT

54. I turn now to consider Mr Buchholz conduct. As I have set out above, the task for me here is to decide on the basis of the evidence I have heard what I am satisfied Mr Buchholz did, how blameworthy I think that conduct is (if at all) and whether it preceded his dismissal (basic award) or contributed to the decision to dismiss him (compensatory award) and, if so, assess whether it is just and equitable to reduce his award and by what proportion.

55. I find the following 5 matters proved on the evidence I have heard:

    55.1 Mr Buchholz deliberately stage the items to look like drug use.

    55.2 This was intended and received as a joke amongst his immediate colleagues but it carried the risk of causing offence to some.

    55.3 He did not intend to leave the scene for the cleaners to find as a joke or to cause trouble - he was careless.

    55.4 His conduct, in staging such a scene and leaving it on his desk, fell below the standards expected and set out in the Disciplinary Policy namely to maintain professional and responsible standards of conduct (paragraph 2.4).

    55.5 Mr Buchholz was not, in my view, as straightforward and forthcoming as he could and reasonably should have been at the investigatory meeting, even allowing for his difficult morning waiting find out why he had been locked out of the system

56. I am satisfied that in all those respects their conduct is blameworthy and that all the aspects above contributed to his dismissal. I have considered whether I should make a reduction to both his basic and compensatory award. I do not accept Mr Forrester's eloquent submission that that reduction should be 100 per cent or anything approaching that. I have found the dismissal to have been a disproportionate response, objectively judged. It would be inconsistent with that if I then concluded Mr Buchholz was 100 per cent responsible for his dismissal such that he should not get any compensation. It is right, of course, that 'but for' his conduct he would not have been dismissed; equally 'but for' the imposition of a sanction outside the range of reasonable responses he would not have been dismissed.

57. It seems to me, in terms of the range of blameworthiness, that this conduct is properly categorised as foolish, insensitive, careless and un-cooperative. It would, in my view, have merited some form of warning but not the loss of his job. Weighing everything up, I have come to the conclusion that a one third reduction properly reflects the nature of the conduct prior to the dismissal for the basic award and the conduct prior to and contributing to the dismissal for the compensatory.

58. In light of my findings, as set out above, it was not appropriate to make any reduction to reflect a risk that Mr Buchholz would have been fairly dismissed by GEZE in any event.

Employment Judge Connolly
Signed on 29 March 2021

REASONS SENT TO THE PARTIES ON

....29 March 2021.....
....

FOR THE TRIBUNAL OFFICE