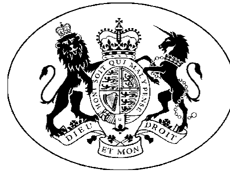

EMPLOYMENT TRIBUNALS

Claimant: **Mr. G Isbell**

Respondent: **First Essex Buses**

Heard at: **East London Hearing Centre**

On: **8th April 2021**

Before: **Employment Judge McLaren**

Representation

Claimant: In person

Respondent: Mr. N Newman, Solicitor

JUDGMENT

The decision of the tribunal is that

1. **The claimant was dismissed for a fair reason, namely conduct.**

2. **The claim for unfair dismissal does not succeed.**

REASONS

Background

1 The respondent operates passenger carrying vehicles in the Essex area. The claimant was employed as an Engineering Supervisor from 6 May 2014 until 3 March 2020, when he was dismissed for gross misconduct. By a claim form presented on 28 July 2020 he brings a claim for unfair dismissal.

2 The claim is listed for a one-day hearing on liability only.

Issues

3 At the outset of the hearing and after some discussion, the parties agreed the list of issues that I should determine. The claimant had raised a number of procedural issues which the respondent suggested had not been raised previously. The claimant explained that, while he had an electronic bundle, he could not read this on his telephone (he had borrowed a laptop for the hearing and had no access himself) and he had therefore prepared his written witness statement before he had read all the documents in the bundle. That had triggered his recollection. The respondent explained that there had been a consequential exchange of witness statements as the claimant's case was unclear from the pleadings, and so they were relying on the claimant's witness statement as the issues in the case. It was only matters raised in the claimant's statement that had been addressed in the respondent's witness evidence.

4 Mr Newman accepted that, in fact, the respondent's witness statements covered a number of the points now raised by the claimant not set out in the witness statement, but did not cover two specific points. These were the claimant's complaint that statements were not signed and dated as a breach of policy, and that the respondent acted in breach of its dignity at work policy. Having briefly reviewed the respondent's witness statements and considered the point, I agreed with the respondent that these two points were new and would not form issues in today's hearing. The agreed issues list is therefore as set out below.

Unfair dismissal

5 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was for gross misconduct.

6 If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses?

7 The claimant contends that the respondent did not adopt a fair procedure when dismissing him, in the following respects:

a) the CCTV footage was not viewed prior to the disciplinary hearing

b) second statements were provided by Mr Henderson and Mr Third after they had viewed the CCTV footage

c) that CCTV and witnesses were not present at the first appeal hearing

d) the respondent was in breach of its own policy by not addressing the claimant's grievance. The respondent states that it did address the grievance

e) the respondent was acting in breach of the service plan. The respondent disputes this

8 The claimant also contends that the dismissal was substantively unfair in that:

a) conditions of bullying that effected his mental health and occupational health advice were not taken into account

b) he was goaded to act as he did by Mr Henderson

c) the respondent has a culture of swearing

Evidence

9 I heard evidence today from the claimant on his own behalf and from three witnesses for the respondent. These were Mr Stephen Harmon, operations manager who chaired the disciplinary meeting, Mr Martin Sweeney, health safety and environment business partner who chaired the first appeal and Mr Piers Marlow, business improvement director who chaired the final stage disciplinary appeal hearing.

10 I was provided with a bundle of documents amounting to 248 pages. In reaching my decision I considered the evidence before me together with those pages of the bundle to which I was directed. I was also assisted by helpful submissions from both parties.

Finding of facts

Contractual documents and Disciplinary Policy

11 The claimant's employment contract stated during the continuance of his employment he will be expected to adhere to all company policies and procedures which are available on the company's intranet. The contract made express reference to the company having in place a disciplinary and grievance procedure, a copy of which was available from the line manager. It was specified that this procedure did not form part of the contract and was not an implied term or condition of employment.

12 The contract set out a number of general obligations that the claimant had to adhere to during his employment, which included acting in a responsible and professional manner whilst discharging his duties.

13 The company's disciplinary policy set out the steps that would be taken in the event of any potential conduct issues. It set out a potential four stage procedure, stage 3 was a final written warning stage and stage 4 was dismissal or other sanction. A final written warning was specified as being kept on the personnel file for a period of 12 months from the date of issue after which time it would be spent.

14 The policy provided that if a further offence occurred where there was a live final written warning, then the employee may be dismissed or issued with some other action short of dismissal, such as demotion or transfer. Dismissal could also occur in the event of gross misconduct and the policy at appendix C gave some examples of this which included abusive behaviour.

Final written warning

15 It was not disputed that on 6 November 2019 the claimant received a final written warning following a disciplinary hearing he attended on the 1

November. The warning was given because the claimant had used offensive language directed at another member of staff. It was common ground that the claimant had in fact sworn and used offensive language at Mr Henderson.

16 The bundle contained a copy of the outcome letter.The letter specified, in accordance with the disciplinary policy, that the sanction would be live on his file for a period of 12 months provided his conduct improved and reached a satisfactory level.

17 The letter advised the claimant that his conduct was expected to improve in that he must treat all members of staff with respect and communicate with them with professional courtesy and work with the depot management team in resolving issues and supporting the implementation of new processes.The warning letter stated that the consequence of further misconduct or insufficient improvement was likely to be dismissal.

18 While the claimant accepted that he knew he had had a warning and he knew what it was for, that is for being abusive, he disputed that he was aware of the consequences of that warning. This had been raised for the first time in the final appeal against his dismissal when the decision maker in that case had concluded that there was no evidence that the claimant had not received the letter. In his oral evidence today the claimant again said that he had not seen it. The letter was sent by recorded delivery and the claimant did not dispute that it was sent to his address. On the balance of probabilities, I find that the letter was received by the claimant and that he was therefore aware that his conduct needed to improve and the consequences of any further misconduct or insufficient improvement was likely to be dismissal.

<u>Events on 3 February 2020</u>

The Trigger for the Incident

19 Mr Hartman explained that the respondent's operators licence requires vehicle inspections to be conducted at prescribed intervals set by the traffic Commissioner. The licence requires inspection of vehicles on at least a 42 day or six week cycle, irrespective of the age of the given bus. In addition to these requirements, the respondent sets its own standard operating procedures to ensure that inspections are completed in line with its licence, legal requirements and its own standards.

20 Mr Hartman explained that in February 2020 the respondent had decided to change its vehicle inspection plan/rota for the depot in which the claimant worked. This meant that some buses, although not all, would go from being inspected every 28 days, which was the depot's normal routine, to an inspection every 42 days, which was the legal limit. The respondent made this decision to improve efficiencies and catch up on overdue inspections.

21 The claimant was made aware of this change in policy at around 9 AM on Monday, 3 February and his rota plan was changed to accommodate this new inspection regime. It is agreed that he spoke to Mr Norris who, together with Mr Henderson had decided to implement this new inspection regime at the Basildon depot and voiced his disagreement. The claimant believed that these changes breached the companies standard operating procedures

which in his view prohibited a 42 day inspection on vehicles over six years old. It was agreed that the claimant had a heated conversation with Mr Norris, although he did not feel threatened or uneasy while talking to the claimant. The conversation concluded with an agreement to disagree about the topic.

22 The claimant continued to suggest that the respondent’s actions were unlawful in making this change. Mr Marlow explained that there was nothing illegal about what had been done. The operating licence allows vehicles to be maintained on a cycle of up to 42 days provided that there was a 21 day inspection for buses that was six years or older. He explained that it was the respondent’s policy to do earlier inspections. In cross examination the claimant accepted that this was not an operating licence isue , but maintained that this change was in breach of the company’s policy but he also accepted that the respondent could change its policy if it wished to do so. I accept Mr Marlow’s evidence that the company is entitled to change its operating policy and that there was therefore nothing unlawful about the changes it made. Even if there were, this is not a whistleblowing claim but a dismissal for an undisputed act.

23 The claimant then left for the day as he was due on the night shift. Mr Norris took the opportunity to warn Jamie Henderson that the claimant was very annoyed with the rota plan and suggested that if he had not calmed down the claimant might not be in later that night for his shift.

24 It was agreed that Mr Henderson telephoned the claimant at around lunchtime that day and that the claimant did not wish to speak to him because he was busy. The claimant confirmed that he would be at work later that day. The claimant gives this as an example of Mr Henderson hounding him and questioned why he needed to be called at home. Based on the evidence within the bundle, that is the statements of Mr Norris and Mr Henderson, I find that on the balance of probabilities it was likely that Mr Henderson was concerned about whether the claimant would attend and it was reasonable to make this call.

Events that evening

25 The sequence of events that evening are disputed. Mr Henderson’s original statement given as part of the later investigative process, records that later that evening the claimant came into work and the claimant ignored him. Both Mr Henderson’s statement and the claimant agree that there was a conversation in the supervisor’s office. Mr Henderson states that he asked the claimant directly if he was happy with inspections and records that the claimant became immediately aggressive, he records the claimant would not let him speak and was shouting at him and pushed past him in order to get back to the workshop. The claimant denies that he pushed past Mr Henderson but has always accepted that he called Mr Henderson a “fucking idiot”.

26 Having got changed to leave work, Mr Henderson went back to the office where the claimant was and reports again that the claimant was very aggressive and abusive as he started to walk out of the office. Mr Henderson states that he followed him when the claimant turned to him and with both fists clenched raised towards his face shouted “why don’t you just

fuck off".The claimant has consistently denied that he was physically aggressive towards Mr Henderson but accepts that he used this abusive language.

27 It is agreed that the claimant was suspended following this incident. The claimant believes that he was told he was suspended because Mr Henderson considered that he had been threatened and he felt it was likely the claimant could become physically violent towards him or a member of the team.

28 The suspension was confirmed in writing by letter of 4 February which made no reference to physical violence or a concern about that, but confirmed that the reason for the suspension was demonstrating unsatisfactory conduct and abusive behaviour in the workplace towards his line manager. A full investigation would take place which should be undertaken by Mr Dan Worley, operations manager.

The investigation process

29 Mr Worley spoke to a number of individuals and took statements from these, this included Mr Henderson, Mr Third, Mr Abbott, Mr Smith, Mr Mair and the claimant. In the investigative meeting with the claimant the claimant confirmed that he had used abusive language to Mr Henderson on two occasions that night.

30 At page 89 of the bundle is a note of a meeting on 26 February at which Mr Worley explained to the claimant his conclusion from the disciplinary investigation meetings. This notes that the claimant had confirmed that he was heated and slightly abusive to Mr Henderson, although not physically abusive. For that reason the note records that the incident is going to be taken forward for further disciplinary action.

31 The claimant was supported by his trade union representative during the investigative process.

Disciplinary hearing and grievance

32 The letter inviting the claimant to the hearing specified that it was to consider an allegation of unsatisfactory behaviour and abusive conduct on the 3rd of February 2020. The claimant was advised the potential outcome of the hearing could be his dismissal without notice. He was reminded of his right to be accompanied and the claimant attended the disciplinary hearing with his trade union representative.

33 Mr Hartman was appointed chair of the disciplinary hearing. Prior to his involvement in this hearing he had never met the claimant having worked at different depots. In advance of that meeting he was provided with minutes of the investigation meetings and five witness statements which set out an undisputed chronology of events.

34 During the hearing the claimant was given a full opportunity to put his side of the case. The trade union representative advised Mr Hartman that the claimant had lodged a grievance. This had been lodged on 26 February. Mr Hartman had not been made aware of this grievance and it is agreed that he adjourned the hearing briefly to find out about this. On his return the

meeting notes, which are not disputed, show that he explained he had not been able to get confirmation of the grievance and therefore asked if the claimant wish to bring up elements of that grievance in that hearing. The response was "no, not really" and from the trade union rep that it would come up throughout. Mr Hartman's evidence was that he therefore continued the hearing understanding that the claimant would raise any relevant parts of his grievance in the disciplinary hearing.I find that this was a reasonable position him to reach given the response of both the claimant and his trade union representative. Neither asked for the disciplinary hearing to be postponed to allow the first stage grievance to be heard. Instead, I find that they gave the impression that they were content for the disciplinary hearing to go ahead and that they would bring up any relevant parts of the grievance during this meeting.

35 While the disciplinary policy provides that where a grievance is raised during the disciplinary process which is related to the disciplinary subject matter the manager should consider adjourning the disciplinary process for a short period whilst the grievance is dealt with, the respondent on this occasion decided not to do that. On 3 March 2020, the same day as the disciplinary meeting, the respondent acknowledged receipt of the claimant's grievance of 26 February. Mr Richard Gilmore, Fleet engineer, set out a different course of action. He stated that that as the claimant was actively undergoing disciplinary procedure and as the grievance related to the event that the best course of action would be for the disciplinary hearing to proceed and for the process to continue. He continued that "the concerns raised in your letter will undoubtedly be raised in the disciplinary hearing at you put your case across and it will be for the disciplinary manager to consider these counter allegations and investigate as appropriate." Again, the claimant did not object to this course of action at the time.

36 In the disciplinary hearing the claimant again confirmed that he had sworn at Mr Henderson on two occasions. His dispute was that he had not pushed Mr Henderson or clenched his fists or been physically abusive in the way Mr Henderson alleged. It was agreed that the CCTV footage was not looked at either before or as part of this hearing. As a result, Mr Hartman concluded that there was no evidence that the claimant had been physically abusive, had pushed past Mr Henderson, clenched his fists or invaded Mr Henderson's personal space as he alleged.

37 Based on the claimant's admission, Mr Hartman did conclude that the claimant had been verbally abusive and had behaved in an unsatisfactory manner towards Mr Henderson. Mr Hartman considered a number of points that the claimant raised in mitigation. This included the claimant's concerns about the new inspection roster, that the claimant was being goaded by Mr Henderson who was setting him up in order to ensure he was dismissed, that he was handed the shift change letter in order to wind him up, the claimant's honesty in his admission as to the swearing, the claimant's length of service and his suggestion that there was a culture of swearing within the workshop.

38 Mr Hartman's evidence on these points was that he did not accept the claimant's suggestion that his behaviour was acceptable because there was a culture of swearing. While he accepted that swearing would occur as employees went about their duties, this was different from directly swearing

at a manager, calling them fucking idiot and telling them to fuck off. He took into account that the claimant genuinely believed that the changes to the inspection plan would put people's safety and jobs at risk, but did not accept that the changes were illegal as suggested.

39 Mr Hartman carefully considered the allegation that the claimant was being goaded because Mr Henderson phoned him before his shift started, followed him whne he arrived at work and handed him a shift change letter, but concluded that it was reasonable for Mr Henderson to have phoned the claimant and that while on site Mr Henderson was attempting to discuss the inspection plan. He concluded that Mr Henderson had not goaded the claimant. He also found there was no evidence Mr Henderson had handed the claimant shift change letter in order to provoke him and concluded it was totally unacceptable for the claimant to have responded in the way he did, regardless of whether the shift pattern was wrong or not.

40 Mr Hartman reached the conclusion that the claimant should be dismissed. He did so have considered the above points and also taking into account the claimant's length of service. An influential factor was the fact that the claimant had a live final written warning for a similar incident with the same manager. He said that if the claimant been remorseful he probably would have issued a lesser sanction, but this is a case when the claimant had flouted the warning, knew what was expected of him and remained verbally abusive towards his manager. He showed no remorse and therefore Mr Hartman had no confidence that there would be any improvement in his behaviour. I find that the dismissal was based entirely on admitted conduct and not on any disputed areas of fact.

41 The outcome letter dated 6 March confirmed that Mr Hartman concluded the claimant should be summarily dismissed for unsatisfactory behaviour and abusive conduct constituting gross misconduct. The respondent accepted that the letter did not set out any conclusion on the claimant's grievance. It was Mr Hartman's evidence that he had not upheld the grievance and that was implicit in his disciplinary decision.

Claimant's grievance and disciplinary appeal hearing

42 The claimant appealed against his dismissal on the grounds of breach of procedure and disputed evidence. A disciplinary appeal hearing and stage I grievance hearing were arranged before Mr Sweeney on 24 August. Prior to that on 9 March the claimant sent a written request that witnesses Mr Gilmore and Mr Norris together with CCTV footage be available at the appeal hearing.It was Mr Sweeney's evidence that prior to the hearing he had requested the CCTV footage but was told it was not available to be viewed.

43 The claimant attended the meeting with two trade union representatives. A number of points were raised, all of which were considered by Mr Sweeney. The claimant complained that his grievance 26 February had not been heard before his dismissal in breach of the companies noncontractual disciplinary procedure. Mr Sweeney considered the disciplinary hearing notes and concluded that Mr Hartman had proceeded with the disciplinary hearing on the understanding that the grievance issues were discussed and

considered at that hearing. That was within his discretion as a disciplinary hearing officer.

44 A complaint was raised that Mr Gilmore and Mr Norris were not present. Mr Sweeney explained that Mr Gilmore was not available and that Mr Norris's statement already been taken as part of the process. Neither the claimant nor his trade union representatives raised any issue with this. Mr Sweeney considered the arguments about mitigation put forward, firstly that the claimant's conduct was justified because he had been informed about what he believed were illegal changes to the vehicle inspection plan and secondly that he had been goaded, bullied and harassed by Mr Henderson. In particular he had given the claimant a shift change letter which fell outside the collective agreement and he had followed the claimant around at the time of the incident. It was suggested that the claimant's suspension had been predetermined.

45 Having listened to everything the claimant wished to say, Mr Sweeney concluded that Mr Henderson had not bullied or goaded the claimant. He reached this conclusion having listened to the claiamnt and having considered the witness statements prepared as part of the investigation. He also considered that it was reasonable that Mr Henderson telephoned the claimant prior to the start of his shift, having been given the information he had by Mr Norris. He concluded that the reason for the suspension was for using abusive language and that this had been made clear to the claimant. The concerns about the inspection changes and receiving a letter about shift changes did not justify his conduct towards Mr Henderson.

46 Mr Sweeney considered the disputed evidence as to the claimant having been physically aggressive and noted that Mr Hartman did accept there was no evidence of this. He concluded that the disputed part of Mr Henderson's evidence was not taken into account when reaching the decision to dismiss. Mr Sweeney concluded that the charge of gross misconduct was not ramped up because the claimant had accepted that he had been verbally abusive to Mr Henderson at least two occasions on 3 February. Mr Sweeney found the language used to be extremely disrespectful. Based on the claimant's own admissions and the disciplinary hearing minutes Mr Sweeney was satisfied the claimant had been dismissed for being verbally abusive towards Mr Henderson and the claimant had accepted using the language for which he was dismissed and speaking to Mr Henderson without any respect.

47 In reaching his decision to uphold the dismissal Mr Sweeney also took into account the live final written warning which the claimant had not appealed. He was confident the claimant knew swearing against his line manager was not acceptable and a further instance could lead to his potential dismissal. Mr Sweeney's evidence that he believed the decision to summarily dismiss the claimant was correct and it was not appropriate in the circumstances to issue a lesser sanction notwithstanding the claimant's representations, honesty, length of service and other mitigation. The claimant had not been remorseful for the offensive language.

48 During the process of litigation the claimant has raised a number of other matters of potential complaint and Mr Sweeney gave evidence on these. The claimant has referred to occupational health reports dated 4 February

2019 and 22 July 2019. These both predate the final written warning. The claimant did not raise this at any point during the disciplinary or appeal proceedings. Neither of the letters suggest that the claimant has anger management issues or that allowances need to be made for him because of any underlying health conditions.

49 The claimant is also now suggested that there is an embedded swearing culture. Mr Sweeney disagreed. He accepted that employers may swear within the workshop on a day-to-day basis but felt this was different from swearing directly at a manager. He remained of the view that the standard required of the claimant was clear to him.

50 The notes of the meeting confirmed that not only is the appeal against dismissal considered but also the grievance was considered. Mr Sweeney's meeting notes record that he believes he has heard the grievance and there is no evidence of bullying or harassment from the manager. The respondent accepts, however that no formal written outcome of the grievance was given to the claimant.

Second stage grievance hearing

51 it was agreed that prior to the final disciplinary appeal hearing the grievance should be heard separately as a second stage grievance. Richard Gilmore was appointed to chair the grievance hearing. The claimant was again accompanied by two trade union representatives. He was given a full opportunity to make all the points he wished. On this occasion the CCTV was viewed and in his evidence before this tribunal the claimant confirmed that the written summary of what happens as shown by the footage is accurately set out in these meeting notes.

52 As part of the investigation that Mr Gilmore carried out he adjourned the meeting to speak to further individuals and to clarify certain points as the claimant requested. This meant that Mr Henderson produced an additional informal Statement and Mr Third did the same.

53 Having considered the claimant's position and the outcome of the further investigation Mr Gilmore reconvened the second stage grievance hearing on 22 May 2020 and went through in detail who he had spoken to and what they had said. The outcome letter was sent to the claimant on 27 May 2020. It did not uphold any portion of the claimant's grievance.

Third stage grievance

54 The third stage grievance hearing was heard by Mr Wickers, Managing Director on 23 June and 14 July 2020. The claimant was accompanied to this meeting by two trade union representatives. The notes of the meeting were included in the bundle and they record that the claimant was happy with Mr Gilmore's investigation. During these meetings the CCTV was thoroughly considered. Having considered the documentary evidence I accept the claiamnt's evaluatin of this prcess ,that this was a full and fair grievance procedure which properly dealt with all the points raised by the claimant.

55 The third stage grievance outcome letter dated 30 July 2020 went through in detail the various points that the claimant had made and having

considered the evidence, dismissed the claimant's grievance. From the documentary evidence I find that the third stage grievance process was a fair and properly conducted one which carefully considered all the points that the claimant had raised.

Final appeal against dismissal

56 The final appeal meeting was chaired by Mr Marlow. Prior to the hearing he was provided with and read all the available documents which led up to the final stage disciplinary appeal hearing which included investigation meetings, disciplinary and appeal meetings and grievance hearings and grievance appeal. Again the claimant was accompanied to the meeting by two trade union representatives. He was given a full opportunity to raise all the matters that he wished to.

57 The appeal grounds included a number of alleged procedural issues. These were that Mr Hartman had failed to view the CCTV footage and to conclude the claimant's grievance before taking the decision to dismiss. Mr Sweeney had failed to view the CCTV footage and to consider the claimant's stage I grievance and to issue a stage I grievance outcome. Mr Henderson and Mr Third had given inconsistent statements during the course of the disciplinary and grievance process and had changed their accounts. The claimant again brought up that he considered Mr Henderson had goaded, bullied and harassed him, that the suspension was predetermined, and that there were conflicting reasons for the suspension. The claimant raised the fact that he felt his behaviour was caused by changes to the inspection plan at the Basildon depot and the lack of consultation from Mr Henderson about the changes was the catalyst for his conduct.

58 Mr Marlow considered these procedural issues. He found that there were issues about the handling of the grievance and access to the CCTV footage at the earliest date of the proceedings but considered these issues had been rectified during later stages of the process. The CCTV footage in particular had been viewed by the claimant on at least two occasions and his grievance was fully investigated and heard by both Mr Gilmore and Mr Wickers.

59 Mr Marlow considered that the way the grievance and disciplinary process had become intertwined was confusing, but he did not change his mind about the charges against the claimant and it did not change anything.

60 He did not consider there were any conflicting points in Mr Henderson or Mr Third's statements.While he acknowledged that the second statements were different, he did not think that they were necessarily conflicting. I accept his evidence on this point.

61 Mr Marlow rejected the claimant's assertion that his abusive language was justified because there had been a lack of consultation about the changes to the inspection regime, which he confirmed in evidence before me was within the legal requirements of the operating licence.

62 Mr Marlow concluded that there was no conflict between the reason for suspension and dismissal, nor was it predetermined. He did not accept the claimant's assertion that he had not received the final written warning outcome letter and concluded that the claimant was aware of the warning.

Mr Marlow concluded that Mr Henderson's attempt to engage with the claimant did not amount to goading, bullying or harassment and that his attempts to discuss the shift changes with the claimant were justified. Further he rejected the claimant's representation that handing him a letter about shift changes containing incorrect information amounted to goading, bullying or harassment. He concluded that irrespective of whether the contents or timing were correct, that did not mean was acceptable for him to call Mr Henderson a "fucking idiot".

63 Ultimately, Mr Marlow concluded that the claimant had accepted he had sworn at his line manager on two occasions on 3 February. He found this to be unacceptable behaviour. He found that the claimant did not show any remorse for his conduct or suggest that he would change his ways will stop Mr Marlow concluded it was likely that the claimant would speak to a manager in a similar way if a similar issue arose.

64 After careful consideration of all the evidence presented, the investigation undertaken in the previous disciplinary and appeal hearings Mr Marlow made the decision to uphold the dismissal. In doing so he took into account the final written warning however, he adjusted the decision to dismissal with notice.

65 I find that Mr Marlow carried out a full and fair process.The claimant was given every opportunity to raise all of his points which were taken into account and addressed.

66 Mr Marlow was asked about a culture of swearing at the respondent and confirmed that while he was sure swearing occurred within the workshop environment, it was the respondent's policy to treat everybody at work with dignity and respect. It was not acceptable for there to be swearing and certainly not for anybody to be sworn at. I accept his evidence on this point and find that there was no culture of swearing.

<u>Relevant Law</u>

67 There are five potentially fair reasons for dismissal under section 98 of ERA 1996: capability or qualifications, conduct, redundancy, breach of a statutory duty or restriction and "some other substantial reason" (SOSR).In this case the respondent states that the reason was conduct.

68 Once the employer has established a potentially fair reason for the dismissal under section 98(1) of ERA 1996 the tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason.

69 Section 98(4) of ERA 1996 provides that, where an employer can show a potentially fair reason for dismissal:

"... 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.

70 By the case of Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23 tribunals were reminded that throughout their consideration in relation to the procedure adopted and the substantive fairness of the dismissal, the test is whether the respondent's actions were within the band of reasonable responses of a reasonable employer. In this case the Court of Appeal decided that the subjective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. The tribunal is not required to carry out any further investigations and must be careful not to substitute its own standards of what was an adequate investigation to the standard that could be objectively expected of a reasonable employer.

Conclusion

71 Applying the relevant law to the findings of fact I have made,I conclude that the reason for dismissal was the claimant's conduct. He has admitted throughout the process that he swore at his line manager on two occasions on 3 February 2020. This is characterised by the respondent as abusive conduct and falls within its disciplinary policy as an example of gross misconduct. There is therefore a fair reason for dismissal.

72 The claimant contends that the respondent did not adopt a fair procedure when dismissing him, in the following respects:

a) the CCTV footage was not viewed prior to the disciplinary hearing

b) second statements were provided by Mr Henderson and Mr Third after they had viewed the CCTV footage

c) that CCTV and witnesses were not present at the first appeal hearing

d) the respondent was in breach of its own policy by not addressing the claimant's grievance.

e) the respondent was acting in breach of the service plan.

73 It is correct that the CCTV footage was not viewed prior to the first disciplinary outcome meeting. I have found that the dismissal was, however, based on the claimant's admission of his conduct and not on any of the disputed matters which the CCTV would have clarified. Further, looking at the process in the round, I have found that the footage was viewed on a number of occasions and was considered by Mr Marlow. I conclude that the matters the claimant wished to raise about any discrepancies were fully and exhaustively investigated and considered throughout the process as a whole. The issue the claimant raises about the CCTV footage on these facts does not amount to a flaw in the process, and I have accepted the respondent's evidence that it would not have changed any outcome. The respondent acted reasonably and its actions were within the reasonable range of responses.

74 The complaint that there were conflicting statements given by two witnesses was considered during the appeal and I have accepted Mr Marlow's finding

that there was no substantial discrepancy. This does not amount to any procedural or substantive flaw in the disciplinary or appeal process.

75 The claimant complains that two witnesses and the CCTV footage were not available at the first appeal. I have found that at the time the claimant accepted the reasons for this and did not seek to suggest that this was a flaw in the process. I've also found that the CCTV footage was viewed on a number of occasions and any issue as to witness unavailability was fully addressed by the respondent in later stages of its process. The two witnesses were Mr Gilmore, who was involved in the process and Mr Norris who gave written statements. Looking at the procedure in the round, the claimant had every opportunity to have the points he wanted have considered reviewed on several occasions. Mr Gilmore and Mr Norris's input was considered as part of the process and the fact that they were not at one meeting in person does not on these facts amount to any procedural or substantive flaw in the process. The respondent acted reasonably.

76 The claimant suggests that the respondent was in breach of its own process in the way it dealt with the grievance and disciplinary matters. I have found that the intertwining of the two was originally proposed by the respondent and not objected to by the claimant. They were, however, separated at a later stage and I have found that all the claimant's grievances were dealt with very thoroughly. I concur with Mr Marlow's conclusion that any further separation would have made no difference to the outcome of what is admitted conduct following a final written warning for the same conduct directed at the same manager. I conclude the respondent acted reasonably in the way it addressed the grievance.

77 The claimant suggested throughout the process that his actions were justified because of the change in the service plan. I have found that the change in service plan was not illegal as he suggested and the claimant himself accepted that the respondent could change its policy. This point was fully considered as a possible justification for the claimant's action by the respondent throughout its process and was rejected as a reason why the claimant should be permitted to verbally abuse his line manager. Such a decision is within the reasonable range of responses.

78 The claimant also contends that the dismissal was substantively unfair in that:

a) conditions of bullying that effected his mental health and occupational health advice were not taken into account

b) he was goaded to act as he did by Mr Henderson

c) the respondent has a culture of swearing

79 The claimant had not raised issues about his mental health during the disciplinary process. I have found that the reports that do exist predate the first disciplinary warning and do not suggest anger management issues or any reason why the claimant's conduct should be held to a lower standard. I conclude that there was no failure to take relevant matters into account.

80 The question of whether or not Mr Henderson goaded the claimant was considered throughout the process by a number of individuals who

concluded that this did not happen. I have accepted their evidence on this point.

81 The claimant raises potential mitigation that the culture of swearing should have been taken into account and failure to do so makes his dismissal unfair. He provided no evidence of such a culture. I have accepted the evidence of the respondent's witnesses that while swearing was no doubt commonplace within the workshop environment that is different from swearing at an individual. I have found that there was no culture of swearing.

82 On this basis I conclude that the dismissal was for a fair reason and was both substantively and procedurally fair.

Employment Judge McLaren
Date: 19 April 2021