EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing which has been not objected to by the parties. The form of remote hearing was V (fully – all remote). A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to comprised of a bundle of 381 pages, three witness statements on behalf of the Respondent and a witness statement on behalf of the Claimant.

Claimant		**Respondent**
Mr M P Wager	v	Coca-Cola European Partners Great Britain Ltd

Heard at: Watford (CVP) **On:** 29 and 30 March 2021

Before: Employment Judge Smeaton

Appearances:

For the Claimant: In person
For the Respondent: Mr C Kelly (counsel)

JUDGMENT

1. The correct name of the Respondent is Coca-Cola European Partners Great Britain Ltd.

2. The Claimant's claim for ordinary unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent from September 1984 until June 2019 when he was summarily dismissed on conduct grounds. In the pleadings, the exact dates of employment are in dispute (the Claimant says 2 September 1984 to 16 June 2019 but the Respondent says 3 September 1984 to 17 June 2019). For the purposes of this judgment, it is not necessary to reach a decision on this issue.

2. At the time of his dismissal, the Claimant was employed as a Technical Representative.

3. By a claim form dated 25 October 2019, the Claimant brought a claim against the Respondent for (ordinary) unfair dismissal (s.94(1) Employment Rights Act 1996 ("ERA 1996")). Limited particulars were given with the Claimant alleging simply that he had been "*treated unfairly in the event and events leading up to my dismissal"*. The claim was denied by the Respondent.

4. The claim was brought against 'CEEP'. The correct name of the Respondent is Coca-Cola European Partners Great Britain Ltd and the Tribunal record will be amended accordingly.

The hearing

5. The final hearing took place over two days during which I heard evidence from the Claimant and Mr. I Martin (Investigating Officer), Mr. J Howlett (Dismissing Officer) and Mrs. C Bottle (Appeal Officer) for the Respondent. I was provided with a hearing bundle running to 381 pages and a small bundle of recent correspondence.

6. The Respondent was represented at the hearing by Mr. C Kelly (counsel). The Claimant appeared unrepresented. I did my best to ensure a level playing field, by asking such questions of the Respondent's witnesses as I considered pertinent. Although Mr. Wager repeated on a number of occasions that he was concerned about adequately expressing himself, I felt that he was able to do so and conducted himself appropriately throughout the hearing. Any instances of confusion or inconsistency were not, in my view, a product of his inability to express himself adequately but went to his credibility.

Application to strike out or to restrict participation

7. At the outset of the hearing, Mr. Kelly indicated that he was pursuing an application to strike out the Claimant's claim on the basis of non-compliance with Tribunal orders. The application was made by email dated 11 January 2021 and renewed by email dated 9 February 2021. Regrettably, the application had not been considered by the Tribunal prior to the hearing. Mr. Kelly applied, in the alternative, for an order that the Claimant be prevented from giving evidence at the hearing.

8. I heard submissions from both parties on the Respondent's applications. After a brief adjournment to consider my decision, I refused both to strike out the claim and to limit the Claimant's participation in the hearing. I gave reasons orally for that decision. They were, in summary, as follows:

    8.1 Under rule 6 of the Tribunal Rules, non-compliance with rules or an order of the Tribunal does not of itself render void the proceedings or any steps taken in the proceedings, but the Tribunal may take such action as it considers just, including striking out the claim (rule 6(b)) or barring or restricting a party's participation in the proceedings (rule 6(c)).
    8.2 In considering whether to strike out the claim or to bar or restrict the Claimant's participation in the hearing, I must apply the overriding

objective to deal with the case fairly and justly.

8.3 It is clear here, and not disputed by the Claimant, that there has been significant and persistent non-compliance by him with case management orders made by the Tribunal. The Respondent's solicitors have carefully explained to the Claimant on numerous occasions what he was required to do and the potential risks of non-compliance. The Claimant failed to comply with orders to disclose documents, to agree the bundle, to serve his witness statement and to serve a schedule of loss. The bundle was compiled by the Respondent without the Claimant's input. His witness statement was served at the last minute, less than one working day before the hearing. The schedule of loss remains outstanding.

8.4 In my view, the Claimant has not provided an adequate explanation for that non-compliance. He admitted that he had buried his head in the sand. He described various difficulties in facing up to, and dealing with, the claim and problems with getting his thoughts down on paper. I accepted that he had those difficulties. I explained to the Claimant that the Tribunal is used to dealing with litigants in person and recognises that coming to Tribunal and dealing with litigation can be very daunting, particularly for those without representation. It is, however, the Claimant's claim. He chose to bring it to the Tribunal and it was his responsibility to actively pursue it and to comply with Tribunal orders. In the event, the burden of getting the claim ready for hearing fell almost entirely on the Respondent.

8.5 Although the Claimant confirmed that he had had access to both the CAB and a solicitor at the early stages of his claim. I recognised that his preparation may have been hindered by events in the last year following the COVID-19 pandemic. That does not, in my view, excuse the non-compliance which is persistent in this case, particularly given the correspondence from the Respondent's solicitors explaining to the Claimant what he was required to do.

8.6 But for the diligence of the Respondent's solicitor, this claim would not have been ready to proceed. In the event, however, all parties attended on the first day of hearing, I had a bundle of documents and witness statements from all parties. I had read those documents prior to the hearing commencing and was ready to hear the case. Mr. Kelly confirmed that, so long as he was permitted to ask supplementary questions of his witnesses, which I indicated I would permit to the extent necessary, the Respondent was not prejudiced by the Claimant's failure to comply with the orders in that a fair hearing remained possible.

8.7 Accordingly, whilst making clear my disapproval of the Claimant's non-compliance, I did not consider it was proportionate or just to strike out the claim or to limit the Claimant's participation in the hearing. A fair hearing remained possible and it was in accordance with the overriding objective and the interests of justice for the claim to be heard fully and determined.

Application to amend

9. In the Claimant's witness statement, served on the Friday before this hearing was due to commence, I identified two new potential claims which were not before the Tribunal; a claim under s.103A ERA 1996 (automatic unfair dismissal) and a claim under s.13 and/or s.19 Equality Act 2010 (direct and/or indirect discrimination).

10. At the outset of the hearing, I raised these potential new claims with the Claimant and asked whether he was making an application to amend in respect of either claim. Upon further discussion, it became clear that what appeared to be a claim of automatic unfair dismissal at page 3 of the Claimant's witness statement was not. The Claimant was not saying that he was dismissed because he had raised complaints, but that the Respondent was looking to reduce headcount and may have picked on him because of his efficiency levels. I indicated that that argument was part and parcel of his claim for (ordinary) unfair dismissal.

11. The second potential new claim was identified in the Claimant's witness statement under the hearing 'ageism'. No details were provided. Upon further dismission, it appeared that the Claimant was seeking to raise a claim of indirect and/or direct age discrimination; the claim being that the Respondent imposed a requirement for employees to use technology in carrying out their role, that the Claimant had difficulty in using that technology, and that he was dismissed as a result. Alternatively, that he was dismissed because the Respondent only wanted to deal with younger employees who were not so comfortable speaking up against imposed changes. If pursued, both claims would require an amendment to the claim.

12. I heard submissions from Mr. Kelly in response to the application. After a brief adjournment to consider my decision, I refused to amend the claim. I gave reasons orally for that decision. They were, in summary, as follows:

    12.1 In deciding whether to grant the applications to amend, I must apply the principles identified in Selkent Bus Co Ltd v Moore [1996] ICR 836 and associated case law. This involves carrying out a careful balancing exercise of all relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant considerations include:

    (a) the nature of the amendment: applications which are simply a re-labelling of existing claims are more likely to be granted than those which require substantial amendment;
    (b) the applicability of time limits: if a new complaint or cause of action is proposed, I must consider whether it is out of time and if so, whether time should be extended;
    (c) the timing and manner of the application: including any explanation for delay.

    12.2 The Claimant was dismissed in June 2019. The claim form was lodged in October 2019. The Claimant ticked the box for unfair dismissal only and provided a very brief narrative of his claim. Nothing in that form indicated that he was pursuing a claim of discrimination.

    12.3 The parties were informed in November 2020 of this current listing. As set out above, the Claimant did not engage properly or at all with the claim until the last minute, despite prompting from the Respondent. He made no indication that he was seeking to bring a claim of discrimination prior to its inclusion in his statement.

    12.4 The Claimant's statement was served on 26 March 2021, less than one working day before the hearing. It was only in that statement, for the first time, that the new claim was alluded to.

12.5 The application was then made orally on the first morning of the hearing, and only in response to questioning from me. In this respect, I note that the Claimant is unrepresented and has not had the benefit of legal advice for some time.

12.6 In respect of the claim for direct discrimination, that seeks to amend the claim to alter the basis of an existing claim (discriminatory dismissal in addition to ordinary unfair dismissal) and accordingly falls within the first category identified in Selkent. That means that it is not affected by the issue of time limits. The original claim remains intact and all that is sought to be done is to change the grounds on which that claim is based. The new claim would not therefore be time barred.

12.7 In respect of the claim for indirect discrimination (and, if I am wrong about the correct categorisation of the direct discrimination claim, that claim also) that is a new and distinct head of claim which is affected by time limits. It is clear that the application is significantly out of time. No good reasons have been identified such as to justify an extension of time on 'just and equitable' grounds. I note, in particular, that the Claimant had access to CAB and a solicitor. He is unsure of the exact timing but it is likely this was before he lodged his claim form. No explanation has been given for why, in those circumstances, a claim for discrimination was not included with the original claim form;

12.8 In the event, it does not matter which category the applications fall into. Whether or not the claims are in time, I must still consider factors such as hardship and delay. In so doing, I conclude that the application must be dismissed (whether the claims are in time or not). The new claims do make a new positive case which would require fresh primary facts to be established by evidence. There is no explanation, or no good explanation, from the Claimant as to why the new grounds, which must have been known to him at the time, were not put forward in the original application. There is no good explanation for why they were not put forward until Friday afternoon.

12.9 There is, to a certain degree, an absence of hardship in refusing the application because the Claimant's complaint of ordinary unfair dismissal would proceed in any event.

12.10 There is a greater risk of hardship to the Respondent if the amendment is allowed, resulting in a necessary adjournment of the proceedings and a longer hearing with a concomitant increase in costs that, in all likelihood, will not be recoverable.

12.11 Taking all factors together and balancing the relative hardship and injustice, it is clear that the application to amend must fail.

List of issues

13. Having confirmed that the hearing would proceed on the basis of a claim for (ordinary) unfair dismissal only, I confirmed the list of issues with the parties as follows:

13.1 Was the Claimant dismissed for a potentially fair reason? The Respondent relies on the potentially fair reason of misconduct.

13.2 Was the dismissal fair. In answering this question, I must consider the following:

13.2.1 Did the Respondent have a genuine belief that the Claimant was guilty of misconduct
13.2.2 Was that believe based on reasonable grounds following a reasonable investigation
13.2.3 Was the process fair
13.2.4 Was dismissal within the range of reasonable responses open to the Respondent.

13.3 If the dismissal was procedurally unfair, would the Claimant have been fairly dismissed had a fair procedure been followed and, if so, what is the appropriate reduction to any award of compensation.

13.4 If the Claimant was unfairly dismissed, to what extent, if any, did he contribute to his dismissal.

13.5 Should there be any adjustments to any award of compensation in relation to failures to follow the ACAS code of practice.

The law

14. The law relating to unfair dismissal is contained in s. 98 ERA 1996. In order to show that a dismissal was fair, the Respondent must prove that the dismissal was for a potentially fair reason (s.98(1) and (2) ERA 1996). Misconduct is a potentially fair reason (s.98(2)(b) ERA 1996). If I am satisfied that the Claimant was dismissed for misconduct, I must then turn to consider the question of fairness, by reference to the matters set out in s.98(4) ERA 1996.

15. In considering the claim of alleged misconduct, I must ask myself a series of questions as set out in British Home Stores v Burchell [1980] ICR 303, EAT:

(a) was there a genuine belief that the Claimant was guilty of the misconduct as alleged;
(b) if so, was that a sustainable belief on the evidence available;
(c) was that belief based on a reasonable investigation.

16. Finally, I must consider whether summary dismissal was within the range of reasonable responses open to the Respondent.

17. In reaching my decision, I must not put myself in the position of the employer and consider how I would have responded to the allegations of misconduct. It is not open to me to substitute my own decision for that of the Respondent. That means that, even if I find that I would have reached a different decision, it will not necessarily mean that the dismissal was unfair. The dismissal will be unfair if I find that there was no genuine belief in the misconduct, or that the belief was not a reasonable one based on a reasonable investigation, or that summary dismissal fell outside of the range of reasonable responses open to the Respondent.

18. The dismissal may, additionally, be unfair if there has been a breach of procedure which I consider sufficient to render the decision to dismiss unreasonable. In considering this question, I must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. If there is a

defect sufficient to render dismissal unfair, I must then, pursuant to the case of Polkey v A E Dayton Services Ltd [1998] ICT 142 determine whether and, if so, to what degree of likelihood, the Claimant would still have been dismissed had a proper procedure been followed. This is a matter relevant to remedy.

19. I explained the legal tests in summary form to the Claimant prior to the lunch break on the second day of the hearing and suggested that he consider his position in respect of each test before closing submissions.

20. Having heard the evidence and closing submissions from both parties, I made the following findings of fact.

Findings of fact

21. The Claimant's role as a Technical Representative required him to visit the Respondent's customers to install, repair and service the Respondent's equipment. This included, but was not limited to, carrying out electrical work.

22. Given that he was working with electrical items, it was imperative that the Claimant's work was carried out safely. A failure to do so risked exposing users of the equipment to danger. It was also important that the work the Claimant carried out was properly recorded for accountability purposes.

23. The Claimant had worked for the Respondent for a significant period of time. He was clearly a loyal employee who enjoyed his job. He said he was proud to work for the Respondent and it is clear, from how upset he is about his dismissal, that he is sad to have lost his job. It is regrettable that such a long career with the Respondent has come to an end in this way.

24. The Claimant did not have an unblemished disciplinary record. In 2011, he was given a Second Level Warning by failing to complete Portable Applicant Tests ("PAT tests") on 32 occasions. Although this warning was not live at the time of his dismissal, it is an indication that the Claimant was aware (or ought to have been aware) of how seriously the Respondent took the requirement to carry out PAT tests.

25. In 2016, the Claimant was given a final written warning (referred to by the Respondent as a Final Level Warning) for inappropriate and offensive conduct and behaviour both towards a member of the public and on a customer's premises. Again, this warning was not live at the time of his dismissal but is an indication that the Claimant was aware (or ought to have been aware) of how important his conduct towards customers and the public was.

26. In 2019, the Claimant was given a further Final Level Warning for inappropriate and offensive behaviour whilst representing the Respondent, resulting in a further customer complaint being made. This warning was live at the time of the events leading to the Claimant's dismissal.

27. At the time of his dismissal, the Claimant was also on a Personal Improvement Plan ("PIP"). This included regular mentoring sessions with Mr. I Jones. By March 2019, the Claimant had been given 12 days of mentoring

by Mr. Jones.

28. On 1 May 2019, the Claimant attended a pub (the Marquis of Lorne) to repair a faulty machine. Whilst attempting to carry out the repair, the Claimant blew one of the electrical transformers resulting in a loss of power to other appliances in the pub. The customer had to call out an emergency electrician to carry out a repair. She subsequently raised a complaint with the Respondent.

29. Following the complaint, Mr. Martin undertook an investigation into the Claimant's actions. This involved taking control of the Claimant's PAT tester and looking through the records. The Claimant challenges this action but it appears to me that it was perfectly reasonable for Mr. Martin to carry out additional investigations in circumstances where, he explains, he had concerns about whether the Claimant was carrying out appropriate testing.

30. That further investigation raised additional concerns about the Claimant's conduct on different occasions including an occasion when he marked a job as closed when work remained outstanding, falsifying records on ServiceMax to suggest PAT tests had been carried out when they had not been and failing to carry out PAT tests when required to do so. These allegations form the main grounds for the Claimant's subsequent disciplinary. The Respondent placed more importance on them than the events at the Marquis of Lorne.

31. The Claimant maintains that the investigation was, in effect, a sham. He alleges that Mr. Martin was under pressure to reduce headcount and saw this as an opportunity to get rid of him. I do not accept that. Mr. Martin identified justifiable concerns which, absent a good explanation from the Claimant, would be cause for concern. It was reasonable for Mr. Martin to pursue those allegations as part of a disciplinary investigation.

32. The Claimant was invited to attend an investigation meeting on 21 May 2019. The allegations were put to him and he was given the opportunity to respond to them. At the conclusion of that meeting, Mr. Martin expressed an opinion that the Claimant had been at fault in respect of the incident at the Marquis of Lorne and in respect of testing more generally. He recommended that the matter proceed to a disciplinary hearing.

33. I accept that the investigation undertaken by Mr. Martin was a reasonable one. Although it may be best practice for an investigating officer to limit himself or herself to reaching a conclusion on whether there is a case to answer, rather than reaching conclusions on the allegations, I do not consider that Mr. Martin's actions in communicating his view to the Claimant undermined the fairness of the investigation in any way. There were no further enquiries that ought reasonably to have been carried out. The investigation was thorough.

34. Mr. Howlett was appointed to consider the disciplinary matter. The Claimant does not suggest that it was inappropriate for Mr. Howlett to carry out that role. The documents relied upon by the Respondent were sent to the Claimant and he was invited to attend a disciplinary hearing on 12 June 2019. The meeting was subsequently adjourned to 17 June 2019 at the Claimant's request.

35. The Claimant attended the disciplinary hearing accompanied by a colleague, Mr. S Winter. He was given the opportunity to respond to the allegations put to him.

36. In summary, C's position at the disciplinary hearing was as follows:

    (a) he was not at fault in carrying out electrical work at the Marquis of Lorne;
    (b) the complaint about his behaviour was a lie. The customer was crazy. He was not rude or offensive to her;
    (c) he sought the support of Mr. Martin on the day and was let down badly by him. He did not have the support of Mr. Martin more generally;
    (d) his failure to record PAT tests was due to the fact that his van charger was broken, something Mr. Martin was aware of and had failed to resolve. It may also have been because he wasn't sure he knew how properly to record the results of PAT tests;
    (e) for those instances where there was no result recorded in either the PAT tester or on ServiceMax, he either wrongly believed he didn't need to carry out a test or alternatively could offer no explanation, stating "*I don't know why I did that, I have let myself down"*.

37. The Claimant relies on substantially the same reasons to argue, at this hearing, that the dismissal was unfair.

38. The Claimant's evidence in respect of all relevant events was at times both confused and contradictory. The Claimant has a genuine sense of grievance about the way in which he has been treated. On occasion, however, as he has himself admitted, he has been overly defensive, quick to respond and hasn't take the time to consider what he is saying. He has on many occasions sought to deflect attention by accusing others of lying, and has then retracted those accusations. His genuine sense of grievance and feelings of betrayal may explain some of the inconsistencies in his account (both during the disciplinary process and at the Tribunal hearing) but they have made it difficult for both the decision-makers and me to obtain a clear understanding of his evidence on key matters. The inconsistencies also cast doubt on his credibility more generally.

39. The Claimant maintains, contrary to my findings above, that he has been consistent throughout and that the notes of the investigation meetings and disciplinary meetings have been fabricated or at the very least that his words have been twisted. I do not accept that and find it more likely that the Claimant has said things in haste and later sought to change his position. I note that for all hearings the Respondent used an independent note taker.

40. At the conclusion of the disciplinary hearing, Mr. Howlett informed the Claimant that the allegations of misconduct would be upheld and that he was to be dismissed summarily for gross misconduct. His dismissal was confirmed by letter dated 25 June 2019. Mr. Howlett concluded that the Claimant had committed the following three acts of misconduct:

    (a) The Claimant falsely recorded the results of an electrical safety test in ServiceMax when he could not have carried out the test because he did not have the PAT tester in his possession.

(b) The Claimant had failed on multiple occasions to carry out PAT tests when required and/or manually recorded PAT results that had not been carried out.
(c) On 1 May 2019, the Claimant demonstrated inappropriate conduct on a customer's premises (the Marquis of Lorne) resulting in the customer complaining.

41. Taking those allegations in turn:

(a) Falsely recording the safety test

42. It was not in dispute at the disciplinary hearing (or at the Tribunal) that the Claimant had falsely recorded that he had carried out a PAT test when in fact he could not have done so; the PAT tester not having been in his possession at the time. At the disciplinary hearing, the Claimant said he had no explanation for it and "I hold my hand up to it". There can be no doubt that such actions constitute serious misconduct and that Mr. Howlett acted reasonably in concluding the same.

43. In his witness statement for this hearing, the Claimant sought to retract (at least partially) that admission. There is no wrongful dismissal case here and what is relevant is only what was or ought to have been in Mr. Howlett's mind at the time of dismissal. For the sake of completeness, however, I do not accept that the Claimant's explanation to the Tribunal mitigates his actions in any way. He now maintains that he was told to clear the job by Mr. Martin and that, believing that that was bad advice, cleared the job and then proceeded to mark it as complete "*as a mark of protest*". I have difficulty understanding that evidence. I do not understand how, even if Mr. Martin did tell the Claimant to clear the job, it would be an act of protest for the Claimant to go a step further and mark the job as complete (i.e. as if a PAT test had in fact been carried out). The Claimant accepted in evidence that it was possible to clear a job without also indicating that a test had been carried out. The additional step he maintains he took was a fabrication and is, in my view, clearly serious misconduct.

(b) Failure to carry out PAT tests and/or manually record PAT tests that had not been carried out

44. In the investigation meeting with Mr. Martin, the Claimant maintained that he had carried out the necessary PAT tests but that he did not record them all. He maintained that this was just him being lazy. At the disciplinary hearing, he sought to retract that statement. Before me, he argued that his comment at the investigation meeting had been taken out of context and that he was simply expressing exasperation at the situation. He suggested, in effect, that the comment was made in a sarcastic manner ("*you're right, I'm lazy"*). I do not accept that and do not accept that Mr. Howlett ought to have considered the comment in that way. The notes of the investigation meeting record a longer exchange in which the Claimant said "*it is not a choice, it is being a bit lazy…Whatever, it seems too long winded, extra work to find something that you have done"*. That is not, on any reasonable view, capable of being read as the Claimant simply expressing exasperation or being sarcastic.

45. At the disciplinary hearing, the Claimant offered an explanation for the

discrepancy between jobs recorded on ServiceMax and jobs recorded on his PAT tester; namely that the charger in the back of his van had not been working so that there were times when he had enough charge on the PAT tester to carry out the test but not to record the results. This is not an explanation he gave at the investigation meeting. The failure to raise it at that meeting is surprising at the least, given that the Claimant maintains that Mr. Martin (who conducted the investigation meeting) was aware of the issue with his charger.

46. Mr. Howlett considered, in any event, that that did not excuse the Claimant's actions. He could have charged the tester at home or at the customer's site. I accept that the Claimant's explanation does not excuse his actions in this respect. The Respondent does bear some responsibility for this issue. It was aware of the issue and ought to have fixed the Claimant's van charger. Ultimately, however, the Claimant bears responsibility for the actions he takes. If he did not have the correct equipment to carry out his role safely, he ought to have escalated the matter. He accepted this at the hearing.

47. In response to the allegation that there were multiple incidents when components had been changed and no testing recorded, the Claimant maintained at the disciplinary hearing that he did not realise he had to carry out testing on those occasions. He alleged that he had not been adequately trained. The training records provided to me were very dated (from 2001 and 2002) although there was no evidence that the requirements of a PAT test had changed since that period. The Claimant relied on the fact that the PAT tester itself had changed, but this does not explain a failure to recognise when a test needs to be carried out.

48. In my view, the Respondent ought to hold more regularly training in this respect to ensure that engineers are reminded how to carry out tests safely and what to test. In this particular case, however, I note that the Claimant had had recent mentoring from Mr. Jones and ample opportunity to raise any concerns about matters he was unsure about. It is likely, in my view, that he did not take advantage of the support offered to him. In the disciplinary meeting, the Claimant said that he did not see the PIP as supportive, that he saw it as a total hindrance and a tool to bash him over the head with. In the appeal meeting the Claimant stated that he did not need a mentor.

(c) The Marquis of Lorne

49. The Respondent maintains that the Claimant was at fault on 1 May 2019, that he did not carry out proper testing or checks before carrying out electrical work and that he displayed inappropriate behaviour towards the customer.

50. Although much of the Claimant's evidence and questioning at Tribunal focused on the actions he took at the Marquis of Lorne, the issue is of secondary importance to the matters discussed above. The Respondent considered those other instances of misconduct to be more serious.

51. It is clear, in my view, that Mr. Howlett genuinely believed the Claimant to have carried out unsafe procedures at the Marquis of Lorne. The Claimant was informed there was a fault with the appliance. He plugged the transformer into the socket on one occasion resulting in a loud bang. Mr.

Howlett reasonably considered that the Claimant ought to have carried out further tests on the transformer before plugging it in, given that he did not know where the fault was. The Respondent further considered, reasonably in my view, that the Claimant committed further misconduct by proceeding to turn on a breaker which was in the off position, without properly checking what it was connected to. This blew the electrics, resulting in a second bang.

52. In fact, despite denying the same to both Mr. Martin and Mr. Howlett, the Claimant now accepts that the second bang was caused by him plugging the (faulty) transformer into another socket. In my view, it would have been reasonable for the Respondent to conclude that both actions were inappropriate but for the purposes of this claim, only that which was before Mr. Howlett at the time is relevant.

53. The Claimant appears to have accepted at the disciplinary hearing that he ought not to have carried out the work at the Marquis of Lorne in the way he did. He maintains, however, that Mr. Howlett ought to have taken into account the fact that he was acting under pressure from Mr. Martin. That explanation does not, in my view, render Mr. Howlett's belief in the Claimant's misconduct unreasonable. Safety was paramount in the Claimant's job and pressure to get the job done does not make it reasonable to carry out work dangerously. There is, in any event, little evidence to suggest that Mr. Martin was placing the Claimant under significant pressure as alleged.

54. The more fundamental issue in respect of the Marquis of Lorne events, so far as the Respondent was concerned, was that the Claimant was said to have been rude, abrupt and unsympathetic to the customer.

55. The Claimant maintains, and I accept, that his encounter with the pub landlord was difficult from the outset in that she was short with both him and the pub manager (who it transpires was her son).

56. Again, the Claimant's evidence on this issue and the extent to which he relied on matters at the Tribunal which had not been raised at the disciplinary process was not particularly clear but I accept that he told Mr. Howlett that at some point during the visit, he telephoned Mr. Martin and told him what was going on. In so doing, he was following advice that had been given to him by a senior manager following a previous disciplinary on how to deal with difficult customers.

57. The Claimant now maintains that, during the phone call, Mr. Martin said words to the effect of "*get back in there and finish the job*". In the disciplinary hearing, he says that he called Mr. Martin and told him what had happened and was told to get on with it.

58. Mr. Martin recalls a conversation with the Claimant but does not recall the details of what was said. He does not accept that he told the Claimant to go back in and finish the job. I find, on balance, that Mr. Martin may have told the Claimant to finish the job. I further find that, in the circumstances, it was not unreasonable for Mr. Howlett to conclude that the Claimant had committed misconduct notwithstanding that instruction from Mr. Martin. Unfortunately, as anyone in a customer-facing role will understand, sometimes encounters with customers will be unpleasant, particularly where

the customers are dealing with faulty equipment belonging to the Respondent. The Claimant had been warned in 2016 about the need to behave appropriately towards customers and had been given customer service training. In 2019, he had been warned further about the need to conduct himself appropriately towards customers. On both occasions, concerns were raised that the Claimant had failed to appreciate how his actions would be perceived by customers. Part of the Claimant's role involved carrying out his role and remaining professional towards customers, even in difficult circumstances.

59. The Claimant's evidence in respect of the customer's behaviour has become increasingly exaggerated over time. In the investigation meeting, he said that she was "*livid"* and "*fuming"* and "*going mental"*. At the disciplinary hearing, he suggested she was "*crazy"*. In his witness statement, for the first time, he alleged that she was intoxicated. At the Tribunal hearing, he said he thought she was on drugs or was drunk. This exaggeration, in my view, undermines the Claimant's credibility. I accept that the situation the Claimant faced at the Marquis of Lorne was difficult. I do not accept that it was as difficult as he now claims or, importantly, that it was unreasonable for Mr. Howlett to have found that it was the Claimant who acted inappropriately.

60. Although the Claimant now places great weight on his difficult relationship with Mr. Martin as mitigation for his actions, at the disciplinary hearing he stated that their relationship had no bearing on his behaviour in question. In any event, although Mr. Martin and the Claimant did not enjoy a particularly good relationship, there were no formal complaints raised by the Claimant about his management and the documents in the bundle in respect of the PIP suggest that Mr. Martin was supportive of the Claimant and had devoted considerable effort to reviewing and trying to improve the Claimant's performance.

61. Considering those allegations together, I accept that Mr. Howlett had a genuine belief in the Claimant's misconduct. I have found no evidence to support the assertion that Mr. Martin or Mr. Howlett were using the complaint from the Marquis of Lorne as an excuse to reduce headcount. Mrs. Bottle looked into this matter carefully. I accept the evidence given by her in this respect. It is detailed and follows a thorough investigation.

62. Mr. Howlett's belief in the Claimant's misconduct was based on the investigation carried out by Mr. Martin (which I have found to be reasonable) together with his consideration of the evidence presented by the Claimant. He gave clear explanations in his evidence for why he concluded that the Claimant had committed the misconduct as alleged and those explanations are, in my view, reasonable ones.

63. Mr. Howlett acknowledged the mitigation put forward by the Claimant. He did not dismiss the Claimant's explanations out of hand. He concluded that the excuses offered may have been sufficient if he was considering one or two instances of wrongdoing but concluded, reasonably in my view, that they could not excuse the repeated failure to carry out his work safely.

64. Mr. Howlett noted that the Claimant had failed to accept wrongdoing. He referred to the Claimant's length of service and active final written warning

and concluded that summary dismissal was the appropriate sanction.

65. I accept that summary dismissal fell within the range of reasonable responses open to the Respondent. Had the only allegation been the complaint in respect of the Marquis of Lorne, I might have reached a different view but the Claimant was not dismissed for that incident only. The allegations were of a serious nature, concerning the safety of the Claimant himself, the Respondent's customers and the public more widely. The misconduct was repeated and nothing the Claimant said during the disciplinary or appeal hearings could reasonably satisfy the Respondent that it would not be repeated.

66. At the time of his dismissal, the Claimant was subject to a live final written warning. Although Mr. Howlett says he did not take that warning into account, it is clear that even if the misconduct had not amounted to gross misconduct (in the circumstances I find that the Respondent reasonably believed it did) dismissal would have remained reasonable.

67. The Claimant was informed of his right to appeal within seven days. He did send an appeal form in to the Respondent but it was blank. He was prompted on a number of occasions to send in his grounds of appeal. On 16 September 2019, the Claimant contacted the Respondent and confirmed that he did wish to pursue an appeal against his dismissal. The Respondent agreed to extend the deadline and the Claimant submitted an email detailing his appeal on 4 October 2019. He alleged, in summary that there was a lack of support from Mr. Martin and an agenda to remove 20 engineers and that the complaint from the Marquis of Lorne was false.

68. Many employers would, reasonably, have refused to accept such a late appeal. The Respondent agreed to accept it.

69. The appeal was heard by Mrs. C Bottle on 17 October 2019. The Claimant attended unrepresented. Again, the Claimant was given the opportunity to set out his concerns in detail. He confirmed in evidence that Mrs. Bottle listened to him during that hearing.

70. At the appeal hearing, the Claimant sought to retract the admission made at the disciplinary hearing that he had failed to carry out PAT testing where required. I do not accept, as alleged by the Claimant, that the notes of the disciplinary hearing were wrong in this regard. There is nothing to suggest that the notes, which were taken by an independent note taker, have been fabricated and nothing to suggest that the Claimant was mistakenly misquoted when in fact he was being sarcastic in this respect. It is not possible to read the notes in that way. I find that the Claimant was seeking to resile from an admission of wrongdoing he had made at the disciplinary hearing. Mr. Howlett (and Mrs. Bottle) acted reasonably in relying on that admission.

71. Mrs. Bottle followed up on the points raised by the Claimant during the appeal hearing. This included speaking to the Claimant's colleagues about their relationship with Mr. Martin. She was satisfied that nothing the Claimant had put forward in his appeal undermined the fairness or reasonableness of the decision to dismiss.

72. By letter dated 13 November 2019, the appeal was dismissed.

Conclusions

73. Applying the facts as I have found them above to the law, I make the following findings:

    (a) The Claimant was dismissed for a potentially fair reason, namely misconduct
    (b) The Respondent had a genuine belief in the Claimant's misconduct
    (c) That belief was based on reasonable grounds following a reasonable investigation
    (d) The Respondent followed a fair process in reaching its decision
    (e) Summary dismissal was within the range of reasonable responses open to the Respondent.

74. For all those reasons, the Claimant's claim of unfair dismissal is not well-founded and is dismissed.

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Employment Judge Smeaton

Date: 1 April 2021

Judgment sent to the parties on

....10 May 2021.....

.....GDJ.....
For the Tribunal office