EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100887/2020 Hearing at Edinburgh on 19 and 20 October 2020

Employment Judge: M A Macleod
Tribunal Member: T McAlindin
Tribunal Member: C Russell

Mr Ioan-Mihal Stoinescu	Claimant In Person
Amazon UK Services Limited	Respondent Represented by Mr O Holloway Barrister

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's claims are all dismissed.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 11 February 2020 in which he complained that the respondent had unfairly dismissed him and discriminated against him on the grounds of his race.

2. The respondent submitted an ET3 response in which they resisted all claims made by the claimant.

3. A Hearing was listed to take place, in person, in the Edinburgh Employment Tribunal, commencing on 19 October 2020. Although the restrictions in place as a result of the coronavirus pandemic meant that

there were alterations to the layout of the Tribunal room, and limitations as to the movements of individuals within and outwith the room, all parties and witnesses complied with the requirement to be sufficiently distant from each other so as to reduce the risk of transmission of the virus in the event that any person in the Tribunal were suffering from it. None of those involved, including the Tribunal, displayed or complained of any symptoms of coronavirus during the course of the hearing.

4. Parties presented a joint bundle of documents, together with a supplementary bundle of documents, to the Tribunal. Witness statements were also presented as the evidence in chief of the witnesses called, and the Tribunal read through each of the witness statements prior to the commencement of questioning of the witnesses under consideration.

5. The respondent led evidence first, and called as witnesses the following:

- Tom Rutherford, Operations Manager;
- Derek William Rougvie, Team Lead; and
- Andrew Scot Livingstone, Senior Operations Manager.

6. The claimant gave evidence on his own account, and also called as witnesses the following:

- Dumitrache Bogdan Andrei (known as Mr Dumitrache);
- Ilie Marius Daniel (known as Mr Ilie); and
- Teleanu Daniel Cristian (known as Mr Teleanu).

7. The services of an interpreter were in place throughout the hearing, in order to translate from English into Romanian, and Romanian into English. The claimant confirmed that he did not require the interpreter to assist him as his spoken and listening language skills were of a standard that he was able to conduct the hearing without assistance. The interpreter remained in the Tribunal throughout, and so was available to the claimant if he wished to clarify his understanding at any stage. As it

turned out, the claimant was content to proceed without any assistance, and to the observation of the Tribunal he did not appear to struggle with his comprehension at any point in the hearing.

8. The interpreter assisted the Tribunal by translating questions and answers for the remaining witnesses called for the claimant.

9. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

10. The claimant, whose date of birth is 26 April 1988, commenced employment with the respondent as a FC Associate on 20 November 2016, within the respondent's Dunfermline fulfilment centre.

11. The claimant was sent a letter dated 19 November 2016 by the respondent offering him the position (58). Attached to that letter was a Statement of Terms and Conditions of Employment (61). The statement confirmed his position as that of FC Associate 1 (paragraph 2.1). It went on to say, in paragraph 2.3, that *"You should recognise that during the course of your employment, as the business of the Company changes, it may be necessary to change your duties. The Company therefore reserves the right to change your responsibilities and duties and job title from time to time, including but not limited to requiring you to work for another company within the Amazon.com, Inc, group of companies, it being understood that you will not be assigned responsibilities which you cannot reasonably perform."*

12. Paragraph 11 of the Statement of Terms and Conditions of Service referred the claimant to the respondent's Disciplinary policy, setting out the standards of conduct expected by the respondent of its employees. It was specifically provided that the Disciplinary policy did not form part of the claimant's terms and conditions of employment.

13. The Disciplinary Policy was produced at 71ff.

2016 Incident

14. On 27 December 2016, the claimant attended a disciplinary hearing conducted by Graeme Milne, Area Manager. Following the hearing, Mr Milne issued a letter dated 2 January 2017 (79) in which he set out the decision he had reached following that hearing.

15. The allegation against the claimant was:

"It is alleged that on Friday December 09, 2016, you got into an argument with another associate, during this argument you used inappropriate language towards him and also threatening behaviour."

16. This was alleged to constitute a serious breach of the Disciplinary Policy, and in particular the subsection relating to gross misconduct:

- *"violence, intimidation or abusive behaviour or language directed towards any other person, even in a social context where it comes to the attention of Amazon and may bring Amazon into disrepute or Amazon believes that such behaviour could impact other personnel;"*

17. Mr Milne concluded that the claimant had intended to intimidate his colleague by walking up to his pup truck and asking him to step outside, and by physically grabbing his colleague's arm as he went to push the claimant away from the pup truck. He believed that the claimant had acted out of frustration, but should have taken the matter to management, and that he was remorseful for his actions. As a result, the claimant was administered a final written warning, to remain on his personnel file for a period of 24 months, though it would be disregarded after 12 months if his conduct remained satisfactory. The claimant was advised that any further instances of unacceptable conduct would be likely to result in his dismissal.

2017 Incident

18. On 28 November 2017, the claimant attended a disciplinary hearing conducted by Alex Lamb, Area Manager. By letter dated 6 December 2017, Mr Lamb wrote to the claimant to advise him of the outcome of that hearing (82).

19. The allegation being considered was:

"It is alleged that on 22 November 2017 whilst walking through security at the end of shift, you proceeded to say 'I will push you through a glass window' to Karen Russell. Furthermore whilst security approached you on the alleged incident, it was advised that you became aggressive and obstructive when they asked to see your badge."

20. Reference was made to the same sub-section of the Disciplinary Policy as the previous incident.

21. Mr Lamb found that the accounts given by the claimant and Ms Russell were very different, and therefore he was unable to substantiate fully the allegation. He did find it unacceptable that the claimant had not shown the security guard his badge, as this was a reasonable request, and he regarded his reaction as unprofessional.

22. Mr Lamb took into account the fact that the claimant had an outstanding final written warning from 2 January 2017, and decided to re-issue the final written warning, to remain on the claimant's record for 12 months effective from the date of the warning (6 December 2017).

2018 Incident with Callum Harley

23. In November 2018, an investigation was carried out into actions by an associate, Callum Harley, following an allegation that he had been guilty of "violence, intimidation or abusive behaviour directed towards another person". In particular, the allegation was that he had directed intimidating and abusive behaviour towards the claimant, specifically calling the claimant a "fucking little bitch" and squaring up to him, including pushing his head against the claimant's in an aggressive manner. Scott Greig,

Area Manager, conducted the investigation, and produced a report (84) dated 28 November 2018.

24. Following the investigation, Neringa Mazliakaite, Area Manager, issued a decision after disciplinary hearing by letter dated 13 December 2018 (94) in which the reasons for the outcome were explained. It was noted that the claimant and Mr Harley had not had a good relationship, when the claimant had made some comments about his private life. Mr Harley was noted to be a very private person, and had taken exception to these comments. His actions were found to have been proved, and it was noted that while there was a level of provocation involved, it was unacceptable that he had acted in this way towards the claimant.

25. The sanction applied to Mr Harley was that he was issued with a final written warning. The allegation was that Mr Harley had gone face to face with the claimant and had pushed him with his finger, but the Area Manager considered that there were extenuating personal circumstances which meant that the appropriate sanction fell short of dismissal in that case.

2019 Incident

26. On 8 November 2019, Callum Sarjantson, another FC Associate, reported an incident which he alleged had taken place on that date at 0335 hours, both the claimant and Mr Sarjantson being on the night shift from 1930 hours until 0600 hours that night.

27. An incident statement was completed by Mr Sarjantson and signed by him at 0535 hours (102).

28. Mr Sarjantson stated that he was at the transship buffer, building uboats – essentially, trolleys into which tote boxes are transferred from pallets when they arrive in the section – when, he said, *"I noticed a tall, bulky man taking a box of favourable work from another pallet and he walked away. I asked him to take from the cone and he ignored me, walked away and said 'I don't give a fuck, I just need one box'. I advised him to*

put the box back and take from the cone as I would anyone else. At that stage he raised his voice saying he 'couldn't give a fuck' and 'do I need authorisation from you?'

29. Mr Sarjantson was not in a position of management over the claimant, and indeed they were of the same grade.

30. The statement continued:

"I continued to explain that boxes need to be taken in order from the cone at which he replied 'You're not my fucking boss, I'll do what I fucking want'. Inga overheard and stepped in saying 'He's the buffer builder, he's building uboats for people, he's here to help you. You can't just take any box'. He replied to her 'I don't need to shit off him, I've been here longer'…'I'll go wherever I want and take whatever I want. I don't give a shit'.

He started to be sarcastic and patronizing being immature about the situation. I continued to build uboats and he was talking at me in a mix of English and another language that I didn't understand. I said to him I have a job to do and there are rules to follow and so do you so could you just do what I've asked, that would be great.

As I put an empty pallet back he made another comment 'shut up you cunt, you're a cunt, I'll fucking squash you and put you in a bin' I said 'Is there any fucking need for that?' He dropped his box when my back was turned and when I turned round he was puffed up, chest out, in an aggressive posture he said 'Do you want to fucking go?' followed by 'Huh, dae something' and I replied 'I don't need to do anything, you're twice my size. If you have a problem go and speak to the Team Lead.' He then said 'I don't need to go to a Team Lead, I'll wait outside, I'll get you outside'. He then walked away continuing with verbal abuse and I continued to work, I was upset and startled by the situation. I notice him hanging around a few isles (sic) down, talking to friends. I decided to go and find Kenny (Team Lead) but he wasn't on my floor. I couldn't find

Kenny. I wanted to take five minutes to relax and compose myself but I didn't…

I reported the incident to Kenny when I got back from break."

31. At 0510 hours that morning, Tobias Newton, Pathway Operations Manager, met with the claimant. Adrian Draghici was present in order to take notes (104).

32. Mr Newton opened the meeting by introducing those present and explaining the reason for the meeting, which was that there had been an incident in the Stow department, in which it had been indicated that the claimant had been intimidating another associate and threatening to meet them in the car park. The claimant responded by saying *"He called me a bastard, and was swearing at me. I told him to come now and be a man. He is a green badge and has only been there a few weeks."*

33. A green badge is worn by agency staff employed within the fulfilment centre. The claimant had been a "green badge", as such staff are known, for some months prior to his employment under a contract of employment.

34. Mr Newton went on to say that he would investigate the incident fairly and that it would be likely that he would have another meeting with the claimant. He told the claimant that there had been "multiple complaints" against him that night. The claimant replied that *"I spoke to stow before. I told them to never send me there again. I said I didn't want to go because they are rude to us, shout at us. They give us orders. If we get sent, we can't say no."*

35. The claimant went on: *"So I will be suspended. What's happening right now is not fair. That guy has been working here for 2 weeks and was rude to me, he is a new guy, I didn't want to complain about him. I have witnesses too. I was going to get a box. He said 'what the f*ck do you think you are doing'. I said I'm taking the box. He was rude. He said 'just because you think you are big, you think you can do anything?'*

36. He complained that if he were to be suspended at that point, that would be discrimination. Mr Newton advised him that an investigation would take place in relation to him because it was alleged that he had threatened violence towards another individual. The claimant maintained that it was discrimination. He said: *"When you are from different country, they will disconsider you. I have already felt that for so many times here. So many times I am just ignored. I have been here for 4 years and nothing's changed…If 2 people are involved in a conflict, I think action should be taken for both. It seems that nobody saw him, but everyone saw what I said. I have witnesses."*

37. Mr Newton asked the claimant to identify his witnesses, and he named *"Maria from stow, Claudia, Amalia".*

38. The meeting concluded, and the claimant left the building, having been suspended on full pay pending the investigation into the allegations made.

39. Mr Stephen Hunter was then appointed investigation manager, and conducted interviews with a number of staff.

40. On 8 November, Mr Hunter met with Hafiz Saleem. Notes of that meeting were taken (107). Mr Saleem said that just after 0400 he went with a uboat to the buffer. When he got there, he said, *"I asked Callum Sarjantson (Adecco), who was distributing the lp's, I asked him to give me some lp's and he told me to go and get them. I was getting my boxes done and then I heard aggressive arguments between Callum Sarjantson and another gentleman (Not sure of name however is an Amazon associate who normally works on P1A picking). The Amazon associate said to Callum 'I don't need permission from you to get LP boxes' and 'I just stowed 50 items in the last hour'. Then the Amazon associate started arguing and swearing at Callum and then Callum responded, trying to explain that it was his job to distribute the LP work to associates as he was on the buffer. The Amazon associate was swearing, using words like 'F**k' and 'F***ing' at Callum and Callum at this point responded in kind.*

There was no physical violence, just a lot of arguing and swearing, which was started by the Amazon associate. I didn't get involved, but instead got my boxes and moved away from the area. Although they were arguing and swearing, they were not face to face and were not fighting, so I did not think it would escalate any further."

41. Ross Pilling, an Inbound Runner, gave a handwritten statement which was dated 7 November 2019, and which also referred to the incident having taken place on 7 November 2019 (108). In that statement, Mr Pilling said:

"The uboat builder was building uboats from pallets in the buffer and one associate took a box from the pallet so the uboat builder asked if he could put it back as he was supposed to be the only one taking from the pallet and the associate replied I'll take any box from any where and no one can stop me or do anything about it."

42. Mr Newton wrote to the claimant on 12 November 2019 (109) to invite him to attend a disciplinary investigation meeting on 13 November 2019.

43. The investigation meeting took place on that date. The claimant attended, and the meeting was chaired by Mr Newton, who was accompanied by Siobhan Kilpatrick, HR Partner, who took notes (111).

44. Mr Newton invited the claimant to tell him in his own words what had happened. The claimant replied:

"I told you on Thursday I have nothing to hide. I was in stow and I was moving the buffer, there was a boy there. He must have been a new start as I have not seen him before. I grabbed my box and he said 'what the fuck do you think you are doing?' he then said 'did you ask for approval'. I then replied 'fuck off' so I just moved over. So after I had spoken with Maria he said something and then I said 'listen shut up I am not talking to you' he then said 'do you think because you are big I couldn't smash you' I just then said to him 'be a man then'. Nothing else was said."

45. He explained that "Maria" was *"PG for stow".* He went on to agree that Mr Sarjanston had initiated the conversation with him, and said *"Yes, I am not from his department and I am not taking orders from someone the same level as me."*

46. When asked if he knew the rules for dealing with this process, he said he did not really know, and that the rules were different for those working in Stow. He complained that *"they disrespect us"*, and that Matt Heath, the manager, had been rude to him some time before. He confirmed that he did not know Mr Sarjantson, who was a "green badge". He explained that he had no interest in anyone losing their job, but just wanted to come to work and go home.

47. Mr Newton suggested to the claimant that the reason why the buffer system worked as it did was to avoid cherry-picking, and then asked why the claimant felt he should not have to take instruction from a green badge. The claimant replied *"I don't know, I have had comments in the past where they have said if you are not happy go back to your own country. The incident happened with people who are rude to me."*

48. Mr Newton raised with the claimant the previous incidents in which he had been involved, and asked him if he had a problem with anger. The claimant denied that he did, and pointed out that he had no live warnings. He said he felt discriminated against, and that *"I always get 'go back to your own country' 'you are here to steal our jobs'. We get treated like shit."*

49. After Mr Newton read the witnesses' statements to the claimant, he asked if there were microphones in the area so that Mr Newton could hear the whole conversation. He said *"When someone has provoked me and I say be a man, I don't see what the problem is?"*

50. On 18 November 2019, Melanie Sinclair came forward and volunteered to provide a statement. She met with Alasdair Brown, investigating manager, on that date, and notes of the meeting were taken (115).

51. She said that she knew the claimant but that she was not aware that something had happened with him. She continued: *"…last week I was working the buffers. I believe Callum had returned to work and him and his friend William were working the buffer on P$, not sure of Williams surname, I missed the start of a conversation but Callum and William not sure of the surname were saying things along the lines of those fucking Romanians we'll sort them out, which point William had said wait until you put your statement in you'll definitely get them sacked, almost like a plan to get Mihal sacked. I wasn't aware of what had happened, the tone of voice they were cheerful of what was happening, once that bit of conversation had stopped I asked a follow up, I asked what happened, Mihal grabbed a box and Callum ran after him and said what are you fucking doing, which I can believe I don't know what was said, I think Mihal said fuck you I'll do what I like which I can imagine him saying. Callum and Mihal were in each others faces, type thing. I'm not scared of him kind of thing the attitude was really bad, I didn't want to dig deeper. I've since worked with Callum on the buffer on Friday and Saturday and my personal opinion his attitude is terrible, especially against blacks or Romanians or basically anyone that's not Scottish."*

52. She explained that she had come forward because the attitude of Mr Sarjantson and William, and the fact that they were gleeful and wanting to get a blue badge sacked, her conscience would not allow her to say anything.

53. Mr Newton concluded that it was appropriate to refer this matter to a disciplinary hearing to determine the allegation of gross misconduct. He prepared an investigation report (118). He noted that there were witnesses to the altercation, but three Associates had refused to give a written statement, but provided verbal accounts.

54. He observed that the claimant's account was different to that of the witnesses, and despite the allegations against Mr Sarjantson and William, he was of the view that the way the claimant reacted in this situation was unacceptable. He also pointed out that the claimant had a history of using

harassing language, and threatening/violent behaviour at Amazon, and that a pattern existed which could be harmful to employees in the future.

55. On 22 November 2019, Tom Rutherford, Operations Manager, wrote to the claimant (120) to invite him to attend a disciplinary hearing on 27 November 2019, in order to answer the allegation that he behaved in a violent and threatening manner towards another Associate on 8 November 2019. Mr Rutherford stated that the allegations against the claimant, if proved, were potentially matters of gross misconduct, and concluded the letter by warning the claimant that if he upheld the allegation against him, that gross misconduct had taken place, he may be dismissed without notice or with payment in lieu of notice.

56. The claimant was advised that he should not attend the office nor make contact with clients or employees of Amazon other than to make arrangements to be accompanied at the disciplinary hearing.

57. The disciplinary hearing proceeded on 27 November 2019. The claimant attended and was accompanied by Angela Bird, shop steward of the GMB Trade Union, in the capacity as companion. Tom Rutherford chaired the hearing, and was accompanied by Carole Hollington, HR Business Partner, and Alasdair Brown, HR Partner and note-taker. Notes of the meeting were produced (122ff).

58. Mr Rutherford asked the claimant to confirm that he understood the allegation against him, which he did, and then invited him to explain what had happened on 8 November.

59. The claimant said that the issue started 2 nights before when he and his wife were sent to Stow, and Matt Heath, the manager, was rude to them. He explained that he did not like being sent to Stow, but he could not disobey orders from a manager.

60. Moving to 8 November 2019, the claimant set out what happened:

"IS: I was working there I headed to the buffer I grabbed a box, I saw a random guy who was wearing a green badge (temporary associate later

identified as Callum Sarjantson), who shouted at me saying something like what the fuck do you think you are doing, and I said huh who are you to tell me that, do I need your approval? He said yes, that was maybe my bad as I said fuck off and he ran after me. I was trying to ignore him I told him to shut up and mind his own business. He said you're big but that he could smash me anytime or something like that, he was trying to act big in front of his friends, I said just do it, I had no interest to be violent but I said be a man and just do it.

TR: Ok, and do you not think that is an inflammatory response?

IS: He said I am going to smash you, he was trying to provoke me, he created all this chaos.

TR: Would you say you reacted in an inflammatory manner?

IS: Yes, but he said to me go back to your country.

TR: Were you aggressive in your response?

IS: I wouldn't say over aggressive.

TR: How would you define aggressive behaviour as in general, what does aggression look like to you?

IS: Like challenge and come forward and provoke.

TR: With that in mind would you say your mannerisms were aggressive?

IS: No, I swore to him. I never said I would wait in the car park and smash you. There were so many people who didn't want to come forward.

TR: Your response is contradicting being aggressive.

IS: I was feeling frustrated about all of this.

TR: You defined aggressive behaviour as provoking, you told Callum to go ahead, to me that's provoking aggressive behaviour.

IS: That's how I feel in the moment, I am sorry about that, I should of (sic) stepped back, I got pissed off and he said to me if you're not happy go back to your country, which I've heard over my 4 years here, I've heard that a lot…

IS: I had different managers, I reported it to Colin Lesiuk 2 days before, manager in Pick, that's why I said I don't want to go to Stow and he accepted it and took me off stow…

TR: Ok, so you reported that someone had said to you go back to your own country?

IS: No, about Stow managers behaviour, how they treat us, I was feeling bad about it…

IS: They shout and interrupt and try to threaten us with disciplinary action. Why are they doing that, why are they threatening us with disciplinary?"

61. Mr Rutherford moved on, after further questions about management, to ask:

"TR: Ok, do you think you had an aggressive approach?

IS: Ok probably yes.

TR: Ok, I am just reading through your statement again, so you have said it's been mentioned about aggression and you haven't hit anyone?

IS: I never fight anyone.

TR: Do you understand there is a difference between verbal and physical aggression? You've said that you did come across as verbally aggressive, both are unacceptable at work.

IS: I can say I am guilty as I responded back, but that's it.

TR: Can you go back to its not the first time?

IS: People from Stow told me to complain about Callum. I seen he had an agency lanyard, I didn't want him to lose his job, I didn't complain because of that as verbal disputes arise in all companies."

62. The claimant denied that he was trying to improve his performance by "cherry-picking", or taking more favourable work.

63. Mr Rutherford then asked the claimant if he had seen the statement of Mr Sarjantson, to which he replied that he could see that Mr Sarjantson was lying. Mr Rutherford then read out excerpts from the statement in order to obtain his response:

"TR: [Reads out Callum's statement] 'I asked him to take from the cone and he ignored me, walked away and said I don't give a fuck, I just need one box. I advised him to put the box back and take from the cone as I would anyone else.'

IS: There was no cone, pallet buffer there are no cones only on uboats, that's why I asked to check p4 camera, I never got a reply back from that.

TR: He's saying you said 'I don't give a fuck'.

IS: I told him to fuck off, I would have been more understanding if he had a better attitude.

TR: He said you said 'you're not my fucking boss, I'll do what I fucking want'

IS: Yes I told him he is not my fucking boss, I don't remember saying I'll do what I fucking want.

TR: Ok would you say that is an aggressive response?

IS: Somehow maybe.

TR: I'm looking for a clear response from you.

IS: I was trying to defend myself from what he started, if they never sent me back to stow we wouldn't be here now.

TR: It's a reasonable request from a manager to send you to Stow. After you said 'you're not my fucking boss' what happened after that?

IS: He came after me and kept talking and talking, he was saying he was going to smash me.

TR: And you didn't respond?

IS: I said you'll do what. He said you're twice the size of me but I'll smash you.

TR: In Callum's statement he said you said 'I'll get you outside'.

IS: No, I didn't say that, he finishes at 1730 and I finish at 1800, why would I wait to cause trouble and I'm aware of British law.

TR: Why would Callum say that, what does Callum have to gain from saying that?

IS: He can say whatever he wants…"

64. Mr Rutherford pressed the claimant on "huge inconsistencies" in his explanation, and he continued to deny that he threatened Mr Sarjantson. He accepted that he was provoking him when he said "just do it", but he did not threaten him in any way about going outside. He said he worked out but he was not a monster, and that he got judged on how he looked.

65. Mr Rutherford put Mr Hafiz's statement to the claimant, who said he did not know who Mr Hafiz was.

66. The claimant went on to say that *"right now I realize it is verbal aggression and now I agree with you, I didn't understand this before…I understand now and I agree with you, I don't have much experience with this, it's not so easy saying it in a different language. I am not trying to say I am a victim but I am sorry about everything. I should of (sic) been smarter, I let frustration to touch me, it was like throwing petrol on a fire, I can tell you on this night he argued with other associates and I heard that."*

67. At that point in the meeting (at 1746)(129) the meeting was adjourned, as the claimant was becoming increasingly irritated and angry at the line of questioning, with Ms Bird at times having to hold his knee to calm him down. Mr Rutherford wanted to give the claimant the opportunity to compose himself.

68. Towards the end of the meeting, Mr Rutherford asked the claimant if he understood all that had been said, and if he was satisfied with how the meeting had been conducted, to which the claimant said that he was happy.

69. Following that hearing, on 28 November 2019, Mr Rutherford met with Mr Sarjantson. Carole Hollington and Alasdair Brown were in attendance at the meeting, and Mr Brown took notes (132).

70. When asked to explain what had happened on 8 November, Mr Sarjantson explained:

"It's been a few weeks now but I recently got assigned to the buffer on p4 within the pick tower, there are certain rules and guidelines that I need to follow when doing that role or that comes with that task as it's a critical role, a large gentleman came up to the buffer and picked up a box without following the FIFO process (first in, first out), as he walked away I tried to say to him the box wasn't his to take…

I said excuse me can you put that back as he wasn't following the process and he walked on ignoring me…"

71. He went on to say that the other man walked away, and was looking away as he asked him to put the box back. He denied that he was following him, but went on to say:

"No I wasn't following him I had the buffer to myself, there was Maria, Ellie she gets called she was beside the buffer and was present, he came back with the box and came back saying he only needed one, he can't just come in and take boxes so I said you don't have a u-boat as you need that for pallets he said he couldn't give a fuck, he said that I'm just a

green badge and he's been here longer. Ellie engaged with him from behind, she was observing I tried to butt in and say there was no need, she said that's just too far and you shouldn't be speaking to anyone like that and he said fuck you and fuck off and who is he and he is just a fucking green badge. He turned around and continued speaking to Ellie about it, so I continued with what I was doing. I heard a few audible comments and my name being mentioned in anger, he was kind of right in the middle of where I was working and I turned around and I was like just to your job fuck sake, that's when he said you are just a fucking cunt, he said I'll squash you and he did like a squashing gesture with his hands like he was squashing or crushing something and he said I'll squash you and put you in that bin, and he pointed to the bin. I said what was that, he said your just a fucking cunt, Maria put her hand up and said no need for that and he cut her off and continued with using language like cunt and a foreign language that I was unaware of, he was going back and forth. It got noisy. I was holding a pallet, and I said just to continue working he said he was bigger than me, I am easy or something like that, which I didn't really understand."

72. Mr Sarjantson went on to say that the whole incident went on for about 3 minutes. He continued to assert that the claimant had said *"…something in regards to I'll get you in the carpark, when he said carpark I took a step forward as I have bad hearing. I had the pallet up which I didn't want to leave as it's a health and safety hazard and I said what was that, he said something along the lines of I'll get you in the carpark and punching me out or punching fuck out of me."*

73. Mr Sarjantson said that the claimant had then stood in front of him, and "kind of over me with his size", and that he believed that the claimant was seeking to intimidate him with his size. He continued:

"I was trying to let him know that he can't take boxes of the pallet and to follow the correct process, I said your size doesn't scare me and he said I didn't give a fuck and I'm a cunt I said are you serious you've got a job to do, since I've been on the buffer a lot of people have complained about

cherry picking and I've always said to people to speak to the team lead if they have a problem and I said the same to him too."

74. Mr Rutherford then put to the witness the statement of Melanie Sinclair in which she alleged that she had heard him and "William" making derogatory statements about Romanians, and asked him if there was some kind of racial prejudice there. Mr Sarjantson denied that either he or "Billy Reid" made such comments, and suggested that he was the subject of racist comments by "people of different regions". In particular, he denied that he had said "go back to your own country", saying *"No, I have friends in all different regions, I would never make that kind of statement so that is definitely lies."*

75. Mr Newton met with a witness who requested to remain anonymous, on 29 November, in the company of Laura Ramanauskaite, who took notes (141). The witness asserted that he was the claimant's best friend, and that he trusted him. The witness set out his understanding of what had happened, which, it appears, came from asking the claimant. He said that the associate, Mr Sarjantson, had told the claimant he was not scared of him, whereupon *"Mihal said, if you are not scared then let's go to the car park and fight."*

76. The witness also suggested that Ms Sinclair wished to change her statement, because she had found out that the claimant, with whom she had been in a relationship, had been cheating on her with another colleague. He said that Ms Sinclair was not there at the time of the incident and only knew what she had been told by the claimant. Later in the meeting, he suggested that the claimant was aggressive and that people did not feel safe in the workplace due to the claimant.

77. Following this, Mr Rutherford arranged a further meeting with Ms Sinclair, in order to go over her previous statement on 3 December 2019. Notes were taken by Alasdair Brown (144).

78. She reiterated that she did not see the incident, and only knew what she had been told. She repeated her statement that she had heard Mr

Sarjantson and William speaking in derogatory terms about Romanians. She said that she gave her statement because although she had not seen the incident, someone might be provoked by the kind of behaviour she witnesses from Mr Sarjantson and William, and that was why she had made her statement.

79. Matt Heath, Stow Area Manager, presented a short written statement dated 4 December 2019 (150), in which he described an encounter with the claimant in "October/November", where he instructed the claimant to move to move, with others, to Stow. The claimant had protested at this instruction, and threatened not to go until Mr Heath had spoken to all of the associates. Mr Heath advised him that he would, but that if he refused to attend as requested at Stow, he would be refusing to follow a reasonable instruction. The claimant then agreed to do so.

80. Mr Rutherford considered the information which had been presented to him, and convened a Disciplinary Outcome Meeting on 12 December 2019. The claimant was present, accompanied by Angela Bird. The meeting was chaired by Euan Stables, Operations Manager, and Ms Hollington and Mr Brown were again in attendance, with Mr Brown taking notes (151).

81. Mr Stables explained that Mr Rutherford had been called to a meeting in Luxembourg, and therefore he had taken over the Outcome meeting on his behalf. He confirmed that the outcome reached by Mr Rutherford was that the claimant should be dismissed immediately, and would be given a right to appeal against that decision. The claimant said that he was not happy with the decision, and would intend to appeal. He complained that he didn't know Mr Sarjantson, to whom nothing had happened, but he had been punished himself for that. He said that for 4 years he was a "perfect employee", and that he did not know that swearing at another associate was aggression which could lead to his dismissal.

82. The letter to which Mr Stables had reference in the Outcome Meeting was dated 12 December 2019 and prepared by Mr Rutherford (154).

83. Mr Rutherford set out his findings in relation to the allegation:

"On 8 November, 2019, you explained that you had gone to the buffer to get a box. As you did so, a temporary associate who you did not know had shouted and sworn at you saying something like 'what the fuck do you think you are doing'. You had replied to him by saying 'who are you to tell me that, do I need your approval?' He replied 'yes' and you said 'fuck off'. You tried to ignore him and told him to shut up and mind his own business.

You stated he said 'you're big but that I could smash you anytime or something like that', he was trying to act big in front of his friends. You had said 'just do it' be a man and just do it'…

My findings are that the account given by you varies significantly from that of the temporary Associate (TA)…"

84. He went on to narrate what Mr Sarjantson had said

85. Mr Rutherford continued:

"The TA also alleges that on three occasions you stated that you would 'get him in the car park and punch fuck out of him'. He also stated that you 'bulked yourself out' and were trying to intimidate him with your size.

You deny making this comment, and as this is one person's word against another, I have been unable to substantiate this allegation.

You have admitted to using foul and abusive language, being verbally aggressive and to inciting the situation by responding to the TA with 'be a man and just do it' and you have also admitted to deliberately provoking the TA.

You claim that this was in response to the TA stating to you 'go back to your country'. The TA denies making this comment and has stated that you have made this up. You have also stated that the TA is lying. I have been unable to substantiate this allegation.

A statement was received from Melanie Sinclair. In her statement she states that she did not see or hear the exchange between you and the TA. She also alleges that she overheard the TA and another Associate discussing 'the Romanians' saying 'just wait until I put my statement in I'll get the bastards sacked'. I have been unable to substantiate this allegation.

Having considered the evidence carefully, I have decided to uphold the first allegation against you.

Having concluded that allegations should be upheld against you, I considered the appropriate action and sanction.

Having considered the matter carefully, I have decided to summarily dismiss you.

I took into account the serious nature of the allegations and I also considered your previous Disciplinary record. I note that in January 2017 you were issued with a Final Written Warning and in December 2017 you were re-issued with a Final Written Warning. Whilst these warnings are spent for the purpose of the Disciplinary Policy, there does appear to be a pattern in your behaviour which is unacceptable."

86. The letter concluded by advising the claimant of his right to appeal against the decision to dismiss him.

87. The claimant was unhappy with the decision, and did submit an appeal, in an email dated 12 December 2019 (159):

"I am writing this email, against my disciplinary meeting decision. I consider the decision is unjustified and unfair to the case. also during the investigation and my suspension period, the meeting manager Tom Rutherford tried to highlight my last final warning, whilst these warnings are spent. He also considered a verbal statement from a stow process guide known as 'Maria'. As she refused to write a formal statement, I consider the decision was not a fair one, and a verbal statement shouldn't be considered. As in the first instance, was 3 other formal statements

from witnesses, and none of them was mentioning anything about threatening the TA, and was no physical violence at all, just some bad words and insults said from one to each other, I would like to appeal the decision made in 12th December 2019, and have a new hearing with someone else. Also I mention, I had no idea swearing to a person is a verbal aggression, and I have found out that from Tom Rutherford.

I want to highlight that Callum Sarjantson 2nd statement is different from the first one, as he never admitted he insulted me, but he did in the first statement. Also 2 days before the incident, as I reported to the Pick Manager Colin Lesiuk about inbound Stow situation, nobody tried to fix that problem and two days later I have been send to support stow department again. If management team was considering my request and was trying to fix this problems from 6th of November 2019, this incident would never happened."

88. On 18 December 2019, Andrew Livingstone, Senior Operations Manager, sent the claimant a letter inviting him to an appeal hearing on 19 December 2019 (160). The claimant attended the appeal hearing, accompanied by Angela Bird. Mr Livingstone was assisted by Gill Cura, who provided HR support and took notes of the hearing (162).

89. Mr Livingstone asked the claimant to go through his appeal points in turn. The claimant explained what had happened, after making some comments about the Stow process:

"The guy came to me and said 'what the fuck you think you're doing'. I said 'fuck off' and stepped away, so I turned to him; he said 'do you think you're a big guy, I can smash you anytime; and I said 'go ahead'. Probably not the best reaction, I know."

90. Mr Livingstone read out the allegation and said that it felt to him as if this was what the claimant was explaining. The claimant replied: *"Yes, but I never saw him in my life."* When Mr Livingstone asked the claimant what abusive behaviour or language looked like, he said: *"When you come to*

me with insults and feeling superior, it's a question mark. He doesn't even know me."

91. He pointed out that everyone in that area would swear, to which Mr Livingstone remarked that if it is aggressive or intimidating, it would be dealt with in a different way.

92. The claimant raised the point that Mr Sarjantson was also swearing, and pointed out that the expired warnings should not have been relied upon in the decision to dismiss him. Mr Livingstone responded by saying that he had not considered the previous warnings, as they were not included, and pointed out that the letter of dismissal confirmed that they had not been taken into account. He also observed that the claimant had told Mr Stables that he was a model employee, but the expired warnings showed that he had not been.

93. Following the hearing, Mr Livingstone issued his decision by letter dated 30 December 2019 (168). He upheld the claimant's dismissal and explained his reasons for doing so in the letter. He stressed that while there was no evidence of any violence involved in the incident, threatening and abusive language is just as unacceptable and amounts to gross misconduct. He also addressed a number of points made by the claimant, including his assertion that another associate was involved in a prior situation which was similar but who was not dismissed. Mr Livingstone said that he had looked into that and had concluded that the circumstances were not the same.

94. The claimant was therefore unsuccessful in seeking to overturn his dismissal, and had no right of further appeal.

95. Following his dismissal, the claimant found another job in January 2020. He wanted to return home to Romania over Christmas and New Year at the end of 2019, and returned to Scotland on 11 January 2020. He applied for a large number of jobs. He commenced employment on 27 January 2020, working on the same terms and conditions as he had received while with the respondent, for a laundry company, driving trucks.

That employment came to an end in September 2020. It was a temporary position. During his employment, he was furloughed and received £320 a week, a proportion of his full salary, which was £400 a week. Following the termination of that employment, the claimant started with a driver hire agency. He takes whatever work he is offered, and his hours of work and pay received vary from week to week. His evidence was that one week he could earn £150, and the next £400.

96. The claimant did not apply for state benefits following the termination of his employment. He continues to look for permanent employment, but is finding it very difficult to do so.

Submissions

97. For the respondent, Mr Holloway addressed the claimant's unfair dismissal claim first. He submitted that the respondent had established a potentially fair reason for the claimant's dismissal, namely conduct, based on the clear and compelling evidence of Mr Rutherford and the terms of the dismissal letter.

98. He then argued that the respondent had demonstrated that they had reasonable grounds upon which to form their genuine belief that the claimant had been guilty of misconduct. He warned the Tribunal against setting the bar too high here and pointed to the account of Mr Sarjantson, which, if believed, would be sufficient to support reasonable grounds upon which to base the decision. Mr Rutherford spoke at length to the two people involved in the dispute itself, and was able to assess how each of them came across.

99. Mr Holloway referred to the "central planks" of the respondent's case:

- It was Mr Sarjantson, and not the claimant, who reported the incident. The claimant said that it was Mr Sarjantson who instigated the incident and threatened him, but it was Mr Sarjantson who took that step;

- There was no evidence before the respondent that the claimant's account – that Mr Sarjantson was the one who instigated the incident – was in any way supported;

- The claimant was irritable on the day of the incident, having been feeling frustrated before the incident occurred, which makes it more likely that he was the one to "lose his cool";

- It was plainly relevant that the claimant had behaved like this in the past, and it would be wrong to say that the respondent could have no regard to past events. The claimant had engaged in remarkably similar incidents in 2016 and 2017;

- The claimant's account of what had happened changed markedly over time.

100. He submitted that it was plainly reasonable for the respondent to form the belief that the claimant was guilty of misconduct.

101. He argued, then, that the investigation which was carried out was also reasonable. It was not perfect, but was within the range of reasonable investigations. The claimant understood the charges against him. The respondent attempted to gather together all the witness statements from those they thought were there. Three witnesses mentioned by the claimant were not prepared to go on the record. There was no opportunity for the respondent to compel any of those individuals to come forward if they were concerned. The respondent followed a fair procedure.

102. Mr Holloway also referred to the claimant's criticism that there was an anonymous statement. He said that the evidence of that anonymous statement did not deal directly with the incident on 8 November, and was therefore peripheral. It was consistent with the decision to dismiss, but not causative of it. Mr Rutherford had already made up his mind before he reached the decision, and was clear as to the lack of impact which this had upon his decision.

103. Mr Rutherford was crystal clear as to his understanding of the expired warnings – he understood that they had expired and that they were not the operative cause of dismissal. In the alternative, Mr Holloway submitted that even if he were wrong about that, the respondent could have considered the warnings as this is a case similar to that of **Airbus UK Ltd v Webb [2008] EWCA Civ 49**, at paragraph 74 in particular. It cannot be right to say that the employer can have no regard to prior warnings in circumstances where there may be a risk to other staff.

104. Mr Holloway then submitted that the claimant's dismissal fell well within the reasonable range of responses open to a reasonable employer. It was an act of gross misconduct. Staff must not threaten other staff at work.

105. He argued that if the Tribunal were not with him, and found that the dismissal was unfair, any compensation or re=employment order would require to be considered in light of **Polkey** and the claimant's contributory conduct. Whatever happened, he said, the claimant's conduct meant that he was going to be dismissed due to the facts of the case. The claimant complained before the Tribunal that there was no CCTV footage and that other witnesses should have been called by the respondent, but he did not complain about those matters at the time.

106. With regard to contributory conduct, he submitted that the reduction should be by 100%, based on a finding that the claimant did threaten Mr Sarjantson. If the Tribunal were not prepared to go that far, his alternative submission was that the reduction should be by 50% to take account of the claimant's failure to provide witnesses in support of his case.

107. Mr Holloway suggested that there were significant concerns about the claimant's credibility in the internal process and before this Tribunal. The claimant, he said, has repeatedly shown himself prepared to say whatever he thinks of at the time without regard to the truth of the matter.

108. The claimant was guilty of "remarkable exaggeration" of the incident in the internal proceedings. In the suspension meeting, the claimant only said that Mr Sarjantson had called him a "bastard", when the incident was fresh in his mind. Further, he alleged, at a later stage, that Mr Sarjantson had told him to "go back to your own country", which Mr Holloway said was completely implausible given that it was not said in the suspension meeting, nor in the investigation meeting. The claimant said that in the past some green badges had said this to him but did not allege that Mr Sarjantson had ever done so to him. The claimant was prepared to say whatever it took to avoid the consequences of his actions.

109. In the Tribunal, the claimant repeatedly made reference to wanting CCTV footage. Mr Holloway described this as a "strange point", which had never come out before the Tribunal process. There was no reason why he did not raise it with Mr Newton, other than the general allegation that he felt that Mr Newton "had it in for him". On that point, the claimant expanded, over time, his accounts of Mr Newton's malicious intent towards him, but at the time did not make the same allegations.

110. The claimant also failed, in the internal process, to mention the 3 witnesses who were present, and failed to explain why he did not do so at any stage to the respondent. This was a sign of a man who was not willing to be truthful.

111. Mr Holloway pointed to a repeated pattern whereby the claimant would threaten someone, and invite them to go outside. He observed that for a man whom the claimant had never met before to accuse him of threatening to squash him and put him in the bin was unusual, and would be an extraordinary thing to make up.

112. The three witnesses brought to the Tribunal by the claimant were deeply suspect, he submitted. None supported his suggestion that Mr Sarjantson had told him to go back to his own country. Their evidence was confused and it is entirely unclear why they did not provide witness statements at

the time, or come forward in support of the claimant if they knew that they had information to give the respondent.

113. The layout of each of their witness statements was strikingly similar despite their assertion that they had been produced independently and months apart. Their accounts are notably similar.

114. Mr Holloway then turned to the claimant's claim that he was discriminated against on the grounds of race, for which the claimant, he said, bore the burden of proof.

115. The claimant compared his case to that of Callum Harley, who was not dismissed. Mr Holloway submitted that there were clear and significant differences between the cases. There were different decision makers, and different circumstances. Mr Harley had been provoked by the claimant, who had been talking openly about Mr Harley's partner's pregnancy, which was viewed as provocation. In this case, there was no provocation.

116. Mr Harley recognised that his behaviour was inappropriate. The claimant's position was that he was not prepared to admit that he had done anything wrong, because he was not guilty of the actions of which he was accused. Mr Rutherford, however, found that this had happened.

117. Mr Harley did not have previous warnings for similar conduct but the claimant did. His treatment – a final written warning – was consistent with the claimant's treatment when he was first accused of similar behaviour.

118. More broadly, the claimant has done nothing beyond making broad assertions about the past which the respondent could not respond to, to show that this was a discriminatory dismissal. Mr Rutherford did not know the claimant and there was nothing to suggest that he did anything discriminatory on the grounds of race towards the claimant. Mr Livingstone reviewed the case, and concluded that there was nothing inappropriate in it.

119. Mr Holloway then made certain submissions in relation to remedy.

120. The claimant then made a short verbal submission in support of his own case.

121. He submitted that following the statements of witnesses taken, nobody had mentioned that he was threatening Mr Sarjantson, nor the FIFO policy he was found to have breached. There was no consistent application of that policy but nothing was done about others who did not comply.

122. He complained that the respondent did take account of his previous disciplinary record, even though the letter suggested that they had not. A spent final warning should be treated as if it had never been issued.

123. Mr Newton took a statement from an anonymous witness. The claimant named the witness before us and alleged that he was not employed in that building, and his statement made clear that someone was leaking details to him. Mr Rutherford admitted that he consulted that statement. He made reference to the claimant being in a relationship with Melanie Sinclair, which led to the end of his marriage. Even if he did not mention CCTV footage, an experienced manager should have consulted that footage in any event. He found it hard to believe that the camera in the particular area concerned was not working at that time in a massive company with such large resources.

124. The decision was completely unfair and totally unjustified.

125. He complained that the respondent had failed to comply timeously with Orders issued by Employment Judge d'Inverno, and that gave them a clear advantage over him.

126. With regard to the Callum Harley situation, the claimant said he was humiliated in front of the whole department. Mr Harley approached him provoking and insulting him, and went head to head with him. The claimant said he put his hands behind his back, and the manager took him away at that point. He complained that he was forced to go into a room to accept an apology by Mr Harley. The outcome for Mr Harley was

very mild considering the disciplinary policy which said he should be automatically dismissed. The claimant suggested that he had tried to apologise for what he had done, but was never able to do so.

127. He attributed the difference in treatment between himself and Mr Harley to the fact that he is Romanian. He said he was "pretty sure" that if he had been English or Scottish, he would not have been dismissed.

128. The claimant said that he would like to get his job back, as this is the only hope for him to get back with his wife.

129. The claimant invited the Tribunal to find in his favour.

The Relevant Law

130. In an unfair dismissal case, where the reason for dismissal is said to be conduct, it is necessary for the Tribunal to have regard to the statutory provisions of section 98 of ERA. The Tribunal considered the requirements of section 98(1) of the Employment Rights Act 1996 ("ERA"), which sets out the need to establish the reason for the dismissal; section 98(2) of ERA, which sets out the potentially fair reasons for dismissal; and section 98(4) of ERA, which sets out the general test of fairness as expressed as follows:

> "Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal was 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 employers 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 the equity and substantial merits of the case."

131. Further, in determining the issues before it the Tribunal had regard to, in particular, the cases of **British Home Stores Ltd v Burchell [1978] IRLR 379** and **Iceland Frozen Foods v Jones [1982] IRLR 439**, to which we were referred by the solicitors in submission. These well known cases set out the tests to be applied by Tribunals in considering cases of alleged misconduct.

132. **Burchell** reminds Tribunals that they should approach the requirements of section 98(4) by considering whether there was evidence before it about three distinct matters. Firstly was it established, as a fact, that the employer had a belief in the claimant's conduct? Secondly, was it established that the employer had in its mind reasonable grounds upon which to sustain that belief? Finally, that at the stage at which that belief was formed on those grounds, was it established that the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

133. The case of **Quadrant Catering Ltd v Ms B Smith UKEAT/0362/10/RN** reminds us that it is for the employer to satisfy the Tribunal as to the potentially fair reason for dismissal, and he does that by satisfying the Tribunal that he has a genuine belief in the misconduct alleged. Peter Clark J goes on to state that "the further questions as to whether he had reasonable grounds for that belief based on a reasonable investigation, going to the fairness question under section 98(4) of the Employment Rights Act 1996, are to be answered by the Tribunal in circumstances where there is no burden of proof placed on either party."

134. The Tribunal reminded itself, therefore, that in establishing whether the Respondents had reasonable grounds for their genuine belief, following a reasonable investigation, the burden of proof is neutral.

135. Reference having been made to the **Iceland Frozen Foods Ltd** decision, it is appropriate to refer to the well-known passage from that case in the judgment of Browne-Wilkinson J:

'Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by S.57(3) of the 1978 Act is as follows:

(1) the starting point should always be the words of S.57(3) themselves;

(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'

136. Reference was made to the decision in **Airbus UK Ltd v Webb**. In that case, before the Employment Appeal Tribunal, the question was essentially whether it would be fair if an employee would not have been dismissed if an expired warning had not been taken into account. In the Court of Appeal, at paragraph 74, the court said:

"The subsequent misconduct on its own was shown by Airbus to have been the reason, or the principal reason, for dismissal. Neither the expired warning nor the July 2004 misconduct were invoked as being within the set of facts constituting the reason, or the principal reason, for dismissal. The relevance of the previous misconduct and the expired warning was to the reasonableness of the response of Airbus to the later misconduct ie whether dismissal of Mr Webb for the later misconduct was within the range of reasonable responses."

137. Section 13(1) of the Equality Act 2010 ("the 2010 Act") provides:

> *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

138. We took into account authorities which were of assistance in clarifying the legal tests to be applied here.

139. In particular, we considered **Nagarajan v London Regional Transport 1999 ICR 877, HL**, in which Lord Nicholls said:

> *"…a variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds … had a significant influence on the outcome, discrimination is made out."*

Discussion and Decision

140. The Tribunal considered, firstly, the claimant's claim of unfair dismissal.

141. The Tribunal had to determine the reason for the claimant's dismissal. In this case, there was no doubt in our minds that the reason was the claimant's conduct, and in particular, that the respondent found that he

had acted in an abusive and threatening manner towards Callum Sarjantson on 8 November 2019. This was found by the respondent to be an act of gross misconduct, contrary to the terms of the Disciplinary Policy. There was no other reason suggested by the claimant for his dismissal: he simply asserted that his dismissal was too harsh, inconsistent with the treatment of Callum Hanley and amounted to discrimination on the grounds of race.

142. The Tribunal then considered whether the respondent had a genuine belief that the claimant had committed an act of gross misconduct, and whether they had reasonable grounds upon which to found such a genuine belief.

143. In this case, the claimant was very anxious to explain that swearing among staff in the section in which he is based is very common, and therefore that if he were dismissed for swearing, that would be very unfair. The respondent has made clear, through Mr Rutherford and Mr Livingstone, that the reason for dismissal was not that he was guilty of swearing, but that he had gone further in his interaction with Mr Sarjantson, and had threatened him.

144. In particular, the respondent received evidence from Mr Sarjantson in his initial statement (102) that the claimant had said to him:

- *"I'll fucking squash you and put you in a bin";*
- *"Do you want to fucking go?"*
- *"I'll wait outside, I'll get you outside"*

145. Mr Rutherford preferred Mr Sarjantson's version of events to that given by the claimant. The statements from the two witnesses who were present and gave statements did not do more than confirm that there had been an argument which involved swearing by both men. The claimant had suggested that Mr Sarjantson had said that he could "smash you", which,

had it been accepted by the respondent, would clearly have amounted to a threat.

146. Mr Rutherford explained that the reason he preferred Mr Sarjantson's version of events was that he had noted him to be very anxious and concerned when he met with him to take a second statement (132), whereas the claimant, during the disciplinary hearing, had been aggressive and had had to be given time to calm down. Mr Rutherford gave clear evidence that he had observed not only the claimant's speaking tone but also his body language, and that Ms Bird, who accompanied him, had sought to put her hand on his knee in order to restrain and calm him down. As a result, he concluded that it was more likely that the claimant had been the aggressor on the day in question.

147. Mr Rutherford appeared to us to be a very straightforward manager who had approached this matter with an open mind, and had allowed the claimant ample opportunity to explain himself and give his version of events. We were prepared to accept his evidence that he reached his view as to the facts of the incident based on what he was able to observe, and also taking into account the consistency of Mr Sarjantson's position in the two statements.

148. Clearly, this Tribunal is not in a position to determine the credibility of Mr Sarjantson from observing him, since he did not give evidence before us. However, it is for us to determine whether the respondent had sufficient evidence before them in order to conclude that the claimant was guilty of threatening Mr Sarjantson, and in our judgment, they did. It was legitimate for the respondent to prefer the statements of Mr Sarjantson to those of the claimant, and to find that not only did Mr Sarjantson not seek to provoke the claimant (a finding which was supported by Mr Rutherford's observation of him when he met him as exhibiting that he felt intimidated by the claimant), but nor did he tell the claimant to "get back to your own country".

149. Having reached these conclusions on the basis of the investigation, which in our judgment were justifiable on the evidence available, it is our finding that Mr Rutherford had reasonable grounds to reach the view that the claimant had acted in such a way as to threaten and abuse Mr Sarjantson.

150. The claimant sought to direct attention to the system of taking boxes at the buffer, and to undermine Mr Sarjantson's position by suggesting that the process to be followed was not FIFO, or if it was, that that was not consistently enforced. The difficulty for the claimant is that even if Mr Sarjantson were not entitled to have asked him to put the box back, that would not justify the claimant threatening violence upon Mr Sarjantson in response. We were not surprised that the respondent did not find this a convincing explanation for the sequence of events which arose then.

151. Did the respondent conduct a reasonable investigation? The claimant argued strongly that they did not, and we deal with his criticisms below.

152. The claimant argued that the respondent should have had access to CCTV footage which would have shown the sequence of events clearly. This was not a matter which he raised in the course of the internal process, but the evidence demonstrated that the respondent's explanation was that the camera at that particular place was not working at the time. The claimant has been unable to persuade us that that is incorrect, but the respondent did not have access to the CCTV footage in the disciplinary process. We were prepared to accept that the camera was not operative at the material time and therefore not having access to the footage was not unreasonable in the circumstances.

153. The claimant argued that the respondent should have sought out 3 witnesses who were present at the time, so as to obtain their evidence. The respondent explained that the witnesses confirmed that they were not prepared to give evidence at the time and could not be forced to do so. In those circumstances, we were not prepared to find that it was

unreasonable for the respondent not to have obtained statements from those witnesses.

154. The claimant argued that Mr Rougvie, the supervisor, prevented two witnesses from giving evidence at the time about this incident. Mr Rougvie appeared as a witness, supporting his witness statement, in which he denied this, and the claimant accepted that Mr Rougvie was telling the truth about this.

155. The claimant argued that the respondent should not have relied upon an anonymous statement which was included within the bundle of productions. Mr Rutherford dealt with this by saying that he had already reached his decision by the time he saw that statement and that it was not therefore taken into account in reaching any conclusions in this case, though it affirmed his view of the claimant's actions.

156. In our judgment, the critical evidence was that of the claimant and Mr Sarjantson, and the respondent was entitled to reach the conclusions it did based on their view of that evidence. The claimant was given the opportunity to review the evidence at the disciplinary hearing and had the chance to challenge and respond to what was said.

157. In these circumstances, and remembering that the Tribunal must consider whether the actions of the respondent were reasonable, and not impose too high a standard upon managers seeking to conduct a fair investigation, we have concluded that the respondent did carry out a reasonable investigation in all of the circumstances.

158. We were also persuaded that the respondent followed a fair procedure, allowing the claimant to see all the evidence available to them at each stage, and being assured that the claimant understood the allegation against him and was allowed the opportunity both to defend himself in relation to that allegation and also to be accompanied as he did so.

159. Finally, then, in relation to the unfair dismissal claim, we considered whether or not the decision to dismiss the claimant fell within the band of

reasonable responses open to a reasonable employer. We remind ourselves that it is not for us to substitute our own views for that of the employer.

160. Before turning to that question, however, we must consider whether the claimant was treated inconsistently in comparison to the treatment afforded to Mr Hanley. Although this is a significant part of the discrimination claim, it also forms part of the unfair dismissal claim and we must address it.

161. The claimant maintains that his actions were less serious than those of Mr Hanley, or at least comparable, but while Mr Hanley was issued with a final written warning, he was dismissed, and regards this as unjust.

162. The respondent argues that there are clear differences. They say that Mr Hanley acted as he did because he was clearly provoked by the claimant telling colleagues that he and his girlfriend were expecting a baby, news which he regarded as private; that Mr Hanley did make physical contact with the claimant, though minor; that Mr Hanley did commit an act of misconduct by engaging in abusive behaviour towards the claimant; but that Mr Hanley expressed remorse about his actions, agreed to apologise to the claimant in person and had a prior clear disciplinary record. On the other hand, the respondent says that the claimant was not provoked by Mr Sarjantson, was not at all remorseful about his actions, threatened Mr Sarjantson with physical violence and had been disciplined for such actions before, albeit that the warnings given had expired.

163. In our judgment, the claimant's concerns about this matter were understandable, but not justified. We were persuaded that there were sufficient differences between his case and that of Mr Hanley to justify a difference in their treatment by the respondent.

164. The Tribunal must consider the guidance provided by, in particular, the case of **Hadjioannou v Coral Casinos Ltd [1981]IRLR 352**, in which cases which are "truly parallel" may give rise to an unfairness due to

inconsistency of treatment. Tribunals must, however, avoid falling into the trap of omitting to apply the statutory test of unfairness.

165. In this case, we considered that the case of the claimant was not truly parallel to that of Mr Hanley. Although Mr Hanley was found to have touched the claimant in his case, it was a minor part of the case, and Mr Hanley readily admitted that he had been wrong and guilty of misconduct. One significant difference, which requires to be handled carefully, is that Mr Hanley had no previous warnings on his file, whereas the claimant had previously been issued warnings for having acted aggressively towards colleagues. Although those warnings had expired, we agreed with the respondent's submission that they were not wholly irrelevant to the respondent's conclusions. We also considered that it was relevant to compare the previous record of Mr Hanley to that of the claimant, as it indicated that the respondent, when previously confronted with an act of misconduct by the claimant in which he had been found to have threatened and abused a colleague, had chosen to issue him with a written warning, which was extended due to a further incident. In our judgment, it was that penalty that was truly parallel to Mr Hanley's case, rather than the current case under examination. In any event, we found that the claimant was not prepared to accept that he had done anything which was wrong, or which he could reasonably have known was wrong, and was not provoked when he did what he did.

166. Accordingly, in light of the fact that we did not consider that the circumstances of this case were truly parallel to those in which Mr Hanley was penalized, and given that we have found that in all the circumstances the respondent was justified in its conclusion that he had committed an act of gross misconduct in his dealings with Mr Sarjantson, we concluded that there was no unfairness in the dismissal of the claimant by the respondent in these circumstances. There was no inconsistency between this decision and the decision issued to Mr Hanley.

167. It is therefore our conclusion that the claimant's claim of unfair dismissal must fail, and be dismissed.

168. We turned, then, to the claimant's claim of discrimination on the grounds of race. We are able to deal with this reasonably concisely.

169. The claimant complains, essentially, that he was treated less favourably than Mr Hanley in similar circumstances, on the grounds of race.

170. We have explained why we do not consider that the circumstances of Mr Hanley and the claimant are truly parallel for the purposes of the unfair dismissal claim. We have also reached the conclusion that the claimant was not treated less favourably than Mr Hanley. Their circumstances were different; the claimant had previously been issued with warnings in respect of conduct which was similar to that for which Mr Hanley was issued with a warning; the claimant was not in any way provoked, as Mr Hanley was; and the claimant did not accept at all what was found by the respondent against him, namely that he had threatened violence against a colleague in the workplace, and therefore showed no remorse for his actions, as Mr Hanley did.

171. In any event, we are not persuaded that there is any basis upon which the claimant can demonstrate that he was treated less favourably, or even differently, than Mr Hanley on the grounds of his race. The claimant suggested that there was a pattern of management behaviour within the respondent's business whereby staff from Scotland or England would be treated more leniently than Romanian or other staff from other countries. Beyond his rather inspecific assertion, the claimant provided no evidence of this. We were convinced that the respondent considered this case on the basis of the facts presented to them, and were entirely justified in their decision to terminate the claimant's employment. They did so completely without regard to the claimant's race.

172. There is not only no evidence in support of the claimant's contention, but there is also evidence which directly contradicts that: in particular, the respondent's managers gave credible evidence that they would have dismissed any employee who had done what the claimant had done, and

denied that they would have treated a Scottish or English employee differently.

173. Accordingly, we have reached the conclusion that the evidence simply does not permit us to find that there has been any act of discrimination against the claimant on the grounds of his race.

174. The claimant's claims therefore fail and are dismissed.

175. We repeat here our thanks to the parties for their courtesy in the manner of the presentation of this case. The claimant, while clearly carrying a strong sense of injustice, conducted himself in the Tribunal with courtesy and clarity. Mr Holloway acted entirely professionally throughout, and provided assistance to the claimant and to the Tribunal. All complied with the rather stringent and novel requirements introduced as a result of the need for social distancing and other precautions due to the ongoing pandemic, and the Tribunal wishes to express its gratitude to all involved for doing so.

Employment Judge: Murdo Macleod
Date of Judgment: 04 December 2020
Entered in register: 08 December 2020
and copied to parties