



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4105591/2020

Hearing held at Dundee on 5 and 6 May 2021

Employment Judge McFatridge

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Mr Mark Tait

**Claimant
Represented by:
Ms Campbell,
Solicitor**

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Discovery Flexibles Limited

**Respondent
Represented by:
Mr Russell,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The judgment of the Tribunal is the claimant was not unfairly dismissed by the
respondent. The claim is dismissed.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he
30 had been unfairly dismissed by the respondent. Initially, he made a claim
that his dismissal was automatically unfair in terms of section 103A of the
Employment Rights Act 1996 in addition to his claim of ordinary unfair
dismissal however the claim under section 103A was subsequently
35 withdrawn by him and dismissed by Order of the Tribunal dated
22 January 2020. The respondent submitted a response in which they
denied the claim. It was their position that the claimant had been

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summarily dismissed for gross misconduct and the dismissal was procedurally and substantively fair. The hearing took place over two days. Evidence was led on behalf of the respondent from David McColl their Production Manager, Thomas Czyba a Senior Operator in their slitting department, William Harris a Team Leader/Machine Operator with the respondent, Paul Collins their Operations Manager, and James Urquhart their Owner/Managing Director. The claimant gave evidence on his own behalf. The parties lodged a joint bundle of documentary productions. This included a chronology which the parties confirmed on the morning of the first day of the hearing was an agreed chronology. It also included a list of issues. On the basis of the evidence and the productions and the agreed chronology the Tribunal found the following factual matters relevant to the claim to be proved or agreed.

Findings in fact

2. The respondent are a company which manufactures specialist wrapping for the confectionary and food industry. Essentially they make wrappers for biscuits and sweets such as Tunnock's tea cakes. They operate from a single site in Dundee. The company has been in existence for many years and a feature of this make-up is that many employees and managers have been with the company for a very long time. The present Managing Director started off on the shop floor when he was 17. The company went through a financial crisis approximately two years ago following which it was purchased by the current Managing Director.
3. The claimant commenced employment with the respondent on or about 1 July 2017. A copy of his contract of employment was lodged (pages 38-47). The respondent also have an Employee Handbook and a copy of this was lodged (pages 48-88).
4. In May 2020 the company had approximately 68 employees. The onset of the Covid pandemic in March 2020 posed considerable difficulties to the respondent. On the one hand there was a rush in the supermarkets on various products which utilised the company's packaging and this led to a boom in orders for the company. On the other hand four of their customers decided at around this time to close their production lines. The company

also required to introduce social distancing measures so as to ensure that their employees remained safe whilst at the workplace. The respondent's Managing Director had issues a Covid-19 bulletin to all staff at the outset of the pandemic on 17 March. On 18 March the respondent instructed
5 Ellis Whittam, a firm of health and safety advisers, to carry out a risk assessment. This led to a further Covid bulletin being issued on 24 March and various changes to staff shift times were made on 26 March. On 20 April the respondent's plans were approved by the British Retail Consortium Institute of Packaging.

10 5. The respondent became aware that despite this, criticisms were being made to the effect that not all staff were complying with the social distancing requirements whilst on the shop floor. The claimant had in fact been one of those who had complained to a union representative about this. At some point in May the respondent had decided to set up a camera
15 in the slitting room to monitor the area between the machines with a view to assuring that all staff did comply with the social distancing regime which they had set up. The camera had been placed in the middle of the room just opposite the middle machine which was the one the claimant usually worked on.

20 6. On 21 May 2020 David McColl who was the respondent's Production Manager invited staff within the slitting department (which included the claimant) to a series of meetings in order to discuss social distancing measures. Mr McColl's office is situated just off the large machine room which contains the slitting machines. The claimant worked at one of those
25 machines. Due to the size of his office and the need for social distancing Mr McColl had decided to invite employees in in pairs for the meeting rather than to invite everyone in at the same time. The respondent, like all businesses, had had to alter their practices so as to introduce social distancing measures with a view to making the workplace safe.

30 7. The purpose of the meeting was to explain to the company's employees just what the company was doing and to advise employees why the camera was there and what the company would be doing to ensure that social distancing requirements were maintained going forward. Mr McColl duly met with all of the employees in the slitting room. The claimant was

amongst the last pair to be seen. He went into the room along with Mr Czyba. Immediately following this meeting Mr McColl produced a note of what had occurred and this note was lodged (page 100-101). Since the note was used in the subsequent disciplinary hearing it is probably as well to set out the terms of the salient parts of the note in full. It states

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“Brought all slitting guys in to office (in pairs) to discuss social distancing measures.

All discussed calmly and some asked questions that were answered.

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MT (claimant) and BC were the last 2.

As soon as I attempted to start a discussion MT went off on one that the company was still breaking the law, I tried to stop him by saying we could discuss this once we had ran through the purpose of the meeting, after several requests for him to stop he eventually

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did. I started again regarding social distancing issues that were picked up by the camera and he again went off on one shouting over the top of me that ‘we are being picked on’, how is there nothing in other department, he was very agitated and up off his seat and straight across to my desk (ignoring social distancing) with

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his phone in his hand stating ‘you are breaking the law’ and you all don’t know what you are fucking doing and we are talking a lot of shite, I continued to ask him to move back to his seat and sit down but was not having much success, MT continued to stand and shouting about things the company was not doing like ‘risk

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assessments, health and safety stuff, one way systems,’ asked him again to calm down and sit down to no avail, I then asked him if he could send me his concerns and I would pass them onto M Robbie to look at and he then stated that MR is not qualified to deal with these issues and it needs someone independent, I told him that MR

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is more than qualified to deal with this issue which seemed to enrage MT who had another outburst of ‘you all know fucking nothing and you’re talking a load of shite’, by this stage he had totally lost his cool and I had to tell him if he continued like this, didn’t sit down and calm down he could be suspended, this seemed

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to eventually sink in and he sat down albeit still muttering.

5 Started again and ran through some of the points and he was off again accusing me of thinking it was him that went to the union again. I explained to MT that I certainly didn't think it was him as he had been honest in the past about what he had and hadn't done, I said that the letter sounded like it may have come from someone in slitting but that I didn't know who had done it.

10 MT said I was using threatening language that I would find out from the union who had reported stuff again, I told MT that it was his colleagues that had approached me to try and find out who did it as they were causing unnecessary trouble and not going through proper procedures. I said to several of the guys (BH included) that I still know people who work in the union and it would be good if we could find out and put all this nonsense to bed and deal with things the way we always have. MT did not accept this and again was up
15 on his feet saying that's not true, I continued to discuss the issues with BC with MT still ranting about things, at this stage BC said to me that he can't hear anything because of MT shouting. I then asked MT to leave the meeting as he couldn't conduct himself in the proper manner required, he still continued to shout things about
20 the company not doing things and I told him to get out the office as he was too disruptive.

Continued meeting with BC, then BH came in office to ask what had happened with MT, I explained he was being quite aggressive and confrontational so I asked him to leave the meeting. BH asked why
25 MT had been suspended? I told BH he was not suspended.

MT walked into slitting department with his clothes changed, I went over and asked him what he was going and why he wasn't on his machine, MT stated that I had suspended him, I told him that at no time was he ever suspended MT said that I couldn't change your
30 mind about suspending someone just like that, I told him I was not changing my mind as he was not suspended, I asked him to go and get back to his role to which he refused and said I am out of here, I once more asked MT what he was doing and he replied 'fuck off you specky prick'."

8. I accepted Mr McColl's account as an accurate record of what took place at the meeting and immediately afterwards. Mr McColl attempted to start a discussion but the claimant became abusive and shouted at him. During the course of the meeting he stated that the respondent's management did not know what they were fucking doing and that they were 'talking a load of shite'. He spoke in a loud voice. He prevented Mr McColl from saying what he wanted to say. At one point Mr McColl advised the claimant that if he did not stop then he would be suspended. The claimant calmed down for a moment and then started up again. He was again asked to calm down. During the course of his rant he approached close to Mr McColl leaning over the desk and talking loudly into his face. Eventually, Mr Czyba said that he could not hear what Mr McColl was trying to tell him because the claimant was making so much noise. At that time Mr McColl said to the claimant to get out. The words he used were just get out. At no point did Mr McColl tell the claimant he was suspended. At no point did he say words which would make any reasonable person consider that they had been suspended.

9. Mr McColl then continued the meeting with Mr Czyba. At that point William Harris came into the office. Mr Harris works for the respondent as a Team Leader. In addition to that he is the "go to person" in respect of all union issues within the workplace. It is unclear whether or not he has any formal appointment or formal title but he is recognised by the workforce as someone who deals with union matters. Mr Harris had been asked by Grant Shirkey one of the machine operators to come through to the slitting department. Mr Shirkey could see what was going on in the office as there is a window between the place where Mr Shirkey works and the office. Mr Shirkey told Mr Harris that there appeared to be a bit of an argument. He told Mr Harris that the claimant had approached the desk and that there appeared to be a lot of finger pointing going on. Mr Shirkey suggested to Mr Harris that he may wish to go through and calm things down. On arriving in the slitting department Mr Harris was told by Paul Moran one of the other employees in the department that the claimant had told him that he had just been suspended. Mr Harris then went in to the office where Mr McColl and Mr Czyba were still holding their meeting. He said "I just heard you suspended Mark (Mr Tait)". Immediately Mr Czyba stated

“He has not been suspended he was just asked to get out of the office.”

Mr McColl then confirmed that the claimant had not been suspended but had been told to get out of the office.

5 10. Mr Harris then saw the claimant come back in to the slitting room wearing his normal street clothes. As a food related business the respondent have a number of food safety and hygiene measures in place to prevent contamination. One of these is that workers are not allowed to wear their street clothes on the shop floor. Workers must wear separate working
10 clothes which they are required to change into. It is not permitted to wear normal street clothes on the shop floor. Mr Harris told the claimant that he had not been suspended. Mr Harris said

“Listen Mark I just went to see Davie (Mr McColl) you are not suspended. Get back to your machine.”

15 Mr Harris also told the claimant to change back into his work gear. The claimant did not appear to listen to Mr Harris. Mr Harris’ impression was that “the red mist had come down”. As Mr Harris left to go to the canteen Mr McColl then went down to the machine floor and asked the claimant why he wasn’t on his machine. The claimant said that he had suspended
20 him. Mr McColl told the claimant that he had never suspended him. He said

“come on let’s get back to work”

The claimant then said

“I am out of here”.

25 As he was walking out he turned to Mr McColl and said

“Fuck off you specky prick.”

At that point Mr McColl was two to three metres away. Mr Grant Shirkey was also around two to three metres away. Two other employees in the slitting room, Jack Marr and Paul Moran, were also present but they were

around eight to ten metres away from the claimant when he made this remark. The slitting room is a fairly noisy environment.

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11. Following the incident Mr McColl produced the statement previously referred to which is lodged with the Tribunal. He also spoke with Paul Collins the respondent's Operations Manager and said that he had had an issue with Mr Tait and that Mr Tait had walked off site. At that time due to Covid there were a limited number of managers on site. Mr Collins was aware that the other manager who could possibly have dealt with the investigation; Mark Robbie, had previously had issues with the claimant.
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- He decided that it would be most appropriate for Mr Collins to deal with any investigations that might be required as well as potentially any disciplinary hearing which might be necessary.
12. Mr Collins did not try to contact Mr Tait for the rest of the day. He hoped that the claimant would calm down and come in on the Friday morning which was the following day. The claimant did not appear for work on Friday 22 May. Mr Collins contacted the claimant by telephone in the morning. The claimant was not available but phoned him back shortly thereafter. Mr Collins told the claimant that he was not suspended. The claimant stated that he would not be coming in and that he would be taking it to a Tribunal.
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13. Later that day Mr Collins wrote a letter to the claimant which he hand delivered to him. The letter was lodged (page 108). It invited the claimant to an Investigatory Meeting to take place on Monday 25 May at 11.30 am. It was noted that the purpose of the meeting was to "discuss the incident which took place on Thursday 21 May 2020 between Dave McColl and yourself". The claimant was advised of his right to be accompanied. The letter went on to state
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"As discussing during our telephone call today I advised you that you are not currently suspended from work and are currently absent without pay. You have declined to come into work even though I have clarified our position and advised you that you are not suspended. You also confirmed that prior to leaving yesterday you were advised on the shop floor that you were not suspended."

14. The claimant did not return to work at all on 22 May. Mr Collins left a message for the claimant over the weekend asking him to attend for work on Monday. The claimant did not return to work on Monday 25 May other than to attend the investigation meeting which took place at 11.30am. The meeting was attended by Mr Collins and the claimant. Mr Ian Kidd took notes. His notes were lodged (page 109-113). The notes as lodged contain various additions which were subsequently added by the claimant. The additions are in italics. At the commencement of the meeting the claimant submitted a written statement of his version of the incident. This document was lodged (page 102-103). The claimant made various points regarding CCTV monitoring and set out his view that the respondent had not acted appropriately when they installed this. He stated that he had raised these issues with Mr McColl at the meeting on 21 May. He set out his view that Mr McColl had believed that the claimant was the person who had gone to the union for the second time to complain about various matters and that Mr McColl had threatened to make this information known to colleagues with a view to them taking action against the claimant. He went on to state

“When in the meeting with Dave McColl and Brian Czyba, I raised several issues to Davie McColl in relation to health and safety issues during this pandemic and the fact he has been repeatedly lying to staff in relation to contact that has went on between unite and discovery flexibles. Among the issues raised were his integrity, a clear lack of following procedures relating to several issues, for example, cctv procedures, risk assessments, ventilation and cleaning. It seems that Dave McColl was not too pleased and threatened twice to suspend myself.”

Mr Collins asked the claimant about the comments he had made. The claimant denied calling Mr McColl a “specky prick”. He said that he had said “is that another trick”. Mr Collins said his personal goal was to get matters resolved and get the claimant back to work as soon as possible. The claimant said he must have been suspended because he heard his door entry card had been cancelled after he left the building. Mr Collins confirmed that his card had been cancelled immediately by management

given the way he had left the building. The claimant was not however suspended. He again told the claimant this. The claimant would have been able to gain access for work if he had turned up.

5 15. The claimant behaved aggressively and unco-operatively with Mr Collins throughout the meeting. The claimant was asked how his mood was in the meeting with Mr McColl. His response was “Normal – just like it is now – perfectly cordial.” Mr Collins put it to the claimant that his demeanour was relaxed. The claimant aggressively responded stating “I never said that – you are putting words into my mouth – look it up in Oxford English
10 dictionary”. Mr Collins sought to obtain further information about the claimant’s position as regards what had happened at the meeting but Mr Tait refused to engage with him. He referred Mr Collins to his statement. Mr Collins tried to get the claimant to discuss the conversation he had with Billy Harris. The claimant said he did not recall speaking to
15 Mr Harris and then went on to say that there was no point in answering further questions because “You boys have already nailed your colours to the mast”. Mr Collins then stated he was going to close the meeting due to Mr Tait’s continued failure to answer questions. Mr Collins also reiterated to the claimant that he was not suspended. The claimant
20 responded to the fact that he was still suspended and he was unable to return to work anyway. He then handed over a written statement giving reasons why he could not return to work.

25 16. This statement by the claimant set out a number of matters which the claimant considered to amount to health and safety issues. These were addressed by the respondent in a letter sent to the claimant dated 1 June 2020 (page 123-133). It is as well to record here that subsequent to his dismissal the claimant reported the respondent to the Health & Safety Executive making various allegations relating to health and safety. These were investigated by the Health & Safety Executive who confirmed to the
30 company that having investigated all of the claimant’s allegations they had no concerns and were satisfied that the respondent were meeting their obligations in respect of health and safety.

17. Following the investigatory meeting Mr Collins decided to invite the claimant to a disciplinary hearing. He had gone in to the investigatory

meeting seeking to get the claimant back to work. He felt frustrated that the claimant had been extremely difficult and obstructive during the meeting, the claimant refused to answer any questions. Mr Collins considered the claimant was trying to manufacture a claim. Mr Collins made it absolutely clear to the claimant that he was not suspended but the claimant refused to accept this.

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18. Mr Collins went to visit a number of employees who had been involved in the matter on the 25 May and interviewed them. He went to see Grant Shirkey and took a statement from him. This was lodged (page 120). He also took a statement from Mr Czyba (page 121). He took a statement from Mr Harris (page 122). He did not at that stage take statements from Jack Marr or Paul Moran since he did not believe that they would have heard what the claimant said to Mr McColl. He noted that although Mr Shirkey did not recall words which were identical to those which Mr McColl had heard Mr Shirkey also believed that the claimant had called Mr McColl a 'specky prick.' Mr Harris' position was that he could not hear what had been said although he did hear voices.

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19. Mr Collins invited the claimant to a disciplinary meeting by letter dated 28 May 2020. This was lodged (page 114-115). The claimant was advised that the matter to be discussed involved 'inappropriate shop floor behaviour and unauthorised work resulting from the incident which took place on Thursday 21 May 2020.' He enclosed with the letter a copy of the notes from the investigation meeting on 25 May. These were the original notes which did not contain the claimant's annotations. He also enclosed a copy of the respondent's Disciplinary Policy and Procedures. The claimant was advised of his right to be accompanied. Mr Collins did not at that stage enclose the statements he had taken from other members of staff.

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20. The claimant duly attended the disciplinary hearing on 1 June 2020. The claimant had not attended work during the period from 25 May until 1 June. The claimant was accompanied at the meeting by Susan Robertson of Unite Trade Union. She attended via telephone. Mr Collins was accompanied by Mr Kidd who took notes. The respondent had decided that Mr Collins should do the disciplinary as well as the investigation. This

was on the basis that the other managers available were Mr Urquhart who would be doing the appeal and Mr Robbie. As noted above it was considered that it would be inappropriate to use Mr Robbie since he had already had issues with the claimant, the claimant had been accused of behaving inappropriately towards him.

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21. Mr Kidd's note of the meeting was lodged (pages 134-138). I considered these to be an accurate though not verbatim record of what took place at the hearing. At the outset Mr Tait made various objections to the proceedings. Mr Collins explained the rationale for Mr Collins doing the disciplinary as well as the investigation. He explained the respondent did not have an HR person. He explained that Mr Kidd would be taking notes but they would not be a verbatim record. The claimant confirmed that he was happy to proceed. Mr Collins then went on to discuss the purpose of the hearing. The claimant interrupted to object to the suggestion that his behaviour was gross misconduct. Mr Collins continued with his opening statement and the claimant again confirmed that he was ready to proceed. The claimant raised the issue of whether Mr McColl's office was to be regarded as on the shop floor or not. Mr Collins confirmed that he believed it was. Mr Tait indicated that he believed certain witness statements were missing namely those of Jack Marr and Paul Moran. He accused Mr Collins of having already made a decision and working backwards. Mr Collins confirmed that he would take statements from Mr Moran and Mr Marr. Mr Collins then went on to outline the three areas which would be dealt with, these were 1. Behaviour in the briefing with Mr McColl, was it appropriate or acceptable? 2. Was the claimant suspended from his position as slitting machine operator? 3. Did he shout abuse at Mr McColl prior to exiting the department? Mr Collins then went through the three matters with the claimant. With regard to the first point the claimant's position was that Mr McColl's statement was "full of lies and was not accurate". He said that he would be putting his objections in writing at a later stage. Mr Collins then went on to move to the second point. The claimant stated that Mr McColl had threatened to suspend him twice and then 10 to 20 seconds later had told him to get out of the office. He accused Mr McColl of telling lies. The statements of Mr Czyba and Mr Harris were put to him. The claimant asked if they had been cross

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5 examined. Mr Collins said no. Mr Collins asked the claimant if he remembers speaking to Mr Harris and the claimant said he didn't. The claimant requested copies of the CCTV of the incident. These had been viewed by Mr Collins. The CCTV did cover the final conversation between the claimant and Mr McColl where it was alleged the claimant had called Mr McColl a specky prick. There was no audio. Mr Collins said that for GDPR reasons they could not provide a copy of the CCTV but that the claimant could come in to the respondent office to view the CCTV. Mr Collins showed the claimant a clip from the CCTV showing him and Mr Harris in conversation. The claimant continued to maintain his position that he had been suspended. With regard to the third point Mr Collins clarified that the incident related to the claimant allegedly calling Mr McColl a specky prick prior to leaving the department. The claimant said that he had said 'is that another trick'. He again accused Mr McColl of telling lies. 10 Mr Collins put Mr Shirkey's statement to the claimant. The claimant asked for him to be cross examined. The claimant again asked for statements to be taken from Jack Marr and Paul Moran. The claimant asked to be shown CCTV footage of the incident and it was agreed that this would be organised and a time and place would be fixed for that to happen. 15 Mr Collins asked the claimant how long he would need to go through the five witness statements which had been handed to him at the beginning of the hearing. The claimant advised that as it had taken Mr Collins five days to forward the investigation notes he would require five days for each statement so would need 25 days. Mr Collins said this was too long and said that five days was agreed. It was agreed that the disciplinary meeting be adjourned so that the claimant could read the witness statements and Mr Collins could interview Mr Marr and Mr Moran. A date and time were agreed for the claimant to view the CCTV footage. 20 25

22. Mr Collins met with Mr Moran and Mr Marr later on 1 June. He took statements from them. Mr Moran's statement was signed by him and is on page 116. Mr Moran confirmed that he saw the claimant speaking to Mr McColl but couldn't make out what was being said. Mr Marr was also interviewed. His statement is on page 119. He also stated that he had seen the claimant speak to Mr McColl but could not hear what they were discussing. 30 35

23. On 2 June Mr Collins wrote to the claimant confirming that the continued adjourned disciplinary meeting would convene on 8 June. The claimant duly attended on 8 June once again accompanied by Susan Robertson his union representative over the telephone. Mr Collins was again accompanied by Mr Ian Kidd who took notes. Mr Kidd's notes were lodged. I considered these to be an accurate though not verbatim record of what took place at the hearing. The meeting began with Mr Tait once again interrupting and raising an issue about his pay. He accused Mr Collins of lying. Mr Collins made an opening statement and the claimant confirmed he was happy to proceed.

24. The claimant submitted a fresh statement which he stated had been taken from Mr Moran. He said that Mr Moran had contacted him and given a new statement freely without fear of retribution or recrimination. At that point Mr Moran had not turned up for several shifts he was due to work with the company. He had not been in touch with the company to advise what his position was although the respondent's management had heard that he had taken up other employment. The statement which the claimant lodged is found on page 117. It also bears to be signed by Mr Moran and is dated 4 June. The meeting states

20 "Mark was in a meeting with Davie, I saw him leave the meeting and he came past me saying he was suspended before leaving the shopfloor. He then returned to collect some belongings from his workstation before beginning to leave the shop floor again but this time he was approached by Davie as he was leaving. I heard Davie ask Mark where he was going and I heard Mark saying that he was suspended and that Davie is playing tricks before proceeding to leave the work place.

25 This is a fair and honest representation of the events that I witnessed on the day in question and is my final comment on the matter."

30 25. Mr Collins then went on to go over the three areas which he had mentioned in the first disciplinary hearing with the claimant. In respect of each area the claimant stated that he had nothing more to add. Mr Collins then

confirmed that he had spoken to Grant Shirkey who had confirmed his statement. The meeting was then closed.

26. Mr Collins wrote to the claimant on 9 June 2020 confirming that he was summarily dismissed for gross misconduct. The letter was lodged (pages 5 145-146). The reasons for dismissal were unauthorised work absence – walking off site. He set out his reasons for this which were basically that he had accepted the evidence of Mr McColl, Mr Czyba and Mr Harris. He also referred to the fact that the claimant had twice been advised after that that he was not suspended. The second reason was stated to be shouting 10 abuse at his line manager. Mr Collins set out his reasons in a number of paragraphs. He noted that Mr Shirkey backed up Mr McColl's version of events. It was noted that the claimant stated he had said something different and that the second statement lodged by Paul Moran appeared to back up the claimant. It was noted however that this was different from 15 his original statement that he heard nothing. Mr Collins preferred the version of events given by Mr McColl and Mr Shirkey. The claimant was advised of his right of appeal.

27. In coming to the decision to dismiss Mr Collins did consider whether or not it would be possible to deal with the matter by way of some sort of warning. 20 He decided this was inappropriate. He accepted as fact that the claimant had been abusive towards Mr McColl. The claimant had not in any way acknowledged that his behaviour was inappropriate. On the contrary he had continued to accuse Mr McColl and others of lying. He had also absented himself from work without good reason. Mr Collins was of the 25 view that the claimant had not been suspended and that he had been told several times by others including Mr Collins himself that he was not suspended yet he had persisted in this assertion. It appeared to Mr McColl that the claimant had no intention of maintaining his part of the employment relationship. His attitude throughout had been obstructive and difficult. Although Mr Collins had hoped at the outset that the matter 30 could have been dealt with otherwise he felt there was little alternative to dismissal given that the claimant's behaviour showed that trust and confidence had entirely broken down.

28. The claimant was advised of his right of appeal. The claimant sent in a letter of appeal dated 16 June 2020. This was lodged (page 147-149). The claimant set out three grounds of appeal. The first was that the respondent's position was contradictory in that it stated in their policy that normally an employee would normally be suspended while the circumstances of any complaint were investigated and that in cases of potential gross misconduct, suspension with pay was essential. He pointed out that it was the respondent's position that he had not been suspended without pay yet they had found him guilty of gross misconduct. The second point was that in his view the office and the shop floor were not one and the same. He also stated that Mr McColl had said to him you will be getting suspended twice and that he was then told to get out of here. He then went on to say that "The fact that the Office & Shop Floor are deemed to be the same to any reasonable and rational minded individual must translate as meaning to vacate the premises". He also referred again to the fact that his key card was suspended shortly after he left. His third point was that he stated "I honestly and sincerely believe if I had not commented on the indisputable fact that Paul Moran and Jack Marr had actually witnessed the events pertaining to Thursday 21st of May 2020 no statements would have been sought from either individual by Management." It was his view that they were in as good a position to hear him as had been Mr McColl and Mr Shirkey and that if they had not heard anything then Mr McColl and Mr Shirkey equally could not have heard him say anything. He went on to confirm that

"This in and of itself made a major contribution towards the Absolute Breakdown Of Mutual Trust & Respect regarding the relationship between Employer and Employee which leaves me with no alternative but to intimate to you my Employer my intent to pursue either a case of Unfair or Constructive Dismissal pertaining to the above-stated matters."

29. On 24 June the respondent's Chief Executive Officer Mr Urquhart wrote to the claimant inviting him to an appeal meeting to take place on 29 June. This letter was lodged (page 150). The claimant was advised of his right to be accompanied. The appeal meeting duly took place on 29 June.

Mr Urquhart was accompanied by Mr G Kelly who took notes. The claimant was not accompanied by his union representative who was unavailable. Mr Kelly's notes were lodged and I considered these to be an accurate though not verbatim record of what took place at the meeting.

5 The claimant began by confirming that he was happy to proceed in the absence of his union official. Mr Urquhart suggested that a union representative or a colleague from the factory could assist however the claimant said this was not necessary and he was happy to proceed alone. There was a discussion regarding the first point in the appeal letter. The

10 claimant said he felt he was suspended when Mr McColl told him to get out. He confirmed he had not been escorted off the premises. He also confirmed he had not received anything in writing from the company. He stated that the letter inviting him to the disciplinary did not mention suspension whereas in actual fact the letter makes it clear that the

15 claimant was not suspended. He also referred to a voicemail which Mr Collins had left over the weekend asking if the claimant was returning to work on the Monday. With regard to the other two points the claimant's position was that Mr McColl had been lying to him throughout the initial meeting on 21 May. He again made reference to the initial failure to

20 interview Mr Marr and Mr Moran. Mr Urquhart asked the claimant how he had received the revised witness statement from Mr Moran. The claimant said that Mr Moran had contacted him personally and given him the statements and that this took place whilst Mr Moran was still an employee of the company. It was his position that the respondent should accept the

25 evidence of the claimant and the revised evidence of Mr Moran. The claimant confirmed these were the only points of appeal being made.

30. Following the appeal Mr Urquhart considered matters. He felt that it was his job to carry out a full re-evaluation of the case. He reviewed the complete history of the case. He had previously arranged for the bundle

30 prepared for the disciplinary hearing to be provided to him. He felt that the claimant's responses had been somewhat short. At various points in the meeting the claimant had simply said refer to his letter. He stated that the claimant accused Mr McColl of lying about just about everything but didn't expand on what he said he was lying about. He felt that the claimant's

35 level of engagement at the appeal had been low. Mr Urquhart had tried

to draw information out of the claimant to get a complete picture. He felt this was unique in his experience. Mr Urquhart decided that he would re-interview all of the witnesses himself. He duly did this. He also looked at the CCTV. He measured the floor of the room in order to get a feel for the distance before standing away from the incident. It was clear to him from the CCTV that Mr Shirkey and Mr McColl were closest to Mr Tait when he is alleged to have made the 'specky prick' comment. Mr Marr and Mr Moran were about eight to 10 metres away. He felt it more likely that Mr Shirkey and Mr McColl had been in a position to hear what was said. He was aware that the claimant was alleging Mr Collins had predetermined the outcome. For this reason Mr Urquhart was careful to go through all of the documentation in the case. He could not find this to be justified.

31. Whilst looking at the CCTV it struck him that the claimant had come back onto the shop floor in his street clothes. He was aware that this was a serious breach of the company's procedures which are insisted upon by the British Institute of Packaging Standards. The respondent are regularly monitored and audited regarding their compliance with these standards and he was disappointed that the claimant had ignored this rule. He viewed the CCTV many times. He confirmed that Mr Harris had spoken to the claimant although he could not hear what was said. He could not hear what was said by the claimant to Mr McColl but it was clear that something had been said. From the body language it appeared to him to be more likely to be a statement along the lines suggested by Mr McColl rather than a question as the claimant had said. He reviewed the two statements provided by Mr Moran. By this time he had tried to get in contact with Mr Moran through Mr Collins but Mr Collins had received zero response. It was mainly to get confirmation from Mr Moran that he wasn't coming back. Mr Urquhart felt from looking at Mr Moran's position relative to the claimant that it would have been highly unlikely that he could have heard what the claimant was saying to Mr McColl. He did not believe the claimant's denial he had said the words claimed. His general view was that sometimes in a workplace cross words are spoken. If they are, then the appropriate step is for everyone to take a breather and back down. He was struck by the fact that the claimant showed absolutely no remorse.

He was adamant that only his view was acceptable. He maintained his position that he was suspended in the teeth of very clear evidence that he was not. Mr Urquhart decided that he could not uphold the claimant's appeal. He found this very frustrating. The respondent as noted above
5 are used to employees who stay with them for a very long time. They invest a considerable amount in staff training.

32. Mr Urquhart wrote to the claimant on 2 July 202 confirming his view. The letter is lengthy extending to six pages (pages 163-169). He goes through his reasoning in depth confirming that he has decided not to uphold the
10 appeal.

33. Since the date of dismissal the claimant has been in receipt of Universal Credit. He was successful in finding new employment in or about mid-January 2021. He works as a driver's mate doing deliveries for a company called ao.com who deliver domestic appliances. The contract is a zero
15 hours contract and he normally works three to four days per week. Prior to obtaining employment the claimant applied for various posts and required to satisfy the Department of Work and Pensions that he was engaged in job search related activity as a condition of obtaining his Universal Credit.

20 **Issues**

34. Whilst the claimant had originally included claims relating to Public Interest Disclosure by the time of the Tribunal the sole claim being made was that of unfair dismissal. The issues were as set out in the joint list of issues agreed between the parties.

25 **Matters arising from the evidence**

35. I found that all of the respondent's witnesses gave their evidence in a patently truthful manner. They answered the questions put to them in cross examination and made concessions as appropriate. I did not consider that any of them were in any way over-egging the pudding. I
30 found their evidence to be credible and reliable.

36. The claimant was an extremely poor witness. He interrupted the respondent's representative on numerous occasions. It was also clear

that he had formed his own view as to what had taken place and was not prepared in any way to engage with anyone who may have a contrary view. I was unclear as to whether he was deliberately lying or had simply convinced himself that matters had proceeded as he stated. An example
5 of this was in relation to the telephone conversation with Mr Collins on Friday 22 May where Mr Collins stated that he had specifically told the claimant that he was not suspended. The claimant's position in evidence was that there had been absolutely no discussion of suspension during this telephone call but that he had only been told about the disciplinary
10 hearing. The claimant maintained this position in cross examination. It was then pointed out that in the written statement which the claimant lodged for the investigation meeting on 25 May at page 104 he states

“For the record I would like to state that I categorically deny confirming such a statement. All that I confirmed on the phone is
15 that Mr McColl had denied saying that he had suspended me, not as you make out that I confirmed I wasn't suspended. I made this quite clear during our conversation but you have twisted these words to suit your agenda.”

There were a number of other matters where I considered that the
20 claimant was a poor historian even in respect of matters which were not particularly relevant to the claim. I was not prepared to accept his evidence as either credible or reliable.

Discussion and decision

37. Section 98 of the Employment Rights Act 1996 provides

25 “(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

30 (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.”

38. In this case the respondent's position was that the reason for the claimant's dismissal was relating to his conduct which is a potentially fair reason for dismissal falling within section 98(2)(b) of the said Act. In this case I was absolutely satisfied that this was the case. It was clear to me that neither Mr Collins nor Mr Urquhart had any other ulterior motive. Both expressed frustration that the claimant appeared to be trying to manufacture a claim and both reached the decision to dismiss reluctantly. I entirely accepted Mr Urquhart's evidence that he found the process extremely frustrating.

39. Having established that there was a potentially fair reason for dismissal I then require to consider the terms of section 98(4). This states

"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

Parties referred me to the well-known case of ***Burchell v British Home Stores Ltd [1978] IRLR 379***. The Tribunal should approach the issues set out in section 98(4) in a conduct based dismissal by looking at three questions. 1. Did the respondent believe that the employee was guilty of the misconduct in question, secondly did the employer have reasonable grounds for that belief, and thirdly had the employer at the point where they formed that belief on those grounds carried out as much investigation as was reasonable in all the circumstances of the case. The question of what is reasonable requires to be determined on the basis of the band of reasonable responses.

40. In this case I was in absolutely no doubt that all three parts of the **Burchell** test were met.

41. I was in absolutely no doubt that the respondent in the form of Mr Collins and Mr Urquhart both believed that the claimant had carried out the misconduct in question. They believed that the claimant had used inappropriate language towards Mr McColl. They also believed that he had absented himself from the workplace without authorisation. I also considered that the respondent had reasonable grounds for forming that belief. They had the statements which had been obtained from the various witnesses. Mr McColl's statement confirmed that the claimant had used inappropriate language to him. This was confirmed by Mr Shirkey. Mr Czyba who had been in the meeting in the office had also confirmed Mr McColl's version of events and in so far as he could this was corroborated by Mr Harris. The fact that the claimant had absented himself from the workplace was not disputed, he had also not returned on Friday 22 May or Monday 25 May. The claimant's position was that he had been suspended. The respondent's managers had ample reason for believing that this explanation was incorrect. Firstly they accepted the evidence of Mr McColl and Mr Czyba that the claimant was not suspended. This was backed up by the fact that Mr Harris had spoken to both individuals immediately afterwards and they had both confirmed that the claimant was not suspended. Mr Harris' evidence was that in fact as soon as he came into the room it was Mr Czyba and not Mr McColl who had first said that the claimant had not been suspended. It was the evidence of Mr Harris that he had confirmed to the claimant that he was not suspended and there was also Mr Collins' own knowledge from his telephone conversation with the claimant on the Friday. In my view the respondent were entirely reasonable in preferring this evidence to the evidence of the claimant and the second statement provided by Mr Moran.

42. With regard to the reasonableness of the investigation I note that the appropriate test is that of the band of reasonable responses. In this case I was entirely satisfied that the investigation fell comfortably within that band. Mr Collins took statements and viewed the CCTV. His initial view was that there was no point in taking a statement from Mr Moran and

Mr Marr since they would not have heard anything. When he did speak to them this was indeed what they confirmed. It was noteworthy that Mr Collins was prepared to adjourn the hearing so as to obtain this additional evidence. I should also say that the obstructive and difficult manner in which the claimant refused to answer questions at the disciplinary meetings does not appear to have in any way caused the respondent's managers to cut short their investigations as it may well have done. They have to be credited for continuing with the investigation in the face of such blatant obstructionism from the claimant.

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10 43. At the end of the day there were no further investigations which the respondent could usefully have carried out. I was entirely satisfied the investigation was within the band of reasonable responses.

15 44. Having decided that the claimant was guilty of the misconduct alleged I then require to decide whether the respondent's response in terms of dismissing the claimant fell within the band of reasonable responses. It appeared to me to be quite clear that it did. I considered Mr Urquhart's words in evidence in relation to workplace arguments and how to treat them to show a considerable amount of common sense. Workplace arguments happen and the appropriate thing to do is for each party to step
20 back and wait for things to cool down. I have no doubt that this was what Mr Collins had in mind at the outset. In this case however the claimant compounded matters by claiming to be suspended when he quite patently was not and being obstructive, difficult and disrespectful in all his subsequent interactions with the company's managers. I note that the
25 claimant did in fact continue some of this behaviour before the Tribunal whilst being cross examined by the respondent's representative. It may be that he does not appreciate the effect of his behaviour on others and that is a matter which he may wish to address. It was clear from the record of the various meetings that throughout the process the claimant was not
30 prepared to engage in any discussion of his own behaviour but wished at all times to point out what he considered to be shortcomings in everyone else. I entirely accepted Mr Collins' evidence that by the end of the process he could see no real alternative to dismissal. The claimant had clearly shown that he was not prepared to be bound by the contract of

employment. The dismissal was entirely fair and the claimant's claim of unfair dismissal falls to be rejected.

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10	Employment Judge:	Ian McFatridge
	Date of Judgment:	01 June 2021
	Date sent to parties:	01 June 2021