



EMPLOYMENT TRIBUNALS

Claimant: Mr Paul Jennings

Respondent: Mellor Bromley Air Conditioning Services Ltd t/a Mellor Bromley Mechanical Services

Heard at: via CVP

On: 16, 17, 18 February 2021

Before: Employment Judge Jeram (sitting alone)

Representation:

Claimant: in person, assisted by Ms Sue Norton (relative)

Respondent: Mr J Fletcher, solicitor

JUDGMENT having been sent to the parties on 22 February 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

JUDGMENT

The Employment Tribunal Judge gave judgment as follows: -

1. The claimant's claim of unfair dismissal is not well founded and is dismissed.

REASONS

1. On 11 May 2020 the claimant presented a claim of unfair dismissal.
2. As discussed at the outset of the hearing, the issues were:
 - a. What was the reason or principal reason for dismissal?
 - b. Was it a potentially fair reason?

- c. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
 - i. there were reasonable grounds for that belief;
 - ii. at the time the belief was formed the respondent had carried out a reasonable investigation;
 - iii. the respondent otherwise acted in a procedurally fair manner;
 - iv. dismissal was within the range of reasonable responses.
 - d. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - e. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
3. I have had regard to a hearing bundle comprising of 247 pages as well as the written and oral evidence of: the claimant, and for the respondent, Simon Frearson, Finance Managing Company Secretary and Andrew Cox, Joint Managing Director.

Background Facts

4. From 10 February 2014 until 2 February 2020 the claimant was employed by the respondent as a Pipe Fitter. The Respondent is a company specialising in the design and installation of mechanical services including heating, cooling, air conditioning, ventilation, water plumbing and sanitation. It is a small company employing approximately 28 employees. The senior management team consists of four directors, Ashley Whitehead, Andrew Cox, Dimian Elouadihi (DE) and Wendy Searle, the first two being managing directors. In addition, the Finance Manager and Company Secretary is a role occupied by Simon Frearson and there is also a Business Development Manager whose role requires him to undertake substantial amounts of travel and time away from the office.
5. On 12 December 2019, Mr Frearson circulated amongst the respondent's staff a revised copy of the employee handbook, which included the disciplinary procedure. The policy listed, as examples of gross misconduct,

Gross insubordination or the use of aggressive behaviour or excessive bad language on Company premises or towards customers/colleagues, or on any occasion whilst performing job duties

Fraud or any other offence committed against the Company. .

Deliberate falsification of records.

6. On 16 December 2019 (DE) sent to employees of the company an e-mail at 10:48, bearing the subject header "*last day before Christmas break, 20 December 2019*". In it, DE reminded staff that whilst there was no formal Christmas function that year, the arrangement was for all to meet at 1.00pm at a local pub for drinks and to 'go from there'. He reminded staff that they were expected to work in the morning but reassured them that they would be paid for a full day.
7. In the six weeks leading prior to Thursday 19 December 2019 the claimant had been attending work at a site in Peterborough known as Hampton Lakes. He drove the journey there and back from his home in Leicester, along the way picking up a junior colleague, JS. No other respondent employee was present on site on Thursday 19 December 2019.
8. On Thursday 19 December 2019 the claimant and JS signed in at the site in Peterborough at 7:30am. They would ordinarily be expected to remain on site from 8am until 4.30pm save for a 30-minute lunch break. On that day, they signed out of the site at 2:00pm; they did not sign back in again that afternoon.
9. That same afternoon, the respondent was notified that it was required to respond to a reported leak; it was imperative for a gas safe engineer, of which the claimant was one, to be on site to investigate and make secure the issue the following morning. All other gas safe operatives were busy and so various people attempted to contact the claimant directly and via JS that afternoon. The Contracts Manager, Carl Whiston, was able to speak to the claimant later that afternoon at approximately 4.30pm who told him that he had, in the moment immediately preceding the taking of his call, the claimant pulled his back exiting the van and that he would not be attending work the next day.
10. The claimant did not attend work the following morning, being Friday 20 December 2019, and reported that he was too ill to attend work.
11. Later that evening the claimant attended the Friary pub, where he met with his colleagues who were continuing with their Christmas celebrations. Events of that evening that were the subject of a later investigation and disciplinary process.
12. In respect of the week ending 22 December 2019, the claimant submitted a timesheet claiming that he worked 9 hours on Thursday 19 December.
13. On 3 January 2020, statements were taken from Zak Shepherd (Project Manager) and Ashley Whitehead about the claimant's conduct on the night of 20 December 2019: each separately described the claimant's verbal and physical conduct in several different pubs. Zak Shepherd described the claimant racially abusing DE.

14. On 3 January the claimant was invited to an investigation meeting to be conducted by Mr Frearson. The basis of the investigation was said to be:
 - a. Failing to be contactable during work hours;
 - b. Attending a company event when on the sick;
 - c. Aggressive behaviour towards a Director at a company event;
 - d. Racial discrimination.

15. The claimant was told that the aim of the investigation was to establish the facts by gathering as much relevant facts and information as possible.

16. On 7 January 2020 Callum Wilkes obtained and forwarded to Mr Frearson an image of the signing in book kept at the Hampton Lakes site, confirming that it indicated that the claimant had signed out at 2pm on Thursday 19 December 2019.

17. The same day, Carl Whiston provided an email statement annexing screen shots from his phone, setting out the various attempts he made, to contact the claimant as well as JS between 14:03 and 16:29 whether by way of calls or by text messages and Whatsapp; he also described attempts made by Leighton Shields and Zak Shephard to assist him in making contact. He stated that he noticed that JS was online on his Whatsapp, so contacted him and asked him to request the claimant call him back. When he did manage to speak to the claimant he had told Carl Wilkes that, in the moments immediately preceding the taking of his call, he had pulled his back when exiting his van and that he would be fine in a few days but unable to attend work the following morning.

18. On 8 January 2020, Leighton Shields provided an email in which he stated that at approximately 10pm, the claimant had, without provocation, approached him and started screaming verbal abuse and threats. He told him for example that he was *'a f*****g d**k, t**t and he's always thought I was a k**b, I think I am the big man, he would f**k me up etc'*. The incident lasted around a minute, LS said, during which time the claimant had lost all self-control. Leighton Shields said that he called the claimant at 8.30am the following day and asked for an explanation for his behaviour, in response to which the claimant had told him that he had no issue with LS, and he apologised. In his email Leighton Shields stated that he accepted the apology, but that he had since learned that the claimant had racially abused 'another colleague' and that had he known this, he would not have done so.

19. On 8 January 2020 Mr Frearson telephoned and confirmed by email his request that the claimant complete his self-certification in respect of his absence on 20 December 2019 and in accordance with the respondent's absence policy for absences for fewer than 7 days. On the claimant's own case, he had rarely if ever been off work sick and so the fact that he had never been asked to produce one before was not therefore evidentially significant.

Investigation Meeting

20. The claimant attended an investigatory meeting on 9 January 2020 with Mr Frearson. It was originally intended that Wendy Searle would act as investigator and Mr Frearson as disciplinary officer, but in the event, Ms Searle suffered a bereavement, leading to unavoidable time away from the office.
21. The claimant maintained to Mr Frearson that in the afternoon of Thursday 19 December 2019, when the respondent was trying to contact him, he was at work, and that whilst he signed out at 2pm, he had forgotten to sign back in again; he said that he did not hear his phone ringing. He rejected the suggestion made by Carl Whiston that when he finally made contact with JS that JS told him that he had arrived home.
22. The claimant told Mr Frearson that he had pulled his back getting out the works van in order to answer the call from Carl Whiston and that he had been to the doctor. He showed Mr Frearson a document which he claimed was a doctor's certificate; it was in fact a repeat prescription, which Mr Frearson photocopied and returned to the claimant. I accept Mr Frearson's evidence that the claimant told him that he had seen a doctor on 20 December 2019.
23. The claimant told Mr Frearson that he felt better having taken tablets; in direct contradiction to his evidence at Tribunal, he told Mr Frearson that his appearance at the Friary pub at a time when his colleagues were already there, was a coincidence.
24. Of his conduct on the evening of 20 December, the claimant said he had no recollection of joking about his bad back but that DE had '*hit [him] first*' and that he would never hit someone first.
25. When asked about whether he had racially abused DE, the claimant said he wasn't '*having that*'.
26. The claimant was asked about his conduct towards LS. He accepted his conduct was '*out of order*' and that he had since apologised to him.
27. On 13 February Callum Wilkes, the Project Engineer, e-mailed Mr Frearson. He forwarded an e-mail from Gary Dickinson (GD) who was permanently on site as a Project Manager for another company called Playfords stating "*Callum following our conversation yesterday, Paul and Jake were on site on 19 December until 2:00 pm and were not on site at all on 20 December*". I do not accept the claimant's contention that that means that the only conversation that took place between Callum Wilkes and GD took place on 13 February. Indeed, the fact that Callum Wilkes forwarded the photocopy of the signing in book on 7 January would suggest that earlier contact had taken place.

28. Mr Frearson chased the claimant for his self-certification sickness form on 15 January. The claimant submitted it the following day. The queries on the certificate were completed by hand by the claimant, so that next to '*period of absence*' he answered '*20 – 21 December 2019*', he completed the '*total days lost*' as being '*1*', he completed the '*reason for absence*' as being '*bad back*' he completed the answer '*did you see a doctor*' as '*yes*' and the in answer to the question '*did you visit a hospital*' as '*no*'. In the box adjacent to the question, '*if you answered yes to either of the above questions, please give the doctor or hospital name and address and treatment or [?] received*' he inserted the name and address of his GP's surgery and gave Meloxicom as the name of his treatment.

29. Finally, and before signing the form, was the following certification:

'I consent to my doctor being approached for information relevant to my absence and agree to be examined by a company nominated doctor if required. I confirm the information given above is correct and understand that a deliberately false claim for sickness benefit is fraudulent and will lead to disciplinary action.'

Invitation to Disciplinary Hearing

30. On 16 January 2020, the claimant was invited to a disciplinary hearing. In the letter of invitation, the claimant was informed that the specific allegations he was to meet amounted to gross misconduct and furthermore, that dismissal was a potential outcome of the process.

31. The specific allegations they were put as follows:

- a. On Thursday 19 December 2020 you were not contactable at the workplace from your Line Manager and Contract Director and ignored telephone calls and messages;
- b. You falsified your timesheet for Thursday 19 December 2020 stating you were at work, when you were not
- c. Falsifying the self-certification sickness form dated 16 January 2020. This was received by us on 16 January 2020 and is currently still under investigation;
- d. On Friday 20 December 2020 you attended a company event when you declared yourself to be on sick leave;
- e. On Friday 20 December you exhibited aggressive and abusive behaviour towards a Director, a Contracts Manager [Carl Whiston] and Project Manager [Zak Shepherd] in separate incidents;
- f. On Friday 20 December you racially abused a Director.

32. The letter enclosed relevant documents, including the witness statements of: Callum Wilkes and Carl Whiston, Zak Shepherd, Ashley Whitehead, Leighton Shields, DE, Sam Greasley (who said that he thought the claimant had called DE a 'black c**t'), Andy Emerson, Rob Greasley, Jake Stanton, Chris Emerson. The statements of Callum Wilkes and Carl Whiston were relevant to allegations were relevant to the claimant's conduct on the night of 20 December 2019. Several were detailed, all were broadly consistent, none contained exculpatory evidence. They described the claimant joking about his miraculous recovery from his back pain, and being involved in a number of aggressive verbal altercations with his colleagues and a physical altercation with DE. The claimant was told that a note-taker would be present.
33. The claimant was invited to notify the respondent in advance of the hearing if he intended to call any witnesses, or adduce any documents, but in the event he did neither. Finally, he was informed of his statutory right to be accompanied by a work colleague or a trade union representative. The claimant was also sent the notes made at the investigation meeting.
34. The claimant submitted a written grievance to Mr Frearson, also on 16 January 2020. In it, the claimant said he felt singled out and bullied and that he had been physically assaulted by 'my boss' DE. He said he had been struck in the face and hit in the face and that the claimant had reacted in defence by pushing him away. He completed his letter by stating '*I would welcome the chance to talk this through with you at a convenient time and place*'.
35. On 20 January 2020, Dr Ahmad wrote to the respondent, in response to enquiries, confirming that the claimant had not been seen at the surgery on 20 December at all, and in response to a question as to whether Meloxicam had been prescribed in respect of injury sustained the previous day, Dr Ahmad responded simply that the Meloxicam was a repeat prescription last issued by the surgery on 20 December 2019.
36. Between 20 and 21 January the claimant corresponded with Mr Frearson on two matters. Firstly, he sought further time to prepare; that request was granted, and the disciplinary hearing was postponed by seven days.
37. Secondly the claimant twice asked to be represented specifically by Sue Norton, although he did not explain why; that request was declined on each occasion, the respondent confirming that his right to be accompanied was limited to his statutory right and as reflected in the company policy.
38. In the meantime, the claimant met and spoke with Zak Shepherd. On 21 January 2020 Zak Shepherd e-mailed Mr Frearson referring to a particular extract of it in which he described events getting heated again, the claimant calling DE '*you black c**t*' leading to Zak grabbing the claimant, telling him it wasn't acceptable and directing him to leave immediately, he continued: '*having spent further time thinking about the situation and replaying things*

*time and time again he cannot hand on heart, one hundred per cent confirm the race abuse allegation as being true. Replaying it over and over in mind I have various seeds of doubt about exactly what was said'. He later clarified that 'he could not hand on heart say the phrase 'black c**t' had been used because it could have been 'bald c**t'.*

Disciplinary Hearing

39. The hearing took place on 29 January 2020 and was conducted, again, by Mr Frearson.

40. The claimant attended the disciplinary hearing unaccompanied. He arrived 15 minutes late and without an explanation or an apology. The claimant produced a six-page written statement:

- a. In his headline response, the claimant wrote that he had been the victim of a physical assault by DE.
- b. In respect of the first allegation i.e. failing to be contactable on Thursday 19 December, the claimant chose to criticise the respondent's call out practice, its directors and the engineers who attended the call out in his stead, who he said made him feel singled out and bullied. He said he hoped the event had highlighted the failings of the respondent's procedures.
- c. In respect of the second allegation, i.e. falsifying timesheet in respect of Thursday 19 December, the claimant said that other fitters had been directed not to work on the morning of Friday 20 December but were still being paid for the full day; he was not paid for the full day so he again, felt singled out.
- d. In respect of the third allegation, i.e. falsifying the self-certificate, the claimant wrote that he did not understand the allegation and sought clarification.
- e. In relation to the attendance at a works event, whilst off sick, the claimant stated that he had received a hostile reception from his colleagues when entering the pub and that whilst he had mocked having back pain, his health issues were confidential and that his privacy had been breached. He stated that he felt better after taking tablets. He said he received a frosty reception on entering the pub and that he had received verbal and aggressive behaviour from individuals who work on the tools and in the office.
- f. Of the last two allegations relating to his conduct on the evening of 20 December, the claimant stated generally that the witnesses may or were likely to be intoxicated and whose evidence was therefore unreliable,

and/or that they were colluding. He described himself as a victim and him entering an atmosphere of hostility coming from the respondent's employees. He at length denied the allegation of racial abuse, stating that the witness had misheard, that he was not a racist and that he had friends and relatives of diverse ethnicity.

- g. The claimant repeatedly claimed that he was the victim of slander, defamation, the subject of a breach of privacy, of verbal abuse, of being singled out and bullied.
41. The claimant was given an opportunity to run through each and every allegation. Limited progress was made. Of the first allegation, the claimant stated he was concerned about a breach of confidentiality. Of the second allegation, and notwithstanding that by now he had read JS's statement which confirmed that they had left work at 2pm on Thursday 19 December 2019 and that he was at home by the time Carl Whiston had managed to contact him, the claimant maintained that he did not leave the site at 2pm and that he had nothing more to say on the matter.
42. Of the third allegation, the claimant disagreed when told of his GP's written confirmation that he had not been seen on 20 December 2019, and said that he had physically entered the surgery and seen the receptionist who 'got hold of a doctor' as a result of which he had spoken to his GP; he said he would contact his GP to obtain clarification.
43. The claimant refused to engage verbally with Mr Frearson in respect of the last three allegations, in relation to events on 20 December 2019, describing the allegation of racial abuse as '*a joke*'. He accepted in his statement he used the word 'c**t' to a Director and accepted before me that was in his view excessive swearing.
44. The claimant said he had problems with money, family and stress.
45. I accept Mr Frearson's evidence that the claimant did not explicitly and substantially disagree with DE's statement at the disciplinary hearing; whilst it is correct to say that there was a subsequent occasion when the claimant expressly informed Wendy Searle that he did not take issue with DE's statement, there is surprisingly little in his written document to Mr Frearson to given a different account, rather he suggested that the intervening 3 weeks provided witnesses with an opportunity to collaborate such that their credibility was 'in question'. Furthermore, the claimant struggled in his evidence to the Tribunal to explain which aspects of the evidence he took specific issue with. Mr Frearson took the view that the claimant was the aggressor, and not DE.
46. Mr Frearson proceeded on the basis that the claimant had a good attendance, a clean disciplinary record and was a competent worker and that he had personal issues. He had also formed the view that the claimant had failed to show any remorse or demonstrate any insight into his behaviour.

47. Mr Frearson concluded that the claimant had impermissibly left work early on Thursday 19 December and was avoiding attempts to contact him that afternoon; he did not believe that the claimant was genuinely unwell on Friday 20 December; he took the view that the claimant had falsely claimed to have seen a doctor to keep up the pretence of being unwell, and that he behaved wholly unacceptably on the evening of 20 December 2019 towards DE and LS and about CW.

48. On 30 January the Claimant was sent an outcome letter of his disciplinary. Mr Frearson's findings were:

"You knew that Carl Whiston and Dimian Elouadihi were trying to contact you in working hours on Thursday 19 December 2020 and you ignored their calls.

You falsified your timesheet for Thursday 19 December stating you worked for 9 hours on that day when you left site at 2:00 pm.

You falsified your self-certification sick form dated 16 January 2020 stating you had seen a doctor on 20 December.

On Friday 20 December you attended a works Christmas do whilst you declared yourself off sick that day.

On Friday 20 December you were abusive and aggressive towards the Director, Contracts Manager and a Project Manager.

In respect of the final allegation, Mr Frearson stated as follows:

Regarding the final allegation of racial abuse, I do not feel there was enough evidence to confirm what had been alleged had been said and so no further action will be taken on the point".

49. Mr Frearson confirmed that the claimant was dismissed with effect from Sunday 2 February 2020. He required the claimant to return the company van, company tools and all other company property by Monday 3 February 2020.

50. The disciplinary outcome letter was received by the claimant and signed for on 31 January.

51. On 4 February the claimant submitted his appeal. He said that the outcome was 'too harsh'. He commented that his grievance against DE had not been acknowledged and that "this is linked to the allegation of me being aggressive". He stood by his self-certification. The claimant said that he had not received an apology for having been accused of being a racist. He asserted that Mr Frearson had not had regard to the contents of his statement and sought, again, to be accompanied by Sue Norton at an appeal hearing.

52. The presence of Sue Norton at the appeal hearing was the subject of significant correspondence between the parties, his only explanation for his request being that he was not a member of a union and that *'a colleague is not impartial'*. The claimant's request was denied.
53. Additional documents were sent to the claimant on 14 February: a copy of the letter from Dr Ahmad and emailed confirmation from a third-party Project Manager, Gary Dickinson (GD), who was based at the Hampton Lakes site, confirming that the claimant had left the premises at 2pm on Thursday 19 December 2019.
54. On 17 February the Claimant's grievance against DE was dismissed in writing by Wendy Searle, she now having by now returned from bereavement leave. The notes of her rationale include the following: *"When Paul delivered the attached letter by hand on 20 January 2020 he apologised to Dimian and to other members of the board for his behaviour. He also acknowledged that Dimian's witness statement was factually true at which point Dimian then refused to talk to Paul as Paul was under investigation"*.
55. The appeal hearing took place on 21 February 2020 before Andy Cox, Joint Managing Director. The claimant attended, unaccompanied.
56. The claimant contended for the first time, at Tribunal, that he had requested notes from the disciplinary hearing and furthermore, that he had either implicitly or explicitly conveyed to Mr Cox that he was not prepared to continue the appeal hearing without them. I reject it because: the claimant was aware at all times that there was a notetaker present; notes were not asked for at any stage before the appeal hearing; the minutes of the appeal hearing do not suggest notes were requested; the claimant made no subsequent complaint about it; the suggestion appeared to be an afterthought made for the first time in evidence when questioned and pressed further for clarity.
57. Also for the first time at Tribunal, the claimant contended that he told Mr Cox that he had left work not at 4.30pm as he told Mr Frearson but somewhere between 3.30-3.45pm, at the explicit direction of Callum Wilkes and furthermore that the respondent should therefore have understood that it had further investigations to undertake. He did not say that to Mr Cox. I prefer the evidence of Mr Cox, which is consistent with the notes of the hearing i.e. that the only context in which Callum Wilkes was mentioned was at the end of the hearing when a discussion arose about whether he had returned company goods. Furthermore, if further evidence is what the claimant wanted to secure, he could have called or at least asked to call CW into the hearing room, since according to the claimant, Calum Wilkes was standing outside the office during the appeal hearing; it was his responsibility to call evidence in his own defence.

58. The Claimant was sent an outcome letter dated 9 March 2020. It addressed each of the matters raised in the claimant's appeal as well as an additional complaint, being that the claimant was singled out and paid sick pay on 20 December 2019, when others were paid a full day's pay at the normal rate. Each ground of appeal was rejected.

Contributory Fault

59. I find that the following events occurred on the balance of probabilities.

60. The claimant absconded from work at 2pm and he did so without good reason. Only the claimant suggests that he was present on site at any stage after 2pm, although he produced no evidence of his presence; his own case was highly inconsistent, suggesting to Mr Frearson twice that he remained on site until 4.30pm but suggesting to Mr Cox as well as the Tribunal that he left at 3.30pm.

61. The claimant ignored calls on the afternoon of Thursday 19 December 2019; he accepts that he was to remain contactable during working hours; I find that the reason he failed to respond to the numerous attempts by various people but in particular Carl Whiston to contact both the claimant and JS between 14:03 and 14:29, via calls, voicemails, text messages and WhatsApp was because he had left work impermissibly.

62. The claimant falsely claimed he was working for 9 hours that day; based on the signing in book and the email from GD, he worked only 6.5 hours, but claimed for 9 hours; on the claimant's own case before the Tribunal, he worked only 8 hours.

63. The claimant provided false information on his sickness self-certification form. I reject as a fanciful explanation given after the event, that when completing the form he understood the question to ask whether he had ever seen a doctor in the past about his condition: the form is asking about one absence only; he understood the importance of completing the form accurately and carefully, since he did so not only at a time when he knew that his absence was under scrutiny but also endorsed the form with a signature acknowledging the consequences of providing inaccurate information; notwithstanding the potential contradiction with that account, the claimant failed to adduce any evidence as he said he would to Mr Frearson that Dr Ahmad was wrong to state that he had not seen a doctor on 20 December.

64. The claimant was abusive and aggressive towards DE on 20 December 2019. I make the following findings on the basis that the evidence of the respondent's witnesses was largely consistent, and on the basis that the claimant did not take any particular issue with the contents of the statement of DE, save to repeat his belief that he was the victim, rather than the aggressor. Before me, he was inconsistent, simultaneously claiming that he could not

recall what happened, and yet maintaining that the witnesses were lying. I find that he was the aggressor, and that he behaved on that evening as follows. He attended the Friary pub at around 6pm knowing that he would meet his colleagues there. Despite his appalling behaviour throughout the night and various attempts to curb his behaviour and encourage him to leave, he nevertheless followed his colleagues to three further public houses. On his arrival at the Friary pub, and on his own account was mocking his account that he had a bad back; he was bent over, clutching his back, laughing and, standing up and pronouncing that he miraculously recovered. He laughed at Ashley Whitehead, DE, and Rob Greasley, saying *'what you going to do, f*****g sack me?'*. He was goading his colleagues and directors.

65. The claimant followed his colleagues to O'Neills bar; and asked DE, when he was going to receive a pay rise; he spoke about Carl Whiston stating *'like I'm going to do anything for that c*** Carl anyway, f*****g ringing me up. . who the f*** does he think he is ringing me. Carl can go suck my c**k. Carl can go suck my f*****g c**k'*. He repeatedly asserted that he did not take orders from Carl Wisdom, and on being addressed by DE, he became aggressive, raised his voice stating *'you lot don't tell me what to do, nobody tells me what to f*****g do'*. He leant into DE, with his forearm, was close to his face, raised his voice further and stated *'you're not my f*****g boss, you don't tell me what to f*****g do'*. DE, tapped him on the cheek and said to the claimant *'whatever you say'* to which the claimant exploded with rage and took a swing at DE, but failed to connect. In response, DE, grabbed the scruff of the claimant's clothes and dragged him to the floor. The claimant's behaviour was to this point highly provocative but also unpredictable and rageful; I am satisfied on the evidence before me that that contact DE, made was consistent with and likely to be an act of self-defence i.e. to prevent the claimant from making any further attempt to attack him. Others intervened and again the claimant was encouraged to go home.

66. Instead the claimant followed his colleagues to the Walkabout pub. Despite being told by DE to disengage the claimant repeatedly asked him whether he still had a job and to tell him *'man to man'*, continuing *'just be honest, you hit me first'* and despite DE, denying he had hit him at all, the claimant continuing to claim DE, had hit him. The claimant lost his temper and started to slap himself hard in the face, shouting *'you hit me first'* and shouting random abuse. As the claimant himself accepts, he called DE *'a bald c**t'*; I make no finding whether he did, or did not, call him *'a black c**t'*. The pub security staff came over to warn that they would be ejected from the premises. The claimant later calmed down and apologised to DE and agrees that what he had done was totally unacceptable. On the claimant's own evidence, his admitted use of the word *'c**t'* would amount to excessive swearing.

67. The claimant followed his colleagues to a fourth bar, The Terrace, at which he conducted himself in the manner set out in the email of Leighton Shields; I reject the claimant's suggestion - that Leighton Shields initiated the call to the claimant in order to proffer him his own apology, which the claimant accepted

- as fanciful and contrary to the evidence provided by Leighton Shields which in all other respects the claimant did not challenge.

68. On Sunday 22 December the claimant sent a text message to DE: it said “*I would phone but don't want to bother you at Christmas, I am sorry and my behaviour was unacceptable*”.

The Law

69. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section 98(2) ERA 1996 or that it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

70. A reason for dismissal ‘is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA.

71. If it is established that the reason for dismissal relates to conduct the next question is whether the employer has acted reasonably in treating that reason as a sufficient reason for dismissal – s98(4) ERA 1996. The burden is neutral.

72. In misconduct cases, the principles in the decision of British Home Stores v Burchell [1978] IRLR 379, EAT apply. Once the employer has shown a valid reason for dismissal the Tribunal there are three questions: the first is whether the employer held a genuine belief that the employee was guilty of the conduct complained of? The second is whether it carried have reasonable grounds for that belief and third, whether it carried out a reasonable investigation. The burden of proving the second and third stages is neutral.

73. The Tribunal must not substitute its own view as to what was the right course of action.

74. The approach to be taken when considering s.98(4) is the band of reasonable responses test, as summarised in Iceland v Frozen Foods Ltd v Jones [1983] I.C.R. 17. The Tribunal must take as the starting point the words of s98(4). It must determine whether in the particular circumstances the decision to dismiss was within the band of reasonable responses which a reasonable employer might have adopted.

75. In considering whether an employer adopted a fair procedure, the range of reasonable responses test applies: Sainsbury plc v Hitt [2003] I.C.R. 111, CA. The fairness of a process which results in dismissal must be assessed overall.

76. The ACAS Code of Practice on Disciplinary and Grievance Procedures provides at paragraph 6 that *'in misconduct cases 'where practicable, different people should carry out the investigation and disciplinary hearing'*.
77. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to the finding of unfair dismissal: section 123(6) ERA
78. The relevant conduct must be culpable or blameworthy and (for the purposes of considering a reduction of the compensatory award) must have actually caused or contributed to the dismissal: Nelson v BBC (No2) [1980] I.C.R. 110, CA.
79. Section 122(2) provides that *'where the tribunal considers that any conduct of the complainant before the dismissal...was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly'*. The tribunal has a wider discretion to reduce the basic award on grounds of any conduct of the employee prior to dismissal. It is not limited to conduct which has caused or contributed to the dismissal.

Discussion and Conclusions

80. I am satisfied that the letter of dismissal reflects the real reason that led Mr Frearson to dismiss the claimant. I accept that he genuinely believed that the claimant had impermissibly absented himself from work on Thursday 19 December, avoided calls from the respondent to avoid detection, falsely complete his timesheet to suggest he was at work all day when he was not, claim to be too unwell to work on Friday 20 December when he was not, claim to have seen his GP when he had not, and been abusive to his colleagues. The respondent has discharged the burden of proving that those matters fall within a potentially fair reason, being conduct.
81. The respondent had reasonable grounds to sustain the belief that the claimant was guilty of an act of misconduct:
- a. The site book, the evidence of JS, and that of GD supported the contention that the claimant had left work at 2pm on Thursday 19 December instead of 4.30pm;
 - b. the evidence of Carl Whiston supported the contention that the respondent had made numerous attempts to call him that afternoon at a time when the claimant should have been responding to calls;
 - c. the time sheet all supported the finding that he claimed he had worked 9 hours work when he had not worked 9 hours;

- d. The account of the claimant, as relayed in Carl Whiston's witness statement, i.e. that the claimant had hurt his back in the moments before he answered the last of a series of calls on the afternoon of Thursday 19 December was so coincidental as to be inherently improbable, as was its timing i.e. on the last day of work before the Christmas break; the claimant's mocking behaviour about his miraculous recovery when he attended the Friary pub; the production of the repeat prescription instead of a self-certification; the denial by Dr Ahmad that the claimant had attended the surgery on Friday 20 December 2019 as the claimant claimed all amount to reasonable grounds to sustain the belief that the claimant was not genuinely unwell on 20 December 2019.
 - e. The same letter from Dr Ahmad, read together with the claimant's assertion that he had been to see his GP on his self-certification form was reasonable grounds for sustaining the belief that he had provided false information on the certificate.
 - f. The broad consistency between the statements of ZS, AW, LS, DE, SG, RG and CE together with the lack of any reasoned challenge by the claimant of those accounts, other than to reframe them so that he was the victim and DE was the aggressor, was reasonable grounds to sustain the belief that the claimant had conducted himself in an aggressive and abusive manner on the evening of 20 December 2019.
82. Turning to the question of whether the respondent had conducted a reasonable investigation, the claimant was unable to say in cross examination what further documents, investigatory steps or interviews might have been conducted; none were self-evident. Although the claimant later suggested Michael Inchley (MI) Ross Murtagh and Jamie Brown might 'possibly' have supported his claim that he was the victim of an attack by DE and not the aggressor, in closing submissions, he confirmed he was advancing only MI as a possible further witness. The claimant had the opportunity to call MI or alternatively ask the respondent to interview MI, but he did neither. Instead, the evidence that the claimant appeared to rely on to suggest that the respondent should have understood, without prompting, to interview MI was an extract from AW's statement in which AW stated *'I think during our time at The Friary, MI might have told Paul he was not happy about his attitude'*. I reject any suggestion that not interviewing MI in such circumstances would cause the investigation to fall below the objective standard of a hypothetical reasonable employer.
83. I am satisfied that it was not 'practicable' for the role of the investigating and disciplinary officers to be separated as the ACAS Code provides. That Mr Frearson act as both investigator and disciplinary officer was not accidental; Ms Searle was required to take unplanned leave in early January 2020 and with Ashley Whitehead and DE as witnesses in the proceedings, the only other person on the senior management team was a business development

manager was often away from the office and therefore unsuitable. The situation was not ideal, but it was reasoned solution to the sudden constraints on management resources faced by the respondent. As Mr Fletcher reminds me s.98(4) ERA requires me to have regard to the size and administrative resources of the respondent and this was a small employer employing only 28 people. Furthermore, quite aside from the rationale, any adverse or prejudicial impact of the decision to combine the roles was not apparent on the facts of this case: the claimant advanced none, the investigation was not involved and at the disciplinary hearing, the claimant all but refused to engage, directing Mr Frearson to simply read his prepared statement instead.

84. The procedure, assessed overall was reasonably fair; the claimant was provided with written confirmation of the allegations he was required to meet; he was provided with all relevant evidence and information at the disciplinary stage, save for the letter from Dr Ahmad and the evidence of GD which were provided before the appeal hearing; he sought further time and was given adequate time to prepare for the disciplinary hearing; he was permitted to address each of the allegations at the disciplinary hearing; he exercised his right to appeal at which point each ground of appeal was separately explored and addressed in the outcome letter.

85. I reject the contention that the process was unfair because Sue Norton was unable to attend the hearings with the claimant; he was informed, repeatedly, of the extent of his legal right to be accompanied and Ms Norton was neither a colleague nor the claimant's trade union representative. The claimant said in response to a direct question, that he wanted Ms Norton to speak for him; I am not persuaded that Ms Norton could sensibly add to events that she was not involved in but most pertinently, it would not avoid the need for the claimant to answer questions himself. In addition, he explained that he wished for her to be present as a note taker – I consider this to be something of an afterthought – despite the various requests for Ms Norton to accompany the claimant, he did not ever give a reason, much less this reason; in any event, the respondent had a notetaker at the disciplinary hearing and yet the claimant did not seek copies of those notes.

86. Finally, on the question of procedural fairness, was the lack of precedence given to the claimant's grievance against DE. In closing, Ms Norton on the claimant's behalf stated that the claimant's case was not that the grievance should have preceded the disciplinary, but that a grievance hearing should have replaced the need for any disciplinary hearing altogether. That, somewhat ambitious, argument ignores the fact that there were serious allegations other than the events of 20 December 2019 that formed the basis of the disciplinary proceedings and the respondent was entitled to seek an account for. Furthermore, the opportunity he sought in his own grievance letter i.e. the opportunity to discuss those events, was precisely the opportunity afforded to him at the subsequent disciplinary hearing and which the claimant declined to engage with. Finally, when a grievance procedure was adopted by the respondent, the claimant told Wendy Searle that he

accepted the factual basis of DE's witness statement. I consider this argument to be little more than a thinly veiled attempt to argue that the respondent should have drawn a veil over the claimant's actions.

87. The findings made by Mr Frearson were objectively capable of amounting to gross misconduct and he acted reasonably in characterising them as so. The examples of gross misconduct in the respondent's disciplinary policy are non-exhaustive, but those examples are plainly consistent with the findings made by Mr Frearson i.e. that the claimant had falsified his timesheet and sickness self-certification form and that he had behaved in a way that was aggressive and used excessive language.

88. The respondent's decision to dismiss the claimant fell within the band of reasonable responses open to a reasonable employer. Mr Frearson had proceeded on the basis that the claimant was a competent worker with a good attendance record and a clean disciplinary record. There were no other mitigating circumstances to take into account on the claimant's own case: he denied he had left work early on 19 December, he claimed to be genuinely unwell on 20 December and he claimed to be the victim of the behaviour complained about that evening. In those circumstances, I am satisfied that applying the test of a hypothetical reasonable employer, the sanction of dismissal fell squarely within the band of reasonable responses.

89. Finally, and insofar as it is necessary for me to find; had I found that the dismissal was unfair, I would have found that the claimant wholly contributed to his own dismissal by reason of his own culpable and blameworthy behaviour and I would have found that it was just and equitable to reduce both his basic and compensatory award to nil.

90. The claimant's claim of unfair is not well founded and is dismissed.

Employment Judge Jeram

Date: 7 June 2021

This was a remote hearing which was consented to by the parties. The form of remote hearing was V: via CVP. A face to face hearing was not held because the parties agreed to the hearing being conducted via videolink.

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