EMPLOYMENT TRIBUNALS

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

"This has been a remote hearing not objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and no-one requested the same."

Claimant		**Respondent**
Mr Andrew Blake-Shute	**v**	**Siemens**

Heard at: Reading (by CVP) **On**: 10 & 11 May 2021

Before: Employment Judge Dobbie

Appearances

For the Claimant: In person
For the Respondent: Priya Nainthy, Solicitor

JUDGMENT

1. The Claimant's claim for unfair dismissal succeeds

REASONS

1. By a claim form presented to the tribunal on 18 May 2020, the Claimant brought a claim of unfair dismissal only.

Findings of fact

2. The Claimant commenced employment with the Respondent on 1 February 2018 as a Technician Level 3 on a permanent contract. The Respondent designs and manufactures superconducting magnets for application in MRI body scanners.

3. The Claimant's contract of employment required him to abide by the Respondent's "Flexit" policy ("the Policy"). His contract directed him to a copy on the intranet. The Claimant was not given a copy at the outset of his

employment and did not have access to it until approximately three months into his employment, when he received his PKI card.

4. The Claimant initially complied with the requirements of the Policy and worked additional flex hours, but after his elderly mother suffered a broken hip, he was unable to comply fully with the Policy because he had caring responsibilities for her which prevented him from working the maximum amount of flex hours.

5. The Respondent's Business Conduct Guidelines require employees to show respect to one another and state that "we do not tolerate discrimination of any form of harassment, retaliation or inappropriate behaviour".

6. The Disciplinary policy referred to "unacceptable behaviour" and "rule breaking" as instances of misconduct, which could be gross misconduct dependent on nature / severity. There was no definition of gross misconduct in this policy, it stated "definition to be provided" under the relevant heading. Gross misconduct is generally understood to be conduct that is so serious that it goes to root of contract or shows disregard for the essence of or continuation of the contract. However, the Policy gave examples of both "general misconduct" and "gross misconduct". Under general misconduct it refers to

    6.1 Using bad language at work
    6.2 Being unprofessional when dealing with others
    6.3 Refusing reasonable instructions

7. Under gross misconduct, it refers to a series of matters, none of which were relevant to the case, for example physical violence and assault (but not threatening behaviour, which falls short of those).

8. In July 2018, the Claimant had a meeting with Tony Osbourne, Manufacturing Manager (who managed the Claimant's immediate Cell Leader, Darren Males) about flex requirements. At that time, the Respondent was requiring relevant employees to work an additional 8 hours per week. The Claimant was asked to raise any issues with flex with his line manager (Mr Males).

9. In September 2018, there was an investigation by Alex Webb in respect of the Claimant not doing full flex requirements. There was a discussion in this meeting about the Claimant's caring responsibility for his then 81-year old mother and the Claimant stated he was willing to flex to best of his ability but may not be able to do full flex due to caring duties. It was agreed that the Claimant should provide evidence by way of a GP's Fit Note of his caring responsibility and inability to work the degree of overtime requested by the Policy. The Claimant submitted a Fit Note dated 12.09.18 for 2 months and further one dated 23.01.19 which ran until 01.04.19.

10. Tony Osbourne later reported that this investigation with Alex Webb had come about because the Claimant had refused to flex (work the required overtime) and that he (the Claimant) had said the flex policy is not legal and

is forced overtime. Due to the nature of the exchange, Tony Osbourne asked Alex Webb (Test Cell leader) to investigate. Mr Webb concluded there was no further case to hear.

11. There was then a further meeting on 25 January 2019 with Tony Osbourne and Claimant about flex hours, at which it was discussed that the Claimant was offering up to one hour a day (5 hours a week) and that the Claimant's caring duties had not changed and his mother's condition was possibly deteriorating. It was noted in the email written by Tony Osbourne about that meeting that "all parties agreed that the hour a day flex would be ok" and there was no timescale put on this.

12. There were no further reported discussions about flex other than informal ones with the Claimant's line manager Darren Males, until 3 October 2019. From April 2019, when the GP's Fit Note expired, to October 2019, there was no need for the Claimant to submit fit notes to justify the reduced flex hours he was available for and Mr Males allowed him flexibility in working flex hours when he was able but not requiring it of him when he was not.

13. Tony Osbourne later described that:

> "In Feb / Mar 2019 Cell Leaders asked everyone to flex. ABS said he would not flex at all, forced overtime. Every time ABS spoke to Darren Males or other work colleagues ABS was vocal how flex is illegal and forced overtime. TO felt DM could make no further progress therefore TO decided to review the situation."

From Mr Osbourne's perspective, this was his recollection of how the meeting on 03.10.19 came about.

14. On 03.10.19, the Claimant attended a meeting to discuss his overtime under the Policy. At that meeting, Tony Osbourne asked the Claimant to abide by the Policy. The meeting got heated between Tony Osbourne and the Claimant. The Claimant felt challenged and became upset and angry.

15. In Tony Osbourne's email to HR that day (at page 129 of the bundle), he reported that the Claimant was aggressive and "pointing his finger directly at me". Tony Osbourne listed various comments at the foot of the email which he says the Claimant had made. He reported that:

> "In his own words he used phrases like: I beg you to discipline me cause I will not flex. I will take you to court and walk all over you. He wants representation by the union. His friends have looked at the policy and it is all illegal. He was not presented the policy before he signed his employment contract."

16. In the email, Tony Osbourne also stated that the Claimant swore on his way out of the room, but did not specify what words were used. In the email, Mr Osbourne did not report that he felt threatened or that the Claimant nearly became physical. He described the Claimant as having a "poisonous attitude" but not that he was or might become violent.

17. On 04.10.19, the Claimant attended an investigation meeting with Mr Hillier and the charges were “general misconduct” “unacceptable behaviour” and “failing to follow reasonable management instruction”. The letter of suspension had been prepared in advance and described that the actions listed constituted potential gross misconduct. The Claimant was suspended that day and continuously thereafter until his dismissal (save when he was on holiday or sickness absence, during which times his suspension was lifted).

18. Following the meeting on 04.10.19, Mr Hillier signed as accurate a note of the Claimant’s interview, which concluded with Mr Hillier walking the Claimant off site. In contrast, in a statement volunteered by Mr Hillier and signed on 09.10.19, he reported that at end of the meeting on 04.10.19, the Claimant said “do you know he lives in the same village as me?” and that this was said in “in a malicious almost threatening way”. From Mr Hillier’s statement, it is not possible to get context of who the Claimant was referring to when he allegedly made this comment.

19. On 07.10.19, Tony Osbourne, Mr Nicholson and Mr Males were interviewed as part of the disciplinary investigation. In Tony Osbourne’s statement, he made no specific allegations about the meeting on 03.10.19 and it appeared that the statement was incomplete. However, Mr Butler confirmed to the tribunal it was the same version he had used in the disciplinary proceedings. There was no mention in that statement of any aggressive behaviour or comments on 03.10.19 or of swearing. In Mr Nicholson’s interview notes, he stated he had overheard the Claimant say to Mr Osbourne “you are a joke” and “no one respects you” and “you want my mum to sit in her own piss and shit”. Mr Nicholson stated that it was clear that the Claimant was being aggressive and that as he left the meeting room, he called Mr Osbourne a “prick”. In Mr Males’ interview, he did not report anything aggressive or untoward, just sarcastic comments from the Claimant and him refusing to flex or read the Policy. Mr Males was physically present in the room and he did not report any aggressive behaviour, finger-pointing etc in this interview.

20. On 07.10.19, Mr Hillier completed his investigatory report alleging:
    20.1 Refusing reasonable instructions from manager
    20.2 Being unprofessional when dealing with others
    20.3 Threatening behaviour
    20.4 Malicious, threatening statements

21. The report recommended formal action, but no specific acts or incidents were listed. Minutes of the investigatory meetings with witnesses were attached to the report. It does not appear that the minutes of the meeting on 03.10.19 were included in the investigatory bundle (the documents at pages 127-128). Those minutes reported that the Claimant had been aggressive and pointed his finger and referred to the Claimant’s mother “sat in her own shit”. They also recorded the Claimant asking Mr Osbourne “are you a man or a mouse?”.

22. On the same day as the investigatory report was completed, 07.10.19, the Claimant was signed off sick with work-related stress to 18.10.19. He also

obtained retrospective Fit Notes covering his inability to flex from April to October 2019.

23. On 08.10.19 – the Claimant raised a grievance against Tony Osbourne for bullying.

24. The grievance process ran from November 2019 to 13.12.19 when Mr Hockey delivered an outcome in which he stated that the meeting on 03.10.19 "involved poor communication by all parties" and he attributed this to being caused by management's failure to discuss flexible working with the Claimant in the previous 9 months or provide advice on the exemption procedures. The grievance also referred to the Claimant's unacceptable behaviour and that he had made the comment "I know where you live" which Hockey described as "completely unacceptable" and "a threat". Mr Hockey recommended mediation of relationships.

25. The Claimant appealed the grievance outcome and in the course of emails with Sarah Selwood from HR, he made a series of comments that were later added to the disciplinary charges. The Claimant sought to raise separate fresh grievances against Mr Hillier and Mr Hockey but was informed that these would be dealt with as part of appeal. The grievance appeal outcome was delivered on 30.01.20. The Respondent upheld one of the Claimant's points and rejected others. The Respondent sent the Claimant all the meeting notes save for one employee who had declined to share his meeting notes.

26. On 6 March 2020, Paul Butler wrote to the Claimant inviting him to attend a disciplinary meeting on 12 March 2020. The charges were described as:

> "During your meeting with Tony Osbourne (03/10/19), where discussions took place about flexing up, your behaviour towards your manager was unacceptable and you refused to follow a reasonable management instruction and, afterwards, you made comments that were threatening towards your manager"
>
> "That there is also a breakdown of mutual trust and confidence, evident from your emails to Sarah Selwood"

27. Appended to the letter were:

The investigation report
Disciplinary policy
The interview notes gathered during the disciplinary investigation in October 2019 (referred to above);
Four sets of interview notes from the grievance appeal (Mr Eachus, Mr Hillier, Mr Males and Mr Nicholson);
Email correspondence with Sarah Selwood and
Business Conduct Guidelines.

28. The letter also invited the Claimant to propose any document or witness statements he wished to be considered.

29. On 9 March 2020, the Claimant sent an email to HR asking for clarity in respect of the allegations. He stated:

> "My behaviour was unacceptable? You need to define unacceptable! I failed to follow reasonable management instructions! What instructions? I made what threats exactly?"

30. The disciplinary meeting was subsequently rearranged to 23 March 2020 at the Claimant's request and in an email sent from Paul Butler to the Claimant on 12 March 2020, Mr Butler stated:

> "The allegation of unacceptable behaviour relates to your alleged aggressive and abusive behaviour towards AO as described in the statements that you have been provided with. The reasonable management instruction is the instruction by AO to comply with the flexit policy on 03/10/19. The alleged threats are your treatment of AO on 03/10/19 as described in the witness statements that you have been provided with, which was allegedly threatening, including your alleged comment to Craig Hillier after the meeting on 03/10/19 "Did you know he [AO] lives in the same village as me, which it is alleged, was said in a threatening way."

31. In this email from Mr Butler, there was no clarification of the specific parts of the emails to Sarah Selwood that were deemed to demonstrate a breach of trust and confidence.

32. The meeting on 23 March 2020 was cancelled at the Claimant's request because his companion could not attend. Thereafter, the Claimant elected to provide written submissions rather than attend a meeting.

33. Paul Butler did not personally interview any of the witnesses (or meet with the Claimant) and he delivered his outcome, summarily dismissing the Claimant, in a letter dated 10 April 2020. In that letter, he copied the original charges and stated:

> "I have decided that gross misconduct did occur. It is therefore my decision that your employment should be terminated without notice for gross misconduct effective 30 March 2020. The reason for your summary dismissal is: A reasonable request from Anthony Osbourne was made on the 3rd October 2019 to adhere to the flexit policy.
>
> - Your reaction to that instruction was unreasonable and threatening.
> - There is evidence that you were loud and aggressive towards Anthony Osbourne. You said "you are a joke" and "no one respects you" to him and finally called him a "prick" when you left the room.
> - You then made a comment to Craig Hillier following your investigation meeting: did you know he [Anthony Osbourne] lives in the same village as me?"
> - The email correspondence to Sarah Selwood were highly inappropriate… for example the email sent on 15 February stated "Your ignorance goes beyond belief", and the words "get a grip" were cited in the same email. The email on the 24th February cited "what utter nonsense from you" and "you have no idea what you are talking about half the time"."

34. Mr Butler then inserted responses to the points made in the Claimant's submission in red, after the relevant comment and cut and pasted that into the outcome letter.

35. The Claimant appealed the grievance outcome on 15 April 2020, and attended an appeal hearing on 23 April 2020. Miss Walters chaired the appeal. She personally interviewed Osbourne, Males, Hockey, Eachus, Hillier and Selwood. However, she confirmed in her live evidence that her task was a review of the decision, not a rehearing. Ms Walters upheld the decision to dismiss the Claimant.

Law

36. Under s.98 ERA it states:

> "(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 (b) that it is either a reason falling within subsection (2) ….
>
> (2) A reason falls within this subsection if it— …
> (b) relates to the conduct of the employee ... ...
>
> (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."

37. In cases of ordinary unfair dismissal, where the employee has at least 2 years' service, the Respondent carries burden of proof in showing the sole or principal reason for dismissal. Then there is a neutral burden on whether the dismissal for that reason was fair or unfair in all the circumstances (Boys and Girls Welfare Society v McDonald [1996] IRLR 129).

38. I reminded myself that, following Sainsbury's Supermarket Ltd v Hitt [2003] IRLR 23 and Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, I am not asked to consider what I might regard as fair, but what a reasonable employer might consider in same circumstances. This is known as the "range of reasonable responses" test.

39. Given that the Respondent relied on conduct as the reason for dismissal, I reminded myself of the guidance in the case of British Home Stores Ltd v Burchell [1978] IRLR 379, which essentially requires a Tribunal to consider each of the three following questions when determining whether the decision to dismiss was within the range of reasonable responses:

    39.1 Did the Respondent genuinely believe the Claimant had committed the misconduct?
    39.2 Was such a belief reasonable?

39.3 Was the belief formed and maintained after a reasonable investigation?

40. However, I reminded myself that the overarching test to apply is that set out in the statute.

Reasons

41. The first matter to determine is the reason for dismissal. I find that the Respondent (through Paul Butler and Lucy Walters) took the decision to dismiss the Claimant, and to uphold the appeal against dismissal, due to the Claimant's behaviour. I can find no evidence of there being an alternative or ulterior reason for dismissal. Therefore, the Respondent discharges its burden of proving that there was a potentially fair reason for dismissal, namely conduct within the meaning of s.98(2) ERA. The next matters to determine are those listed in the Burchell test.

42. I had trouble ascertaining from the Respondent what specific matters were relied upon by the Respondent in reaching the decision to dismiss. The matters detailed in the disciplinary invite letter were very vague. The matters identified in Mr Butler's email to the Clamant of 12 March 2020 were also vague, but gave some specific allegations, including the comment that the Clamant had allegedly said "Do you know he lives in the same village as me?". The matters listed in the letter of dismissal were slightly more detailed/specific, but differed from the matters listed in Mr Butler's witness statement.

43. At paragraphs 10 and 14 of Mr Butler's statement, he referred to various comments/matters that were not identified or specified to the Claimant or included in the letter of dismissal. In Mr Butler's witness statement, he also relied on sources of evidence that did not form part of the disciplinary pack, including witness statements taken during the grievance process (not the appeal, but the first stage of the grievance process). This indicated to me that the disciplinary charges were not adequately clear in the first instance.

44. Further, Paul Butler had included a "failure to follow reasonable instructions" in both the disciplinary invite letter and the outcome letter. However, when asked further about this during the hearing, he stated that the failure to "follow the policy" formed no part of his decision to dismiss. Later in his oral evidence, he stated it formed a small part of the decision to dismiss, but that the main reason for deciding to dismiss the Claimant was the Claimant's behaviour on 03.10.19 and after. In closing argument, the solicitor for the Respondent stated that the "failure to follow reasonable instructions" was a failure to "abide by the policy", by which they meant that if the Claimant wanted an exemption, he should provide fit notes and follow the exemption procedure in the Policy. Again, this was not made clear in the disciplinary charges. Further, I find that it was outside the range of reasonable responses for the Respondent to form the view that the Claimant had refused to do as requested in proving his inability to flex. This is because in Tony Osbourne's initial email to HR about the meeting, he stated that "He [the Claimant] said that he is going on holiday

and will go to the social services to get a letter that states that he is a full time carer and that will make him exempt.". The Claimant did obtain retrospective fit notes after the meeting. Therefore, the Claimant was not refusing to do as requested, he specifically informed Mr Osbourne he would get the certificates. It was therefore not reasonable for the Respondent to take the view that the Claimant had failed / refused to abide by these instructions. Further, part of the grievance outcome had noted that the Claimant had an informal arrangement with his Cell Leader up to 3 October 2019 that he only worked flex overtime when he was able (due to his caring responsibilities). Therefore, it cannot be said that he had failed to follow a prior management instruction to apply for an exemption either, and the Respondent cannot reasonably have believed that he had so failed.

45. I note also that the grievance outcome stated:

> "The handling of the meeting on 3 October 2019 involved poor communication by all parties. During my investigation, I acknowledge that this was a result of the failure to discuss the issue of flex with you over the previous 9 months and provide adequate advice to you about the process and procedures available if you were unable to flex…"

Therefore, I find that to subsequently discipline the Claimant for this alleged failure (a failure to apply for an exemption) and rely on it as part of the decision to dismiss is outside the range of reasonable responses.

46. In respect of the other allegations arising from the meeting on 3 October 2019, I find that the Respondent had a genuine belief and one which was reasonably formed, that the Claimant had exhibited angry behaviour in the meeting, which included finger-pointing, sarcasm, a raised voice and bad language, referring to "shit and piss" and that on the way out of the meeting, he uttered something along the lines of "prick" or "cock". I find that the belief was reasonable because the witness evidence in respect of these matters was reasonably consistent.

47. However, Mr Butler did not appear to have properly considered (or considered at all) the mitigating circumstances that may have led to the Claimant becoming animated and angry during the meeting. This includes the finding of the grievance outcome report (referenced above) that he had not been given adequate information or management guidance; and the fact that the meeting on 3 October was called to require the Claimant to work more flex hours. It was not just a general discussion about his position and to see whether he might be able to work more flex hours, it was designed to question or challenge him on why he was able to work flex on occasion but not at other times and to persuade him to work more flex hours or justify his refusal. This much is clear from the minutes of the interviews with Mr Osbourne and Mr Males as part of the disciplinary appeal and other documents.

48. It was evident from the email sent by Tony Osbourne to HR on same day as the meeting, 03.10.19, that "I called the meeting off as I could see that this was going no where and Andy was adamant that he was not going to follow policy, agree to review the Flex policy or even compromise with at least partial flex." Tony Osbourne would not have talked of needing a compromise with

partial flex if there had been no pressure to work more flex overtime. In the notes of Mr Osbourne's interview as part of the disciplinary appeal, he also referred to the fact that the Claimant "is not flexing up and is refusing to do so" and that "the reason why I requested the meeting [on 03.10.19] is because out of a whole group of people ABS has refused to flex for his own reasons and without consultation … Reason that I called the meeting is that ABS wanted to flex on his own terms. He flex's when he wants to and not when the business needs him to". Mr Males' interview as part of the disciplinary appeal also demonstrate that the meeting on 3 October 2019 was called to request that the Claimant worked more flex hours.

49. Therefore, whilst I accept that there was a discussion about the Claimant following the Policy if he wanted an exemption, I also find that on 03.10.19, Tony Osbourne was requesting that the Claimant work additional "flex" hours under the Policy and that he was irritated with the Claimant relying on his caring duties to avoid flex overtime but then working flex overtime when it suited the Claimant. I find that it is outside the range of reasonable responses for Mr Butler or Miss Walters not to have considered in any real sense that the conversation was confrontational and this partly caused the Claimant to react the way he did. This is not in any way to condone the Claimant's behaviour on 03.10.19, but it was valid information which a reasonable employer would consider when looking at mitigating evidence and considering what sanction was appropriate. A reasonable employer would also have considered that the subject was an emotive one for the Claimant (given his mother's ailing health) and that having previously been told by Darren Males that he did not need to provide any evidence or do anything further to demonstrate his inability to work flex overtime, the meeting may have been frustrating and surprising for the Claimant.

50. I find that Mr Butler's belief that the Claimant had said "I will sort you outside" was not reasonably formed. That is, I find that Mr Butler's belief that the Claimant had made such a comment fell outside the range of reasonable responses. I make this finding because Mr Butler had before him a series of statements (including it would seem, the grievance statements which he did not include in the disciplinary pack) which were often contradictory. Not just one man's version contradicting another's, but one man's account contradicting the same man's earlier account. It can be seen that in the original set of statements and Tony Osbourne's email to HR, the allegations against the Claimant are far milder and they become progressively more serious. The allegations against the Claimant became more serious in the context of the grievance process in which Tony Osbourne was seeking to defend allegations of bullying brought against him by the Claimant. Hence, he might have motive for exaggerating the Claimant's own wrongdoing.

51. Mr Butler did not at any stage in the internal processes appear to seek clarity from those involved as to why their statements had changed. Nor did he explain in his outcome letter how he came to believe some of the statements and not others or rationalise the many contradictions.

52. In evidence to the Tribunal, when asked whether he thought some of the witnesses had exaggerated matters as time went on, he said he had not considered that. I find that Mr Butler did not approach the task of decision maker with an open mind with a view to ascertaining what had actually happened. Rather, he appears to have only relied on evidence that supported the charges and turned a blind eye to inconsistencies in the accounts given by those witnesses and to mitigating evidence.

53. Mr Butler also appears to have turned a blind eye to sources of evidence which might call into question the statements he relied on. For example, he did not include the grievance appeal interview with Mr Hockey in the disciplinary pack or appear to have considered it. In that interview, Mr Hockey reported:

> "I had some suspicion that the two [Darren Males and Tony Osbourne] were a close account of what happened. Had a discussion Roger and Dave, did feel that some bits missed out, so I did feel that there had been a little few bits left out but I came to the conclusion that probably both as bad as each other in the meeting. Andrew probably didn't help the situation and maybe Tony snapped a bit." And "Tony and Darren statements quite close, felt a bit too close, they recall the same and not same information, felt a bit close…"

54. Therefore, there were relevant sources of information that were either: (1) withheld from Mr Butler; or (2) he had them and he disregarded them.

55. If it was the first of these, the investigation was lacking to an extent that it was outside the range of reasonable responses. HR or whomever within the Respondent was responsible for collating the disciplinary pack should have given Mr Butler all relevant statements, not a select few.

56. If it was the second of these (that Mr Butler had the contrary evidence but chose to disregard it) the decision to uphold certain allegations against the Claimant was also outside the range of reasonable responses and demonstrates the more fundamental flaw in the decision-making approach, namely that Mr Butler was looking only for evidence against the Claimant, rather than seeking to undertake a balanced investigation.

57. The Claimant raised various of the inconsistencies / contradictions in the evidence in his written submission to Mr Butler, but Mr Butler dismissed these with comments such as "This point is regarding the grievance hearing not the disciplinary hearing". Therefore, I find that not only did the Respondent fail to follow a fair procedure by failing to include all relevant statements from the grievance process in the disciplinary pack in the first instance, it further refused (through Mr Butler's dismissal of them) to consider them when the Claimant raised them. This was despite the fact that the disciplinary invite letter invited the Claimant him to present any evidence he wished. These are two significant flaws in the process. These alone take the investigatory and disciplinary process outside the range of reasonable responses. Further to this, these flaws further indicate a more fundamental problem which is that the evidence presented was a skewed account, which omitted evidence supportive of the Claimant's case and that the Respondent then sought to disregard it once it was raised by the Claimant. This is indicative of a closed

mindset suggesting Mr Butler undertook the process with a predetermined outcome in mind, namely dismissal.

58. Mr Butler himself in his witness statement at trial, referred to various of the grievance investigation interview minutes as part of the evidence he considered, yet he refused to entertain statements from the same process when they presented evidence which might assist the Claimant or which cast doubt on the validity of the statements in the disciplinary pack. Therefore, Mr Butler saw the relevance of the statements which were detrimental to the Claimant, but refused to take into account statements from the same process which might have been helpful to the Claimant. Had he considered such evidence and weighed it up reasonably, he would have to have explained why he preferred certain witnesses' accounts over others.

59. In respect of the finding that the Claimant said "did you know he [Tony Osbourne] lives in the same village as me?", there was no indication that Paul Butler had considered why there were varying accounts of what had allegedly been said or that he had weighed them up to reach a reasoned decision as to which account was accurate. Further, he did not seem to consider the Claimant's explanation (in his written submission) that he had made a comment about another colleague (not Tony Osbourne) who he was driving home, and that this comment may have been misconstrued. This was on page 301 of the bundle and Paul Butler's comment to that was "Duly Noted", but he did not explain why he disregarded it or why he preferred the accounts of the other witnesses, whose version of events often differed. Therefore, there is no evidence to suggest that Paul Butler upheld this allegation after considering the evidence in a balanced way. Therefore, the Respondent's belief that the Claimant had made this comment was not reasonably formed. Mr Butler's approach to this matter also indicates his closed mindset, and this finding was therefore outside the range of reasonable responses.

60. As to the final allegations, namely the correspondence between the Claimant and Sarah Selwood, these are incontrovertible and therefore I find that the Respondent's belief in respect of them is reasonable and was genuinely held. Further, there was no need for any real investigation in respect of them because they were recorded in the email chain from which the context was clear. These comments were described as "highly inappropriate" and were in themselves rude, but not extremely offensive.

61. Taking all the above into account therefore, I find that whilst it was reasonable to uphold certain of the allegations (as identified above) the process followed, and the substantive decision was unfair and outside the range of reasonable responses. In respect of the matters which the Respondent did have a reasonable belief in, they are not adequately serious to support a decision of dismissal for gross misconduct. Such a finding was outside the range of reasonable responses and was too harsh.

62. In respect of the Claimant's anger and behaviour in the meeting of 3 October 2019, this was misconduct, but cannot reasonably have been considered to be gross misconduct. His swearing after the meeting was similarly serious in

the context of a workplace such as the Claimant's. In his evidence, the Claimant explained that he would regularly be called names such as "shithead" "pisshead", "perv" and "fossil" as a matter of banter. This was not contradicted / disputed. I noted that in the witness statements in the internal process there was reference to banter also. Therefore, in context, his language and behaviour was not sufficiently serious to reasonably be regarded as gross misconduct.

63. In respect of the communications with Sarah Selwood, the Claimant's comments were less offensive still, but nonetheless were culpable misconduct. Therefore, even taken together, the matters cannot reasonably have been regarded as gross misconduct and the decision to dismiss was therefore outside the range of reasonable responses open to a reasonable employer.

64. On balance therefore, I find that whilst there will be a substantial reduction on damages as a result of the Claimant's conduct contributing towards the dismissal (to be assessed at a remedy hearing) the decision itself was unfair and outside the range of reasonable responses.

_____
Employment Judge Dobbie

Date: ……27th May 2021

Sent to the parties on: ...7th June 2021...
THY
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For the Tribunal Office