



examined. There was a substantial bundle, and I considered such pages as I was taken to therein and also considered the closing submissions of both parties.

3. The Respondent is a well-known retail chain that has outlets across the country. They are a large employer and according to their Response Form employ 86,700 staff as at that date. The matters which are the subject of this claim took place at Tamworth and the Claimant had been employed from September 2011 and had progressed into his role of “Team Manager Operations and Visual Merchandising”. The Claimant had a clean disciplinary record before the matters which are the subject of this case.
4. The Claimant provided a lot of background information in which he sought to provide context. It is clear that he undertook a number of different roles in his career with the Respondent which started in 2011 and also that he did make some progression through the ranks. His performance in the past has not been questioned to any great extent and I also formed the view that he was a diligent and interested employee. The Claimant was also involved in the John Lewis Shops Forum.
5. The structure of the Tamworth store was with a Branch Manager at the head into which two Department managers Ms Flack and Mr Burgess reported. They in turn had four Managers report into them including the Claimant. At the time of the matters complained of a new Branch Manager was about to start.
6. There is a further demarcation between the “Selling Team” and the “Operations Team”. The Claimant was part of the Operations team and led that team along with Ms Flaxington.
7. The Claimant described a situation in early 2019 in which there was additional pressure brought to bear because of a long-term sickness absence of one of the other managers and also other members of staff which he and his team had to cover. He expressed the view that the Department Managers would call him to account for matters which were really not his fault on account of him having to gift staff to other departments from time to time to make up shortfalls.
8. The Claimant took a period of time off on sickness absence on account of the anxiety he had experienced, and I have seen emails with Ms Flack which seem to be a sensible dialogue in relation to him coming back into the workplace.
9. On 4 March, the Claimant received an email which indicated that the Operations Department would be losing 4 Full Time Equivalents. The Claimant believed that these had deliberately not been spoken about at a meeting earlier that day in order to stymie any debate or discussion on those proposed changes. The Claimant describes that this caused him great anxiety and worry on account of the workload demands that he perceived would be required going forward and the fact that he perceived the changes as going back on previous promises.

10. The Claimant states that he was not feeling well the following morning but notwithstanding that still decided to go in. He provides a number of reasons as to why he felt he needed to go in, but it is implicit that he must have felt well enough to do so. The Claimant had a team meeting on arrival and explained the staffing reductions.
11. In his statement he states, ***“Although a rather small point in amongst the bulk of what I was saying, I did express a view that I didn’t know that I could trust (Ms Flack and Mr Burgess) when they were making this decision behind closed doors...”***. This was specifically one of the points that the Claimant was disciplined for, and he seeks to minimise his actions even at this Tribunal. I do not share the view that it is “a small point”. If he has an issue with a management decision, then he needs to raise that upwards as opposed to airing his grievances with those who he manages. That would be the responsible way to act. In addition, whatever his view about whether he felt he could trust the Department Managers, it was not appropriate for him to share that view with his Team thereby potentially spreading discontent and a jaundiced view throughout the staff. By saying that he could not trust them which on any view was an attack on their integrity, was a view he was entitled to hold for himself but not to communicate down the chain. It was a substantial error of judgment for him to do so.
12. Word of the discussion found its way back to Ms Flack and Mr Burgess and there is a meeting that afternoon. There are differing accounts of that meeting within the bundle. The Claimant’s view of the meeting is that Ms Flack and Mr Burgess were hostile and intimidatory. He describes it as more of a “argument than a conversation” and that he felt “frustrated and even angry” at their failure to listen to him. The Claimant suggests that he was emotional but not aggressive. The Claimant agreed that it was not a professional conversation but in effect that was the responsibility of all three individuals.
13. The account of Mr Burgess which was considered at the disciplinary hearing was that the Claimant stated that he had no respect for either Mr Burgess or Ms Flack as managers and that his voice, manner, and body language was abusive and threatening and that Ms Flack in particular was very upset by it. Ms Flack stated that in the 27 years she had worked for the Respondent she had never felt as bad leaving work as she did on that day and that the tone and manner she was spoken to fell far below the Respondent’s published standards.
14. The Claimant was suspended from his employment by a letter dated 13 March 2020 until further notice pending an investigation into issues of misconduct (87). Preliminary witness statements had already been gathered from Chantelle Bennett, Dave Burgess and Emma Flack (p.68-86).
15. Rebecca Smith was charged with making further investigations and she made enquiries of those named in the previous paragraph, Elizabeth

Flaxington, Greg Day, Karen Williams. The notes of those investigations are at pages 93-173.

16. On 8 April 2020 Rebecca Smith met with the Claimant about the matters under investigation (174-217) and the meeting lasted for 1 hour 19 minutes. In addition, various messages were gathered.
17. The various documents outlined above were collated and passed over to Ms Dentith-Davies and she considered that there was a case to be answered in a disciplinary meeting and she set one up for 29 April 2020. The allegations were of potential serious misconduct which were:
  - a) Inappropriate aggressive behaviour
  - b) Engaging in persistent disruptive behaviour in the Claimant's role.
18. The Claimant was sent the full set of statements and interview notes and was reminded of his statutory right to be accompanied and also provided with contact numbers for Partner Support and Personnel Policy and Advice team. He was also given a copy of the Respondent's disciplinary policy and informed that there was a range of disciplinary actions that could be invoked up to summary dismissal (218-219).
19. The disciplinary meeting took place on the scheduled date and lasted from 10 in the morning until 4.50 in the afternoon with breaks as necessary, including a lengthy one from around 2.30 to 4.15. The Claimant was accompanied by Neil Smith.
20. The broad allegations are set out above, but the main focus of the investigation was:
  - a) Alleged aggressive behaviour during a meeting on 5 March 2020 with Emma Flack who was the Claimant's line manager and Dave Burgess. Both of those individuals were Deputy Managers.
  - b) Alleged inappropriate behaviour in that the Claimant discussed with his team his views of Ms Flack and Mr Burgess' management in a meeting with the Claimant's team on 5 March 2020.
  - c) The sending of a What's App message to the Claimant's team questioning Ms Flack and Mr Burgess' management decisions. That message read:

***“Sorry if I pissed any of you off this week. I'm an emotional person and my emotions are shown in a different way to how some of you show yours. Regardless of my personal future road map, I don't have the kind of person personally (sic) that allows me turn off and not give a shit, and my other half is still a Tamworth partner and has no plans to go elsewhere so I am still emotionally invested in what that means for her. If what Emma and Dave are telling me is true then my thoughts and feelings on 1) their performance and local decision making 2) some parts of our collective performances as a leadership team and 3) our strategic direction on how to progress*”**

***the branch differs very much to the rest of you. I'm going to have to think on what that means going forwards.***

21. The disciplinary meeting took place by video conference with the consent of both parties. I have considered the notes of the meeting carefully and also considered the evidence from both parties in relation to the same. I am satisfied that the notes of the meeting offer a fair reflection of what was discussed. Ms Dentith-Davies applied an inquisitorial approach, and I am satisfied the Claimant was fully aware of the allegations that he had to meet and was given every opportunity to take the discussion to any areas that he wanted to have covered. I am satisfied that the Claimant had every opportunity to put forward his Response to the allegations made and also to place matters in context.
22. Within the course of the meeting the Claimant disclosed that he had been suffering from an underlying health condition resulting in a stress related condition and Ms Dentith Davies took advice from HR as to how this should be factored into any decision-making process. HR suggested that an OH referral may assist in order to establish whether any of the Claimant's behaviours had been caused or impacted upon the behaviour that had been flagged up as a concern.
23. The Claimant took time to consider this proposal and spoke with the HR team about it and was ultimately content for the referral to be made. The referral was made the following day and an assessment was completed over the telephone. Within the report that followed the consultation the question is posed ***"Is there a medical condition which affects attendance or performance?"*** The response was as follows: ***"Nick reports he is fit and well and does not have any underlying medical conditions which may impact his performance or attendance. However, in 2017 nick did experience heightened anxiety due to work pressures and he did have a course of cognitive behavioural therapy for a problem-solving therapy aimed at helping him to achieve goals which appeared to significantly help him at work. Part of this treatment is to agree a relapse prevention plan which Nick is able to refer to when needed. Nick cares passionately about our business and at times feels frustrated and aggrieved at what he perceives to be unfair treatment or decision making and this may be communicated or challenged in the direct but honest way which may at times not be in line with partnership behaviours."***
24. The disciplinary meeting was reconvened on 2 May where an opportunity was given for the Claimant to raise any issues arising from the medical information gleaned. The Claimant had little to add but reiterated that he considered that mediation between herself and Ms Flack would be useful so that both parties could ***"understand how we both reacted to the situation."***
25. Having adjourned the meeting for a short time Ms Dentith Davies announced her conclusion that the Claimant was guilty of serious misconduct through

inappropriate aggressive behaviour and also that the Claimant was persistently disruptive by his conveyance of his feelings of distrust and lack of respect for his managers. She concluded that it fell foul of the standards of behaviour required of a John Lewis Partner and that he had not afforded the appropriate level of dignity and respect to others. It is clear to me that the Respondent had high expectations in that regard and those expectations were known by the Claimant (p.236) and that it was clear that disciplinary proceedings would be considered for any breach of them.

26. The Claimant was summarily dismissed by a letter dated 2 May and within that letter the Claimant was given the opportunity to appeal which he duly did on 9 May. He categorised six heads of appeal as follows:
  - a) Lack of evidentiary support
  - b) Inconsistent expectation used as a reason for dismissal
  - c) Failure to review points raised by myself
  - d) Insufficient consideration to mental health and emotional well-being
  - e) Unreasonable severity of outcome
  - f) Investigation failures and biases.
27. Mrs Mihell was assigned the appeal and she was a manager in the Appeals Office which resides in the "Independent Side" which I was told was a department tasked with keeping the spirit of the Partnership alive and is independent of management. Mrs Mihell's sole role is to hear appeals against grievances and disciplinary matters. She had worked in the role for 8 years and told me that she had heard just under 250 appeals and had upheld fifteen appeals against dismissals which had led to reinstatement.
28. Mrs Mihell was supplied with a comprehensive set of documents and considered those before the meeting but did not speak to anybody about the documents she considered. The appeal hearing was set to take place on 2 June and did so by telephone. I have considered the notes of the meeting and the testimony regarding the meeting, and I am satisfied that the claimant had every opportunity to put forward his reasons why the dismissal should be revoked.
29. The hearing lasted for almost two and a half hours and much of this time was spent in ensuring the context of the events that gave rise to the disciplinary were made clear. Mrs Mihell confirmed that the issue about Rule 71 was not raised with her and had it been so raised she would have raised it with the necessary authority. Rule 71 is a provision in the Partnership Constitution that Partners who have been on the Respondent's democratic bodies can only be dismissed with eth specific Agreement of the President of the Partnership Council. After the appeal hearing Mrs Mihell made further enquiries of Ms Dentith-Davies and went through a substantial checklist to try and ensure that all points were covered.

30. On 8 June Mrs Mihell sent through a letter of outcome in which she dismissed the Claimant's appeal. That letter is a detailed document which sets out the background to the conduct which gave rise to the disciplinary matters in the first place and then sets out her findings of fact on each of the appeal points. She concludes that she could not find any grounds by which she could reasonably intervene or change the original decision to dismiss. She considered that the necessary Partnership policies had been followed and that there did not appear to be any inconsistency of treatment. There is no need to repeat the precise findings here save to comment that each of the areas raised by the claimant are dealt with and dismissed.
31. I should record that Mrs Mihell was barely challenged in cross examination and I considered her to be a very clear and cogent witness who approached matters in a straightforward and professional manner. I am quite sure that had Mrs Mihell detected any failings in the previous process she would have had no hesitation in investigating them thoroughly.

## **32. THE LAW**

### **Unfair dismissal (s.94/98 ERA 1996)**

33. Pursuant to s.94 Employment Rights Act 1996 ('ERA 1996') an employee has the right not to be unfairly dismissed by their employer. Whether or not an employee has been unfairly dismissed is determined in accordance with s.98 ERA 1996:

***(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) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.***

***(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.***

34. It is for the Respondent to prove on the balance of probabilities, the sole or principal reason for dismissal. In considering fairness the burden is neutral.
35. In conduct cases, when considering whether or not the dismissal was reasonable the Tribunal must have regard to whether, at the time of dismissal, the employer:
  - 4.1. genuinely believed that the employee was guilty of misconduct;
  - 4.2. had reasonable grounds on which to base that belief;
  - 4.3. at the time it had carried out as much investigation as was reasonable in the circumstances (*British Home Stores Ltd v Burchell* [1978] IRLR 379).
36. The Tribunal must be careful not to substitute its view for that of the employer and should consider instead whether the employer acted within the range of responses available to a reasonable employer when considering both whether dismissal was reasonable and all other aspects of fairness, for example whether the investigation was reasonable (*Sainsbury PLC v Hitt* [2003] ICR 111).
37. When considering the procedure followed by the respondent, the Tribunal's task is to consider the fairness of the whole of the disciplinary process. Any deficiencies in the process (including at appeal stage) will be considered as part of the determination of whether the overall process was fair (*OCS Group Ltd v Taylor* [2006] ICR 1602).

**38. Findings**

The first matter to consider is the reason for dismissal. The Respondent asserts that it was for a conduct reason. The Claimant in his Claim Form sought a redundancy payment, but it was clear that his view was that this is a sum he would have received had he remained employed as the store shut later in the year and so was really a matter of remedy. The Claimant did not push for any alternative reason during the course of the hearing, and I am satisfied on the balance of probabilities that conduct was the reason for the dismissal.

39. I am satisfied that the Respondent acted reasonably by commencing an investigation into the conduct of the Claimant having read carefully the initial statements taken which are set out at length within the bundle. I am also satisfied that having gathered that evidence it was within a reasonable band of responses to suspend the Claimant having had the statements from Mr Burgess and Ms Flack. This was particularly so taking into account the nature of the allegations which would have the capacity to be potentially disruptive in the workplace if the Claimant's actions were as alleged.
40. From a procedural perspective the Respondent has adequately complied with their obligations and have provided the Claimant with the evidence of his alleged wrong-doing in sufficient time for him to prepare his response, allowed him to be accompanied according to the statute and having considered the transcripts of the various meetings – investigatory, disciplinary



and appeal, I am satisfied that the Claimant was given every opportunity to be heard and to have his points considered.

41. I have considered the investigation and consider the same to have been thoroughly conducted. As is very often the case those that dealt with the matter both at first instance and then on appeal had to choose between very differing accounts. There was sufficient evidence provided to demonstrate that the Claimant was aggressive at the meeting and the decision that he was, is a decision that a reasonable decision maker could come to. Another person may have come to a different conclusion on the same evidence but that does not assist the Claimant in this unfair dismissal claim.
42. The Claimant asserts that Ms Flack and Mr Burgess colluded together in order to bring about his demise. I have considered their statements and do not accept that there was any further investigation that could have been done on that matter. If they had colluded they would have denied it even if asked and their statements place their own perspective on matters which is not identical in terms although certainly both broadly condemnatory of the Claimant. It does not matter whether or not the Claimant's words to his Team actually caused dissent in the ranks or others to distrust the more senior managers. The point is that it was highly inappropriate of the Claimant to speak to junior staff about senior staff in that way when there were other appropriate avenues he could have taken e.g., raising a formal grievance, taking it up with a more senior manager, going to HR.
43. The Claimant even on his own account demonstrates that he was prepared to undermine those above him inappropriately by casting doubt upon their integrity by telling his team that he did not feel he could trust them. The What's App message on its own is not, in my view, so serious but when placing it in context with the previous conversation is certainly a furtherance of his expression that Ms Flack and Mr Burgess are not to be trusted.
44. I consider that there was adequate evidence for Ms Dentith-Davies to come to the conclusion she did and that she did hold a genuine belief on reasonable grounds after a reasonable investigation that the Claimant had acted aggressively and had engaged in disruptive behaviour. The Claimant takes issue with the word persistent which was used and found by the Respondent. His behaviour was persistent but only over the day in question. I take the view that the addition of the word persistent really adds nothing to the charges which are clearly time limited to that day.
45. I did not form the view that there was any bias on the part of Ms Dentith-Davies on the basis of the evidence before me. Ms Mihell's appeal was thorough and professional and again was without any suggestion of bias / unreasonable conduct towards the Claimant.
46. The Claimant has also raised the issue of his mental health and how that may have affected the situation. It is clear to me that the Respondent did take this point seriously and adjourned the disciplinary hearing for further enquiries into it. I consider this step to be indicative of the care taken by Ms Dentith-Davies to consider both sides representations and to try and come to

what she considered was a fair outcome. The information she got from Occupational Health was used appropriately in forming her final decision.

47. It is not for me to substitute my own view for that of the employer. That is the case when considering whether or not there was a genuine belief or when considering the appropriate sanction.
48. I have already expressed the view that matters were such that the decision to investigate fell within a band of reasonable responses and I also consider that the decision to find the Claimant culpable for the allegation also fell within the same band. I am quite satisfied that this Respondent set their standards of conduct at an appropriate level and that taking into account the upset experienced in particular by Ms Flack and taking into account the undermining of senior management by the Claimant to junior staff it was inevitable that some form of disciplinary action would be taken. The Claimant's behaviour on the day in question as found by the Respondent fell well below that which was acceptable
49. Whilst I do not think that every employer would have dismissed for these offences and some may have considered a final warning coupled with mediation in order to move forward an appropriate sanction, I am satisfied that the sanction falls within a band of responses open to the Respondent taking into account all the circumstances of the case which includes the seriousness of the findings and the attitude of the Claimant who never really accepted any genuine culpability for his actions and sought to minimise them as he did at paragraph 57 of his statement.
50. The Claimant raised at this hearing the fact that he was a member of the Democracy and so under Rule 71 of the Constitution he should not have been dismissed unless agreed by the President of the Partnership Council (524). That point was never raised by him during his disciplinary or at his appeal. In those circumstances it cannot render the dismissal unfair if the Claimant did not raise the point. In any event the Claimant has no evidence that would be supportive of any different decision being made even if that had have been undertaken.
51. In all the circumstances whilst I understand the worries and concerns the Claimant has about his treatment on examination the dismissal was a fair one pursuant to the Employment Rights Act 1996 and his claim is dismissed.

**Signed by: Employment Judge Self**

**Signed on: 27 June 2021**