EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111842/2019

Final Hearing held remotely at Glasgow on 4, 5 and 6 May 2021

Deliberations 7 and 10 May 2021

Employment Judge Hoey

Mr Steven Smith	**Claimant** **Represented by:** **Ms Blair** **(Consultant)**
Teleperformance Limited	**Respondent** **Represented by:** **Mr Gray** **(HR Manager)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1 The Tribunal finds that the claimant's claim of unfair dismissal is well founded.

2 The respondent shall pay to the claimant the following by way of compensation in respect of the claim for unfair dismissal:

a. A basic award in the sum of **£840**, calculated as follows: 2 x £420; and

b. A compensatory award in the sum of **£3,333.60**, comprising 7 week's net pay (7 x £354 which is £2,478) plus £300 for loss of statutory rights (which

is £2,778) plus 20% due to the respondent's unreasonable failure to follow the ACAS Code (£555.60).

The recoupment regulations do not apply to the unfair dismissal award in this case.

3 The Tribunal finds that the claimant's claim for notice pay/wrongful dismissal is well founded and awards the claimant damages in the net sum of **£1,008** calculated as follows: with damages in respect of his 2 week notice period being £840 plus an uplift of 20% in respect of the respondent's unreasonable failure to follow the ACAS Code of Practice (£168).

REASONS

1. The claimant had initially raised claims for unlawful discrimination, unfair dismissal and wrongful dismissal. Before this hearing, however, the only claims that had not been withdrawn (and dismissed) were claims for unfair dismissal and wrongful dismissal/notice pay. Those were the claims the claimant confirmed were proceeding.

2. The hearing was conducted remotely via CVP with the claimant's agent, the claimant and the respondent's agent attending the entire hearing, with witnesses attending as necessary, all being able to be seen and heard, as well as being able themselves to see and hear. There were a number of breaks taken during the evidence to ensure the parties were able to put all relevant questions to the witnesses. While there were some connection issues, these were readily overcome. The Tribunal was satisfied that the hearing had been conducted in a fair and appropriate manner, with the practice direction on remote hearings being followed, such that a decision could be made on the basis of the evidence led.

3. The Hearing was initially to be an in person hearing but the parties applied for this to be converted to a remote hearing. It was also agreed by the parties that the hearing would proceed before an Employment Judge sitting alone.

4. We agreed a timetable for the hearing of evidence and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality. I explained to both parties, that it was necessary to ensure evidence was led in respect of each matter upon which judgment was sought since the Tribunal is only able to make a decision based on the evidence that is before it.

5. Both parties worked together to ensure relevant evidence was led and I assisted the parties where I could, by asking a relevant question if that was necessary.

6. At the conclusion of the hearing both parties confirmed that they had led all the evidence they wished and believed that they had been given a fair opportunity to do so.

7. We discussed the issues that required to be determined in light of the claims that are proceeding and it was agreed that the issues were:

Unfair dismissal

8. The respondent accepts that the claimant was dismissed and that the reason was for matters relating to conduct.

9. The first issue what was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

10. The next issue is, 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 decide whether:

    a. there were reasonable grounds for that belief;

b. at the time the belief was formed the respondent had carried out a reasonable investigation;

c. the respondent otherwise acted in a procedurally fair manner;

d. dismissal was within the range of reasonable responses.

Remedy for unfair dismissal

11. The claimant does not wish to be reinstated or re-engaged and seeks compensation only. The parties had agreed losses on a full liability basis (since the claimant had secured a comparable job 9 weeks after his dismissal). The relevant issues with regard to remedy were therefore whether the claimant contributed to his dismissal by reason of conduct and to what extent, if any compensation should be reduced. The respondent did not argue that dismissal would have been inevitable (in terms of **Polkey**). The different tests in terms of reduction of the basic and compensatory awards would need to be considered.

12. The claimant also argued that the respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures by reason of a flawed investigation. Was this correct and if so, by what proportion, if any, is it just and equitable to increase the award (up to 25%)?

Wrongful dismissal / Notice pay

13. The parties agreed that the claimant's notice was 3 weeks but in fact given the claimant had 2 complete years service (i.e. less than 3), his notice period was 2 weeks. The issue is whether or not the claimant was, as a matter of fact from the evidence led before the Tribunal, guilty of gross misconduct, in other words did the claimant do something so serious that the respondent was entitled to dismiss without notice?

Evidence

14. The parties had agreed a bundle of some 150 pages to which a further page was added during the course of the hearing, with the consent of both parties (an email sent from one of the witnesses, just prior to the hearing), which was allowed to be added. As explained to the parties, only the documents referred to in evidence would be considered by the Tribunal, the parties having worked together to finalise the agreed bundle.

15. The Tribunal heard from the investigation officer (Ms Marshall), the dismissing officer (Mr Stevenson) and the appeal officer (Mr France). The respondent had also intended to lead one of the witnesses to the incident in question but for personal reasons she was unable to attend and the respondent's agent indicated that he was content proceeding without any further witnesses. The Tribunal also heard from the claimant. The witnesses gave oral evidence.

16. The parties had reached agreement on the value of the claim in the event that the claimant was 100% successful thereby avoiding the need for evidence on that matter (with the issues being what, if any, reductions should be made to the full award in terms of the legal tests).

17. As neither party was legally represented additional breaks were afforded to ensure that both parties had sufficient time to ensure relevant questions were put to the witnesses and all the material that each party wished to put before the Tribunal was done so. Both parties confirmed at the conclusion of the Hearing that they had been afforded such an opportunity and believed that they had received a fair hearing.

Facts

18. The Tribunal is able to make the following findings of fact which is has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what position was more likely than not to be the case.

Background

19. The respondent is a large outsourced partner contact centre. It supports large clients, including energy companies. It is a large business with around 10,000 staff in the UK. The business is supported by a human resources function. The site at which the claimant worked (which was based in Airdrie) had around 3 HR business partners assigned to it and had over 850 staff based there.

20. The claimant was employed as a customer services adviser and was part of a team with around 15 advisers. Staff employed by the respondent were grouped into teams. Each team was managed by a team manager who in turn reported to an assistant contact centre manager.

21. The claimant's employment lasted from 1 November 2016 until his dismissal on 7 October 2019. He had entered into a contract of employment with the respondent. That contract stated that in the event that the respondent wished to terminate the employment relationship, it required to provide 1 week for each completed year of service (up to a maximum of 12 weeks) by way of notice. For the claimant therefore, he was entitled to 2 week's notice having completed 2 complete years of employment.

22. The claimant had respiratory issues and on occasion his face can go red due to his breathing.

Disciplinary policy

23. The claimant was also subject to a disciplinary policy. That policy (which the contract stated was non-contractual) set out the respondent's expectations in relation to conduct (behaviour, performance and attendance) at work.

24. The policy set out the approach to be taken where conduct falls short of the required standards.

25. Employee responsibilities include: observing the standards of conduct set by a line manager and in policies and conducting one's self appropriately when at work or work related events. An employee is also responsible for making every effort to make any required improvement in conduct and sustain that improvement.

26. Managers have a responsibility to set high standards of behaviour and communicate these clearly.

27. An informal approach is set out in relation to matters that are deemed minor. If there is repetition or if the conduct is more serious the formal approach could be followed. That would require an investigation to be carried out to establish the facts before a decision is taken as to whether further action is warranted. Such an investigation could include speaking to witnesses or looking at systems or any other reasonable way of determining events. Disciplinary action would not be taken until a "full investigation" has been carried out.

28. Reference is made to a "statutory" disciplinary hearing procedure and possible outcomes are stated to be a first written warning, final written warning or dismissal. A final written warning can be issued if misconduct is deemed sufficiently serious, "i.e. if the issue is a potential gross misconduct offence but not serious enough to dismiss on the first instance".

29. Summary dismissal is reserved for cases of dismissal for gross misconduct. It is possible for a gross misconduct offence which could lead to dismissal to be downgraded to serious misconduct if considered appropriate. Alternatives to dismissal may be considered, if appropriate.

30. The outcome of a disciplinary hearing will be made by the disciplinary hearing manager after considering the facts and any explanation and mitigation.

31. An employee can also be suspended if suspension is considered necessary to protect the integrity of an investigation or to safeguard an employee or the company. Suspension is precautionary in nature.

32. An employee is also entitled to appeal against any sanction.

33. The policy sets out non-exhaustive examples of the types of conduct falling within each category. Thus, misconduct includes failing to meet performance standard, serious or wilful negligence, committing an act bringing the employee or company into disrepute, such as benefit fraud, behaviour inconsistent with the equal opportunities policy or any act of discrimination, in appropriate postings on social networking forums and failure to follow any other rule or policy.

34. Non exhaustive examples of gross misconduct include serious failings to follow absence procedures, including prolonged periods of unauthorised absence, theft or fraud within the workplace, deliberate falsification of records, acting violently, including fighting or physical assault, using rude and abusive language or behaving immorally or obscenely towards other employees or clients and customers, deliberate damage to property, being in possession of, consuming or under influence of illegal drugs, negligence which causes or could cause significant loss damage or injury, a serious act of insubordination, wilful or reckless failure to follow health and safety that may endanger lives, sexual harassment or bullying, and disclosure of confidential information.

35. The policy then sets out a procedure that should be followed in most cases. Where the investigation has determined that there is a case to answer a hearing should be arranged without delay. The employee should will be informed in writing of details of the allegation and the hearing details and be given copies of material relied upon. The employee would be given the opportunity to answer the allegation and raise any points they wish to be taken into account, including mitigation. The manager will ask questions to clarify any points and to seek confirmation of information provided. After an adjournment, a decision would be made with a written note of the findings and conclusion, the nature of the misconduct allegations upheld and why and the right of appeal.

Investigation commences

36. Ms Marshall was a team manager. She had experience of conducting disciplinary investigations, having conducted between 20 and 30 within the preceding 12 months. She had been given training on the disciplinary policy. Ms Marshall had some experience of working with the claimant and knew of him.

37. She had been approached by a security guard at around 5pm on Friday 27 September 2019 who had advised her that the claimant had been involved in an incident in the canteen that day, namely Friday 27 September 2019. Ms Stevenson, a canteen assistant (employed via a third party) had raised the issue with the security guard.

38. Ms Marshall believed that the incident was potentially serious and spoke with her managers who agreed that the claimant should be suspended, on full pay, as a precautionary measure and to allow a full investigation to take place. There was a concern that the claimant had acted aggressively with potential violence, which had the potential to amount to gross misconduct.

39. Ms Marshall and a colleague from HR approached the claimant around 7pm that evening. The incident had occurred around 4pm. They had advised the claimant to log off the system which he did. They then handed him a letter and advised him that serious allegations had been made which had resulted in their decision to suspend the claimant, on full pay, to allow a full investigation to take place. The claimant was told that he would be contacted to attend an investigation meeting.

40. The suspension letter was not provided to the Tribunal but it stated that further to a meeting held on the date the letter was issued, the claimant was suspended on full pay to allow investigations to take place. The only meeting that took place was to advise the claimant to log off and that he was being suspended.

Investigation meetings

41. On 30 September 2019 Ms Marshall met with the claimant for an investigation meeting. A representative from HR was present and the claimant had taken a companion with him to the meeting.

42. The claimant was told that the meeting was an investigation meeting into an incident which had occurred the preceding Friday in the canteen. The claimant was asked what had happened and he said he had asked for chicken nuggets and chips and cheese. The canteen assistant had put 3 chicken nuggets in the box. He said he did not want it and "slid the box back". He was asked why he reacted in that way when he received the food and he said "she should have declared there was only 3 chicken nuggets before giving me it. Other people were getting 4 or 5". He said he had been calm during the interaction.

43. He confirmed that he believed it was acceptable for him to act in that way.

44. There were pre- prepared questions that Ms Marshall was going to ask but not all were asked.

45. He was asked what impact he thought "this had on the business" and he said: "massive impact on the business and me. It's slander". When asked if he understood the seriousness of the allegations he said: "of course. Assault is assault." He said he had conducted himself in the correct manner.

46. The meeting was adjourned to allow witness statements to be obtained.

47. Ms Marshall met with both canteen assistants, with an HR officer in attendance. The canteen assistants were not employed by the respondent but were engaged via an outsourced provider. Statements were taken from both canteen assistants on 1 October 2010.

48. Both individuals gave their statements verbally which Ms Marshall wrote down.

49. Ms Stevenson's statement (in full) was as follows:

"I was at the counter as I let Megan off to do something else. Steven came to the counter and I asked what he wanted. He took a while to decide and he

picked chicken nuggets and chips. I had asked if it was a plate or a box. He advised box and he watched me place the items in the box. He had noticed there was only 3 chicken nuggets and asked “Is that it?”. I advised Steven he could have an additional 3 chicken nuggets for 99 pence and by this time I was at the till. He told me no. He had a cheese pot in his left hand and I placed the box in front of him. He at this point said “I’m not a kid. You can keep it” and forcefully pushed the box back at me and he them stormed off. Megan then advised me to report what had happened.

Adele asked “Was there anyone else at the service counter”. No only myself, Megan and Steve .

Adele asked “How was his body language/demeanour?” I knew he was angry by his attitude and by his tone and language changed. He was not shouting but he was louder than he had previously been. I could tell by his face also. My stomach was churning at this.”

Under a statement saying “This statement is true to the best of my knowledge. I understand that my signed statement may be used in the event of a disciplinary hearing. I understand that I may be required to attend any hearing as a witness”, Ms Stevenson signed the statement.

50. Ms Campbell also provided a statement which (in full) said:

“Steven asked for chicken nuggets chips and beans. Helen boxed up the meal and Steven noticed that there was only 3 chicken nuggets in the box. He asked if that was all that was included. Helen offered to include another 3 nuggets for 99 pence. Steven refused this and forcefully pushed the box back to Helen and told her he “was not a fucking kid.” He at this point walked away.

I was busy at the time so I watched the incident happen from the hot cupboard and I found his behaviour unreasonable and I advised Helen to report the matter.

Adele asked “Was there anyone else at the service counter” No only myself, Helen and Steven. William, the security guard, was at the security doors.

Adele asked “How was his body language/demeanour?” His face was bright red. He was talking normal with a bit of attitude and it felt as if he would have kicked off if either of us opened our mouths.

Under a statement saying “This statement is true to the best of my knowledge. I understand that my signed statement may be used in the event of a disciplinary hearing. I understand that I may be required to attend any hearing as a witness”, Ms Campbell signed the statement.

51. On 2 October 2019 the claimant attended a second investigation meeting with his companion. Ms Marshall was present with HR support.

52. The meeting began by explaining the meeting was to discuss the incident that had happened the preceding Friday in the canteen.

53. The claimant was able to read the witness statements that had been provided. A number of preprepared questions had been set out.

54. The claimant was asked that at the first investigation meeting he had said there were other people in the queue at the time he was at the service counter. He was asked if he remembered who they were. He said he did not know the names of the persons as he keeps himself to himself.

55. The claimant explained that there was a female employee behind him in the queue, whom he recalled had purple hair, who had been speaking into her mobile phone during the incident.

56. The claimant was asked if he was sure as both witness statement that had been obtained said there was no one else at the counter. The claimant said that as far as he was aware there was someone there.

57. The next question was: “The wording which had been used in the statements is “forcefully pushed” instead of thrown as the action described was not that of throwing a ball however the description provided by both witnesses was that the box was rather forcefully pushed back across the counter. Would you agree with this description?” The claimant said he did not.

58. Upon being asked how he "felt at the time, amused, complacent, not bothered etc" he said: "I was dissatisfied – woman who was serving should have raised a complaint instead of antagonising the situation."

59. He was asked if it was accurate to say that he was angry and stormed off. He disagreed saying: "I went directly up the stairs and spoke to a line manager. Why has the manager not escalated this?".

60. The claimant was asked why one of the witnesses would say that she felt her stomach churning as a result of the claimant's reaction and if he understood her reasoning for that. He said: "I don't know I just wanted to get food and get out to go back to my job. I take medication in which I need to eat."

61. He was told that he had not been given details of the allegation sooner because of the need to protect the person who had made the allegation. The claimant explained that he was raising a grievance.

62. He was asked if he believed he conducted himself in the correct manner. He said yes. He was asked that if he believed he conducted himself in the correct manner, why did the staff member complain. At this point the claimant handed Ms Marshall a letter which he said contained a grievance as he felt he was being discriminated against and victimised. He felt that by advising a manager as to what happened (albeit informally), the matter should have been escalated. He believed that he had clearly shown that he was dissatisfied. He believed that as a consumer he had rights which had been deprived of him. He said that the entire allegation was because the canteen assistant was offended by the way he reacted to what she presented to him. He said that "you need force to push something across the table." He said "legal ramifications will be substantial I am being victimised and discriminated against". He explained that there was no CCTV or any evidence showing any assault and that the witness statements had been fabricated.

63. Following an adjournment the claimant was told that his grievance would be dealt with after the investigation. Ms Marshall told the claimant that she believed the matter would proceed to a disciplinary hearing.

Claimant's grievance

64. In a 5 page letter dated 1 October 2019 to Ms Marshall the claimant stated that at an ongoing investigation a matter had been raised which caused him to raise a formal grievance. He stated that in the letter of suspension reference was made to a meeting on 27 September when his first meeting was on 30 September. He also said that the letter refers to a number of allegations having been levelled against him but he understood there was only one, namely assault.

65. He said that the allegation was that on 27 September (which he was told on 30 September) he had allegedly assaulted the canteen assistant. He said that he conducted himself in the normal way any person would. He explained that he went to get some food as he was on medication and had been working overtime, near to a 12 hour shift. When in the canteen he stood there for some time deciding what to have and decided to order the chicken nuggets. He was not aware of the portion size.

66. He stated: "Due to the disillusion of what was presented before me in the white box at which the food was presented in and the sheer shock of what I was presented, I showed nothing more than dissatisfaction at which said canteen lady should have offered to raise a complaint. However, she did not do this and instead antagonised me by stating if I wanted more I would be charged an extra £1 for 3 chicken nuggets.. Due to further shock and dissatisfaction I advised if I wanted a happy meal i would go to McDonalds."

67. He explained that the meals were supposed to be subsidised, not the portion size. He explained he was a 30 year old man having worked with the respondent for nearly 3 years. He explained he had dealt with customer conflict and dissatisfaction as part of his role. He said "it is not my fault that this canteen lady did [not] see or understand my dissatisfaction. She should have acknowledged my dissatisfaction and raised a complaint. However instead we are in this situation where I am being falsely accused all because I have somehow offended this woman of which was not the intent as I showed dissatisfaction at which was present to me not by whom it was presented."

68. He explained that he felt he had been deprived his consumer rights and that the ACAS Code had not been followed since a complaint should have been raised. He said he made a manager aware of it on the day in question and that he had attended his GP since the issue is causing him stress. He stated that: "I still am unaware of exactly what it is I am being accused of as nothing has been brought to light even after the meeting on 30 September 2019." He said that he believed what had happened was that he had shown his dissatisfaction as to what was presented to him and the canteen lady was not happy. A complaint should have been raised which was not, nor was his informal grievance recognised.

69. He then said; "I also feel that if this lady in question did not like my response to what was presented and mannerism of how I showed dissatisfaction then I apologise but this is victimisation and discrimination to my culture and belief."

70. He concluded by saying: "Although this may appear to be an incident with reason to act upon, in my opinion it is petty and why did no one act on my concerns? Even the canteen lady should have raised a complaint due to my dissatisfaction and who else it was it not actioned upon"? He also asked why his informal grievance was not progressed.

71. The claimant had also produced a handwritten note from as GP dated 30 September 2019 stating that the GP saw the claimant "at the out of hours primary care centre today".

Next steps

72. Access to the canteen was by way of swipe card which could allow those having accessed the area to be identified. The swipe card access would also identify those accessing training rooms and lockers and other facilities which were next to the canteen. There was also a pool table near the till area. There were other staff within the canteen area at the time of the incident.

73. Ms Marshall took no steps to identify who was present in the canteen at the time of the interaction, whether by speaking with the canteen assistants, the

security guard or otherwise. As the claimant was unable to give her specific names and given the time she considered it would take to investigate the swipe card system (and the fact such an approach would include people who were not in the canteen) she decided not to investigate further. She accepted the position of both canteen assistants without further enquiry.

74. The issue for Ms Marshall was the way the claimant had returned the box to the canteen assistant and the claimant's conduct and comments. She believed there was no justification for the way he acted during the incident. She believed all staff should be treated kindly. With regard to the food box, she believed the claimant had "pushed it back quite aggressively".

Mr Stewart to convene disciplinary hearing

75. Ms Marshall remitted the matter to Mr Stewart (a team leader) to deal with the disciplinary hearing. Ms Marshall had a discussion with Mr Stewart who was appointed to deal with the disciplinary hearing. She told Mr Stewart that she thought the claimant had acted in a way that made her believe the claimant was capable of acting in the way the allegations suggested. She had previous experience of outbursts involving the claimant.

76. Mr Stewart had asked Ms Marshall why she had not asked all the pre-prepared questions and she told him that she had a feeling from the way the claimant acted that he could "kick off at any point" and so she did not ask all the questions she wanted to because of the way he conducted himself during the investigation meetings. This was not communicated to the claimant but it was something Mr Stewart took into account in his assessment of the matter. She was of the view that having had previous conversations with the claimant, she was not surprised in what both witnesses had said.

77. Ms Marshall also told Mr Stewart that while Ms Stevenson did not say that the claimant had swore (which was what Ms Campbell had said), she believed that Ms Stevenson was of such a nature that she was unlikely to have repeated the swear word. These were not matters that were communicated to the claimant.

Invite to disciplinary hearing

78. By letter dated 3 October 2019 the claimant was invited to a disciplinary hearing. The letter stated that:

"Dear Steven

Invite to disciplinary hearing – gross misconduct

Following the investigatory meeting held on 30 September and 2 October 2019 you are required to attend a formal disciplinary hearing to be held on 7 October 2019. The hearing will be conducted by James Stewart, Team Manager. An HR business partner will be in attendance for note taking.

At this hearing we will consider allegations of gross misconduct in accordance with the company's disciplinary policy and procedures as follows:

Acting violently. Including fighting or physical assault, using rude and abusive language or behaving immorally or obscenely towards other employees or our clients and customers.

Please note that the possible outcome of this formal disciplinary hearing may be of a formal disciplinary sanction to be held on your personnel file up to and including your summary dismissal from the company.

Enclosed is a copy of the documentation that may be referred to at the hearing. This is provided for you to prepare for your meeting and to take any advice that you may wish. At the hearing you will be given every opportunity to explain and discuss the allegations in full.

You are entitled if you wish to be accompanied by a currently employed work colleague of your choice or an accredited trade union official. If you wish to be accompanied please inform me prior to the meeting so the necessary arrangements can be made.

It is in your best interests to attend this meeting or notify us of your reasons for nonattendance. If you fail to attend without good reason then a decision

may be made in your absence, based on the evidence available and without the benefit of your input.

If you have any questions regarding the contents of this letter please contact me at the earliest opportunity.

Yours sincerely

Ms Marshall

Team manager".

The letter enclosed the disciplinary procedure investigation meeting notes, witness statements, copy of grievance letter and the claimant's subject access request.

Disciplinary hearing

79. On 7 October 2019 the claimant attended the disciplinary hearing along with a companion. It was chaired by Mr Stewart with an HR business partner in attendance. Mr Stewart had been a team leader for 3 years and was experienced in carrying out disciplinary hearings.

80. The hearing began by stating that the allegations to be heard were of gross misconduct regarding "acting violently, including fighting or physical assault using rude and abusive language or behaving immorally or obscenely towards other employees or our clients and customers."

81. The claimant was asked if he understood the allegation and he said yes. He was then told that Mr Stewart would look at all the evidence and if he believed the allegation is justified an appropriate sanction would be issued. The claimant said "yes and I have already drafted an appeal letter about the decision."

82. The claimant provided Mr Stewart with a letter and statement at this point. This letter set out the claimant's concerns that the investigation had been unfair and that he believed one of the witnesses, Ms Stevenson, had a reason

to exaggerate what happened (since the claimant believed there had been a dispute between that person and his mother). The letter (which amounted to a grievance about the investigation process) and statement were read by Mr Stewart and the HR business partner who was assisting him. The claimant was told that they could not accept the statement as they believed it could be biased, since it emanated from the claimant's mother. The hearing proceeded.

83. The claimant was asked to speak through what happened when he purchased food on 30 September. The claimant said he was working a 12 hour shift and as he was not well (and was feeling down as he was on medication) he needed something to eat to get energy. He went to the canteen and took his time to pick what he wanted. He said he was disorientated and chose chips and chicken nuggets with beans and a pot of cheese. He went to the counter. He alleged Ms Stevenson did not have any gloves on despite dealing with food and cash. He said the portion was small. He said "I am not taking that please take it back". At no point did the box leave the counter. He said he was unaware of the portion size and it was a disillusion of a meal. He said managers were fully aware of his illness.

84. Mr Stewart said as a manager if a team member was showing disorientation he would want to know about it to help. The claimant said he showed "dissatisfaction. I said I'm not happy. I'm not a child and if I wanted a happy meal I would go to McDonalds. That's exactly what I said. I didn't raise my voice or swear. I hadn't paid for it yet. I wasn't showing any anger towards Helen and referring back to Helen's statement he was not showing there's nowhere in her statement where she says I am being abusive at all."

85. He was asked why Helen would say he forcefully pushed the box and the claimant said that was her assumption. There was no malice when he pushed the box back – there needs to be force to move it.

86. Mr Stewart noted that the witness said: "I know he was angry his tone started changing. I could tell this by his face changing to the point my stomach was churning." The claimant said: "I want to see medical evidence of this". He was told that he does not need medical evidence since it was how someone said

they felt because of the incident. The claimant said: "for all I know she could have diarrhea because she isn't wearing gloves. I don't agree with it one but I am forcefully being made to accept something that I haven't done. No evidence no CCTV." Mr Stewart said "you've just admitted it. We need to go through these questions to get the full picture of what has happened." He was asked if he felt the way he acted was acceptable and he said it was.

87. Mr Stewart then referred the claimant to the witness statements. He noted the term "forcefully pushed" was used and that the claimant "stormed off". The witness said she knew the claimant was angry by his attitude and his tone and language. He was not shouting but was speaking louder than before and she could tell by his face and her stomach was churning at this. Mr Stewart referred to the other statement that noted Helen tried to resolve the matter by offering more nuggets for 99p but the claimant refused and "forcibly pushed the box back saying he was not a fucking kid" and walked away. She had watched the incident and found the claimant's behaviour unreasonable and had to advise her colleague to report it. Mr Stewart noted that both said there was no one present at the counter to witness it.

88. When asked about the claimant's body language, one witness said the claimant's face was bright red and he was talking with attitude and she felt that the claimant would have kicked off if either had opened their mouths. Mr Stewart noted that the claimant had said he was dissatisfied during the investigation meetings but the witness statements suggested he was more than dissatisfied. The claimant said that he did not swear and that "someone is fabricating this." He said that he did not know why the witness would feel like that. He pointed out that in one statement she said she asked that the other person make a complaint, which is "in her vindictive nature".

89. The claimant was asked to explain in what way he had been antagonised and he said it was because they offered 3 more nuggets for £1.

90. The claimant said he told a manager on his way back to his desk that he was not happy and she should have raised a complaint. He said "that's how I felt. I said please take it back. I may have muttered to myself but there was no

malice towards anyone." He said he was not happy with the way she had conducted herself and she should have raised a complaint. He was not happy with the resolution which he felt was antagonising. He said it was "an informal dissatisfaction raised. Not happy with what she presented me and she did nothing about it. She didn't say anything to me. She just walked away from me. A complaint should have been logged regardless. Nothing else came of it."

91. He was asked if he still believed that there were others present since he had said at the first investigation meeting there were others at the counter. The claimant responded by saying that there were people around and there was a woman present at the counter who was on her phone walking towards the counter. He said he keeps himself to himself and did not know their name.

Adjournment and decision

92. There was a short adjournment after which the claimant was advised that he was to be dismissed. Mr Stewart said he decided to accept what the canteen assistant statements said and decided not to instruct any further investigation. He concluded that as both witnesses had said the claimant was aggressive or that he swore, although there were some differences, he concluded that there was no reason to disbelieve those individuals. From his discussion with Ms Marshall he believed that both witnesses had said the claimant swore (even although only 1 witness had said the claimant had swore). He was satisfied that the claimant had been aggressive. He took into account how the claimant had conducted himself during the hearing (and what Ms Marshall had told him as to her view of the claimant) which he believed supported the behaviour contained within the allegations.

93. The claimant then went to his car to obtain a copy of his appeal letter. He handed over a copy of his appeal letter. The claimant said that he believed the treatment was unfair and that he felt he had been victimised and harassed. He said he would be going to ACAS and raising Tribunal proceedings. He was asked if he fully expected this to happen and said that he felt there was a

restructure in place and people were being forced to take voluntary redundancy and that his wage was a factor in his dismissal.

94. He then said that he believed Ms Campbell had a vendetta against him and that the witness statements did not marry up.

Outcome letter

95. By letter dated 7 October 2019 Mr Stewart confirmed his decision. The outcome letter stated that "the hearing had been arranged to discuss alleged breaches of the company disciplinary rules regarding acting violently, including fighting or physical assault, using rude and abusive language or behaving immorally or obscenely towards other employees or our clients and customers.". The letter also stated that "it was explained to you in your invite letter and during the meeting that your grievance and disciplinary matters were so linked that both could be dealt with together, there was no objection to you so the meeting proceeded as planned."

96. It was stated that the claimant confirmed that he had not been happy that his complaint about the portion size of food was not dealt with in the manner he wished and because of this he felt the staff member was antagonising him. He believed he did not act with any malice during the interaction.

97. The letter noted that the claimant believed there was a vendetta against him by a member of the canteen staff and that was why he had been brought to a hearing and that the witness statements had been fabricated to describe the incident in negative light. It also noted that the claimant denied forcefully pushing the meal back at the canteen staff and that he felt he acted acceptably.

98. Mr Stewart stated that his decision was that the claimant admitted to saying that he wasn't a child and if he wanted a happy meal he would go to McDonalds because he was not satisfied with the portion size. Mr Stewart wrote that he believed the claimant acted in such a manner towards the canteen assistant that caused her to make a complaint and in her witness statement advised that her stomach was churning when the incident occurred.

He believed that the description in the witness statement of the claimant's tone changing when he was not satisfied with the resolution and that his face and body language had changed and that he did forcefully push the meal back at the staff member led him to agree that the behaviour would be classed as acting violently and behaving obscenely towards a member of staff.

99. Mr Stewart believed that when the witness had said her "stomach was churning" that meant she felt sick and was almost afraid to come to work. He believed that the matter had been investigated fully and although mindful of the claimant's service and clean disciplinary record there was no mitigation and the claimant had failed to take accountability for his actions. Mr Stewart said that "I consider your actions to be gross misconduct and having considered all alternatives have decided to summarily dismiss you with effect from 7 October 2019."

100. His letter ended: "I also note that you have given me statement and appeal letter at the end of the meeting. This will be passed to the appropriate parties. I would like to note that in large part your complaint seems to be aimed toward the canteen staff . We outsource our canteen service and I will pass these elements to our outsource partner".

101. The outcome letter did not directly deal with the grievance the claimant had raised but in essence concluded that the 2 canteen assistant's witness statements were to be preferred to the position advanced by the claimant.

Appeal letter

102. The letter of appeal which the claimant submitted during his disciplinary hearing was dated 7 October 2019 and ran to 2 pages. He stated that he would like to appeal "based on the outcome of today". His appeal letter referred to examples of gross misconduct and he said that he would not accept being a victim of victimisation, discrimination or harassment.

Response

103. By letter dated 9 October 2019 Mr France, Assistant Contact Centre Manager, wrote to the claimant inviting him to an appeal meeting on 15 October. Mr France was experienced in dealing with appeal hearings.

104. On 10 October 2019 the claimant emailed Mr France and asked for the appeal hearing to be adjourned to a later date. He asked for copies of his contract and minutes and associated documents. Mr France responded with the documents and confirmed he would rearrange the meeting.

105. A meeting was fixed for 18 October 2019 but the claimant's position changed and in an email to Mr France he stated that he was not going to attend the meeting. His email stated that "I would like to make it known that I have the utmost respect for you.. so please note that I have nothing whatsoever against you at all." He gives his reasons for not being able to attend. He said that firstly he had not been well throughout the process which was something he said he had already raised concerns about. Secondly, he advised that he was scared to attend the office as he was worried he may be accused of doing something wrong which he hadn't. Thirdly he said he had provided a statement and a grievance which he believe had been completely ignored at the last hearing and he felt it was a waste of time to attend since if he was to be dismissed over 3 chicken nuggets there was no point. He said that he would not accept that he had done anything wrong since all he had done was to give the box of food back and he was not prepared to be humiliated.

106. He also argued that the facts had not been correct following the last meeting and the complaints procedure with regard to the canteen staff had been ignored. He also pointed out that there was deliberate falsification of the evidence which he considered to be collusion and that if anyone should have been dismissed, it ought to have been those whose evidence had been fabricated.

107. He ended by saying that Mr France should read through the claimant's statement which was provided on 7 October in which he had noted that Ms Campbell's statement stated that a security guard was present yet he took no

action at the time, which was surprising. The claimant said he was not prepared to accept something that he had not done.

Appeal outcome

108. On 30 October 2019 Mr France issued an outcome letter. He noted that the meeting had been rescheduled and that the claimant chose not to attend the hearing and "requested the hearing proceed in his absence" in the email of 17 October 2019.

109. The main points of appeal that Mr France gleaned from the claimant's letter of 7 October were negligence, deliberate falsification of records and failure to follow health and safety rules.

110. Mr France stated that the appeal hearing had been convened to allow the claimant to explain in more detail why he considered his dismissal to be unjust but given he did not attend Mr France used the information that was in his possession, including the minutes of the meetings and statements. He concluded that the dismissal would be upheld.

111. He stated that he could find no evidence of negligence by any employee during the investigation or disciplinary process. The claimant had not specified what or who was responsible in this regard.

112. With regard to falsification, again Mr France could find no evidence, absent any explanation as to what specifically was alleged to have been amended or falsified. With regard to the suggestion that the allegations were false and misleading, Mr France said that the allegations against the claimant were genuine. He stated that "At Teleperformance we do have a duty to investigate allegations as they are made in order to provide a safe and secure working environment for all of our employees and 3rd party contractors alike."

113. With regard to failure to follow health and safety, Mr France indicated that the canteen was run by a third party and that all regulatory standards were set by external bodies. This was not upheld given there was no suggestion as to how that resulted in the dismissal being unfair.

114. Mr France then considered the statement the claimant had submitted on 7 October 2019 and 9 matters the claimant raised. This had not been provided to the Tribunal but Mr France's response was as follows.

115. He stated that no one had taken a witness statement from the manager the claimant spoke to shortly after the incident. Mr France indicated that he had spoken to the manager in question who confirmed there was an informal conversation with her and the claimant.

116. The second issue was that the witness statements did not marry up. Mr France concluded that based on the balance of probabilities, both statements gave similar information and determined that the incident did take place.

117. The third issue was the failure to take a statement from the security guard which was mentioned in one of the statements. Mr France said that the reason no statement was taken was because there was enough information from the information collected to substantiate the allegations, corroborated by the witness statements.

118. Fourthly health and safety concerns as to canteen staff not wearing gloves or hair nets were matters passed to the external contractor.

119. Fifthly the claimant's comments about no allergy or nut information being on menus was also passed to the contractor.

120. Sixthly the claimant felt there had been discrimination as portion sizes differed. This was a matter passed to the external contractor.

121. Seventhly the claimant believed he had been harassed as a member of the canteen staff had a vendetta against him. Mr France noted that the claimant had submitted a witness statement from his mother detailing the individual's character but Mr France decided that he could not use that as evidence as "it may have biased implications"

122. Eighthly the claimant argued that canteen staff committed gross negligence or gross misconduct in not following procedures as a result of the claimant's dissatisfaction. This was a matter passed to the external contractor.

123. Ninthly the claimant believed that he passed the meal box back with reasonable force which was not gross misconduct. Mr France said "although this specific allegation is not within the company handbook it is believed your actions on this occasion merited an allegation of acting violently including fighting or physical assault using rude and abusive language or behaving immorally or obscenely towards other employees or our clients and customers to be upheld during the disciplinary hearing".

124. Mr France concluded that "after taking into consideration all that is noted I am satisfied that a full and thorough investigation has taken place with the information available to me and having reviewed the evidence I have made a decision not to uphold your appeal or any of the points made in your statement.

Email to respondent after appeal from witness to the interaction

125. On 27 April 2021 Ms Campbell, one of the canteen assistants who had given a statement (who had told Ms Stevenson to report matters and had claimed the claimant had swore) sent an email to the respondent's agent in the following terms: "I'm emailing about the court case, see my statement could you pull it out please i dont want to attend so i wish for my statement not to be used neither could you pull it out if it hasnt already. I genuinely think things have been blown out of proportion."

Findings of fact for the purposes of the wrongful dismissal claim and for the purposes of contribution

126. It is necessary to make separate findings of fact in relation to the claim for wrongful dismissal and for the purposes of contribution since for these matters the Tribunal requires to decide, from the evidence led before it, what happened as a matter of fact, on the balance of probabilities.

127. The Tribunal finds that on 30 September 2019 the claimant approached the canteen to order food. He was in the midst of a long shift, which was to last around 12 hours. It was about 4pm. There were around 15 to 20 other people in the canteen at this time. There was another person, a woman with purple hair, behind the claimant when he was at the counter. It is more likely than not that she saw the interaction as it happened. There is also a pool table near the counter and it was possible that staff who were at that location also saw what happened.

128. The claimant stood at the counter. Ms Stevenson asked him what he wanted to eat. He took some time to decide what to order. He then told Ms Stevenson he would have chicken nuggets, chips and beans with a cheese pot. He was asked if it was a plate or box and said he wanted a box. The price was £1.99. The claimant watched Ms Stevenson put 3 chicken nuggets into the box. He asked if that was all he was getting and was told that if he wanted more he could pay an additional 99p and would secure another 3 nuggets.

129. Ms Stevenson had moved to the till and pushed the box to the claimant. Ms Campbell was also working in the canteen but she was behind the waist level hot cupboard but was able to hear and see the interaction.

130. The claimant said he did not want the meal. He said he was not a kid and if he wanted a happy meal he would have gone to McDonalds. He was unhappy with how he had been treated and felt the offer of more nuggets for 99p had antagonised him. His face reddened. He had worked a lengthy shift. He had a health condition which could result in his face becoming red. He slid the box of food back to Ms Stevenson and walked away. He did not use unreasonable force in sliding the box back to Ms Stevenson.

131. Ms Stevenson was unhappy because the claimant had ordered a meal and then changed his mind and rejected it. She did not raise an issue until her colleague, Ms Campbell, advised her to report the matter and she then told the security guard who had been in the canteen during the interaction.

132. The claimant did not shout or raise his voice unreasonably but it was obvious to Ms Stevenson that the claimant was upset as to how he felt he had been treated. The claimant was not aggressive.

133. The claimant left the canteen, with no food, and told a manager he met about his dissatisfaction. He did not raise a formal complaint about the issue but was unhappy as to how he had been treated. He raised the issue informally.

Losses

134. With regard to the financial position, the claimant's gross weekly pay with the respondent was £420. His net weekly pay was therefore £354. The claimant was aged 30 at the date of his dismissal.

135. The claimant had not obtained any statutory benefits.

136. After a period of 9 weeks following his dismissal the claimant secured another role with a comparable income.

Observations on the evidence

137. The witnesses in this case did their best to recall the evidence. There were few factual disputes given the focus was on what information was before the respondent at the time.

138. The main dispute on the facts I required to resolve was whether or not the claimant had given Mr Stewart a copy of his appeal letter at the start of the hearing (as Mr Stewart contended) or once the claimant had been advised of his dismissal (as the claimant contended). The claimant contended that in fact he had given Mr Stewart a copy of his grievance and a statement from his mother outlining a reason why Ms Stevenson may have fabricated or exaggerated the allegation at the start of the hearing. I concluded that Mr Stewart was mistaken in believing that the claimant had submitted his appeal at the outset as he believed. I concluded the claimant had given Mr Stewart his grievance letter and statement at the start of the hearing. There are a number of reasons for this.

139. I found the claimant's evidence on this point to be more likely than not to be the case, in preference to the evidence of Mr Stewart's evidence on this point. The claimant was absolutely clear as to his position but Mr Stewart's position while initially clear, became less so when he was taken to his letter of dismissal during cross examination (when he referred to the passage of time perhaps affecting his memory).

140. Mr Stewart had made the point that not only did he recall the appeal being given at the outset but this had been the view of the note taker. The minutes of the hearing, however, do not disclose this and tend more to support the claimant's position. There is no mention of anything being handed over at the start of the meeting. Had Mr Stewart's recollection been correct, it would have been likely that the minutes would have recorded the position as he had said. The minutes were more reflective of the claimant's position. There was no evidence before the Tribunal to support what Mr Stewart said. While there is no evidence in the minute of what the claimant said, as the claimant was advised that the statement would not be taken into account, since it could be biased, that explained why it was not recorded in the minute.

141. Finally it would have made little sense for the claimant to have given his appeal letter to Mr Stewart twice during the hearing. It was accepted by Mr Stewart that he handed his appeal at the end of the meeting. There was no reason for the claimant to have done this twice. It was accepted that the claimant had drafted an appeal letter before he knew of the outcome but this was because he believed that the decision had been predetermined. He waited until his dismissal was confirmed and then asked to be given time to retrieve the letter, which was granted.

142. It was more likely than not that the claimant would wait to see if he was being dismissed and if so then provide the letter he had written. The minute does record early in the meeting that his letter of appeal had been drafted (and does not say his appeal letter was handed in at the start of the meeting).

143. The dismissal letter confirmed that the claimant had produced a grievance letter and statement (and an appeal). Given the minute stated the claimant

had produced his appeal letter at the end of the hearing, it was likely that the grievance letter and statement had been provided at the start of the hearing.

144. This issue is likely to have arisen following the passage of time rather than as a result of any attempt to misrepresent the position. Each of the witnesses sought to assist the Tribunal in providing their position in relation to each of the facts arising.

Law

Unfair dismissal

145. The Tribunal has to decide whether the employer had a reason for the dismissal which was one of the potentially fair reasons for dismissal within section 98(1) and (2) of the Employment Rights Act 1996 and whether it had a genuine belief in that reason. One of the potentially fair reasons is for matters relating to "conduct". Another is "some other substantial reason". The burden of proof here rests on the respondent who must persuade the Tribunal that it had a genuine belief that the employee committed the relevant misconduct (or that the reason was some other substantial reason) and that belief was the reason for dismissal.

146. Once an employer has shown a potentially fair reason for dismissal within the meaning of section 98(2), the Tribunal must go on to decide whether the dismissal for that reason was fair or unfair which involves deciding whether the employer acted reasonably or unreasonably dismissing for the reason given in accordance with section 98(4).

147. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer): "depends on whether in the circumstances (including the size and administrative rescores of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case".

148. What a Tribunal must decide is not what it would have done but whether the employer acted reasonably: ***Grundy (Teddington) Ltd v Willis HSBC Bank Plc (formerly Midland Bank plc) v Madden*** *2000 ICR 1283.* It should be recognised that different employers may reasonably react in different ways and it is unfair where the conduct or decision making fell outside the range of reasonable responses. The question is not whether a reasonable employer would dismiss but whether the decision fell within the range of responses open to a reasonable employer taking account of the fact different employers can equally reasonably reach different decisions. This applies both to the decision to dismiss and the procedure adopted.

149. Mr Justice Browne-Wilkinson in his judgement in ***Iceland Frozen Foods Ltd v Jones*** *ICR 17*, in the Employment Appeal Tribunal, summarised the law. The approach the Tribunal must adopt is as follows:

"The starting out should always be the words of section 98(4) themselves.

In applying the section, a Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Tribunal) consider the dismissal to be fair

In judging the reasonableness of the employer's conduct, a Tribunal must not substitute its decision as to what was the right course to adopt

In many (though not all) cases there is a band of reasonable responses to the employee's conduct which in which the employer acting reasonably may take one view, another quite reasonably take another.

The function of the Tribunal, as an industrial jury, is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which the reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, it is falls outside the band it is unfair."

In terms of procedural fairness, the (then) House of Lords in ***Polkey v AE Dayton Services Ltd 1988 ICR 142*** firmly establishes that procedural

fairness is highly relevant to the reasonableness test under section 98(4). Where an employer fails to take appropriate procedural steps, the Tribunal is not permitted to ask in applying the reasonableness test whether it would have made any difference if the right procedure had been followed. If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced. Lord Bridge set out in this case the procedural steps which an employer in the great majority of cases will be necessary for an employer to take to be considered to have acted reasonably in dismissing: "in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

150. Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal. According to the Employment Appeal Tribunal in **British Home Stores v Burchell** 1980 ICR 303 the employer must show it believed the employee guilty of misconduct and that it had in mind reasonable grounds upon which to sustain that belief. At the stage at which that belief was formed on those grounds, it must be shown that it had carried out as much investigation into the matter as was reasonable in the circumstances.

151. The employer need not have conclusive evidence of misconduct but a genuine and reasonable belief, reasonably tested. The burden of proof is on the employer to show a fair reason but the second stage of reasonableness is a neutral burden. The Tribunal must be satisfied that the employer acted fairly and reasonably in all the circumstances in dismissing for that reason, taking account of the size and resources of the employer, equity and the substantial merits of the case.

152. In ***Ilea v Gravett 1988 IRLR 487*** the Employment Appeal Tribunal considered the Burchill principles and held that those principles require an employer to prove, on the balance of probabilities that he believed, again on the balance of probabilities, that the employee was guilty of misconduct and that in all the

circumstances based upon the knowledge of and after consideration of sufficient relevant facts and factors he could reasonably do so. In relation to whether the employer could reasonably believe in the guilt, there are an infinite variety of facts that can arise. At one extreme there will be cases where the employee is virtually caught in the act and at the other extreme the issue is one of pure inference. As the scale moves more towards the latter, the matter arising from inference, the amount of investigation and inquiry will increase. It may be that after hearing the employee further investigation ought reasonably to be made. The question is whether a reasonable employer could have reached the conclusion on the available relevant evidence. In that case the Employment Appeal Tribunal upheld the Tribunal which found that the employer had not investigated the matter sufficiently and therefore did not have before them all the relevant facts and factors upon which they could reasonably have reached the genuine belief they held. The sufficiency of the relevant evidence and the reasonableness of the conclusion are inextricably entwined.

153. The amount of investigation needed will vary from case to case. In ***Gray Dunn v Edwards*** *EAT/324/79* Lord McDonald stated that: "it is now well settled that common sense places limits upon the degree of investigation required of an employer who is seized of information which points strongly towards the commission of a disciplinary offence which merits dismissal." In that case the Court found that further evidence would not have altered the outcome as the employer had shown that they would have taken the same course even if they had heard further evidence. That was a case which relied upon the now superseded ***British Labour Pump v Byrne*** *1979 IRLR 94* principle but emphasises that the amount of investigation needed will vary in each case. Thus in ***RSPB v Croucher*** *1984 IRLR 425* the Employment Appeal Tribunal held that where dishonest conduct is admitted there is very little by way of investigation needed since there is little doubt as to whether or not the misconduct occurred.

154. A Tribunal in assessing the fairness of a dismissal should avoid substituting what it considers necessary and instead consider what a reasonable

employer would do, applying the statutory test, to ensure the employer had reasonable grounds to sustain the belief in the employee's guilt after as much investigation as was reasonable was carried out. *In* ***Ulsterbus v Henderson*** *1989 IRLR 251* the Northern Irish Court of Appeal found that a Tribunal was wrong to find that in certain circumstances a reasonable employer would carry out a quasi-judicial investigation with confrontation of witnesses and cross-examination of witnesses. In that case a careful and thorough investigation had been carried out and the appeal that took place involved a "most meticulous review of all the evidence" and considered whether there was any possibility that a mistake had been made. The court emphasised that the employer need only satisfy the Tribunal that they had reasonable grounds for their beliefs.

155. Where there are defects in a disciplinary procedure, these should be analysed in the context in which they occurred. The Employment Appeal Tribunal emphasised in **Fuller v Lloyds Bank** 1991 IRLR 336 that where there is a procedural defect, the question to be answered is whether the procedure amounted to a fair process. A dismissal will normally be unfair where there was a defect of such seriousness that the procedure itself was unfair or where the result of the defect taken overall was unfair. In considering the procedure, a Tribunal should apply the range of reasonable responses test and not what it would have done (see **Sainsburys v Hitt** 2003 IRLR 23).

156. The Court in **Babapulle v Ealing** 2013 IRLR 854 emphasised that a finding of gross misconduct does not automatically justify dismissal as a matter of law since mitigating factors should be taken into account and the employer must act reasonably. Length of service can be taken into account (**Strouthous v London Underground** 2004 IRLR 636).

157. In considering a claim for unfair dismissal by reason of conduct, the Tribunal is required to consider the terms of the ACAS Code of Practice on Disciplinary and Grievance matters. This sets out what a reasonable employer would normally do when considering dismissal by reason of conduct. This includes

conducting the necessary investigations, inviting the employee to a meeting, conducting a fair meeting, issuing an outcome letter and allowing an appeal.

158. Paragraph 5 of the Code states that "it is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case".

159. Paragraph 9 of the Code is headed "Inform the employee of the problem" and states: "if it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide any copies of any written evidence which may include any witness statements with the notification."

160. Paragraph 12 is entitled "Hold a meeting with the employee to discuss the problem" and states; "Employers, employees and their companions should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this."

161. The reasonableness of the decision to dismiss is scrutinised at the time of the final decision to dismiss – at the conclusion of the appeal process *(**West Midland v Tipton** 1986 ICR 192*). This was confirmed in ***Taylor v OCS*** *2006 IRLR 613* where the Court of Appeal emphasised that there is no rule of law that only a rehearing upon appeal is capable of curing earlier defects (and that a mere review never is). The Tribunal should consider the disciplinary process as a whole and apply the statutory test and consider the fairness of

the whole disciplinary process. If there was a defect in the process, subsequent proceedings should be carefully considered. The statutory test should be considered in the round.

162. Where a claimant has been unfairly dismissed compensation is awarded by way of a basic award (calculated as per section 119 of the Employment Rights act 1996) and a compensatory award, per section 123 of the Employment Rights Act 1996 ("the 1996 Act"), being such amount as is just and equitable so far as attributable to action taken by the employer.

Basic award

163. This is calculated in a similar way to a redundancy payment. The basic award is subject to reduction where the conduct of the employee before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to do so (section 122(2) of the Employment Rights Act 1996).

Compensatory award

164. This must reflect the losses sustained by the claimant as a result of the dismissal. In respect of this award it may be appropriate to make a deduction under the principle derived from the case of **Polkey**, if it is held that the dismissal was procedurally unfair but a fair dismissal would have taken place had the procedure followed been fair. That was considered in **Silifant v Powell** 1983 IRLR 91, and in ***Software 2000 Ltd v Andrews*** *2007 IRLR 568,* although the latter case was decided on the statutory dismissal procedures that were later repealed. The case of ***Ministry of Justice v Parry*** *2013 ICR 311* is relevant too. The Tribunal must consider all the circumstances in deciding whether it is able to assess the chance of a fair dismissal (see ***Frew v Springboig St John's School*** *UKEATS/0052/10*). Further, if an employer wishes to advance a **Polkey** argument, it should be supported by evidence (***Compass v Ayodele*** *2011 IRLR 802*).

165. At paragraph 54 of the Judgment, the Employment Appeal Tribunal in **Software 2000** summarised the legal principles and it is worthwhile quoting them in full (but it must be read bearing in mind the statutory procedures were abolished as was section 98A): "The following principles emerge from these cases:

In assessing compensation, the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).

However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.

The s.98A(2) and **Polkey** exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

166. Having considered the evidence, the Tribunal may determine that if fair procedures had been complied with, the employer has satisfied it - the onus being firmly on the employer - that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).

That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.

That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.

Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

167. In ***Jagex v McCambridge UKEAT/41/19*** the Employment Appeal Tribunal held that on the facts of that case the dismissal had been substantively and

procedurally unfair and the Tribunal's reasons showed that no reasonable employer would or could fairly have dismissed the claimant for what he did. In such cases there was no need to consider the **Software 2000** principles in detail. It was inherent in that decision that fair procedures would not have made the dismissal fair. The Tribunal had erred, however, in concluding that gross misconduct was required to justify a reduction for contributory fault since the correct test is to consider whether the conduct was culpable, blameworthy, foolish or similar, which could include conduct that falls short of gross misconduct or even a breach of contract.

168. The amount of the compensatory award is determined under section 123 and is "such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

Mitigation

169. The leading authority in this area is ***Wilding v BT 2002 ICR 107.*** That case confirms that the onus is on a wrongdoer to show that the claimant failed to mitigate their loss by unreasonably refusing an offer of reemployment. It is not enough to show that it would have been reasonable for the employee to take those steps since it was necessary to show that it was unreasonable for the innocent party not to take them. It is only where the wrongdoer can show affirmatively that the innocent party has acted unreasonably in relation to the duty to mitigate that such a defence can succeed. This was considered in **Cooper v Lindsey** UKEAT/184/15 where Langstaff P noted that there is a difference between acting reasonably and not acting unreasonably. It is not for the claimant to show that what he did was reasonable. The central cause is the act of the wrongdoer.

170. Lady Wise considered this issue in ***Wright v Silverline UKEATS/8/16*** where she noted that the Employment Judge had erred in adopting a starting point of considering whether the employee's conduct was unreasonable and by

failing to make it clear that the onus is on the wrongdoer to show that the employee failed to mitigate their loss. The onus is not neutral and it is for the respondent to show that the claimant acted unreasonably.

Reduction of the awards

171. The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant but the tests are different.

172. Guidance on the amount of compensation was given in ***Norton Tool Co Ltd v Tewson [1972] IRLR 86***. In ***Nelson v BBC (No. 2) 1979 IRLR 346*** it was held that in order for there to be contribution the conduct required to be culpable or blameworthy and included "perverse, foolish or if I may use a colloquialism, bloody minded as well as some, but not all, sorts of unreasonable conduct." Guidance on the assessment of contribution was also given by the Court of Appeal in ***Hollier v Plysu Ltd [1983] IRLR 260***, which referred to taking a broad, common sense view of the situation, in deciding what part the claimant's conduct played in the dismissal. The Employment Appeal Tribunal proposed contribution levels of 100% (employee wholly to blame), 75% (employee mainly to blame), 50% (employee and employer equally to blame) and 25% (employee slightly to blame). That was not, however, specifically endorsed by the Court of Appeal and there is no reason a Tribunal has to follow these guidelines as they are a matter of common sense. The more serious and obviously 'wrong' an employee's conduct, the higher the deduction is likely to be.

173. A Tribunal should also consider whether there is an overlap between the **Polkey** principle and the issue of contribution (**Lenlyn UK Ltd v Kular UKEAT/0108/16).**

174. Thus, if the Tribunal finds that the employee has, by any action, caused or contributed to his dismissal, it shall reduce the amount as it considers just and equitable. There need be no causal connection between the dismissal and the conduct when a Tribunal considers a reduction to the basic award.

175. A deduction for contributory fault under s 123(6) can be made only in respect of conduct that persisted during the employment and which caused or contributed to the employer's decision to dismiss. It follows that the employee's conduct must be known to the employer prior to the dismissal.

176. In ***Nelson v BBC (No 2*)** [1979] IRLR 346 the Court of Appeal said that three factors must be satisfied for the tribunal to find there to be contributory conduct. The first of these is that the conduct must be culpable or blameworthy. The second is that it must have caused or contributed to the dismissal. The third is that it must be just and equitable to reduce the award by the proportion specified.

177. In ***Steen v ASP Packaging*** **Ltd** [2014] ICR 56 (Langstaff P presiding) the Employment Appeal Tribunal stated that the application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy—the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Tribunal to establish and which, once established, it is for the Tribunal to evaluate; (3) the Tribunal must ask for the purposes of section 123(6) of the Employment Rights Act 1996 if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did cause or contribute to the dismissal to any extent then the Tribunal moves on to the next question; (4) this is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. It will likely be an error of law if the Tribunal simply states its conclusion as to contributory fault and the appropriate deduction for it without dealing with these four matters. The court said that there is no need to address these matters at any greater length than is necessary to convey the essential reasoning and of its nature a particular percentage or fraction by which to reduce compensation is not susceptible to precise calculation but the factors which held to establish a particular percentage should be, even briefly, identified.

178. In **Steen** a finding of 100% contributory conduct was said to be an unusual finding but a permissible finding. A Tribunal should not simply assume that because there is no other reason for the dismissal therefore 100% contributory fault is appropriate. It may be the case but the percentage might still require to be moderated in the light of what is just and equitable: see ***Lemonious v Church Commissioners*** *UKEAT/0253/12*.

179. In terms of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, if an employer unreasonably fails to comply with the ACAS Code the compensatory award can be increased by up to 25%. If an employee has unreasonably failed to comply with the Code, the compensatory award can be reduced by up to 25%. The Employment Appeal Tribunal has held that the Tribunal take into account the absolute value of any uplift, rather than just the percentage value (see ***Acetrip Ltd v Dogra*** *UKEAT/238/18).*

180. If a claimant has received certain benefits, including Job Seeker's Allowance (as in this case), the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply. This means that the respondent must retain a portion of the sum due until the relevant Government department has issued a notice setting out what the claimant is to be paid and what is to be refunded to the Government.

Notice pay

181. Under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 a Tribunal can award a claimant damages for breach of contract where the claim arises or is outstanding on termination of employment. The cap of the award that a Tribunal can make is currently £25,000.

182. For claims of breach of contract for notice pay, such as in this case, where an employee has been dismissed by reason of breach of contract for gross misconduct, the Tribunal requires to make findings from the evidence it has heard to determine whether or not the claimant was as a matter of fact in breach of contract such that the respondent was entitled to terminate the

contract summarily. If the employer did not have grounds that entitled it to dismiss the employee summarily, notice pay can be awarded (subject to the rules as to mitigation).

183. In ***British Heart Foundation v Roy*** *UKEAT/49/15* the Employment Appeal Tribunal (Mr Langstaff, President, as he then was) noted, at paragraph 6: "Whereas the focus in unfair dismissal is on the employer's reasons for the dismissal and it does not matter what the Employment Tribunal thinks objectively probably occurred, or whether in fact the misconduct actually happened, it is different when one turns to the question either of contributory fault for the purposes of compensation for unfair dismissal or for wrongful dismissal, There the question is indeed whether the misconduct actually occurred."

Submissions

184. Both parties had submitted written submissions which each party had seen and considered. The points arising was properly raised during submissions and the parties were given the opportunity to respond to the issues arising, which both parties did.

The respondent's submissions

185. The respondent's agent had prepared a detailed written submission which was fully considered by the Tribunal as were his oral submissions and his response to the questions arising.

186. With regard to wrongful dismissal, the respondent's agent accepted that there was no direct evidence, other than the claimant, as to the circumstances surrounding the dismissal. The claimant admitted to making the comment about the happy meal which, it was submitted, was an escalation that led to the incident. It was submitted that the submission with regard to unfair dismissal was to be adopted in relation to wrongful dismissal. I explained that the legal tests were different and, as had been raised during the course of the hearing, the Tribunal required to make its own findings of fact as to what

happened and whether, from the evidence before the Tribunal there was a breach of contract that justified summary termination.

187. The respondent's agent argued that the issue would in essence be determined by the assessment of the claimant's evidence. He admitted to sliding the box back and his comments showed he was angry. That could be construed as violence. The actions that amounted to gross misconduct were therefore pushing the box of food back to the canteen assistant and saying if he wanted a happy meal he would go to McDonalds.

188. With regard to the claim of unfair dismissal, the respondent argued that the claimant had reacted in the manner described since he had made the comment about the happy meal. He also failed to fully participate in the disciplinary process and did not attend the appeal hearing. The respondent agent submitted that the reason for the dismissal was that the claimant's actions, specifically that during an incident within the workplace the claimant took part in an confrontation with a canteen operative, and that during this exchange the claimant behaved in such a manner to cause concern that should the matter have escalated any further there was a genuine concern that physical violence could have occurred, the claimant became angry during this exchange in order to show his dissatisfaction with the portion size offered to him, the claimant then proceeded to forcefully push the box of food back at the canteen operative, which can be interpreted as an potential act of violence or an intent of violence, and used language that could have been interpreted as foul or abusive language and that these actions amounted to gross misconduct.

189. The respondent's agent reminded the Tribunal that it must ask itself whether what occurred fell within the range of reasonable responses of a reasonable employer in the circumstances.

190. As to whether the respondent had a genuine belief in the reason for dismissal, the respondent argued that the claimant was dismissed because the respondent genuinely believed that the claimant had committed the acts complained about with not mitigation.

191. As to whether the respondent had in its mind reasonable grounds on which to sustain that belief, the respondent noted that it is not for the Tribunal to substitute their own opinion as to whether they would have believed in the guilt of the claimant. The question to be determined by the Tribunal is whether the employer believed that the employee was guilty and were entitled so to believe, having regard to the investigation carried out

192. During the disciplinary hearing it was the belief of Mr Stewart that the claimant had acted in such a manner towards the canteen operative that caused her to make a complaint and left her "stomach churning". It was also put to the claimant at the disciplinary hearing that the description within the witness statements of the claimant's tone changing due to dissatisfaction with the resolution offered to him that the claimant reacted in such a way as to forcefully push the box back at the canteen worker, this lead to a finding that the claimant had acted in a way that could be seen as acting violently, and behaving obscenely towards another staff member. Mr Stewart also concluded that a full investigation had been carried out.

193. Accordingly, the respondent submitted that it had in its mind reasonable grounds on which to sustain the belief that the claimant had committed the acts complained about. As to whether the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances, the respondent noted that the range of reasonable responses test applies as much to the question of whether the investigation into the suspected misconduct was reasonable in the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason.

194. The respondent carried out an investigation into the claimant's conduct: Once with the claimant on the 30 September 2019 and again with the claimant on the 2 October 2019, within the second investigation meeting 2 witness statements were put to the claimant who failed to provide full explanation for his part in the incident described. Therefore the matter was referred to disciplinary hearing on the reasonable belief that the claimant had acted in the manner suggested.

195. The respondent's agent emphasised that the claimant had not fully participated in the investigation. It was accepted that there was no evidence that the respondent had taken any steps to locate the person the claimant had said was present during the interaction, the person with purple hair but if was fair to conclude the investigation upon the basis of the evidence available without the need to go further. The dismissing officer believed that the canteen assistant's stomach was churning as a result of the claimant's actions and that was sufficient.

196. As the dismissing officer had relied upon the absence of any apology, I asked whether the apology contained in the grievance letter was relevant. The respondent's agent argued the claimant had failed to show any remorse during the hearing and that was the issue. His answers had been short and he had not taken a full part in the hearing.

197. With regard to the issue of a vendetta, that had not been explicitly raised until dismissal was announced and there was nothing to investigate.

198. A disciplinary meeting was held on 7 October 2019 in which the claimant was given the opportunity to respond to each of the allegations against him and so it was argued a reasonable investigation had been undertaken.

199. As to whether the decision to dismiss the claimant fall within the band of reasonable responses which a reasonable employer might have adopted, the respondent submits that there is always an area of discretion within which management may decide on a range of disciplinary sanctions, all of which might be considered reasonable. It is not for the Tribunal to ask whether a lesser sanction would have been reasonable, but whether or not dismissal was within the range of reasonable responses open to employers, following the case of **Boys & Girls Welfare Society v McDonald** [1996] IRLR 129. The respondent submitted that a key question in determining the substantive fairness of the gross misconduct dismissal in this case is the nature of the conduct committed by the claimant and the particular employment relationship.

200. The respondent submitted that the claimant knew the seriousness and the potential consequences of his actions. ***Neary and Neary v Dean of Westminster [1999] IRLR 288*** states that what will amount to gross misconduct can and will vary according to the character of the employer concerned. Reference was made to the position of the employee too.

201. The respondent's disciplinary policy defines what the respondent considers gross misconduct. The policy points out that gross misconduct may result in summary dismissal. The policy lists examples of gross misconduct, including, acting violently, including fighting or physical assault, using rude and abusive language or behaving immorally or obscenely towards other employees or our clients and customers. The respondent submitted that it was entitled to treat the conduct in question as misconduct meriting disciplinary action and in the circumstances the decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted.

202. As to the framing of the allegation, it was accepted that the disciplinary hearing invite letter state the allegation by setting out the wording of an example of gross misconduct. The ACAS Code says that the allegation should be notified in writing with sufficient information of the conduct being set out in the notification. The respondent, it was submitted did so, not within the letter itself but by taking the letter along with the various attachments which together ensured compliance with the ACAS Code. The claimant knew from all evidence that he had received what the charges were.

203. With regard to procedural failures, the respondent's agent noted that ***Whitbread v Hall*** *[2001] IRLR 275* is authority for the proposition that the band of reasonable responses test is applicable not only to the substantive decision to dismiss but also to the procedural steps taken by the employer. It was argued the ACAS Code was followed and a fair procedure was followed too.

204. With regard to remedy, the respondent submitted that if the Tribunal finds that the dismissal was unfair, that the amount of any compensatory award should

be reduced on the basis that the claimant has contributed to the dismissal under section 123(6) ERA on the grounds of the claimant's conduct.

205. The respondent argued that that claimant, by his actions, caused or contributed to his dismissal to a substantial degree. Reference was made to ***Nelson v BBC (No 2)*** *1979 IRLR 346*. It was noted that with regard to culpable or blameworthy conduct by the employee, the conduct must have caused or contributed to the dismissal; and it must be just and equitable to reduce the assessment of loss to a specified extent. It was argued that the claimant committed gross misconduct as he admitted to saying to the member of staff in the canteen that 'I am not a child and if I wanted a happy meal I would go to McDonalds' because he was not satisfied with the portion size of his meal. This exchange served to escalate the situation. He also admitted to pushing the box back to the canteen worker which caused the canteen worker to have concern that the situation could escalate to violent conduct. This caused the Canteen Assistant to make a complaint, and in her witness statement advised that her 'stomach was churning'. The claimant failed to show any remorse for his actions or acceptance that his actions played a contributory role in the situation. It was argued that the actions of the claimant amount to contributory conduct, which would justify the Tribunal reducing the award proportionately.

206. The proportion by which the Tribunal shall reduce the award is discretionary. Some general guidelines were issued by the EAT in the case of ***Hollier v Plysu*** *[1983] IRLR 260.* It was argued that but for the claimant acting in the manner described the claimant would not have been dismissed. The respondent submitted that the claimant was to blame for his dismissal and that it would be just and equitable to reduce any award of compensation to reflect that. The respondent submitted that any compensatory award should be reduced to nil. It was argued that the basic award should be reduced too. The claimant committed gross misconduct. The claimant admitted to saying to the member of staff in the canteen that 'I am not a child and if I wanted a happy meal I would go to McDonalds' because he was not satisfied with the portion size of his meal. This exchange served to escalate the situation. The

claimant also admitted pushing the box back to the canteen worker, this action caused the canteen worker to have concern that the situation could escalate to violent conduct. This caused the Canteen Assistant to make a complaint, and in her witness statement advised that her 'stomach was churning'. The claimant at no point had shown any remorse for his actions or acceptance that his actions played a contributory role in the situation.

The claimant's submissions

207. The claimant's agent prepared a detailed written submission which was supplemented by oral submissions. It was argued that the procedure that led to the dismissal (and the dismissal) was unfair. There was no evidence to justify dismissal, whether before the Tribunal or the respondent at the time. Further Ms Campbell made it clear that she wished to withdraw her statement since she considered matters to have been taken out of proportion, evidencing the unfairness of the matter.

208. The claimant's agent noted that Miss Marshall testified that the security guard approached her and informed her of the incident. She took this as formal complaint against the claimant but did not obtain a written statement from the security guard. She then proceeded to discuss with her manager and the claimant was suspended pending a full investigation. The only investigation was to speak to the 2 canteen assistants and the claimant. No steps were taken to identify anyone else, particularly the person with purple hair the claimant said was nearby at the time. The allegations against the claimant were severe and a reasonable investigation would have gone further.

209. The claimant's agent also referred to the fact that reliance was placed upon the witness's reference to the claimant's perceived demeanour but they were unable to clearly state what it was about his demeanour, if infeed it was his demeanour. Despite this, the respondent relied upon that evidence to dismiss the claimant.

210. The statements were also inconsistent particularly with reference to whether the claimant was alleged to have sworn or not. This was a matter that a

reasonable employer would have clarified given its importance. Similarly it was unreasonable to rely on reference to "stomach churning" without seeking further information about this from the witness.

211. It was also argued that it was unfair to rely upon the claimant's approach to the disciplinary hearing. It was noted that Mr Stewart had testified that during the disciplinary meeting he found the claimant to be sarcastic which he felt supported the allegations but this was not referred to anywhere.

212. It was not correct to say the appeal letter was handed to him at the start since this was a grievance and statement. This was read at the commencement of the hearing. The paperwork showed that the statement and appeal was handed in at the end of the meeting. The grievance and statement was produced at the start.

213. It was also clear that the grievance, which noted the unfairness in approach, had not in fact been dealt with during the disciplinary hearing since nothing was made of the inconsistencies in the investigation. Mr Stewart assumed that "stomach churning" was because of the demeanour of the claimant but there was no evidence of that. Mr Stewart also said that he relied what Ms Marshall had told him about how the claimant had acted during the disciplinary hearing but this was not something that had been led in evidence or written down and it was unfair to rely on that without telling the claimant exactly why it was that was being relied upon to bolster the allegation.

214. The specific allegation facing the claimant was unclear and even during the Hearing the parties were still unable to precisely say what the charges the claimant faced were. This was unfair.

215. The ACAS Code had not been followed due to the unreasonable investigation. The claimant had referred matters to a manager but this had not been progressed despite the respondent progressing an informal issue by the canteen staff.

216. It was also argued to be unfair not to have postponed the hearing on a second occasion. Mr France proceeded to deal with the claimant's claims in his absence. There was no suggestion he was going to do this.

217. The dismissal was based upon exaggerated statements and it was unfair. Had a reasonable procedure taken place, the claimant would not have been dismissed.

218. The wrongful dismissal claim should be upheld as the claimant's position was clear and credible.

Discussion and decision

219. In reaching my decision I took account of the entirety of both written submissions and the points made by the agents orally. I have also taken the time to consider carefully the evidence that was led both in terms of the oral evidence and the productions to which reference was made. I shall deal with each of the issues that require to be determined in turn.

Unfair dismissal

Genuine belief

220. The respondent accepted that the claimant was dismissed and the claimant accepted that the reason relied upon by the respondent was for matters relating to his conduct. The first issue is whether the respondent genuinely believed the claimant had committed misconduct. It is clear from the decision of the dismissing manager that the respondent genuinely believed the claimant had been guilty of the conduct in question. Mr Stewart chose to accept the witness statements that had been submitted and did not believe the claimant's position. The claimant was dismissed as a result. On that basis the respondent did genuinely believe that the claimant was guilty of matters relating to conduct.

Reasonable grounds

221. The next issue is whether there were reasonable grounds for the belief. Again from the evidence before the Tribunal it was clear that Mr Stewart accepted the witness statements that had been provided to him from the canteen assistants. Taken at face value, they support the belief. There were therefore reasonable grounds for the belief.

Investigation

222. One of the key issues was whether at the time the belief in the claimant's guilt was formed, the respondent had carried out a reasonable investigation. It was the investigation that the claimant had challenged. It was essentially argued that the respondent had failed to carry out a fair investigation since it accepted the 2 canteen assistant statements without making enquiries to verify if what was said was accurate given the claimant disputed the events in question and that the approach was unreasonable, falling outwith the range of reasonable responses.

223. It is important to note that the issue here is whether a reasonable employer from the information before the respondent could have acted as the respondent did. It is not for the Tribunal to substitute its view. In other words, did the investigation carried out by the respondent in this case fall within the range of responses open to a reasonable employer.

224. Having carefully reflected upon this and considered the evidence led before the Tribunal I have concluded that the respondent's investigation fell outwith the range of responses open to a reasonable employer. There are a number of reasons for this.

225. It was clear throughout the investigation that the claimant fundamentally disputed the events provided by both canteen assistants. He argued that what was presented by them was exaggerated. He denied using unreasonable force to return the box and denied swearing. He was also clear that there was at least one other employee present who was likely to have seen what had happened, since she was behind the claimant in the queue and had purple hair.

226. While the claimant was unable to name the individual, no evidence was presented to the Tribunal showing any steps to verify the claimant's position. Dismissal is a process ending at the conclusion of the appeal. As confirmed in ***Taylor v OCS*** *2006 IRLR 613,* fairness of the disciplinary process as a whole is considered with each case being considered on its facts. The respondent knew that the claimant was arguing one of the canteen assistants, indeed the one who recommended the matter be reported, and the witness who said the claimant swore, could have had a "vendetta" against him or at least a reason potentially to exaggerate what happened. The claimant advised Mr Stewart during the hearing of the issues he had (in his grievance and statement). Mr Stewart concluded that the statement could be biased since it came from his mother and did not consider it. An employer which was acting fairly and reasonably would take steps to check what was being reported was accurate, rather than rely upon the limited information within the statements given the limited information within them.

227. The claimant had told the respondent that the canteen assistant in question had an altercation with the claimant's mother such that she may have used this incident to cause the claimant's mother upset by seeking to orchestrate action by the respondent against the claimant.

228. It is important not to consider information that was not before the respondent at the time and in assessing the fairness of the dismissal I rely only upon the information before the respondent at the time. The information provided to the respondent's agent before the Tribunal by the witness (which was not something available to the respondent at the time) indicated that the individual in question believed that the matter had been taken out of proportion. Had the respondent undertaken more detailed enquiries to verify the claimant's position, the position of the canteen assistants may well have been different since that is the type of response that could well have been obtained. That email is not something that was available to the respondent at the time and could not therefore have been taken into account but had the respondent made further enquiries given what the claimant said, further information would have been available before them as to the witnesses' position. It is that type

of information that a reasonable investigation could well have discovered, The difficulty in relying upon the terse witness statements that is inferences are made rather than making a decision based on what actually happened or what the witnesses actually saw or felt.

229. An employer facing the facts of this case would not be acting fairly and reasonably without taking further steps to verify what happened given the information the respondent had. In this regard a reasonable employer would have sought to ascertain whether any other person witnessed the altercation (and if so spoken to them). At the very least the security guard appeared to have been in the vicinity. He was the individual to whom Ms Stevenson had reported the matter (on Ms Campbell's advice). He could have assisted by identifying those present, particularly the person the claimant indicated was behind him in the queue with purple hair.

230. Ultimately the investigation needs to be reasonable. It does not need to be perfect. In the specific facts of this case an employer acting fairly and reasonably would not simply have relied upon the 2 statements of the individuals without undertaking more enquiries given the limited information within the statements and given the position advanced by the claimant.

231. It is not clear from the statements whether or not the witnesses themselves were of the view that there was no one else who saw the interaction. While both say there was no one else at the counter, they were not asked whether there was anyone else who was in the vicinity who could confirm what happened. They are not asked about the individual the claimant said was behind him in the queue. They are not asked whether the security guard saw it, or if anyone else did. That was a serious failure since it was entirely possible the claimant was correct and there was evidence that would have assisted in understanding what happened, given the dispute on this key issue.

232. In addition to seeking other witnesses, a reasonable employer would also have reverted to the 2 witnesses to seek further clarification given the limited information within each statement (and the potential contradictions). The

respondent placed significant weight on the evidence given of the claimant's demeanour and how they believed he had been angry, such as red faced creating anxiety. The claimant had advised the investigator that he had health issues and it was possible his complexion (and demeanour) could in some way have been connected to his health (or indeed hunger or exasperation) rather than in a way that was adverse as was being suggested. The information as to the claimant's demeanour was relatively brief and lacking in detail. Despite that, considerable weight was placed upon it in concluding that the claimant was guilty of the allegation.

233. Ms Stevenson said she knew the claimant was angry "by his attitude". It is not clear what that means given the few words that were exchanged. His tone and language changed and he was louder. Yet it is accepted he was not shouting. What was it that he said or showed that suggested he was acting in a way that was inappropriate, rather than just irate at the meal he was offered? The fact Ms Stevenson says she could "tell by his face" is also unclear. The claimant had not eaten after a long shift and had health issues. It is equally possible that his face (and possibly attitude, tone and language) were all related to something unrelated to the interaction, something not explored with Ms Stevenson.

234. Very significant weight was placed on the fact she said her stomach was churning. While a reasonable employer could conclude that she suggests this was because of the claimant, an employer acting fairly and reasonably in this situation would ask what it was that caused her stomach to churn and why. It was unreasonable to place so much weight upon this without checking what specifically had caused the reaction. Mr Stewart's evidence was that he understood that to mean she felt sick and could have feared coming to work but that was an inference he made. It was equally possible Ms Stevenson's stomach was churning because of her unhappiness at the meal having been rejected. Mr Stewart also said he concluded she was "quite angry" as a result of the interaction.

235. Ms Marshall had believed that by "stomach churning" she believed Ms Stevenson was nervous or upset but Ms Stevenson was not asked if this was because of the claimant or because of the consequences of the meal being rejected. It was equally possible that her stomach was churning because she could have feared a complaint being made by the claimant in some way. In short there was a lack of detail as to what had actually happened and the consequences of the claimant's actions. Instead Ms Marshall and Mr Stewart had to resort to inference, which was adverse to the claimant.

236. Ms Campbell accepts that she was not directly present at the till where the interaction happened and it is assumed she witnessed the entire exchange but it is not entirely clear if she did so. She says that "I was busy at the time so watched the incident happen from the hot cupboard". Was it possible that she did not see it closely or fully? She said that she found his behaviour "unreasonable". It is not clear exactly what behaviour is relied upon. She says she advised Ms Stevenson to report the matter. It is not clear if Ms Stevenson felt the matter serious enough to report herself. She may not have. This was not asked of her. Why did Ms Campbell have to advise the matter be reported?

237. Ms Campbell refers to the security guard being at the doors, which was not something Ms Stevenson commented upon and she is not asked whether there is anyone who may have seen what happened, including the person the claimant said was behind him.

238. Ms Campbell says the claimant's face was "bright red". Ms Stevenson said she could tell "by his face". It is not clear what significance the colour of the claimant's face was and whether being "bright red" was an example of anger or due to temperature or some extraneous factor. The claimant had health issues and it was possible his face colour could be due to those.

239. Ms Campbell also says the claimant was "talking normal with a bit of attitude". if he was talking normally is that inconsistent with Ms Stevenson's view that the claimant was louder than before? Ms Campbell says he had a "bit of

attitude": what did this mean given the few words that had been exchanged. She said "it felt as if he would have kicked off if either of us opened our mouths". It is not clear why Ms Campbell would have been involved or said anything given she was not at the till and working on something else. What led Ms Campbell to think the claimant would have kicked off from what she heard?

240. These are the types of issues that remained unclear from the statements. While it is not a counsel of perfection, no reasonable employer would accept the statements as originally provided without some further inquiry given the information available to the respondent. I accept that some reasonable employers would ask some of the foregoing questions and that some equally reasonable employers would not. Nevertheless I do not consider that a reasonable employer would accept the statements at face value without some form of further enquiry given the issues in this case. At the very least putting the claimant's response to each of the canteen assistants given the differing views and checking on other witnesses was something a reasonable employer would have done. Failing to take this step fell outwith the range of reasonable responses open to a reasonable employer. In other words the investigation that was carried out was one that no employer acting fairly and reasonably on the facts of this case would have carried out. It fell outwith the range of responses open to a reasonable employer.

241. The lack of corroboration as to exactly what the claimant said was something that a reasonable employer would have considered further (especially given the conflict in the evidence before the respondent). The fact that one person said the claimant swore and the other did not was significant given the reliance upon the witness statements. If both witnesses said the claimant swore, that would have been relevant as to his state of mind and how he expressed his anger. If he did not, the fact that one of the witnesses said he did could also affect their credibility and whether in fact the matter was being exaggerated for nefarious purposes. It was notable that the witness that said the claimant had swore was the individual whom the claimant alleged had a

grudge against his mother (and the witness who had suggested Ms Stevenson raise the matter formally).

242. If the respondent believed that Ms Stevenson believed the claimant had swore but felt awkward about saying this, that was something that should have been asked of Ms Stevenson and communicated to the claimant. The swearing was part of the aggression that the respondent relied upon in upholding the allegations and it was important therefore to be clear exactly what the aggression on the part of the claimant was.

243. The respondent relied upon 2 very short statements which had some inconsistencies in deciding to dismiss the claimant, without pausing to consider whether in fact the evidence provided might in some way be mistaken. The points raised by the claimant, especially around identifying other witnesses to support his position, were reasonable and no reasonable employer would have proceeded to dismiss without first checking the position.

244. It was not enough for Mr Stewart to conclude that a full investigation had taken place. It was clear that a reasonable investigation had not taken place.

245. Given the appeal officer was aware of precisely why the canteen assistant was said to have a vendetta against the claimant, no reasonable employer would simply ignore that, simply on the grounds of potential bias. Given the claimant's livelihood was at stake, it was unreasonable to rely upon the evidence that was provided without further enquiries being made.

246. I did not accept the respondent's submission that as the claimant had failed to fully participate in the investigation process that essentially balanced out the failure to investigate further. It was incumbent upon the respondent to carry out a reasonable investigation given the seriousness of the charge. The claimant did not know the identity of the person he saw behind him but was able to say there was a witness. The respondent did not reasonably follow that up.

247. The claimant did fail to properly participate in the appeal process. Mr France did not tell the claimant he would proceed to deal with the appeal without the claimant in attendance but that was not unfair. While some employers might well have offered another opportunity to attend and adjourned the appeal hearing, Mr France reasonably concluded from the information the claimant had given that the hearing could proceed in his absence with the information the claimant had already provided being the grounds of appeal.

248. Mr France knew that the claimant disputed the allegation and denied entirely any unreasonable actions. He also knew that there was a potential reason why the statements that had been relied upon to dismiss the claimant could have been fabricated or exaggerated. Despite that knowledge no further steps were taken to verify what the claimant had said.

249. I did not consider the respondent's failure to properly deal with the claimant's informal complaint to a manager to have a material bearing on the dismissal. The dismissal process was the correct forum for the claimant's concerns as to the investigation and the allegations to be raised and considered. The respondent knew fully what the claimant's position was. I accept that the outcome of the dismissal letter did not also clearly deal with the claimant's grievance, but it was clear that the claimant's position was not being upheld by the respondent.

250. The investigation that was carried out by the respondent on the facts of this case (from the information before the respondent at the time) fell outwith the range of responses open to a reasonable employer. That resulted in the dismissal being unfair.

Did the respondent otherwise act in a procedurally fair manner?

251. The next issue is whether or not the respondent otherwise acted in a procedurally fair manner.

252. One of the issues in this case is the failure to set out exactly what the allegation or allegations were. While the respondent valiantly sought to argue the claimant ought to have known exactly what they were, it was clear that he

did not fully understand what the specific allegations he was to face were. His belief that he was being accused of an assault was clear when he suggested this at the investigation meeting. His grievance makes it clear that he was still unclear as to precisely what it was he was being accused of. Even the disciplinary invite letter refers to allegations of gross misconduct, suggesting there was more than one specific allegation but the specific allegations which the claimant was to meet was entirely unclear.

253. The respondent argues that it ought to have been obvious to a reasonable person what the allegations were but it is important that the claimant himself knows what they are. He did not and the respondent ought to have known that he did not. Even during the submissions stage of the hearing it was clear that the precise allegation was still unclear. Leaving the allegation to be inferred from the witness statements (which themselves are not identical) is not helpful. While it was clear that the allegation surrounded what happened at the canteen, exactly what was being alleged and why this was said to fall within the definition of gross misconduct was entirely absent.

254. By failing to set out exactly what it was the respondent was saying the claimant did wrong and why this was wrong was, on balance, the respondent not acting in a procedurally fair manner. It is critical that an employee facing disciplinary action knows what the allegation is to allow him to properly prepare and answer the charge or charges.

255. The allegation in this case was said to be “allegations of gross misconduct: acting violently, including fighting or physical assault, using rude or abusive language or behaving immorally or obscenely towards other employees or our clients and customers”. That was in reality an example of gross misconduct as set out in the disciplinary procedure rather than the specific allegations the claimant faced.

256. There was no violence alleged as such. There was no fighting or physical assault. There was no obviously rude or abusive language (unless one of the statements was to be preferred where it was alleged the claimant swore).

There was no obvious immoral behaviour nor was there any obviously obscene behaviour. Technically the canteen staff were not the respondent's employees, clients or customers (since they were engaged by a third party). The example of gross misconduct set out as the allegation was not therefore entirely apposite nor clear.

257. The difficulty arose because the respondent failed to specify precisely what was said to be gross misconduct rather than relying upon the example. The invite letter refers to allegations in the plural without setting out what these are.

258. In essence the claimant was alleged to have rejected the meal that was passed to him in an inappropriate way. It was alleged that he pushed the box back in such a way so as to cause the canteen staff to fear that the claimant was about to "kick off". It was also suggested that his comments and demeanour at the time were inappropriate.

259. The sarcastic remark about a happy meal is not by itself abusive nor rude. For some the comment may have been positive depending upon their food preferences. For others it may have been negative.

260. The issue was the way in which the claimant pushed the food box to the canteen staff. The canteen assistants were of the view the claimant had forcibly pushed it to them, accepting it had not left the surface.

261. The absence of exactly what demeanour or action of the claimant that was linked to his return of the box was a serious failing. One statement referred to the claimant being angry "because of his attitude and tone and language" and face. But being angry by itself is unlikely to be something giving rise to misconduct unless it is associated with something that reasonably creates an issue.

262. In short the failure to set out each specific allegation resulted in the procedure that was followed being unfair. A significant amount of focus was spent on trying to identify what it was the claimant was said to have done wrong rather than on considering the claimant's response to clearly defined allegations.

263. Taking a step back and looking at the procedure that was followed, the dismissal was unfair. The procedure that led to the dismissal was a procedure that no reasonable employer would have followed. That in itself would render the dismissal unfair.

Did dismissal fall within the range of reasonable responses?

264. Even if the procedure had fallen within the range of responses open to a reasonable employer, the dismissal would still need to fall within the range of reasonable responses open to the respondent. It is important to avoid substituting my view for that of the respondent and to focus on the range of responses open to a reasonable employer given the facts and information available to the respondent at the time.

265. In this case the allegation was that the claimant had forcibly pushed the meal box back to a canteen assistant while making comments which are said to have escalated matters. The claimant admitted sliding the box back but denied doing so with unreasonable force (or rage). He was unhappy with how he perceived he had been treated and believed that the offer of more nuggets had antagonised him. He made a sarcastic comment but there was no assault or violence as such.

266. From the information before the respondent they assumed the degree of force was such to amount to violence but the evidence in this regard was entirely unclear. Both statements said the claimant “forcibly pushed” the box back. No reasonable employer from the evidence available to the respondent would conclude that doing so was an act of “violence” such as to amount to gross misconduct from the information before the respondent.

267. The dismissing officer took account of what he had been told by the investigation officer as to how the claimant had conducted himself during the investigation meetings such as to draw an adverse inference about the claimant and support the conclusion that he was capable of the conduct which was considered to be alleged. This had not been something about which the

claimant could comment. It was not recorded anywhere in the notes. It was entirely unclear as to exactly what the conduct was that led to the inference.

268. The only information the dismissing officer had with regard to what happened were the 2 statements from the canteen assistants. These did not reasonably disclose that the claimant had been responsible for conduct that justified summary dismissal. The absence of detail setting out exactly what the claimant's demeanour was and why it was so resulted in there being insufficient detail that justified dismissal. At best the claimant had made sarcastic comments, returned the food box and was unhappy during the interaction. While the canteen assistant may have been unhappy with how the claimant reacted, and potentially anxious as to what happened (such that her stomach was churning), no reasonable employer would conclude that what the claimant had done amounted to gross misconduct, even ignoring the example definition of gross misconduct relied upon by the respondent and focusing instead on what the respondent concluded happened. The label used is not important. It is the conduct that is relied upon that must amount to gross misconduct. In this case no reasonable employer would have concluded that it did.

269. I considered equity and substantial merits of this case. The claimant's livelihood were at stake. He had raised concerns about how he felt he had been treated and he did not fully understand what the precise allegations were. His recollection was clear as to what had happened and he believed the 2 statements that were being relied upon were exaggerated and unclear. The size and resources of the respondent are relevant in assessing what is reasonable also and I have taken that into account.

270. The conduct of the claimant found to have occurred by the respondent did not reasonably justify the conclusion that the claimant had been guilty of gross misconduct. There was no violence nor obscene or rude language. The claimant refused a meal he considered not of good value. He was upset as to how he felt he had been treated and made a sarcastic comment. His response was not favourably received by the canteen assistants but it was not

reasonably considered as gross misconduct. In other words no reasonable employer would conclude from the information before the respondent that the claimant was guilty of gross misconduct, conduct that could justify his summary dismissal.

271. With regard to the sanction, the dismissing officer relied upon the lack of any remorse by the claimant in justifying the decision to dismiss rather than a lesser sanction. The claimant did not offer any apology at the hearing. He had equally not been asked about this specifically. In fact in his grievance letter he did apologise if offence had been taken. That had not been taken into account.

272. The claimant had a clear disciplinary record during his service with the respondent.

273. Even if there was gross misconduct, the decision to dismiss in all the circumstances, taking account the size, resources, equity and the merits of the case was unreasonable. It fell outwith the range of responses open to a reasonable employer.

274. I have ensured when assessing the fairness of the dismissal and applying the statutory wording that I consider only the information before the respondent at the time and whether the actions fall within the range of responses open to a reasonable employer (carefully avoiding the substitution mindset). I have also taken into account the terms of the ACAS Code on Disciplinary Procedures. At paragraph 23 it is noted that some acts (those considered to be gross misconduct) are so serious in themselves or have such serious consequences that they may call for dismissal without notice. Such acts can vary and will depend upon the organisation. In this regard I took account of the respondent's policy.

275. Taking a step back I have assessed the facts of this case and applied the statutory test. I have taken into account the size and resources of the respondent, equity and the substantial merits of the case. The procedure followed by the respondent fell outwith the range of responses open to a

reasonable employer. Accepting the 2 statements without further enquiry was unreasonable. Failing to properly set out what the precise allegations were that the claimant had to meet was unreasonable. Concluding that the claimant's conduct was gross misconduct was unreasonable on the facts found by the respondent. Finally, the decision to dismiss fell outwith the range of reasonable responses open to a reasonable employer.

276. In all the circumstances of this case therefore the decision to dismiss was unfair and the claimant's claim of unfair dismissal is successful.

Remedy for unfair dismissal

277. With regard to remedy the parties had agreed the position on a full liability basis. It was accepted by the respondent that the claimant had 9 week's worth of losses (at which point the claimant secured other employment and the losses flowing from the dismissal ceased). The issue for the Tribunal is whether either the basic or compensatory awards should be reduced by reason of contributory conduct (applying the separate tests pertaining to each award).

278. The difficulty for the respondent in this regard is the absence of any evidence supporting the submission. The respondent did not lead any oral evidence from either of the 2 witnesses who were present. The claimant gave clear evidence as to what happened on the day in question and he was cross examined on this.

279. I found the claimant to be credible in that regard. In other words, I accepted that he did not swear and that he did not forcibly (in the sense of unreasonably) push the food box towards the canteen assistant. He did make a sarcastic comment and he was upset as to how he perceived he had been treated with regard to the transaction.

280. There was nothing in his behaviour that caused or contributed to his dismissal to the extent that it would be just and equitable to reduce either the basic or compensatory awards (applying the different tests pertaining to each award).

281. I considered the respondent's agent's submission that the claimant escalated matters by his comment and that his comment and conduct justified a reduction in compensation. I did not consider that his comment was such as to amount, reasonably, to culpable conduct that justified any reduction in compensation. A sarcastic comment may be unwise but it was not culpable or blameworthy conduct and I did not consider it to amount to foolish conduct that justified a reduction in compensation.

282. I concluded, having considered the evidence before the Tribunal, that there was no reasonable basis upon which to reduce either the basic or compensatory award. I have concluded that the compensation ordered by this judgment is just and equitable following upon the claimant's dismissal in all the circumstances.

283. The claimant argued that the respondent had failed to comply with the ACAS Code of Practice by reason of the failure to properly investigate the matter. Paragraph 5 of the Code states that "it is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case". I accept the claimant's submission in this case that the respondent did not carry out the necessary investigations to establish the facts of this case.

284. The investigation was superficial in the sense that the short statement obtained from each of the canteen assistants was relied upon, without proper scrutiny or challenge despite the potentially valid points the claimant made. "Necessary investigations" in this case would have resulted in consideration as to other witnesses or indeed putting the points the claimant made (and the point I have set out above) to the witnesses.

285. I considered whether the respondent failed to follow the Code by failing to set out precisely and clearly what the specific allegations were the claimant was to face. Paragraph 9 of the Code explains that a written notification should be given to the employee containing sufficient information "about the alleged misconduct to enable the employee to prepare to answer the case at a disciplinary hearing".

286. I considered the respondent's arguments carefully in this regard. While I have some hesitation, I accepted their submission that in this case it would be sufficient, to comply with the ACAS Code, to include the details of the case within both the invite letter and the witness statements. I did not consider that failure to amount to a breach of the ACAS Code on balance.

287. There was no justification for the failure to carry out the necessary investigations in this case. The failure was therefore unreasonable.

288. In all the circumstances I have concluded that it is just and equitable to increase the award by 20% as a result of the failure of the respondent in this case.

289. The award for unfair dismissal is therefore as follows. The basic award is £840 (2 x £420).

290. With regard to the compensatory award, as his notice pay covers his first 2 weeks of losses, that leaves 7 weeks of loss. This method of calculating the compensatory award is a permissible method of awarding loss set out by the Employment Appeal Tribunal in ***Shifferaw v Hudson*** *UKEAT 0294/15*. His losses are therefore 7 x his net weekly pay £354 which is £2,478. The compensatory award is based on net weekly pay and not the gross weekly pay (unlike the basic award). He is also entitled to £300 for loss of statutory rights.

291. Prior to the increase for the failure to comply with the ACAS Code, the total compensatory award is £2,778. This is then subject to an increase of 20% (£555.60) giving a total award of £3,333.60.

292. As the claimant did not obtain any statutory benefits there is no recoupment applicable to this award.

Wrongful dismissal / Notice pay

293. The respondent accepted that there was no oral evidence before the Tribunal, other than the claimant's, to set out what had happened on the day in question. I have taken account of all the evidence presented to the Tribunal.

294. I concluded from the evidence before the Tribunal that the claimant had not acted in such a way so as to fundamentally breach his contract. He was upset as to the portion size and made sarcastic comments. He did not swear nor act in a way that could reasonably have led to the canteen assistants being fearful. He had not been aggressive. He was not in breach of his contract.

295. The actions of the claimant on the day in question did not amount to a breach of his contract. His summary dismissal was therefore wrongful.

296. In terms of his contract he is entitled to 2 weeks' notice as he had less than 3 complete years' service.

297. The damages awarded for the breach of contract are therefore 2 x £420 which is £840.

298. The award is based upon gross pay given the impact of the post-employment notice pay tax position.

299. The uplift for the unreasonable failure to comply with the ACAS Code applies to the wrongful dismissal award resulting in the total award being £840 plus £168 (20%) which is £1,008.

Employment Judge: David Hoey
Date of Judgment: 19 May 2021
Entered in register: 24 May 2021
and copied to parties