EMPLOYMENT TRIBUNALS

Claimant: Mr N Pengelly

Respondent: Sainsbury Supermarkets Limited

Heard at: Reading **On: 21 and 29 June 2021**

Before: Employment Judge Gumbiti-Zimuto

Appearances
For the Claimant: In Person
For the Respondent: Mr N Bidnell-Edwards, counsel

JUDGMENT

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

REASONS

1. The claimant was employed as an online delivery driver at the respondent's Didcot store from 1 May 2016 until 5 August 2020 when he was summarily dismissed. The claimant presented a complaint of unfair dismissal on 29 October 2020. By a response presented on the 7 December 2020 the respondent defends the claim.

2. The claimant's claim form including attachments runs over more than 100 pages. The claimant gave evidence in support of his own case, he produced a witness statement of 362 pages and provided closing submissions running to 150 pages. The respondent relied on the evidence of Mr Mark Fenton and Mr Andrew Taylor who produced statements that were taken as their evidence in chief. The respondent also produced a witness statement from Mr Glenn Cookson who was not available to give evidence. From these sources I made the following findings of fact.

3. On the 1 July 2020 the claimant had a conversation with Ms Rebecca Preece about the hours he was working. The claimant wanted to work more hours than he was allocated. Ms Preece describes the claimant's manner as *"V. defensive/aggressive".* This evidence set out in a statement produced at the disciplinary hearing was found by Mr Taylor to have been

irrelevant to the dismissal. The claimant considers that an attempt to reduce his working hours was Plan A to try and get rid of the claimant.

4. On 19 July the claimant had an exchange with Ms Andrea Smith about the fact a number of deliveries had been cancelled in a previous shift. The claimant insisted that he could have been called to carry out the deliveries. Ms Smith told the claimant she could not call on him because *"you were up to your work hours"* and that he would have been *"over your hours to drive"*. The claimant disagreed with Ms Smith, stating that she did not understand what she was doing. Ms Smith said of this *"all the time he was shouting at me and* [made] *me feel very threatened with the way he was* [being] *to me"*. Ms Smith described herself as *"feeling upset intimidated and threatened about the way he was with me and a manager"*.

5. A short while later Ms Smith spoke with Ms Tracy Grimly. She was described in Ms Grimly's statement as *"distressed and quite shaken"*. Ms Smith complains of the claimant being *"aggressive with his tone and his voice was raised"*. Ms Smith complained that she felt uncomfortable and threatened by *"the way he was pointing,* [gesticulating] *and leaning into her"*.

6. The incident between the claimant and Ms Smith was witnessed by colleagues, one of whom said, the claimant was *"shouting at Andrea about his shift patterns"* in a manner that was *"loud and aggressive verbally towards Andrea"*. Another colleague who witnessed the incident described the claimant's *"body language was recognisably aggressive".* Another colleague spoke of *"a shouting match"* the claimant arguing with Ms Smith, describing the claimant as *"raising his voice and gesticulating at Andrea"*.

7. Later that day, 19 July 2020, the claimant was called into a meeting with Ms Helen Pook at which the claimant was told that he was being suspended *"pending an investigation into the allegation of inappropriate and aggressive behaviour towards a member of store management*".

8. On 20 July 2020 the claimant attended an investigation meeting with Ms Pook. This was stated in a letter dated 19 July 2020 to be *"an investigation into allegations of aggression/ inappropriate behaviour, on 19th July 2020 at approximately 10 AM your behaviour towards a member of store management was inappropriate and aggressive".*

9. When the claimant attended he objected to Ms Pook carrying out the investigation and requested an "*independent arbiter".* After taking advice Ms Pook adjourned the meeting and further suspended the claimant so that an impartial manager could be appointed to conduct the investigation at a later date.

10. The claimant was asked to attend another investigation meeting on the 24 July 2020, the claimant was informed it was into "*gross misconduct following allegations of aggression/ inappropriate behaviour"* when the

claimant's *"behaviour towards a member of store management was inappropriate and aggressive".*

11. On 24 July 2020 the claimant attended an investigation meeting with Mr Glenn Cookson, a customer trading manager at the respondent's Kidlington store. The meeting lasted from 10:00 AM until 3:18 PM. In the meeting the claimant objected to Mr Cookson conducting the investigation because he knew Ms Smith and he didn't have knowledge of the online business. The claimant considered that his decision was pre-judged. The claimant said of his encounter with Ms Smith that it was a "*discussion firm but true"*, the claimant stated that the respondent's witness statements had been coached and displayed institutional nepotism. Mr Cookson found the claimant's behaviour towards him to be aggressive and noted that *"the claimant said he was "being the same today" in our meeting as he was when he was speaking to Andrea"*. Mr Cookson formed the view that the claimant was aggressive in his meeting, this supported the possibility he was also aggressive and inappropriate to Andrea Smith. Mr Cookson decided that the matter should proceed to a disciplinary hearing. He gave his reasons in the following way [p184] *"put forward to disciplinary hearing - feels him calling out poor performance in an open forum his acceptable - oblivious to how he is coming across to people"*.

12. The claimant was required to attend a disciplinary meeting for gross misconduct. The allegation was aggression / inappropriate behaviour on 19 July 2020 towards a member of store management that was inappropriate and aggressive.

13. On 5 August 2020 the claimant attended a disciplinary meeting with Mr Mark Fenton, operations manager Kidlington store. During the meeting it became clear that the claimant had not previously been provided with copies of statements made by Ms Smith, Ms Grimly and Ms Preece. The meeting was adjourned for 45 minutes to allow the claimant to consider those statements.

14. Mr Fenton considered that the claimant was aggressive towards him in the meeting. The claimant considers that the behaviour of Mr Fenton was bullying towards him during the meeting. The notes of the meeting do not allow for an assessment of the way communication was conducted by Mr Fenton and the claimant in the meeting. Apart from what was recorded in the notes of the meeting, Mr Fenton caused it's be recorded that the claimant was interrupting him and it was recorded that the claimant said he was not being allowed to speak by Mr Fenton. I am unable to conclude that either the claimant or Mr Fenton actually behaved in an aggressive way during the meeting. Having seen the two give evidence during the tribunal hearing I do not consider that either of the two men would have been intimidated by the other but both may well have given the impression of being aggressive to each other.

15. During the meeting the claimant denied that he had behaved in an aggressive manner. He stated that he had been "*firm but true"*. The

claimant's answers to questions from Mr Fenton about how his behaviour would have made other people feel led Mr Fenton to conclude that the claimant "*showed a lack of understanding of his colleagues feelings*".

16. Mr Fenton said to the claimant "*at this point you are proving to me you are not prepared to correct your behaviour"*. The claimant referred to the discussion with Ms Smith as a business discussion and said that he would "*do it again*". After Mr Fenton had announced his decision to dismiss, the claimant stated, "*I want to point out that "do it again" means be firm but true I would do it again and again, over and over"*. Mr Fenton concluded that the claimant was aggressive and inappropriate towards Ms Smith. Mr Fenton did not believe there was any collusion or conspiracy between the individuals who made statements about the incident. The claimant's answers and aggression towards him had the effect of supporting his view that the claimant had been aggressive and inappropriate towards Ms Smith.

17. Mr Fenton considered the sanction to impose on the claimant. His view was that a warning would be appropriate if the claimant could demonstrate a willingness to be self-aware and correct his behaviour, by bringing up the points he raises about the online operation in a more constructive and considerate way.

18. However, Mr Fenton concluded that the claimant did not understand that he acted inappropriately. *"He thought that because a mistake had been made, he was entitled and justified in being aggressive and shouting at whoever he thought was responsible*". The claimant's assertion that he would "*do it again, over and over"* left Mr Fenton with the view he would not change his behaviour. Mr Fenton was of the view that the claimant would continue behaving aggressively and inappropriately towards his colleagues, causing them to feel intimidated and threatened. Mr Fenton therefore decided to dismiss the claimant.

19. The claimant appealed the decision to dismiss him [p211]. The claimant was invited to attend an appeal hearing by Mr Taylor, Bicester store manager. The claimant met with Mr Taylor for the first part of the appeal meeting on 27 August 2020. The meeting was adjourned for Mr Taylor to make some further investigation. Mr Taylor spoke to people concerned about aspects of the claimant's grounds of appeal. As a result of his investigation Mr Taylor found that the claimant's grounds of appeal were not made out. In relation to ground six, Mr Smith found the Ms Smith, Ms Grimly and Ms Precce's statements were introduced at the disciplinary meeting and we're not part of the investigation in breach of the process. Mr Taylor stated it was poor practise to introduce 3 new statements to the claimant during the disciplinary hearing but he did not think this affected the outcome of the meeting and so did not consider it sufficient to overturn the decision. Ground 7 of the claimant's appeal was that evidence that the claimant provided was not considered. On this ground Mr Taylor found that after he reviewed all of the documentation provided by the claimant carefully, much of the contents related to performance, competency, state

of mind of the management team at Didcot, and the performance of the online department as a whole. That content was not relevant to the incident in question. Mr Taylor was satisfied that the relevant information within the claimant's documentation was reviewed and considered.

20. Mr Taylor stated that he did not find any evidence that substantiated the claimant's more serious allegations of collusion between the Didcot team or that the outcome was predetermined. Mr Taylor found evidence of poor process but considered that the *"imperfections did not impact the fairness of the decision and we're not serious enough to overturn the dismissal"*. His view was that overall a fair and a balanced decision was made to dismiss the claimant.

21. The claimant produced a lengthy witness statement much of the content was argumentative and provided an analysis of the material that was produced during the investigation meeting, disciplinary hearing and appeal hearing. Summarised below is a brief narrative of the claimant's assertions. The claimant says that the management of Didcot, in particular Ms Grimly wanted to get rid him. Plan A was to reduce his working powers so that he would leave and when plan A did not work Plan B was to get the claimant dismissed.

22. The claimant states that his "*previous life was as* [a] *management consultant and business leader [CEO/COO etc.)" that he usually (i) build businesses; (ii) identify problems (iii) and effect positive change"*. He describes himself as *"always passionate about everything he does".*

23. The claimant describes how he was *"top driver at Didcot for all four years"*, he had no sick days, no disciplinary meetings, *"no client complaints to speak of",* no accidents and was an *"integral part of Didcot winning team when did Kurt was in top 20 of Sainsburys' GOL operations".* A change in management however led to a change in performance and *"now the standard is ABYSMAL so many mistakes and customer complaints*". The claimant states that when he called these out Ms Grimly found it "*inconvenient*" and Ms Smith *"inappropriate"*. It was an example of poor performance that the claimant says led to him having a *"business discussion"* with Ms Smith. On 17 July 2020, 24 customers were disappointed by cancellation of their online orders because no one was available to make the delivery. The claimant became aware of this on Sunday 19 July 2021 when the claimant arrived at work he raised this with Ms Smith. The claimant explains how the conversation began with him pointing out that a van loaded to make deliveries was not legal to drive because the mudguard was missing. The claimant describes what happened next in the following way in his witness statement:

> *NP Knew the answer to the next question but asked Andrea loudly from across the room " were 24 orders cancelled on Friday?*
> *Andrea- "not sure I believe so."*
> *NP- "I could have done most/all as usual."*
> *…*

Andrea – "you were over hours" -refering NP supposed to the Friday morning discussion
NP- "I was not over hours in afternoon please check your facts"
Andrea- " I don't want to talk about this"
…
NP- "you and Becky say this all the time"
as walking out NP commented "what a way to run a business"

The claimant describes how he was wearing a "*drinks laden backpack*" which led to him "*leaning forward to balance*". He describes himself as firm and true describing the exchange as "*a normal business discussion*" where he was "*pointing out the inconvenient truth and management not liking being called out on it yet again"*.

24. The claimant says that Mr Cookson should not have carried out the investigation meeting because he did not have detailed GOL experience. The claimant discovered he had been removed from the schedule on Kronos, indicating to him that his disciplinary was pre-judged and Mr Cookson was brought in to find against him. The claimant complains about the conduct of Mr Cookson in the investigation meeting because he was using his phone and lied about what he was doing on his phone. The statements of the witnesses that Mr Cookson relied on were "*coached*" and did not include a statement from Ms Smith or Ms Grimly these latter statements emerged for the first time during the disciplinary meeting. The statements of Mr Toby Hambly and Mr Danny Hogan could not have been genuine because they were not in a position to see and hear what was stated in their statements. The claimant described their statements 'scribbles'.

25. The claimant says that Mr Fenton should not have conducted the disciplinary hearing. Mr Fenton worked with Mr Cookson and had been brought in to conduct the disciplinary hearing to ensure the claimant was dismissed to carry out Plan B. Mr Fenton in the disciplinary hearing was unpleasant, repetitive, bullying and continually interrupted the claimant. It emerged during the disciplinary hearing that Ms Smith had recently written a statement which was provided to the claimant for the first time during the disciplinary hearing together with statements from Ms Grimly and Ms Preece. The statement from Ms Preece was found by Mr Taylor to have been irrelevant and should not have been included.

26. Section 98 of the Employment Rights Act 1996 provides that in determining whether the dismissal of an employee was fair or unfair, it shall be for the employer to show the reason (or, if there was more than one, the principal reason) for the dismissal, and that it is a reason falling within subsection (2). The conduct of an employee is a reason falling within the subsection.

27. Where an employer has shown a potentially fair reason 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 resources 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.

28. The Respondent must show that it believed the claimant was guilty of misconduct; it had reasonable grounds upon which to sustain the belief; at the stage which it formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

29. It is not necessary that the tribunal itself would have shared the same view of those circumstances.[1]

30. After considering the investigatory and disciplinary process, the tribunal has to consider the reasonableness of the employer's decision to dismiss and (not substituting our own decision as to what was the right course to adopt for that of the employer) must decide whether the Claimant's dismissal "fell within a band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair"[2]. The burden is neutral at this stage: the Tribunal has to make its decision based upon the evidence of the claimant and respondent with neither having the burden of proving reasonableness.

31. The claimant was dismissed because Mr Fenton believed that the claimant was aggressive and inappropriate in his behaviour towards Ms Smith during the exchange on the 19 July 2019. The claimant was dismissed because his conduct. I am satisfied that this was Mr Fenton's genuine belief.

32. Mr Fenton came to the conclusion that the claimant was aggressive and inappropriate to Ms Smith based on a number of factors. Mr Fenton considered that the claimant was aggressive towards him during the disciplinary meeting. Mr Fenton had looked at the CCTV footage that existed of the exchange. The CCTV footage was silent but he was able to discuss it with the claimant, and he formed the view that the CCTV footage supported the allegation that the claimant was aggressive. Mr Fenton had the witness statements, recently produced, from Ms Smith, Ms Preece, and Ms Grimly. The statement of Ms Smith explained the incident from her point of view and referred to the claimant as being *"very close… shouting at me… all the time he was shouting at me and made me feel very threatened with the way he was being to me".* Ms Grimly's statement described how Ms Smith had complained about the claimant's behaviour soon after the incident as *"aggressive with his tone and his voice was raised… leaning into her, she said he made her feel very uncomfortable and threatened."* Mr Fenton also had the statements made by witnesses

[1] British Home Stores Limited v Burchell [1978] IRLR 379
[2] Iceland Frozen Foods v Jones [1982] IRLR 439

to the incident, Messrs Hogan, Hambly and Piper who described the claimant as "*Shouting at Andrea… loud and aggressive towards Andrea"* (Mr Hogan); *"Neil's body language was recognisably aggressive"* (Mr Hambly); *"Neil Pengelly was arguing with Andrea Smith… Neil was raising his voice and gesticulating at Andrea"* (Mr Piper).

33. Mr Fenton's conclusion that the claimant was aggressive and inappropriate is criticised by the claimant. The claimant says that the conclusion was unreasonable. The claimant says that the statements produced by Messrs Hogan, Hambly and Piper were "scribbles" that had been coached. The claimant objects to Ms Smith's statement which was produced some time after the investigation meeting and not provided to the claimant till the disciplinary hearing. The claimant points out that the CCTV has been destroyed and is no longer available, this he suggests is because it shows that his exchange with Ms Smith was merely a business discussion.

34. Mr Fenton justifies his conclusions by saying that in his opinion the CCTV footage appeared to show the claimant was being aggressive towards Ms Smith. Of the statements obtained Mr Fenton concluded that they were all written independently and provided a generally consistent picture that the claimant was aggressive and inappropriate towards Ms Smith. Mr Fenton rejected the contention that there was collusion or conspiracy between Ms Smith, Ms Grimly and Messrs Hogan, Hambly and Piper. The claimant's answers and aggression towards Mr Fenton made him more confident that the allegation against the claimant was true.

35. Mr Fenton's belief was that the claimant's behaviour was inappropriate and aggressive is reasonable having regard to the conclusions he had reached.

36. The claimant contends that the respondent did not carry out a reasonable investigation. Ms Smith was not spoken to by Mr Cookson, Mr Fenton or Mr Taylor. Only Mr Taylor spoke to Messrs Hogan, Hambly and Piper as part of his investigations into the claimant's grounds of appeal. The respondent only had the 'scribbles' produced by the witnesses and the CCTV.

37. While the CCTV footage has now been destroyed and is no longer available, I am not persuade that there is anything underhand in that regard.

38. The witnesses statements are laconic but describe, consistently with each other, a picture of the aggressive behaviour by the claimant. The witness statements were produced independently by each of the witnesses. In my view a reasonable employer is entitled to rely on such information in the course of a disciplinary investigation or disciplinary hearing. The appeal confirmed that the witnesses acted independently in preparing their statements, and addressed each of the points raised by the claimant in his appeal including the contention that his evidence pack had not been

considered in the disciplinary hearing. Mr Taylor found that the relevant information and documentation within the claimant's documentation was reviewed and considered at the disciplinary hearing.

39. The claimant was presented with statements from Ms Smith, Ms Preece and Ms Grimly, which were not before the investigation officer. The claimant was only provided with these statements during the disciplinary hearing. The claimant was given an opportunity to consider the statements and address Mr Fenton on those documents. The claimant will have been hampered in the presentation of his case because of the late production but in my view not so that it made a material difference to the outcome or the claimant's substantive ability to present his argument against the charges. The claimant in his evidence dismissed the statements presented at the disciplinary hearing as 'scribbles' referencing the claimant's view of their insubstantial nature, the claimant's defence was not materially altered by the late production of the statements. I recognise that this is a breach of the ACAS Code of practise which provides at paragraph 9 that:

> "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 copies of any written evidence, which may include any witness statements, with the notification."

40. However having taking into account all the circumstance of this matter I am of the view that this breach is not sufficient to render the decision to dismiss the claimant unfair. The claimant was not only given the opportunity to address the matters in the new statements he was given time to consider the statements and he was able to present his case despite the late production of the statements.

41. In all the circumstances the investigation of the claimant's case by the respondent was within the range of responses of a reasonable employer.

42. Whether it was reasonable to dismiss the claimant depends on the view that the respondent took of the claimant's actions. The claimant's version of what was said is not really capable of being contested by the respondent and in some respects is supported by the respondent's witnesses. What is contentious is whether having regard to the way it was said it was inappropriate and aggressive so as to justify dismissal. If the claimant's version of events was right there was no basis at all for dismissal.

43. However, the respondent rejected the claimant's account and did not consider that the exchange between the claimant and Ms Smith was 'a business discussion' as the claimant suggested. The claimant's

explanation about the volume at which he had to speak to be heard (due to loud background music, the CCTV was so was not determinative of this issue) and his explanation for why his posture might appear aggressive but in fact was not (the claimant was described as leaning forward towards Ms Smith, something viewed on the CCTV) were considered by Mr Fenton who formed his view after hearing all the material presented, him including the claimant's explanations. Having roundly rejected the claimant's version of events and concluded as he did that the claimant conducted himself in an aggressive and inappropriate manner an employer might reasonably consider the claimant was guilty of gross misconduct.

44. The respondent's handbook states that it has the following expectations:

> *"We want our workplace to be free from discrimination, harassment, sexual harassment, bullying or victimisation. This means we don't tolerate any of these types of behaviours by colleagues or managers against other colleagues or managers, third party contractors or customers.*
>
> *We must all treat each other with dignity and respect and avoid any form of harassment.*
>
> *Harassment means any unwanted, unreasonable, or offensive behaviour that affects the dignity of colleagues in the workplace. It may be related to age, sex, race, disability, religion, sexual orientation, nationality, or any personal characteristic of the individual that makes people feel offended, humiliated, frightened or threatened...*
>
> *Bullying is a form of harassment and can include offensive, intimidating, malicious or insulting behaviour an abuse or misuse of power which can undermine, humiliate, or injure the individual."*

45. The circumstances in this case are such that a reasonable employer might conclude that the claimant was guilty of gross misconduct, this employer did so conclude.

46. I have gone on to consider whether the dismissal was fair in all the circumstances. Dismissal was in my view clearly an option but not inevitable. There was clearly scope for the claimant to be advised as to his future conduct with some sanction short of dismissal being taken. The claimant in his submissions seems to suggest that, if he was to be found guilty, the sanction should have been a warning.

47. Two linked factors in my view operated against him and led to his dismissal, his general attitude and his insistence on continuing to behave as he has always done in circumstances when it was explained that his behaviour was unacceptable. During the hearing the claimant displayed a tinned eared attitude towards the effect on others of his use of language by making references to the Gestapo and the Klu Klux Klan when describing the procedure he was taken through by the respondent. Mr Cookson and Mr Fenton considered that the claimant was aggressive towards them in the investigation meeting and the disciplinary hearing.

48. The claimant's witness statement begins with the passage *"NP previous life as Management Consultant and Business leader (CEO/COO etc)"*, from his evidence it is clear that the claimant considered that he knew better that Ms Smith and had on many previous occasions saved the day for the respondent in the face of Ms Smith's and others' failings. The claimant made it clear that he intended to continue to behave in the same way in the future as he did not do anything wrong.

49. My impression is that the claimant's attitude would not have endeared him to his colleagues. I have considered whether this would have affected the way that the claimant's behaviour was considered by the respondent and therefore led to his conduct being viewed as "*aggressive and inappropriate*" when in fact it should properly be viewed as "*a business discussion*". I bear in mind that I must not replace my view for that of the employer and bearing that in mind it appears to me that to me that there was a proper basis for the conclusion that the claimant's behaviour was aggressive and inappropriate, it is therefore not open to me to replace that conclusion with a finding that it was a business discussion not meriting the sanction of dismissal.

50. The claimant's dismissal was not unfair.

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Employment Judge Gumbiti-Zimuto

Date: 20 August 2021

Sent to the parties on: .....

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For the Tribunals Office

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