EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102626/2019

Hearing Held in Glasgow on 13-15 September 2021

Employment Judge Jones

Ms June Bradley Personal Representative of Mr K Clark (Deceased)	**Claimant** **Personal Representative** **Represented by:** **Mr B McLaughlin,** **Solicitor**
Glasgow City Council	**Respondent** **Represented by:** **Mr Farrell** **Solicitor**

JUDGMENT

1. The claimant was unfairly dismissed by the respondent. The claimant contributed to his dismissal to the extent of 25% and his compensatory award is reduced accordingly. The respondent is ordered to pay to the claimant's personal representative compensation as follows: a basic award of £4995.72 and a compensatory award of £13,980.54. The recoupment provisions apply to the compensatory award of £13,980.54 and cover the period from 12th October 2018 to 20 May 2020.

2. The claimant was wrongfully dismissed but no further award of damages is made in that respect.

REASONS

Introduction

1. The claimant lodged a claim of unfair dismissal on 22 February 2019. Sadly, the claimant passed away on 25 May 2020. The claim was therefore advanced on behalf of his personal representative in terms of section 206 Employment Rights Act 1996 ('ERA'). Ms Bradley was present throughout the proceedings.

2. A joint list of documents was lodged by the parties. The Tribunal heard evidence from Mr Soutar who was the investigating officer and Mr Jackson who was the dismissing officer. Both parties made detailed submissions. Having considered the evidence heard, documents to which reference was made and the submissions of the parties, the Tribunal found the following facts to have been established.

Findings in fact

3. The claimant was employed by the respondent from 1 September 2007 until his dismissal without notice on 12 October 2018. The claimant's role latterly was that of Land Environmental Operative. His duties involved road sweeping in the Govanhill area of Glasgow.

4. The claimant worked with a team of other operatives. They were transported in a 'Sherpa' vehicle from the main garage facilities to the local areas where their road sweeping barrows were stored to carry out their duties.

5. New barrows were introduced by the respondent for use in around June 2018. The trade union advised against use of the equipment. A number of staff including the claimant did not wish to use that equipment initially due to safety concerns.

6. In the evening of 25 June 2018, the claimant had a text exchange with a colleague, Mr McCoid. That text exchange started with a message from Mr McCoid to the claimant saying '*Naw am on the bus now got doctors*

appointment the mawra so it up the road' then immediately after '*You aff aye suck maitland aff*'. This referred to the supervisor of both the claimant and Mr McCoid a Mr Maitland and followed allegations made by Mr McCoid to the claimant regarding the claimant's relationship with his supervisor and that the claimant sought favour from him. The claimant responded by saying '*Cant handle yer emoji fanny*', then '*take that barrow out next shift I'll take yer head aff*', then '*See u Friday wee man'*. Mr McCoid responded by saying '*Youll see double on Friday ya steamer*'. The final message in the exchange which was produced was from the claimant which said '*4 days to do the right thing don't let me down* 'angry emoji''. Mr McCoid did not make any comment to anyone about the text exchange at the time because it was in keeping with the style and tone of his communications with the claimant.

7. The claimant and Mr McCoid were dropped off in Bellisle Street on 2 July 2018 along with others after their lunch in order to perform their duties.

8. The claimant and Mr Coid had engaged in what they called '*banter'* such as that set out above in their text communication, during their employment together. That banter was generally light-hearted. However, on 2 July that 'banter' escalated and the possibility of physical violence between them was discussed. To put in colloquial language, the possibility of a '*square go'* was discussed between them during their shift.

9. Later in the afternoon of 2 July, Mr McCoid sent the claimant a text saying '*Don't bother leaving early a want a word*'. The claimant did not reply to that message.

10. When the claimant and Mr McCoid returned to the garage on 2 July, the claimant asked Mr McCoid about what he perceived as his earlier threats towards him. There was then an altercation between the two men and Mr McCoid assaulted the claimant which resulted in an injury to the claimant's head. The claimant was covered in blood as a result.

11. The claimant then spoke to a supervisor Mr Maitland and advised him what had happened.

12. Shortly thereafter the claimant saw Mr McCoid and spoke to him in an angry manner regarding what had happened.

13. The claimant was then suspended by Mr Maitland and Ms Paterson another supervisor. Mr McCoid was suspended at a later date.

14. The claimant was taken to hospital by a colleague where he was dropped off at the entrance to the hospital. The claimant received treatment to his head wound and then went home.

15. The respondent wrote to the claimant by letter dated 3 July 2018 confirming his suspension from work. The letter said that the reasons for this were that: '*You were fighting with a colleague, John McCoid within Polmadie Depot grounds during working hours and you were under the influence of alcohol during working hours"*. The claimant was invited to attend an investigatory interview on 9 July.

16. The claimant reported the assault by Mr McCoid to the police in the days following 2 July 2018. The claimant also contacted his MSP who wrote to the respondent by email date 10 July 2018 raising concerns regarding how the claimant had been treated. The claimant also contacted the Health and Safety Executive regarding his injury.

17. Mr Soutar was appointed as an investigatory officer in relation to the allegations against the claimant in terms of the respondent's disciplinary policy. He was provided with a copy of a statement from Mr Maitland which was prepared on 3 July 2018 and an undated statement of Ms Paterson.

18. Mr Maitland was also interviewed by Mr Soutar on 9 July and 17 August. Ms Paterson was interviewed by Mr Soutar on 9 July and 3 September. Mr McCoid was interviewed on 9 July and 13 August.

19. On 11 July Mr Soutar also interviewed a number of the colleagues of the claimant who had been working with him on 2 July: Mr Fisher, Mr Hamilton, Mr McDonald and Mr Stevenson. On the same day, Mr Soutar also

interviewed Mr Burns who had taken the claimant to hospital. Notes of all interviews were taken.

20. The claimant was then signed off work suffering from stress. The investigatory meeting was therefore postponed and rearranged for 8 August 2018. A further meeting was also arranged for 17 August 2017. Notes were taken of these meetings.

21. The respondent wrote to the claimant by letter dated 7 September 2018 in which additional allegations were set out against the claimant. These were that "on Monday 2 July 2018 you physically threatened John by chasing him around Polmadie Depot grounds and verbally threated him by stating that he '*better have a knife to finish you off*' and that the claimant had 'sent text messages to John on 2 dates prior to 2 July 2018 which threatened violence suggesting you would '*take his head off*' if he used a new piece of machinery." The letter also required the claimant to attend a further investigatory hearing on 14 September.

22. By letter dated 28 September 2018 the claimant was invited to a disciplinary hearing on 4 October. The claimant was provided with a copy of the investigation report which had been prepared by Mr Soutar together with copies of all notes of the interviews. In his report, Mr Soutar summarised the interviews which had taken place, set out his conclusions and then recommended that the claimant was 'passed for disciplinary consideration for the following allegations'.

23. The respondent's disciplinary policy statements provides at paragraph 3.1, which relates to investigations, that there are two outcomes following an investigation – no case to answer or case to answer. There is no mention in the respondent's policy of the investigating officer setting out conclusions on the evidence.

24. In his conclusions Mr Soutar stated that '*I was satisfied that, based on the information provided during the investigation, that Kevin (the claimant) was involved in a fight with his colleague John McCoid within Polmadie Depot*

grounds during working hours. This is based on a combination of factors including John's statement and account he gave to both Connie and David. The Supervisors description of John demeanour following the incident, namely that John appeared scared'. He went on to state: '*I also believe that Kevin was under the influence of alcohol during working hours*.' He went on to say that he based this on the supervisors' accounts of events and that '*John's account of seeing Kevin consume alcohol was also found to be credible combined with the supervisor's assessment*.'

25. The report also noted in the conclusions '*Kevin stated that Connie was present in the Supervisors' Office when he reported the incident, which was not the case and he also denied that Connie had given him a bandage despite him holding it in his hand in Appendices 3 and 4 and both Connie and David confirming that Connie had given him a bandage. Based on all these factors I find Kevin's account of that day difficult to believe*.'

26. A disciplinary hearing took place on 5 October 2018. The hearing was chaired by Gavin Jackson who was Assistant Group Manager. The claimant was represented by his trade union at the hearing and an HR advisor was also present in a note taking capacity. Mr Soutar presented his report at the hearing and witnesses were called.

27. The disciplinary hearing was adjourned and reconvened on 12 October with the same people in attendance. At the reconvened hearing, the claimant was informed that he was being summarily dismissed.

28. A letter was sent to the claimant dated 15 October confirming his dismissal. The reasons given for dismissal were that Mr Jackson was satisfied that

> "*On Monday 2 July you-:*
>
> - *Were fighting with a colleague, John McCoid, within Polmadie Depot grounds during working hours*
> - *Were under the influence of alcohol and/or another substance during working hours*

- *Physically threatened John by chasing him around Polmadie Depot grounds and verbally threatened him by stating that he 'better have a knife to finish you off'.*

And

- *You sent text messages to John on 2 dates prior to 2 July which threatened violence, suggesting you would 'take his head off' if he used a new piece of machinery.'*

29. No further reasons were given for the claimant's dismissal and Mr Jackson did not explain to the claimant or his trade union representative how he had reached those conclusions.

30. By letter dated 16 October 2018, the claimant's trade union representative wrote to the respondent providing detailed grounds of appeal against the decision to dismiss the claimant.

31. The claimant's MSP wrote to the respondent by letter dated 8 November 2018 setting out concerns regarding the decision which had been taken to dismiss the claimant and seeking to point out inconsistencies of evidence in the investigation report. The letter also stated '*I have spoken to both Police Scotland and the Procurator Fiscal's office. My understanding is that Mr McCoid has been charged and the PF has yet to make a decision to take this matter to court'.*

32. A document called 'Appeals Case Management' was prepared in advance of the appeal hearing. This document included a section headed 'Consideration by the Disciplinary Officer, Gavin Jackson' which set out what was said to be the considerations of Mr Jackson in reaching his decision. The content of this section of the document was not prepared by Mr Jackson but was written by a member of the respondent's HR team. It was not something which had been prepared at the time of dismissal but in response to the appeal against dismissal. It was not a contemporaneous record of the considerations taken into account in dismissing the claimant.

33. An appeal hearing before the respondent's Personnel Appeals Committee took place on 4 December 2018. The hearing was conducted by three councillors. Mr Jackson and Mr Soutar were also present and the claimant was represented again by a trade union representative Mr Crook

34. In handwritten notes of the appeal hearing, Mr Jackson is recorded as telling the panel '*Also believe KC attacked JMcC and JMcC acted in self-defence. Dec 2012 in similar situation (KC) same process. Final warning suspended 8 weeks – showed me KC was aware of process. KC aware of his behaviour dismissal option. Staff safety priority. 2nd altercation in 6 years*.'

35. Mr Jackson took into account when reaching the decision to dismiss the claimant a disciplinary matter which had taken place 6 years previously and where the relevant warning was no longer live on the claimant's record. Mr Jackson did not at any stage prior to the conclusion of the appeal hearing inform the claimant that he was aware of the specific circumstances of this matter or that he would take this into account when considering the allegations against the claimant.

36. The claimant was advised by letter dated 6 December 2018 that his appeal had been unsuccessful. The letter stated '*The Personnel Appeals Committee has concluded that the decision to dismiss you is reasonable in the circumstances and therefore your appeal is rejected*.' No reasons for the decision were provided.

37. The claimant sadly died on 25 May 2020. Between the date of his dismissal and the date of his death he received benefits and £250 in respect of wages for one week's work. The claimant's net weekly pay had been £306.10.

Observations on the evidence

38. The manner in which the claimant was treated by the respondent following his injury was extremely surprising to the Tribunal. He was suspended before attending hospital and Mr McCoid was not. It appeared that a view was taken as to who was at fault in the matter immediately and it was very surprising to

the Tribunal that the claimant who had suffered an injury was suspended and Mr McCoid was not.

39. It was clear that the claimant had suffered a significant injury to his head while at work at the hands of a colleague, yet the police were not called. The respondent did not contact the Health and Safety Executive and there was no evidence about what steps had been taken to record the incident as a work-related incident.

40. Further, a colleague was asked by the supervisor to take the claimant to hospital. He was simply dropped off at the hospital. No one waited with him and no arrangements were made to ensure he got home. He was advised he could phone someone if he needed to get home, but his mobile had run out of credit and he was not able to call anyone. He had to make his own arrangements. It seemed to the Tribunal that the respondent's approach from the beginning was that the claimant had brought his injury on himself.

41. The Tribunal heard evidence from Mr Soutar and Mr Jackson. Their evidence was generally credible and reliable in relation to the procedure which was followed. The evidence regarding their thought processes and reasons for taking the action they did, and in particular that they maintained an open mind throughout, was not credible.

42. One notable part of both of their evidence was the extent to which they discounted the evidence of the claimant's colleagues due to a view shared by them that colleagues don't want to get involved in any disciplinary matters and would not say anything which is to a colleague's detriment. Mr Jackson had a name for this 'the Code', while Mr Soutar referred to it as '*hear no evil, see no evil*'. It was said that if a member of staff were to support allegations against a colleague, they would be ostracised. Mr Jackson however could not explain how the fact that the claimant did report his colleague fitted into 'the Code'

43. The Tribunal could not understand why these colleagues would be interviewed at all given this view, as their evidence was disregarded where it was in favour of the claimant. It seemed to the Tribunal this put the claimant in a no win situation, where if the colleagues said anything negative about the claimant, it might be believed but if they said anything positive or neutral, it would be taken as them not wishing to get involved. When asked to clarify what evidence Mr Jackson had to base his view of 'the Code' on he referred to a disciplinary matter he had been required to determine recently, which was unrelated to the claimant's case.

44. Mr Jackson's evidence was vague regarding what was said by him at the appeal hearing in relation to the claimant's disciplinary history. While that is perhaps not surprising given the passage of time, the Tribunal did not accept Mr Jackson's evidence that he did not take the claimant's previous disciplinary history into account in reaching a decision to dismiss. Mr Jackson said that he became aware of it through evidence from Mr McCoid. However, the Tribunal formed the view that even if that were accurate, Mr Jackson then sought further information from HR in relation to the matter. He did not explain why such information might be relevant.

45. The witnesses' evidence was also unsatisfactory in relation to the issue of the text which had been sent to the claimant by Mr McCoid on the day of the incident between them. There appeared to be a deliberate attempt by both witnesses to suggest that they could not be convinced that Mr McCoid had actually sent the text even after the respondent had been advised that Police Scotland had confirmed that the text had come from Mr McCoid. Mr Jackson said that he would still have dismissed the claimant even if he had accepted that the text had been sent by Mr McCoid as he said that the claimant was 'still chasing Mr McCoid around'. While the Tribunal accepted that Mr Jackson would in all likelihood have dismissed the claimant in any event, this was not because he had properly taken into account additional information and weighed it up, but because he had prejudged the question of the claimant's guilt and was intent on dismissing him whatever the evidence in his favour might be.

46. The Tribunal formed the view that this was indicative of the general approach of both Mr Soutar and Mr Jackson to the allegations against the claimant, which was to give weight to any evidence which was to the disadvantage of the claimant but either ignore or play down any evidence which might be to his advantage. Neither men conducted the proceedings with an open mind or sought to balance the evidence before them in a reasonable manner. It was clear that the content and tone of communications between the claimant and Mr McCoid was to put it mildly, involving industrial language. There was no consideration given this throughout or investigations into whether this was consistent in terms of other communications between them.

47. It was also notable that Mr Jackson said that he did not accept Mr McCoid's evidence regarding the allegations he made of the claimant drinking alcohol on 2 July and indeed every day. Surprisingly, this did not appear to cause Mr Jackson to question whether he could accept the other aspects of Mr McCoid's evidence. Mr McCoid had said that the claimant had been drinking Buckfast during his shift and had a can of Tennant's lager in the vehicle returning to the depot. He also said that the claimant drank every day at work. It was surprising to the Tribunal that if Mr Jackson did not accept this evidence, it did not make him question how reliable the rest of Mr McCoid's evidence was. It was notable that Mr Soutar had accepted this evidence, despite the fact that no one reported smelling alcohol from the claimant at any time, that his supervisors had never had any concerns regarding the claimant drinking alcohol while at work before 2 July events, and that the claimant's colleagues reported that there was nothing about the claimant's demeanour which suggested to them that he had been drinking alcohol. It seemed to the Tribunal that the allegations of Mr McCoid in this regard were incredible and the willingness with which Mr Soutar accepted them, and that Mr Jackson discounted them but did not question the credibility of the remainder of Mr McCoid's evidence was also indicative of a closed mind on the part of both Mr Soutar and Mr Jackson to the possibility that the claimant's version of events may have been credible.

48. The Tribunal was also very surprised at the basis on which the claimant's version of events was said not to be credible, given that this view seemed to be supported by minor matters only which were in the immediate aftermath of the claimant suffering an injury to his head.

Relevant law

49. In order to determine whether a dismissal is fair or unfair, it is first necessary to determine whether the reason for the dismissal is one of the potentially fair reasons set out in ERA. Section 98(2) ERA sets out the potentially fair reasons for dismissal. These include conduct (section 98(2(b)).

50. Where an employer has established a potentially fair reason for dismissal, that is not an end to the matter. Where a Tribunal is satisfied that an employee was dismissed for a potentially fair reason, a Tribunal must then apply its mind to the provisions of section 98(4) ERA which states:

    a. Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – 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 dismiss the employee, and shall be determined in accordance with equity and the substantial merits of the case.

    b. This requires the Tribunal to consider whether in all of the circumstances, including the procedure which was followed, the dismissal of an employee was fair.

51. A Tribunal must always keep at the front of its mind that it should not stray into what is called a 'substitution mindset'. Rather it should assess the actions of an employer in the context of a band of reasonable responses of a reasonable employer.

Submissions

52. The respondent helpfully provided written submissions which he spoke to. The Tribunal was referred to well established authorities, *Iceland Frozen Foods v Jones* [1982] IRLR 439, *Sainsbury's Supermarkets Ltd v Hltt* [2003] IRLR 23, *Midland Bank plc v Madden* [2000] IRLR 82 and *BHS v Burchell* [1978] IRLR 379.

53. The respondent said the procedure which had been followed was fair, that the claimant was aware of the allegations against him and was accompanied, and there was a thorough impartial investigation. It was said that the inclusion of conclusions by Mr Soutar in his report did not undermine it, that the respondent considered evidence put forward by the claimant and that the reasons given by Mr Jackson for his decision were adequate. The appeal hearing was a review of Mr Jackson's decision and was a fair process. There was no requirement to provide reasons for the decision to dismiss the claimant's appeal.

54. In terms of substantive fairness, it was said that Mr Jackson was entitled to prefer the evidence of Mr McCoid to that of the claimant, that he each of the allegations against the claimant amounted to gross misconduct. It was also said that the information regarding the claimant's previous disciplinary matter was raised by Mr McCoid's union representative, that the allegation that this was indicative of unfairness on the part of the respondent had not been raised in the claimant's claim form or indeed until the hearing itself.

55. It was also said that it was irrelevant whether or not Mr McCoid had been charged or gone to trial over the incident with the claimant and that the failure of the respondent to dismiss Mr McCoid was not indicative of inconsistent treatment which might render the claimant's dismissal unfair. Reference was made to *UK Coal Mining v Raby* UKEAT/1124/02 in this regard.

56. The Tribunal was invited to take into account the role of the claimant's trade union in that it had also represented Mr McCoid and in doing so had been

critical of the claimant. It was said that the union's role went beyond that of a union representing two members with conflicting positions and was in fact hypocritical to suggest that a decision taken not to take disciplinary action against Mr McCoid was irrational.

57. In terms of remedy, it was said that if the dismissal was found to have been procedurally unfair, then even if Mr McCoid had been dismissed, the claimant would still have been dismissed and applying the principles of *Polkey*, there was a 100% chance that the claimant would have been fairly dismissed.

58. Further, it was said that the claimant had contributed to his dismissal and any award should be reduced by 100%

59. In terms of the claimant's claim of wrongful dismissal, it was said that the respondent was entitled to dismiss for gross misconduct.

60. The claimant's position was that there were no reasonable grounds on which to sustain the position that the claimant was guilty of misconduct. Reference was made to the agreed schedule of loss.

61. It was said that the investigation was outwith the band of reasonable responses, that the dismissal was both procedurally and substantively unfair and that the appeal did not remedy any defect in the procedure.

62. In relation to the investigation, it was said that Mr Soutar was selective in his analysis of the evidence. He only produced part of the text exchanges between the claimant and Mr McCoid which portrayed the claimant in a negative light and were taken out of context which would deprive anyone of understanding the full exchange. The investigation was conducted with a closed mind and there was a lack of objectivity and fairness.

63. The purpose of the investigation was to determine whether there was a case to answer but Mr Soutar went on to make findings that the claimant was guilty. It was irrational to say as Mr Soutar did that Mr McCoid was scared of the claimant rather than that he was scared because he had caused the claimant an injury. It was not taken into account that it was only the claimant who had

reported the incident and Mr McCoid's version of events continued to change as matters developed. This was in contrast to the claimant whose position remained the same throughout.

64. It was said to be irrational not to find the claimant's position credible on the basis he had said that he had not been given a bandage by Ms Paterson. It was irrational not to take into account the text sent to the claimant by Mr McCoid or the evidence of witnesses that the claimant did not smell of alcohol and had not been taking alcohol. Reference was made to Mr Soutar's view that some of the claimant's colleagues took the approach of '*hear no evil, see no evil'*. This was an irrational view. It was also said that where the version of events of Mr McCoid was corroborated, it was in relation to minor points only and not the substantive point.

65. It was said that Mr Jackson's decision was fundamentally unfair and that unfairness permeated it. In particular he referred to the '*Code*' which he said meant that colleagues would not 'grass' each other. This was a perverse and irrational view to take. No reasonable employer would find Mr McCoid to be a credible witness.

66. Reference was made to *Strouthos v London Underground Ltd* [2004] EWCA Civ 402 at paragraph 38 in relation to comments made by Mr Jackson at the appeal hearing in relation to the claimant's prior disciplinary record.

67. It was also said that the respondent's position on the role of the GMB was hypocritical, any union would act in a similar manner where there was a conflict between the interests of two members. The issue is not the involvement of the trade union but what the employer does. It was also relevant that Mr Jackson referred to the claimant's disciplinary record at the end of the process so as to leave the Councillors with that information. The timing was deliberate. Therefore, he was dismissed for an expired disciplinary warning 6 years before which had not been put to him during the process.

68. Reference was also made to *ILEA v Gravett* [1988] IRLR 497 at paragraph 13, which highlighted the importance of more investigation where a serious

allegation has been made. Here there was fighting and the police were involved, but there was no focus of the consideration of the evidence to exculpate the claimant.

69. In terms of the text message from Mr McCoid to the claimant , it was said that by 8 November 2018, there had been correspondence from the claimant's MSP and the respondent knew that this text had been sent by Mr McCoid. It was not reasonable of Mr Jackson to refuse to carry out further investigations in this regard. The text message further undermined the credibility of Mr McCoid but again this was not taken into account.

70. It was also said that in reaching the decision to dismiss, there was no consideration of the fact that the claimant had suffered an injury to his head, he was simply judged in the aftermath of this incident, when it wasn't surprising that his demeanour was different from normal. It was said that the refusal to investigate the issue of the text was very important as it set up what happened thereafter. The only evidence that the claimant had been an aggressor came from Mr McCoid, and this evidence challenged his view.

71. It was also said that the fact that no reasons for the dismissal had been given was important. This process was replicated in relation to the appeal. This disadvantaged the claimant when trying to appeal against his dismissal.

72. Reference was made to *Bowater v Northwest London Hospitals NHS Trust* [2011] EWCA Civ 63 in relation to the question of the Tribunal substituting its own views of whether a claimant ought to have been dismissed.

73. Reference was then made to the *British Heart Foundation v Roy UKEAT/0049/15* in relation to the claimant' breach of contract claim, in particular at paragraphs 6 and 7. The considerations are different from that of unfair dismissal. It was said that Mr McCoid was a wholly unreliable witness. There was no evidence that there was an actual assault on him and no evidence of repudiatory conduct on the part of the claimant. Therefore the claimant was entitled to his notice pay.

74. In referring to the case of *Jagex Ltd v McCambridge UKEAT/41/19* regarding contributory fault and *Polkey* deductions, reference was made to paragraphs 22 and 23. It was said that there was no more egregious example than of a closed mind and therefore the dismissal was substantively unfair and there should be no reduction in compensation.

75. Reference was also made to *Steen v ASP Packaging LtdUKEAT/0023/13,* where it was said that there was no blameworthy conduct on the part of the claimant and that the claimant had acted in extremis.

76. Finally it was said that it had been irrational of the respondent not to take any disciplinary action at all against Mr McCoid, not least given the content of the texts of 25 June.

Discussion and decision

77. The Tribunal was satisfied that the claimant had been dismissed for a potentially fair reason, being conduct. However, the Tribunal was of the view that the investigation which was carried out, while fair insofar as relevant people were interviewed, was unfair in a number of material respects and the respondent did not have sufficient evidence on which to form the belief that the claimant had been guilty of the alleged conduct. In particular:

78. The investigation report set out conclusions on the evidence, rather than setting out the evidence in a neutral manner. This was not within the scope of the respondent's own procedure. That procedure envisaged an investigation report which set out the evidence and whether there was a case to answer. The procedure made no mention of a requirement to set out conclusions on the evidence and set out who was to be believed. While this factor of itself did not render the dismissal unfair, it was indicative of the more general approach to the allegations against the claimant, whereby Mr Soutar appeared to seek to establish facts which result in a finding against the claimant, rather than simply try and get to the truth of what might have happened. There was certainly no effort on his party to seek any information which might support the claimant's position. The manner in which the conclusions were set out and

the tone of them were also indicative of this approach. There was no balancing of what evidence was in favour of the claimant and what evidence was against him or whether the serious injury the claimant had sustained could have caused his behaviour to be different. The setting out of conclusions in this manner was not within the band of reasonable responses.

79. The investigation discounted the evidence of the claimant's colleagues which stated that they had not seen him drink alcohol that day (or any other day) and indeed in the evidence of the driver of the vehicle in which the claimant was alleged to have drunk a can of lager, that he would not allow drinking in his van. The report did not however state that this evidence had been discounted by Mr Soutar or set out the reasons for it.

80. The report only referred to the aspects of the texts exchanges between the claimant and Mr McCoid which showed the claimant in a negative light. This was again indicative of a closed mind.

81. There was no investigation into the text sent from Mr McCoid to the claimant on the day of the incident telling him not to leave early. Mr Soutar clearly did not accept that this text had been sent by Mr McCoid and his evidence before the Tribunal suggested that he did not think it was his responsibility to investigate this further. This was again indicative of the general approach of Mr Soutar which was to downplay any evidence which might support the claimant's position.

82. There was no effort to investigate what police involvement there was in the matter, even though the claimant had said that he had referred the matter to the police.

83. For all these reasons, the investigation was not conducted within the band of reasonable responses, which rendered the dismissal unfair.

84. However, if the Tribunal is wrong about the extent to which the investigation was conducted in a fair manner and within the band of reasonable responses, it concluded that the decision to dismiss the claimant was also unfair. It reached this conclusion for the following reasons.

85. Mr Jackson also discounted the evidence of the claimant's colleagues in relation to the question of his alcohol intake or behaviour. He did not give the claimant an opportunity to comment on the reason for discounting that evidence.

86. Although Mr Jackson discounted the evidence of Mr McCoid in relation to the issue of alcohol consumption while at work, which is not surprising as such evidence was quite incredible, he did not give consideration as to whether the rest of Mr McCoid's evidence should be treated with caution. It seemed to the Tribunal that if Mr McCoid was willing to make outlandish claims regarding the claimant's alcohol consumption, any reasonable employer would at least give consideration to whether that impacted on the credibility of the witness more generally. There was no suggestion that Mr Jackson did so. The Tribunal was of the view that this was indicative of a closed mind.

87. Mr Jackson did not weight up the evidence for and against the allegations, but jumped straight to a belief in the guilt of the claimant in relation to all allegations. He did not approach the matter with an open mind. He was not assisted in that regard by the investigation report itself and the manner in which it set out conclusions.

88. Mr Jackson did not have sufficient information to form a reasonable belief in the guilt of the claimant.

89. In relation to the allegation of fighting, this was because he did not approach the matter with an open mind or critically analyse Mr McCoid's evidence in any way. It was said by the supervisors that Mr McCoid was 'scared' and that this supported the allegation that the claimant had assaulted him. There was no assessment as to whether he was scared because he had just caused a serious injury to a colleague while at work and the police would likely become involved. The narrative was created in such a manner as to support the allegations against the claimant. Further, Mr Jackson did not think it was for him to investigate the text which Mr McCoid had sent to the claimant. The Tribunal formed the view that Mr Jackson still not accept that Mr McCoid had sent that text, even though it had been confirmed by Police Scotland that it

had been sent by him. Again, this was indicative of a closed mind on the part of Mr Jackson. He believed the claimant was guilty of misconduct whatever the evidence might be.

90. There was insufficient evidence to entitle Mr Jackson to conclude that the claimant was under the influence of alcohol or some other substance. There was never any investigation into whether the claimant was under the influence of 'some other substance' and the Tribunal was unclear as to why this allegation was added, other than that the evidence did not support the allegation of the consumption of alcohol while at work. Other than Mr McCoid's evidence which Mr Jackson said he discounted, the only support for the allegation of alcohol consumption was that the supervisors thought that the claimant's demeanour was different. It was astonishing to the Tribunal that Mr Jackson concluded that this meant that the claimant must have consumed alcohol, even though no one could smell any alcohol from him and in circumstances where he had just suffered a serious injury to the head. There was no attempt to obtain any medical evidence as to whether the change in the claimant's behaviour could have been caused by his injury or indeed that he had just been involved in an altercation. When taken together with the evidence of the colleagues of the claimant who had worked with him that day that the claimant had not taken alcohol, the conclusion reached by Mr Jackson was irrational and not within the band of reasonable responses.

91. Neither was Mr Jackson entitled to conclude that the claimant had 'physically threatened John by chasing him around Polmadie Depot ground and verbally threated him by stating that he 'better have a knife to finish you off'. In the first instance, the wording of the allegation was telling. It painted a picture of the claimant running round the depot with Mr McCoid running away from him. There was no evidence to support that. At most, it was said by Ms Paterson that the claimant was walking quickly behind Mr McCoid. There was little other evidence to support this allegation. In any event, at this stage there was no dispute that the claimant's head was bleeding. It was extremely surprising to the Tribunal that there was no consideration of whether or not the claimant was suffering from shock. Further, no account appeared to have been taken

of whether the claimant was entitled to be angry and upset having just suffered a severe injury to his head. Mr McCoid's statement said that the claimant had said he was going to stab him, which was quite different from Ms Paterson's version of events. There was no evidence that the two men had to be physically separated, that Mr McCoid had suffered any injury or that the claimant had or was about to attack Mr McCoid. Rather, the Tribunal concluded that the evidence was again put forward in such a manner as to be negative towards the claimant.

92. Mr Jackson had said that each of the allegations against the claimant amounted to gross misconduct. He said therefore that the allegation in relation to the text exchanges between the claimant and Mr McCoid was gross misconduct on the part of the claimant. As narrated above the investigation report did not provide the full exchange between Mr McCoid and the claimant. There was no investigation in whether anyone else was aware of the claimant having threatened Mr McCoid if he took out one of the new machines or whether the tone of the exchange was in keeping with their normal communciations. This was something which could easily have been investigated. However, instead, the Tribunal was of the view that there was no effort to investigate the background to the texts or take into account he offensive nature of the texts from Mr McCoid to the claimant again, because Mr Jackson did not have an open mind and intended to dismiss the claimant come what may. There was no investigation into whether Mr McCoid had in fact taken the machine out notwithstanding the alleged threat by the claimant.

93. Further, Mr Jackson took into account an expired warning in relation to the claimant. He did not tell the claimant that he knew about the circumstances of this matter which had been six years before. While the Tribunal accepts that in some circumstances, it may be relevant to take into account expired warnings, this was not one of those cases. In the first instance, the claimant was not given the opportunity to comment on the circumstances of previous warning. Secondly and more importantly, the Tribunal formed the view that the previous warning was taken by Mr Jackson as corroboration for the allegation against the claimant as well as in his decision that dismissal was

an appropriate sanction. The Tribunal concluded that Mr Jackson adopted the approach of 'he did it once, so must have done it again', without considering all the circumstances of both cases on an individual basis.

94. Therefore, for all these reasons, the Tribunal concluded that Mr Jackson was not entitled to reach a conclusion that any of the allegations had been established. There was insufficient evidence to entitle him to reach that conclusion and he did not give proper and fair consideration to the allegations against the claimant but approached his deliberation with a closed mind. He then took into account an expired warning without informing the claimant, all of which was not reasonable of Mr Jackson.

95. In all these circumstances, the claimant was unfairly dismissed by the respondent.

96. The Tribunal was also satisfied that the claimant's conduct was not such that the respondent was entitled to dismiss the claimant without notice. He did not commit a repudiatory breach of his contract. Therefore, he was also wrongfully dismissed.

Remedy

97. The Tribunal went on to consider the question of remedy. The claimant was entitled to a basic award of £4955.72. The claimant had a loss of earnings from the date of dismissal 12 October 2018 to the date of his death on 25 May 2020 of 84 weeks at a net weekly salary of £306.10. This amounted to a total wage loss of £15,667.20 and pension loss of £2973.53.

98. The Tribunal considered whether there should be any deduction from that compensation on the basis of *Polkey.* It concluded that there should not. The failures of the investigation and the decision to dismiss were too fundamental to amount to procedural failures and the Tribunal was not at all satisfied that if a fair procedure had been followed that the claimant would have been dismissed.

99. However, the Tribunal also considered whether the claimant had contributed to his dismissal. Conduct need not amount to gross misconduct in order to it constitute contributory conduct, but must be blameworthy and culpable. The Tribunal was of the view that while it could not be said that the claimant was responsible for the altercation which led to his dismissal, or that the texts which were sent between him and Mr McCoid amounted to gross misconduct, it is clear that the claimant did not do anything to try and put his and Mr McCoid's relationship back on an even keel. While the Tribunal accepted that it was Mr McCoid who assaulted the claimant, nonetheless, it appeared to have been accepted that the claimant was aware of a decline in the relationship between him and Mr McCoid. The claimant's own evidence in the investigation was that he confronted Mr McCoid about the threats which had been made. The claimant did nothing to de-escalate matters or bring concerns to the attention of his supervisors. The claimant might reasonably have tried to take steps to de-escalate matters which might have avoided the altercation which ultimately took place. In these circumstances, the Tribunal concluded that the claimant had contributed to his dismissal to the extent of 25%. The Tribunal did not consider it just and equitable to reduce the basic award to which the claimant was entitled, but did think that the compensatory award should be reduced by 25%. Therefore, the claimant is entitled to a basic award of £4955.72 and a compensatory award of £13,980.54.

100. While the claimant would also have been entitled to damages for breach of contract in relation to the claimant's wrongful dismissal, to award additional damages would be to award the same sums twice. Further, while the Tribunal is aware that the claimant had 11 years' service, the Tribunal was not addressed on damages for wrongful dismissal. Therefore, no further award is made in respect of the claimant's claim of wrongful dismissal

Employment Judge: Amanda Jones
Date of Judgment: 05 October 2021
Entered in register: 08 October 2021
and copied to parties