**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4109750/2021**

**Final Hearing Held by Cloud Video Platform (CVP) on 6, 7 and 8 September 2021**

**Employment Judge: Russell Bradley**

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| **John Taylor** | **Claimant**<br>**H Menon**<br>**Of Counsel** |
| **Lighting Warehouse & Electrical Limited** | **Respondent**<br>**M O'Carroll**<br>**Advocate** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that the claimant was unfairly dismissed. The respondent is ordered to pay to the claimant: -

1. A basic award of ONE THOUSAND EIGHT HUNDRED AND FIFTY POUNDS AND FORTY FIVE PENCE (£1,850.45)
2. A compensatory award of FOUR THOUSAND ONE HUNDRED AND FORTY TWO POUNDS AND EIGHTY PENCE (£4,142.80)

The Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations 1996 apply. The monetary award is £ 5,993.25. The prescribed element is £4,142.80. The dates to which that prescribed element apply are 14 January 2021 to 8 September 2021. The monetary award exceeds the prescribed element by £1850.45.

## REASONS

### Introduction

1. In an ET1 presented on 19 May 2021 the Claimant maintained the single claim of unfair dismissal. It was resisted. In accepting that it had dismissed the claimant, the respondent relied on "*conduct*" as its reason. The dismissal arose from an episode which occurred on Tuesday 1 December 2020. The case was listed for a three day final hearing to consider merits and if appropriate remedy. The claimant sought compensation.

2. An indexed bundle of 101 pages was lodged in advance of the start of the hearing. It was, apparently, an agreed bundle. In the course of the claimant's evidence it became apparent that since his effective date of termination he had been unfit for work. He said that he had sick notes vouching his unfitness for work for the period to the date of this hearing. They were produced on the morning of 8 September. The respondent had no objection to them being included in the bundle. By agreement they were numbered pages 102 to 105. Related to that issue and again by agreement pages 11 and 12 of the respondent's handbook were lodged. They set out the position in relation to the payment of SSP while absent from work due to sickness. It was agreed that they should be inserted as pages 52a and 52b.

### The issues

3. The issues for determination were:-

    1. Did the respondent have a genuine belief in the guilt of the claimant in respect of the allegation which resulted in his dismissal?

2. Did the respondent have reasonable grounds upon which to sustain that belief?

3. At the stage at which it formed that belief on those grounds, or at least by the final stage at which it formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

4. In all the circumstances of the case was the decision to dismiss the claimant fair in the context of section 98(4) of the Employment Rights Act 1996?

5. In the event that the claimant was unfairly dismissed to what compensation is he entitled? And in particular to what extent should any of that compensation be reduced to reflect ***Polkey*** and/or any contributory conduct?

**Evidence**

4. Evidence was heard from Angela Welsh, the respondent's operations manager, Ashish Lamba (employee of the respondent), Randhir Bawa, its managing director, and the claimant.

**Findings in Fact**

5. From the evidence and the Tribunal forms, I found the following facts admitted or proved.

6. The claimant is John Taylor. The respondent is Lighting Warehouse & Electrical Ltd. It trades from three premises in Scotland. Two are in Glasgow. They are at 69-71 Commerce Street and 593 Lawmoor Street. The third is in Edinburgh. The respondent has two directors. They are Randhir Bawa (Ricky) and his son Josh Bawa. Ashish Lamba is the brother-in-law of Randhir Bawa. He is responsible for the Edinburgh business. It opened in about 2019. He worked for the respondent in Glasgow prior to the opening of the Edinburgh premises. The respondent provides lighting, electrical and bathroom goods. It employs about 20 staff across its three sites. Each of the three premises has

a branch manager and an assistant manager. It was described as a family-run business.

7. The claimant's effective date of termination was 14 January 2021. At the time of his dismissal the claimant was employed as a warehouse assistant. He was 53 years of age. At that time he was based at the respondent's warehouse in Lawmoor Street. It is known as its Dixon's Blazes warehouse. The branch manager at Dixon's Blazes is Vishal Sirohi. The assistant manager is Lynne McDowall.

8. The claimant began work for the respondent on or about 11 October 2017. Mr Bawa had previously employed the claimant's father. Following the claimant's loss of employment with the Post Office, Mr Bawa agreed with his father to take the claimant on on a paid part-time trial basis. On 1 January 2018 the claimant began employment on a full time basis. Shortly thereafter, he began a period of sickness absence. It lasted about three months.

9. On or about 1 January 2020 the respondent issued to the claimant a written statement of terms and conditions of employment (**pages 33 to 39**). It provided that his places of work were both Glasgow branches. On 4 May 2020 the claimant signed to acknowledge receipt of the respondent's Employee Handbook (**page 53**). While not produced in its entirety, the handbook extended to 42 pages. Extracts were produced (**pages 40 to 52b**). They included the parts dealing with; positive work environment; behaviour at work; disciplinary rules; disciplinary procedure and disciplinary appeal procedure. In the course of his employment the claimant mislaid or lost his copy of it.

10. The claimant began working at Commerce Street. In the period of his employment prior to 1 December 2020, and as a result of "*problems*" the respondent moved him from there to Dixon's Blazes. At some later stage the respondent moved the claimant to its Edinburgh premises. The claimant worked there for only about three days. He then had a period of illness-related absence. It lasted for about three months. Sometime thereafter he returned to Dixon's Blazes. Mr Bawa believed that these episodes were part of a trend. The trend was that the claimant would work for about six months, then be off

work sick for about three months. Also prior to 1 December 2020 there had been an altercation between the claimant and his colleague Sukhjinder (Manny) Singh. The claimant believed that the result of that altercation was that they were both to receive written warnings. Neither was issued with a warning. Instead, they shook hands on the basis that that was "*an end of it*". However, neither had spoken to the other until 1 December.

11. On 1 December there was an altercation between the claimant and Manny Singh at Dixon's Blazes warehouse. Each version of how it came about was disputed by the other. Both also later disputed what was said by the other in the altercation itself. At the end of the altercation the claimant went to find Lynne McDowall in order to ask her to suspend Mr Singh. Shortly thereafter both the claimant and Mr Singh were suspended by Vishal Sirohi.

12. On 1 December, the claimant had moved various boxes into what he believed to be a suitable area. Mr Singh did not like what the claimant had done. The claimant learned of this because of what Mr Singh said to him, "*you fucking idiot*". The claimant challenged Mr Singh as to what he had said. The altercation then ensued. It became heated. The claimant then removed himself and went to the office to report the incident and Mr Singh's behaviour. On his way, he met Ms McDowall.

13. Between about 9am and 9.30am on 1 December, Mr Bawa was made aware of the exchange between the claimant and Mr Singh. He therefore travelled from Commerce Street to Dixon's Blazes. On his way out of Commerce Steet, he told Mrs Welsh about the incident. He told her that he was on his way to Dixon's Blazes. On arriving there in his car, he met the claimant in the car park. They had a discussion. That discussion included a reference by Mr Bawa to the claimant's short temper and to previous incidents where that had been apparent. Mr Bawa's impression was that the claimant was involved in petty arguments just about every second day. His recollection was that having been told by the claimant that he was suspended, he told him to go home and calm down.

14. In an undated letter (**page 66**), Mr Bawa confirmed the suspension of the claimant. The letter was indexed as having been dated 3 December. My Lamba was aware of the suspension of both the claimant and Mr Singh at that time.

15. Mrs Welsh began her employment with the respondent in about August 2020. Her main duties are to do with finance, including invoicing. Because of a background in human resources, Mr Bawa included her in discussions to do with the incident. She was then asked to carry out an investigation into it. She was the respondent's HR "*department*". In that role she dealt with issues as they arose. She also followed and disseminated information in light of any new legislation. She obtained advice from an outside agency, Croner's. The respondent relied on advice from Croner's and its solicitors throughout the exercise of disciplining the claimant including his appeal.

16. At the start of the investigation exercise, Mrs Welsh was given three handwritten statements. Ms McDowall had written her own statement on 1 December. Ms McDowall had also obtained statements from two other employees, Rhys Mowat and Joseph Drain. They were produced in the bundle respectively at **pages 62-63, 64 and 65**.

17. Relevant to the incident, Ms McDowall's statement recorded that; she walked into the warehouse; was met with the claimant shouting that Mr Singh had threatened him and he was calling the police, his lawyer and his union; she asked him to calm down; she asked him to speak properly, she had customers on the phone; she told him she would speak to him in a minute; and the claimant then started to tell her what had happened, claiming that he was only moving boxes when Mr Singh had said to him he would "*smash his face*". Her statement recorded that that seemed to her to have been a bit of an over-reaction and was definitely out of character for Mr Singh. Her statement then continued, amongst other things; that the claimant had been very angry aggressive in the previous few weeks; referred to him having threatened to take outside and stab whoever had "*grassed him*" for allegedly taking too long at breaks; that this was not the first argument the claimant had had with

Mr Singh, and that he had gone towards him with a hammer in an aggressive manner a few months previously; that since that incident neither had spoken to the other which had caused an atmosphere; and that Mr Singh's annoyance with the claimant was "*purely down to* [the claimant's] *lack of caring*."

18. Mr Mowat's undated statement recorded that; in the early hours of the morning he had been loading a van for deliveries as normal; when he came back "*behind the curtain*" he heard the claimant shouting; the claimant and Mr Singh were "*in each other's faces going back and forth"*; he did not hear what either had said except hearing the claimant say, "*If that's how you want to be then that's fine*"; and he continued to load the van.

19. Mr Drain's signed statement dated 1 December recorded that; he had come in to work and got an order form and started picking out items for the order when the claimant and Mr Singh started to argue with one another; the argument had started after the claimant had put away boxed units when Mr Singh said to him "*If you are not sure where they go leave them and I'll put them away later*"; the claimant replied, "*Don't you fucking speak to me, you said you were not going to speak to me again so don't, ok*"; at that point he (Mr Drain) had gone down the far aisle in the warehouse to get panels for his order; on his return to his pallet they were still arguing; they were about 1 foot apart; at which point the claimant said to Mr Singh that "*this was going to get sorted*" in "*like threatening*" manner; Mr Singh replied "*Don't be an idiot*"; the claimant then said, "*who are you calling a fucking idiot? I will fucking end you ok I am sick of you. You are always like this."*

20. As part of her investigations, Mrs Welsh carried out interviews with those three members of staff. By that time she had seen their written statements. It was her belief that there had been no-one else on the warehouse floor at the time of the incident. In the course of her discussions with them she learned that; the claimant's behaviour was typical of the person he was; they were intimidated and frightened of him; he had previously been to the employment tribunal; he had "*caused havoc*" elsewhere and had been to prison.

21. On 8 December and as part of her investigation Mrs Welsh met with Mr Singh. On 10 December she wrote to him. She said that she had drafted a written account of what they discussed "*for your records*". Insofar as relating to the incident with the claimant she wrote; "*You went onto warehouse floor to start your shift, there was a large delivery due in later so all staff members were trying to clear boxes away into correct areas to make space for new stock. John came over to the area you had cleared and moved the same boxes back into the empty space. You approached John and asked why he was putting the boxes there and if he did not know where the stock went just to leave it and you would sort it later. John started shouting at you "why are you fucking speaking to me?, you said you would not speak to me again ". I asked if this was the case that both of you did not speak and you said it was the case. John's temper seemed to get worse displaying a more violent aggressive nature towards you and at this point the space between you two was around a foot apart. John was shouting and pointing into you he was "going to sort you he had, had enough and he would smash you ". He also threatened to stab you. You asked him not to be an idiot and move away. You explained you didn't want to fight with him, and you were trying to diffuse the situation by telling him to go away and not to be an idiot (foolish) however John continued to react to your comment and more verbal arguing continued as you both walked away from each other. A short time afterwards Vishal came into warehouse and said you were suspended to get your stuff and go home straight away. You followed instructions and left to go home feeling worried and concerned*." The letter continued that Mr Singh had also raised issues of him having suffered bullying by the claimant. It said that Mrs Welsh would need to investigate them further. It told him that she was only focusing on the incident that happened on 1 December. Mrs Welsh took Mr Singh's statement by way of a letter to him because of a language barrier.

22. On 11 December and as part of her investigation Mrs Welsh met with the claimant. On 17 December she wrote to him. She said that she had drafted a written account of what they discussed for his records. Insofar as relating to the incident with the claimant she wrote; "*You went onto warehouse floor to start your shift, clearing boxes away Manny approached you and shouted in*

*your face "you are a fucking idiot, I will smash you." you replied to Manny "You will smash me? This is the second time you have threatened me so do something about it then." Both exchanged words further and things got rather heated with the distance between each of you close on 2 inches apart, you asked him to "get out your face." Having had enough of the situation between you and him you went to Lynn to report it who at the time was approaching the warehouse, she said she will deal with it and pass it onto Vishal as she was with a customer. You asked Lynne to suspend Manny, then returned to the warehouse to get on with clearing boxes away. A short time afterwards Vishal came into warehouse and said you were suspended to get your stuff and go home straight away. You did not understand why this was happening but left the building as instructed. On leaving the building you seen Ricky in his car and went into the car to speak to him. There was a discussion took place in the car and you left to go home afterwards*." The letter continued that the claimant said that on various occasions he had felt victimised and was being "*set up*" for dismissal. It also noted the claimant's reference to previous altercations between him and Mr Singh including a "*more serious violent outburst*" and that Mr Singh had told him not to speak to him ever. Her letter clarified that her position was to investigate the incident on 1 December and not anything that was said or done in the past. The letter noted that the claimant handed Mrs Welsh a sick note and he told her he was suffering from stress. The sick note was for 28 days.

23. The next day, 18 December, Mr Lamba invited the claimant to a disciplinary hearing. The letter fixed the hearing for 23 December at 11.00am. It was posted to an address in Fife. The claimant was at that time living at an address in Fife with his girlfriend. The letter was sent by special delivery post. Two further letters were sent by special delivery post to the same address fixing hearings for 31 December 2020 and 8 January 2021. All three invitation letters were substantially in identical terms. They said, "*The purpose of the hearing will be to discuss the allegations listed below:*

- *Break down of communication between you and Mr S Singh*

- *Aggressive and threatening abusive manner used towards Mr Singh.*

*The evidence that will be reviewed at the disciplinary hearing is listed below:*

- *Written statement from member of staff witness to incident*
- *Written statement from member of staff witness to incident*
- *Written statement from member of staff witness to incident.*

*Please find a further copy of the information detailed above enclosed with this letter*."

24. Prior to the disciplinary hearing, Mrs Welsh provided a verbal report to Mr Lamba. In it she provided other information of concern. That information included; a description of the claimant as intimidating; that the incident on 1 December was typical of him; that he had been involved in previous employment tribunal claims; and that he had been to prison. In addition, Mr Welsh provided Mr Lamba with a copy of the respondent's Employee Handbook. It contained (**pages 47 to 48**) the respondent's examples of gross misconduct. They included "*serious cases of bullying, offensive, aggressive, threatening or intimidating behaviour or excessive bad language*."

25. On 6 January, the claimant had submitted a three page document headed "*My statement*". It included information about three incidents. The third was on 1 December. About that incident the statement said, "*He said your a fucking idiot approached him and said am a fucking it he repeated your a fucking idiot I'll smash you after confrontation, I said do it then, he was trying to see if I would react*" and "*Tuesday morning clearing Pallets of stock Manny I reckon didn't like what I was doing maybe?. He said you fucking idiot, I replied am a fucking idiot. He said your fucking idiot I'll smash you, I said Do what you have to do. I asked him to move away, I walked away. Went to Lynn, ask for him to be suspended*."

26. The claimant attended the meeting on 8 January. It was held by Zoom. He was accompanied by his trade union representative, Lisa. He had not received any of the letters sent by post. By the time of the meeting on 8 January he had seen the three witness statements referred to. By the time of the meeting he had not seen the letter of 10 December to Mr Singh. Notwithstanding the fact

that the invitation letters made no reference to it, it was enclosed with all or at least some of them.

27. The Zoom meeting was recorded. Notes from the recording were prepared by Mrs Welsh (**pages 81 to 84**). The claimant (via his counsel) agreed that they were substantially and materially correct. Mr Lamba chaired the meeting. The notes record at their outset that Mr Lamba asked the claimant to start from the beginning and give his account of 1 December. The claimant did so. The note records it as being "*John told Ash he walked onto the shop floor and started having a look about to see what was needing done. He decided to start on some stock lying in the warehouse and grabbed a pallet. He walked around the corner with the loaded pallet and started unpacking the boxes into an area he thought was suitable. Manny was working in the same area where John had chosen to unpack the stock. Manny turned around and said to John "you're a fucking idiot". John assumed from Manny's actions he did not want him putting the stock away in that area. John responded by saying to Manny "am a fucking idiot?" Manny repeated "you're a fucking idiot, I will smash you". John described the two of them as being right up against each other at this point and John challenged Manny by saying "You want to do something about it, then do it*".

28. Mr Lamba repeated the question several times, suggesting that he did not understand the claimant's explanation. He did so because he was aware of the claimant's nature and things in the past. The claimant explained that as far as he was concerned Mr Singh did not like where he had been putting the stock. That was the only thing he could think of that would make him say and react the way he had to the claimant. The note then records that Mr Lamba continued to seek an explanation as to how the altercation had begun. It then notes reference to the statements from the three other members of staff. Mr Lamba asked, "*Why would they all have something against you*?" and thought that all of them backed up that it was Mr Singh who was the victim. After the claimant had got quite "*wound up*", his representative took over from him in the meeting. Mr Lamba also referred to Mr Singh already having had a disciplinary hearing.

The meeting ended on the expiry of 40 minutes, being the free time available for a Zoom call.

29. Mr Lamba's summary of the outcome of the meeting was that he could not get an answer from the claimant as to the reason for the incident. In his view he had tried a few times, but the claimant was not telling him. Or at least he was not providing the full picture. On his rationale for his decision, Mr Lamba knew what the claimant was like. He had worked with him for a while. He sometimes got angry with customers and colleagues. Mr Lamba considered the content of Mrs Welsh's verbal report to him when considering the issues he had to decide. He was aware of the claimant's nature from working with him for two or three years. In his opinion, the claimant had an aggressive nature. In his view his attitude had not changed notwithstanding his move to Dixon's Blazes. The claimant was still getting angry with customers and staff. He was aware of his temper from his time working with him. Mr Lamba knew that the claimant did not have a formal disciplinary record. In his view, the respondent had hoped that notwithstanding the previous incidents, things with the claimant might have improved. He also knew that Mr Singh was not aggressive. He knew this from his time working with him.

30. By letter dated 14 January Mr Lamba wrote to the claimant. It advised him of the outcome of the meeting on 8 January. After repeating the issues from the invitation letters, Mr Lamba said, "*In response to the allegations I have considered your testimony and witness statements, on review I believe that you did use inappropriate and abusive language with an intimidating, aggressive manner towards Mr Singh leaving him feel stressed and threatened. This is not acceptable. Having taken your explanations into account, I have concluded that your actions can be classed a Gross Misconduct and therefore you are dismissed without notice pay. Your dismissal date is therefore 14 January 2020*." Mr Lamba decided that the second allegation (aggressive and threatening abusive manner used towards Mr Singh) was well-founded. He decided that it was gross misconduct in that it was an example of the kind of behaviour expressly provided for in the handbook namely, "*serious cases of bullying, offensive, aggressive,*

*threatening or intimidating behaviour or excessive bad language*." In Mr Lamba's view in saying to Mr Singh "*we'll sort it out*" the claimant was angry and behaved in a threatening way to his colleague. His view was in part based on other things which he knew about the claimant from working previously with him. Those things included an incident with a hammer. He was concerned that the claimant was a risk to other staff. His decision to dismiss the claimant was in part influenced by his view that the respondent could no longer take that risk.

31. As per a fit note dated 31 December 2020 (**page 77**) the claimant's GP advised that he was not fit for work in the period 8 January to 5 February. That advice was on the GP's assessment that the claimant had "*work stress*". He continued unfit for work in the period 5 February to 30 September 2021.

32. By letter dated 14 January the claimant appealed against his dismissal. The reasons for appeal were:-

    1. "*The decision to my self being dismissed and made unemployed has been too harsh as advised by union representative.*
    2. *Myself and my union representative were not shown any allegation statement that was made by your worker called Manny, Mr Singh*
    3. *All the evidence was not taken into consideration*
    4. *Only one statement was relevant to the proceedings and the other two statements were not.*"

33. On 28 January the appeal was heard by Mr Bawa in a Zoom meeting. The meeting was recorded. Notes from the recording were prepared by Mrs Welsh (**pages 86 to 95**). The claimant (via his counsel) again agreed that they were substantially and materially correct. Mr Bawa's approach to the appeal was to look at the evidence again.

34. On the first appeal ground, the notes record Mr Bawa's view that the decision was not too harsh. In his opinion it was within the framework of the rules and regulations. It was in his view gross misconduct.

35. On the second ground, the claimant's counsel accepted that by the time of the appeal the claimant had seen Mr Singh's statement.

36. On the third ground, it was argued for the claimant that CCTV footage was not taken into consideration.

37. On the fourth, the notes disclose that in contrast to its position, the claimant's representative argued that none of the three statements support the allegations made by Mr Singh.

38. The notes record a number of passages in which Mr Bawa alleged that the claimant had previously threatened colleagues with violence. They refer to his knowledge that the claimant had been phoning people to say he would "*stab them*." He was aware of an earlier incident in which he understood that the claimant had taken a hammer out so as to hit them with it. In Mr Bawa's view in order to understand the incident on 1 December it was necessary to consider the whole picture. That picture included these earlier incidents. In his words, "*you have to watch the full movie*" to understand. The respondent had not dealt formally with these earlier incidents because when they occurred it did not have the resource to deal with them.

39. By letter dated 5 February Mr Bawa advised the claimant that the original disciplinary decision was correct and should stand. On the four appeal points the letter explained that in his view; the dismissal was not too harsh and was in line with company policy; Mr Singh's statement had been posted to the claimant and returned to the respondent and was shared in the appeal meeting; a full investigation had been carried out by Mrs Welsh and all collated evidence was considered; and that all statements were relevant and had to be considered to help build a true picture of what had happened on 1 December.

40. Mr Singh was not disciplined in connection with the incident on 1 December. He has remained an employee of the respondent.

41. The claimant was certified by his GP as unfit for work since 8 January. Had he remained in the employment of the respondent he was have received SSP. Since his dismissal he has been in receipt of universal credit of about £325.00 per month. In that period he has also been gaining experience with a view to being taken on by McLean Joiners as a "*nail hand*" (or joiner's labourer) in

October 2021. In that work he expects to earn about £100 per day. That work depends in large measure on whether he is fit to do it.

42. In the period from 8 January to 5 April 2021 the rate of statutory sick pay was £95.85 per week. Thereafter it was £96.35. SSP is paid for up to 28 weeks to employees who are too ill to work. The claimant did not receive statutory sick pay between 8 and 14 January 2021 (see wage slip dated 22 January 2021, **page 54**).

**Comment on the evidence**

43. The respondent pled that some of the three witnesses interviewed wished for their statements to be kept anonymous "*due to their fear of the claimant and his temper*." On reading all of them, it would have been obvious to the claimant as to the identity of each. It was also obvious from the way that Mr O'Carroll presented the case that the respondent had no wish to retain any question of anonymity. The respondent also pled that "*several other employees had made comments to Ms Welsh about the claimant's threatening behaviour*." There was no evidence either within the disciplinary process or before me to support such a finding. I made some findings based on the notes of the disciplinary hearing after Mr O'Carroll's invitation to me that I should read them, albeit they were not read in full at the time of the hearing.

44. In his evidence, Mr Bawa volunteered information beyond the scope of the answers to questions. For example, when taken to part of the claimant's terms of employment (**pages 33-34**) he volunteered that just after his start date as recorded there (1 January 2018) the claimant went off sick for three months. He suggested that this information was relevant because it was "*good to have a picture to understand the story*." He also suggested, in answer to a question as to his initial involvement on 1 December that the claimant's only downside was his short temper; and that even the claimant's father had asked Mr Bawa about it.

45. My impression of the claimant was that he was trying hard to tell the truth. It was obvious from an emotional moment in his evidence that he believed he

was telling the truth about the incident and was becoming frustrated that he may not be believed about it. He had a tendency to interrupt questions and "*introductory*" statements to questions. That tendency occasionally resulted in him misunderstanding what it was he was being asked.

## Submissions

46. Mr O'Carroll lodged written closing submissions. Mr Menon lodged a written skeleton. I do not repeat them. Both had seen the other's before making short oral submissions. I have summarised their respective positions here.

47. For the respondent, Mr O'Carroll referred to section 98 of the Employment Rights Act 1996 and to the familiar cases of ***British Home Stores v Burchell*** [1980] ICR 303, ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17, ***Sainsbury's Supermarkets plc v Hitt*** [2003] IRLR 23, ***Taylor v OCS Group Ltd*** [2006] ICR 1602 and ***Polkey v AE Dayton Services*** [1988] ICR 142.

48. On the second "*test*" from ***Burchell*** (his heading of reasonable grounds for belief) Mr O'Carroll highlighted the lucidity of Mr Drain's statement, its consistency with that of Mr Singh and the fact that there was no suggestion of collusion between them. He described it as "*foremost*" of the statements.

49. In relation to the claimant's position, he argued that the tribunal could see that the claimant had embellished his account (of the incident with Mr Singh). I noted him as emphasising that the respondent had before it an employee who was not being entirely frank or truthful with it.

50. Mr O'Carroll also highlighted his point that "*the respondent's actions cannot be measured against a high judicial standard or one that would apply in the criminal courts. The purity of procedure achievable is not the same for the respondent as it would be for a large conglomerate with many staff and a full HR department.*" In contrast, a measure of realism was necessary. The context for his comments was the suggestion that other matters were considered by the respondent beyond the allegations and the evidence supporting them. The focus should be on what was said by the respondent in its outcome letters.

51. On remedy, he sought a 100% reduction applying ***Polkey*** and a 100% reduction under section 123(6) of the 1996 Act. He argued that the evidence of Mr Drain, albeit hearsay, could be taken into account on the latter. In his submission, (accepting that a 100% reduction for contributory conduct was exceptional) this was such a case given the severity of the conduct complained of. He also argued that the claimant had failed to mitigate his losses.

52. Mr Menon questioned what it was that the respondent's dismissal officers believed in (in the context of the ***Burchell*** test, part one). The overarching criticism was that what had been actually found as misconduct was "*totally garbled*". It was not enough to simply look at the dismissal letters because they say nothing of any meaning on what misconduct had in fact been found. On the question of substantive/procedural unfairness, the focus was on the inclusion of extraneous material at each stage of the process, the subsidiary but nonetheless relevant point being that none of it was put to the claimant. Separately, he argued that the imposition of the sanction of dismissal was manifestly excessive and outside the range of reasonable responses.

53. He took no issue with the respondent's argument on measuring the respondent against any higher standard. But I understood him to mean that even by the correct standard, the respondent fell short. The size of the respondent's business and its resources were not a "*get out of jail*" card. Certain minimum standards were expected and had not been met.

54. He argued that it had not been any part of the respondent's case that the claimant had been involved in any act of bad faith or dishonesty.

55. ***Polkey*** has no application by virtue of the serious substantive breaches. On the question of contributory conduct, it would be an error to conflate that question with the question of reasonableness of dismissal. The role of the tribunal is to consider the claimant's explanations to it, balancing against them the hearsay evidence relied on which inevitably had not been tested.

56. On remedy, it was accepted that his loss of earnings in the period from 14 January 2021 to date were of statutory sick pay and would be subject to the recoupment regulations.

**The law**

57. Section 98(1) of the Employment Rights Act 1996 provides that *"In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*" One reason with subsection (2) if it relates to the conduct of the employee.

58. Section 98(4) of the Act provides "*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case*."

59. The three-part test which Tribunals and courts apply in cases of alleged misconduct is well known, derived as it is from ***British Home Stores v Burchell*** [1980] ICR 303. "*First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case*." This three-part test was set out for cases "*in which there has been a suspicion or belief of the employee's misconduct entertained by the employers; it is on that ground*

*that dismissal has taken place; and the tribunal then goes over that to review the situation as it was at the date of dismissal*."

60. Equally well known and often cited is what was said in ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17. The Tribunal "*must not substitute its decision as to what was the right course to adopt for that of the employer*." And "*The function of the employment Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted*." The band of reasonable responses applies to the consideration of the investigation by the Tribunal as well as the decision to dismiss (***Sainsbury's Supermarkets plc v Hitt*** [2003] IRLR 23.

61. "*A " **Polkey** deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done*." And "*the Tribunal has to consider not a hypothetical fair employer but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly, though it did not do so beforehand.*" ***Hill v Governing Body of Great Tey Primary School*** [2013] ICR 691 at paragraph 24).

62. Section 123(6) provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. A Tribunal must identify the conduct which is said to give rise to possible contributory fault. Having identified that conduct, it must ask whether that conduct is

blameworthy. The Tribunal must ask if that conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did then the Tribunal moves to the next question; by what proportion is it just and equitable, having regard to that finding, to reduce the amount of the compensatory award?

63. Section 122(2) provides that where the Tribunal considers that any conduct of the complainant 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 reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.

**Discussion and decision**

64. In the case of ***Strouthos v London Underground Ltd*** [2004] IRLR 636 Lord Justice Pill said (at paragraph 12), "*It is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be precisely framed, and that evidence should be confined to the particulars given in the charge*." The fundamental difficulty in this case is that the respondent relied on evidence of previous indicents prior to the incident on 1 December 2020 which in its view were incriminatory of the claimant and which influenced its decision to dismiss him.

65. In this case, the misconduct entertained by the respondent and which resulted in the claimant's dismissal was that on 1 December 2020 he used inappropriate and abusive language with an intimidating, aggressive manner towards Mr Singh which left him feeling stressed and threatened. Both Mr Lamba and Mr Bawa appeared genuine in their belief that this was their reason for dismissing the claimant.

66. However, from their evidence before me, their reasons for dismissal included a consideration by each of their understanding of the claimant's past history. In Mr Lamba's case, his understanding included; his belief that the claimant got angry with customers and colleagues; the content of Mrs Welsh's verbal report to him; the claimant's nature based on his experience of working with

him for two or three years; and his opinion that the claimant had an aggressive nature. In Mr Bawa's case, it included; his belief that the claimant had previously threatened colleagues with violence; his "*knowledge*" that the claimant had been phoning people to say he would *"stab them*"; and his awareness of an earlier incident in which he understood that the claimant had taken a hammer out so as to hit a colleague with it.

67. Paragraph 9 of the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) provides, "*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*." Mrs Welsh told the claimant (**page 68**) that her position was to investigate the recent incident and not anything that was said or done in the past.

68. In concluding that the claimant was guilty of gross misconduct the respondent took account of the material noted at paragraph 66 above. In reaching that conclusion, the respondent did not provide any information to the claimant to suggest that they were being taken into account. In that respect, the respondent failed to adhere to paragraph 9 of the ACAS Code. In doing so, the respondent went beyond what it had told the claimant was the remit of the investigation and the allegations. In doing so, the respondent fell foul of the basic proposition contained in ***Strouthos***. The allegations which ultimately led to the claimant's dismissal went beyond the charge. Separately, the evidence relied on went far beyond the particulars of the charge. In short, the claimant was dismissed based on allegations and evidence supporting them which he did not have the opportunity to answer. That being so, the respondent has not satisfied the second or third parts of the *Burchell* test. No reasonable employer would have concluded guilt without affording its employee an opportunity to answer the allegations which the employer had in mind or the evidence said to support them. Mr O'Carroll argued that a relevant factor was that the "*purity of*

*procedure achievable*" was not the same as it would be for a large conglomerate with many staff and a full HR department. To agree with that ignores the respondent's evidence that it took advice from Croner's throughout the process. I do not accept that the respondent could rely on its modest size and resources so as to avoid its obligations under the ACAS Code or the proposition from ***Strouthos***. The claimant was unfairly dismissed.

**Remedy**

69. On 14 January 2021 the claimant had three years' continuous service. He was 53 years of age. His agreed gross weekly pay was £411.21. The basic award is therefore £1,850.45. My judgment is to order that sum to be paid.

70. The claimant seeks £350 for the loss of his statutory rights which sum is awarded. His counsel quite properly accepted that his loss of earnings from 14 January to the end of September could only be statutory sick pay. After that date, it is accepted that he has no loss by virtue of the employment that he is due to take up. On the assumption that he lost SSP from his effective date of termination of 14 January, the 28 week period in which the respondent would have been obliged to pay it ended on Thursday 29 July. For about 12 of those weeks, he would have received £95.85 per week (£1150.20). For the balance (16 weeks) he would have received £96.35 per week (£1541.60). On the claimant's analysis his loss of earnings is therefore £3,792.80. As he has been in receipt of universal credit in the period since 14 January the award for loss of earnings is liable to recoupment.

71. On the question of ***Polkey***, I reminded myself that the exercise is predictive. Further, "*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*" (***Software 2000 Ltd v Andrews*** [2007] ICR 825). The respondent in this case has not given any relevant evidence. I assessed the evidence as a whole. In my view, it was not

possible to predict to any extent that the respondent would have fairly dismissed the claimant or that he would have resigned. I made no reduction to compensation on this basis.

72. In considering the question of contributory fault, a tribunal must identify the conduct which is said to give rise to it. Having identified it, it must ask whether that conduct is blameworthy. The Tribunal must ask whether that conduct caused or contributed to the dismissal to any extent. If it did so, then the Tribunal moves to the next question; to what extent the award should be reduced and to what extent it is just and equitable to reduce it? In this case there was no dispute that as a result of a previous altercation between them, the claimant and Mr Singh were not speaking to each other. The claimant in his evidence in chief gave a clear explanation about what he did when he started work on 1 December. That explanation included reference to him having moved various boxes into what he believed to be a suitable area. It also included reference to the fact that Mr Singh did not like what the claimant had done. The claimant learned of this because of what Mr Singh said to him, "*you fucking idiot*". That is consistent with what the claimant was noted as having said in the disciplinary hearing, "*as far as he was concerned Manny did not like where he was putting the stock. That is the only thing he could think of that would make Manny say and react the way he had to John*." (**page 82**) The claimant then challenged Mr Singh as to what he had said. An altercation ensued between them which became heated. The claimant then removed himself and went to the office to report the incident and Mr Singh's behaviour. On his way, he met Ms McDowall the assistant manager. I had no oral evidence to contradict the claimant's version of the incident. Mr O'Carroll relied on the written statement of Mr Drain (**page 65**). It contradicts the claimant's evidence in a number of ways. Self-evidently, there was no test of that evidence in this hearing. It was, obviously, not sworn evidence. I preferred the claimant's account. He was clear as to what had happened. He was passionate that he was telling the truth. His evidence was on oath. In my view the claimant's conduct which gives rise to the question is his involvement in the altercation with Mr Singh. In my view, that conduct was not blameworthy. The claimant reacted to a challenging and provocative question from Mr Singh. The catalyst

for the altercation was Mr Singh's conduct. On that analysis, the compensatory award does not fall to be reduced in terms of section 123(6) of the 1996 Act.

73. The compensatory award is therefore £4,142.80. The part which reflects loss of earnings is liable to recoupment and I have reflected that in the judgment.

Employment Judge: Russell Bradley
Date of Judgment: 01 October 2021
Entered in register: 05 October 2021
and copied to parties