EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110312/2021 (V)

Final Hearing Held by Cloud Video Platform (CVP) on 20 and 21 October 2021

Employment Judge: Russell Bradley

Mr Edward McEachan	**Claimant** **In Person**
Enviraz (Scotland) Ltd	**Respondent** **Represented by:** **Ms A Forsyth – Solicitor**

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 FIVE HUNDRED AND THIRTY THREE POUNDS AND SEVENTY FIVE PENCE (£1,533.75)

2. A compensatory award of FIVE THOUSAND AND THIRTY SIX POUNDS AND TWENTY FIVE (£5,036.25)

The Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations 1996 apply. The monetary award is £6,570.00. The prescribed element is £5,036.25. The dates to which that prescribed element apply are 16 April

2021 to 20 October 2021. The monetary award exceeds the prescribed element by £1,533.75.

REASONS

Introduction

1. In an ET1 presented on 1 July 2021 the Claimant maintained a claim of unfair dismissal. He also indicated in it that he was owed "*other payments*." The claims were resisted. In accepting that it dismissed the claimant the respondent relied on "*conduct*" as its reason. The case was listed for a two day final hearing fixed to consider merits and if appropriate remedy. The claimant sought compensation. In discussion with him, he agreed and understood that the claim for other payments (which related to the return of tools) was one which the Tribunal could not decide. The single issue was therefore the fairness of his dismissal.

2. An indexed bundle of 11 documents (31 pages) had been lodged by the respondent before 20 October. Ms Forsyth added a twelfth document before the start of the evidence. The claimant had not seen either the bundle or that document. The start of hearing evidence was delayed while they were emailed to him. It was clear from discussions with him that the claimant had seen the vast majority if not all of the documents in or about March and April at the time of his dismissal.

3. The claimant had not contributed to the bundle. Nor had he complied with the terms of a case management order issued to the parties on 4 August. That non-compliance resulted in a written application by the respondent to strike out the claim. That application was made on 1 October and repeated on 13. By email on 13 October, the Tribunal directed the claimant to provide comment on his non-compliance by 20 October. Ms Forsyth confirmed that the respondent pressed its application for strike out. The alternative (for a deposit order) was sensibly not insisted on.

4. In the period before hearing evidence the claimant lodged 7 documents which related to the issue of his dismissal. 5 of them were duplicates of material in

the respondent's bundle. One of the other two was a hand drawn plan or layout of part of the respondent's premises. No witness took issue with the broad accuracy of the information contained in it.

Strike out application

5. Ms Forsyth sought to strike out the claim on the basis of the claimant's failure to comply with the terms of order 3 (details of financial loss). In her submission; this was a crucial part of the claim; the claimant had completely failed to comply; the respondent was prejudiced in that it had no opportunity to challenge any loss information and had no basis to understand his claim for compensation. She argued that without that information the respondent had no ability to deal with the case on a commercial basis. On the question of proportionality, she argued that strike out was proportionate given that the absence of a schedule of loss and supporting information left the respondent unable to assess the commerciality of contesting the claim against the possibility of settling it.

6. In reply, the claimant said that his mobile telephone had not been working over a period up to about 13 October. After that date he had not been able to retrieve emails earlier than about 19 September. He said that he had not received a copy of the order either by email or by post. On receipt of the email of 13 October from the Tribunal he had tried to contact a Tribunal clerk (the author of the email) and had then been in touch with the CVP clerk for this hearing. He briefly explained that since his dismissal he had worked "*a few shifts here and there*" and had recently applied for universal credit.

7. There was a short adjournment in which I decided to refuse the application. In that time the documentation referred to at paragraphs 2 and 4 was exchanged. In refusing the application I reminded myself of the overriding objective. The basis of the application was the failure to comply with the order. The respondent did not rely on its (written) alternative argument of an alleged failure to actively pursue the claim. I was satisfied that the claimant had not received the order at the time it was made. I was satisfied that as a result of his mobile telephone not working, he did not have access to emails until about 13 October,

and that from that date he could not access emails earlier than about 19 September. Irrespective of that state of affairs, it was in my view important to distinguish between (i) the merits of the claim of unfair dismissal and (ii) any compensation that may be due should the claim succeed. It is not uncommon (though perhaps less so in claims of unfair dismissal) for those issues to be "*split*". For the merits element, the claimant's failure to comply was irrelevant. Absent the information sought by the order it may have been possible for the claimant to succeed only in a basic award. If he were not able to establish loss of earnings, it was possible that there would be little or no compensatory award. Such a circumstance is not prejudicial to the respondent because of a failure to comply with the order. I also reminded myself that to strike out the claim should be proportionate to the gravity of the failure. In my view it was not. A lesser more proportionate remedy was to order compliance with order 3 within 24 hours which I made. The clerk to the hearing sent a copy of the order to the claimant in the course of the hearing. The claimant then produced a one page document in answer to order 3 a to f.

The issues

8. The issues for determination were:-

    1. Did the respondent have a genuine belief in the guilt of the claimant in respect of the two allegations 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? In particular, had it carried out as much investigation into each of the two allegations as was reasonable so as to sustain its belief?

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

9. Evidence was heard for the respondent from John Miller (contracts manager), Thomas Paterson (stores manager), Melissa Waldman (HR support), Craig Smith (contracts manager) and James Curran (managing director). The claimant also gave evidence.

Findings in Fact

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

11. The claimant is Edward William McEachan.

12. The respondent is Enviraz (Scotland) Ltd. Its principal business is in the removal of asbestos. It has business premises in Glasgow, Elgin and Carlisle. At the time of the circumstances giving rise to this claim it had about 80 or 90 staff across those sites. About 75 or so of them worked in Glasgow, including the claimant. The managing director is James Curran.

13. The claimant began his employment with the respondent on 14 March 2016. His agreed effective date of termination was 16 April 2021. By that date, the claimant was 39 years of age. He was employed as an asbestos operative. As at that date his agreed gross weekly pay was £409.00. His agreed net weekly pay was £330.00.

14. The respondent operates from a number of sites occupied by its clients. They include local authorities and the NHS.

15. On 17 March 2021 there was an incident involving the claimant and Ralph Cruikshanks at the respondent's Glasgow premises. Mr Cruikshanks is a director of the respondent. The circumstances of that incident led to the claimant's summary dismissal.

16. The respondent uses EasyBop. It is an online tool where staff can find information to do with their work. For example, it is used to log holidays. It is also used to "*post*" work-related information to the workforce.

17. The respondent has 16 CCTV cameras covering its Glasgow premises. Mr Curran has screens in his office which allow him to observe the goings on via those cameras.

18. On 11 March 2021 Melissa Waldman posted on the EasyBop notice board information which (amongst other things) advised the claimant and his colleagues that the respondent was in the process of installing additional safety/security cameras over its skip area and the stores which would "*be closely monitored.*" Since about 20 March 2021, they were not functioning properly. While they were able to show "*live*" footage, they no longer recorded it. Accordingly, from about that time it was not possible to replay footage from them. The cameras were not repaired until after the claimant's dismissal.

19. On 16 March the claimant was working on site in Johnstone, Renfrewshire. He was working alongside colleagues Barry Dougan and Charles Drew. The claimant was doing overtime work on it that day. The manager on the job was Craig Smith. The job was regarded by Mr Curran as very important work. It involved the removal of artex. Prior to the incident between the claimant and Mr Cruikshank, Mr Smith became aware that there were issues with the work at the site. There had been complaints. Prior to the incident, Mr Smith told Mr Cruikshanks about those issues. He told Mr Cruikshanks to be prepared for a complaint coming from the client. Mr Smith told the operatives that he wanted to discuss the job with them. No particular time for that discussion was fixed. The claimant left the site on 16 March in order to collect his daughter.

20. At about 1.30pm on 17 March the claimant returned from work on another site to the respondent's premises. He returned with a Risk and Method Statement (RAMS) from that job. He entered the operative's reception area as it is shown on the hand drawn plan of part of the respondent's premises which had been produced. Mr Cruikshanks was in the room talking to Thomas Paterson and another colleague (acting supervisor) Stevie McCarter. Others were in the room at the time. They included John Miller. They included some members of the support team. They included another colleague, Robert Whitehill. Mr Cruikshanks was adjacent to Mr Paterson's desk as it shown ("*Tam*") on the plan. He approached the reception area. He spoke to the claimant through a Perspex screen which was between them. They are both marked on the plan. The screen is open at the bottom, akin to those found in Post Offices. Mr Cruikshanks asked if the RAMS which the claimant had was for the work on site on 16 March. The claimant advised him that it was not. He asked for Mr Smith as the RAMS was for him for another job. Mr Cruikshanks suggested to the claimant that the job on 16 March had been left in a mess. He asked him why. He suggested to the claimant that the site should not have been left in the condition that it had. The claimant told Mr Cruikshanks that; he had been working overtime; he had worked beyond normal hours on the site; and he had told Mr Smith at the time that he had to collect his daughter and could not stay "*all night*". Mr Cruikshanks told the claimant that; that was not good enough; the job should not have been left in that condition and that he was not interested in the claimant's explanation of having to collect his daughter. The claimant explained to Mr Cruikshanks several times about having to collect his daughter. He also said that he was not the only operative on the job. He told him that there were two others and a senior supervisor. The claimant explained that he (and his colleagues) had been told by Mr Smith that they needed to meet with him to discuss the state of the site. An argument between the claimant and Mr Cruikshanks developed. Mr Cruikshanks came in to the operative's reception area via the door (marked on the plan) adjacent to the Perspex screen. He said to the claimant, "*Get in to my office*". The claimant refused. He told Mr Cruikshanks to "*fuck off*." He then left the reception area and returned to the outside yard via the door by which he had come in. Mr

Cruikshanks followed the claimant. He told the claimant to get back in to his (Mr Cruikshanks') office. Again the claimant told him to "*fuck off*." Mr Cruikshanks then spoke to John Miller. He asked Mr Miller to calm the claimant down. He asked him to get from the claimant his van keys. Mr Miller spoke to the claimant. He told him to go home and calm down. Mr Miller took the van keys. He told the claimant to come back in the next morning for a chat about what had happened. The claimant walked home.

21. James Curran became aware of the incident on 17 March from two sources. First, general conversation in the office that day. Second, from a conversation with his fellow director Mr Cruikshanks.

22. The next day, 18 March, the claimant cycled to work. He arrived at the respondent's premises at about 7.40am. He then attended a meeting with Mr Smith and others from site to discuss the state that the job had been left in on 16 March. The meeting lasted no more than 5 minutes. The claimant was then asked by Mr Miller to come in to a small conference room. The claimant was told that he was being suspended. He left the respondent's premises at about 8.10am.

23. On 19 March Mr Miller wrote to the claimant (**document 1/1 to 1.2**). The letter reminded the claimant that; he had been suspended; that he was asked to prepare a statement; and invited him to an investigatory meeting at 9.00am on Wednesday 24 March.

24. On 24 March the claimant attended the investigatory meeting. The other attendees were John Miller and Melissa Waldman. Ms Waldman took notes from which she prepared a typed version (**document 2.3 to 2.4**). It was a fair and accurate record of the meeting. It bears to be a verbatim record of what was said by those present. It noted that the meeting began at 9.00am. In answer to Ms Waldman's invitation to explain what had happened in the afternoon of 17 March the claimant said that; Mr Cruikshanks was in the office with Mr McCarter and Mr Whitehill; Mr Cruikshanks made a "*beeline*" for him when the claimant was in the yard; he asked the claimant what had happened at the job; he kept on asking and going on about it; he kept saying "*is that the*

RAMS from last night?"; he told Mr Cruikshanks to leave it as Mr Smith had said they would discuss it the next day (18 March); he then walked away from Mr Cruikshanks, something which with hindsight he recognised he should not have done, explaining that he needed to at the time; he felt disrespected by Mr Cruikshanks who dismissed the fact that the claimant was a single parent (by saying it "*doesn't matter*") when he explained about leaving the site early to collect his daughter; Mr Cruikshanks asked him to come in to the office but he already had a meeting with Mr Smith and was not in the right frame of mind to do as Mr Cruikshanks asked. The claimant further explained that he felt that he got "*dug up for petty things*", including not wearing an orange HIVIS when others do the same and for wearing black tee shirts. He also said that Mr Cruikshanks had told Mr Paterson not to order a triple X item of clothing which the claimant had asked for.

25. Later in the morning of 24 March Ms Waldman and Mr Miller met Mr Cruikshanks. Ms Waldman took notes from which she prepared a typed version (**document 12**). It was a fair and accurate record of the meeting. It bears to be a verbatim record of what was said by those present. It noted that the meeting began at 11.50pm. Mr Cruikshanks' explanation of what had happened on 17 March was "*I was standing in the office talking to Stevie McCarter and Tam Paterson and* [the claimant] *came into the works reception. I went over and asked him "what happened at the job and why it was left in such a mess" He started to get defensive and said he "had to get the wean" I said I was not interested in that I was asked in what happened with the job. I asked him to come in the office and have a general chat about what happened, and he swore at me and was verbally abusive and then he walked away."* And *"He walked out into the yard and left the building to go to his van, then I asked you to go get the keys from him*."

26. On 25 March Robert Whitehill provided a written statement which he signed that day (**document 2.6**). In it he said that; voices were raised; the claimant said to Mr Cruikshank, "*Don't speak to me like that, if you want to speak to me then speak to me like a man*"; the claimant opened the door to walk out of the office/service area into the yard; Mr Cruikshanks said "*come into my office to*

speak to me" to which the claimant replied "*fuck off*"; Mr Cruikshank said words to the effect of "*don't speak to me like that*"; the claimant approached him in an aggressive manner and put his head down close to Mr Cruikshanks' face; Mr Cruikshanks then repeated the request to come into his office; the claimant walked away and told him (again) to fuck off.

27. Between 17 and 22 March Thomas Paterson was on holiday. On 25 or 26 March he sent an email to himself. It appears that he then printed and signed it. In it he said that; when Mr Cruikshanks asked the claimant about "*other works*" (meaning the artex removal works done on 16 March) that the claimant started to raise his voice in an abusive manner; the claimant also refused Mr Cruikshanks' request to come into his office and "*went on being abusive*" to him; when the claimant went out of the labourers door entrance he heard the claimant say "*fuck off*" to Mr Cruikshanks, who then walked away; and at that point Mr Cruikshanks asked John Miller if he could get the van keys from the claimant. He was unsure as to who had asked him to write the document. He did not say that he saw the claimant put his head down close to Mr Cruikshanks' face.

28. Ms Waldman asked Mr McCarter to provide a statement. He declined.

29. On 29 March Mr Smith wrote to the claimant (**document 2.1 to 2.2**). The letter invited him to attend a disciplinary hearing fixed for 1 April at 9.00am. It said that the purpose of the meeting was to discuss an allegation of misconduct. It noted that the specific allegations were: 1.1 threatening and aggressive behaviour; 1.2 failure to attend informal meeting when asked by your director. It said that the basis of the allegation was the investigation discussion between the claimant and Mr Miller and witness statements from Robert Whitehill and Thomas Paterson. The letter enclosed a copy of the notes from his meeting with Mr Miller and Ms Waldman (now **document 2.3 to 2.4**) and the statements from those witnesses as noted above. The letter advised that if found guilty of misconduct the respondent may issue a written or final written warning or dismiss with notice (or pay in lieu). It advised that if found guilty of gross misconduct the claimant may be dismissed without notice or a payment in lieu.

It sought any other documents from the claimant and advised that Mr Smith was to conduct the hearing. Mr Smith saw the letter before it was sent. The basis of the allegation of threatening and aggressive behaviour was that the claimant raised his voice and swore. At the time of drafting the letter, Mr Smith saw the "*statements*" of Mr Paterson and Mr Whitehill. He could not recall if he had seen the notes from the investigatory meeting on 24 March.

30. On 1 April the claimant attended the disciplinary hearing. The other attendees were Craig Smith, Melissa Waldman and Alan Hay (senior supervisor) who acted as the claimant's companion. Ms Waldman took notes from which she prepared a typed version (**document 4**). It was a fair and accurate record of the meeting. It bears to be a verbatim record of what was said by those present. It noted that the meeting began at 9.00am.

31. The notes record that the claimant provided a written statement as some parts of the notes from his investigation meeting were incorrect. The statement was in the bundle at **document 3.1 to 3.2**. The claimant's statement explained his version of the incident. It noted; Mr Cruikshank had been standing at Mr Paterson's desk from where he approached the claimant; he replied that the RAMS was not from the job the previous night; Mr Cruikshanks was not happy about that job and "*kept going on about it*"; the claimant told him that he was "*being pulled in the next about it and could he leave it*"; Mr Cruikshank said that it wasn't good enough, was disrespectful of the claimant and the fact that he is a single parent; at that point they argued; neither of them should have allowed it to "*go as far as it did*"; he regretted swearing; Mr Cruikshanks came into the service area and "*demanded*" that the claimant get in to his office to which the claimant refused by swearing; Mr Cruikshanks "*got in my face*" and broke government guidelines of 2m social distancing. It went on that he felt Mr Cruikshanks "*has it in*" for him; in particular he alleged that Mr Cruikshanks accused him of abusing Mr Paterson. That allegation referred to an exchange which involved the claimant "*hanging up*" on Mr Paterson after an exchange to do with ordering a triple X item of clothing which the claimant had asked for and in which the claimant believed he "*got nothing but excuses*."

32. The notes of the meeting are brief. I repeat them from the point where Mr Smith began to consider the allegations.

    1. "*CS: We will go through the points of all allegations, start with 1.1 (Threating & Aggressive Behaviour)*

    2. *EM: Me and Ralph were arguing, I do not agree I was aggressive and threatening, I didn't not threaten him, however I regret using foul language.*

    3. *CS: Point 1.2 (Failure to attend informal meeting when asked by your director)*

    4. *EM: I was not asked it was told to "get in my office" Ralph should not have approached me due to government guidelines and he always approached me. I do not know if CCTV was part of the investigation, if you look at the CCTV you will see Ralph should not have came towards me there should have been a 2 metre distance and his mask was around his neck. I did not have an aggressive manner as I was the one walking away from him. I also don't agree two statements for the investigation are enough for these allegations as there were more witnesses in the room such as Stevie McCarter. About the statements provided, there is nothing said about what Ralph said in either Tam's or Robert's statement, they both contradict one another. It may be because they want to keep their jobs that they have not mentioned what Ralph said *Ed has notes on both and he said he would provide them **

    5. *MW: Thanks Ed. Anything else to add?*

    6. *EM: I will be appealing as all I done was stand up for myself and the allegations are not right.*

    7. *MW: Thanks, you will be notified of the outcome as soon as possible by letter*."

33. Later that morning at about 11.21 Ms Waldman emailed the claimant. She; reminded him that he had mentioned having notes on both witness statements that were contradicting one another; asked for a copy of them; recorded that she thought he had passed them over in the meeting but noted that she only had "his statement"; and told him that the notes she requested would help the decision process. On 5 April, the claimant replied. He; did not send any notes; explained that if she looked at the statements she would see what he said at the meeting about contradictions between them; and reminded her that he had mentioned CCTV footage.

34. By letter dated 13 April Mr Smith advised the claimant that the decision had been taken to dismiss him without notice on grounds of misconduct (**document 6.1 to 6.2**). The letter repeated the allegations. Under the heading of **Investigation**, it summarised what had occurred from the investigatory meeting to the adjournment of the disciplinary hearing. Under the heading of **Disciplinary procedure** it referred to the respondent's procedure and principles and explained that it took the view that the allegation was serious enough to be considered gross misconduct. It further explained that following the hearing all evidence was compiled and passed to Mr Smith for a decision. Under the heading of **Findings as regards each allegation**, the letter repeated the two allegations and in respect of each recorded his decision to uphold them "*for the reasons set out*". On both allegations, the reason was the same; "*Evidence confirmed the above*." On the question of sanction and under the heading of **Reasons for dismissal**, Mr Smith said that the appropriate sanction was summary dismissal having considered that the conduct amounted to gross misconduct "*for the reasons set out above*." Those reasons were "*Evidence confirmed the above*." The letter also noted that alternatives to dismissal were considered and set out how and when to appeal.

35. Prior to writing the letter of 13 April, Mr Smith saw the notes of the meeting between Mr Miller and Mr Cruikshanks, **document 12**. The claimant did not see it prior to the meeting on 1 April. Mr Smith accepted that the claimant should have seen it because he should have seen all of the statements "*put against him.*"

36. On the allegation of threatening and abusive behaviour, Mr Smith believed that from the statements of Robert Whitehill and Thomas Paterson the claimant had raised his voice to Mr Cruikshanks, put his head close to Mr Cruikshanks' face and told him to fuck off. Mr Smith recognised that the claimant disagreed that he had been aggressive but accepted (and regretted) using foul language. On the second allegation he understood the claimant's position to be that he had not been asked to attend the meeting, he had been told to "*get in*" to it. Mr Smith could not recall if he checked on whether the CCTV was working or not. He could not say if the cameras were on or not. He could not explain why he did not check. Mr Smith did not speak to Mr McCarter. He did not ask Mr Miller to do so. He just "*went with the evidence*" which was "*there and then*". He did not and could not see any contradictions between the statements of Mr Whitehill and Mr Paterson. Mr Smith was "*sure*" that he had read the claimant's statement (**document 3.1 to 3.2**). He could not say when he had done so. On the question of what specifically constituted gross misconduct, Mr Smith believed that the claimant's aggressive and threatening behaviour and in particular putting his head to Mr Cruikshanks' face and using foul language to a director (as opposed to another work colleague) was gross misconduct. He believed that the failure to attend the meeting was not gross misconduct. On the question of sanction and in particular the alternatives to dismissal, Mr Smith decided that the claimant having put his head in Mr Cruikshanks' face and telling him to fuck off was unacceptable, and he could not accept that it was possible to carry on with the employment. While he took into account his opinion that the claimant was a good and reliable worker with a lot of experience, those factors did not balance against the decision to summarily dismiss him. In his opinion, the fact that the claimant did not see the notes of meeting with Mr Cruikshanks made no difference to his decision.

37. By email dated 14 April, wrote to the claimant to inform the respondent of his wish to appeal. It said that; he believed he was being treated unfairly; could not understand why it reached its decision; and argued that on the evidence provided by the respondent doesn't match up with CCTV.

38. By letter dated 14 April, James Curran replied. He invited the claimant to an appeal hearing fixed for 21 April. He noted its purpose as being to consider the grounds of appeal as per the email. It enclosed copies of the documents to be referred to at the hearing. Those documents were:-

    1. Letter of suspension date 19 March (**document 1/1 to 1.2**)
    2. Letter inviting to disciplinary hearing 29 March (**document 2.1 to 2.9**)
    3. Handwritten notes from claimant (**document 3.1 to 3.2**)
    4. Disciplinary hearing notes (**document 4**)
    5. The email exchange of 5 April (**document 5**)
    6. Letter of dismissal of 13 April (**document 6**)
    7. The appeal email of 14 April (**document 7**)
    8. Mr Curran had not seen any of the documents before his involvement in the appeal.

39. Ms Waldman took notes of the appeal hearing from which she prepared a typed version (**document 9.1 to 9.2**). It was a fair and accurate record of the meeting. It bears to be a verbatim record of what was said by those present. It noted that the meeting began at 9.30am. The note records the claimant's argument on his allegation of contradictions between the statements of Mr Paterson and Mr Whitehill. His focus was on what he alleged could or could not be heard by them given their locations at the time of the incident. Mr Curran did not agree with it. He is very well aware of the layout of the building. In his view he knew who would be able to hear what given different locations. He did not accept this appeal point. The note records the claimant's assertion of a friendship between Mr Cruikshanks and Mr Paterson and his suggestion that as a result Mr Paterson's statement should be discounted. Mr Curran did not accept this point because he has known Mr Cruikshanks for over 30 years and in his opinion any friendship with Mr Paterson made no difference; for both of them "*work is work*". The note also records the claimant's argument that the two

statements contradicted each other when referring to the claimant's direction of travel. Mr Curran considered that it was clear to him that people were moving about in a live situation and there was in his view no contradiction in what the witnesses said. The note further records the claimant's complaint that he did not see how the respondent could come up with the first allegation based on only the two statements. In Mr Curran's view Mr Whitehill's evidence that the claimant had; said "*Don't speak to me like that, if you want to speak to me then speak to me like a man*"; put his head down close to Mr Cruikshanks' face; and told him to fuck off in answer to the invitation to come into his office was evidence of threatening and aggressive behaviour. In Mr Curran's view Mr Paterson's evidence that the claimant had raised his voice in an aggressive manner, refused to go into the office, continued to be abusive, walked out of the office and told Mr Cruikshanks to fuck off was evidence of threatening and aggressive behaviour.

40. The note also records the claimant's argument on allegation 2 that Mr Cruikshanks "*had it in*" for him. In Mr Curran's view this was a smokescreen and a way of trying to cover up his own conduct. He was aware of the importance of the work on the job on 16 March and believed that Mr Cruikshanks was fair. On the specifics to do with overalls, he knew that the ones which the claimant wanted could not be got. The note records the claimant's reference to CCTV not working and refers to a memo which the claimant handed over. That was in fact a copy of the EasyBop notice board information from 11 March. Mr Curran knew that from before 20 March the equipment was not recording images and could only display live footage. The appeal hearing note then refers to the letter of 13 April and the claimant's question as to where its reference to company procedures is to be found. They are available of EasyBop. It is the responsibility of staff to access them there. On the second allegation the note records the claimant's argument that it should be deleted because "*evidence from statements are not* (sic) *clear and Ralph has it in for me.*" Mr Curran believed that the notes were clear and that Mr Cruikshanks did not have it in for the claimant.

41. By letter dated 28 April Mr Curran advised that he did not uphold the appeal (**document 10.1 to 10.3**). The letter was drafted by him and typed by Ms Waldman. Mr Curran saw the note of the investigatory meeting with Mr Cruikshanks (**document 12**) as part of the appeal. He was not aware that the claimant had not seen it, albeit he knew that he had not sent it to him. He did not know why it had not been sent to him. In his view it should have been. The letter was written after a discussion which Mr Curran had with Mr Cruikshanks and from looking at the statements.

42. The letter records Mr Curran's view; of Mr Paterson (honest and trustworthy) which justified the inclusion of his statement; that the two statements were from honest and trustworthy employees and were not contradictory; that Mr Cruikshanks was unaware that the claimant was a single parent and did not see the relevance of that information; that he disagreed that Mr Cruikshanks had it in for him and explained why, including detail of the issue to do with the purchase of overalls; and that the CCTV cameras were not recording. The letter also recorded that Mr Cruikshank had to raise his voice to be heard at the time of the incident and asked the claimant "*to come to his office in an attempt to diffuse the situation and discuss the matter calmly*."

43. On 4 June the respondent obtained an estimate (**document 11**) for an amount of work relating to its CCTV equipment. It included replacement of 2 faulty 5 terabyte hard drives "*to allow system to record*". That work has not yet been done.

44. Since 16 April the claimant has worked on a self-employed basis for Manse Builders (a company run by a friend's cousin). In that work he has earned £2215.00. He is currently unemployed. He has only recently applied for universal credit. He has received an advance payment of it of £300.00.

45. He has sent his CV to various other asbestos companies. He has contacted some by telephone in an attempt to find alternative work. He has registered his CV on "*Indeed*" and applied for various warehouse and driving jobs.

Comment on the evidence

46. Mr Smith was an unimpressive witness. He could not recall a significant amount of relatively basic information. For example, he could not recall; when he saw either of the two witness statements sent to the claimant; whether he saw anything other than them when drafting the letter of invitation to the disciplinary hearing; when he first saw the notes from it; what material the claimant had produced at it; if anything was wrong with the CCTV; whether the claimant produced any other written material after the disciplinary hearing; or whether he had seen the email of 5 April. He struggled to recall if had seen the claimant's handwritten statement (**document 3**). When presented with the document he could not say for certain that it was the document provided by the claimant for the disciplinary hearing. Separately, he gave the impression of showing no interest in going beyond a consideration of the material which had been given to his for the disciplinary hearing. He repeated that he "*just went with the evidence*". That gave the impression of someone who did not see it as his responsibility to enquire at or after the disciplinary hearing about things raised by the claimant at it. His letter of 13 April did not set out any detailed reasons for upholding the allegations.

47. Mr Curran was, in contrast, an impressive witness. He gave clear, direct, measured, confident answers to the questions asked of him. His recollection of relevant issues was good. Albeit he did not say so, it would appear from some of his conclusions in his outcome letter (see the end of paragraph 42 above) he must have discussed matters with Mr Cruikshanks before writing it.

Submissions

48. For the respondent Ms Forsyth made an oral submission which I summarise here. She said that there were three issues, (i) whether there was a potentially fair reason for the claimant's dismissal (ii) if so was it overall procedurally fair and if the answer to either was "*no*" (iii) to what compensation was the claimant entitled. On the first, the answer could be found in **document 6** the dismissal letter and the two findings of gross misconduct which she said were on the two allegations. The evidence to support them came from two witnesses; neither of them were involved in the incident and were thus "*untainted*" unlike Mr

Cruikshanks and the claimant. There was nothing contradictory about their statements. Further, the claimant had admitted some of the detail of the allegations. She said that if a managing director asks an employee to a meeting to discuss a work-related issue that is a reasonable request. In that context, a failure to do so could be gross misconduct. Both allegations were potentially fair reasons to dismiss. On the question of overall fairness she referred to the process that had been followed; an investigation followed by the disciplinary hearing and the appeal. She said that while it was always possible to pick holes in an investigation, that was not the test. Instead the issue was whether the quality of the evidence supported the findings. On one particular criticism (the alleged failure to take a statement from Mr McCarter) the respondent could do no more than ask. The respondent was entitled to proceed based on the two statement which it had obtained. They had volunteered to give them. On the other, the alleged failure to provide the notes of the meeting with Mr Cruikshanks, she reiterated that it was always possible to pick holes in an investigation. Under reference to the decision of the EAT in ***Capita Hartshead Ltd v. Byard*** [2012] IRLR 814 she said that it is not the function of the employment Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. She said that Mr Curran considered the incident significant. It needed to avoid the risk of it happening again. Gross misconduct was the reason and taking account of the respondent's size and administrative resources the dismissal was fair. On the issue of loss, the claimant cannot relevantly claim beyond the basic award because (she said) there was no evidence of any effort to mitigate loss. On ***Polkey***, she sought a reduction of 100% to the compensatory award. On the question of contributory conduct, she also sought a 100% reduction.

49. The claimant also made an oral submission. In his view the investigation from the outset was not done properly. He questioned how genuine was the volunteering of the two colleagues who provided written statements. He reiterated his position on the question of CCTV footage and reminded me that Mr Smith had not checked the position. He asserted that he had not been given all of the evidence from the outset. He had no opportunity to see Mr

Cruikshanks' statement and argue that Mr Whitehill's statement may be incorrect, that statement being an important basis for part of Mr Smith's decision.

The law

50. 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.

51. 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*."

52. 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*." 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.

53. "*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.

54. Section 123(6) of the 1996 Act 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?

55. 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

56. The ACAS Code of Practice on Disciplinary Procedures (2015) provides that employment Tribunals will take it into account when considering relevant cases. Paragraph 9 of the Code provides that "*If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification*." In this case, the decision-makers had written evidence in the shape of the notes of the investigation meeting with Mr Cruikshanks which the claimant had not seen. An employer following the ACAS Code would have provided them to the claimant before the disciplinary hearing. There was nothing to suggest that the circumstances in this case were anything other than "*normal*". Indeed Mr Smith accepted that the claimant should have seen the notes before his meeting with him. A reasonable employer would have provided them. A reasonable employer would have appreciated that Mr Cruikshanks' evidence was particularly relevant in that he was "*the victim*" of the threatening and aggressive behaviour. A reasonable employer would have; given the claimant the opportunity to comment on Mr Cruikshanks' statement, particularly where he had already argued that the two statements which he had seen were inconsistent; noted that Mr Cruikshanks did not say that the claimant approached him in an aggressive manner and put his head down close to his face; appreciated that the evidence of Mr Whitehill on this point (which was regarded as significant) was not supported by the alleged victim of that conduct; and would have at least asked Mr Cruikshanks if the claimant had

done so. Given the significance of this evidence on Mr Smith's thinking about allegation 1, a reasonable employer would have (i) made further enquiries as to whether it was corroborated and (ii) allowed the claimant the opportunity to challenge it by reference to Mr Cruikshanks' own evidence. I do not accept that the failure to provide Mr Cruikshanks' statement was merely a means of picking holes in the respondent's investigation. It was a failure to provide the claimant with the evidence of the "*victim*" which evidence was available to both decision-makers. It was also arguably a failure to make reasonable enquiries of a witness whose evidence was inconsistent with that of another. The case of ***Capita Hartshead*** concerned a redundancy situation. The point in issue was whether the respondent had acted unfairly in limiting the pool of selection to one, the claimant (it had). The proposition referred to by Ms Forsyth is in turn taken from what was said by Browne-Wilkinson J in the well-known case of ***Williams v Compair Maxam Ltd*** [1982] IRLR 83 [18]. I respectfully agree with it. It is consistent with what is often quoted from ***Burchell*** in misconduct cases. In the context of ***Burchell*****,** there is no real dispute that the first leg of the test is satisfied; the decision-makers had a genuine belief in the guilt of the claimant on the allegations. But that belief was not a reasonable one because the respondent had not carried out enough of an investigation or enquiry so as to be satisfied in relation to the one allegation which it considered equated with gross misconduct, allegation 1. The claimant's dismissal was thus unfair.

Remedy

57. The claimant was thirty nine years of age at his effective date of termination. He had been employed for 5 years. His agreed gross weekly pay was £409.00. The basic award due to him would therefore be £2,045.00

58. In his response to the Tribunal's case management order, the claimant said that he had not found alternative employment. In it he made a claim for loss of earnings for the period since his dismissal, 26 weeks. That period ended on 15 October. His agreed net pay was £330.00. The claimant's documentation suggested net weekly pay of £678.40 per week. I was not willing to accept this figure as accurate for two reasons. First, it was unvouched. While I accepted

that he had not seen the Tribunal's order until recently, it was always for him to prove his loss, and in particular to prove that his earnings were different from those he set out in the ET1. Second, it was unfair on the respondent to accept this figure at such short notice where they had no notice of it prior to the start of the second day of the hearing. His loss of earnings in that period was therefore £8,580.00. The claimant said he had earned £2215.00 in that period which falls to be deducted. His net loss in the period is thus £6,365.00. Albeit not sought by the claimant, he is entitled to an award for the loss of statutory rights. Subject to adjustment for contributory fault, this award is £350.00. Ms Forsyth argued that the claimant could not maintain any claim for loss of earnings because there was no evidence to support the conclusion that he had taken reasonable steps to mitigate his loss. She was critical of the fact that no documentation had been produced as per the case management order. I do not agree with her analysis of the relevant law or her position on the material. In the case of ***Cooper Contracting Ltd v Lindsey*** [2016] I.C.R. D3, the then President Mr Justice Langstaff set out (at paragraph 16) nine principles relevant to the question of mitigation and allegations of a failure to do so. The first is; the burden of proof is on the wrongdoer; a claimant does not have to prove that he has mitigated loss. In this case I was satisfied on the claimant's oral evidence as to the steps he had taken to mitigate the loss he had suffered. The respondent adduced no evidence to discharge the burden on it. Ms Forsyth argued that the respondent was at a disadvantage in that it did not see the claimant's "*material*" until after the start of the hearing. But in my view that does not relieve the respondent of attempting to discharge the burden on it. The respondent could have led evidence of any suitable vacancies in the period for which the claimant had (obviously) not applied. That might have satisfied the burden on it absent a reasonable explanation from the claimant as to why he had not done so. Had it been the case that the claimant had already found alternative employment by the start of this hearing, the respondent's evidence may well have been redundant. But the absence of material from the claimant's side did not relieve the respondent of the burden on it.

59. I do not accept that ***Polkey*** justifies a 100% reduction, or at all. Could the respondent fairly have dismissed and, if so, what were the chances that the employer would have done so? Mr Smith's evidence was that the fact that the claimant did not see the notes of meeting with Mr Cruikshanks made no difference to his decision. But that was as far as his evidence on the point went. He did not explain why. 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 beyond Mr Smith's unsupported opinion. In my view given; (i) Mr Smith's reliance on allegation 1 as his principal reason for finding gross misconduct; (ii) his reliance on Mr Whitehill's evidence that the claimant approached him in an aggressive manner and put his head down close to Mr Cruikshanks' face in support of it; (iii) the claimant's denial of that act and (iv) the claimant's argument on the inconsistencies in the two statements that he had seen, it is likely that in the disciplinary process he would have argued that Mr Whitehill's evidence was not supported by the witness best placed to comment on that facet, Mr Cruikshanks; and therefore there was another inconsistency in the evidence against him. I am not persuaded that the respondent would have fairly dismissed the claimant in that scenario.

60. 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 should the award be reduced and to what extent it is just and equitable to reduce it? The claimant has admitted swearing at a director of the respondent on two occasions in quick succession on 17 March. He also refused to attend a meeting with him. In my view both of those acts give rise to the question of contributory fault. The swearing is blameworthy conduct. But I am not persuaded that in the circumstances the

refusal to go to Mr Cruikshanks' office is also blameworthy. The claimant's unchallenged evidence was that he (with others) was due to meet his line manager to discuss the state of the job from 16 March. In the circumstances of the confrontation between him and Mr Cruikshanks and in particular (i) how Mr Cruikshanks explained it began and (ii) the claimant's position on the meeting with Mr Smith the next day, his refusal to attend the meeting was not blameworthy. There is little doubt that swearing at Mr Cruikshanks contributed to the decision to dismiss the claimant. A tribunal's discretion is limited to considering what is just and equitable having regard to the extent to which the employee's contributory conduct contributed to the dismissal (***British Gas Trading Ltd v Price*** EAT 0326/15). I had regard to the decision of the Court of Appeal in ***Hollier v. Plysu*** Ltd [1983] IRLR 260. It approved the EAT's division of cases under the statutory provisions into four general categories. While those categories do not limit a Tribunal's discretion they are useful guidance. I see no reason to depart from it. I consider that this case falls into the fourth of those categories. In my view, compensation should be reduced by 25%. I have reduced the compensatory award of £6715.00 by 25% (£1,678.75). The respondent sought a reduction of 100%. Such a reduction is exceptional. The respondent did not advance any argument as to what made the circumstances worthy of such a reduction. In my view they are not exceptional. The compensatory award is therefore £5,036.25.

61. On the basic award, I had regard to the decision of the EAT in ***RSPCA v Cruden*** [1986] ICR 205. There it was held that only in exceptional cases should a Tribunal differentiate in the exercise of its discretion under the statutory provisions governing a basic and a compensatory award. This was not an exceptional case. The basic award is therefore reduced by 25% to £1,533.75.

62. The judgement reflects that the claim succeeds and the reduction to both awards. The Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations 1996 apply given that the claimant has been in receipt of Universal Credit.

Employment Judge: Russell Bradley
Date of Judgment: 15 November 2021
Entered in register: 17 November 2021
and copied to parties

5