



EMPLOYMENT TRIBUNALS

Claimant

Respondent

MR ASHLEY CHAHAL

V XPO LOGISTICS DRINKS LIMITED

Heard at: Watford (by CVP)

On: 29, 30 November 2021
and 1 December 2021

Before: Employment Judge Skehan,
Mr Hoey, and
Mr English

Appearances

For the Claimant: In person

For the Respondent: Ms Owusu-Agyei, counsel

JUDGMENT

1. The claimant was not unfairly dismissed contrary to the Employment Rights Act 1996 and his claim for unfair dismissal fails and is dismissed.
2. The claimant was not discriminated against contrary to the Equality Act 2010 and his claim for sex discrimination fails and is dismissed.

REASONS

1. Oral reasons were given to the parties with the Judgment on 1 December 2021 and written reasons were requested by the claimant on that day. The respondent's name was changed by consent to XPO Logistics Drinks Limited.
2. By claim form received at the Employment Tribunal dated 4 February 2019, the claimant claimed unfair dismissal, direct sex discrimination and race discrimination. The respondent's notice of appearance dated 18 March 2019 was accepted by the tribunal and the matter was defended. The race discrimination claim was dismissed upon withdrawal by the claimant.

The Issues

3. At the outset of the hearing, we revisited the list of issues as compiled by EJ Daniels at the preliminary hearing held on 24 October 2019 and agreed it to be a complete list of the matters to be determined within this litigation. It was agreed with the parties that the tribunal would hear evidence in relation to liability together with evidence in relation to any alleged argument that even if the dismissal is found unfair that the claimant would have been dismissed in any event and any alleged contribution on the claimant's part. Remedy would be determined separately if appropriate.

The Law

4. In a claim of unfair dismissal, it is for the respondent to show a genuinely held reason for the dismissal and that it is a reason which is characterised by section 98(1) and (2) of the Employment Rights Act 1996 ("the ERA") as a potentially fair reason. The respondent relies upon 'conduct'. If the respondent shows such a reason, then the next question, where the burden of proof is neutral, is whether the respondent acted reasonably or unreasonably in all the circumstances in treating the reason for dismissal as a sufficient reason for dismissing the claimant, the question having been resolved in accordance with the equity and substantive merits of the case. It is not for the Employment Tribunal to decide whether the respondent employer got it right or wrong. This is not a further stage in an appeal.
5. In a case where the respondent shows the reason for the dismissal was conduct, it is appropriate to have regard to the criteria described in the well-known case of Burchell v BHS [1978] IRLR 379. The factors to be taken into account are firstly whether the respondent had reasonable grounds for its finding that the claimant was guilty of the alleged conduct; secondly whether the respondent carried out such an investigation as was reasonable in the circumstances; thirdly whether the respondent adopted a fair procedure in relation to the dismissal and finally whether the sanction of dismissal was a sanction which was appropriate, proportionate and, in a word, fair. In relation to each of these factors, it is important to remember at all times that the test to be applied is the test of reasonable response. The claimant reminded the tribunal of the case of London Ambulance service NHS Trust v Small [2009] that deals with the dangers of substitution mindset.
6. Section 207A applies and the relevant Code of Practice is the ACAS Code of Practice on disciplinary and grievance procedures.
7. Section 13 of the Equality Act 2010 (EqA 2010) provides the statutory basis for the direct discrimination claim. This provides that where an employer, because of the protected characteristic of sex, treats the claimant less favourably than it treated or would treat others. When looking at a relevant comparator section 23 of the equality act 2010 provides that there must be no material difference between the circumstances of each case. The principle was expressed in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 as follows:

"...the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

Only those characteristics which the employer has taken into account in deciding to treat the claimant in a particular way, with the exception of the alleged discriminatory characteristic, are relevant

8. As regards the burden proof, it is for the Claimant to initially prove facts which could establish that an act of discrimination occurred. It is only once this has been satisfied that the burden shifts to the employer. Once the burden has passed to the Respondent, it is on them to show that a contravention did not occur (s.136 EqA 2010).
9. We note the claimant's reference to the ET case of *Mr R Hastings v Kings College Hospital NHS Foundation Trust 2016*. The claimant says that while this case deals with the subject matter of race, "it was found that during the investigatory hearing the claimant provided evidence of racial abuse and of foul and offensive language being directed at him, but this was not investigated. It was concluded that by failing to investigate this the claimant was treated less favourably because of race." and considers there are clear similarities with the subject matter in his case being related to sex.

The Facts

10. We heard evidence from Mr Connaughton who dealt with the investigation stage of the disciplinary process and Mr Turner who dealt with the appeal stage. We did not hear from Mr Kendall who dealt with the decision to dismiss the claimant. We were referred to the documentation within the bundle in relation to Mr Kendall's input and informed that Mr Kendall no longer worked for the respondent and draw no negative influence against the respondent in relation to his absence. We heard from the claimant on his own behalf.
11. All witnesses gave evidence under affirmation. Their witness statements were adopted and accepted as evidence-in-chief. All witnesses were cross-examined. As is not unusual in these cases the parties have referred in evidence to a wider range of issues than we deal with in our findings. Where we fail to deal with any issue raised by a party, or deal with it in the detail in which we heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance. We only set out our principal findings of fact. We make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.
12. The claimant was employed as a Drayman between 1 September 2003 and his dismissal on 10 October 2018, when his employment was summarily terminated by the respondent. The allegations that led to the claimant's dismissal arose from an incident on 19 July 2018. Prior to this time the claimant had a clean disciplinary record.

13. On 19 July 2018 the claimant was returning to site with his colleague Mr Harewood in a lorry. The lorry stopped outside the gates of the respondent site and the claimant went to the back. As the lorry moved forward the claimant jumped on the back of the vehicle and rode on the back of the vehicle as it moved through the gates and into the yard. The claimant was advised by an unnamed colleague that Ms Jackie Butler had observed and reported the incident as a health and safety breach. The claimant entered Ms Butler's office, on the claimant's evidence, to ask her repeatedly 'why she had grassed him up'. There was an altercation within the office. There is a dispute in relation to what was said.
14. An informal investigation was undertaken by the claimant's line manager Mr Andy Sayers. The formal investigation was undertaken by Mr Connaughton who was the respondent's general manager for South London overseeing the Croydon and Faversham site. Mr Connaughton has substantial experience in conducting investigations. Mr Connaughton was asked to investigate the claimant's conduct and that of Mr Harewood. The allegations investigated against the claimant by Mr Connaughton were that the:
 - 14.1. Claimant had breached health and safety procedures by hanging on the rear of a moving vehicle in the yard; and
 - 14.2. The claimant had used aggressive language and behaviour intended to intimidate.
15. There was some delay with the initial investigation as both Mr Connaughton, the claimant and Mr Harewood had periods of annual leave booked. Further the claimant wanted Mr Mark Wastell, a union steward who was involved in national projects, to attend the investigation meeting with them. Mr Connaughton considered information from: the claimant, Mr Harewood, Ms Sam Forbes, the supervisor, Mr Gary Barnes, a driver & trade union rep, Ms Jackie Butler, general admin assistant, Mr Chris Allen, a support manager, Mr Geoff Airro, warehouse & trade union rep, Mr Liam Brown, warehouse manager and Mr Andy Sayers, manager.
16. The investigation report was concluded and an outcome provided to the claimant on 12 September 2018. The notes collated during the investigation process were contained within the tribunal bundle. Mr Connaughton concluded by reference to the CCTV of the incident that the claimant did ride on the back of the lorry. He noted that this was not disputed by the claimant. The CCTV footage was shown to the tribunal. The claimant can be seen stepping onto the back of the moving lorry, appearing to swing from it and riding on it as it passes through the gates for a period of approximately 30 meters. Mr Connaughton noted that there was no injury arising from the claimant's action but it was reckless could have caused injury and could have resulted in a fatality on site. Mr Connaughton noted that serious injury could have been caused had the handle, from which the claimant was hanging, given way. Mr Connaughton concluded that this was a breach of the respondent's 'National Ways of Working' and the respondent's policy requiring the claimant to take reasonable care for his own health and safety.

17. It is common ground that there is no express written rule within the respondent that employees must not hang on the back of moving lorries. Mr Connaughton told the tribunal that it was not possible for any employer to have a comprehensive list of unsafe actions that employees should avoid for example there was no express rule prohibiting employees from surfing on the top of a transit van or from putting scissors in an electric socket. Mr Connaughton also refers to the respondent's disciplinary procedure. This provides a non exhaustive list of offences that are normally considered gross misconduct. This list includes, the use of language or behaviour intended to intimidate.
18. Prior to Mr Connaughton's investigation an initial investigation was undertaken by Mr Sayers who had sought to obtain statements from Jackie Butler and Sam Forbes. Both women made and retracted their initial statements and the reason given was due to fear of possible repercussions from the claimant. These initial statements were not provided to Mr Connaughton and not available to the tribunal. Mr Sayers had also sought to obtain witness statements from the two union reps, Mr Airro and Mr Barnes, who witnessed part of the altercation. Both gentlemen initially refused to provide witness statements. Mr Connaughton interviewed all four employees as part of his investigation and the notes of these interviews are contained within the bundle.
19. The relevant parts of the interview notes include:
 - 19.1. The claimant's account of the incident is that he was calm when he arrived as Ms Butler was on the phone. His body demeanor showed he was upset. He asked her 'why you grassing me up' repeatedly. There was an exchange and Sam Forbes called the manager Mr Sayers. Mr Sayers told the claimant to 'get into his office'. When in the office the claimant heard Ms Butler say ' I am going to get you fucked up'. The claimant said this was a direct threat to him and his family. He sought to remove himself from the situation but was physically blocked by Mr Sayers. He felt imprisoned and became a 'nervous wreck'. The claimant says in his statement and during the disciplinary hearing that he was frustrated and wanted to get out of the building as he felt threatened, uncomfortable and wanted to go home. The claimant also said in his interview with Mr Connaughton that he felt threatened ...and wanted to get to Jackie so she could repeat what she said.
 - 19.2. Ms Butler said: ... The claimant came straight at me and said, 'you're a fucking grass'. Initially I said nothing. Sam said, 'not today'. '[The claimant] was bearing over me, swearing and shouting' . [Andy Sayers] told [the claimant] to come into his office. I told him to 'shut his fucking mouth'. I called my boy and old man. ... The notes record that 'Ms Butler re-enacts incident' and '[the claimant] threatened to kill me, should call the police he would be arrested, physical assault on Andy. Ms Butler confirmed that she had called her son and that her 'other half knows Mark'. Her son called Mark on his mobile as he had been given the number by Mark previously.

- 19.3. Ms Forbes said: The claimant said to Ms Butler 'who are you fucking grassing me up to.... You're a fucking grass and a bitch.I got up and told him to get out if he was going to continue to behave like that. Exact words, 'you're not going to do this to her today, get out'. ... Ms Forbes called Andy Sayers who was having a health and safety meeting with Gary Barnes and Geoff Airrio [two trade union reps]. Andy beckoned the claimant to his office. The claimant continued to shout at Ms Butler. At this point Ms Butler shouted back saying, 'shut your fucking mouth'. The claimant said something back. Andy Sayers was in the doorway. The claimant tried to get to Jackie, the claimant put his arm around Andy and another on the door to get through. It was quite forceful because the door was making noises.
- 19.4. Mr Sayers said that '...Jackie Butler said across the office that she had seen someone riding on the back of a lorry, I asked who it was, Jackie responded she didn't know. Sam Forbes looked out the office window and said to me that Mark Harwood had just pulled into the yard. I explained that I would go and look at the CCTV to see who it was and deal with it after I viewed it. I returned to my office and continued with my meeting with Gary Barnes and Geoff Airrio.' He was called by Sam Forbes to deal with an incident. He heard both the claimant and Jackie Butler shouting. The claimant was leaning over Ms Butler's desk saying, 'why are you grassing me up....'. Mr Sayers said that he could see both Jackie and Sam were intimidated and he asked the claimant to come into his office. The claimant walked inside the office. Ms Butler shouted that the claimant should 'shut his fucking mouth', it was at this point that the claimant became enraged and lost his temper. 'He started to physically manhandle me and tried to pull me out of the way of the door grabbing at myself and the door frame in an attempt to get back into the main office, presumably to confront Jackie. He was shouting, 'you fucking bitch' at Jackie while pulling me and grabbing hold of the door frame trying to pull it out of my grasp. I managed to close the door and stood in front of it in case he tried to leave. Both Gary [Barnes] and Geoff [Airrio] were sat in my office during this incident.....
- 19.5. Mr Barnes said, 'Ashley brought in partly to do with his behaviour and to separate the two. Jackie said you better shut your fucking mouth. Ashley took offence. Door partly closed. We heard it. Ashley was very physical with Andy trying to get out. Andy stopped him. In that five seconds I told him to calm down, you're going to get yourself into trouble.....In that lull he did calm down. There was back-and-forth. I said calm down until then I won't speak to you. I could tell he was angry..... I had to escort Sam to car because she was frightened....'
- 19.6. Chris Allen said, "I looked up and I could see Ashley trying to get out of the office with the door half open threatening Jackie and bombarding her with insults and threatening behaviour. While

Ashley was trying to get out of Andy's office Andy was blocking his exit trying to calm him down." and "Door being pulled and pushed open. Was like leopard trying to get out of a cage. Couldn't see everything Andy was very big in front of the door."

- 19.7. Mr Harewood subsequently received a call from an unknown number on his phone asking for the claimant. The claimant said that Ms Butler had followed through on her threat. Glen Sewell and Robert Tulloch witnessed this call.
20. Mr Connaughton told us that he weighed up the information that he had gathered during the investigation and considered what happened on the balance of probability. He concluded that:
 - 20.1. the claimant had used industrial language and acted aggressively to both Jackie Butler and Mr Sayer in trying to push past him.
 - 20.2. Jackie Butler had told the claimant to 'shut his fucking mouth'. Ms Butler did not threaten the claimant as the claimant had alleged.
 - 20.3. It was improbable that Ms Butler had improperly passed on Mark' Harewood's phone number to her partner or son. Had she passed on a mobile no in breach of data protection provisions because of the incident, she would be likely to have passed on the claimant's number. Her explanation that that her son or partner already had Mr Harewood's number was more likely to be correct
21. Mr Connaughton wrote to the claimant on 12 September 2018. This states that the outcome of the investigation will be a disciplinary hearing for gross misconduct for:
 - 21.1. Safety conduct. The alleged and safety breaches been confirmed by you during our investigation and undisputed as an act you undertook knowingly. Riding on the back of a moving vehicle in the eye by holding a handle and standing on the bumper is failing to take reasonable care of your own health and safety; this may have led to a serious accident and possible fatality. The general duty as set out in the law and underpinned in the NWOW.
 - 21.2. Your conduct in the office following the report of your unsafe act in the yard was not acceptable, physical posture, demeanour, language and aggression that is reflected in the statements of the interviewees is not acceptable in the workplace. There is reference to the respondent's disciplinary process and potential gross misconduct in the form of, actual or attempted a threaten violence to another person, the use of language or behaviour intended to intimidate and serious acts of insubordination.
22. Mr Kendall was tasked with the disciplinary hearing. The claimant was invited to a disciplinary hearing by letter dated 2 October 2018. The disciplinary allegations were stated to be the alleged breach of the health and safety procedures and alleged use of aggressive language and behaviour intended to intimidate. We did not hear from Mr, Kendall but we

have the benefit of the notes taken during the disciplinary meeting that occurred on 10 October 2018.

23. During the course of the disciplinary hearing the claimant's representative made reference to a similar incident the previous year whereby an agency worker had ridden on the back of a lorry. It was alleged that the agency worker was stood down or suspended for a week and thereafter employed by the company. Mr Kendall tells the claimant that he will return to this issue and duly does so. He asks the claimant's representative for information on the matter towards the end of the disciplinary hearing. Following an adjournment, the notes of the meeting reflect his response to this matter as:

With regards to point about the previous similar event I have looked into this and I now believe that since this event the health and safety standard is much stronger and needs to be, and as the decision was made by an employee no longer with the business I cannot ask him why he made this decision. I do not believe that this decision sets precedents as the acts should be looked at in a case-by-case basis. Mr Kendall has identified both the name of the manager who dealt with the previous matter and the date of the previous matter being February 2017.

24. We refer to the disciplinary outcome letter dated 11 October 2018. This letter records the allegations as:

- that on 19 July 2018 failed to take reasonable care of your own health and safety, you knowingly and undisputedly rolled on the back of a heavy goods vehicle which may have led to a serious accident and possibly a fatality; and
- that you threatened to kill your co-worker, he swore at her, you physically intimidated her by the way you stood over her, you accused her that she was a 'grass' even though by her reporting a serious breach of H&S, it was the correct and proper thing for her to do.

The disciplinary letter goes on to state that, 'it is my belief that 19 July you returned to the Greenford Offices and confronted a co-worker and called her 'a grass' which you have admitted to, based on the various statements taken I also believe that your posture demeanor, language and aggression was not acceptable in the workplace. It is also a fact that you rode on the back of a heavy goods vehicle.

25. The claimant appealed the decision to terminate his employment by letter dated 20 October 2018 and the appeal was dealt with by Mr Turner who was at the time employed as a regional general manager for a North London. Mr Turner told the tribunal that he had known on a general level that an incident had occurred, a process had been followed and the decision to dismiss been taken. There's correspondence in the tribunal bundle from Mr Turner referring other managers to the respondent's policies and the HR department in general terms. The claimant's appeal was on the following basis:

- 25.1. He did not threaten to kill a co-worker and not one statement backs up this allegation. They did swear at each other but the claimant did not stand over Ms Butler as described, they were at either side of the

- desk. The claimant did not actually accuse Miss Butler of being 'a grass', he asked her why she had 'grassed him up'.
- 25.2. That he raised a complaint regarding to threats made to him during the incident. The claimant was sworn at and there was an outside phone call asking for him during the argument and he was subjected to unlawful imprisonment. While the claimant is criticised it appears okay for a workplace colleague to display unacceptable demeanour, language and aggression towards him.
- 25.3. The claimant says that he has been treated inconsistently, unequally and unfairly. Ms Butler behaved in an unprofessional manner and the statements support this.
- 25.4. While the respondent says that his actions may have led to a serious accident or fatality and he has been accused of a major breach of health and safety. His daily tasks of unloading green Fords empties area with many forklifts working together in close proximity in a confined area is 100 times more likely to result in a serious accident or fatality..... The claimant sets out 10 alleged health and safety breaches at the Greenford site starting with vehicles loaded outside of the golden rules and ending with bins overflowing on a daily basis. The claimant says that he assumes that the breaches go unchecked and it is one rule for the claimant and a different rule for everyone else.
- 25.5. The claimant also notes the agency worker incident referenced above.
- 25.6. The claimant has worked for the respondent 15 years and has a 'completely clean record in all aspects of his work' with the respondent. The claimant asks for a second chance.
26. The claimant referred to a disciplinary issue raised between two employees in October 2018 at Newton Heath. The claimant says that this disciplinary issue related to threats of violence made by two male employees against each other and neither was dismissed. No other information in relation to this matter was available to the tribunal.
27. By letter dated 26 October 2018 the claimant was invited to an appeal hearing that was arranged for 1 November 2018. Due to unavailability of the claimant's representative the hearing was rescheduled for 14 November 2018. During the hearing the claimant said inter-alia that Ms Butler had made threats to him. The subsequent phone call received by Mr Hereford confirms that. The claimant feels he is being treated differently because he is a man and Ms Butler is a woman. Mr Turner's appeal outcome letter includes the following:
- 27.1. It is without question that on 19 July 2018 you make the conscious decision to ride in the back of the vehicle. You have not disputed this at any stage of the investigation that the event happened. This is clearly a breach of the NWOW in failing to take reasonable care of your own health and safety.

- 27.2. Mr Turner refers to the similar incident in 2017 stating. 'I will not discuss individual cases but I am happy that this matter was addressed in 2017 and I do not accept it as mitigation for your actions.
- 27.3. There is a general onus placed on all individuals within the workplace to ensure that they comply with NWOW regarding health and safety. On 19 July 2018 by your own admission you failed to do this.
- 27.4. In relation to the alleged use of aggressive language or behaviour intended to intimidate: Mr Turner refers to the wording of the dismissal letter and states: '
A number of the statements clearly recall that you were the aggressor and a fellow colleague recalled, 'Ashley was very physical with Andy'.
Another colleague recollects 'a clear verbal attack by you on Jackie', leaning over her and demonstrating unacceptable behaviour. The statement also confirms that the attempt to get past Andy in the doorway was more than casual.
Another colleague recalls 'you attempt to leave the office in a physical manner'. Another witness recalls an aggressive and intimidating verbal assault on Jackie, leaning over her. An aggressive attempt to get past Andy in the doorway 'like a leopard attempting to get out of the cage'.
Any colleague who witnesses an unsafe act has the duty to report this without being intimidated or threatened. Regardless of if you actually did threaten to 'kill a co-worker or not' your behaviour on that day without question was unacceptable. A co-worker reported an unsafe act and you reacted this in a manner that is deemed as gross misconduct.

Conclusions

28. The tribunal have discussed this matter at length and all findings have been made on a unanimous basis. We are grateful for and have considered both parties written submissions together with their oral submissions.

Unfair dismissal

29. We first look at the reason for the claimant's dismissal. There is considerable evidence within the bundle including CCTV footage and the claimant does not dispute that on 19 July 2018 he was observed to be hanging off the back of a moving lorry. This is an obvious health and safety concern. Further, it is the claimant's own case that on learning that his breach of health and safety had been reported by Ms Jackie Butler he chose to confront her directly by repeatedly asking her 'why she had grassed him up?' The claimant had worked for the respondent for 15 years and there is nothing within the evidence to suggest that the disciplinary process and the claimant's subsequent dismissal was related to anything other than the events of 19 July 2018. Taking the entirety of the evidence into account we conclude that the reason for the claimant's dismissal was one relating to his conduct.
30. Turning to the factors to be taken into account in accordance with the *Burchell* test, we find that that by reference to the CCTV and the admitted

altercation that occurred between the claimant and Ms Butler, that the respondent had a genuine belief and reasonable grounds for its finding that the claimant was guilty of the alleged conduct.

31. We have looked carefully at the investigation carried out by the respondent. In general terms we found Mr Connaughton to provide considered, open and helpful evidence to the employment tribunal. When examining the adequacy of the investigation we apply the band of reasonable responses. The required standard of reasonableness is always high where an employee faces the loss of his employment and there is a need for careful and conscientious enquiry. We address the claimant's complaints relating to the investigation as follows.:

31.1. The claimant alleges that Ms Butler threatened him. He says that this behaviour on her part was unreasonably ignored and demonstrates unfairness and inconsistent treatment. It is common ground between the parties that Ms Butler said something to the claimant that led to a flareup of the situation. The claimant says that Ms Butler said, 'I am going to get you fucked up', he considered this to be a threat to him and his family and he was intimidated by it. The claimant claims that he was a victim but ignored by the respondent. The claimant claims that the unknown number calls received by Mr Harewood, asking to speak to the claimant, following the altercation prove his position. Ms Butler says that she told the claimant to, 'shut your fucking mouth'. Mr Connaughton considered this as part of his investigation. He considered it likely that had Ms Butler wished to pass on a number to any member of her family, she was likely to pass on the claimant's number rather than that of Mr Harwood. Ms Butler told him that she had contacted family members following the altercation. He considered that it was more likely than not to be the case that those family members had Mr Harwood's mobile number and sought to contact him. There is nothing within the evidence before the tribunal to suggest that there was any further contact. The witness statements of those who witnessed the altercation between the claimant and Ms Butler, including Mr Barnes a trade union representative, support Ms Butler's version of events. There are repeated references to Ms Butler being intimidated and the claimant being angry. Mr Connaughton concludes on the balance of probability that Ms Butler did not say 'I am going to get you fucked up' or threaten the claimant as he has alleged. We do not criticise Mr Connaughton's handling of this matter and we conclude that it falls squarely within the band of reasonable responses.

31.2. The claimant questions the absence of initial statements from Ms Butler and Ms Forbes and alleges that the unreasonable delay in obtaining the statements allowed for collusion on the part of Ms Butler and Ms Forbes. Further the claimant questions why Ms Forbes was allowed to attend Ms Butler's interview as a companion. Mr Connaughton's evidence and the documentation in the bundle shows that immediately following the altercation Mr Sayers sought to obtain

statements from those present including Ms Butler, Miss Forbes and the two union reps who were in Mr Sayer's office being Mr Barnes and Mr Airro. It can be seen from the documentation that both women wished to retract their statements due to fear of possible negative repercussions from the claimant. Ms Butler had reported a serious health and safety breach without identifying the claimant by name and was thereafter, on the claimant's own evidence, directly and repeatedly questioned by the claimant as to 'why she was grassing him up?' and there are multiple reports within the witness statements of Ms Butler being upset and intimidated by the incident. Mr Barnes and Mr Airro appeared initially unwilling to assist Mr Sayers investigation. While we consider early statements from those involved would be helpful, we note that Mr Connaughton took prompt steps to speak to those who witnessed the incident and his handling of this matter to fall within the band of reasonable responses of a reasonable employer.

- 31.3. We note that Ms Butler was accompanied by Ms Forbes at her interview however similarly, the claimant was accompanied at his initial interview with Mr Sayers by Mr Barnes who was a trade union representative and also a witness to the event. Mr Barnes was initially unwilling to give a statement in relation to the incident. Mr Barnes would have been aware of the claimant's initial account of the incident. The notes of his interview on 24 August 2018 record a similar version of events to that provided by Ms Forbes and Ms Butler. There is nothing within the bundle that would suggest to Mr Connaughton that there had been collusion between any of the witnesses in this matter. We consider Mr Connaughton's handling of this matter to fall within the band of reasonable responses of a reasonable employer.
- 31.4. The claimant complains that a further individual within the office, MX did not provide a witness statement. It is common ground that MX witnessed the incident. The claimant says that the statement may have been helpful to his side of events. Mr Connaughton told us that the individual involved was a former victim of domestic violence and was upset by the altercation between the claimant and Ms Butler and did not wish to become involved. Mr Connaughton considered that, in light of the number of witness statements he had obtained this particular witness would be unlikely to add any substantial further information. Again, we consider Mr Connaughton's dealing with this matter to fall within the band of reasonable responses.
- 31.5. The claimant complains that Mr Connaughton did not speak to Glen Sewell and Robert Tulloch who were witnesses to the fact that Mr Harewood received a phone call from an unknown number requesting to speak to the claimant. When dealing with this matter Mr Connaughton noted that Ms Butler had said that she called her son and her partner following the incident. He accepted that Mr Harwood had received a phone call from the unknown number as

alleged requesting to speak to the claimant. Mr Connaughton expressly considered whether Ms Butler had improperly released telephone contact details of Mr Harewood to either her son or partner and concluded that she had not by reference to that set out above. In the circumstances Mr Connaughton considered that it was most unlikely of witnesses to these calls could add anything of value to his investigation. We consider Mr Connaughton's actions in dealing with this matter to be within the band of reasonable responses.

32. We have considered whether a fair process was adopted by the respondent in dealing with the disciplinary matter. The respondent appointed an investigation manager, a disciplinary manager and an appeal manager to deal with the individual steps within the process. Mr Turner was open in his evidence, telling the tribunal that he had been aware of the incident in general terms but had not played any part in the previous process. There is documentary evidence showing Mr Turner referring to general policies and directing others to seek HR advice. There is no evidence in front of this tribunal to suggest that any of those tasked with parting of the process were impartial or biased against the claimant. The claimant was accompanied by a colleague trade union rep throughout. The claimant was aware of the disciplinary allegations made against him and provided with a reasonable opportunity to answer those allegations.
33. The claimant complains of unreasonable delay within the process generally and particularly delay in the early part of the process between the incident on 19 July 2018 and the investigation outcome on 12 September 2018. There is some delay during this process however it is noted that August is a traditional holiday month and the documentation in the bundle shows that there was delay due to prearranged holidays. Further it can be seen from the dates of the witnesses evidence that following holiday absence, the investigation was progressing. Taking the entirety of the evidence into account we do not consider that the delay encountered by the claimant in this matter brings the process outside the band of reasonable responses from a reasonable employer. Even if we are wrong on this point, we do not consider that any delay with any of this process from the original incident of 19 July 2018 to the claimant's dismissal on 11 October 2018 to have had any effect whatsoever on the respondent's decision to terminate the claimant's employment. The only consequence of the delay highlighted by the claimant, in light of the findings made by this tribunal, was the claimant continued in employment during a period where he would otherwise have been dismissed at an earlier date.
34. Finally we examined whether the sanction of dismissal was a sanction which was appropriate, proportionate and, in a word, fair. In relation to each of these factors, it is important to remember at all times that the test to be applied is the test of reasonable response. In considering this matter we look in particular at the points raised by the claimant.
35. The claimant complains of inconsistent treatment. It is common ground between the parties that there was an incident in 2017 within the respondent

where an agency driver was observed to be hanging on the back of a lorry and the driver involved was treated more leniently than the claimant and ultimately employed by the respondent. Other than these general circumstances, this tribunal was provided with no information in relation to the previous incident. We do not consider this to be a truly comparable situation and there are significant and material differences between what we know of the two scenarios. While the health and safety aspect of hanging on the back of a truck is comparable there is no suggestion that the agency worker sought to confront the individual who reported the health and safety breach in a manner similar to the claimant's confrontation of Ms Butler.

36. Even if the misconduct alleged against the claimant was limited to a similar health and safety aspect, it is open to an employer to acknowledge a situation where a health and safety incident was, for reasons unknown, dealt with leniently and conclude as the respondent did that, 'since this event the health and safety standard is much stronger and needs to be' and for that reason to decline to treat it a precedent. It is open to an employer to consider each disciplinary allegation on a case-by-case basis. We note that these are circumstances where it is common ground that the claimant's behaviour could have resulted in serious injury or even fatality. We consider that the respondent's manner of dealing with the claimant's consistency argument falls within the band of reasonable responses of a reasonable employer.
37. The claimant also raises consistency points in relation to the Newton Heath incident where he says that 2 colleagues who have made physical threats of violence against each other but were not dismissed. On the limited information available to the tribunal, we do not consider this to be a valid comparison to the claimant circumstances. There is no suggestion that either of the individuals involved within the Newton Heath incident had committed a serious health and safety breach, nor was it said that their altercation arose from a confrontation following the reporting of a serious health and safety breach.
38. The claimant complains of inconsistency of treatment in that Ms Butler was treated as the victim who was intimidated and the respondent identified a duty of care to her. The claimant complains that he was the victim of a serious threat by Ms Butler, he had been intimidated, falsely imprisoned and his situation was effectively ignored by the respondent. We note that the respondent had made findings of fact on the balance of probability that the claimant was not threatened as he had alleged. The respondent treated Ms Butler as the victim of the altercation. We consider that the respondent's actions in viewing the incident in this way, based on the evidence available to it, falls squarely within the band of reasonable responses of a reasonable employer.
39. The claimant places emphasis on the arguments that Ms Butler was treated differently to him and argues that this makes his dismissal unfair however while it is the case that both the claimant and Ms Butler swore at each other. Ms Butler had not breached health and safety nor had she confronted a colleague who reported that breach in a verbally aggressive manner. Her

conduct is not comparable to that of the claimant. The respondent did not accept that Ms Butler had threatened the claimant as alleged.

40. The respondent acknowledged the claimant's unblemished record and long length of service and the tribunal considers the respondent's treatment of these factors alongside the disciplinary allegations to fall within the band of reasonable responses.
41. The claimant alleged that he did not, at the time of the incident appreciate that it was a serious breach of health and safety. He criticised an absence of training on the respondent's part until the tribunal that it was only with hindsight that he appreciated that his actions were a serious breach of health and safety. The claimant argued that this absence of an articulated rule that employees should not hang off the back of lorries, rendered his dismissal unfair. This was not an argument raised by the claimant during the disciplinary process. Throughout the disciplinary process it appears that the claimant accepted that what he had done in standing on the back of a moving lorry was an obvious and acknowledged health and safety breach and the claimant repeatedly refers to his honesty in dealing with this matter throughout. We find the claimant's argument that he was unaware prior to or at the time that he should not hang on the back of a lorry to be lacking in credibility. Such a lack of knowledge on the claimant's part is inconsistent with his subsequent aggressive confrontation of the person who reported him for a health and safety breach and it is inconsistent with his position throughout the disciplinary process. We note Mr Connaughton's evidence in relation to this matter and we conclude that the absence of express training or an articulated rule that employees must not hang off the back of moving lorries does not push the respondent's decision to dismiss the claimant outside band of reasonable responses.
42. We note the reference within the dismissal letter that the claimant 'threatened to kill' a co-worker. We note Ms Butler's interview notes record that 'the claimant] threatened to kill me', we can find no other reference within the documentation. We did not hear from Mr Kendall. The respondent's position was that while this comment is included within the disciplinary letter it is not something that was found as a matter of fact by Mr Kendall. Mr Kendall does not state within the dismissal letter that he has found that the claimant threatened to kill a co-worker. In addition to this comment, Mr Kendall clearly sets out the two allegations referred to throughout this disciplinary process. We find that there has been no finding on the respondent's part that the claimant threatened to kill a co-worker and this particular allegation has not been relied upon by the respondent in dismissing the claimant. We do not consider that this reference within the dismissal letter pushes the respondent's decision to dismiss outside the band of reasonable responses. If we are wrong, we consider that this particular point has been adequately addressed within the appeal process as set out above. Further, if we are wrong and inclusion of this comment renders the dismissal unfair, we refer to our comments in respect of contribution are set out below.

43. Taking the entirety of the evidence into account we conclude that the respondent's decision and consideration of the available evidence falls within the band of reasonable responses of a reasonable employer. The claimant was not unfairly dismissed.

Contribution

44. If we are wrong and any of the matters raised by the claimant result in an unfair dismissal, we address the issue of contribution. We have considered whether the claimant's actions in the circumstances were culpable or blameworthy. We did not hear from those directly involved in the incident however we have assessed the evidence presented to us and conclude on the balance of probability that the claimant:

44.1. Stepped on the back of a moving lorry in circumstances where he was aware that it was a serious breach of health and safety that could result in serious injury or fatality.

44.2. On being informed that he had been observed and reported by Ms Butler for a breach of health and safety he chose to confront Ms Butler in an angry fashion. We make no distinction between the claimant asking Ms Butler repeatedly, 'why she grassed him up' and calling Ms Butler 'a grass'. We find either scenario equally inappropriate. We find that the claimant was angry throughout the confrontation. He acted in an inappropriate, aggressive and intimidating manner in both instigating the confrontation and 'bearing over' Ms Butler. We find that both the claimant and Ms Butler swore at each other. The swearing in isolation, taking into account the nature of the respondent's workplace was not considered serious misconduct. Ms Butler did not threaten the claimant, Ms Butler told the claimant to, 'shut his fucking mouth' triggering an angry and physical reaction on the claimant's part. We find the claimant's evidence that he was intimidated and wanted to go home with a view to distancing himself from the situation to be lacking in credibility. The claimant had lost his temper with Ms Butler to the extent that Mr Sayers was required to physically stand in his path until he calmed down. He wanted to leave Mr Sayers' office to continue his exchange with Ms Butler. Ms Butler was correctly identified by the respondent as the victim of the incident. Ms Butler did later inform members of her family of the altercation and a member of Ms Butler's family sought to make contact with the claimant by ringing Mr Harewood's mobile phone number. No contact was made.

44.3. At no point during the disciplinary process or this litigation has the claimant addressed or acknowledged his inappropriate, intimidating and aggressive behaviour towards Ms Butler.

45. In light of our findings above we conclude that the claimant's blameworthy and culpable conduct in this matter as such that he is entirely responsible for the circumstances leading to his dismissal. Should this dismissal be considered unfair, we assess the claimant's contribution to his dismissal to be 100%.

Sex discrimination

46. The claimant's allegation of direct sex discrimination is confined to his dismissal. The first task of the tribunal is to identify an appropriate comparator. When looking at the claimant's circumstances we refer to our findings of fact made above under the heading of 'contribution'.
47. We find that Ms Butler is not an appropriate comparator to the claimant. They are not in similar circumstances in that:
 - 47.1. Ms Butler did not commit a health and safety breach by hanging on the back of a moving lorry
 - 47.2. Ms Butler did not choose to confront the individual who reported her serious health and safety breach in an inappropriate, intimidating and aggressive fashion.
48. This tribunal, in considering less favourable treatment, is considering a hypothetical comparator, being a woman who had committed a serious health offence and thereafter chose to confront the individual who reported her in an inappropriate intimidating and aggressive fashion. We have been presented with no evidence whatsoever to suggest that the claimant has been less favourably treated than how the respondent would treat such a hypothetical comparator. The claimant has not shown any facts that would allow the tribunal to conclude that in an absence of explanation, the respondent had unlawfully discriminated against him for a reason connected to his sex.
49. Should it be the case that the claimant could provide a prima facie case, effectively shifting the burden of proof to the respondent, we conclude on the basis of the evidence set out above that the respondent has clearly demonstrated that the reason for the claimant's dismissal related to his conduct and was wholly unrelated in any way to the claimant's sex.
50. For the sake of completeness we note the claimant's reference to the ET case of Hastings v Kings College Hospital NHS Foundation Trust 2016. As an ET decision it is not binding on this Tribunal. Further the employment tribunal was unable to identify any correlation between the race discrimination claim pursued within that claim and the claimant's sex discrimination claim under consideration by this tribunal. We repeat our factual findings as set out above.

Summary

51. The claimant's claims for unfair dismissal and for direct sex discrimination are not well-founded and are dismissed.

Employment Judge Skehan

Date:10/12/2021.....

Sent to the parties on: 30/12/2021

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For the Tribunals Office