



EMPLOYMENT TRIBUNALS

Claimant: Mr J Preston

Respondent: John Allen

Heard at: Manchester (remotely, by CVP) **On:** 7 June 2021
25 October 2021
10 December 2021
(in Chambers)

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: Ms N Kaye, Lay Representative (Claimant's Partner)

Respondent: Mr P Smith, Counsel

JUDGMENT

The judgment of the Tribunal is:

That the claimant was not unfairly dismissed. His claim for unfair dismissal under section 98(40) Employment Rights Act 1996 fails and is dismissed.

REASONS

1. The claimant brought a claim of unfair dismissal following his dismissal for insubordination by the respondent on 9 September 2020.

Claimant's Submissions

2. The claimant submitted that:

- (1) the dismissal was unfair because there had been no investigation;
- (2) he had been given insufficient notice of the hearing;

- (3) the matter he was accused of (serious insubordination) could not be gross misconduct as he was allowed to work between the hearing and the dismissal;
 - (4) the process was unfair as the individual he had had the altercation with was in charge of collecting the witness statements;
 - (5) the view that he had not expressed any remorse was incorrect; and
 - (6) the expectation that he would spontaneously discuss this in the difficult environment or a disciplinary hearing was unrealistic and inappropriate.
3. The claimant also submitted that swearing was the norm at the respondent's business.
4. The claimant was represented by his partner who has no legal training and I noted at the hearing that Ms Kaye had represented the claimant very well during the hearing.

Respondent's Submissions

5. The respondent submitted that the claimant had sworn at his manager and one of the owners of the business, in front of others, he had not apologised and still thought he was justified in his behaviour; that this was potentially gross misconduct and it was fair to dismiss the claimant for this incident.

The Issues

6. The issues for the Tribunal to determine were as follows:
- (1) Did the respondent have a potentially fair reason for dismissing the claimant within the meaning of section 98(2)?
 - (2) As the reason was conduct, did the respondent meet the **BHS v Burchell** test in that the employer genuinely believed the employee was guilty of the misconduct, it had in mind reasonable grounds upon which to sustain that belief, and at the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances?
 - (3) Did the respondent follow a fair procedure in respect of the claimant's dismissal and appeal?
 - (4) Was the dismissal of the claimant within the range of responses of a reasonable employer?
 - (5) If the dismissal was unfair did **Polkey vs A E Dayton Services Ltd (1987) HL** apply and/ or should any compensation be reduced for contributory conduct

Witnesses

7. The Tribunal heard from the claimant himself, for the respondent Mr Jeff Middleton (solicitor) and Mr Peter Allen (director).

Findings of Fact

8. The Tribunal's findings of fact are as follows.

9. The claimant began working for the respondent on 18 January 2016 as an HGV driver. His employment was without any significant incident until 26 August 2020. On the Monday of that week (i.e. 24 August 2020) the claimant had asked John Allen one of the firm's directors for the Friday off. He was having some soil delivered and needed to be there when it was delivered and wanted to start on the job of improving his garden straightaway. It was agreed that John Allen had said something along the lines of "leave it with me and I'll get back to you".

10. The respondent said that whatever was said the procedure was that any holiday requests had to be referred to another member of staff. This was Julie Moran in the Wages Department, and the claimant had used this procedure before. It was the claimant's belief that while sometimes he did use that procedure, it was equally reasonably and accepted to approach John Allen directly.

11. On the following Wednesday the claimant stated that he printed his jobs off for Thursday and then another manager came and said to him "I think your day may have changed" and the claimant said, "no problem", thinking he had had a job added to his list. The claimant went and had another look at the diary and he could see that another worker PG's name had been taken off for Thursday. The claimant asked one of the office staff, CM, whether PG was off "tomorrow", and she said, "Yes, and Friday. I have just been notified now". The office staff were discussing this and Jodie McHugh said, "PG has only just booked them days off, just before lunch". The claimant then said, "that's bang out of order, he knew I wanted Friday off". The claimant said he said to Jodie, "Do you agree that's bang out of order?" and she agreed and said, "Yes, he should have honoured it to you first, you asked on Monday". CM then said, "Why don't you go and have a chat with him but stay calm?", ('him' being John Allen).

12. The claimant went outside and spoke to John Allen and said to him, "Is it still ok to have Friday off, boss?" in the normal way. In the claimant's version John Allen looked at the claimant and smirked and said, "No, Paul's off now". The claimant then said, "That's bang out of order, I asked you first". The claimant said:

"I turned away and started heading back to the office. He came up to me from behind and said, 'Paul went through Julie, so he went through the right protocols', then I raised my voice and said, 'no, that's fucking bullshit John, and you know it'. He replied, 'oh now, JP, stop getting excited', which wound me up even more. I got the impression he was trying to provoke me. I carried on walking and went into the office to clock off. I picked up my clock card, leant on the counter and John appeared at the side of me and said, 'You should've gone through the right protocols and you would have had Friday off', then he walked off. I felt threatened by John's manner as he followed me into the office and encroached on my personal space. I then said, 'fucking arsehole' because of the comment he had just said and how he had made me feel. If that was the case he should have informed me on Monday and I would have gone through Julie. In the past when I've asked Julie she has always said she'll ask John, therefore I thought I would go straight to the main man. John then came back into the office and said, 'did you say something?'. I

said, 'yes, fucking arsehole'. He then walked off and waited for me outside the premises. I wrote down my finishing time on my card and left the office.

As I was walking out of the gate John said to me, 'that's going to cost you'. I didn't retaliate and carried on walking towards my car. I knew at that point he was definitely trying to provoke me and feel that he did not have my mental wellbeing at heart as he could see I was frustrated with the situation and he was goading me for a reaction. I feel I've been unfairly treated in this matter. In the past John would normally phone me if there was a situation that needed compromise to resolve. In this case a phone call from John to say that Paul had asked for Thursday and Friday off could have prevented any of this from happening."

13. Mr Allen was one of the directors of the business with his brother Peter Allen and "CM" and following the incident it was decided to take legal advice from the respondent's solicitors. Mr John Allen contacted Mr Middleton at Hill Dickinson Solicitors on or around 26 August for advice, "with a view to commencing disciplinary proceedings". As it was a small business and Mr Allen was a director and brother of the other director, it was decided that Mr Middleton would handle the situation with the claimant as an independent decision maker, with Mr Peter Allen doing any appeal.

14. Mr Middleton received statements from Mr John Allen, CM and Jodie McHugh who were present when the incident took place. Mr Middleton took the view that in the context of an allegation of insubordination, which was the eventual charge against the claimant and not swearing, the collection of these three witness statements was sufficient to establish the facts such that the matter should proceed to a disciplinary hearing. Therefore there was no further or separate investigation before the claimant was written to on 4 September to be invited to a disciplinary hearing on 8 September, and he was sent the witness statements on 4 September. The claimant felt that this was insufficient time to properly prepare and that he should have been interviewed as part of an investigation once he had had time to consider what the other witness statements said. The claimant was accompanied by a colleague, Peter Dickson, at the hearing.

15. In her statement Jodie McHugh's stated that:

"CM told John Preston that Paul Graham had spoken with John Allen earlier on in the morning and that John Allen had told him that John Preston had wanted Friday off and to speak to him and Julie and decide who was having the day off i.e. Paul off on Thursday and John Preston on Friday. I'm not sure if Paul Graham had spoken with John Preston about the booking on Thursday and Friday. I'm presuming not with how John reacted. CM advised Mr Preston that Mr Graham had only booked the days off that day just before lunch.

John Preston then went on to say, 'that's bang out of order, that'. He looked at me and said, 'do you agree?'. I said, 'I do agree', as John Preston had been up to see John Allen on Monday and asked him if he could have Friday off, and John Allen had looked at the holiday list and said 'I will get back to you'. I think CM said to John Preston 'go and see John Allen about it but remain calm', and John Preston said he would...

I am not sure what was said outside but there were raised voices. John Preston walked into the office very mad, got his clock card to sign what time he was going and said something but I can't remember what he said (think he may have said 'that's bang out of order or that's bullshit'). John Allen walked in behind him and said, 'If you want Friday off you should have followed protocol and booked Friday off with Julie' and walked out of the office. John Preston then called John Allen a 'fucking asshole'. John Allen heard the back end of this and walked into the office and said, 'did you say something?' and John Preston said, 'yes, I said you're a fucking asshole'. John Allen didn't say anything and walked out then John Preston put his clock card back and walked out. John Allen said something to John Preston when he walked but I don't know what was said."

16. In his witness statement John Allen stated:

"On Monday or Tuesday afternoon John Preston came to my office and asked me if he could have Friday 28 August off so he could do his garden up at home. I took a look at the holiday list and said I wasn't sure as I didn't know if anyone had booked Friday off or not. (Sometimes the holiday list is a day or two behind for us). I said I would get back to him. He jokingly said he had someone to cover his truck and looked at Jodie. I said Jodie might be busy doing office work but if it got busy she could cover (this is in the claimant's statement, it was a joke).

On Wednesday 26 August while I was in the transport office Paul Graham asked me if he could have Thursday and Friday off. I said I wasn't sure as the holiday list was in my office but mentioned to him that JP wanted Friday off. I said to Paul 'ask JP if he still wants Friday off. If he does you can have Thursday off and JP can have Friday off, but whatever happens you need to go and see Julie and book them through the booking system we have'. Later on that day I was told that Paul had seen Julie and booked Thursday and Friday off.

Later on Wednesday afternoon I was walking in from my office to the transport office when JP walked over to me and said very loudly 'that's fucking bang out of order'. I said what was, he said 'you know I wanted Friday off and you've let Paul have it, you are fucking bang out of order doing that'. I said to him to stop shouting and calm down and he said, 'no, I'm telling you that's bang out of order'. He continued saying 'you knew I wanted Friday off and now Paul has booked it off'. I said, 'why didn't you go and book the day off with Julie?'. He raised his voice again and said, 'I was waiting for you to get back to me'. I said to John 'I've loads of things to do every day but we do have a holiday booking procedure. If you'd done that in the first place you would have had Friday off'. John walked off to the transport office. I was close behind him to hopefully calm him down and sort this out as best I could. As I opened the door into the transport office I heard John say whilst he was leaning over the counter in the transport office that I was a fucking arsehole in front of a member of staff and a director. I said to John, 'did you just call me a fucking arsehole?' and he said, 'yes'. I closed the door. John walked out to go home. As he did so I said, 'that last comment could cost you'. John never replied and got in his car and drove off."

17. There was also a statement from CM, who was another director. The statement was very short. It said:

“John Allen and John Preston had a disagreement in the transport office. Voices were raised and words were exchanged. I believe it was about annual leave. Unfortunately I was busy at the time dealing with other company matters and therefore did not hear what was said between them.”

18. On 8 September 2020 at the disciplinary hearing the claimant forcibly made the point that he would have gone through Julie if John Allen had said this but because John Allen had said he would get back to him he had not gone to see Julie. He said at one point, “The be all and end all of it is lack of communication I think”.

19. The claimant agreed that he had called John Allen a “fucking arsehole” and only repeated it because Mr Allen had asked him “did you say something?”. It was the claimant's case that he was very upset and Mr Allen was following him and provoking him.

20. Mr Middleton explained that generally it was not a good idea to tell one's boss they were wrong, “I am working class lad. There is a pecking order. You understand there is a hierarchy and whatever you may think there is a way to disagree with something. It's common sense you don't do it with an audience”. He then went on to say the charge was insubordination and that the claimant understood what it meant. The claimant said he still felt upset about it, that he and John Allen had always respected each other, but he was adamant that he felt that Mr Allen had provoked him by smirking and then confirming that Paul was off because he had gone through Julie, and then he had said, “Oh JP, stop getting excited”. Then he had followed the claimant into the office when he did not need to and after the incident had said, “that's going to cost you”. The claimant said that he was going to crack on with his job, he did not have regrets, he does not hold grudges and he was sure John Allen was the same and that he would not hold grudges either.

21. Mr Middleton pointed out to the claimant that his job was on the line so did he want to add anything. The claimant was astounded by this and said, “I haven't had all this explained to me”. He said that everything was in his statement and that he would just forget about everything and carry on with his work.

22. It was in Mr Middleton's evidence that when he was asking the claimant if he wanted to add anything he was giving him the opportunity to apologise and the claimant failed to do so.

23. The claimant also complained that Mr Middleton had told him he would give the claimant an answer by the next day, but then he was kept hanging around all of the next day waiting for the letter. The claimant also carried on working from the hearing until he got the outcome, and he felt how could it be gross misconduct if the respondent was happy for him to carry on working. The claimant felt that this was done deliberately in order to increase his anxiousness and distress. However, I find that this was not the case, although I understand why the claimant felt like that.

24. The next day a letter was produced which stated that:

“It was also your position you felt you were provoked, almost goaded, by John Allen. I don't believe that to be the case as its essence the reason you did not

obtain the request you made was down to your words of breakdown in communication and a failing on your part to ensure the holiday was booked with Julie. I am satisfied you knew how the holiday booking system worked.

You face a charge of gross misconduct for insubordination. I am satisfied that your actions and comments on 26 August 2020 amount to insubordination. I am satisfied that you understand what insubordination is. You told me you had to look it up and I explained it in relation to a couple of scenarios outside work. The situation is made worse by the fact this was done in front of colleagues. You said that you wouldn't bear any grudges, but you did not apologise or express any regret. I gave you several opportunities during our meeting where I felt I had allowed you the opportunity to say sorry. At no point did you show any regret or attempt to apologise. I have taken into account that you have worked for the respondent for 4½ years and have a clean disciplinary record...

In my view it's a fundamental basic principle within the employee contract that an employee shows loyalty for the employer and follows reasonable instructions. To openly disrespect a director of the company in front of colleagues is serious matter and does constitute gross misconduct...

I had to consider whether I felt any outcome other than dismissal was appropriate. I considered 10.12 of the handbook which expressly refers to demotion, suspension without pay, reduction in pay, transfer or loss of overtime. Any of these sanctions would necessarily have to be accompanied at the very least with a final written warning because of the severity of the offence. In the absence of any expression of regret and an apology I don't believe it appropriate to issue any form of warning.

In view of the above I have decided to dismiss you with effect from Wednesday 9 September."

25. The respondent paid the claimant four weeks in lieu of notice in order to cushion the blow.

26. The claimant complained that the minutes of the disciplinary hearing were incomplete and expressed the fact that he wanted to appeal the decision by a letter dated 8 September, which he gave to Peter Allen in a meeting Peter Allen called in order to hand over the letter from Mr Middleton.

27. The claimant wrote in on 14 September 2020 to appeal. His reasons for appealing were:

"I feel I have been unfairly dismissed following the incident that took place on Wednesday 26 August. In the hearing I was given the opportunity to explain in my own words what happened. I presented my statement to Jeff Middleton and provided the details of what I believed was a true statement. After reading the statement of John Allen I can see there is vital information missing from what happened on Wednesday 26 August. Jeff Middleton took the time to read my statement. He sympathised with me and agreed that I had asked for the day off first. He acknowledged the breakdown in communication and that everybody could have spoken differently, yet these comments that I took note of during the hearing are not stated in the write-up produced by Sharon.

I feel the write-up is also missing key factors and has been aimed to place all the blame on me with no mention of John Allen's actions.

I was asked during the hearing what the procedure is for booking time off and I answered with how I had personally requested time off in the past for the past 4½ years. I was also asked if I had a copy of the handbook with me which I didn't at the time. Following the hearing I have had the opportunity to peruse the handbook and note there is no formal procedure in the handbook for booking time off. I have never been told during the 4½ years I was requesting this incorrectly. The incident on 26 August stemmed from the fact that I had booked time off only to then be told the person who had asked for time off after me had been granted the leave and therefore I could have not it.

In John Allen's statement he states that he said to me, 'We have a holiday booking procedure. If you'd done that in the first place you would have had Friday off'. At no point have I been advised of any procedure to book holidays. I feel that John's attitude towards me at this point was humiliating. I felt he was trying to make me feel foolish in that I had done something wrong, however as I had done the same thing that I had done for the past 4½ years I do not understand why this is suddenly wrong.

As my boss I do not believe John should treat staff in this manner and as stated in the handbook believe that he is in breach of clause 14.2.8 in this instance.

I explained in the hearing that the comment made from John Allen, 'Oooo now JP, stop getting excited' made me feel like I was being spoken to like a child. In the handbook it clearly states in 14.2.10 that examples of bullying include shouting at, being sarcastic towards, physical or psychological threats. I feel very let down that these comments made towards me have been ignored and allowed to happen with no recourse, yet it states in the handbook that 'all staff must be treated with dignity and respect'. I do not feel that on 26 August I was treated with dignity and respect.

I acknowledged in the hearing that things were said by both parties that could have been said differently to each other and I do regret that things escalated the way that they did. I have been very honest in what was said, and I take responsibility for what I said. At no point has any responsibility been taken for the way I was spoken to or any acknowledgement of how this made me feel.

In the letter addressed to me with the outcome of the hearing it was stated I had no regret and I did not apologise and that if I had done then I would have been issued with a form of warning. It also states that Jeff Middleton felt he had allowed me an opportunity to say sorry. I strongly refute this. I do not feel I was given that opportunity. I was asked what happened and how that made me feel, which I answered honestly. I was not asked for my feelings John Allen or whether I was sorry for what was said. I stated that I would hold no grudges and that I would carry on as normal. I even stated that I believed John Allen would not be one to hold a grudge in that we would both be able to do our jobs and interact appropriately. I believe this was misinterpreted by Mr Middleton. After being told at the meeting that my job was on the line I struggled to concentrate on anything else that was being said to me.

In receiving the disciplinary hearing outcome letter I feel that my side of events was not heard in relation to how I was made to feel during the incident on 26 August 2020. I feel as though only John Allen's position as my boss was all that mattered and it has not been considered that John Allen's words and conduct on that day towards me was offensive and intimidating and in breach of the company handbook.

I am also confirmed there has been very little confidentiality in dealing with this matter. All members of staff were aware of this incident and that a disciplinary hearing had taken place. It clearly states in the handbook that breach of confidentiality may give rise to disciplinary action and I feel that this issue has not been confidential in this instant."

28. There was another letter of 14 September which had added on further information about the fact that the claimant believed Mr Middleton had promised him a decision first thing in the morning, and then he had to work for a considerable amount of time without receiving the decision. The claimant had not slept well with worrying and had quite a bad headache. The claimant kept asking had the decision arrived yet. By the afternoon the claimant's head was causing him to feel sick and his anxiety was high, so he advised that waiting for the letter was giving him a migraine. He went to have his 45 minute break and was told that the letter would not be available until 4.30pm. The claimant was advised he should have phoned in sick rather than coming in, but he said he did not want to be absent sick at this point in time. The claimant carried on with the rest of his jobs and felt that he had been treated very badly by this delay. He then got the letter explaining he had been dismissed for not apologising and that if he had apologised the outcome would have been different. The claimant repeated again that at no point was he given an opportunity to apologise.

29. Mr Allen also looked into the claimant's allegation that the typed up notes of the disciplinary had matters missing. The claimant advised him of what those were, but Mr Allen did not feel that the differences were material to the outcome.

30. The claimant's appeal letter was then updated (as referred to above) and presented to Mr Allen on the day of the hearing, 5 November. Mr Allen discounted the claimant's complaint that vital information had been missed out of John Allen's statement because he did not raise an issue about it prior to the hearing or during the disciplinary hearing, although he did consider that he was satisfied that any differences were merely differences in emphasis and did not effect the fairness of the original decision.

31. The claimant said he was not given an opportunity to apologise. Mr Allen read the minutes and liaised with Mr Middleton, who he said confirmed he did give the claimant plenty of opportunity to apologise. For example, the claimant was asked how did he feel about things now, and if he wanted to say anything, on multiple occasions. He felt that he would not have been asked to specifically apologise, he needed to demonstrate he was genuinely sorry by voluntarily doing this and he felt that the claimant still had not apologised.

32. The claimant also raised that there was no formal procedure for booking annual leave, but Mr Allen checked with Julie Moran who provided him with information that the claimant had in fact booked leave through her on 45 separate occasions in his 4½ years of service.

33. Mr Allen also said that he spoke to John Allen and Jodie McHugh about the claimant's allegations that Mr Allen was bullying and belittling him in the way he followed him into the office, etc., and some of the comments he made. Mr Allen said he spoke to Mr John Allen and Jodie McHugh about this and both said that in fact Mr Allen had tried to calm the claimant down. There were no notes of this, however and it was not mentioned in the respondent's response form. However it was referred to in the outcome letter.

34. Regarding the lack of confidentiality, the respondent could not ascertain where this had arisen from other than that the claimant may well have talked about it and that the claimant had been observed by "KR" on 9 September talking to a number of colleagues about the disciplinary hearing, and that Peter Dickson who had attended the hearing with him had also told another employee of what had happened. Therefore, Mr Allen drew the conclusion that the information staff had come through the claimant.

35. In addition Mr Middleton advised Mr Allen that he had not given the claimant a specific time, just that it would be there "in the morning", but because it had to be put on a company letter-head there was some delay.

36. Mr Allen therefore investigated every part of the claimant's appeal. He also opined that he considered whether the claimant's length of service and lack of active disciplinary sanctions meant that the sanction of dismissal was unreasonable in all the circumstances. However, he felt that the seriousness of the claimant's actions particularly the insubordinate behaviour that challenged a director in front of other staff, and the claimant's lack of apology or a statement of regret even at the appeal stage justified a sanction of dismissal. He accordingly did not uphold the appeal and wrote to the claimant on 10 November setting out why he was upholding the claimant's dismissal. In this letter Mr Allen does refer to speaking to John Allen and Jodie McHugh regarding how the claimant was spoken to by Mr Allen.

37. In the company's disciplinary procedure excessive swearing, obscene language and other offensive behaviour is described as "misconduct", the usual penalties for which were a verbal warning or a first written warning where a case was more serious. The procedure said, "A first written warning will usually be appropriate for a first act of misconduct". It stated a final written warning would usually be appropriate – where there is already an active written warning on the employee's record or the misconduct that the company considers sufficiently serious to warrant a final written warning, even though there are no active warnings on the employee's record.

38. As to dismissal, it states:

"Dismissal will usually only be appropriate for:

- (1) Any misconduct during the employee's probation period;
- (2) Further misconduct where there is an active final written warning on the employee's record;
- (3) Any gross misconduct regardless of whether there are any active warnings on the employee's record."

39. Gross misconduct was in section 10 of the disciplinary procedure, and as usual said it was not an exhaustive list. One of the matters was “wilful refusal to obey a reasonable instruction from a superior” and serious acts of insubordination, which was the offence the respondent chose to pursue against the claimant.

The Law

Unfair Dismissal

40. Section 98 of the Employment Rights Act 1996 sets out the relevant law on unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within section 98(2). Conduct is a potentially fair reason for dismissal. In **Abernethy v Mott, Hay & Anderson [1974]** it was said that:

“A reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee.”

41. Once the employer has shown a potentially fair reason for dismissal a Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. Section 98(4) states that:

“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 sufficient reason for dismissing the employee; and
- (b) shall be determined in accordance with equity and the substantial merits of the case.”

42. In relation to a conduct dismissal **British Home Stores Limited v Burchell [1980] EAT** sets out the test to be applied where the reason relied on is conduct. This is:

- (1) did the employer Did the employer genuinely believe the employee was guilty of the alleged misconduct?
- (2) were there reasonable grounds on which to base that belief?
- (3) was a reasonable investigation carried out?

43. In relation to a professional job subject to a regulatory body where a finding may effect the individual’s ability to continue in their chosen career the employer must be particularly careful in its investigation and in reaching its conclusions **A vs B EAT (2003)** and **Salford Royal NHS Foundation Trust v Roldan CA (2010)**

44. In respect of deciding whether it was reasonable to dismiss **Iceland Frozen Foods Limited v Jones [1982] EAT** states that the function of the Tribunal:

“...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.”

45. The Tribunal must not substitute its own view for the range of reasonable responses test.

46. In respect of procedure, the procedure must also be fair and the ACAS Code of Practice in relation to dismissals is the starting point as well as the respondent's own procedure. In **Sainsbury's PLC v Hitt [2003]** the court established that:

“The band of reasonable responses test also applies equally to whether the employer's standard of investigation into the suspected misconduct was reasonable.”

47. In addition, the decision as to whether the dismissal was fair or unfair must include the appeal (**Taylor v OCS Group Limited [2006]** Court of Appeal). Either the appeal can remedy earlier defects or conversely a poor appeal can render an otherwise fair dismissal unfair.

Polkey

48. The House of Lords in a decision of **Polkey v A E Dayton Services Limited [1988]** decided that where a case is procedurally unfair a decision would still be of unfair dismissal even if there was a strong argument the procedural irregularity made no difference to the outcome unless the procedural irregularity would have been utterly useless or futile. Rather the question of the irregularity making no difference would be addressed in terms of remedy. This principle has also been extended to cases where dismissal is substantively unfair, although it is most likely to apply to procedural irregularity cases. The outcome can be that it would have made no difference and the claimant, although unfairly dismissed, would be entitled to no compensation or the rectification of the problem would have resulted in a delay in the claimant being dismissed and therefore the claimant receives compensation for that delayed period.

Contributory conduct

49. The Tribunal must always consider whether it would be just and equitable to reduce the amount of the compensatory award pursuant to section 123(6) of the Employment Rights Act 1996, where an employee by blameworthy or culpable actions, caused or contributed to his dismissal. If the claimant did so the Tribunal will have to assess by what proportion it would be just and equitable to reduce any compensatory award, usually expressed in percentage terms. The three principles are:

- (1) That the relevant action must be culpable or blameworthy;
- (2) It must have actually caused or contributed to the dismissal; and
- (3) It must be just and equitable to reduce the award by the proportionate specified.

50. These principles were set out in **Nelson v BBC No. 2 [1980]** Court of Appeal.

Conclusions

51. The matters which were in issue by the end of the hearing and which were reflected in both parties' submissions were:

- (1) Potential procedural defects:
 - (a) Not having a full investigation;
 - (b) John Allen directing the statements and instructing Mr Middleton;
 - (c) Mr Allen (his brother) conducting the appeal hearing;
 - (d) The minutes from the disciplinary hearing not being in full;
 - (e) The short period between the claimant receiving the documents and the hearing;
 - (f) The claimant not realising he could be dismissed at the hearing.
- (2) Substantive issues:
 - (a) Was the claimant's offence correctly labelled as serious insubordination; or
 - (b) Was it obscene language/swearing and did any significant issues regarding sanction flow from that?
 - (c) Subject to (1)(a) above, did the respondent meet the **BHS v Burchell** test?
 - (d) Was the decision to dismiss within the range of reasonable responses of the reasonable employer, including did the respondent properly consider mitigation and properly take into account the alleged failure of the claimant to apologise?
- (3) If there were any defects, how does **Polkey** and contributory conduct apply? For example, if there was a procedural defect but it did not affect the fairness of the dismissal, whilst there might technically be an unfair dismissal it is likely no compensation would be awarded. In relation to contributory conduct, where there is an unfair dismissal but the claimant's own behaviour has contributed to the dismissal in the first place, a percentage reduction can be made to any compensation.

Procedural Defects

52. I find that it was a procedural defect not to undertake a proper investigation before holding a disciplinary hearing and that it certainly had the appearance of unfairness to have the person who was complaining organising the witness statements and instructing Mr Middleton. However, I consider that these matters were cured by the thorough appeal undertaken by Mr Allen.

53. I was concerned during the hearing as to the fact that not all of Mr Allen's investigations had been recorded, for example there were no supplementary

statements from Mr John Allen and Ms Jodie McHugh, however I note that this is mentioned in the outcome letter from the appeal and therefore I accept that these investigations were undertaken and the outcome was as reported.

54. In respect of the other matters, I do not regard these as procedural defects. The claimant would have had the opportunity to complain about the length of time between receiving the letter and holding the disciplinary hearing and regarding Mr Allen undertaking the appeal and he did neither.

55. The minutes not being verbatim did not affect the outcome of the hearing.

Substantive Issues

I find that the claimant's offence was reasonably described as serious insubordination – it could have been obscenity or swearing which is described as “misconduct” in the respondent’s own procedures. However serious insubordination does not just mean the disobeying of a lawful instruction and could cover the factual matrix of these events. Here there were aggravating factors, the recipient was a director, it was in front of others, he was advised to stay calm, he was overheard and he repeated the swearing.

BHS v Burchell test

56. Taking the actions taken by Mr Peter Allen at the appeal into account in assessing the investigatory process means that I do find the respondent met the **BHS v Burchell** test in that by the end of the appeal they had done sufficient investigation and they did have reasonable grounds for concluding the claimant was guilty of the matter he was charged with.

Was it within the range of reasonable responses?

57. It is imperative in deciding this test that I do not substitute my own view for that of the respondent. The reasonable responses test is a broad one. I might have given the claimant a final written warning, but the issue is whether the sanction of dismissal was within the range set out in the **Iceland Frozen Foods Ltd** case.

58. I find that dismissal was just within the range of reasonable responses given the circumstances. Even taking the claimant's account that he felt intimidated, any employee would know that swearing in those terms (at not just one’s “boss” but at a director of the company in front of other people) would be a matter for which dismissal would be a possibility. The claimant expressed surprise at the meeting with Mr Middleton that he could be dismissed for what had happened but he was warned of this in the invitation to the disciplinary hearing and he was aware obviously that this was the situation by the appeal. Whilst the claimant did not establish that swearing was the norm in the workplace had he done so he would still have had to show that this included directors being directly sworn at and in front of others; there was no evidence to that effect.

59. Regarding the issue of the claimant not apologising, I find that by the time of the appeal the claimant had in effect apologised. I understand the respondent’s position that it needs to be spontaneous and it was rather late in the day, however the respondent (certainly at the disciplinary hearing) was pitting a sophisticated legally trained person against a somewhat distressed and out of his depth individual.

If the claimant had, for example, union representation I have little doubt that the union would have got the claimant to have written out a written apology well before the disciplinary hearing, however the claimant did not have access to any of that sort of advice.

60. However, I still consider dismissal was within the range of reasonable responses as the claimant had said a number of times at the disciplinary that he did not hold grudges and would put it behind him. he clearly still felt that he had been justified in his conduct on finding out about PG ousting his own holiday. The claimant was justified in feeling aggrieved about this but not in his subsequent behaviour. At the appeal this was considered by Peter Allen carefully.

61. Accordingly, I find that the claimant was not unfairly dismissed.

62. Had the claimant succeeded there was a real possibility that he would have received no compensation under the **Polkey** principle or that there would have been a substantial deduction for contributory conduct.

Employment Judge Feeney

Date: 11 January 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

20 January 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.