



# EMPLOYMENT TRIBUNALS

## Claimant

Colin O'Rourke

## Respondent

Kab Seating Ltd

v

**Heard at:** Bury St Edmunds ET Centre

**On:** 15<sup>th</sup> December 2021

**Before:** Employment Judge Conley

## Appearances

**For the Claimant:** Mr Andrew Watson (Counsel)

**For the Respondent:** Mr Daniel Godfrey (Representative)

## RESERVED JUDGMENT

The Claimant's claim of unfair dismissal is not well founded and is dismissed.

## REASONS

### BACKGROUND

1. By a claim form presented to the Employment Tribunals on 1<sup>st</sup> March 2021, following a period of early conciliation between 15<sup>th</sup> February 2021 and 1<sup>st</sup> March 2021, the Claimant sought to pursue a complaint of 'unfair dismissal' against the Respondent.
2. The Claim was resisted by the Respondent and they presented a Response which included comprehensive Grounds of Resistance to the Claim. In essence, the claim is resisted on the ground that the Claimant had committed an act of gross misconduct, that the matter had been fully and fairly investigated, and that as a result summary dismissal was justified.

### THE ISSUES

3. Where an individual has been dismissed for misconduct, the issues for the Tribunal to decide (as per *British Home Stores v Burchell*) are:

- a. Was misconduct the reason for the Claimant's dismissal? (This is not in dispute)
- b. Did the Respondent have a genuine belief that the claimant was guilty of the misconduct alleged?
- c. Were there reasonable grounds on which that belief was founded?
- d. Was the belief in misconduct arrived at having carried out as much investigation into the matter as was reasonable in all the circumstances of the case?
- e. Was the procedure within the band of reasonable responses, in other words, would a reasonable employer have carried out the procedure the respondent did?
- f. Was the sanction within the band of reasonable responses, in other words, would a reasonable employer have imposed the sanction that the respondent did?

## **THE EVIDENCE**

4. The evidence in this case came from the following sources:
  - a) The written and oral evidence of Mr Simon Carpenter and Mrs Emma Rowson on behalf of the Respondent;
  - b) The written and oral evidence of the Claimant
  - c) An agreed Bundle of Documents amounting to 162 pages
5. I was provided with submissions from both Representatives to whom I am grateful, and which I have considered with care.

## **FINDINGS OF FACT**

6. The Claimant was employed by the Respondent as a Production Manager. He commenced employment on 24<sup>th</sup> March 1986, and the effective date of termination (EDT) was on 15<sup>th</sup> February 2021, when he was summarily dismissed for an act of gross misconduct.
7. He was promoted to the position of Production Manager on 16<sup>th</sup> April 2018.
8. His total period of employment, therefore, was 34 years, 10 months and 22 days.
9. As of the EDT, he was paid £3,187.12 per month gross; which amounted to £2,461.91 net of deductions.
10. The Respondent's Disciplinary Policy had most recently been revised in July 2020. This sets out the procedure for conducting disciplinary investigations, formal disciplinary action, and appeals; and sanctions for, and examples of, misconduct and gross misconduct.
11. Examples of 'gross misconduct' capable of justifying summary dismissal include 'assault/attempted assault/violence towards clients, employees or other' and 'use of foul and/or abusive language'.

12. On 26<sup>th</sup> January 2012, an employee of the Respondent, Colin Giles, completed a Grievance Form relating to an incident on the 11<sup>th</sup> January 2012 involving the Claimant, in which he was alleged to have shouting at Mr Giles, and then said 'Outside now', which he then repeated/ When asked by Mr Giles 'Are you threatening me?', the Claimant pointed to his watch and said 'Outside me and you at 4.15'.
13. This allegation was not counter-signed by a Shop Steward or Manager, and does not appear to have been the subject of an investigation or decision. The Claimant was never interviewed and was never given an opportunity to comment upon the allegation.
14. On a Performance Evaluation form dated 29<sup>th</sup> January 2018, Competencies assessment form, the following entry is made under 'Manager's Assessment': 'Colin's passion can appear aggressive in some situations. I would like a more calm exterior in most situations'. The Manager's name is given as Stewart Wright, but the form has not been signed either by Mr Wright or the Claimant.
15. In February 2020, a redundancy exercise was carried out in which the Claimant scored highest in his selection pool.
16. An appraisal form from 25<sup>th</sup> February 2020 was broadly positive about the Claimant's performance.
17. In March 2020, a formal grievance was raised by the Claimant against an employee called Debbie Warn, alleging that she used abusive language against him; she responded by making a counter-allegation against him that he had, amongst other things, spoken aggressively to her.
18. An investigation, authorised by Gwyneth Hodgkinson, Human Resources Manager, and carried out by Natalia Jeziorska, Human Resources Officer, established that both of their voices were raised during their conversation but there was no swearing. The conclusion was they both conducted themselves inappropriately, but no formal action was necessary.
19. A Performance Improvement Plan in which the Manager is named as Lee Bailey dated 11<sup>th</sup> May 2020 (unsigned) referred to the Claimant's communication with others generally, and with Debbie Warn specifically, and recommended that he 'consider his communication style and develop effective communication with internal customers. This would include the tone of voice and refraining from physical gesticulation such as pointing fingers'.
20. At around 7am on the 19<sup>th</sup> January 2021, a meeting took place between Lee Bailey, Laetitia (known as Tish) Kinch, and Stuart Wright. At the meeting there was an exchange between Mr Bailey and the Claimant concerning an email that had been sent to the Claimant by Steve Sennett. After the meeting, Ms Kinch and Mr Wright left the office and the Claimant remained in the room with Mr Bailey with the door closed. It was at this time that the Claimant allegedly used abusing and threatening language towards Mr Bailey.

21. After the incident, Mr Bailey reported the incident to HR, and Gwyneth Hodgkinson commenced an investigation into the events of that morning. She interviewed the Claimant, accompanied by Natalia Jeziorska, as note taker, and although not entitled to a representative, the Claimant was accompanied by Tony Carlton.
22. He explained that he attended the meeting at 7am and the first thing he heard was a 'brag' from Lee Bailey, a 'very directive request' to answer his email. The Claimant felt that it shouldn't have been done in front of his colleagues Tish and Stuart. After they had left the office, he had a normal conversation with Lee asking him what the 'barrage' was all about. There was no foul or abusive language and he didn't raise his voice. He accepted that there were no witnesses, and that he had waited for the others to leave before raising his issue. Ms Hodgkinson warned the Claimant that he might have to be suspended pending investigation.
23. Steve Sennett provided notes, from memory, about a meeting with the Claimant and Lee Bailey that morning, after the incident. He had asked them to join him in Mr Bailey's office to discuss situation informally. The Claimant said he felt overwhelmed by requests for more information, and that he was struggling with the additional responsibilities that he had been given after the redundancy exercise the previous year. He asked to go back to his old job. Mr Sennett accepted that he may be struggling but this was not a reason for unacceptable behaviour and the Claimant agreed. He appeared to be ashamed of his earlier actions and asked him to apologise.
24. Ms Hodgkinson interviewed a number of potential witnesses on the 19<sup>th</sup> January. Kamila Kowalska said she didn't hear any raised voices, although the radio was on. Nobody was there except Marcy O'Keefe. Tish Kinch confirmed that there were no raised voices while she was there but 'Colin was argumentative as he normally is' and that he 'always needs to have the last word'. She recalled that the Claimant stayed behind with Mr Bailey but didn't know why. She didn't hear anything as she left the production office. The Claimant was talking to Lee in his usual way which could come across as shouting but it's not because he is loud. Marcy O'Keefe said she didn't notice if anyone was in Mr Bailey's office she didn't pay any attention she didn't notice anything different or unusual.
25. Stuart Wright said that Mr Bailey had made it clear to the Claimant that his results were not good, and to communicate with him and the team. The Claimant was 'defensive'. Mr Bailey's request for the Claimant to answer Steve Sennett's email 'might have sounded forceful but it was reasonable'. The Claimant got louder but he wasn't shouting: 'he can be loud'. It was a standard meeting, 'it didn't differ to previous one'. He then saw Mr Bailey after the meeting briefly at about 7:30am; he looked frustrated and stressed. In the meeting there was no foul or inappropriate language, no aggressive behaviour, body language or threats. The atmosphere was 'ok, maybe a bit tense'.

26. Mr Bailey provided a statement on 19<sup>th</sup> January 2021. He says that at the production manager's meeting, he discussed Steve Sennet's email regarding poor communication with the Claimant. The Claimant's response was poor, saying that 'Steve can send whatever he wants'. Mr Bailey tried to explain one more time that the Claimant needed to reply in a timely and professional manner. When others left meeting Mr Bailey once again asked the Claimant to reply within an hour to Steve, to which his reply was 'I don't need this shit' and 'Are you fucking enjoy to beat me up every day'. He went on to say 'we are fucking finished pal', and then as he was leaving the office he turned round pointed at Mr Bailey and said in a raised voice 'me and you, one to one, now'.
27. When told by Mr Bailey that he would take it further, the Claimant became angry and said with a raised voice 'where are your fucking witnesses.'
28. On the 21st January Ms Hodgkinson removed herself as investigator, following an allegation by the Claimant that she had a conflict of interest arising from a grievance that the Claimant had raised about her previously. An HR consultant from an external organisation 'Gravitas' called Dawn Exley was appointed to conduct the investigation.
29. I do not find that Ms Hodgkinson was conflicted in the way that the Claimant alleged, given the fairness and thoroughness of the investigation that she initiated. Her decision to recuse herself and appoint an external investigator in order to dispel any perception of unfairness was to her great credit.
30. On 27<sup>th</sup> January 2021, the Claimant, Mr Bailey, and Mr Sennet were interviewed by Dawn Exley.
31. The Claimant described having had a good working relationship with Mr Bailey until recently, and that they 'were a good production team'. He said that on the 19th January he entered the meeting 7am and was met with 'a barrage'. Mr Bailey wouldn't even look at him, and said 'you need to answer your emails', which was inappropriate in front of two colleagues. He then said in the same manner and still without looking at him that 'Steve wants an hour-by-hour report on what we cannot build sense to Debbie Warne'.
32. The Claimant went on that after Ms Kinch and Mr Wright left the meeting, he asked Mr Bailey 'Are you getting some sort of glee out of this?'. The discussion did not become heated and no offensive or threatening language was used.
33. He denied using the words 'I don't need this shit are you fucking enjoying to beat me up like this every morning', and 'You and me are fucking finished pal' 'Pal' was not a word he ever used; however, it is a word that Mr Bailey uses. Finally he denied saying 'Me and you one to one now'. He denied that Mr Bailey said he would take it further with HR. He does not think anyone could have overheard because at the time they were having the conversation the door was definitely shut.
34. In interview, Lee Bailey repeated the allegations that he had made in his statement and elaborated.

35. Mr Bailey said that he interpreted the phrase 'you and me, one to one' as fighting talk, and went straight to HR. The Claimant tried to come into my office afterwards but he thought that there may be a continuation of the threatening behaviour and so he locked the door. He said 'The way [the Claimant] acted was frightening.'
36. Steve Sennet was interviewed and repeated the matters raised in his statement. He described the atmosphere in his meeting the Claimant and Mr Bailey as 'strange'. The Claimant was unusually quiet and quite apologetic. He admitted he couldn't do his job and asked for his old job back. Mr Bailey wasn't really a part of the conversation and was clearly upset. The Claimant later told Mr Sennett that he tried to apologise but Mr Bailey didn't listen. Mr Sennett interpreted the Claimant's wish to apologise as being an admission of what he had done.
37. On 3rd February Dawn Exley produced a Grievance Investigation Report. It confirmed that she was investigating 3 allegations. First, that the Claimant subjected Lee Bailey to threatening behaviour; secondly, that the Claimant subjected Mr Bailey to abusive language; and thirdly that the Claimant threatened Mr Bailey with physical violence. She found, on the balance of probabilities allegations 1 and 2, evidence to support the first two allegations but not the third. She recommended a formal disciplinary meeting, which was scheduled for 8th February 2021, to be chaired by Simon Carpenter, the Head of Supply Chain.
38. On 5th February 2021, the Claimant wrote an email objecting to Simon Carpenter as the chair of the disciplinary alleging conflict of interest with Mr Bailey, Mr Sennet, and Ms Hodgkinson. The request was denied and meeting is rescheduled for 11th February 2021 because the Claimant had Covid symptoms.
39. The disciplinary meeting took place on the 11<sup>th</sup> February 2021, with Simon Carpenter and Alicia Richardson in attendance, together with the Claimant. At the conclusion of meeting it was indicated that the meeting would reconvene on 15th February 2021 for a decision.
40. In evidence, the Claimant indicated that he didn't have a problem with the way the meeting was conducted and that he was given the opportunity to say all he wanted to.
41. That evening, the Claimant emailed alleging that Dawn Exley had a conflict of interests because she is Facebook friends with Gwyneth Hodgkinson, and as a result he would not be attending the adjourned meeting on the 15<sup>th</sup> February. However, Mr Carpenter concluded that there was no conflict and the Claimant was told that he was required to attend. I agree that this was not a conflict of interest and accept that it was entirely understandable that professionals in the HR sector would have personal relationships with one another that would not affect their objectivity.

42. At the meeting on 15th February Simon Carpenter indicated he reviewed all the details and notes and on the balance of probabilities found all three allegations proved, and that accordingly summary dismissal was the only option. This was confirmed in a letter, which Mr Carpenter indicated was written on his behalf by Ms Hodgkinson.
43. Later that evening the Claimant gave notice of his intention to appeal. The Grounds of Appeal were that he was dismissed on 'grounds of probability and not certainty'; and that reiterates his earlier complaints that the people involved in the investigation had conflicts of interests.
44. The Appeal hearing was held by Emma Rowson, the finance director, on 24<sup>th</sup> February 2019, which was not upheld. The Claimant now complains that Mrs Rowson was insufficiently senior and independent to hear this appeal, in that she is a 'peer' of Mr Bailey.
45. I accept Mrs Rowson's evidence that she was, in fact, senior to Mr Bailey and Mr Carpenter, and that because she reports directly to the American parent company, her role is stand-alone and therefore she is entirely independent of Mr Sennett.

## THE LAW AND CONCLUSIONS

### Legislation

46. Subject to any relevant qualifying period of employment (two years in this case) an employee has the right not to be unfairly dismissed by his employer (Employment Rights Act 1996, section 94). The Claimant plainly has served the relevant period and therefore has acquired that statutory right.
47. The legislative basis for 'conduct' being a potentially fair reason for dismissal stems from s98 of the ERA 1996 which reads:

#### *s.98 General*

*(1) 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.*

*(2) A reason falls within this subsection if it—*

*(a) ...*  
*(b) relates to the conduct of the employee,*

*(c) ...*

*(d) ...*

*(3) ....*

*(4) 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 issue*

48. The employer bears the burden of proving the reason for dismissal whereas the burden of proving the fairness of the dismissal is neutral. It is not in dispute that 'conduct' was the reason for dismissal in this claim.
49. Where the potentially fair reason given by the employer is misconduct, the Tribunal is to have regard to the guidance set down in the case of *British Home Stores v Burchell* [1978] IRLR 379, as per the list of issues set out above in paragraph 3 above.
50. *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 EAT: the function of the Employment Tribunal was to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair. In *Sainsburys Supermarket Ltd v Hitt* [2003] IRLR 23 CA, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal
51. The Court of Appeal in *London Ambulance NHS Trust v Small* [2009] IRLR 563 warned that when determining the issue of liability, a Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct.

#### *Genuine Belief*

52. Did Mr Carpenter, acting on behalf of the Respondent, have a genuine belief that the Claimant was guilty of the misconduct alleged? I am quite sure that he did.
53. I found Mr Carpenter to be an impressive and reliable witness who took his task in chairing the disciplinary meeting, in reviewing the material and in coming to his decision with the integrity and gravity befitting of the exercise. I accept unreservedly his evidence that he believed that the act of misconduct, by which I mean that words and actions attributed to the Claimant during the course of his exchange with Mr Bailey on the January 2021, had been committed.

#### *Reasonable Grounds*

54. Did Mr Carpenter have reasonable grounds for his belief?
55. In answer to this question I accept the analysis set out by Mr Godfrey on behalf of the Respondent. He points to the following matters:
- i. The Claimant's account of events on 19 January 2021 were frequently inconsistent with other witnesses. The Claimant described being subjected to a "barrage" when he entered the production meeting on 19 January; whereas Tish Kinch said there was no difference in this meeting to other meetings and that "Lee made it quite clear to Colin to respond to Steve and Debbie about emails that had been sent", an exchange that



Stuart Wright described as “forceful but definitely reasonable”. Ms Kinch and Mr Wright described the Claimant as ‘argumentative’ and ‘defensive’ respectively. During their meeting later that morning, Mr Sennett described the Claimant as ‘apologetic’ and ‘unusually quiet’ whereas Mr Bailey was ‘upset’. The Claimant denied that he attempted to apologise to Mr Bailey, and stated categorically that he did not have anything to apologise for.

- ii. The evidence of Ms Kinch, Mr Wright, Mr Bailey, and Mr Sennett, as referred to above, was consistent in describing the Claimant as someone who was more likely to behave in the way described by Mr Bailey than in the way the Claimant described. Mr Carpenter was also able to consider his own experience of the Claimant’s behaviour in the disciplinary hearing, which he found ‘strange’ because he was threatening legal action in the event of an adverse decision, and that his physical demeanour (eg he stood up during the majority of a 2 and a half hour meeting) implied that he had come to the meeting seeking a confrontation.
- iii. The Claimant had a positive working relationship with Mr Bailey and indeed his own evidence was that Mr Bailey had supported him when he had been criticised. The Claimant could identify no discernible motive for Mr Bailey to make a false allegation against him; whereas the Claimant had a motive for not being untruthful, in that he could be dismissed.
- iv. The threat of physical violence in this incident was similar in wording and tone to an allegation that had previously been made against the Claimant some years earlier.

56. I accept to a limited extent, as per Mr Watson’s submissions on behalf of the Claimant, that the letter sent to the Claimant reporting the outcome of the disciplinary meeting did not comprehensively set out the basis upon which Mr Carpenter reached his decision. But I do not accept that the letter contains any inaccuracy that has the effect of undermining the fundamentally sound rationale that he set out in his evidence before the tribunal and I accept Mr Carpenter’s evidence as to the reasons why he arrived at the conclusion that he did.

57. Mr Carpenter candidly accepted that he was inexperienced in conducting disciplinary hearings and that he sought assistance in a number of respects. But in my judgment, his lack of experience was more than adequately compensated for by the diligence with which he set about his task. It was in my judgment entirely appropriate for him to seek guidance in relation to those aspects of the exercise in which he felt he needed it. I am perfectly satisfied that the assistance he sought was in relation to procedural matters only, and not in relation to his determination of the facts.

58. Having carried out as much investigation into the matter as was reasonable in all the circumstances of the case? Again, this is something of which I am perfectly satisfied. The investigation that was carried out was timely and thorough. Every possible material witness was interviewed or otherwise asked

to provide a statement as to what happened within 24 hours of the incident taking place. The Claimant, Mr Bailey, and Mr Sennet were interviewed on the 27<sup>th</sup> January 2021, 8 days after the incident; but the delay was only caused by the fact that the Claimant had made allegations that Ms Hodgkinson was conflicted which led to the appointment of Ms Exley to conduct the remainder of the witness interviews. The integrity of the evidence that they provided in interview was preserved by the decision to ensure that they provided written statements whilst events were fresh in their minds.

59. Miss Exley then produced a detailed and considered report as to her findings based upon the evidence that had been gathered up to that point, which she then submitted to Mr Carpenter with a recommendation that the matter proceed to a full disciplinary hearing, and finding that there was a case to answer in respect of two of the three allegations.
60. This was a professional, comprehensive investigation, and I cannot find any fault with it.

*Procedure*

61. I must next consider whether the procedure that the Respondent adopted was reasonable. I will address the complaints made about this procedure by the Claimant in turn.

*Mr Carpenter and Mrs Rowson were both insufficiently senior to conduct the disciplinary and the appeal hearing respectively*

62. As I have previously indicated, my view of Mr Carpenter was that what he may have lacked in seniority he more than made up for in terms of his diligence and integrity. I accept that it may have placed him in a difficult position personally to make findings that were critical of Mr Sennet. However, I am satisfied that Mr Carpenter, as a relatively new employee, was both sufficiently senior and sufficiently independent to be able to conduct a fair procedure. I am satisfied that he was not influenced in his decision by the dynamics of the workplace. He was very firm in his evidence, which I accepted, that he would not shirk from his responsibility to address the issues before him without fear or favour.
63. I should address the question of who would the Claimant have been happy with as a suitable person to conduct either the disciplinary hearing or the appeal? Clearly the Respondent addressed its mind to the issue and Mr Carpenter was the most suitable person. It was suggested by the Claimant that a request should have been made for the procedure to be carried out by someone from the parent company in the USA. I do not consider this to have been proportionate solution, and indeed may have been problematic – a person from the USA is likely to have been unfamiliar with UK employment laws and practices. The choice of Mr Carpenter and Mrs Rowson was within the band of reasonable responses.
64. I do not find that any aspect of the appeal procedure impacted upon the fairness of the dismissal. The grounds of appeal raised by the Claimant were misconceived, in that they related solely to a misunderstanding about the

applicable standard of proof, and a perceived, yet unfounded in my judgment, conflict of interests. The Appeal was doomed to fail whoever the chair would have been. However for the sake of completeness I should say that I see nothing unreasonable about the choice of Mrs Rowson for the task.

*Mr Carpenter wrongly considered and made a decision on the physical violence allegation when that was not properly before him*

65. This submission in my judgment seeks to place an unnecessarily legalistic burden upon the exercise of the disciplinary procedure. What I consider to be important is that Mr Carpenter made a finding of fact that the Claimant did say the words and exhibit the behaviour alleged against him. Whether those words and that behaviour constituted a 'threat of physical violence' or were merely 'threatening' is not a matter that needs to be determined. Neither term is accurately defined, and either would constitute gross misconduct in accordance with the Respondent's disciplinary code.

66. The fact that Miss Exley defined 'physical violence' more narrowly than Mr Carpenter does not in my view amount to an estoppel on Mr Carpenter determining that the language used by the Claimant was 'fighting talk'. It may well be that Miss Exley concluded that the phrase 'you and me, one to one, now' does not constitute a threat of *immediate* physical violence, but I do not think it unreasonable to conclude that it is an implicit challenge to physical combat in the very near future.

*Mr Carpenter took advice on the how he should decide the case from Dawn Exley, the investigating officer*

67. I find nothing unreasonable in this. The advice that he sought from Miss Exley did not impact upon his findings of fact. It was confined solely to matters of procedure to ensure that he conducted the disciplinary meeting correctly, and applied the correct standard of proof.

*Mr Carpenter wrongly approached the matter on the assumption that he had to make a positive decision to prefer either C's account or Mr Bailey's, when it was also open to him to find the case not proved*

68. Mr Watson for the Claimant referred me to the case of *Salford Royal NHS Foundation Trust v Roldan* [2010] EWCA Civ 522 in relation to a suggestion made to Mr Carpenter that he wrongly assumed that he was bound to accept either the account of the Claimant or that of Mr Bailey in relation to the central issue, and that he had not considered the possibility that the burden of proof had not been satisfied.

69. Mr Carpenter candidly accepted that he did not consider this possibility. To that extent he fell into error. However, I do not find that this error caused him to accept Mr Bailey's evidence 'by default'. Notwithstanding the fact that this was a 'one man's word against another' situation, Mr Carpenter gave a detailed rationale for his decision to prefer to the evidence of Mr Bailey.

70. The recent EAT case of *Hovis Ltd v Louton* EA-2020-000973-LA reminds us that when tasked with making a finding of fact, the decision maker should only fall back upon the burden of proof in exceptional circumstances, and that consideration should be given to all of the evidence available in reaching decisions. In my judgment this was the approach Mr Carpenter took, quite properly, despite his misunderstanding.

*Mr Carpenter then wrongly approached the matter by, in essence, placing a burden on the Claimant to prove that Mr Bailey had a motive for lying about it*

71. I disagree. There was no reversal of the burden of proof. It is perfectly acceptable, and quite routine where a lie is alleged, to consider whether there was an obvious motive to lie, and to give such motive or lack thereof appropriate weight.

*Mr Carpenter impermissibly placed weight on matters on C's personnel file, including untested allegations, when making his decision*

72. Mr Carpenter was very careful, when considering the document from the Claimant's personnel file relating to an historic grievance, not to treat that as being evidence of a propensity towards aggressive or threatening behaviour. This, he accepted, would have been unfair, given its age and the fact that it was, as Mr Watson points out, untested. The only reliance he placed upon it was in relation to the likelihood of coincidence given the nearly identical phrase allegedly used by the Claimant in that incident and the current one. Mr Carpenter did not find these allegations proved wholly or even substantially based upon that earlier document; but he did find that it was capable of supporting the other evidence. I do not find that to be unreasonable.

*Mr Carpenter then reached an unreasonable conclusion, which was based on a combination of untested evidence, misrepresented evidence, and inconsistent evidence which was not properly investigated. In effect, Mr Carpenter just accepted Mr Bailey's account uncritically*

73. For all of the reasons that I have already set out and will not rehearse, I do not accept this submission.

#### *Sanction*

74. Was the sanction within the band of reasonable responses? I find that a reasonable employer would have been entitled to reach the same conclusion that the respondent did. It was within the range of reasonable responses for them to dismiss the claimant. It cannot be said that no reasonable employer would have dismissed in the circumstances.

75. I take on board the concerns that the employer could have had greater regard to the various mitigating factors that the Claimant had in his favour. However, this type of conduct from an employee towards any colleague, but especially towards his own line manager, would in my judgment almost invariably lead to summary dismissal, irrespective of personal mitigation, and this was certainly within the band of reasonable responses.

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Employment Judge Conley

Date: 26 January 2022

Sent to the parties on:

27 January 2022

For the Tribunal Office