



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J. Connolly

**Respondent:** JD Wetherspoon PLC

**Heard at:** East London Hearing Centre

**On:** 19-22 October 2021; and  
9 November (in chambers)

**Before:** Employment Judge Massarella  
**Members:** Mr J. Webb  
Mr R. Hewitt

## Appearances

For the Claimant: In person  
For the Respondent: Ms C. Jennings (Counsel)

# RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. the Claimant's dismissal was procedurally unfair;
2. had a fair procedure been followed, the Claimant would have been fairly dismissed within two weeks;
3. the Claimant contributed to his dismissal by his own conduct; the basic award only is reduced by 50%; no further reduction is made to the compensatory award;
4. the claim of wrongful dismissal is not well-founded and is dismissed;
5. the claims of victimisation are not well-founded and are dismissed.

# REASONS

## Procedural history

1. The ET1 was presented on 11 March 2020, after an ACAS period between 17 December 2019 and 16 January 2020. There was a preliminary hearing for case management before me on 17 August 2020. The case was originally listed for final hearing in August 2021 but was postponed in September 2020 on the Respondent's application to the current listing in October 2021.
2. The claim of unauthorised deduction from wages was dismissed on withdrawal on 14 May 2021.

## The hearing

3. Although the hearing was conducted in person, one of the non-legal members, Ms Hewitt, attended by CVP on the first day only; one of the Respondent's witnesses, Ms Dagonca, gave her evidence by CVP with the Tribunal's permission.
4. At the start of the hearing Ms Jennings confirmed that no time point was being taken, and that it was accepted that the Claimant did a protected act in his grievance of 12 August 2019.
5. We had a bundle of around 350 pages. The Tribunal spent the morning of the first day reading into the case. We then heard evidence from:
  - 5.1. the Claimant;and for the Respondent from:
  - 5.2. Mr Alan Duncan (Area Manager), who dealt with the Claimant's grievance;
  - 5.3. Mr Daniel Griffin (Pub Manager at the Moon and Stars in Romford), who conducted the disciplinary investigation meeting;
  - 5.4. Mr Alexander Whaley (Shift Manager at The Colley Row Inn in Romford), who attended that meeting as a note-taker;
  - 5.5. Ms Sansel Doganca (Shift Manager at The Moon and Stars, Romford);
  - 5.6. Ms Victoria Snowden (Deputy Manager at JJ Moons in Hornchurch), who attended the disciplinary meeting as a note-taker;
  - 5.7. Mr Richard Marriner (Regional Manager), who conducted the grievance and disciplinary appeal meeting.
6. The Claimant made succinct oral submissions, Ms Jennings provided us with helpful written submissions and supplemented them orally. We apologise to the parties for the delay in sending out this judgment, which was caused by pressure on judicial resources and the competing demands of other cases.

## Findings of fact

7. The Respondent owns and operates a chain of pubs.
8. The Claimant, who is gay, commenced employment on 13 July 2017 as a Kitchen Associate at the Dairyman in Brentwood ('the pub'). He was later promoted to Kitchen Team Leader.
9. At the relevant time the pub manager was Mr Tom Cios; the kitchen manager was Mr Sam Marandy; Mr Marandy replaced Mr Luke Gurton, with whom the Claimant had had a better relationship.

#### The grievance

10. The Claimant raised a grievance on 12 August 2019. The grievance is essentially a complaint of bullying by Mr Marandy and Mr Cios. Specific complaints included: Mr Cios ignoring him and/or making him the butt of jokes; Mr Marandy and Mr Cios accusing him of lying when he complained of letting the staff arrive late and leave early which put extra pressure on him; Mr Cios waving a straw shaped like a penis in the Claimant's face; Mr Marandy falsely accusing the Claimant of being aggressive towards him. The alleged incidents were undated. In the last line of the grievance the Claimant wrote:

'I do my job I don't think I should expect to be bullied in the process, whether I'm being made out to be a liar, ignored for weeks on end or made to feel uncomfortable on the basis of my sexuality it's not ok.'

11. On 16 August 2019, Mr Alex Smith (Regional Personnel Adviser) wrote to the Claimant, inviting him to attend a grievance meeting on 28 August 2019, which was to be conducted by Ms Gill Brown (Regional Manager) and Ms Louise Jonas (Regional Personnel Manager).
12. The Claimant did not attend, and the meeting was rearranged for 13 September 2019, when it was heard by Mr Duncan, with Mr Lee Utting as notetaker. The Claimant suggested that there was something untoward in the change of hearing manager. We accept Mr Duncan's explanation: that he would always have been the logical person to conduct the grievance hearing but that he was on leave on the original date. Ms Brown, his line manager, stepped in to cover, and stepped back when the hearing was re-arranged for a date he could do. Mr Utting's role was exclusively to take notes. The Claimant confirmed in cross-examination that no allegation was pursued against him.

#### The grievance hearing

13. The grievance interview with the Claimant took place on 13 September 2019. The Claimant alleged that Mr Duncan was defensive and would not listen to the issues he raised. We do not accept that: Mr Duncan explored the content of the grievance in some detail with the Claimant, who had ample opportunity to explain his concerns. Indeed, he raised additional matters, which Mr Duncan then investigated.
14. The Claimant relied specifically on Mr Duncan's reference to a fellow manager from another pub, Ms Laura Shaw, who was conducting a parallel investigation into the same altercation between the Claimant and Mr Marandy. It was already ongoing by the time of Mr Duncan's interview with the Claimant. We were not told how that investigation had come about, nor when it was concluded. On

instruction, Counsel informed us that Ms Shaw's conclusion was that there was fault on both sides; no notes were kept because no formal action had been taken. Mr Griffin later confirmed that information during his evidence.

15. The Claimant criticised Ms Shaw at the hearing with Mr Duncan; Mr Duncan replied that she was an independent manager 'and I will not at this point question her integrity'. That was because he was simply not in a position to comment. There was nothing improper in the observation.
16. There was then an issue about the CCTV of the altercation between the Claimant and Mr Marandy. When he was asked about this in the course of the grievance appeal, Mr Duncan said that he did not ask for the CCTV footage because he considered that he could deal with the relevant points without the need for it. That was a flaw in Mr Duncan's investigation. However, we reject the Claimant's evidence that he specifically asked for the CCTV evidence to be viewed at this first meeting (there is no reference to this in the detailed notes). The first time he asked for it to be viewed was in his letter of appeal against the grievance outcome, by which time it had expired from the system.
17. In the course of the hearing the Claimant raised additional concerns which were not in the written grievance, including concerns about not being paid. Mr Duncan accepted that there had been instances when the Claimant had not been paid but did not investigate how extensive the problem was. We are satisfied that around this time there were ongoing issues with Claimant not being paid on time.
18. There were also additional matters in relation to the Claimant's concerns about homophobia: an allegation that Ms Davies waved a gherkin in the Claimant's face; an allegation that Mr Gurton had referred to the Claimant as 'Gaymie'; and an allegation that the expression 'Gay Boy' had been used.

#### Mr Cios's departure

19. There were separate issues about Mr Cios's conduct as a manager. These were raised with him at a meeting towards the end of September 2019. Mr Duncan said that, as a result, Mr Cios 'demoted himself'. Soon afterwards he was moved to another pub.

#### Unauthorised absences

20. There were four occasions when the Claimant was rostered to work - 24 and 28 September 2019; and 5 and 6 October - but did not attend.
21. In Tribunal the Claimant denied that any of those dates were discussed with him at the subsequent investigation and disciplinary meeting. We reject that suggestion: the notes of both meetings clearly record the matters being put to the Claimant and his giving explanations. Counsel for the Respondent accurately recorded in her closing submissions the Claimant's explanations at the two meetings.
  - 21.1. 24 September 2019 - in the investigation meeting, the Claimant said that he thought he had messaged a colleague called Jasmine but could not remember when. He accepted that he did not make the site aware that he was not coming in on the day. At the disciplinary meeting he

said that he had not eaten in five days and had had his phone cut off, and so could not call in.

- 21.2. 28 September 2019 - at the investigation meeting the Claimant said it was the same situation as the 24 September absence. He could not remember if he had contacted the pub to notify them. At the disciplinary hearing he said that he did contact the pub but could not remember who he spoke to.
- 21.3. 5 October 2019 - at the investigation meeting the Claimant said that it was the same situation as the two other absences and highlighted that he had not eaten in nine days. When asked why he could work some days but not on others, if he had not eaten, he said he was not affected on all days. He accepted that he did not contact the pub to inform them of his absence. At the disciplinary hearing he said that he told Ms Sam Cox that she needed to fix his wages for him before he would attend shifts. He said that 'they' knew he was not coming in but could not remember who he told.
- 21.4. 6 October 2019 - at the investigation meeting the Claimant said that he resigned around 8 pm, but he was due on shift at 3 pm. He said that he had told his colleague Sam the day before when she was fixing his wages. At the disciplinary hearing he said that he told Sam that she needed to fix his wages before he would come in. He said that 'they' knew he was not coming in but could not remember who he told.

#### Events after the Claimant's grievance interview

22. Mr Cios was interviewed on 1 October 2019. He denied any inappropriate conduct towards the Claimant. They discussed a previous incident between him and the Claimant, when Mr Cios alleged that the Claimant used abusive language towards him. Mr Duncan already knew about this alleged incident because he referred to the fact that he had advised Mr Cios to deal with it through the disciplinary procedure, which Mr Cios had not done. Mr Duncan probed Mr Cios about the alleged homophobic incidents and said in terms: 'should not allow any type of homophobic comment in business, others may be offended.'
23. Mr Marandy was interviewed on 11 October 2019. He was asked whether he gave the Claimant any reason to think that he was being aggressive and he replied: 'Maybe when I was getting changed he picked up on that note when I pointed at Jack and said I can't continue the conversation. It was not a rude way'.
24. Mr Duncan conducted seven further grievance interviews on 17 October 2019 with Mr Luke Doyle, Mr Jack Doyle, Mr Jack Hatton, Ms Debbie Reeve, Ms Kelly Carroll, Ms Nicola O'Neill and Ms Samantha Davies. There were conflicting accounts of the events in question. On several occasions Mr Duncan pushed the witnesses for clarification, on others he did not.
25. There was some support for the Claimant's concerns. Ms N. O'Neill gave evidence that Mr Gurton had called the Claimant 'Gay-mie'. She also stated that she had heard (but not witnessed) that 'Tom [Cios] showed a penis-shaped straw to Jamie and said here's one for you'. She said that she was surprised

- about this because 'Tom never really spoke to Jamie'. Mr Hatton also said that he heard about (but did not witness) this incident.
26. Ms O'Neill also said that she had heard an ex-member of staff (called Dannielle) say 'oi gayboy' to the Claimant. We note Mr Duncan's response at the interview: 'She will no longer be welcome in the pub, that is disgusting behaviour'. We accept his evidence that he subsequently barred the individual from the pub.
  27. Mr Jack Doyle confirmed that there had been an altercation between the Claimant and Mr Marandy. He confirmed that they were arguing with each other and that it was 'a little bit heated'. He tried to get them to talk to each other, but Mr Marandy would not speak to the Claimant, only to Mr Doyle. Asked whether anyone became aggressive, Mr Doyle stated that 'when Sam was taking his uniform off it looked like he could have been starting something but it could also look like it was just taking off his uniform. It was probably just because Jamie wouldn't let him speak and seen it as a waste of time'.
  28. On the other hand there was evidence, which suggested that the Claimant was not singled out. Dealing with the question of whether Mr Marandy ignored the Claimant, Ms Carroll stated that 'Sam ignores a lot of people, he is appalling, he overlooks a lot of us. I don't like it was a manager'. Ms Reeve described the Claimant and Mr Marandy as being 'both as bad as each other'.
  29. The interview notes record Mr Duncan making further unequivocal statements during interviews about the unacceptability of homophobia in the workplace.
  30. On 30 October 2019 Mr Duncan wrote to the Claimant to inform him there would be a delay in providing the grievance outcome. On 1 November he conducted a further interview with Ms Jasmine Scrutton.

#### The Claimant's resignation

31. On 6 October 2019 the Claimant gave a week's notice. He attended work on 8 October 2019. By this point, Mr Cios had left. Ms Katie Lyon encouraged the Claimant to withdraw his notice. She told him that she thought that, with Mr Cios no longer there, things would improve.
32. Mr Griffin had just been appointed holding manager at Brentwood while his home pub was being refurbished. He met the Claimant on 8 October 2019, when he offered him a cooling-off period with regard to his resignation. His intention was to use this meeting in part to complete a return-to-work interview with the Claimant about his absence on 5 October 2019, which he thought was a sickness absence. However, the Claimant told him that he had not been ill but had just not come to work. Mr Griffin told the Claimant that, if he did decide to withdraw his resignation, he would need to look into the question of unauthorised absence; he told the Claimant that they would meet on 12 October 2019. We reject Mr Griffin's evidence that he was clear that this would be a disciplinary investigation meeting. We find that he gave the Claimant the impression that it would be an informal, perhaps even supportive, meeting.
33. The Claimant retracted his resignation on 10 October 2019 by text to Mr Griffin.

#### The Claimant's WhatsApp messages

34. On 11 October 2019 Mr Duncan interviewed Mr Marandy. During the meeting Mr Marandy showed him two WhatsApp messages which the Claimant had posted on the pub staff's WhatsApp group. On 5 October 2019, the Claimant posted that the management team were 'crap at their job and should just go'. On 6 October 2019, he posted: 'excuse me are you taking the piss' and 'if any of you wanna talk shit about me I'm all ears'.
35. The Respondent has an online/social media policy which states, among other things:
- 'Disparaging remarks must not be made about the Company, its employees or its customers, irrespective of the personal facility being used. Any breach of these standards may result in formal disciplinary action being taken up to and including dismissal.
- [...]
- Employees must at no time publish anything, on or off duty, that could directly or indirectly damage the Company's best interests or compromise the Company's reputation (including locally) in any way.
- [...]
- Social media is defined as any website or application which allows users to create and share content and/or take part in online networking ... It covers personal blogs, any post made by an employee and any comments on other people's posts or blogs, online forums or noticeboards.
- [...]
- Employees must never criticise the Company, customers, suppliers, contractors, colleagues or anyone else you may come into contact with through work.
- [...]
- Employees should never air grievances regarding the Company, customers, suppliers, contractors or colleagues or anyone else you may come into contact with through work on social media.'
36. The notes of Marandy's interview record that Mr Duncan said: 'Jamie needs to be spoken to about these messages as well, I will send the pictures to Dan to speak to him'. Mr Duncan duly sent the texts to Mr Griffin and asked him to investigate them. At the same time, we find that Mr Duncan also asked Mr Griffin to deal with the question of the Claimant's absences more formally.
37. Neither Mr Duncan nor Mr Griffin asked to see any other posts from the WhatsApp group. Many of the other WhatsApp messages were inappropriate; some were very offensive indeed; but none of them directly criticised management. The Claimant did not provide copies of other people's messages until these proceedings, at which point the Respondent investigated messages posted by others. In one case a letter of concern was issued, nearly a year later.

The disciplinary investigation meeting on 12 October 2019

38. On 12 October 2019, a disciplinary investigation meeting took place, conducted by Mr Griffin. Mr Whaley attended as an observer and to take notes. The investigation was into the unauthorised absences.
39. There was no formal invitation to the meeting. We accept the Claimant's evidence that he was summoned from the kitchen at the end of his shift and that he believed he was going to take part in the informal/supportive meeting, to which Mr Griffin had referred on 8 October 2019.
40. At the beginning of the meeting, he was told that it was an investigation meeting; the only subject identified for discussion was the four absences. Later in the meeting Mr Griffin also raised the WhatsApp messages and issues regarding the Claimant failing to clock in/out for his shifts. The Claimant had no warning that these matters would be discussed with him.
41. The Claimant repeatedly raised the issue of his not being paid. Mr Griffin stated in cross-examination that he made some enquiries and established that that had been problems with the Claimant not being paid 'on occasions'. He did not record those investigations and so that information was not passed on to the dismissing officer.
42. In relation to the clocking in/out issue the Claimant accepted that he had been asked to ensure that he clocked in/out more than once, and that he had failed to do so more than once. He conceded that this might have had an impact on the pay issue.
43. As for the WhatsApp messages the Claimant did not deny making the posts but argued that the group was private, and of no concern to the Respondent. He was not remorseful about having made the comments, at one point he said: 'I didn't make these people rubbish at their jobs, they did that all on their own'. The Claimant did not produce any messages sent by other employees at the meeting, nor did he ask for an adjournment to locate them, nor did he provide them after the meeting.
44. Towards the end of the meeting the Claimant said that he did not feel comfortable continuing. He complained that he found it difficult to remember what he wanted to say when he had to keep stopping to allow the note-taker to catch up ('I can't have a conversation with a computer'). Mr Griffin agreed to end the meeting.
45. Mr Griffin then told the Claimant that he was being suspended. The Claimant became angry and refused to sign the minutes of the meeting or the suspension letter. The authorising manager for the suspension was Mr Duncan. We find that was a purely administrative step; the decision to suspend was Mr Griffin's, but he required the formal approval of Mr Duncan to do so, which Mr Duncan gave.
46. Those who were present described the Claimant acting in an agitated and verbally abusive manner as he left the building. Mr Griffin prepared a statement on 5 November 2019, in which he wrote that the Claimant said several times words to the effect of 'learn how to do your fucking job', and told him not to speak about his (the Claimant's) personal business in public, before slamming the door on his way out. Mr Whaley corroborated that account in a statement dated 28 October 2019, although he was less specific as to the language used, stating simply that that the Claimant was 'hurling abuse' at Mr Griffin. Ms



Doganca, who was present on the premises, but unseen by the Claimant, wrote in a statement dated 5 November 2019 that she heard the Claimant shouting and swearing ('nobody knows how to do their fucking job properly' and 'why are you fucking following me?').

#### The grievance outcome

47. Mr Duncan gave the Claimant the grievance outcome on 1 November 2019. He found no evidence that the Claimant had been bullied and observed that some of the Claimant's own behaviour may have fallen short of acceptable standards. He found that there was no evidence of the Claimant being ignored, but he found that there a breakdown in working relationships. 'to which the fault is shared'.
48. As for the discrimination allegation, he rejected the allegation that Mr Doyle referred to the Claimant as 'Gay Boy', but found that an ex-employee 'has referred to you inappropriately when she has been on site, and she has since been barred from the pub and will not return.' Mr Duncan did not uphold the 'penis straw' allegation because there were no witnesses to it (other than the Claimant himself). With regard to the gherkin incident, Mr Duncan concluded that the incident did not take place but 'partially upheld' the grievance on the basis that Ms Davies accepted that she did engage in 'banter' with the Claimant about sexual matters, which Mr Duncan described as 'totally unacceptable'.
49. In relation to the altercation with Mr Marandy, Mr Duncan found that 'there are conflicting views which makes coming to a conclusion difficult'. Overall, he exonerated Mr Marandy, notwithstanding the fact that several of the witnesses, including Nicola O'Neill and Mr Marandy himself, accepted that Mr Marandy may have appeared threatening to the Claimant on one occasion.

#### Further potential disciplinary matters

50. Around this time, Ms Katie Lyon reported to management an incident on 29 October 2019 when the Claimant referred to one of his colleagues, Sam, as 'that fat bitch'. She also recorded that the Claimant had sent a text to her telling her that he had been suspended and calling Mr Griffin 'a moron' for suspending him. She subsequently produced a statement about these matters, dated 10 November 2019.

#### The disciplinary charges

51. On 7 November 2019, Mr Griffin wrote to the Claimant inviting him to attend a disciplinary hearing on 18 November 2019. The letter set out the charges clearly:

At the hearing you will be asked to respond to the following allegations:

- On 24/09/2019, 28/09/2019, 05/10/2019 & 06/10/2019 you were absent from work without authorisation. Later stating during investigation that managers should just know that you weren't going to be turning up.
- On multiple occasions you were asked to ensure that you were using the site clock in and out machine however failed to do so.

- On 15/10/2019 you sent a message via WhatsApp into a staff chat whereby you stated that the management team were 'crap at their job and should just go'
  - On 06/10/2019 you sent a message via WhatsApp into a staff chat whereby you stated 'Excuse me are you taking the piss' and 'If any of you wanna talk shit about me I'm all ears'
  - On 12/10/2019 you reacted aggressively towards Daniel Griffin, Investigating Manager and Alexander Whaley, Company Witness shouting abuse after being suspended with the phrase 'learn how to do your fucking job' repeatedly.
  - On 12/10/2019 during a conversation you decided to slam the door behind you as you left the premise after again shouting abusively towards Daniel Griffin, Pub Manager.
  - During a phone call with duty manager Katie Lyon you referred to shift leader Samantha Davis as a 'fat bitch'
  - During a text message with duty manager Katie Lyon you referred to pub manager Daniel Griffin as a 'Moron'.
52. The respects in which the Respondent maintained these matters could constitute gross misconduct were also set out in the letter. Unauthorised absences for any reason, use of obscene language towards colleagues and unreasonable insubordination, are all specifically identified in the Respondent's disciplinary policy as gross misconduct offended.
53. There were also references in the letter to 'implied or actual violence', as well as a reference to 'aggressive and violent behaviour' in the suspension letter. The Claimant told the Tribunal he found this particularly upsetting, and we can understand why. There was no basis at all for any allegation of violence (whether implied or actual) by the Claimant. There is a difference between an employee losing their temper (and using inappropriate language) and violent behaviour. These references had no place in the documents.
54. The disciplinary invitation letter concluded as follows:
- 'You may be accompanied by either a work colleague or a trade union representative (they must be able to provide photographic identification). They may take a statement or confer with you but cannot answer questions for you. If you choose to be accompanied, please let me know as soon as possible who your companion will be.'

#### The disciplinary hearing

55. The disciplinary hearing took place on 21 November 2019; an earlier hearing had been postponed because the Claimant did not attend. It was conducted by Mr David Moran. Ms Victoria Snowden attended as an observer and to take notes. Mr Moran did not attend the Tribunal to give evidence. We were told that he was subsequently dismissed for poor performance, and that he had refused to attend to give evidence on behalf of the Respondent.

56. At the beginning of the disciplinary meeting the Claimant said that he was not happy to continue as he did not have a witness/observer with him. There was a short adjournment when Mr Moran took advice. He returned and told the Claimant that the company could provide a witness, but the Claimant declined. Mr Moran decided to proceed with the meeting. We are satisfied that the Claimant knew that he could bring someone but either elected not to do so or did not make the necessary arrangements. He did not tell the Respondent in advance that there was a problem in this respect. He rejected the offer of a witness to be provided by the Respondent. He confirmed his willingness to proceed, by signalling his consent in writing on the nature of the hearing.
57. We have already found (para 21) that there was detailed discussion about the four occasions of alleged unauthorised absence. There was also discussion about whether the Claimant clocked in and out. He admitted that he had not done so on more than one occasion.
58. There was a discussion about the WhatsApp group messages. The Claimant admitted posting the two messages but maintained that he had 'seen messages from others, worse that haven't been picked up'. He did not identify specific colleagues or messages at the meeting.
59. There was a discussion about the Claimant's conduct on 12 October 2019. The CCTV was viewed at the meeting. The Claimant denied swearing at the managers. Asked if he had slammed the door. He replied: 'I wasn't slamming it for effect, just trying to shut it properly'.
60. The Claimant denied referring to Ms Davies as a 'fat bitch' but accepted referring to Mr Duncan as a moron.

#### The dismissal

61. At the end of the meeting, Mr Moran summarised the Claimant's position in relation to each of the issues. He then adjourned at 14:40 and resumed at 15:30 when he gave his decision, which was that the Claimant was summarily dismissed.
62. The letter confirming the dismissal sent to the Claimant on 28 November 2019. Mr Moran disregarded the allegation that the Claimant called Ms Davies a 'fat bitch'; but took into account the fact that the Claimant called Mr Duncan a moron. He upheld the allegations of unauthorised absences, failing to clock in/out on multiple occasions, the posting of the two WhatsApp messages, and the inappropriate conduct at the meeting with Mr Griffin. In relation to the last of these matters he found that the Claimant had shouted 'learn how to do your fucking job' repeatedly and slammed the door on his way out.

#### The appeals

63. The Claimant appealed the grievance outcome by letter dated 11 November 2019. At the end of the appeal documents he set out its position in relation to Mr Duncan:

'I can't help if I'm overworked I can't help if people aren't going to talk to me or swear at me, these people are going to do it regardless I only have the power to defend myself and that's what I've tried to do in this

grievance, it's clear to me that Alan has no idea what's actually happened but he has come to a firm decision regarding my actions but has found no evidence of anyone's actions against me. I expressed my concerns to the personnel team on several occasions about Alan's ability and fairness of this grievance and now I've received his decision it's clear that it hasn't been handled fairly because had all the CCTV been reviewed you would see that this response wouldn't match up to reality.'

64. We note that although the letter contained repeated allegations of unfairness and incompetence against Mr Duncan, there was no allegation of victimisation. We also note that two passages in the appeal document complain of a pattern of not being paid wages due to him which, the Claimant said, lay behind some of his conduct.
65. By letter dated 22 November 2019, the Claimant was invited to a meeting to discuss his grievance appeal on 5 December 2019. The meeting was to be chaired by Mr Richard Marriner.
66. The Claimant appealed the dismissal by email dated 4 December 2019. The email was 12 pages long, closely typed and detailed. One of the points the Claimant raised was that Mr Jordan Davies (kitchen associate) was present on 12 October 2019 but had not been interviewed.

#### The appeal meeting

67. Mr Marriner began the meeting by explaining that 'we are here for the appeal'. Shortly after that he said: 'We separately will have a meeting about the disciplinary as well possibly'. Mr Marriner accepted that at the beginning of the hearing he had not read the appeal against dismissal.
68. Mr Marriner heard the grievance appeal. He then took an adjournment of around 20 minutes, returned and heard the appeal against dismissal. We find that the best he could have done, given the extent of the appeal, was skim-read it during the break.
69. The Claimant had no notice of the fact that his disciplinary appeal would be dealt with at that hearing; it was sprung on him. He had no opportunity to prepare; nor did he have the opportunity to be accompanied at the appeal against dismissal, which he may well have chosen to do. There was some suggestion that he consented to the two appeals being heard together; we think it likely that he felt he had no choice but to do so, especially when a previous hearing had gone ahead despite his objection.
70. In the course of the meeting, the Claimant again raised the fact on several occasions that there had been ongoing issues with his not being paid.
71. Mr Marriner conducted four interviews after the appeal hearing. He interviewed Mr Davies at the Claimant's request, who said that he recalled 'an argument' on 12 October 2019 between the Claimant and Mr Griffin; he stated that the 'raised voices' were mostly coming from the Claimant, who was behaving angrily. Mr Marriner also watched the CCTV of the incident. He told the Tribunal that he asked Mr Griffin for it to be put on disc and saved because the Claimant had already indicated he was thinking of bringing Tribunal proceedings. However, the CCTV was not available for the Tribunal to view.

72. Mr Marriner told the Tribunal that he did not himself investigate the Claimant's account of not being paid. He said that he had 'referred the question to personnel and they said it had all been picked up and sorted. I thought it was not an issue when I spoke to him'. He did not address the issue in the appeal outcome letter.
73. Mr Marriner did not revert to the Claimant to give him an opportunity to comment on the outcome of his investigations, either about the interviews or such enquiries as he had made into the pay issues, nor did he relay to the Claimant the investigations he said he conducted into whether the Claimant was overworked.
74. On 15 January 2020, Mr Marriner wrote to the Claimant, dismissing the appeals against dismissal.
75. Dealing with the appeal against dismissal, Mr Marriner was critical of Mr Griffin's failure to inform the Claimant at the beginning of the disciplinary investigation meeting of the allegations which he proposed to discuss, in addition to the matter of the unauthorised absences. Other than that, he dismissed the Claimant's appeal. He was satisfied that the conclusions which Mr Moran had reached were open to him on the evidence before him. In particular, he did not accept that the evidence relating to the 12 October 2019 incident was inconclusive; he noted that the Claimant expressed no remorse for his behaviour. As for the CCTV, he concluded that it did not add anything to the written accounts provided by the various witnesses.
76. Mr Marriner noted that the Claimant had made counter-allegations against other members of staff but had not then provided evidence to provided details to substantiate the allegations.
77. Finally, Mr Marriner concluded that Mr Moran was entitled to conclude that the Claimant had committed gross misconduct, and that dismissal was an appropriate sanction in the circumstances.
78. Dealing with the appeal against the grievance outcome, Mr Marriner concluded that there was evidence of a culture of swearing within the pub; that an ex-employee, who had subsequently been barred, had referred to the Claimant as 'Gay-mie'; and that, although the 'penis straw' incident had not been directly witnessed by those who had been spoken to, he accepted that 'it was a talking point within the kitchen.' Notwithstanding these positive findings, Mr Mr Marriner did not formally uphold these aspects of the appeal; it was unclear to the Tribunal why that was.
79. Mr Marriner did, however, 'partially uphold' one aspect of the appeal: that Mr Duncan could, and should, have viewed the CCTV footage of the altercation with Mr Marandy, which should have been saved before it dropped off the system. He described this as a 'learning point' for Mr Duncan.
80. Mr Marriner described his overall conclusion as follows in his statement (para 36):

'Whilst I had identified there were some learnings for Alan regarding the process he had followed with investigating Jamie's grievance, I did not find Alan incapable of completing tasks of this nature or that he was

incompetent. I concluded that the investigation and outcome were reasonable in the circumstances.'

81. The only reference to the pay issue came towards the end of the letter when Mr Marriner observed:

'it then seems from [sic] you have become aggrieved that you were not paid correctly and then reacted abruptly to that [...] We also remind our employees that failing to clock in and out correctly may result in pay discrepancies.'

Findings of fact on contribution/wrongful dismissal

82. The findings below are the Tribunal's own findings, on the balance of probabilities.
83. We are satisfied that the Claimant was absent from work without authorisation on the four occasions identified by the Respondent. We accept that failing to attend work without notifying the employer creates significant difficulties for both management and colleagues; it is serious misconduct.
84. We find that Claimant's explanations for his absences were at best vague, and at worst contradictory. The Claimant did not contend that he was authorised to be absent on any of the occasions. At one point in his oral evidence he suggested that he had in fact attended work on 28 September. At another point he said that he had booked that same day off on holiday to spend with his friends, but that the Respondent had then rostered him to work. He explained that he went into central London to attend an event related to the *Friends* TV series. The entrance charge was £20. That was not an explanation that he gave at the time; it is incompatible with his explanations that he had been unable to notify the Respondent of his absences because he could not afford to eat (because he had not been paid). Although we accepted that not being paid would have had a significant impact on the Claimant, we found his evidence not eating to be exaggerated, especially in circumstances where he was entitled to free food from the Respondent.
85. The Claimant admitted that he sent both the WhatsApp messages. We did not regard the message on 6 October 2019 as especially serious. As for the message on 15 October 2019, the Judge and Mr Webb considered that abusive criticism of managers does amount to misconduct. Ms Hewitt disagreed and considered that, in a context where strong language appears to have been endemic in the organisation, these comments did not amount to misconduct.
86. As for the events 12 October 2019, we are satisfied that the Claimant became verbally abusive towards Mr Griffin; he swore and shouted at him and used words to the effect of 'learn how to do your fucking job'; he slammed the door on his way out. His conduct was unprofessional and reprehensible. Using obscene language towards a manager is, in our view, gross misconduct.
87. The Claimant admitted that he referred to Mr Duncan in a text as a 'moron'. Abuse of that sort will always be highly inappropriate in the workplace.
88. As for the allegations relating to the Claimant's failure to clock in/out, it emerged in evidence at Tribunal that, in fact, there was no automatic correlation between

failing to clock in and not been paid: the system was such that it would pick up such failures and prompt managers to regularise the position. On the other hand, not clocking in created an additional administrative task, which would not be necessary if the Claimant had followed the usual procedure. It was foolish of the Claimant not to ensure that he clocked in and out consistently, especially in circumstances where he had concerns about whether he would be paid correctly.

## The law

### The burden of proof in discrimination cases

89. The burden of proof provisions are contained in s.136(1)-(3) EqA:

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

90. The effect of these provisions was summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

**‘It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.<sup>1</sup> He explained the two stages of the process required by the statute as follows:**

**(1) At the first stage the Claimant must prove “a *prima facie* case”. That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving “facts from which the Tribunal could conclude that the Respondent ‘could have’ committed an unlawful act of discrimination”. As he continued (pp. 878-9):**

**“56. ... The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal ‘could conclude’ that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.**

**57. ‘Could conclude’ in section 63A(2) [of the Sex Discrimination Act 1975] must mean that ‘a reasonable Tribunal could properly conclude’ from all the evidence before it. ...”**

**(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**

**“He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim.”**

**He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.’**

91. In *Royal Mail Group v Efobi* [2021] ICR 1263, the Supreme Court confirmed that a Claimant is still required to prove, on the balance of probabilities, facts from

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<sup>1</sup> *Madarassy v Nomura International plc* [2007] ICR 867, CA

which, in the absence of any other explanation, the employment tribunal could infer an act of unlawful discrimination. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense. Where it was said that an adverse inference ought to have been drawn from a particular matter, the first step had to be to identify the precise inference which allegedly should have been drawn. Even if the inference is drawn, the question then arises as to whether it would, without more, have enabled the Tribunal properly to conclude that the burden of proof had shifted to the employer.

### Victimisation

92. S.27 Equality Act 2010 ('EqA') provides as follows:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

...

93. The test of causation in a victimisation complaint is whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test, it is a subjective test. The focus is on the 'reason why' the alleged discriminator acted as he did (*West Yorkshire Police v Khan* [2001] IRLR 830).

94. The Court of Appeal emphasised the importance of focusing on motivation, rather than 'but for' causation in *Dunn v Secretary of State for Justice* [2019] IRLR 298 at [44], *per* Underhill LJ:

**'In the context of direct discrimination, if a Claimant cannot show a discriminatory motivation on the part of a relevant decision-maker he or she can only satisfy the 'because of' requirement if the treatment in question is inherently discriminatory, typically as the result of the application of a criterion which necessarily treats (say) men and women differently. [...] There is an analogy with the not uncommon case where an employee who raises a grievance about (say) sex discrimination which is then, for reasons unrelated to his or her gender, mishandled: the mishandling is not discriminatory simply because the grievance concerned discrimination.'**

### Unfair dismissal

95. S.94 Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

96. S.98 ERA provides so far as relevant:



- (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— ...
  - (b) relates to the conduct of the employee ... ..
- (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 case.”

97. In *Orr v Milton Keynes Council* [2011] ICR 704 at [78], Aikens LJ summarised the correct approach to the application of s.98 in misconduct cases:

‘(1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss an employee.

(2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the “real reason” for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.

(3) Once the employer has established before an employment Tribunal that the “real reason” for dismissing the employee is one within what is now section 98(1)(b), ie that it was a “valid reason”, the Tribunal has to decide whether the dismissal was fair or unfair. That requires, first and foremost, the application of the statutory test set out in section 98(4)(a).

(4) In applying that subsection, the employment Tribunal must decide on the reasonableness of the employer’s decision to dismiss for the ‘real reason’. That involves a consideration, at least in misconduct cases, of three aspects of the employer’s conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of; and, thirdly, did the employer have reasonable grounds for that belief.”

If the answer to each of those questions is ‘yes’, the employment Tribunal must then decide on the reasonableness of the response of the employer.

(5) In doing the exercise set out at (4), the employment Tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a ‘band or range of reasonable responses’ to the particular misconduct found of the particular employee. If it has, then the employer’s decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.

(6) The employment Tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted'.

(7) A particular application of (5) and (6) is that an employment Tribunal may not substitute their own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances.

(8) An employment Tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice.'

98. At (4) above, Aikens LJ was summarising the well-known test in *British Homes Stores Ltd v Burchell* [1980] ICR 303 at p.304.

99. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at [16-17]) cited paragraphs (4) to (8) from that extract in Aikens LJ's judgment in *Orr* and added:

**'As that extract makes clear, the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see *J Sainsbury plc v Hitt* [2003] ICR 111.**

100. It is impermissible for a Tribunal to substitute its own findings of fact for those of the decision-maker (*London Ambulance Service NHS Trust v Small* [2009] IRLR 563 at [40-43]). Nor is it for the Tribunal to make its own assessment of the credibility of witnesses on the basis of evidence given before it (*Linfood Cash and Carry Ltd v Thomson* [1989] ICR 518). The relevant question is whether an employer acting reasonably and fairly in the circumstances could properly have accepted the facts and opinions which he did.

101. The EAT in *Tesco Stores Ltd v S*, EATS 0040/19, observed that the band of reasonable investigation may also extend to the investigation of mitigation, bearing upon the appropriate sanction for proven or admitted misconduct. However, the degree of investigation required in relation to potential mitigation is inevitably fact sensitive and will vary from case to case. The EAT held that there is no requirement on an employer to investigate wholly speculative matters advanced as possible mitigation, but this did not mean it would never be unreasonable for an employer to fail to investigate mitigation. In considering whether a particular line of inquiry into mitigation was so important that failure to undertake it would take the investigation outside the band, Tribunals needed to consider, among other things: whether or not the employee had advanced any evidential basis which merited further inquiry; the extent to which resultant further investigation could have revealed information favourable to the employee; and the degree of relevance of the inquiry to the issue of sanction.

102. Even if the dismissal decision falls within the band of reasonable responses, it may still be unfair, if the Respondent has not followed a fair procedure. The Tribunal must evaluate the significance of the procedural failing, because 'it will almost inevitably be the case that in any alleged unfair dismissal a Claimant will

be able to identify a flaw, small or large, in the employer's process' (*Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW at [26]).

103. When considering whether the employer acted reasonably, the Tribunal has to look at the question in the round and without regard to a lawyer's technicalities (*Taylor v OCS Group Limited* [2006] ICR 1602 at [48]). This need for a holistic approach has been reiterated in later cases, notably *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW and *NHS 24 v Pillar* UKEATS/005/16/JW.
104. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the Tribunal's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses. The fact that other employers might reasonably have been more lenient is irrelevant (*British Leyland (UK) Ltd v Swift* [1981] IRLR 91).
105. The denial of a right of appeal is capable of rendering a dismissal unfair and equally a failure to apply the appeal process fairly and fully may have the same result. If dismissal would be likely to have occurred in any event, then that will affect compensation, but not the finding of unfairness itself (*Tarback v Sainsbury's Supermarkets Limited* [2006] IRLR 664 at [80]).

#### Polkey

106. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness (the *Polkey* issue).
107. Guidance as to the enquiry the Tribunal must undertake was provided in *Whitehead v Robertson Partnership* UKEAT [2002] 7 WLUK 539 at [22].

**'[...] it is, we think, incumbent upon the Employment Tribunal to demonstrate their analysis of the hypothetical question by explaining their conclusions on the following sub-questions:**

- 1. what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process. Was it conduct? Was it some other substantial reason, that is a loss of trust and confidence in the employee? Was it capability?**
- 2. depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the reason, would or might the Respondent have reasonable grounds for their belief in such misconduct even although the Employment Tribunal found as a fact that misconduct was not made out for the purposes of the contribution argument; alternatively, if for some other substantial reason, was that a sufficient reason for dismissal: similarly, capability.**
- 3. even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?'**

#### Contribution

108. S. 123(6) ERA provides, in relation to the compensatory award:

**Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the**

**compensatory award by such proportion as it considers just and equitable having regard to that finding**

109. In order for a deduction to be made, the conduct in question must be culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish or perverse or unreasonable in the circumstances (*Nelson v BBC (No.2)* [1980] ICR 110.
110. S.122(2) ERA provides, in relation to the basic award:
- Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce that amount accordingly.**
111. The EAT in *Langston v Department for Business, Enterprise and Regulatory Reform*, EAT 0534/09 confirmed that the same criteria ('culpable or blameworthy') apply to deductions from the basic award.
112. In *Steen v ASP Packaging Ltd* [2014] ICR 56 the EAT held (at [10-18]) that it is for the Tribunal to:
- 112.1. identify the conduct which is said to give rise to possible contributory fault;
  - 112.2. decide whether that conduct is culpable or blameworthy;
  - 112.3. ask for the purposes of s.123(6) if that blameworthy conduct caused or contributed to the dismissal to any extent. If it did not do so to any extent there can be no reduction on the footing of s.123(6), no matter how blameworthy in other respects the tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent, then the tribunal moves to the next question;
  - 112.4. to what extent the award should be reduced and to what extent it is just and equitable to reduce it;
  - 112.5. a separate question arises in respect of s.122(2), where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so.
113. A reduction to nil should be an unusual finding. As Langstaff P. put it in *Lemonious v Church Commissioners*, EAT 0253/12:
- 'even if the conduct were wholly responsible for the dismissal, it might still not be just and equitable to reduce compensation to nil. Though there might be cases where conduct is so egregious that that is the case, it calls for a spelling out by the tribunal of its reasons for taking what is undoubtedly a rare course.'**
114. In *Allen v Queen Mary University of London*, EAT 0265/15, HHJ Richardson held at [26]:
- '... a finding of 100 per cent contribution under section 123(6) is permissible only where the Claimant's conduct was wholly responsible for the dismissal. Even then, it does not follow that the finding must be 100 per cent (see Steen at paragraph 21). But if the Employment Tribunal concludes that the Claimant's conduct was not**

entirely responsible for the dismissal and that the Respondent shares responsibility for it, then a finding of 100 per cent contribution is not permissible. This question of causation is not to be addressed in a narrow or technical manner. The Employment Tribunal's task is to apply standards of justice and fairness in reaching its conclusion.'

115. The Court of Appeal in *Rao v Civil Aviation Authority* [1994] ICR 495 (at 502F) held that the deduction from the basic award for contribution may not be the same as the deduction from the compensatory award for contribution, if there has already been a deduction by reason of the Tribunal's conclusion as to the likelihood of the employee remaining in employment (the *Polkey* issue).
116. The EAT in *Lenlyn UK Ltd v Kular* EAT 0108/16 at [81] confirmed that, where there is a significant overlap between the factors taken into account when making a *Polkey* deduction, and when making a deduction for contributory conduct:
- 'the ET should have considered expressly, and did not, whether, in the light of that overlap, it was just and equitable to make a finding of contributory fault, and if so, what its amount should be. That overlap means that there is a real risk, which, I consider again, the ET did not take into account, that the Claimant was being penalised twice for the same conduct. I allow the cross-appeal on this point and remit this case for the ET to consider again, after it has reconsidered the *Polkey* issue, what deduction, if any, for contributory fault is just and equitable, in the light of that overlap.'
117. However, the principal of moderating a reduction for contribution in the light of a reduction already made for *Polkey* cannot apply to the basic award, which is not affected by the *Polkey* principle: *Granchester Construction (Eastern) Ltd v Attrill*, EAT 0327/12, per Langstaff P at [19].

### Wrongful dismissal

118. A complaint of wrongful dismissal is a common law action based on breach of contract and is quite different from a statutory complaint of unfair dismissal. The EAT considered the distinction in *Enable Care and Home Support Ltd v Pearson* EAT 0366/09, where both were claimed. In a wrongful dismissal claim the Tribunal was concerned not with the reasonableness of the employer's decision to dismiss but with the factual question: was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment, entitling the employer to summarily terminate the contract?
119. In *Neary v Westminster* [1999] IRLR 288 at [33], Lord Jauncey reviewed the authorities on the question of when summary dismissal is justified:
- 'What degree of misconduct justifies summary dismissal? I have already referred to the statement by Lord James of Hereford in *Clouston & Co Ltd v Corry*. That case was applied in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698, where Lord Evershed MR, at p.700, said: 'It follows that the question must be – if summary dismissal is claimed to be justified – whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.' In *Sinclair v Neighbour*, Sellers LJ, at p.287F, said: 'The whole question is whether that conduct was of such a type that it was inconsistent, in a grave way – incompatible – with the employment in which he had been engaged as a manager.' Sachs LJ referred to the 'well established law that a servant can be instantly dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his master but is also inconsistent with the continuance of confidence between them'. In *Lewis v*

*Motorworld Garages Ltd* [1985] IRLR 465, Glidewell LJ, at 469, 38, stated the question as whether the conduct of the employer 'constituted a breach of the implied obligation of trust and confidence of sufficient gravity to justify the employee in leaving his employment ... and claiming that he had been dismissed.' This test could equally be applied to a breach by an employee. There are no doubt many other cases which could be cited on the matter, but the above four cases demonstrate clearly that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.'

120. In *Mbubaegbu v Homerton University Hospital* UAEAT/0306/17/JOJ, the EAT held that it is possible to justify summary dismissal on the basis of a series of incidents, none of which could itself be said to be repudiatory conduct. Choudhury P. held (at [32]):

'Whether or not the label of gross misconduct is applied to such conduct is not determinative. It is quite possible for a series of acts demonstrating a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between employer and employee. That may be so even if the employer is unable to point to any particular act and identify that alone as amounting to gross misconduct. There is no authority to suggest that there must be a single act amounting to gross misconduct before summary dismissal would be justifiable or that it is impermissible to rely upon a series of acts, none of which would, by themselves, justify summary dismissal. As stated in *Neary*, conduct amounting to gross misconduct is conduct such as to undermine the trust and confidence inherent in the relationship of employment. Such conduct could comprise a single act or several acts over a period of time. Where it is the latter, it is not a case of the employer "collecting sufficient ammunition against [the employee] to dismiss", as suggested in the Claimant's skeleton argument. Rather, it may be, as it was in this case, that upon examination of a series of acts, which the employer believes put patients at risk, the employer finds that it has lost confidence that the employee will not act in that way again. I see no reason why an employer would be acting outside the range of reasonable responses were it to dismiss an employee in whom it has lost trust and confidence in this way.'

121. In determining the issue Tribunal may make findings of fact by evaluating the hearsay evidence of the statements gathered in the internal investigation (*Hovis Ltd v Louton*, EA/2020/000973/LA). In that case, the Judge erred by proceeding on the that, in the absence of direct evidence in person from at least one of the witnesses, she could not make a find that the misconduct had occurred.

### **Conclusions: victimisation**

122. The Respondent concedes that the email of 12 August 2019 was a protected act.

Issue 2.1: the manner in which the grievance itself was handled by Mr Alan Duncan and Mr Lee Utting (Area Managers), which the Claimant alleges was not impartial; he relies in particular on the fact that they did not view CCTV footage, which he asked them to do

123. No allegation was pursued against Mr Utting, whose role was confined to taking notes.
124. We have concluded that Mr Duncan's approach to the grievance was unreasonable in several respects. We agree with Mr Marriner that Mr Duncan

ought to have taken steps to secure the CCTV evidence. We have also concluded that, although he was diligent in conducting numerous interviews, he did not analyse the results of those interviews with sufficient rigour. Where there were conflicting accounts, he seems to have been hesitant to adjudicate between them; he appears to have taken the view that he required compelling, direct evidence of the conduct alleged by the Claimant to uphold any of the allegations; consequently, he gave barely any weight to the indirect, hearsay evidence he received where they supported the Claimant's complaints. Moreover, he rejected an allegation of aggressive behaviour by Mr Marandy, in circumstances where even Mr Marandy acknowledged that (on one occasion) his manner might have been perceived as aggressive and, arguably, Mr Marandy had greater responsibility as the Claimant's manager. In the sense that he set the bar unreasonably high for the Claimant to prove his case, we consider that his approach lacked balance.

125. However, it is trite law that unreasonable conduct does not, in itself, suffice to justify an inference of unlawful discrimination to satisfy stage one of the burden of proof provisions. We also reminded ourselves of the *dicta* of Underhill LJ in the *Dunn* case: that the mishandling of a grievance is not discriminatory simply because the grievance concerned discrimination. By analogy, the mere fact that the Claimant's grievance contained a protected act does not, in itself, give rise to an inference that any failings in dealing with the grievance were because of the protected acts.
126. We observe that the failings we have identified are not uncommon in the handling of internal work grievances; we remind ourselves that managers conducting internal investigations of this kind sometimes lack the forensic skills, which are taken for granted by specialist professionals. Nor is it unusual for lay investigators to assume that there must be direct corroboration of a complainant's evidence, before the complainant's account can be accepted. Ms Hewitt asked Mr Duncan how he would go about balancing, and adjudicating between, conflicting evidence; we were struck by the obvious difficulty he had in articulating an answer to that question. We have concluded that the failings we have identified were the result of a lack of skill and/or experience on Mr Duncan's part and were not materially influenced by the fact that the Claimant had done a protected act. We think it probable that his failure to secure the CCTV was because he simply did not appreciate its potential probative value.
127. We cross-checked our conclusion by considering the burden of proof provisions, asking ourselves whether the Claimant had proved facts from which we could reasonably conclude that Mr Duncan's failings were materially influenced by the Claimant having done a protected act. We concluded that he had not. The claims of victimisation were barely pursued by him at the hearing. He did not identify facts which specifically suggested that Mr Duncan was influenced by the protected acts. Indeed, by the end of his cross-examination of Mr Duncan, nothing had been put in support of that case. The Tribunal asked him whether he was still maintaining it. He confirmed that he was and the allegations were put very briefly to Mr Duncan, who denied them.
128. By contrast, we considered there were indicators which suggested that Mr Duncan had no difficulty with the fact that the Claimant had complained of sexual orientation discrimination: he followed the allegations up, including new

matters which the Claimant raised at his interview; he did not hesitate to express himself robustly as to the unacceptability of homophobia in the workplace (para 22); and, on at least one occasion, he took action when he was satisfied that a discriminatory incident had occurred (para 26). For these reasons, we are satisfied that the burden of proof does not shift to the Respondent.

Issue 2.2: the raising of the disciplinary charges against the Claimant by Mr Duncan

129. The first respect in which Mr Duncan might be said to have 'raised the disciplinary charges' against the Claimant was that he passed on to Mr Griffin, the two WhatsApp messages and also asked him to investigate the unauthorised absences more formally (para 36). However, it was Mr Griffin who, having conducted his investigation meeting, decided that those matters, along with the others, should go forward to a disciplinary hearing. It was he who 'raised the disciplinary charges', not Mr Duncan.
130. Even if that were not the case, we are satisfied that the sole reason why Mr Duncan passed the messages on was because they had been drawn to his attention by Mr Marandy, and he considered that they were inappropriate (which they plainly were). We are also satisfied that the sole reason he asked Mr Griffin to deal with the unauthorised absences more formally was because they were potentially serious disciplinary matters. We are satisfied that the fact that the Claimant had done a protected act played no part in those actions.
131. The second matter relied on by the Claimant is the fact that Mr Duncan authorised the suspension. We have already found (para 62) that that was a purely administrative act and that the decision to suspend was taken by Mr Griffin. We are satisfied the protected act played no part in either decision.

Issue 2.3: the dismissal.

132. There was no evidence at all before us that Mr Moran's decision to dismiss the Claimant was influenced in any way by the fact that the Claimant had done a protected act. We accept Ms Snowden's evidence that the reasons for the dismissal were those given in Mr Moran's letter to the Claimant.
133. We have considered carefully whether we should draw any inference from the fact that Mr Moran did not attend to give evidence; we have concluded that we should not. There was a clear, credible reason for his non-attendance. Even through the Respondent might have sought a witness order to compel his attendance, such an application would be unusual where the relationship between the ex-employee and the Respondent has so obviously soured.
134. Insofar as the Claimant contends that the dismissal was in some way engineered or orchestrated by Mr Duncan, because the Claimant had done a protected act, there was no evidence to support that contention. There was nothing to suggest that Mr Duncan sought to influence Mr Moran (nor was that put to Mr Duncan in cross-examination), or indeed that he had any involvement in the disciplinary process at all once it had passed to Mr Moran.
135. For all these reasons the claims of victimisation do not succeed.

**Conclusions: unfair dismissal**



What was the sole or principal reason for the dismissal? Was it a permissible reason?

136. The Claimant contends that the reason for the dismissal was victimisation. We have already rejected that. We are satisfied that the sole reason for the dismissal was the Claimant's conduct, that is the matters upheld by Mr Moran in his letter of dismissal.

Did the Respondent believe in the guilt of the Claimant of that misconduct at that time?

137. We are satisfied that Mr Moran believed in the guilt of the Claimant. The letter of dismissal is unequivocal as to that.

Did the Respondent have reasonable grounds for that belief?

138. There were reasonable grounds for Mr Moran's belief. The Claimant admitted the two WhatsApp messages, calling Mr Duncan a 'moron' and (although he disputed the reason for doing so) slamming the door as he left on 12 October 2019. In relation to the unauthorised absences, the Claimant accepted that he was absent from work; his evidence as to what steps he took to notify the Respondent in advance was vague and contradictory; Mr Moran was entitled to conclude that the absences were unauthorised. As for his abusive comments on 12 October 2019 although denied by the Claimant, they were confirmed by others in their statements; Mr Moran was entitled to prefer their evidence to his.

Did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case?

139. For the reasons given above we are satisfied that the investigation, viewed as a whole, was sufficient to establish a reasonable belief in the misconduct alleged. The Claimant had every opportunity to present his case; much of the misconduct was admitted. It fell comfortably within the band of reasonable responses.

Were there any other procedural failings

140. We were concerned by Mr Griffin's failure to set out all the matters which he intended to explore at the disciplinary investigation at the outset. Although there is no obligation on an employer to warn an employee of what will be discussed at a disciplinary investigation meeting, if the employer chooses to identify the subject for discussion at the beginning of the meeting, it is only reasonable that all the matters to be discussed should be identified. When Mr Griffin raised the additional matters, the Claimant understandably felt ambushed; he suddenly realised that the situation was more serious than he had been led to believe on 8 October 2018 and even at the beginning of the meeting itself. However, we have concluded that, although this approach was bad practice, it did not ultimately taint the fairness of the process overall, because the Claimant had ample warning of all the matters which would be discussed at the subsequent disciplinary hearing; the unfairness was cured.
141. We have concluded that the decision to proceed with the disciplinary hearing after the Claimant had objected did not fall outside the band: the hearing had already been adjourned once, because the Claimant did not attend; he had been told that he could be accompanied but chose to attend without a companion,

- without warning or any further explanation; he was offered a witness by the Respondent, but refused.
142. Although there was some suggestion by the Claimant that he was not alone in being absent without authorisation and not clocking in (i.e. inconsistent treatment), at no point during the disciplinary process did he identify a comparable instance, which did not result in disciplinary action. Nor did the Claimant provide the Respondent with specific examples of inappropriate messages on the WhatsApp group by other employees until long after his dismissal. We are not satisfied that he was prevented from doing so at any point. Those messages which he did eventually provide in the course of these proceedings, while certainly inappropriate in other respects, did not contain abuse of managers. We reject the contention that there was material inconsistency in the decision to dismiss.
143. Mr Moran reviewed the CCTV of the 12 October 2019 incident, and an extract was viewed at the disciplinary hearing. The Claimant did not identify what more would have been discovered if more had been viewed at the hearing: the alleged misconduct was verbal, not physical, and the CCTV did not have audio.
144. We also reject the contention that the dismissal was predetermined. This was based on Mr Duncan's supposed manipulation of the process, which we have found did not occur.
145. Insofar as new charges were introduced after the investigatory meeting (the 'fat bitch' and 'moron' comments), we are satisfied that the Claimant was not disadvantaged by the inclusion of these matters: he had Ms Lyons' statement as part of the investigation pack and was given the opportunity to address them at the disciplinary hearing. He admitted one, but denied the other, which Mr Moran duly disregarded.
146. We then considered the fact that neither the dismissing officer nor the appeal officer fully investigated the potential mitigation in relation to the Claimant's not having been paid, which he said lay behind some of the misconduct alleged. The Respondent says that they did not need to investigate the pay issues because it was accepted that there had been issues. The position taken at the time was that the Claimant was to blame for the pay issues because he did not clock in/out properly. However, both Mr Duncan and Mr Marriner accepted in Tribunal that being paid correctly was not dependent on clocking in correctly: the system was capable of picking up clocking errors and making sure that they did not impact on pay.
147. It is right that the Respondent never properly established whether the situation was as bad as the Claimant said it was. If it was, it might have provided him with some mitigation. The Claimant was a low earner and would probably not have had resources to fall back on, if he did not receive his pay. However, we have concluded that, even if it emerged that the problem was recurrent, it would not have been sufficient mitigation to reduce the sanction from dismissal to a lesser sanction; it could not justify the very serious misconduct which the Respondent had found proven, in particular the use of abusive and obscene language to and about managers. For these reasons, we do not consider that this omission fell outside the band of reasonable responses.

148. However, we have concluded that the disciplinary procedure was unreasonable in one respect: the conduct of the appeal against dismissal. In our judgment, no reasonable employer would have informed an employee at the beginning of an appeal which the employee had been told would address his grievance appeal, that his appeal against dismissal would be heard at the same time. The Claimant had no notice of the dismissal appeal hearing. The unreasonableness was compounded by the fact that the appeal against dismissal had only been lodged the day before; the appeal officer had not read it by the time the meeting started, and only skim-read it during a break in the meeting; and the Claimant did not have the opportunity to be accompanied to the disciplinary appeal hearing, because he did not know that it was taking place until after meeting started. The unreasonableness was further compounded by the fact that Mr Marriner did not revert to the Claimant with the outcome of his further investigations, to give him an opportunity to comment on the results. In our judgement, these matters were sufficiently serious to render the dismissal procedurally unfair.

Polkey

149. Had a fair procedure been followed, we are satisfied that there was a 100% chance that the Respondent would have fairly dismissed the Claimant in any event. The only difference in practice, had a fair procedure been adopted, was that the Claimant would have been given proper notice of the appeal hearing, time to prepare for it and the opportunity to arrange to be accompanied, if he wished. However, we do not believe that there was anything the Claimant would have said on appeal which would have altered Mr Marriner's overall conclusion. In the circumstances, we are satisfied that dismissal was reasonably open to the Respondent, and that Mr Marriner would have upheld Mr Moran's decision. In our judgment the sanction of dismissal plainly fell within the band of reasonable responses.
150. We consider that it would have taken a further two weeks to conduct a fair appeal process, and that the compensatory award should be limited to that period.

**Wrongful dismissal and contribution**

151. In the light of our findings of fact above (paras 82-88), our unanimous view is that the unauthorised absences and the abusive conduct on 12 October 2019, taken together were sufficient in themselves seriously to damage the relationship of trust and confidence, and amounted to gross misconduct. In our judgment, the Respondent was entitled to dismiss without notice.
152. The Judge and Mr Webb considered that the abusive WhatsApp messages were also seriously blameworthy; using abusive language about managers will always amount to misconduct. Ms Hewitt disagreed and considered that, in a context where strong language appears to have been endemic in the organisation, these particularly comments were not egregious.
153. We are satisfied that this same conduct amounted to blameworthy conduct and that it contributed to the dismissal: these were all matters, to which Mr Moran had regard in deciding to dismiss.
154. We then considered whether the compensatory and basic awards ought to be reduced by reason of contribution.

155. Dealing first with the compensatory award, we bore in mind that the blameworthy conduct which we have found contributed to the dismissal was precisely the same conduct, to which we had regard in reaching our conclusion on the *Polkey* issue. For that reason, we consider that a further reduction of the compensatory award in respect of precisely the same conduct would not be just and equitable, because it would amount to double-counting.
156. The same does not apply to the basic award, because *Polkey* does not apply to it. We have concluded that it would be just and equitable to reduce the basic award to some extent to reflect the Claimant's blameworthy conduct. We have concluded that a significant reduction would be appropriate because the Claimant contributed to a very great extent to his own dismissal. We reminded ourselves that a 100% reduction would be exceptional. We have concluded that it would not be just and equitable that he should receive no basic award, in circumstances where we have found that there was a significant procedural failure by the Respondent. In all the circumstances, we have concluded that a reduction of 50% would be appropriate.

#### **Calculation of compensation**

157. Given our conclusions on the *Polkey* and contribution issues, we consider that the precise amount of the compensation ought to be capable of agreement between the parties. It will consist of two weeks' net pay; and a basic award, reduced by 50%. If the parties can agree those sums, they must notify the Tribunal no later than 14 days after this judgment is sent to the parties; the Tribunal will then send out a judgment by consent on remedy. If they cannot agree, they must set out their competing submissions in writing and send them to the Tribunal by the same date. The Tribunal will then make its decision on the papers, unless it considers a further hearing is required.

**Employment Judge Massarella  
Date: 7 February 2022**

## APPENDIX: THE ISSUES

### The issues

#### *Victimisation (s.27 EqA)*

1. Did the Claimant do a protected act?
  - 1.1. The protected act relied on by him is his grievance, which included a complaint of sexual orientation discrimination, sent by email on 12 August 2019.
2. Did the Respondent treat the Claimant unfavourably because it believed he had done, or may do, any of the protected acts? The unfavourable treatment relied on is:
  - 2.1. the manner in which the grievance itself was handled by Mr Alan Duncan and Mr Lee Utting (Area Managers), which the Claimant alleges was not impartial; he relies in particular on the fact that they did not view CCTV footage, which he asked them to do;
  - 2.2. the raising of the disciplinary charges against the Claimant by Mr Duncan;
  - 2.3. the dismissal.

#### *Unfair dismissal*

3. What was the reason for the dismissal?
  - 3.1. The Respondent relies on conduct; the Claimant alleges that the dismissal was, in part, an act of retaliation because he brought a grievance.
4. If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will decide, in particular, whether:
  - 4.1. the Respondent genuinely believed in the misconduct;
  - 4.2. there were reasonable grounds for that belief;
  - 4.3. at the time the belief was formed the Respondent had carried out a reasonable investigation;
  - 4.4. the Respondent otherwise acted in a procedurally fair manner;
  - 4.5. dismissal was within the range of reasonable responses.
5. The Claimant relies on the following matters as going to the fairness of the dismissal:
  - 5.1. he alleges that the Respondent treated him inconsistently, compared with other employees who did the same things as the Claimant, specifically: Mr Jordan Davis, who also sent inappropriate messages and had an unauthorised absence; and Mr Jack Hatton, who sent

inappropriate messages in the WhatsApp group and who never clocked in;

- 5.2. the dismissal was predetermined;
  - 5.3. new charges were added part way through the process;
  - 5.4. the Respondent failed properly to investigate;
  - 5.5. Mr David Moran did not give the Claimant a proper opportunity to present his case at the disciplinary hearing;
  - 5.6. The Claimant was not given an opportunity to show other messages from the WhatsApp group at the hearing;
  - 5.7. the Respondent failed to produce the CCTV which would have helped the Claimant's case; he was told in an email that it was available, but he was only permitted to see a short extract at the hearing;
  - 5.8. the sanction was too harsh;
  - 5.9. the Respondent failed to give proper consideration to the Claimant's appeal: it was lodged on 4 December 2019 and heard on 5 December 2019; Mr Richard Marriner admitted at the hearing that he had not read the Claimant's appeal.
6. If the decision to dismiss was unfair, did the Claimant contribute to his dismissal by any culpable or blameworthy conduct on his part?
  7. If the Claimant was unfairly dismissed, what was the chance that he would have been fairly dismissed in any event (*Polkey*).

*Breach of contract (notice pay)*

8. Was the Claimant entitled to be paid notice pay? The Respondent accepts that it did not make such payment.