EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103288/2019

Held in Glasgow on 22, 23 and 24 October 2019

Employment Judge A Kemp

Mr Allan Burns	**Claimant** **In person**
Openreach Limited	**Respondent** **Represented** **Mr G Mitchell** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant was not unfairly dismissed by the respondent and the claim is dismissed.

REASONS

Introduction

1. The claimant pursued a claim of unfair dismissal. It was defended by the respondent. The case called for a Final Hearing.

2. The claimant represented himself. Mr Mitchell appeared for the respondent.

3. That matter of representation was one that I became aware of only on arrival at the Tribunal office. I had been informed when asked to hear the matter that the respondent was represented by another firm of solicitors, DAC Beachcroft. They had however written to the tribunal office at a little after noon on 21 October 2019 to state that the respondent would be represented by Mr Mitchell, a partner of Clyde and Co (Scotland) LLP ("Clyde").

4. I explained to the parties at the commencement of the hearing that that was the position, that I had been in partnership with Mr Mitchell at Clyde until December 201 7, after which I was with another firm for a short period before commencing as an employment judge on a full time basis on 1 May 2018. 1explained to the claimant that he had an entitlement to say that he would not wish me to conduct the case given that, and that had I earlier been aware of the representation changing to Mr Mitchell I would not expect to have been allocated to the case. I explained that he could make any concern known without needing to give any reason, and that if he did wish the case to be heard by someone other than me attempts would be made to find another employment judge to hear the matter. He stated that he was content that I conduct the case. I explained that the respondent also had a right to object, and Mr Mitchell stated that he too was content that I conduct the case. On that basis the hearing then proceeded, after a short delay to make arrangements to conclude the bundle.

The Issues

5. The issues before the Tribunal were -

1. What was the reason for the claimant's dismissal?
2. If potentially fair, was the dismissal unfair under section 98(4) of the Employment Rights Act 1996?
3. In the event of any finding in favour of the claimant what remedy, including reinstatement, re-engagement and financial award should be made?

4. In regard to any financial award (i) would there have been a fair dismissal by a different procedure (ii) had the claimant contribute to her dismissal, and should any award be reduced, if so to what extent and (iii) had the claimant mitigated his loss?

The Evidence

6. The parties had prepared a bundle of documents. Not all of the documents in the bundle were spoken to in evidence. The claimant had brought with him to the hearing what he described as a multi-tool, which had been held by security staff on his arrival. It was agreed that in the event that it became appropriate to do so the item could be examined and used in evidence, and Mr Mitchell confirmed that he did not object to that. It was referred to in the evidence, and examined by me at that time.

7. The Tribunal heard oral evidence from (i) Mr David Dougans (ii) Mrs Lesley-Ann Keith (iii) Mr Gregory Fleming (iv) the claimant and (v) Mr William Crilley.

The facts

8. I make the following findings in fact:

9. The claimant is Mr Allan Burns.

10. He was employed by the respondent from 1 February 2005 as a Frames Engineer, also referred to as an Exchange Services Technician.

11. The respondent operates a digital network throughout the United Kingdom. The respondent's role was to carry out connection and related work in exchanges which provided telephone and broadband lines from the exchange to customers' premises.

12. In August 2006 he commenced working on night shift. That continued until August 2012 when he suffered mental health difficulties, and was absent from work for about two and a half months. He then returned to work on night shift which continued until December 2014, when he commenced working on day shift.

13. The contract of employment provided that there be annual health checks, but there was no evidence produced that those checks were ever carried out.

14. The claimant has been treated for depression and anxiety by his GP, and is prescribed an anti-depressant Fluoxetine.

15. On 20 August 2018 the claimant alleged that he had been assaulted and spat at by a colleague at work, in respect of whom he had written graffiti on a toilet wall, in answer to graffiti about him from that person. He was kicked several times on the leg by that person, who wore steel capped boots, and sustained bruising injury. He defended himself, and left the premises. Outside he was seen by a colleague who took a photograph of his leg.

16. He was absent from work thereafter due to illness, initially self-certified and then by a fit note from his GP.

17. The claimant made a complaint that he had been assaulted at work shortly after the incident occurred. The claimant's line manager Rose Weir investigated the allegation. Her investigation was delayed for two weeks due to annual leave. She did not find what she thought was sufficient evidence support for it. An employee who had been outside the premises where the assault was said to have taken place told her that he did not wish to be involved. A photograph taken by that employee of the claimant's leg which she viewed did not show injury clearly.

18. She arranged to meet the claimant on 13 September 2018 in order to discuss that matter with him, and she also wished to conduct a home visit to discuss his sickness absence. A home visit is held under the respondent's policy for managing absence, although it need not take place at the employee's home. The arrangements were made for that meeting by telephone. She was accompanied by Mr Scott Wallace, another manager. The claimant was accompanied by his union representative Mr Anton Begley. The claimant had not expected the meeting to address anything other than his complaint of assault.

19. The meeting took place not at the claimant's home address but at premises of the respondent. Ms Weir informed him of her decision on the allegation, and that she did not consider that there was sufficient evidence to take forward. During the meeting the claimant became frustrated at what he was told, and he raised his voice. He pointed at Ms Weir on a number of occasions. He moved his chair to be closer to her, and she felt that he had invaded her personal space. Mr Wallace had a concern at how the meeting was being conducted and moved his chair so as to be closer to her. She felt intimidated by the claimant's actions and conduct, and considered that he was aggressive towards her.

20. She provided a statement in relation to that meeting, and made a complaint about the conduct of the claimant. Mr Wallace provided a written note of the meeting. Shortly thereafter he commenced a period of paternity leave.

21. The respondent appointed Mr David Dougans, another manager at the same level as Ms Weir and Mr Wallace, to act as a fact finding investigator. He commenced his investigation, and met the claimant on 1 October 2018 to discuss the allegations made. The claimant was represented at that meeting by a union representative Mr William Crilley. A note of the meeting taken by the respondent is a reasonably accurate record of it.

22. After the meeting and on the same day Mr Dougans consulted HR staff of the respondent, and following his doing so he informed the claimant that he was suspended pending further investigation. That was later confirmed by Mr Dougans in writing.

23. The claimant was sent a note of the meeting with Ms Weir taken by Mr Wallace, and Mr Begley responded with an annotated version of that with his comments. In those comments he did not accept that the claimant had been aggressive, but did say that he had been frustrated and that the discussion had been "heated".

24. After the claimant was informed that he was suspended, Mr Dougans was informed that another employee had made an allegation that the claimant had been in possession of a knife when at work at around the end of May 2018. The person did so anonymously, having learned that Ms Weir had

made an allegation that the claimant had been aggressive. Mr Dougans sought a meeting with that person, and did so on 9 October 2018. He took a written witness statement. After that a redacted witness statement was prepared, for a person the respondent referred to as Person X, which stated as follows:

> "End of May beginning of June working in [redacted] MDF/Exchange. [Redacted section] advised Allan removed a knife from his bag, 6 to 8 inch knife possibly a foldable handle then carried on as if it's a normal thing [redacted sentence] After my meeting I felt I had to tell her about the incident with the knife"

25. It indicated that the handwritten copy of the note was signed.

26. Prior to taking that statement Mr Dougans had carried out a search of the claimant's company vehicle, which was a van. He found in a compartment within it an item which was constructed of metal, with a handle which folded in two, and had tools on it which included a set of pliers and a knife with a blade of about two and a half inches in length.

27. Mr Dougans consulted an HR file held electronically with regard to the claimant, and noted the terms of an informal discussion held with the claimant, known by the respondent as a local discussion, in relation to an incident which occurred in 2017. He discovered that following the investigation of that no formal action was taken in view of the absence of sufficient evidence, but that the manager Alistair Buchan spoke to the claimant with regard to his future conduct. His doing so was not a formal disciplinary warning. The claimant did not have a formal disciplinary record.

28. Mr Dougans arranged to meet the claimant again, and did so with Mr Crilley in attendance on 9 October 2018. At the meeting the claimant was asked if he had taken a knife to work. He said that on a few occasions he had done so when working alone on night shift in some areas of Glasgow, and that he had done so for his own protection. He described it as a pen knife. He was asked about the item found in the van and denied that it was a knife, saying that it was a multi-tool and that he had last used

it in 201 3 to mend fuses in his van, he being an auto-electrician. He agreed that it was not company issued and ought not to have been in his van.

29. Mr Dougans concluded his investigation and was of the opinion that the matter should proceed to a formal disciplinary hearing on allegations of gross misconduct. He prepared a formal report which set out the nature of his investigation, his conclusions and had attached to it as an appendix the supporting documentation.

30. That report was sent to Mrs Lesley-Anne Keith, the manager of Ms Weir, Mr Wallace and Mr Dougans. By letter dated 3 November 201 8 she called him to a disciplinary hearing to consider allegations of gross misconduct. He was informed of there being three allegations, provided with a copy of the report by Mr Dougans with its attachments, and advised that one outcome could be his summary dismissal. The allegations were in relation to (i) his meeting with Ms Weir, (ii) the item found in the van and possession of a knife at work on his admission and (iii) the allegation by Person X.

31. The disciplinary hearing took place on 11 December 2018. Mr Crilley accompanied the claimant. A minute of the meeting was taken and is a reasonably accurate record of it.

32. By letter dated 21 January 2019 Mrs Keith intimated to the claimant that she had decided to dismiss him summarily, with that with effect from 23 January 2019. She set out the rationale for her decision in a separate note of the same to which she referred in that letter. She believed that the allegations made had been established. She believed that he had acted aggressively towards Ms Weir and made a threatening remark, had a knife at work on the occasions he admitted in relation to the pen knife and the bladed instrument found in his van, and she believed the evidence from Person X. She considered that there was a serious risk involved in such matters, particularly in relation to the issues of possession at work of a knife, and that they amounted to gross misconduct of such degree as warranted summary dismissal. In making her decision she took into account the circumstances as she understood them to be, his thirteen years of continuous service and his conduct, attendance and performance

records. She also considered whether disciplinary action short of dismissal was appropriate.

33. The claimant appealed the decision by email dated 22 January 2019. An appeal meeting was convened for 15 February 2019 and was heard by Mr Gregory Fleming. A minute of that meeting was prepared from an audio recording of it and is an accurate record of the same.

34. Mr Fleming decided to uphold the decision to dismiss the claimant, and intimated that decision by letter dated 8 March 2019, setting out the rationale for his decision by a note dated 6 March 2019. The decision included consideration of documents provided by Mr Begley and a discussion he had held with Mr Wallace.

35. On or around 15 March 2019 the claimant supplied an audio recording of a meeting he had held with Mrs Keith on 1 August 2018. He also sent Mrs Keith a copy of that recording on 10 May 2019, and referred to Person X as her "nepotistic wee pal", adding "Karma like that comes back to you". He emailed her on 13 May 2019 with a copy of the audio recording of their conversation.

36. A transcript of the recording that the claimant prepared for the purposes of the Final Hearing is an accurate record of it.

37. The claimant also posted an entry on Facebook with regard to his meeting with Mrs Keith on 1 August 2018, alleging that he had told his senior operations manager about poor management, nepotism, bullying managers and a union who capitulate, that he had a recorded meeting in which she "asks me to sweep it under the carpet" and asking if he should post it. That generated a number of replies which included remarks which were abusive towards Mrs Keith, or threatening. She felt intimidated by his messages.

38. The respondent has a disciplinary policy and procedure. It includes under the list of examples of gross misconduct, which was not exhaustive

- Acts of bullying, harassment ....(including physical assault or breaching our Standards of Behaviour.,..policies"

39. There was a document entitled "Settling the Standard - Our standards of behaviour procedure" issued by the respondent which included under the expected level of behaviour:

- "Always treat others how you would expect to be treated by not using harsh or abusive language and always act in a reasonable manner
- Don't become involved in any illegal activity"

40. The respondent issued guides to staff, and managers, with regard to the disciplinary policy. It included advice in the event that the person became emotional in a disciplinary meeting, to ask for a break. It added that that "could really help you if you're becoming angry or upset."

41. When employed by the respondent the claimant was paid £433.92 per week net. He also had an entitlement to pension, details of which were not before the tribunal.

42. The claimant has not worked since the dismissal. He receives medication for anxiety and depression, and has received benefits on the basis of being unfit for work. He has however sought to obtain work from using online services.

Respondent's submissions

43. Mr Mitchell produced a written submission at the end of the second day of evidence to allow the claimant time to consider its terms. At that point his cross examination had yet to start. The following is a basic summary. Mr Mitchell set out what he referred to as the claimant's admitted behaviour. He argued that the provisions for anonymous statements had been complied with.

44. He argued that conduct had been the reason for dismissal, and that the dismissal was fair under section 98(4) of the 1996 Act. He referred to authority on the law in relation to fairness, some of which is referred to further below. He referred to the Criminal Law (Consolidation) (Scotland) Act 1995, section 47, which has provisions in relation to the possession of an offensive weapon in a public place, in which there is a defence of reasonable excuse or lawful authority. He supplemented his written

submission by referring to the concessions that the claimant had made in his evidence, both his own and in cross examination, and argued that the claimant did not “get it" in relation to what had happened, and what had been alleged of him. He suggested that carrying a pen knife for the purposes given by the claimant may amount to a crime, and that the respondent was within the range of reasonable responses in concluding that there was serous misconduct that led to a breakdown in trust.

Claimants submissions

45. The claimant made a brief submission arguing that the respondent had caused his mental health issues by failing to carry out health checks when he was on several years of night shift, had not addressed the assault on him appropriately, and in effect that matters had been blown out of proportion. He argued that the real reason was not conduct, but matters had been used to dismiss him. The evidence from Person X could not have been right. The multi-tool was not a knife, but its discovery was used as a basis to dismiss him.

The law

(i) The reason

46. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 (“the Act”).

47. If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law. Conduct is a potentially fair reason for dismissal.

(it) Fairness

48. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the Act which states that it

> "depends on whether in the circumstances .....the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."

49. That section was examined by the Supreme Court in ***Reilly v Sandwell Metropolitan Borough Council [2018] UKSC 16.*** In particular the Supreme Court considered whether the test laid down in ***BHS v Burchell [1978] IRLR 379*** remained applicable. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case, although it had not concerned that provision. He concluded that the test was consistent with the statutory provision. Lady Hale concluded that that case was not the one to review that line of authority, and that Tribunals remained bound by it.

50. The ***Burchell*** test remains authoritative guidance for cases of dismissal on the ground of conduct in circumstances such as the present. It has three elements

(i) Did the respondent have in fact a belief as to conduct?
(ii) Was that belief reasonable?
(iii) Was it based on a reasonable investigation?

51. It is supplemented by ***Iceland Frozen Foods Ltd v Jones [1982] ICR 432*** which included the following summary:

> "in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;
> in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
> the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

52. The manner in which the Employment Tribunal should approach the determination of the fairness or otherwise of a dismissal under s 98(4) was considered and summarised by the Court of Appeal in ***Tayeh v Barchester Healthcare Ltd [2013] IRLR 387.***

53. Lord Bridge in ***Polkey v A E Dayton Services [1988] ICR 142,*** a House of Lords decision, said this after referring to the employer establishing potentially fair reasons for dismissal, including that of misconduct:

> "in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

54. The focus is on the evidence before the employer at the time of the decision to dismiss, rather than on the evidence before the Tribunal. In ***London Ambulance Service v Small [2009] IRLR 563*** Lord Justice Mummery in the Court of Appeal said this;

> "It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question - whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

55. The band of reasonable responses has also been held in ***Sainsburys pic v Hitt [2003] IRLR 223 Xo*** apply to all aspects of the disciplinary procedure.

56. Anonymised statements were taken in this case. That matter is the subject of guidance in ***Linfood Cash and Carry Ltd v Thomson [1989] IRLR 235,*** as follows:

> "Every case must depend upon its own facts, and circumstances may very widely - indeed with further experience other aspects may

demonstrate themselves - but we hope that the following comments may prove to be of assistance:

1. The information given by the informant should be reduced into writing in one or more statements. Initially these statements should be taken without regard to the fact that in those cases where anonymity is to be preserved, it may subsequently prove to be necessary to omit or erase certain parts of the statements before submission to others - in order to prevent identification.

2. In taking statements the following seem important:

(a) date, time and place of each or any observation or incident;

(b) the opportunity and ability to observe clearly and with accuracy;

(c) the circumstantial evidence such as knowledge of a system or arrangement, or the reason for the presence of the informer and why certain small details are memorable;

(d) whether the informant has suffered at the hands of the accused or has any other reason to fabricate, whether from personal grudge or any other reason or principle.

3. Further investigation can then take place either to confirm or undermine the information given. Corroboration is clearly desirable.

4. Tactful inquiries may well be thought suitable and advisable into the character and background of the informant or any other information which may tend to add or detract from the value of the information.

5. If the informant is prepared to attend a disciplinary hearing, no problem will arise, but if, as in the present case, the employer is satisfied that the fear is genuine then a decision will need to be made whether or not to continue with the disciplinary process.

6. If it is to continue, then it seems to us desirable that at each stage of those procedures the member of management responsible for that hearing should himself interview the informant and satisfy himself what weight is to be given to the information.

7. The written statement of the informant - if necessary with omissions to avoid identification - should be made available to the employee and his representatives.

8. If the employee or his representative raises any particular and relevant issue which should be put to the informant, then it may be

desirable to adjourn for the chairman to make further inquiries of that informant.

9. Although it is always desirable for notes to be taken during disciplinary procedures, it seems to us to be particularly important that full and careful notes should be taken in these cases.

10. Although not peculiar to cases where informants have been the cause for the initiation of an investigation, it seems to us important that if evidence from an investigating officer is to be taken at a hearing it should, where possible, be prepared in a written form."

57. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness.

58. The Tribunal is required to take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures. It is not bound by it. The following provisions may be relevant:

"4.3(4) Employers should carry out any necessary investigations to establish the facts of the case.

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification...

23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. ...

[Under the heading - Provide employees with an opportunity to appeal]

26. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.

27. The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case. "

59. Whether or not a matter might be regarded as one of gross misconduct has been the subject of authority. It must be an act which is repudiatory conduct ***Wilson v Racher [1974] ICR 428.*** The question is whether it was reasonable for the employer to have regarded the acts as amounting to gross misconduct - ***Eastman Homes Partnership Ltd v Cunningham EAT/0272/13.*** If the employer's view was that the conduct was serious enough to be regarded as gross misconduct, and if that was objectively justifiable, that was a circumstance to consider in assessing whether or not it was reasonable for the employer to have treated the conduct as a sufficient reason to dismiss. But a finding that there was gross misconduct does not lead inevitably to a fair dismissal. In ***Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854*** the Tribunal suggested that where gross misconduct was found that is determinative, but the EAT held that that was in error, as it gave no scope for consideration of whether mitigating factors rendered the dismissal unfair, such as long service, the consequences of dismissal, and a previous unblemished record.

60. An appeal is a part of the process for considering the fairness of dismissal - West ***Midlands Co-operative Society Ltd v Tipton [1986] ICR 192*** in which it was held that a failure to permit an employee to exercise a contractual right of appeal was of itself capable of rendering a fair dismissal unfair and that employers must act fairly in relation to the whole of the dismissal procedures. The importance of an appeal in the context of fairness was referred to in ***Taylor v OCS Group [2006] ICR 1602*** in which it was held that a fairly conducted appeal can cure defects in the dismissal such as to render the dismissal fair overall.

(ii) Remedy

61. In the event of a finding of unfair dismissal, the tribunal requires to consider whether to make an order for re-instatement under section 113 of the Employment Rights Act 1996. The matter is further considered under section 116.

62. The tribunal requires also to consider a basic and compensatory award which may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant

as a result of the dismissal. In respect of the latter it may be appropriate to make a deduction under the principle derived from the case of ***Polkey,*** if it is held that the dismissal was procedurally unfair but a fair dismissal would have taken place had the procedure followed been fair.

63. The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant. The amount of the compensatory award is determined under section 123 and is "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

Observations on the evidence

64. Mr Dougans was I considered a credible and reliable witness. He had had very little prior contact with the claimant, and sought to investigate the matters before him. I consider that he did so independently and reasonably. There was a difficulty in relation to the evidence of the witness he described as Person X, which I refer to below. He gathered the evidence, which included carrying out a search of the claimant's van, and found a tool with a blade. He suspended the claimant, and did so before having either the evidence of Person X or that of the tool he found. That he did so on the basis of the allegations from the home visit meeting therefore was a matter to be considered, but that did not cause me to have doubts over the evidence he gave.

65. The dismissing officer was Mrs Keith. I considered her a credible and reliable witness. She met the claimant before matters became more challenging, which was before the incident when the claimant alleged that he was assaulted. At that stage they had an informal meeting, which the claimant recorded unknown to her. The transcript of that meeting shows a manager who sought to assist an employee in her team, was considerate towards him, and not only did not reveal any stance against him, but a positive desire to help. When she came to consider the disciplinary hearing itself I accepted that she went into it with an open mind and came to a conclusion on the evidence. She did so after careful consideration,

listening to the recording of the hearing on over twelve occasions. Her evidence was measured and convincing, in answering questions from the claimant and from me. She had been upset by posting of entries on Facebook and an earlier email from the claimant, but these took place after her decision to dismiss was reached.

66. There were issues raised in relation to her having both a note taker and an audio recording, which was very unusual, but she explained that she had taken a colleague with her in light of concern over how the meeting may be conducted, given the allegation by Ms Weir. I consider that that is both credible as the explanation and within the band of reasonable responses at the very least. Separately, the audio recording itself was not latterly available, and appears to have been deleted in error from the HR electronic system. It was suggested that there was something malign or suspicious in that loss of the recording, but I was satisfied that there was not.

67. She further explained that she had taken time to reach her decision, and had listened to the audio recording about a dozen times before doing so.

68. Mr Fleming heard the appeal, and was also a credible and reliable witness. He conducted a lengthy appeal meeting, sought to find out what the claimant was arguing and why, and then carried out further investigation of his own including by speaking to Mr Wallace abut the home visit meeting. The appeal was I consider conducted independently, and thoroughly, such that it was reasonable.

69. The claimant's evidence was I considered mostly credible, and he had been honest when making the admission as to the pen knife for example, and mostly reliable, but that his view of the reasonableness of his actions in taking a pen knofe to work for security was not one I consider could properly be held. He had accepted on two occasions, once before Mr Dougans and once before Mr Fleming, that he had carried a form of pen knife when working on night shift in earlier years, and justified that as being for "security". It was not a tool with which to do work. He was entirely candid both with them and before me that he had done so, and argued

that it was reasonable to do so given the need to work alone on night shift in certain areas of Glasgow.

70. That position, which he raised initially in cross examination, was however a concern, in that it was not only contrary to the respondent's policy but had the risk of being a criminal offence.It is not my function to consider whether or not there was a criminal offence committed, but it is I consider within judicial knowledge that taking a knife in such circumstances does not increase security but threatens it, both for the person carrying it and anyone he encounters.

71. When he came to give his own evidence I advised him that he did not require to give evidence himself or answer questions in cross examination or otherwise that might incriminate him.

72. He then said in evidence that he thought that he was justified in carrying such a knife, and said that that was because he was sent at night to work in areas of Glasgow which involved risk to him. The exchanges he worked at were formerly ones requiring two man working, but that had changed to one man working. That heightened risk, as he saw it, led to him taking the knife with him, but that had only been on a few occasions, perhaps four he latterly accepted and only when he had been on night shift. He said that he would not intend to use the knife. I did not however consider that a reasonable position or assessment of matters, and shall address it further below.

73. He did not accept that his meeting with Ms Weir was other than a normal meeting albeit with a discussion over differences of opinion. He used various terms to describe that, one of which in the appeal hearing was that it was a "conflagration". He said that that meant a disagreement. The term does not however mean that, but a large fire or war. His union representative in written notes accepted that there was a heated discussion and that the claimant had become frustrated, but did not consider him to be aggressive or that there was any physical threat to anyone.

74. That was not however how Ms Weir saw it, as she set out in her witness statement prepared for the investigation, nor was it what the notes from

Mr Wallace described. Mrs Keith did not speak to either of them about it and Ms Weir left the business in January 2019 but Mr Fleming spoke to Mr Wallace after the appeal hearing and he confirmed that the conduct had been aggressive and intimidatory such that he had moved his chair to be closer to Ms Weir in effect so as to be able to protect her should he need to do so. He did not, but that indicated that there was a perception of a high level of threat.

75. The claimant questioned Mrs Keith during the hearing in a manner that she found upsetting, and unduly aggressive. Although he was informed by me on a number of occasions that he should not interrupt a witness when answering his question, he did so persistently, and in a manner that could properly be described as aggressive. He apologised for doing so on a number of occasions, and said that he had mental health issues which were the reason for his doing so. In his own evidence he on occasion became heated, raising his voice and moving forward in his chair.

76. I formed the view that he did not realise that he was doing so when acting in this manner, nor that it led to the perception of his being aggressive.

77. He did not appear to appreciate that there was evidence against him, all of which he described it as "rubbish". He said that the evidence from Person X was totally untrue, and that all he had was a multi-tool which he used for work in 2013, along with a 12 volt tester with a probe he thought was a greater danger than the multi tool.

78. But that tool described by him as a multi-tool did, as Mr Fleming said in evidence, have the capabilities of a knife. When the blade was extended and the handle made into a single length rather than in two halves, it had all the signs of a knife. It could properly be called a knife. Mrs Keith referred to it in cross examination as being an offensive weapon. It was within his work's van. That was itself evidence of concern, but the claimant did not appear to consider that it was at all.

79. He referred to having had a knife with an orange handle issued to him when working on underground work in about 2001, after which he was redundant then redeployed later in 2005. That orange handled knife had been issued by the respondent to carry out work. He argued that that was

indistinguishable from his taking a pen knife for "security". The pen knife, which he obtained privately, was carried by him in a very different set of circumstances. The two are not comparable. His evidence was not supported by Mr Crilley at all, as I shall come to.

80. He criticised the managers of the respondent, including Mrs Keith in particular. His evidence included criticism of her for failing to act when he met her for an informal meeting, but the fair reading of Mrs Keith's comments at the meeting on 1 August 2018, which he sought to argue was about seeking to sweep matters under the carpet, was that she was being supportive of him, and agreeing with him that it was best to look to the future and draw a line under the past. She was not seeking to sweep under the carpet allegations he wished to pursue as complaints or grievances or similar.

81. There was I concluded something in the submission by Mr Mitchell that the claimant did not appreciate why his admission to carrying a pen knife allegedly for security was a matter of serous concern, that the statement of Person X referring to a knife coupled with the finding of an item that had the functionality of a knife, and could properly be so described, was further a matter of serious concern.

82. Mr Crilley gave evidence which was to support the claimant to an extent. He was not present at the meeting with Ms Weir, but did attend the fact finding then disciplinary meetings with Mr Dougans, Mrs Keith and Mr Fleming. I accepted his evidence as credible and reliable. He was very balanced in what he said, and supported the claimant in his evidence that at the fact finding and disciplinary meetings he had explained that the multi tool was used in 2013 for changing fuses on his van, and had been left there since then. He had also stated that he was concerned that there was a witch hunt against the claimant in that there had been the statement from Person X, the finding of the multi tool and a view that that was sufficient, or a eureka moment as he put it.

83. On the other hand, in cross examination he gave evidence that he would not condone the carrying of a pen knife for protection in the circumstances the claimant described; that he himself would not do so but would not work

at a site, working alone, if that felt unsafe; that the union did not condone graffiti of any kind, and that both the union and he did not condone the Facebook post which was shown to him as having been made by the claimant on 12 August 2018. He accepted that there had been confusion over the description of the knife in the Person X statement and that it did not refer to it having a 6 to 8 inch blade, as he had initially thought, but that its total length was so described and that it may have been foldable. He was also not aware of the full extent of the evidence, and admissions made by the claimant, when he had referred to there being a "witch-hunt".

84. I considered that he was a fair and balanced witness, and I accepted his evidence as credible and reliable.

Discussion

(a) Reason

85. I am in no doubt that the respondent has established that the reason for the dismissal was conduct. The investigation commenced following a home visit during which the claimant's conduct was put into question, followed by a second allegation in relation to carrying a knife. Those issues led to an investigation, disciplinary hearing, and dismissal. I do not consider that those issues were all to hide the true reason, as the claimant alleged, which was related to liability for the claimant's mental health.

(b) Reasonableness

86. I will consider this issue firstly in respect of substantive matters, and secondly the procedure.

(i) Fact of Belief

87. I am satisfied that the respondent did in fact hold the belief that the claimant was guilty of gross misconduct. Whilst that was disputed, I consider that the evidence of Mrs Keith, supported by the written materials, establishes that there was a belief held by the respondent that there had been gross misconduct. The evidence given orally is supported by the rationale document, which in turn is supported by the evidence as set out below.

(it) Reasonableness of belief

88. There were three allegations made against the claimant, but it is relevant also to consider all of the evidence as a whole.

89. The first allegation was of aggressive and intimidating behaviour towards Ms Weir at what was described as a home visit. The arrangements for that meeting were not before the tribunal, but it was notable that the claimant was accompanied at it by his trade union representative. The versions of events at the meeting differed. That of Ms Weir and Mr Wallace indicated that the claimant had been acting as alleged, which included raising his voice, pointing at Ms Weir, moving his chair close towards her, and being what I might term disrespectful towards her for example by not engaging in eye contact. On at least two occasions the claimant was in effect told to calm down including by his union representative, and there was a five minute break on one occasion for that reason. The claimant accepted that he had been frustrated and that there was a heated discussion but denied acting aggressively. Mr Begley in written annotations of the note of the meeting broadly supported the claimant, but had used the term "heated discussion" and that the claimant had become "frustrated"

90. The allegation also included that the claimant had made threatening comments towards a colleague, specifically "if he comes into an exchange when I'm there it won't end well." He argued that that meant not end well for him, and it is true that the words used are not without ambiguity. He did however later say that in such a situation of the two men being together he could not say what would happen, and in context that does raise the possibility of aggression by him, as well as towards him.

91. I concluded that Mrs Keith was entitled to find that there had been aggressive and intimidating behaviour shown by the claimant. She was entitled to accept the evidence of Ms Weir and Mr Wallace that was before her, but also to have regard to acceptance on the part of the claimant of his having been frustrated, and that there had been a heated discussion. The cause of the heat in that discussion was clearly the claimant. He accepted that he had become frustrated at the failure as he saw it to investigate fully his allegations, and then to take steps to deal with that

issue. It is also instructive that the union representative appeared broadly supportive of the proposals made by Ms Weir which included using an access system to seek to ensure that the claimant and his alleged assailant being kept apart. The claimant was also informed that he could report the matter to the police. He did not accept those proposals, and did so rather out of hand.

92. In relation to the alleged threatening comments, the words used by the claimant were not disputed. Their meaning was. I have stated above that the meaning is not without ambiguity. The question for me however is whether Mrs Keith was entitled to hold that they were intended to be threatening. I have concluded that she was. In the context of the discussion, where there had been an alleged assault, the issue was what might happen if the two of the employees were together again. What the claimant was referring to was the possibility of some form of altercation which may include physical contact. Whether he may be the perpetrator or victim is secondary to the reference to a threat of that happening. That contrasts sharply with the standards of behaviour document. Had the claimant meant only that he might be assaulted he could have said so, but by using such ambiguous words and in that context he left open the possibility of others having the view that he meant that there would be a risk to that other person. Whilst the point is therefore not without its difficulties, and the evidence was thin, I concluded that Mrs Keith did act as a reasonable employer might have in believing that his comment was a threatening one.

93. I do accept that the claimant was frustrated at the lack of support for him as he saw it at the meeting with Ms Rose. He had made an allegation of assault, and was told that there was not sufficient evidence to uphold that. He did not agree. From his perspective it appeared that his complaint was not being addressed adequately. There was something in that. No written evidence, such as witness statements taken by Ms Weir who was the investigator, were produced. The claimant referred to a potential witness, who Ms Weir told him did not want to be involved, but who had taken a photograph of injuries sustained by the claimant, he said. That photograph was not produced, nor shown to the claimant. It was not stated in evidence

whether the alleged assailant had even been interviewed, and if so what was said, nor what else had been done to investigate the issue. Matters had been delayed by two weeks because Ms Weir went on holiday, but it appears that no one was asked to carry on the investigation in her absence. No written evidence was produced as to the arrangements for the meeting with Ms Weir, and the claimant's evidence was that it was only to address the investigation, not a home visit.

94. The claimant produced a photograph which showed bruising to his leg. There was some support therefore for his allegation. For Ms Weir simply to have said that there was no evidence other than one person's word against another is at least arguably not right.

95. Against that background I have some sympathy with the claimant feeling frustrated about the lack of action on his complaint. I accept his evidence that he had been assaulted by the colleague about whom he had written graffiti. His having done so was not to his credit, but I accept that the assault involved being spat at, and kicked with steel toed boots on the leg causing bruising.

96. But he could and should have addressed the comment from Ms Weir that she did not have the evidence to take that forward very differently, including by formal grievance and then an appeal. He could have conferred further with his union representative about that, or asked further questions of Ms Weir as to her view of evidence or suggested the gathering of further evidence. . He could have acted on the suggestion that he refer it to the police. He may have had civil law remedies. Instead the weight of the evidence is that he became aggressive and intimidatory towards Ms Weir. Whilst I take into account his mental health difficulties, I was satisfied that Mrs Keith was entitled to conclude that there had been aggression and intimidation by him at the meeting with Ms Weir.

97. It was also material that Ms Weir did at least discuss a way to seek to avoid issues in future. The claimant alleged that the suggestion came from Mr Begley but the written record, which he later accepted was likely to be accurate, supported that Ms Weir had first suggested that as a solution, and Mr Begley had supported that as a proposal, but the claimant did not

appear to believe that it would work. The evidence was that the suggestion of using a system called obass to control access to the workplace to seek to keep the two men apart was being followed up by Ms Weir after the meeting, the written record suggests, but was overtaken by the disciplinary investigation, then suspension and dismissal.

98. The claimant had referred to his having mental health difficulties, and challenges in his personal life, when he met Mrs Keith on 1 August 2018. He referred to disagreements with other members of staff, and described himself as being at times like a "bull in a china shop". Clearly that matter, and the stress he felt in the incident in which he was assaulted, was part of the background. The claimant spoke further about the background in cross examination, during which he accepted that he could become aggressive when frustrated but that he did not intend to do so. He apologised after a break in the meeting with Ms Weir, and he also apologised for the times when he had become agitated during the present hearing. I took that into account.

99. Ms Weir did however say in her witness statement for the investigation that she felt under threat, and unnerved, by what happened, and there was sufficient from the witness statements and the meetings held with her for Mrs Keith to conclude that Ms Weir's perception was reasonably held in my opinion. In short Mrs Keith was entitled to find the first allegation established.

100. The second allegation was that a bladed instrument, which was described both as a multi-tool by the claimant and a knife by the respondent, was found in his company vehicle on 1 October 201 8, and when questioned about that having a knife he admitted that he both said that he carried a pen knife when working on night shift between June 2013 and May 2014, and that the instrument, a multi-tool, was his own property. He said that he had used it last in 201 3 to repair fuses on his van, which as an auto electrician he could do. He had used the pliers function to do so, and had then left the tools there, and forgotten about them. There was also a 12 volt tester, which had a probe of about six inches in length, in the same place.

101. Both of those matters were admitted by the claimant, although he was adamant that what was found in his van was not a knife but was a multi-tool. The tool has a number of different tools within it, one of which was a blade which was about two and a half inches long. It could be retracted within the body of the tool by folding it back into the body. The tool itself folded into two halves. It also had long nose pliers which similarly folded into a handle. He agreed at the meeting, as did his union representative, that the tool ought not to have been in the vehicle at all. He said it had not been used since 2013. He claimed it had been left in a container in the van unused since then.

102. Mrs Keith was I consider entitled to make the findings she did given those admissions. The written notes of the meeting did not refer in detail to the full explanation given by the claimant, but Mrs Keith did have the audio recording to consider at the time she took her decision, and I accept the evidence of the claimant and Mr Crilley that that matter was raised by the claimant at the meeting. On that basis Mrs Keith would have been aware of it. When that matter was put to her in cross examination, she said that she did not believe that explanation. The repair of the van the claimant used was not his role, any repair was undertaken by the respondent. It ought not to have required work by the claimant, she considered. The tools required for his role were issued to him by the respondent, and he ought not to have used tools not so issued to him. He accepted that when asked, as did Mr Crilley. These were all factors that Mrs Keith was entitled to take into account, together with the other evidence on the other allegations which provided further evidence that supported this allegation.

103. The third allegation was in respect of the statement made by a witness described as Person X. It related to a knife with a blade, which was of a total length of about 6 to 8 inches. Clearly there were some difficulties with that evidence. It was anonymous. It was given in a redacted witness statement, with what was left being very limited. It had not in any event been particularly long prior to redaction. Some detail that might have been given, such as how close the person had been to see what was described, how he had come to know about the allegations by Ms Weir, and why he

had said nothing at the time, which was late May or early June 201 8, were not provided.

104. Guidance about the use of such evidence was given in ***Un food.*** It is not clear that all that guidance was followed to the letter, however it is guidance rather than statutory provision, and as it states matters depend on the facts of each case. All of the evidence in the case requires to be considered. In this case there is other evidence that provides support for the conclusions Mrs Keith reached, which amounts to a form of corroboration. When using that term it is important to stress that this is not used in the sense of the criminal law, but that there is some form of evidence that indicates that the statement given anonymously is likely to be reliable.

105. There are a number of elements of that support. Firstly, Mr Dougans had met the person. Secondly, he was satisfied that there was a genuine concern for the witness's well-being if his identity was revealed, and in the circumstances that is understandable. Thirdly, whilst there is clearly a possibility that the evidence was created by someone seeking to cause harm to the claimant after he became aware of the allegations involving Ms Weir, the evidence was supported by two further pieces of evidence, at least. The first is the finding of the multi- tool, which one could describe as a knife but is certainly bladed, in the claimant's van, which he ought not to have had there. The second is his admission to carrying a pen knife some years earlier, stating in effect that he did so for his own protection.

106. Had the evidence been only that of Person X I do not consider that that would have been sufficient as a basis for a finding of gross misconduct by a reasonable employer. But there was more than that as I have described, and there was I consider sufficient for Mrs Keith to believe that the evidence from Person X was to be believed.. The admission as to carrying a pen knife for protection was I considered particularly significant in this context.

107. It is relevant to state that the test is not that in the criminal courts of proof beyond a reasonable doubt, nor is it that of the civil courts of proof on the balance of probabilities. The standard is that of reasonableness of the

belief. There can be a range of views by reasonable employers as to how to deal with such a case, different but each one permissible for a reasonable employer. I seek to judge whether or not the respondent's actions were taken within that range. I consider that they were.

108. In light of the foregoing I concluded that there was a reasonable belief formed by Mrs Keith that the claimant had acted as alleged.

(c) Reasonableness of investigation

109. I considered that there was a reasonable investigation by Mr Dougans. It is notable that at the disciplinary hearing there was no suggestion to the contrary by the claimant or his representative, nor was that referred to as a part of his appeal. I consider also that the ACAS Code of Practice was followed.

(d) Procedure

110. In general terms I consider that the procedure followed was one that a reasonable employer could have decided upon, and again followed the ACAS Code of Procedure.

(e) Reasonableness of Penalty

111. In light of the findings made, I consider that it was at the least open to a reasonable employer to dismiss the claimant summarily. Mrs Keith in her rationale document specifically took into account the claimant's long service, and his record. She also considered action short of dismissal. The allegations made collectively however were serious ones. Had each one been considered in isolation the analysis may have been different, but they were not. It was appropriate to have regard to the entire picture presented by the evidence. What was most serious was the allegations of carrying a knife of some kind when working, when having such an item was both contrary to the instructions given, and potentially a source of danger. Of the three parts of the allegations in that respect, the claimant admitted to having done so four times between 201 3 and 201 4.

112. That is a significant admission, and I consider that a reasonable employer was entitled to regard it as destructive of trust. As Mrs Keith said in evidence, the seriousness of the risk was high. That risk was either to the

claimant himself, or to someone else. I cannot conceive of a situation when it would be appropriate for a person at work to carry any kind of knife supposedly for protection. Her evidence was that trust had been destroyed, and she had a genuine concern over the risk of a serious matter arising involving the claimant given all the circumstances.

113. I consider that a reasonable employer could have dismissed given the circumstances of the case. I have accordingly concluded that the decision taken by Mrs Keith to dismiss the claimant summarily was not unfair under section 98(4) of the Employment Rights Act 1996.

(f) Appeal

114. I consider that the appeal was conducted both reasonably and fairly. Mr Fleming considered in detail all that the claimant and his union representative said, and conducted further investigation himself. His conclusions were ones that he was entitled to reach. He considered matters at length, and set out his reasons in the rationale document. What was most significant for him was the position with the bladed items, on which there were three pieces of evidence, the admissions about carrying a pen knife earlier, the finding of the tool with a blade in the van, and the evidence of Person X. These together created a risk, in his opinion, and as a result of that risk he considered that the decision by Mrs Keith should be upheld. It was notable that he had also spoken with Mr Wallace who confirmed the contents of Ms Weir's statement at least in broad terms. The claimant had set out his position fully, including on why he had taken a pen knife with him, and what he said was his last use of the multi tool found in his van, and why and when that was.

115. It was also notable that Mr Fleming, unlike Mrs Keith, saw the unredacted statement of Person X. He was aware of who that person was, and considered that the evidence was capable of being relied on in light of that. That is further support for the finding made. Had there been any issue with the hearing before Mrs Keith and her decision, which there was not, I would have held that the appeal by Mr Fleming was sufficient to cure any such defect, and render the dismissal fair.

116. For completeness I will add that there was other evidence in relation to a local discussion, texts sent by the claimant, a Facebook post and related matters which I do not consider relevant to the case before me in light of the finding that there was no unfair dismissal, and the fact that they had not been before Mrs Keith at the time she took her decision. Had that not been the case they would have potentially been relevant to issues as to remedy.

Conclusion

117. The claimant was dismissed for the reason of his conduct. That is potentially a fair reason. The claimant was not unfairly dismissed under the terms of section 98(4) of the 1996 Act.

118. I require therefore to dismiss the claim.

Employment Judge: A Kemp
Date of Judgment: 4 November 2019
Entered in register: 6 November 2019
and copied to parties