



EMPLOYMENT TRIBUNALS

Claimant: Mr. B Pieniecki

Respondent: Fresh & Wild Limited

HELD AT: London South Employment Tribunal by CVP (Video)

On: 27 April 2022 and 28 April 2022

BEFORE: Employment Judge C M Macey - Sitting Alone

REPRESENTATION:

Claimant: In person

Interpreter: Mrs. K McCorkell (Polish/English)

Respondent: Mr. K Wilson, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

The complaint for unfair dismissal is not upheld and is dismissed. This means the Respondent fairly dismissed the Claimant.

REASONS

CLAIMS AND ISSUES

1. The Claimant, Mr. Pieniecki, was employed by the Respondent, Fresh & Wild Limited, as a Receiver until his dismissal without notice on 30 December 2019.
2. The Claimant claims that his dismissal was unfair within section 98 of the Employment Rights Act 1996. That on 6 December 2019 he was called a “dog” and a “nobody” by his supervisor and when he tried to reply he was restrained by his other colleague who misinterpreted the Claimant’s

behaviour. Then the Claimant tried to speak to the supervisor to apologise, but as a result he was dismissed.

3. The Respondent contests the claim. It says the Claimant was fairly dismissed for misconduct when he was verbally aggressive towards a work colleague during an altercation (to the extent that he had to be physically held back by another colleague), and it was entitled to terminate his employment without notice because of his gross misconduct.
4. The issues were agreed to be as follows:

Unfair dismissal

- 4.1 What was the reason for the Claimant's dismissal on 30 December 2019? The Respondent says that it was the Claimant's aggressive behaviour towards his supervisor Simon Tsegay on 6 December 2019.
- 4.2 Was the reason for the Claimant's dismissal a potentially fair one? The Respondent says it was a reason relating to the Claimant's conduct within the meaning of section 98(2)(b) Employment Rights Act 1996 ("ERA").
- 4.3 Did the Respondent have a genuine belief in the Claimant's misconduct?
- 4.4 Was the Respondent's belief in the misconduct a reasonable one, based on an investigation falling within the range of reasonable responses open to the Respondent?
- 4.5 Did the Respondent follow a reasonably fair procedure in dismissing the Claimant?
- 4.6 Was the dismissal a response to the Claimant's conduct that fell within the range of reasonable responses open to the Respondent?

Remedy Issues

- 4.7 Should any compensatory award awarded to the Claimant in respect of unfair dismissal be wholly or partially reduced because the dismissal would have occurred in any event regardless of any unfairness found (see **Polkey v AE Dayton Services Ltd [1987] UKHL 8**)? The Respondent said that the Claimant would have been dismissed in any event, therefore any award should be reduced by 100%.
- 4.8 Should any basic award or compensatory award be reduced in total or part because the Claimant wholly caused or contributed to his dismissal by his blameworthy conduct?

PROCEDURE, DOCUMENTS AND EVIDENCE HEARD

- 5 The form of this hearing was a remote hearing by CVP.
- 6 Because English is a second language for the Claimant and his witness, Mateusz Rzekec, the proceedings were interpreted for them by Mrs. K McCorkell.
- 7 Although this was an unfair dismissal claim (and there was no dispute about whether there had been a dismissal) the Claimant and his witness, Mateusz Rzekec, gave evidence first. I decided this was appropriate after discussing this with the Claimant and Mr. Wilson; due to the Claimant not having representation, with no knowledge of the procedure in a tribunal hearing and requiring the hearing to be interpreted.
- 8 There was a Bundle of Documents of 205 pages. There were written witness statements in a separate bundle. The Claimant and Mateusz Rzekec gave evidence for the Claimant. Ronan Doherty (Store Team Leader at the Respondent - though at the relevant time in December 2019 he was an Associate Store Team Leader) and Kate Combs (Store Team Leader at the Respondent), gave evidence for the Respondent. The Claimant also had a Schedule of Loss.
- 9 The Tribunal was also sent three CCTV clips copied as videos into three separate PowerPoint files. I viewed these files before hearing the evidence. I also instructed the Claimant and Mateusz Rzekec to watch the three CCTV videos prior to giving evidence. Both confirmed that they had watched them before they gave evidence, though Mateusz Rzekec commented the quality had not been good, with the videos stopping and starting. The Claimant later stated he had not been able to watch two of the videos, that there were only images on two of the PowerPoint files and not videos. Mr. Wilson confirmed that the Claimant had been emailed the exact same files that had been emailed to the Tribunal. At this point Mr. Wilson played all three videos in the remote hearing using the screenshare function.

FACTS

- 10 The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed Bundle of Documents.
- 11 The Claimant was employed by the Respondent between 16 February 2016 and 30 December 2019 as a Receiver, initially at Waltham Cross and then at the Dartford Distribution Centre from July 2019 [66-67]. The Respondent is a food retail business that trades under the name Whole Foods Market. It has approximately 1,000 employees in the United Kingdom and is part of a global corporation that is based in the United States. The Claimant was 32 at the date of his dismissal.
- 12 The Claimant had a written statement of terms and conditions of employment in a letter dated 12 February 2016 [49 – 53].

- 13 On 6 December 2019 after 5.00 am the Claimant attended work at the Dartford Distribution Centre warehouse. He saw Mateusz Rzekec (the Claimant's brother-in-law) and another work colleague, Roland Zojdz. They told the Claimant that their supervisor, Simon Tsegay (DC Shipment Supervisor), had made them perform duties beyond their professional qualifications. The Claimant decided to talk to Simon Tsegay.
- 14 The Claimant gave evidence that when he spoke to Simon Tsegay about these issues that Simon Tsegay spoke to him in an insulting tone and called the Claimant a "dog" and a "nobody". I accept the Claimant's evidence on these points. In cross-examination the Claimant admitted that he had called Simon Tsegay a lazy bastard after Simon Tsegay had called him a "dog" and a "nobody", that the Claimant lost his temper and that they were both shouting at each other.
- 15 The Claimant was adamant in his evidence that although Mateusz Rzekec was holding him back during the exchange that he had no intention to hit Simon Tsegay. Mr. Rzekec gave evidence that he had been holding the Claimant because Simon Tsegay was provoking the Claimant. Mr. Rzekec also confirmed in cross-examination that the Claimant was trying to break free.
- 16 Mr. Doherty gave evidence that in the first CCTV video clip Simon Tsegay enters the loading bay and the Claimant approaches Simon Tsegay. They speak for a few seconds and then Simon Tsegay tries to walk away from the Claimant. The Claimant follows Simon Tsegay and continues to try to speak to him while pointing at Mr. Rzekec, himself and Simon Tsegay. Mr. Rzekec then stands between the Claimant and Simon Tsegay and the Claimant attempts to push past Mr. Rzekec. At that point Mr. Rzekec then holds the Claimant by gripping his upper arms and pushing him backwards, they then all go off-screen.
- 17 Mr. Doherty also gave evidence that in the second CCTV video clip the Claimant is still being held back by both Mr. Rzekec and Artur Ptak with their hands on the Claimant's chest and upper arms to push him backwards and the Claimant pushes past them and starts jabbing his finger towards Simon Tsegay. The Claimant gave evidence that he was gesticulating because his English is not very good. I find that the content of the two CCTV video clips is consistent with Mr. Doherty's description.
- 18 It is also clear from the CCTV video clips that this altercation was in the loading bay where there were forklift trucks and stacked pallets close by.
- 19 I also find that even if the Claimant's subjective intention was not to hit Simon Tsegay his colleagues, Mateusz Rzekec and Artur Ptak, clearly acted in a manner that demonstrated that they were concerned that the Claimant could physically attack Simon Tsegay. The Claimant in cross-examination suggested Mateusz Rzekec was holding the Claimant back because Mateusz Rzekec did not want the Claimant and Simon Tsegay to shout at each other. I do not find this a plausible explanation of Mateusz Rzekec's actions. I find that Mateusz Rzekec was concerned that the Claimant could have physically attacked Simon Tsegay.

- 20 The Claimant also gave evidence that Simon Tsegay was not avoiding the confrontation. On cross-examination he did not accept that Simon Tsegay attempted to walk away. The first CCTV video clip does show the Claimant and Simon Tsegay having a brief conversation for a few seconds and then Simon Tsegay attempts to walk away. I find, however, that this was before the incident had escalated. I also find that once the incident had escalated to the point where the Claimant was being held back by Mateusz Rzekec Simon Tsegay was not attempting to leave the argument or confrontation.
- 21 The Claimant's evidence was that after this he left the warehouse. The second CCTV video clip at the end does show the Claimant leaving the warehouse and I accept that he did leave the warehouse before returning to the warehouse office.
- 22 The Claimant's evidence was that he thought the whole situation over and then he went to the warehouse office to talk calmly with Simon. That he, Mateusz Rzekec and Artur Ptak entered the office and that he saw that Simon Tsegay was on the telephone to the police. The Claimant wanted to apologise to Simon Tsegay, but Simon Tsegay did not want to listen to him so, he left the warehouse office and returned to his duties. Mr. Rzekec's evidence was that the Claimant wanted to say sorry, he did not want to lose his job and that he wanted to make it better.
- 23 In cross-examination Mr. Rzekec conceded that the Claimant was stressed and uptight and was maybe swearing in Polish on the way to the warehouse office, but that the Claimant was speaking more to him than anyone else at that point. I find that the Claimant was still upset and swearing in Polish on his way to the office, although this was not directed at Simon Tsegay.
- 24 Mr. Doherty described the third CCTV video clip in his evidence as showing the Claimant and Mateusz Rzekec entering through the warehouse office reception into the warehouse office where Simon Tsegay allegedly was, but that it is not possible to be certain that Simon Tsegay was in the office in this clip. Artur Ptak follows and watches from the door of the office and Roland Zojdz watches through the window from the office reception. I find that Mr. Doherty's description does match the third CCTV video clip. I also find that the Claimant was not being held back by Mateusz Rzekec when he walked into the warehouse office.
- 25 Mr. Rzekec accepted in cross-examination that while he and the Claimant were in the warehouse office the Claimant did shout "liar" several times, but that he shouted this so that the policeperson on the other end of the telephone could hear. The Claimant also conceded on cross-examination that he shouted "liar" when he was in the warehouse office. I find that it was the Claimant's intention to apologise to Simon Tsegay when he went to the warehouse office, that he did try to apologise to Simon Tsegay and Simon Tsegay ignored him because he was on the telephone with the police. I also find that the Claimant was shouting "liar" repeatedly when he was in the warehouse office. Even if the Claimant's subjective intention for shouting was so that the policeperson at the other end of the telephone could hear him, Simon Tsegay's experience of the incident would have been the Claimant shouting at him for a second time.

- 26 The police attended and spoke to Simon Tsegay and the Claimant. The police issued the Claimant with a Kent Police Community Resolution Record [70].
- 27 At 7.15 am on 6 December 2019 Ian Geddes (the Respondent's Facilities Team Leader) suspended the Claimant on full pay [76]. Simon Tsegay was also suspended on full pay [73] on 6 December 2019.
- 28 On 6 December 2019 Ian Geddes conducted a preliminary investigation by speaking to the team members who were present in the Dartford Distribution Centre at the time of the incident. Ian Geddes spoke to Slovek Kusstal [81], Adrian Pack [82], Mateusz Rzekec [83-84], Roland Zojdz [85] and Edmund Akyaw Osei-Wsu [86]. Ian Geddes also took a statement from the Claimant [74-75] and the Claimant confirmed in cross-examination that it was the statement he provided to Ian Geddes. In this statement the Claimant alleged Simon Tsegay had said, in reference to the Claimant, "*we are like dogs*" he then went on to state "*He [Simon Tsegay] tried to provoke me so I lost my temper*".
- 29 Ian Geddes also received an email from Artur Ptak on 6 December 2019 [78]. This email is from Artur Ptak's work email address at the Respondent. 6 December 2019 was the last day that Artur Ptak worked for the Respondent.
- 30 Simon Tsegay also sent an email to Ian Geddes [71] about the incident.
- 31 Other than the statement of Mateusz Rzekec [83-84] there is nothing in the evidence or the documentation to confirm whether the statements and the emails sent to Ian Geddes were given to the Claimant prior to the formal investigation or disciplinary hearing. Mr. Doherty did not know if they had been sent to the Claimant. Mr. Doherty confirmed the usual procedure would be for copies to be made on the day and then be given to the team member. Unfortunately, Ian Geddes did not give evidence to the Tribunal. In the absence of evidence confirming that they were given to the Claimant I conclude that the Claimant did not receive the statements or the emails (other than Mateusz Rzekec's statement [83-84]) from the preliminary investigation prior to the formal investigation and disciplinary hearing.
- 32 James Morrissey (Seafood Team Leader) then conducted the formal investigation. On 11 December 2019 James Morrissey held separate investigation meetings with the Claimant [92-101] and Simon Tsegay [102-117]. The first meeting was with Simon Tsegay and the second meeting was with the Claimant.
- 33 During the investigation meeting on 11 December 2019 the Claimant was asked to comment on what was happening in the three CCTV video clips. The Claimant stated in the investigation meeting that he had been unable to play the third CCTV video clip. This suggests that the Claimant was sent the three CCTV video clips before the investigation meeting. It is not clear from the notes of the investigation meeting [92-101] whether all three CCTV video clips were shown to the Claimant during the meeting itself. The notes indicate that the third CCTV video clip was played during the investigation meeting. Mr. Doherty gave evidence that the Claimant was shown the

CCTV video clips as part of the investigation and asked to comment on them. It's also clear from the investigation notes that the Claimant is commenting on specific aspects of the three CCTV video clips. I find that the Claimant was shown all three CCTV video clips as part of James Morrissey's investigation.

- 34 The Claimant in the investigation meeting explained that he had refused to work a Saturday when asked to do so by Simon Tsegay and that he thought Simon Tsegay was humiliating Mateusz Rzekec and discriminating against Mateusz Rzekec because of this. In the investigation meeting the Claimant said during the conversation Simon Tsegay had called him a "dog" and that he had provoked the Claimant further by saying "come on hit, come on". During this investigation meeting the Claimant could not recall calling Simon Tsegay a "lazy bastard", that he was gesticulating because his language (English) is not very good, and that he went to the warehouse office to apologise to Simon Tsegay.
- 35 James Morrissey questioned the Claimant about a previous incident with another employee. In the investigation meeting the Claimant explained he had asked the other employee about why there was a lot of mess everywhere. The other employee had alleged the Claimant had been aggressive. The Claimant explained that Chernelle [Philp] had investigated "*and we sorted everything out*".
- 36 The investigation notes indicate that the Claimant was asked if he remembered doing the Respectful Workplace Training. The Claimant could not remember. James Morrissey indicated the Claimant had signed a record confirming that he had watched the training video. This record [65] is dated 24 January 2018.
- 37 Simon Tsegay in his investigation meeting [102-117] said the following about the incident: that the Claimant had approached him to talk about the Claimant's brother; Simon Tsegay indicated he did not know who that was, and the Claimant then pointed at Mateusz Rzekec; Simon Tsegay then said "*Matt can talk for himself*"; the Claimant then shouted "*why are you having a problem with my brother?*"; Simon Tsegay had then replied that Mateusz Rzekec was his team member and that he was his supervisor and that "*you have no right to talk on behalf of another team member because it's none of your business*"; that Simon Tsegay had attempted to walk away at that point but the Claimant had followed him; that Simon Tsegay had remained calm; that the Claimant had been "*yelling, insulting me, cursing me and threatened that he would finish me. Verbally he assaulted me with so many faulty words screaming in front of our customers, suppliers and other team members that I am a lazy bastard...*"; and that if Mateusz Rzekec and Artur Ptak had not stopped the Claimant the Claimant would have physically assaulted him.
- 38 Simon Tsegay (in the investigation meeting) then said the following about the incident in the warehouse office: that he had felt scared and went into the office to calm down; that the Claimant was trying to get into the office, but his colleagues were trying to stop him; that the Claimant was still shouting and insulting Simon Tsegay and that is when Simon Tsegay decided to telephone the police.

- 39 The notes of the investigation meeting show James Morrissey asking Simon Tsegay why the Claimant may have thought that Simon Tsegay had a problem with Mateusz Rzekec. Simon Tsegay explained in the investigation meeting that he had given Mateusz Rzekec constructive feedback because *“he refuses to take instructions or duties that I have assigned to him to help another TM, Roland...”*.
- 40 The notes of the investigation meeting also show that James Morrissey asked Simon Tsegay *“you had a few opportunity to walk away and I would like to know why you didn’t?”* Simon Tsegay replied *“I was trying to make him understand that it wasn’t the right way to talk. I was still calm – I told other TMs to leave him and not to hold him – I was trying to leave but he blocked my way – I couldn’t get back.”*
- 41 James Morrissey also re-interviewed Edmund Osei-Wsu [120-121] and Roland Zojdz [122-123] on 19 December 2019. Roland Zojdz in his statement dated 19 December 2019 said that Simon Tsegay had used an aggressive tone when telling the Claimant that he should not get involved and that he [Simon Tsegay] is the supervisor of nights. Roland Zojdz further stated *“And then Simon said to Bartek [the Claimant] that he is nothing and Bartek did not like what he heard so Bartek tried to hit Simon. Simon walked up to Bartek and said hit me and proceeded to repeat that a couple of times which made Bartek even more angry”*.
- 42 In respect of what happened in the warehouse office Roland Zojdz said in his statement of 19 December 2019 [122-123] *“...Simon was talking to the police over the phone and then Bartek walked inside the office and went to speak to Simon, Bartek asked Simon a couple of questions calmly, Simon did not reply and kept talking to the police. Then Bartek walked off...”*
- 43 James Morrissey did not re-interview Slovek Kusstal, Adrian Pack, Mateusz Rzekec or Artur Ptak. James Morrissey did not give evidence to the Tribunal. Mr. Doherty’s evidence was Mateusz Rzekec may not have been re-interviewed because he is the Claimant’s brother-in-law, and that Artur Ptak had left both the Respondent and the country.
- 44 Mr. Doherty did not know what efforts were made by James Morrissey to contact Artur Ptak or whether the Claimant had given Artur Ptak’s telephone number and/or email address to Ian Geddes or James Morrissey. Mr. Doherty confirmed that the Claimant never gave Artur Ptak’s contact details to him. Ms. Combs also did not know what efforts were made to contact Artur Ptak and confirmed that the Claimant never gave Artur Ptak’s contact details to her.
- 45 In cross-examination the Claimant did not accept that Artur Ptak’s evidence to the investigation/ disciplinary would have merely confirmed that the Claimant was provoked. The Claimant confirmed that Artur Ptak had been present throughout in both the loading bay and later in the warehouse office. That Artur Ptak would have told the truth about what had happened. From the evidence of Mr. Doherty about the three CCTV video clips, and the CCTV footage itself, it is clear that Artur Ptak did witness both the incidents in the loading bay and the warehouse office.

46 The Respondent has a Disciplinary Policy which is in the "Team Member's Handbook". An extract of the Disciplinary Policy was in the bundle [54-64]. The Claimant confirmed in cross-examination that he received a copy of the Team Member's Handbook when he started his employment and that it could also be accessed on the Respondent's Intranet.

47 Under the section headed "*Gross Misconduct*" [56-57] a number of examples of gross misconduct are listed, three of these are: "*Physical violence (actual or threatened), bullying, or behaviour which provokes violence; Inappropriate conduct or assault (whether verbal or physical) against a colleague, customer or supplier of the Company;*" and "*Obscene language or other offensive behaviour*".

48 The Disciplinary Policy also states [56] "*Gross misconduct is a serious breach of contract and includes misconduct which in our opinion is likely to prejudice our business or reputation or irreparably damage the working relationship and trust between employer and employee. Gross misconduct will be dealt with under our Disciplinary Procedure and will normally lead to dismissal without notice or pay in lieu of notice (summary dismissal).*"

49 Mr. Doherty invited the Claimant to a disciplinary hearing by letter of 20 December 2019 [124-125], setting out the allegations as:

"It is alleged that on the 6th December 2019 you went to have a conversation with Simon Tsegay regarding possible operation issues on the night shift. It is alleged that this conversation quickly turned aggressive and that you had to be restrained by some of your colleagues so that you would not physically harm Mr Tsegay. The witness statement all confirmed that the situation was enflamed by some of the language used by Mr Tsegay during that encounter. I also note that you do not deny having reacted aggressively because of the tone and language that was used to address you on that occasion. I also note that your last respectful Workplace training took place 24th January 2018 but that you also confirm that you do not recall attending the training."

50 The letter stated that the allegations could amount to a breach of the implied contractual term of trust and confidence between employer and employee.

51 It further stated:

"I must notify you that if the allegations are substantiated disciplinary action may be taken including summary dismissal."

52 The letter also enclosed the investigation notes with the Claimant dated 11 December 2019 [92 – 101], the investigation notes with Simon Tsegay dated 11 December 2019 [102-117], Mateusz Rzekec's statement dated 6 December 2019 [83-84], the investigation notes with Roland Zojdz dated 19 December 2019 [122-123], the investigation notes with Edmund Osei-Wsu dated 19 December 2019 [120-121] and the Respectful workplace training record dated 24 January 2018 [65]. The letter also confirmed that the CCTV footage would be available for the Claimant to view again before the

disciplinary hearing if he wished to do so. The letter also referred the Claimant to the disciplinary policy in the employee handbook.

- 53 Mr Doherty's evidence was that on or around 20 December 2019 Mr Doherty was provided with the following documents:
- 53.1 The Claimant's investigation notes dated 11 December 2019 [92-101];
 - 53.2 Simon Tsegay's investigation notes dated 11 December 2019 [102-117].
 - 53.3 Mateusz Rzekec statement dated 6 December 2019 [83-84];
 - 53.4 Roland Zojdz's statement dated 19 December 2019 [122-123];
 - 53.5 CCTV footage of the events; and
 - 53.6 The Respectful Workplace training record dated 24 January 2018.
- 54 Mr Doherty's evidence was that whilst he was considering the disciplinary, he also collected the following documents:
- 54.1 Simon Tsegay's account by email on 6 December 2019 [71-72];
 - 54.2 The Claimant's statement on 6 December 2019 [74-75];
 - 54.3 Slovek Kusstal's statement dated 6 December 2019 [81];
 - 54.4 Artur Ptak's email dated 6 December 2019 [78];
 - 54.5 Adrian Pack's witness notepaper dated 6 December 2019 [82];
 - 54.6 Roland Zojdz's statement dated 6 December 2019 [85];
 - 54.7 Edmund Osei-Wsu's statement on 6 December 2019 [86];
 - 54.8 Ian Geddes email dated 9 December 2019 [79-80]; and
 - 54.9 Edmund Osei-Wsu's witness notes on 19 December 2019.
- 55 The Claimant's disciplinary hearing took place on 23 December 2019. Mr Doherty was accompanied by a notetaker (Adriana Zarecka), and the Claimant was accompanied by a translator (Jacek Biskup). I have the notes in the Bundle [128 -132].
- 56 During the disciplinary hearing Mr Doherty showed the three CCTV video clips to the Claimant.
- 57 Mr Doherty's evidence was that the Claimant in the disciplinary hearing explained that he felt that he had been provoked by Simon Tsegay in the loading bay including by calling him a dog and raising his voice. Mr Doherty's evidence was that the Claimant did not deny his behaviour nor some of the comments that Simon Tsegay had alleged the Claimant had said.
- 58 The notes of the disciplinary hearing do state the Claimant said that Simon Tsegay had called him a "dog" and had said "hit me". The notes of the disciplinary hearing also show Mr Doherty asked the Claimant "If Matt didn't stop you, would you hit him?", the Claimant replied, "I don't know, I was really angry".
- 59 The notes also show Mr Doherty asked the Claimant "At any point of your conversation with him, have you told him "you are lazy bastard"?" The Claimant replied "Maybe". Mr Doherty also asked the Claimant "At any point of your conversation with him, have you told him "you are useless"?" and the Claimant replied "I doubt this. I haven't even known this word until now."

- 60 I accept Mr Doherty's evidence that during the disciplinary hearing the Claimant did not deny that he had called Simon Tsegay a lazy bastard. The notes of the disciplinary hearing also confirm that the Claimant admitted that he was really angry during the incident.
- 61 When Mr Doherty showed the Claimant the second CCTV video clip the Claimant explained *"He started shouting at me and then I shouted at him. And then this section he is saying " Hit Me" Hit Me" and "you see you are in trouble"*.
- 62 The Claimant's comments on the third CCTV video clip during the disciplinary hearing were *"I am going to Simon and I wanted to speak to him. I saw him on the phone to police. I said to him I am sorry for my explosion. But he ignored me and keep talking on the phone, "come in please help me" So I walk away and carry on walking"*.
- 63 Mr Doherty also questioned the Claimant about why the Claimant felt he needed to speak to Simon Tsegay about Mateusz Rzekec. The Claimant answered *"I feel they are picking on my brother-in-law. He would schedule Edmund for all weekend off, or schedule more people off at the same time and then struggle to cover the workload. When Matt request time off, he is always refused. I think they are discriminating him"*. The Claimant also confirmed that Ian Geddes (the Claimant's supervisor) was aware of this and *"went to night shift and spoke to people..."*.
- 64 Mr Doherty gave evidence that during the disciplinary hearing he asked the Claimant about the Respectful Workplace Training, but that the Claimant had said he thought that he had signed the form but never watched the video, and that if he had watched the video his English was not very good at that time. The notes of the disciplinary hearing correspond with this description, and I accept Mr Doherty's evidence on this point.
- 65 Mr Doherty gave evidence that during the disciplinary hearing the Claimant said the situation would not happen again and he had learnt his lesson. The notes of the disciplinary hearing show Mr Doherty asked, *"If this situation was going to happen again, how would you behave?"* The Claimant replied *"It would never happen again. I have learnt my lesson. I cannot afford to do it again because I am a father and have responsibilities."* I accept Mr Doherty's evidence on this point.
- 66 Mr Doherty's evidence was that although during the disciplinary hearing he asked the Claimant about the previous incident with another employee because there was no investigation or follow-up with the Claimant, Mr Doherty did not take this alleged previous incident into account when he later made his decision to dismiss the Claimant. I accept Mr Doherty's evidence on this point.
- 67 The notes show that close to the end of the disciplinary hearing on 23 December 2019 Mr Doherty read an email from Simon Tsegay [71] which amongst other allegations had said *"While I was on the phone with the police he was calling me liar and F words shouting at me many times"*. Mr Doherty asked the Claimant to comment on it. The Claimant's answer was, *"I did call him Liar once when I was in the office. I wasn't aggressive towards him."*

Before walking into office I was swearing outside office in Polish. Nobody stopped me when walking into office. I raised the voice when saying he is a liar so that policeman can hear it.” Mr Doherty drew my attention to the fact the Claimant had admitted during the disciplinary hearing that he had said “liar” with a raised voice when he was in the warehouse office when I was questioning Mr Doherty about the procedure.

- 68 Mr Doherty adjourned the disciplinary hearing pending further investigation. He decided he wanted to clarify what had happened in the warehouse office area. He decided he wanted to speak to Roland Zojdz because when the Claimant was in the office with Simon Tsegay Roland Zojdz had been watching through the window and he was the only impartial witness. Mr Doherty did not speak to Mateusz Rzekec again because he did not think he would be impartial.
- 69 Mr Doherty spoke to Roland Zojdz on the telephone on 30 December 2019 to ask him some final questions about how the Claimant had behaved in the warehouse office. The note of this conversation with Roland Zojdz [142] indicates that Roland Zojdz said, *“Simon was in the office on the phone when Bartosz and Matt walked in, Simon was shouting “he is a liar” over and over at Simon while he was on the phone”*. Mr Doherty then asked Roland Zojdz whether the Claimant walked into the office in a calm manner or shouting. Roland Zojdz replied *“Bartosz was first shouting as he entered the office but after a few moments was quiet and started to ask Simon questions, but I didn’t hear what they were.”*
- 70 The note [142] also states that Mr Doherty asked Roland Zojdz whether he had heard the Claimant apologise to Simon Tsegay. Roland Zojdz replied *“Bartosz was trying to speak with Simon but I didn’t hear his apologies.”*
- 71 In the note [142] Mr Doherty also asked about the incident in the loading bay and what Simon was saying while the Claimant was angry. Roland Zojdz replied, *“Simon was saying to Bartosz “hit me, hit me” which made Bartosz more angry”*. Mr Doherty asked, *“Did Simon say anything else?”* Roland Zojdz replied, *“He was saying something but I didn’t hear it.”*
- 72 On being questioned Mr Doherty accepted that the note of this telephone conversation with Roland Zojdz on 30 December 2019 [142] was not given to the Claimant before the reconvened disciplinary hearing. Mr Doherty could not remember when the note was given to the Claimant, but he said it may have been later that day (30 December 2019). I find that the Claimant did not have a copy of the telephone conversation [142] either before or during the reconvened disciplinary hearing and that it was given to him later on 30 December 2019 after the reconvened disciplinary hearing had finished.
- 73 The reconvened disciplinary hearing took place on 30 December 2019. Mr Doherty was accompanied by a notetaker (Adriana Zarecka), and the Claimant was accompanied by a translator (Jacek Biskup). I have the notes in the Bundle [147-148].
- 74 Mr Doherty gave evidence that during the reconvened disciplinary hearing he explained to the Claimant what Roland Zojdz had said to him during their telephone call on 30 December 2019. That in response to Roland Zojdz

saying that the Claimant had shouted in the office the Claimant did not deny this, but that he did not remember if he had apologised first and then shouted liar so that the police could hear, or whether it was the other way around. Mr Doherty's evidence was that the Claimant in this reconvened disciplinary hearing did not deny that he had shouted in the office at all.

- 75 The notes of the reconvened disciplinary hearing show that Mr Doherty said, *"I've spoken to Roland about the situation in loading bay and in the office. I did it on the phone. Can give you the copies later. So Simon said that you came to the office and yell "liar" so Roland was at the office window and hear you when you were in the office. He say he heard you shouting at Simon and then went quiet and left. On your statement you said you went in and went to apologise. Simon said that you never apologized and shouting" Liar ,Liar". Roland also just heard you shouting, not apologizing."*
- 76 The notes show the Claimant replied *"I don't remember exactly the course of event if I apologized first and then shouted in the space, so that police can heard me on the phone when I said Simon is a liar. But could have been another way around."*
- 77 I accept Mr Doherty's evidence that during the reconvened disciplinary hearing the Claimant accepted that he had shouted "liar" while in the warehouse office.
- 78 Mr Doherty's evidence was that after he spoke to Roland Zojdz, he believed that the Claimant had been provoked by something that Simon Tsegay had said to the Claimant. He did not know whether Simon Tsegay had called the Claimant a "dog", because none of the other team members heard Simon Tsegay saying this and Simon Tsegay denied saying it.
- 79 The notes also confirm that Mr Doherty's view of the loading bay incident was that the Claimant had been provoked. The notes indicate that Mr Doherty said *"Roland confirmed that you were provoked. Based on what Roland said I agree that on the footage we cannot hear anything, but we can clearly see you were provoked. It's my belief that he must have said something to provoke you."*
- 80 Mr Doherty made the decision to dismiss the Claimant during the reconvened disciplinary hearing after he had discussed Roland Zojdz's comments in the telephone call of 30 December 2019 [142] with the Claimant. Mr Doherty's evidence was that he concluded, even though the Claimant had been provoked in the loading bay by Simon Tsegay, that the Claimant's behaviour was inappropriate and that because the Claimant went into the warehouse office shouting again at Simon Tsegay on a second occasion that he should be dismissed. Mr Doherty's evidence was that he did consider the following mitigating points: that the Claimant was sorry; that he had promised that it would not happen again; and that the Claimant had been provoked by Simon Tsegay.
- 81 The notes of the reconvened disciplinary hearing show Mr Doherty said to the Claimant *"Looking at the CCTV footage, it looks like you were triggered by something Simon said. If that was the only occasion when you get triggered I would understand, but the fact that you went to the office again,*

shouting as Roland verified and because you had the situation on the shop floor just amplifies the situation. And put Simon in a difficult situation. So taking those two into account it will make the situation a lot worse. Based on these two occasions I have no other option but to dismiss you."

- 82 The Claimant gave evidence that the Respondent had said to him they could give the Claimant a final warning if there had only been one situation that had happened, but that they could not give a final warning because two of them had happened. Mr Doherty's evidence was that he had explained to the Claimant that had it been a single incident he would have considered giving him a final warning but because there were two instances when he raised his voice towards Simon Tsegay, which seemed like threatening behaviour, he decided dismissal was appropriate.
- 83 The notes of the reconvened disciplinary hearing show Mr Doherty said, "*If it was the single incident when you confront Simon, I would consider giving you final warning. But because there are two instances when you raised the voice at Simon, which seemed like threatening behaviour, I decided for dismissal.*" The notes do correspond with Mr Doherty's evidence, and I accept Mr Doherty's evidence on this point.
- 84 Mr Doherty's evidence was that he thought he probably would have dismissed the Claimant for the incident in the loading bay in any event due to the Claimant's unacceptable behaviour. In cross-examination Mr Doherty said that if he had removed the incident in the warehouse office from his decision, he still would have dismissed the Claimant. In cross-examination Mr Doherty explained he had not said he would give the Claimant a final warning for one incident, but that he would consider giving the Claimant a final warning. I accept Mr Doherty's evidence that he only would have considered a final warning for one incident.
- 85 Mr Doherty informed the Claimant of his right to appeal in the reconvened disciplinary hearing.
- 86 It was not entirely clear from Mr Doherty's evidence-in-chief (i.e., his written witness statement) which statements or documents Mr Doherty used to reach his decision to dismiss the Claimant.
- 87 In cross-examination Mr Doherty said that in coming to his decision he considered all the statements and all the CCTV video footage. Mr Doherty confirmed that he used all the statements that James Morrissey had collected as part of his investigation, including the investigation meetings with the Claimant [92-101] and with Simon Tsegay [102-117].
- 88 When I questioned Mr Doherty on which of the statements collected by Ian Geddes Mr Doherty had relied, he confirmed he had used Roland Zojdz's statement dated 6 December 2019 [85] and Edmund Osei – Wsu's statement dated 6 December 2019 [86]. On re-examination he stated he had also considered the contents of Mateusz Rzekec's statement dated 6 December 2019 [83-84].
- 89 I find that in reaching his decision Mr Doherty did consider some of the statements that Ian Geddes had collected, these being the statements of

Roland Zojdz [85], Edmund Osei-Wsu [86] and Mateusz Rzekec [83-84]. Though given Mr Doherty's evidence that Mateusz Rzekec may not have been an impartial witness of the events I find that he attached less weight to this statement compared to the others.

90 In addition, I find that he also considered the statements James Morrissey took from Roland Zojdz dated 19 December 2019 [122-123] and Edmund Osei-Wsu dated 19 December 2019 [120] and the investigation meetings on 11 December 2019 with the Claimant [92-101] and with Simon Tsegay [102-117].

91 It is clear from Mr Doherty's evidence that he did also consider what Roland Zojdz had told him in their telephone call on 30 December 2019 [142].

92 Mr Doherty sent a letter by recorded delivery dated 30 December 2019 [149-150] confirming and explaining his decision to dismiss the Claimant. The letter states:

"This letter confirms that after careful consideration of all the facts, and having taken into account your comments, I have decided to summarily dismiss you on 30/12/2019 by reason of gross misconduct for Inappropriate conduct towards Simon Tsegay on 2 separate occasions, 1 in the loading bay where you were physically threatening and needed to be restrained and 1 in the Office area where you entered the office area shouting at him.

The above reasons constitute the following definitions of Gross Misconduct as outlined in your Team Member Handbook:

Inappropriate conduct or assault (whether verbal or physical) against a colleague and Physical violence (actual or threatened)."

93 Mr Doherty also held disciplinary hearings with Simon Tsegay on 23 December 2019 [133-139] and 30 December 2019 [143-146]. Simon Tsegay was also summarily dismissed [151].

94 The Claimant appealed against his dismissal by letter dated 2 January 2020 [157]. His grounds of appeal were as follows: that the witness notes taken from Roland Zojdz on 19 December 2019 and 30 December 2019 did not match; that it was incompetent to take the second witness note from Roland Zojdz over the telephone because it could have been anyone; and that the investigation was not actioned soon enough as Artur Ptak was not questioned before he left the business and the Claimant felt that he was a key witness in the situation which happened in the warehouse office.

95 Ms Combs invited the Claimant to the appeal hearing by a letter dated 6 January 2020 [163]. In this letter the Claimant was informed that he had a right to be accompanied to the appeal hearing.

96 Ms Combs heard the appeal on 8 January 2020. Her decision was to reject the appeal [184-185]. I have the notes of the appeal hearing [164 -169]. The notetaker was Moha Wamaoui. The Claimant was not accompanied and did not have a translator.

- 97 Ms Comb's evidence was that her role was to specifically consider the points of appeal that had been raised by the Claimant, it was not to re-hear the disciplinary.
- 98 Ms Combs gave evidence that before the appeal hearing she was sent a pack of documents which contained the following:
- 98.1 The letter dated 30 December 2019 to the Claimant confirming his dismissal [149-150].
- 98.2 The notes of the disciplinary hearings with the Claimant on 23 December 2019 [128 - 132] and 30 December 2019 [147-148].
- 98.3 The notes of the investigation meeting with the Claimant on 11 December 2019 [92 – 101].
- 98.4 The notes of the investigation meeting with Simon Tsegay on 11 December 2019 [102-117].
- 98.5 Mateusz Rzekec's witness statement dated 6 December 2019 [83-84].
- 98.6 Roland Zojdz's witness statement dated 19 December 2019 [122-123].
- 98.7 The CCTV footage of the events.
- 98.8 The Respectful Workplace Training record dated 24 January 2018 [65].
- 98.9 Simon Tsegay's email account on 6 December 2019 [71].
- 98.10 The Claimant's statement on 6 December 2019 [74-75].
- 98.11 Artur Ptak's email dated 6 December 2019 [78].
- 98.12 Roland Zojdz's witness statement dated 19 December 2019 [85].
- 98.13 Ian Geddes' email dated 9 December 2019 [79-80].
- 98.14 The notes of Simon Tsegay's disciplinary hearings dated 23 December 2019 [133-139] and 30 December 2019 [143-146].
- 99 Ms Combs confirmed that she did review the pack of documents and the CCTV footage, and then she asked the Claimant further questions in the appeal hearing. Ms Combs confirmed that she mostly considered the documents from James Morrissey's investigation when conducting the appeal.
- 100 Ms Combs checked the three grounds of appeal with the Claimant at the start of the appeal hearing. In relation to the statement of Roland Zojdz dated 19 December 2019 [122-123] not matching the telephone note on 30 December 2019 with Roland Zojdz [142] the Claimant explained in the appeal hearing that in the statement on 19 December 2019 Roland Zojdz states the Claimant went to the warehouse office to speak with Simon Tsegay. But that on 30 December 2019 Roland Zojdz said the Claimant went to the office being aggressive and that the Claimant shouted at Simon Tsegay. The Claimant asked, "*Why is he changing his mind three weeks later?*".
- 101 In the appeal hearing the Claimant explained that he thought that it was incompetent to take a statement over the telephone because it could be anyone. Ms Combs asked whether the Claimant had any reason to believe that it had not been Roland Zojdz when Mr Doherty had called Roland Zojdz's telephone number. The Claimant's only answer was, "*so why did he change his statement?*". The Claimant again explained that he went to the warehouse office to apologise to Simon Tsegay, but that Simon Tsegay was already on the telephone when the Claimant entered the office, that the Claimant was trying to apologise for losing his temper earlier, but that Simon Tsegay was already on the telephone.

- 102 During the appeal hearing the Claimant also explained that it was not just him and Simon Tsegay in the warehouse office, Mateusz Rzekec and Artur Ptak had been there too.
- 103 In respect of Artur Ptak not been asked to give a statement the Claimant confirmed in the appeal hearing that Artur Ptak had worked on the day shift on 6 December 2019 and that had been Artur Ptak's last day with the Respondent.
- 104 The appeal hearing notes also show that the Claimant raised again the issues about Simon Tsegay that he had raised with James Morrissey on 11 December 2019 concerning the Claimant's refusal to work on a Saturday for Simon Tsegay and that was why Simon Tsegay was picking on the Claimant's brother-in-law (Mateusz Rzekec).
- 105 Ms Combs also asked the Claimant about the incident in the loading bay and the Claimant accepted that he did have to be physically restrained by Mateusz Rzekec, the Claimant also explained that Simon Tsegay "*had been provoking me and saying hit me while smiling.*"
- 106 Ms Combs decided that Mr Doherty's decision to summarily dismiss the Claimant was entirely reasonable and the right response to the Claimant's conduct.
- 107 In her evidence Ms Combs explained that in respect of the alleged change in Roland Zojdz's account between 19 December 2019 and 30 December 2019 Ms Combs partially upheld that Roland Zojdz had changed his statement and that she had also considered a typing error in the notes. But that she did not believe that these discrepancies negated the fact that the Claimant had to be restrained and could have caused harm to another team member.
- 108 The appeal letter [184-185] on this ground states:
- "Following our meeting, I have thoroughly Investigated the points you raised and have set out my findings below."*
- "Witness notes taken from Roland Zojdz (on the 19 and 30 December) didn't match.
30 December via phone that Roland Zojdz meant Bartosz was shouting he is a liar over and over at Simon as how could Simon shout at Simon. Whilst I am unsure as to if it was a simple mistake on Ronan's part whilst typing, it still doesn't negate the fact that you had to be restrained and you very clearly could have caused physical harm to another Team Member. Upheld."*
- 109 The appeal letter does not go into the same level of detail as Ms Combs evidence to the Tribunal. In cross-examination Ms Combs accepted that Roland Zojdz's statement on 19 December 2019 and the telephone note with Roland Zojdz on 30 December 2019 did have a little bit of a difference. I questioned Ms Combs about the reasoning of the appeal decision, and she confirmed that the typing error in the telephone note with Roland Zojdz on 30 December 2019 did not negate for her that the Claimant had to be restrained.

110 On the second appeal ground Ms Combs in her evidence said she felt that it was reasonable to hold interviews over the phone, especially given the various shifts and locations. Also, that this was a second interview to clarify a few final points. The appeal letter [184-185] reflects Ms Combs evidence.

111 On the third appeal ground Ms Combs gave evidence that she partially upheld the Claimant's point that Artur Ptak would have been a key witness as he might have provided evidence of the provocation. In Ms Combs' view this did not change the fact that the Claimant clearly went after Simon Tsegay and that had he not been restrained he could have physically harmed him. Ms Combs had also been mindful that Mr Doherty had in any event accepted that Simon Tsegay had provoked the Claimant and therefore it seemed to her that Artur Ptak's further evidence would not have had a material effect on the conclusions that had been reached.

112 The appeal letter [184-185] on this ground states:

"Artur Ptak hasn't been questioned, before leaving the business and I feel he was a key witness.

Artur's last day with Whole Foods Market was the day of the incident and efforts were made to discuss this with Artur even after he had moved away. Whilst it might have supported your claim that Simon Negash [Tsegay] provoked you, it still doesn't take away from the fact that you clearly went after Simon and had you not been restrained might have physically harmed him. Partially upheld."

113 Ms Combs' evidence was that she upheld the dismissal due to the admissions made by the Claimant in the disciplinary meeting and the appeal hearing that he tried to go for Simon Tsegay (Night Supervisor) and that he had to be restrained by other team members and then went to find Simon Tsegay when Simon Tsegay was in the warehouse office and was verbally attacking him by shouting at him. The appeal letter [184-185] reflects Ms Combs' evidence on this point. On being questioned though Ms Combs did state that she had based her decision on the first incident in the loading bay. I find that Ms Combs did base her decision on the incident in the loading bay and the incident in the warehouse office, but that her main focus was the fact that the Claimant needed to be physically restrained in the loading bay. The Claimant's dismissal therefore stood.

114 Ms Combs also held an appeal hearing with Simon Tsegay on 13 January 2020 [171-182] and upheld the decision to summarily dismiss Simon Tsegay for his conduct in relation to the incident with the Claimant [186-187].

115 The Claimant presented his claim for unfair dismissal to the Tribunal on 8 March 2020.

Law

Unfair dismissal

116 Section 94 of the ERA confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the Respondent under section 95, but in this case the Respondent admits that it dismissed the Claimant (within section 95(1)(a) of the ERA) on 30 December 2019.

117 Section 98 of the ERA deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.

118 Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

119 In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **Burchell [1978] IRLR 379 and Post Office v Foley [2000] IRLR 827**. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones [1982] IRLR 439, Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, and London Ambulance Service NHS Trust v Small [2009] IRLR 563**).

120 There must also be a reasonably fair procedure. The Employment Appeal Tribunal in **Bentley -v- Engineering Co Ltd -v- Mistry [1979] ICR 47** held that natural justice required not merely that an employee should have a chance to state their own case but that he must know sufficiently what was being said against him so that he could put forward his own case properly. The Court of Appeal re-affirmed this in **Louies -v- Coventry Hood and Seating Co Ltd [1990] ICR 15** and held that if heavy reliance is placed upon the statements of witnesses, the dismissal is likely to be unfair unless the employee has sight of the statements or is told what is in them.

121 The Court of Appeal in **Hussain -v- Elonex plc [1999] IRLR 420** stressed that there is no hard and fast rule that in all cases an employee must be shown copies of witness statements obtained by an employer about the employee's conduct. Mummery LJ stated "*What emerges... is not that there is a failure of natural justice where witness statements are obtained but not disclosed, but there is a failure of natural justice if the essence of the case on the employee's conduct is contained in statements which have not been disclosed to him, and where he has not otherwise been informed at the hearing, or orally or in other manner, of the nature of the case against him.*" This case was applied by the Scottish EAT in **RBS -v- Donaghay [2011] UKEATS/0049/10/BI**. Whether a failure to disclose information renders a dismissal unfair is a fact-sensitive question (**Old -v- Palace Fields Primary Academy UKEAT/0085/14/BA**).

122 Mr. Wilson also drew my attention to **Polkey -v- A.E Dayton Services Limited [1988] ICR 142**. Lord Bridge of Harwich agreeing with the judgment of Lord Mackay of Clashfern L.C. added these observations "*...the one question the industrial tribunal is not permitted to ask in applying the test of reasonableness posed by [section 98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural step had been taken. On the true construction of [section 98(4)] this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under [section 98(4)] may be satisfied.*"

123 Defects in the disciplinary process may be capable of being cured by a fair appeal, depending upon the seriousness of the allegations made against the employee, how serious the unfairness was and the substance of the appeal process. The Court of Appeal emphasised that there is no rule of law that earlier unfairness can be cured by an appeal by way of rehearing and not by way of a review, because the examination should be of the fairness of the disciplinary process as a whole. Each case will turn on its own facts (**Taylor -v- OCS Group Ltd [2006] ICR 1602**).

CONCLUSIONS

Unfair dismissal

124 Mr. Wilson provided me with written and oral submissions and the Claimant provided me with oral submissions which I have considered and will refer to where necessary in reaching my conclusions.

125 The Respondent's case is that it dismissed the Claimant because it believed he was guilty of misconduct due to the Claimant's verbally aggressive behaviour towards Simon Tsegay during an altercation on 6 December 2019 (to the extent that the Claimant had to be physically held back by another colleague, Mateusz Rzekec). Misconduct is a potentially fair reason for

dismissal under section 98(2) ERA. The Respondent has satisfied the requirements of section 98(2) ERA.

- 126 I find that the Respondent's management, Mr. Doherty and Ms. Combs held a genuine belief that the Claimant was guilty of the misconduct. By the time Mr. Doherty made the decision to dismiss the Claimant in the disciplinary hearing on 30 December 2019 the Claimant had admitted he had argued with Simon Tsegay, that he had lost his temper and was very angry, and that he had been physically restrained by Mateusz Rzekec. During the disciplinary hearing on 23 December 2019, he did not deny that he had called Simon Tsegay a "lazy bastard" and he admitted that he may have said "liar" once in the warehouse office. Further, in the disciplinary hearing on 30 December 2019 he again admitted that he had shouted "liar" in the warehouse office.
- 127 Mr. Doherty and Ms. Combs also had the CCTV footage as evidence which had been shown to the Claimant twice, once during James Morrissey's investigation and then in the disciplinary hearing on 23 December 2019. The CCTV footage clearly shows the Claimant being held back by Mateusz Rzekec in the first place and then later by both Mateusz Rzekec and Artur Ptak, and it also shows the Claimant jabbing his finger towards Simon Tsegay.
- 128 Mr. Doherty's evidence was clear that he dismissed the Claimant due to the entirety of the Claimant's conduct. The letter confirming dismissal confirms this. Ms. Combs evidence was less clear, but I do find that she upheld the decision to dismiss the Claimant due to the entirety of his conduct, but with more focus on the fact that the Claimant had to be physically restrained in the loading bay. The appeal letter confirms this.
- 129 The Claimant's submission was that his dismissal was based on the cumulative impact of the second incident in the warehouse office and if he had been found guilty of only the incident in the loading bay, the Respondent would have given him a final warning instead. The Claimant contends this based on Mr. Doherty stating in the disciplinary hearing on 30 December 2019 that he would have considered giving the Claimant a final warning if there had only been one incident.
- 130 Mr. Doherty stating that he would have considered giving the Claimant a final warning is not the same as Mr. Doherty saying that he would have given the Claimant a final warning if there had been only one incident. I find that if Mr. Doherty had discounted the Claimant's behaviour in the warehouse office, he would have considered the possibility of a final warning along with the other possibility of a summary dismissal for the incident in the loading bay.
- 131 The Respondent's disciplinary policy includes physical violence (actual or threatened), inappropriate conduct or assault (whether verbal or physical) against a colleague, and obscene language or other offensive behaviour as being examples of gross misconduct. The Respondent's disciplinary policy is also clear that gross misconduct will generally lead to summary dismissal. The Claimant was aware of the Team Handbook and that the Respondent had a disciplinary policy.

- 132 The way in which Mr. Doherty and Ms. Combs assessed the Claimant's explanation for his behaviour and his contrition is relevant to whether they had reasonable grounds for the belief that he was guilty of gross misconduct and to the penalty they imposed, and to the procedure they followed. The range of reasonable responses test applies to all aspects of what the Respondent did.
- 133 Mr. Doherty accepted that the Claimant had been provoked by Simon Tsegay and Ms. Combs was also mindful that Mr. Doherty had accepted there had been some provocation. Mr. Doherty did not accept that Simon Tsegay had called the Claimant a "dog". Given what evidence Mr. Doherty had at the time of the decision it was reasonable for him to reach that conclusion.
- 134 The Claimant had said Simon Tsegay called him a "dog" and Simon Tsegay had denied calling the Claimant a "dog". None of the other witnesses in either Ian Geddes' preliminary investigation or, James Morrissey's investigation had confirmed that Simon Tsegay had called the Claimant a "dog". I have had the benefit of the Claimant giving evidence under oath and being cross-examined on that evidence so, just because I've reached a different finding of fact on this issue does not mean that Mr. Doherty's conclusion was unreasonable.
- 135 The Claimant had also said (during the disciplinary hearings) the reason why he had shouted "liar" in the warehouse office was because he wanted the policeperson on the other end of the telephone to hear. I find that it was reasonable for Mr. Doherty to decide that shouting "liar" (whomever it was aimed at) was still unacceptable behaviour, particularly given it happened soon after the previous incident in the loading bay.
- 136 There is also a slight difference between the third statement of Roland Zojdz [142] and Roland Zojdz's two previous statements on 19 December 2019 [122-123] and 6 December 2019 [85]. In the earlier statements Roland Zojdz had said the Claimant had walked into the warehouse office and tried to talk to Simon. In the last statement Roland Zojdz said the Claimant had entered the warehouse office first shouting "liar" and then after a few moments became quiet and asked questions. The Claimant's case was that this last statement led to his dismissal due to the cumulative impact of him shouting in the warehouse office. The Claimant's case was that the Respondent should not have used this third statement of Roland Zojdz's because of its difference to the earlier statement of Roland Zojdz given to James Morrissey [122-123].
- 137 Mr. Wilson's submission was that this last statement of Roland Zojdz's [142] is not the "smoking gun" the Claimant seems to think it is because it confirms that the Claimant was shouting "liar", and the Claimant had already admitted this himself in the disciplinary hearing.
- 138 By the time Mr. Doherty made the decision to dismiss the Claimant had admitted that he had shouted "liar" in the warehouse office in the disciplinary hearing on 23 December 2019 and in the disciplinary hearing on 30 December 2019. The only issue still unresolved was whether he had

walked into the warehouse office shouting or, had walked in calmly and then shouted. Mr. Doherty's decision to rely on the third statement of Roland Zojdz [142] along with the other statements, the CCTV footage and the Claimant admissions during the investigation and the disciplinary was reasonable.

- 139 Mr. Wilson reminded me that I must not fall into the trap of substitution. It is for the employer, with knowledge of their business to make the judgment on whether the behaviour constitutes misconduct, and if so, how severe that misconduct is.
- 140 I find that Mr. Doherty's and Ms. Combs' genuine belief in the misconduct was based on reasonable grounds. I also find that the Respondent's decision to summarily dismiss the Claimant was within the range of reasonable responses even though Mr. Doherty accepted the Claimant had been provoked, that the Claimant was sorry and had said he would never do it again. The Respondent was entitled to take a zero-tolerance approach to verbal aggression and threat of physical aggression towards another colleague. The fact that Simon Tsegay was also dismissed for his part in the altercation is further evidence of the Respondent's zero tolerance approach.
- 141 I now turn to the question of whether the Respondent followed a reasonable investigation with a reasonably fair procedure.
- 142 The Respondent conducted a preliminary investigation, a formal investigation, a disciplinary hearing and an appeal hearing with the Claimant.
- 143 The Claimant's case is that his dismissal was unfair because a key witness was not interviewed. Artur Ptak witnessed the argument in the loading bay and the incident in the warehouse office. The Respondent's case is that Artur Ptak's last day at the Respondent was the date of the incident, 6 December 2019, and that he later left the country. The question is whether the Respondent still followed a reasonable investigation despite not taking a statement from Artur Ptak.
- 144 Neither Mr Doherty nor Ms Combs could tell me what efforts had been made to contact Artur Ptak after he had left the Respondent. It is clear that Artur Ptak emailed Ian Geddes on 6 December 2019 (his last working day at the Respondent), but then neither Ian Geddes nor James Morrissey followed this up.
- 145 The Respondent's case is that the only evidence Artur Ptak would have provided to the investigation or disciplinary is that the Claimant had been provoked. As Mr Doherty, at the time he made the decision to dismiss the Claimant, had already accepted that the Claimant had been provoked by Simon Tsegay Mr Wilson submitted that it was reasonable for the Respondent to conclude that it would have been futile to have gathered further evidence from this witness.
- 146 Although at the time of dismissal Mr Doherty accepted that there had been some provocation of the Claimant, he had not found that Simon Tsegay had

called the Claimant a "dog". In respect of the incident in the warehouse office, the Claimant had admitted that he had shouted "liar" in the warehouse office, but he had not admitted that he had walked into the warehouse office shouting. There was, therefore, still some factual discrepancies remaining in the evidence at the time of dismissal.

- 147 Mr Doherty was clear in his evidence that it was enough for him that the Claimant had admitted shouting in the warehouse office, regardless of whether he had walked in shouting or had shouted later. What is not clear from the evidence is whether Mr Doherty would have come to a different decision if he had found that Simon Tsegay had called the Claimant a "dog". Ms Combs in the appeal hearing had been mindful that Mr Doherty had already accepted that the Claimant had been provoked by Simon Tsegay and concluded that a statement from Artur Ptak would not have had a material effect on Mr Doherty's decision.
- 148 It is also difficult to say with any certainty that Artur Ptak would have confirmed this strong provocation if he had been asked to provide a statement. In cross-examination the Claimant asserted that Artur Ptak would have told the truth.
- 149 Mr Wilson submitted that a reasonable investigation does not require the employer to leave no stone unturned. Although this is true, in assessing what would have been reasonable I do need to have regard to the size and administrative resources of the Respondent. What is required of a large employer is different to what is required of a small employer. In the United Kingdom the Respondent has 1,000 employees. It is also part of a global corporation which is based out of the United States.
- 150 I find it concerning that in the appeal letter it states that efforts were made to contact Artur Ptak, but when I asked the Respondent's witnesses what efforts had been made, they were unable to tell me. It also would have been preferable to have obtained a full statement from Artur Ptak before he left the Respondent.
- 151 I, however, must assess whether the Respondent conducted a reasonable investigation. If at the time of the dismissal the Respondent reasonably concluded that it was futile to take a statement from Artur Ptak this would put its investigation well within the boundaries of a reasonable investigation. It's not clear from the evidence whether Mr. Doherty did consider this at the time of dismissal. Ms. Combs did consider this point when she heard the Claimant's appeal, and she decided that taking a statement from Artur Ptak potentially could have proved the provocation, but that Mr. Doherty had already accepted that the Claimant had been provoked. Ms. Combs concluded that taking a statement from Artur Ptak would not have changed the decision to dismiss.
- 152 Given how seriously management took the Claimant's actions and its zero-tolerance approach to verbal aggression and threat of physical aggression towards another colleague I find that Ms. Combs conclusion that taking a statement from Artur Ptak would have made no material difference and, therefore, would have been futile was reasonable.

- 153 Further, Ms. Combs' consideration of this point on appeal cures any failure by Mr. Doherty to assess whether a statement from Artur Ptak would have made a material difference at the time of his decision to dismiss to the Claimant.
- 154 I also find that even if the Respondent had accepted that Simon Tsegay had called the Claimant a "dog" and had then still dismissed the Claimant, despite this stronger provocation, that dismissal would also have been within the band of reasonable responses.
- 155 Paragraph 9 of the ACAS Code of Practice on Disciplinary and Grievance Procedures ("ACAS Code") states that if there is a disciplinary case to answer the employee should be notified in writing. It further states that it would normally be appropriate to provide copies of any written evidence, which may include witness statements with the notification.
- 156 Paragraph 12 of the ACAS Code also states that at the (disciplinary) meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered.
- 157 The only document collected in the preliminary investigation that was sent to the Claimant in advance of the disciplinary hearing was Mateusz Rzekec's statement [83]. The other statements and emails were in the pack of documents given to Mr. Doherty and Ms. Combs.
- 158 I find that this has not impacted on the fairness of the procedure or rendered the investigation unreasonable and is not an unreasonable failure to follow the ACAS Code for the reasons set out below.
- 159 In respect of the Claimant's own statement [74-75] to Ian Geddes the Claimant would have known what he had said to Ian Geddes on 6 December 2019, and the Claimant was able to give his version of the incidents to James Morrissey in the investigation meeting on 11 December 2019.
- 160 In respect of Edmund Osei-Wsu's statement [86] and Roland Zojdz's statement [85] to Ian Geddes, both were re-interviewed by James Morrissey as part of his investigation. Edmund Osei-Wsu's statement [120-121] and Roland Zojdz's statement [122-123] to James Morrissey are both very similar to the statements they had previously given to Ian Geddes on 6 December 2019. The Claimant was provided with these later statements prior to his disciplinary hearing.
- 161 The statements of Slovak Kusstal [81] and Adrian Pack [82] were not very detailed and these two witnesses were on the periphery of the incidents. Their statements were peripheral and did not cover the main points of disagreement between the Claimant and Simon Tsegay about what had happened.
- 162 The email from Artur Ptak [78] was a one-line email and again did not cover the main points of disagreement between the Claimant and Simon Tsegay.

- 163 The email from Simon Tsegay to Ian Geddes [71] was read out to the Claimant in the disciplinary hearing on 23 December 2019 and the Claimant was able to comment on its content during that hearing.
- 164 Roland Zojdz's third statement which was the note of the telephone conversation with Mr. Doherty on 30 December 2019 [142] was also not provided to the Claimant before or during the reconvened disciplinary hearing on 30 December 2019. Mr. Doherty did explain its content to the Claimant in the reconvened disciplinary hearing and the Claimant was able to comment on what Roland Zojdz had said prior to Mr. Doherty deciding to dismiss the Claimant.
- 165 It would have been better to provide the Claimant with Roland Zojdz's third statement [142] before the reconvened disciplinary hearing on 30 December 2019, especially given that it was slightly different to the previous statement that Roland Zojdz had provided in the investigation [122-123]. But since the Claimant had already admitted that he had shouted "liar" once in the warehouse office in the disciplinary hearing on 23 December 2019 I find that this did not make the procedure unfair and nor was this an unreasonable failure to follow the ACAS Code.
- 166 At the two disciplinary hearings the Claimant had the benefit of a translator, at the appeal hearing he did not. The ACAS Guide - Discipline and Grievances at Work states that if an employee's first language is not English the use of a translator should be considered. This is not in the ACAS Code itself. Mr. Wilson submitted that the Claimant was still able to take part effectively in the appeal hearing and to present his case at the appeal hearing.
- 167 Reviewing the notes of the appeal hearing I do agree that the Claimant was able to present his appeal and was also able to answer the questions that Ms. Combs asked during the appeal hearing. I find that the failure to provide a translator at the appeal hearing did not make the procedure unfair.
- 168 I find that the Respondent did conduct a reasonable investigation with a reasonably fair procedure.
- 169 I find that the Respondent fairly dismissed the Claimant.

Employment Judge Macey

Date: 23 May 2022

decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.