THE EMPLOYMENT TRIBUNALS

Claimant: **Mr G Brown**

Respondent: **TT Construction Northern Ltd**

Heard at: **Newcastle upon Tyne Hearing Centre**
On: **24 September & 28 October 2021**

Before: **Employment Judge Loy**

Representation:

Claimant: **Mr J Morgan, Counsel**
Respondent: **Mr T Taylor, Director**

RESERVED JUDGMENT

The judgment of the employment tribunal is that:

1. The claimant's claim of unfair dismissal is well-founded and succeeds.

2. The claimant's claim for unpaid accrued holiday pay is dismissed upon withdrawal by the claimant.

REASONS

1. The claimant in these proceedings was represented by Mr Morgan of Counsel, who called the claimant and Gillian Wardhaugh to give evidence. A statement from Dougal Reed was also relied upon by the claimant. The respondent was represented by Mr Taylor, a director of the respondent company, who also gave evidence on his own account. Mr Taylor called Mr Clementson and Mr Hunter to give evidence, both are employees of the respondent or related companies and were so employed at the time relevant to these proceedings.

2. All of the witnesses had prepared typed and signed written statements which were taken "as read" by the tribunal, subject to supplemental questions, cross-examination and tribunal questions. There was an agreed bundle of documents comprising 77 pages. The bundle included all of the witness statements.

3. Mr Taylor had also produced short written statements from Dougal Reed, Paul Parker, Alan Quinn and Mr G Edington. The statement of Mr Parker was unsigned and undated. Mr Quinn was a resident at one of the flats converted and sold by the respondent. Mr Edington ran a plumbing and heating company who provided services to the respondent. I indicated, in the interests of proportionality, that the evidence of Mr Quinn, Mr Edington and Mr Parker was not germane to the principal issues of the fairness of the claimant's dismissal and those witnesses were not called by the respondent on that basis. The tribunal nevertheless read the statements of the witnesses that were not called and applied appropriate weight to their evidence. I was satisfied that the evidence of these witnesses could not have had a material influence on the outcome of these proceedings had they been called as witnesses and cross-examined. Their evidence was, at best, peripheral.

Claims and issues

4. By a claim form presented on 18 May 2021, the claimant brought a complaint of unfair dismissal. At the outset of the hearing, Mr Morgan confirmed that the claimant also brings a complaint that he was not issued with a written statement of initial employment particulars contrary to Section 1 (1) of the Employment Rights Act 1996 ("ERA"); and that a claim was being made under Section 38 of the Employment Act 2002 ("the 2002 Act") in those circumstances. Section 38 of the 2002 Act applies where certain claims (including a claim for unfair dismissal) succeed and the respondent was in breach of its duty under Section 1 (1) of ERA when the proceedings were begun. It is not necessary for a complaint under section 38 to be pleaded (which it was not in this case). The respondent did not seek to challenge either the claimant's entitlement to rely upon section 38 of the 2002 Act or to gainsay the claimant's contention that the respondent had failed to comply with Section 1(1) ERA.

5. In summary, the claimant claims that "his dismissal on the spot" on 20 April 2021 by Mr Taylor was both procedurally and substantively unfair. The claimant's case is that Mr Taylor had no reasonable grounds to believe that the claimant had grossly misconducted himself justifying his dismissal. Alternatively, or in addition, the claimant says that the real reason for his dismissal arose out of Mr Taylor's dissatisfaction at being challenged by the claimant who had become upset with Mr Taylor when he found out that, in the claimant's view, Mr Taylor was looking to blame the claimant for a cannabis farm found in the cellar of the building that was being converted into flats by the respondent, a project on which the claimant had worked for a number of years.

6. The claimant also suggested that his dismissal may also be related to Mr Taylor's dissatisfaction with the reduced amount of time that the claimant was able to devote to the conversion project due to the claimant spending increasing amounts of time building his own property.

7. The respondent defends the claim on the basis that it had a genuine belief, based on reasonable grounds, to believe that the claimant had grossly misconducted himself by making threats of violence and verbally abusing Mr Taylor on 19/20 April 2021. The respondent says it fairly and lawfully dismissed the claimant.

8. A claim for holiday pay that was initially made is no longer being pursued.

9. The issues to be decided by the tribunal are summarised as follows:-

   9.1 What was the reason, or if more than one, the principal reason for the claimant's dismissal?

   9.2 If misconduct, did the respondent hold a genuine belief that the claimant had committed those acts of misconduct?

   9.3 Were there reasonable grounds for that belief?

   9.4 Did the respondent follow a fair procedure in dismissing the claimant for that reason and, in particular, did it carry out an investigation which was reasonable in all the circumstances of the case?

   9.5 Was the respondent's decision to dismiss the claimant for that misconduct one which fell within the range of reasonable responses open to a reasonable employer in all the circumstances?

Findings of fact

10. The respondent accepts that the claimant was dismissed on 20 April 2021.

11. The incidents that led to the claimant's dismissal occurred on 19 and 20 April 2021.

12. According to the claimant, he was originally employed by the respondent as a joiner from June 2011. The respondent says that employment started in August 2012.

13. The respondent is a small construction company. The principal work upon which the claimant was engaged was the conversion of what was described as the old co-op building in Burnopfield, County Durham. The respondent (or a related company) purchased this building on or around 2011 in order to convert it into a number of flats to be sold individually. It was to be a self-funding project with the proceeds of the sale of each converted flat funding the conversion of the next stage in the process; and so on. The owner and sole director of the respondent company is Mr Taylor.

14. It was agreed between the parties that the claimant became a valuable resource to Mr Taylor. His role expanded from that of joiner to, effectively, that of project manager, and for many years the parties enjoyed a successful working relationship. It is accepted by the respondent that the claimant would frequently work long hours and that he became Mr Taylor's "right-hand man". There was a dispute about the extent to which the claimant was responsible for certain aspects of the design and sale of the converted flats, but that dispute was not germane to the issue of the fairness of the claimant's dismissal.

15. There was also a dispute whether certain properties were to be given to the claimant in return for his significant contribution to the development of the co-op building over the years. Again, that dispute is not germane to the fairness of the claimant's dismissal. On the parties' own cases, the antipathy that developed between Mr Brown and Mr Taylor about these issues crystallised only after the claimant's dismissal and could therefore not be relevant to its fairness.

16. In this regard, I note that the claimant's case was based on two fundamental matters: first, the deterioration of his relationship with Mr Brown because of the reduced amount of time that the claimant was able to dedicate to the refurbishment of the co-op building; and, secondly, the apportionment of blame in relation to the cannabis farm found in the cellar to the co-op building. It was not any part of the claimant's case (at least prior to dismissal) that a dispute about any agreement to give flats to the claimant and/or the claimant's role in the design and sale of the flats was a consideration in Mr Taylor's decision-making when he came to dismiss that claimant. Whatever may have been the discussions and/or (mis)understandings that might have emerged between Mr Taylor and Mr Brown about how he was to be rewarded for his efforts, I was nevertheless satisfied that those considerations had no factual bearing on the fairness or otherwise of the claimant's dismissal on 20 April 2021. I therefore make no findings of fact, or consider there to be a need to draw any inference, from (whatever may be the rights and wrongs) of those matters.

17. It was common ground that the claimant did not always take his holiday entitlement, preferring to dedicate his time to the flat conversion project in respect of which the claimant says he understood he would have an interest. At no stage did Mr Taylor seek to contest that the claimant's contribution to the co-op project had been substantial.

18. Towards the end of 2019, the claimant began to build his own house as a result of which the claimant was unable to spend as much time as he had previously spent on the respondent's conversion project. At this point the claimant told Mr Taylor that whereas he would still be able to work his contractual hours, he would no longer be able to put in the considerable additional hours that had become habitual and he would, in future, intend to take his holiday entitlement to spend that time building his own property. None of this was in dispute.

19. It was at this point that the claimant says his relationship with Mr Taylor began to deteriorate. The claimant says that Mr Taylor became resentful because Mr Taylor now had to do more work himself on the co-op project than had previously been the case. The claimant says his relationship with Mr Taylor continued to deteriorate throughout 2020. He says that Mr Taylor became "picky" and "argumentative" with him which the claimant attributed to the claimant's relative lack of availability and consequent slower progress regarding the conversion project as a result of the reduced time that the claimant was able to spend at the co-op building.

20. I am alive to the need not to determine the facts myself when reviewing the reasonableness of a respondent's procedure and decision-making. However, it

was self-evident (and not disputed by Mr Taylor) that it was plainly inconvenient to Mr Taylor to lose a substantial proportion of the claimant's time when he had become heavily reliant on the claimant for the completion of this central and important project for the respondent company.

21. In the early part of 2021 an agreement was reached between the claimant and Mr Taylor that the claimant would reduce his working hours to three days per week. It was, however, also common ground that it was Mr Taylor's own suggestion that the claimant's hours should reduce in recognition of the fact that the claimant was looking to spend more time building his own property.

22. Mr Taylor is highly experienced in the construction industry having spent a considerable amount of time running his own construction businesses. The claimant was not the respondent's only employee and it was common ground that, as would be expected, Mr Taylor had a wide network of tradesmen that he could call upon to keep the flat conversion project moving forwards, albeit at a slower rate. However inconvenient the claimant's reduced availability was to Mr Taylor, Mr Taylor had the good commercial sense to find a different way to deliver the services necessary to progress the conversion of the co-op building.

23. The matters that the respondent says directly led to the claimant's dismissal commenced on 12 April 2021. On that date the police attended the co-op building and discovered a cannabis farm in the large cellar beneath it. On 16 April 2021, the claimant says he spoke to Mr Quinn who was a resident in one of the converted flats. The claimant says that Mr Quinn had been told by another resident, who was known as "Paul", that Mr Taylor had told Paul that the claimant knew the people who were involved in the cannabis farm. The claimant took this to mean that Mr Taylor was seeking to blame the claimant for the cannabis farm that had been operating from the co-op building's cellar. The claimant accepted that he was "quite annoyed" by what he had been told. The claimant accepts that he confronted Mr Taylor, who the claimant says denied having said anything to anyone (including Paul) connecting the claimant to the cannabis farm.

24. On 19 April 2021 the claimant attended a local sandwich shop operated by Gillian Wardhaugh. The claimant said he was told by Mrs Wardhaugh that Paul had told her (Mrs Wardhaugh) that the operators of the cannabis farm were friends of the claimant. The claimant attributed what he regarded as misinformation to Mr Taylor. The claimant accepted that he then decided to "confront" Mr Taylor about what the claimant believed Paul had said; and also to speak to Paul directly.

25. The evidence of Gillian Wardhaugh was of little benefit. Ms Wardhaugh's bakery and sandwich shop is situated close to the co-op buildings that were being renovated by the respondent. Mrs Wardhaugh's evidence is, in reality, little more than local gossip and I attach proportionate weight to it.

26. Also on 19 April 2021, the claimant said he asked Mr Taylor about what he had been saying and asked Mr Taylor to open the doors to the apartments so he could speak directly to Paul. The claimant says that Mr Taylor denied suggesting to anyone that the claimant was involved in any way, including denying that the claimant had any knowledge of the use out of the cellar by those operating the

cannabis farm. The claimant then says that he overheard Mr Taylor and Paul blaming each other for what had been said about the claimant.

27. The claimant says he then intended to go back to his work when Mr Taylor approached him and confronted him denying that he had said anything to anyone connecting the claimant to the cannabis farm. The claimant accepts that he then said to Mr Taylor that if Mr Taylor had said anything connecting him to the cannabis farm, "it would be the biggest mistake he had made." It was the claimant's position that Mr Taylor had, in fact, knowingly allowed the cannabis farm to be set up in the cellar and, by implication, was trying to shift the blame onto the claimant.

28. Mr Taylor's version of the events of 19 April 2021 is at odds with that of the claimant. Mr Taylor says that at approximately 13:30 on 19 April 2021, the claimant confronted him in an extremely aggressive manner. Mr Taylor says that this was witnessed by Mr Clementson, an employee of COOP Taylor Limited, another of Mr Taylor's companies.

29. Mr Taylor says he denied having said anything to anybody connecting the claimant to the cannabis farm. Mr Taylor's account is that the claimant became aggressive and advanced towards him invading his personal space. Mr Taylor says that Mr Clementson moved next to Mr Taylor to protect him (Mr Taylor) from the claimant. Mr Taylor says that this was also witnessed by Mr Hunter who was on the balcony above where Mr Taylor, the claimant and Mr Clementson were standing. Mr Hunter also worked for Mr Taylor, either in direct employment or as a contractor.

30. Mr Taylor then says that the claimant called him, "a lying little cunt" and said, "I'm going to knock your fucking head off." Mr Taylor said he left the site immediately given the claimant's threat of violence and personal abuse. Mr Hunter corroborates Mr Taylor's evidence that the claimant called Mr Taylor, "a lying little cunt" and Mr Hunter also says that he witnessed the claimant having aggressive body language and saying to Mr Taylor, "I'm going to knock your fucking head off". Mr Hunter and Mr Clementson both had the benefit of being a direct witness to the altercation between Mr Taylor and the claimant.

31. Mr Taylor says that this was not the first time that the claimant had lost control in the workplace. He referred to an incident in 2016 when he was allegedly assaulted by the claimant. Mr Taylor also points out that the claimant was, at the time of the incident in April 2021, fifty-one years of age whereas Mr Taylor was seventy-one, with the effect (according to Mr Taylor) that the claimant had the advantage of age as well as physical strength over him. Mr Taylor said he feared he would have been attacked by the claimant had it not been for the intervention of Mr Clementson.

32. Mr Clementson and Mr Hunter also gave evidence that they had also witnessed at first-hand the claimant's violence towards Mr Taylor in 2016. Mr Hunter's evidence was that the claimant had physically attacked Mr Taylor in 2016 causing bruising to Mr Taylor's neck. Mr Taylor explained that he had not taken formal action in 2016, preferring to give the claimant another chance, taking into account that the

claimant was stressed as a result of not seeing enough of his daughter. Mr Clementson recalled that two former employees "Benny and Adam" had been needed to stop the claimant's attack on Mr Taylor in 2016.

33. On the morning of 20 April 2021, Mr Taylor called together the claimant, Mr Clementson and Mr Hunter to inform them that he was considering closing down the respondent company. Mr Taylor says that the reasons he gave at the time for considering doing so were that: he had had enough of the threats of violence and verbal abuse from the claimant; the co-op project was nearly completed; and, given Mr Taylor's age, he did not want to carry on working. It was nevertheless common ground that Mr Taylor was still working at the date of this hearing.

34. Mr Taylor says that at this point the claimant began shouting loudly and accusing Mr Taylor of lying. Mr Taylor says he then told the claimant that he would not tolerate the claimant's abusive and violent behaviour and told the claimant to leave the site immediately. Mr Taylor's account is that the claimant threatened him by saying that if the claimant did not get what he was entitled to (a reference as I understood it to the flats that the claimant says he was promised) then the claimant would make Mr Taylor "suffer". At that point Mr Taylor accepts that he then told the claimant that he was sacked for gross misconduct resulting from his threatening and violent behaviour. There had been no prior warnings given to the claimant, there was no investigation, disciplinary hearing or contemporaneous documentation evidencing of the dismissal.

35. The claimant's account of what happened on 20 April 2021 is somewhat different. The claimant agrees that Mr Taylor said he was going to close down the respondent company, but that he thought nothing of it because Mr Taylor had said that on more than one occasion between December 2020 and April 2021. The claimant also denies shouting or accusing Mr Taylor of lying.

36. The claimant says that Mr Taylor, unprompted by any new altercation, told the claimant, "you can fuck off now". The claimant says a heated conversation followed during which the claimant asked Mr Taylor if he was being sacked. The claimant says that Mr Taylor replied "yes and fuck off."

37. As at 20 April 2021, the claimant had been employed by the respondent for some ten years and he says he had no written warnings, no oral warnings, nor had he received any criticism whether relating to his conduct or his capability. Apart from the incident in 2016, Mr Taylor did not contest that.

38. The claimant appealed his dismissal following a discussion with ACAS. His indication that he wanted to appeal is set out in a letter of 6 May 2021 (bundle page 31). Initially the respondent did not respond to the claimant's request for an appeal. It was only after the claimant began early conciliation on 14 May 2021 and presented a claim to the tribunal that the respondent replied to the claimant's letter seeking an appeal against his dismissal.

39. The claim form was presented to the tribunal on 18 May 2021. By a letter dated 27 May 2021 (bundle page 39), the claimant is offered an appeal in a letter which has plainly had some professional input. That letter sets out the process to be

followed on appeal and offers Friday 24 June 2021 as a suggested date for the appeal hearing at which the respondent said an HR professional would also be present. The letter also purports to explain the delay in responding to the claimant's letter of 6 May 2021 requesting an appeal in the first place. That explanation is that the delay was "due to the limitations that are inherent within a small company in terms of availability or of an appropriate person to chair the hearing." The difficulty with the respondent genuinely adopting that position is that the respondent does not explain why the respondent was, after the letter from the claimant 6 May 2021 requesting an appeal, able to pursue correspondence with the claimant on matters which were plainly in Mr Taylor's own interests, such as:

39.1 the e-mail of 12 May 2021 (bundle page 32) requesting a return of the company van, return of company plant; and the removal of the claimant's property from the cellar of the Burnopfield flats;

39.2 the letter of 15 May 2022 (bundle page 33) chasing the claimant for a reply to the respondent's e-mail of 12 May 2021 referred to immediately above; and

39.3 the letter of 19 May 2021 (bundle page 35) again chasing the claimant to return the company van.

40. The respondent would have been made aware of the claimant's likely intention to pursue a claim against it once the early conciliation process had started on 14 May 2021. The practical reality of the situation was that it was only after the respondent became aware that it might be facing employment tribunal proceedings that the respondent began to engage with the claimant on his request for an appeal.

41. The claimant decided against pursuing an appeal on the basis that Mr Taylor was to be the chair of his appeal hearing. The claimant's position was that, given Mr Taylor's behaviour towards him and given the extent to which Mr Taylor was personally involved in the events that led to his dismissal, he did not think an appeal to Mr Taylor would be worthwhile. Tellingly, when Mr Taylor was cross-examined on the point, Mr Taylor was adamant that he would not have reinstated the claimant under any circumstances. When asked by Mr Morgan what was the point of an appeal if Mr Brown would never have been reinstated, Mr Taylor replied simply, "I wouldn't reinstate him, no."

Contributory fault

42. It is not my function when deciding whether the claimant's dismissal was or was not unfair to make originating findings of fact.

43. However, should I find the dismissal to be unfair it is my role when deciding whether there was any conduct that should reduce any Basic Award (section 122(2) ERA) or any Compensatory Award (section 123(6) ERA) to make original factual findings.

44. In that regard, I find that the claimant did call Mr Taylor, “a lying little cunt” on 19 April 2021 and that he did say, “I’m going to knock your fucking head off” on the same date. I also find that the claimant was aggressive in his demeanour and that it caused Mr Taylor to fear for his personal safety. I base that finding on the evidence of Mr Taylor himself, and the corroborating evidence of Mr Clementson and Mr Hunter. I also rely on the surrounding circumstance where the claimant thought he was being blamed for the presence of the cannabis farm; his understandable indignation at that implication; and his ready acceptance that he immediately went to “confront” Mr Taylor.

45. I also find that the claimant was aggressive and antagonistic on 20 April 2021 and that he again accused Mr Taylor of lying. I again rely on the three respondent’s witnesses who gave a consistent account of that happened on 20 April 2021.

46. I accept the violent assault incident in 2016 did in fact occur. I accept Mr Taylor, Mr Hunter and Mr Clementson’s evidence about what happened in 2016, and, specifically, that the claimant violently assaulted Mr Taylor leaving bruises on his neck. The evidence of each witness on this incident was consistent.

47. I also accept the evidence of Mr Taylor, again corroborated by Mr Clementson and Mr Hunter, about what happened on 19 and 20 April 2021. Both Mr Clementson and Mr Hunter witnessed first-hand what happened on 19 and 20 April 2021. I found their accounts both consistent and credible.

48. Mr Morgan said that the witness statements of Mr Clementson and Mr Hunter were unreliable. They were taken by Mr Taylor himself in a meeting with his two witnesses in the same room at the same time.

49. It was suggested, essentially, that the witnesses were being led by Mr Taylor to whom they were both indebted for their employment and livelihood. I carefully considered Mr Morgan’s point, not least because I also found Mr Taylor to be controlling and (assessed by the way he gave his evidence) argumentative, combative and used to getting his own way.

50. I am not meaning to suggest that the way Mr Taylor conducted himself when giving evidence in a case where he was representing himself necessarily means that his behaviour in the workplace mirrored his conduct at the material time as far as these proceedings are concerned. However, I had the benefit observing Mr Clementson and Mr Hunter under cross-examination and I was satisfied that both witnesses were giving their own accounts of the events that they had witnessed in a truthful and accurate way. I do not find that their evidence was elicited by Mr Taylor in such a way as to render their evidence unsafe or unreliable.

The law of unfair dismissal

The statutory provisions

98.— General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

(a) relates to the capability or qualifications of the employee for performing work of the

kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(ba) […]

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(2A) […]

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(3A) […]

(4) [Where] 2 the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

The reason for the dismissal

51. In a claim of unfair dismissal within the meaning of section 98 of the ERA 1996, it is for the employer to prove ("show") the reason, or the principal reason, for the dismissal. That is the result of section 98(1)(a). In order to be a fair reason, the reason must be one which falls within section 98(2) (which includes "conduct") or is some other substantial reason within the meaning of section 98(1)(b).

52. What is the "reason" for the dismissal is the subject of some helpful case law. It is often the case that an employer dismisses an employee for what could be regarded as several "reasons". In Abernethy v Mott Hay and Anderson [1974] IRLR 213, [1974] ICR 323, at 330B-C, Cairns LJ said this:

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

53. Paragraph DI[821] of Harvey on Industrial Relations and Employment Law ("Harvey") helpfully (and in my view accurately; if I refer below to any other passage in Harvey, I do so on the basis that I agree with it as a description of the applicable case law) states the manner in which those words have been approved and applied in subsequent case law:

"These words, widely cited in case law ever since, were approved by the House of Lords in W Devis & Sons Ltd v Atkins [1977] AC 931, [1977] 3 All ER 40 and again in West Midlands co-operative Society v Tipton [1986] AC 536, [1986] IRLR 112, HL where the rider (important in later cases) was added that the 'reason' must be considered in a broad, non-technical way in order to arrive at the 'real' reason. In Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401, [2017] IRLR 748, Underhill LJ observed that Cairns LJ's precise wording in Abernethy was directed to the particular issue before the court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which causes them to take the decision – or, as it is sometimes put, what 'motivates' them to do what they do."

54. In paragraph DI[824] of Harvey, this is said:

"[I]n cases of alleged mixed motivations, once the employee has put in issue with proper evidence a basis for contending that the employer has dismissed for some extraneous reason such as out of pique or antagonism, it is for the employer to rebut this showing that the principal reason is a statutory reason. If the tribunal is left in doubt, it will not have done so. Evidence that others would not have been dismissed in similar circumstances would be powerful evidence against the employer, but it is open to the tribunal to find the dismissal unfair even in the absence of such strong evidence. In a case of mixed motives such as malice and misconduct, the principal reason may be malice even although the misconduct would have justified the dismissal had it been the principal reason: ASLEF v Brady [2006] IRLR 576, EAT."

55. Similarly, in paragraph Q[722] of Harvey, this is said:

"The reason must be that of 'the employer'; in the case of a corporate employer that will usually mean the reason motivating the dismissing manager but if that manager (acting in good faith) is in fact manipulated by another manager who

acts for another reason (which may well be unfair) that second manager's reason can be attributed to 'the employer', at least if that manager is higher in the organisation's hierarchy than the claimant: Royal Mail Group Ltd v Jhuti [2019] UKSC 55, [2020] IRLR 129, [2020] ICR 731 (a whistleblowing dismissal case, but the principle is applicable across unfair dismissal law). In Uddin v London Borough of Ealing [2020] IRLR 332, EAT, Jhuti was extended to allow an ET to take into account that second manager's knowledge of facts, not just his or her motivation."

The fairness of the dismissal

56. Where the employer has satisfied the tribunal that the reason is a potentially fair one, the question of the fairness of the dismissal falls to be determined under section 98(4) of the ERA 1996, which provides this:

"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

The range of reasonable responses of a reasonable employer test

57. Section 98 of the ERA 1996 has been the subject of much case law, the effect of which can be summarised by saying that the key question when the fairness of a dismissal is in issue is whether or not it was within the range of reasonable responses of a reasonable employer to dismiss the employee for the reason for which the employee was in fact dismissed. However, particular considerations arise in relation to the different reasons falling within subsections (1) and (2).

Conduct dismissals

58. In a case where the employer relies on conduct as the reason for the employee's dismissal, the following questions arise:

    1. Has the employer satisfied the tribunal on the balance of probabilities that the reason for which the employee was dismissed was indeed the employee's "conduct"?

    2. Did the employer, before concluding that the employee had done that for which he or she was dismissed, carry out an investigation which it was within the range of reasonable responses of a reasonable employer to conduct? The best authority in that regard is the decision of the Court of Appeal in J Sainsbury plc v Hitt [2003] ICR 111.

3. The following statement of the applicable principles in British Home Stores v Burchell [1978] IRLR 379 (but bearing in mind the fact that the test at every stage is whether what was done or omitted was within the range of reasonable responses of a reasonable employer) also applies:

   "What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

4. The final question which then falls to be answered is whether the dismissal for the conduct for which the employee was in fact dismissed was outside the range of reasonable responses of a reasonable employer. Normally, that question arises only when the preceding questions have been answered in the employer's favour.

The importance of a proper investigation

59. In paragraph DI[1482] of Harvey, this is said:

"The investigative process is important for three reasons in particular:

– it enables the employer to discover the relevant facts to enable him to reach a decision as to whether or not an offence has been committed;

– if properly conducted, it secures fairness to the employee by providing him with an opportunity to respond to the allegations made and, where relevant, raise any substantive defence(s); and

– even if misconduct is established, it provides an opportunity for any factors to be put forward which might mitigate the offence, and affect the appropriate sanction."

60. The ACAS Code emphasises the importance of an investigation to establish the facts ... . Even putting the Code to one side, there is a whole series of cases emphasising the significance of the need for proper procedural inquiries. As to the need for the employer to acquaint himself with all relevant facts, as Viscount Dilhorne said in W Devis & Sons Ltd v Atkins [1977] IRLR 314, [1977] ICR 662, HL, the employer cannot be said to have acted reasonably if he reached his conclusion 'in consequence of ignoring matters which he ought reasonably to have known and which would have shown that the reason was insufficient'. The

same sentiment was expressed slightly differently by Stephenson LJ in W Weddel & Co Ltd v Tepper [1980] IRLR 96 at 101:

'… [employers] do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, in the words of the [employment] tribunal in this case, "gathered further evidence" or, in the words of Arnold J in the Burchell case, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case". That means that they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably'.'

The range of reasonable responses of a reasonable employer test applied to conduct dismissals

61. The severity of the consequences to an employee of dismissal are a relevant factor. So is the employee's length of service. So is his or her past record as an employee of the employer (whether good or bad). Those things are stated helpfully in the following passage from paragraph DI[1535.01] of Harvey:

"In para 3 of the ACAS Code ... it is stated that: 'Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case.' See also the ACAS Guide ... . There are a whole range of potential factors which might make a dismissal unfair. ... In misconduct cases they include especially the employee's length of service and the need for consistency by the employer. The importance of length of service and past conduct were emphasised by the EAT in the early case of Trusthouse Forte (Catering) Ltd v Adonis [1984] IRLR 382 as being proper factors for a tribunal to take into account when considering whether the sanction imposed falls within the band of reasonable sanctions. Moreover, it was later accepted by the Court of Appeal that the severity of the consequences to the employee of a finding of guilt may be a factor in determining whether the thoroughness of the investigation justified dismissal: Roldan v Royal Salford NHS Foundation Trust [2010] EWCA Civ 522, [2010] IRLR 721 (dismissal likely to lead to revocation of work permit and deportation). While this latter point has obvious sense behind it (particularly where, for example, some form of professional status is in grave jeopardy), it was suggested subsequently in Monji v Boots Management Services Ltd UKEAT/0292/13 (20 March 2014, unreported) that some care may be needed in its application; the basic principle was not doubted, but three caveats were mentioned:

(1) this is an area where the EAT must be particularly careful not to substitute its own view on the facts for that of the tribunal;

(2) it may be that the Roldan principle may be most applicable to facts such as those in that case itself, namely where there is an acute conflict of fact with little corroborating material either way, and/or where the case against the employee starts to 'unravel' as it proceeds, in which case it makes sense to expect a higher level of investigation and adjudication on the part of the employer in the light of the severe effects of dismissal on that employee;

(3) the question is whether the tribunal has in fact applied the Roldan approach, not just whether they have done so expressly, though the EAT did add that in such a case a tribunal is advised to make it clear in their judgment that this has been part of their reasoning."

62. Expanding on those principles, Elias LJ in Crawford v Suffolk Mental Health Partnership NHS Trust [2012] EWCA Civ 138, [2012] IRLR 402, said this:

"25

The relevant law

The basic legal principles are not in dispute. Ever since the seminal case of British Home Stores v Burchell [1978] IRLR 379 (as modified to the extent that the burden of proof has since been amended by legislation) it has been recognised that it is for the employer to satisfy the tribunal that he dismissed for a potentially fair reason. Thereafter, the tribunal has to determine whether the employer acted reasonably in treating that reason as sufficient to dismiss the employee. It is accepted by the trust that the following self-direction given by the tribunal accurately reflects the law:

'It is for us to consider whether the employer had an honest belief in the misconduct alleged and that that belief was based upon reasonable grounds after having carried out sufficient investigation. It is not for us to determine on the evidence that we have heard whether we believe the misconduct had occurred. The tribunal views the matter through the eyes of a reasonable employer. Provided that the actions of this employer fall within a range of responses by a reasonable employer, the tribunal cannot interfere. It is also an exercise which is carried out when considering the penalty that follows from the employer's belief. It may be that the tribunal would have imposed a different penalty but the sole question is whether the penalty applied by this employer was such that no reasonable employer would have applied such a penalty.'

26

The tribunal reminded itself on numerous occasions throughout its decision that it must not substitute its own view for that of the employer.

27

Moreover, as I observed in the Court of Appeal in Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721 paragraph 13, it is particularly important that employers take seriously their responsibilities to conduct a fair investigation

where, as is the case here, the employee's reputation or ability to work in his or her chosen field of employment is likely to be affected by a finding of misconduct. The court was approving a passage to that effect in A v B [2003] IRLR 405.

28

Of course, the mere fact that there has been an appropriate self-direction will not preclude an appellate court from finding that there has been an error of law if it is satisfied that the tribunal has, in fact, failed to act in accordance with that self-direction. As Lord Justice Mummery observed in Brent London Borough Council v Fuller [2011] IRLR 414 at paragraph 30:

'.... There are occasions when a correct self-direction of law is stated by the tribunal but then overlooked or misapplied at the point of decision. The tribunal judgment must be read carefully to see if it has, in fact, correctly applied the law which it has said is applicable. The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques, over-analysing of the reasoning process; being hyper-critical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid.'

63. However, it should not readily be assumed that a tribunal has failed to follow its own directions. There must be a proper basis for an appellate court to conclude that the tribunal has failed to follow its own self-direction; see Roldan, paragraph 51.

Conclusion

64. I now apply the law to the facts of this case through the lens of the reasonable employer to determine the claimant's claim that his dismissal was unfair.

What was the reason, or if more than one, the principal reason for the claimant's dismissal?

65. I accept, on the balance of probabilities, that Mr Taylor's reason for dismissal was the claimant's conduct on 19 and 20 April 2021. The facts and matters which operated on Mr Taylor's mind were the claimant's aggressive behaviour on 19 and 20 April 2021 Specifically, on 19 April 2021 the claimant verbally abused Mr Taylor by calling him a "lying little cunt", threatening him by saying, "I am going to knock your fucking head off" and advancing towards him in an aggressive manner. This was compounded by the fact that the following day the claimant remained aggressive and continued to accuse Mr Taylor of lying.

66. I reject the claimant's contention that there was an ulterior reason for his dismissal. I asked Mr Morgan why he says the claimant was dismissed if, as was the claimant's case, that his conduct on 19 and 20 April 2021 was largely unremarkable. The claimant was only prepared to accept that he had told Mr Taylor that it would be "the biggest mistake of his life" if he had said to anyone that the claimant knew who was responsible for the cannabis farm. Mr Morgan

submitted that the real reason for the claimant's dismissal might have been that Mr Taylor: didn't like being challenged; didn't like rumours circulating about his own involvement in the cannabis farm; and/or that the claimant was less valuable to Mr Taylor now that he had dropped to 3 days a week and was working less hours. None of those matters seemed to me to be likely to have led to the claimant's dismissal, and in the last-mentioned regard it was common ground that the claimant's reduction to 3 days a week was a suggestion emanating from Mr Taylor himself.

67. I find that Mr Taylor's reasons for dismissal fall within section 98(2)(b) ERA because those reasons relate to the claimant's conduct. The reason for the claimant's dismissal is therefore potentially fair.

If (mis)conduct, did the respondent hold a genuine belief that the claimant had committed those acts of misconduct?

68. I am also satisfied that Mr Taylor genuinely believed that the claimant had so misconducted himself. I am mindful that this was a case where My Taylor witnessed all matters relevant to the claimant's dismissal himself and was in fact the person on the receiving end of the claimant's misconduct on 19 and 20 April 2021.

Were there reasonable grounds for that belief?

69. I am satisfied that the respondent had reasonable grounds to believe in the claimant's misconduct. Mr Taylor, who took the decision to dismiss the claimant, was present during the encounters on 19 and 20 April 2021 and was therefore a first-hand witness to the claimant's misconduct that lead to his decision to dismiss the claimant.

Did the respondent follow a fair procedure in dismissing the claimant for that reason and, in particular, did it carry out an investigation which was reasonable in all the circumstances of the case?

70. It was common ground that no investigation or disciplinary hearing was carried out or arranged by the respondent.

71. I carefully considered whether it was reasonable for the claimant to dispense with an investigation altogether bearing in mind Mr Taylor was directly aware of the claimant's misconduct. This is a small employer without access to any support services, including to any human resources expertise. At the same time, Mr Taylor did engage an external HR professional, Sandra Stewart, when making arrangements for the claimant to appeal against his dismissal.

72. I have come to the conclusion that no reasonable employer would have failed to carry out an investigation or to convene a disciplinary hearing. Indeed, it is a rare case where it would be reasonable not to do so. I am conscious that an argument had developed between Mr Taylor and the claimnat because of the cannabis farm found in the basement to the co-op building and that effectively the claimant and

Mr Taylor were blaming each other when it came to who knew about it. I also note that there had been an incident of physical violence in 2016 when the claimant had attacked Mr Taylor and that incident had not lead to the claimant**'**s dismissal (or indeed to any warning) because of mitigating circumstances. I therefore find that any reasonable employer would at least have (1) considered suspending the claimant to allow feelings to settle down; (2) investigated matters to see what scope there might be to continue the working relationship; (3) listened to whether there were any mitigating circumstances (like in 2016); and (4) considered what disciplinary sanction it was appropriate to take.

73. I am also mindful of the provisions of the Acas Code of Practice on Disciplinary and Grievance Procedures issued under s199 of the Trade Union and Labour Relations (Consolidation) Act 1992 which includes (amongst other things) giving employees the opportunity to put their case before any decisions are made and providing an employee with an opportunity to appeal. In the latter regard, it was Mr Taylor's own evidence that he would not have reinstated the claimant no matter what the claimant said or did on appeal. In those circumstances that was not an appeal that had any meaning or purpose. It could not have cured any procedural or substantive defect in the original decision to dismiss.

Was the respondent's decision to dismiss the claimant for that misconduct one which fell within the range of reasonable responses open to a reasonable employer in all the circumstances?

74. Having identified the procedural failures referred to above, I have also to go on to consider the substance of the respondent's decision to dismiss the claimant for misconduct alongside those procedural shortcomings and to make an overall assessment whether the decision to dismiss fell within the range of reasonable responses open to a reasonable employer.

75. I have come to the conclusion that, considered overall, the decision to dismiss the claimant did not fall within the range of reasonable responses of a reasonable employer because of the respondent's unreasonable failure to conduct an investigation and to consider whether there were any mitigating considerations to be taken into account; to give the claimant an opportunity to put his case before he was dismissed; and the respondent's unreasonable failure to allow the claimant access to a meaningful appeal.

Polkey

76. I also need to consider whether, had there had been a reasonable investigation, disciplinary hearing and appeal hearing, the claimant would still reasonably have been dismissed. This goes to the issue of "just and equitable" compensation under section 123 ERA. In accordance with the decision of the House of Lords in **Polkey V AE Dayton Services**, I need to consider whether if everything that should have been done had been done there would still have remained a prospect that the claimnat would have been fairly dismissed.

77. This is an unusual case in that Mr Taylor was both the witness to the events that led to the claimant's dismissal; the owner of the business; and the person who took the decision to dismiss. As the owner and sole director of the respondent (a very small employer) it was inevitable that Mr Taylor would need to take that decision. I have found that Mr Taylor genuinely believed that the claimant had on 19 April 20221 called him a "lying little cunt"; had threatened him by saying "I am going to knock your fucking head off"; had advanced toward him in an aggressive manner; and had on 20 April 2021 remained aggressive and continued to call Mr Taylor a liar.

78. If a proper process had been followed, Mr Taylor would still have had reasonable grounds to believe that the misconduct in respect of which he dismissed the claimant had indeed occurred, not least because he directly witnessed the events himself. I also noted that the claimant's position was that he denied that the misconduct had occurred at all, preferring to identify various ulterior reasons for his dismissal for which there was no reasonable basis. The claimant's position was not one of mitigation but rather one of denial. In those circumstances, I consider that had a fair procedure been followed, the claimant would have been fairly dismissed in any event and a fair process would have taken no more than 2 weeks to have been undertaken.

Reduction to Basic Award and Compensatory Award

79. Section 122(2) ERA provides that where conduct of the claimant before dismissal was such that it would be just and equitable to reduce or further reduce the Basic Award the Basic Award should be reduced accordingly.

80. Section 123(6) ERA provides that that where the tribunal finds that dismissal was to any extent caused or contributed to by any action of the complainant, the tribunal shall reduce the amount of the Compensatory Award by such proportion as is just and equitable having regard to that finding.

81. I have found that there were reasonable grounds to believe that the claimant called Mr Taylor "a lying little cunt"; had threatened him by saying "I am going to knock your fucking head off"; had advanced toward him in an aggressive manner; and had on 20 April 2021 remained aggressive and continued to call Mr Taylor a liar.

82. Whether or not the claimant was correct in his belief that Mr Taylor was blaming him for the cannabis farm in the basement of the co-op building, that cannot be a justification for such extreme verbal abuse and physically threating behaviour. In coming to this conclusion, I have had regard to the fact that industrial language may be more commonplace on a construction site than in other working environments. However, I find that the claimant's language and behaviour were of a deliberately and physically threatening nature causing Mr Taylor to leave the site on 19 April 2021 to put himself out of harm's way.

83. I have had regard to the different formulations in the two subsections referred to above and come to the conclusion, given my findings at paragraphs 42 to 50

above, that it is just and equitable to reduce and/or further reduce the claimant's Basic and Compensatory awards by 100%.

Section 38 Employment Act 2002

84. The respondent did not contest that the claimant was not provided with a written statement of particulars of employment as required by section 1 ERA 1996.

85. In those circumstances, and having regard to the terms of section 38 of the Employment Act 2002 as well as the fact that liability in this reserved judgment has been determined in favour of the claimant, the claimant may be entitled to an award under section 38 Employment Act 2002.

Remedy

86. It is hoped that the findings of the tribunal will assist the parties to resolve this matter between themselves. If matters have not been resolved by **1 July 2022**, the claimant must write to the tribunal requesting that this matter be listed for a Remedy Hearing.

EMPLOYMENT JUDGE LOY

13 JUNE 2022