



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Butt

**Respondent:** A&D Facilities Limited

**Heard at:** East London Hearing Centre (via CVP)

**On:** 30 June & 1 July 2022

**Before:** Employment Judge Thackray

## **Representation**

**Claimant:** In person

**Respondent:** Mr S Tibbitts, Counsel

# RESERVED JUDGMENT

The judgment of the Tribunal is that:

- 1. The complaint of unfair dismissal is well-founded; the respondent unfairly dismissed the claimant. The unfairness related to flaws in the disciplinary and appeal procedures.**
- 2. A 100% reduction in the compensatory award for unfair dismissal will be made under the principles in Polkey v A E Dayton Services Limited 1988 ICR 142.**
- 3. The claimant contributed to his dismissal to the extent of 100%, to be applied to the basic and compensatory award for unfair dismissal. Any award is therefore extinguished.**
- 4. The claimant's complaint of wrongful dismissal and claim for notice pay is not well-founded and is dismissed.**

# REASONS

## Introduction

1. This is the reserved judgment with reasons following the hearing on 30 June 2022 and 1 July 2022.
2. By a claim form presented on 26 January 2022 the Claimant complained of unfair dismissal from his post as a security officer on 28 October 2021. He was summarily dismissed following an allegation of aggressive and intimidating behaviour made by a third party, a contract cleaner, at the building where the Claimant was a security guard. He argued that any admitted conduct did not warrant summary dismissal. In addition to the unfair dismissal complaint the Claimant sought notice pay for wrongful dismissal, having been dismissed without notice. He argued that the process had not been fair in a number of ways.
3. The Respondent resisted the claims brought, asserting that the conduct alleged had been serious and that summary dismissal was within the band of reasonable responses for the employer. Likewise, the wrongful dismissal claim was resisted on the ground that the behaviour fell within the definition of gross misconduct in the company rules, a summary dismissal had been justified and no notice pay was due.
4. The Respondent acknowledged some deficiencies in the disciplinary procedure, but argued that these were minor, had been remedied and ultimately did not affect the outcome or the fairness of the procedure.

## Claims and Issues

5. The issues the Tribunal had to decide are set out below. I indicated that, although the Polkey and contributory conduct issues concerned remedy and would only arise if the claimant's complaint of unfair dismissal succeeded, I would consider them at this stage as they were so interwoven with the evidence to determine the claims.
6. Unfair dismissal
  - 6.1 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
  - 6.2 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant and whether:
    - 6.2.1 there were reasonable grounds for that belief;
    - 6.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

- 6.2.3 the respondent otherwise acted in a procedurally fair manner;
- 6.2.4 dismissal was within the range of reasonable responses.
- 6.3 If there is a compensatory award, how much should it be? The Tribunal will decide:
  - 6.3.1 What financial losses has the dismissal caused the claimant?
  - 6.3.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
  - 6.3.3 If not, for what period of loss should the claimant be compensated?
  - 6.3.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
  - 6.3.5 If so, should the claimant's compensation be reduced? By how much?
  - 6.3.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
  - 6.3.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?
  - 6.3.8 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
  - 6.3.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
  - 6.3.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
  - 6.3.11 Does the statutory cap apply?
- 6.4 What basic award is payable to the claimant, if any?
- 6.5 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
- 7. **Wrongful dismissal/Notice pay**
  - 7.1 What was the claimant's notice period?
  - 7.2 Did the claimant do something so serious that the respondent was entitled to dismiss without notice?

## **Procedure, documents and evidence heard**

- 8. A bundle of 251 pages was provided by the Respondent with input from the Claimant. References to a page number refer to that bundle of documents. There were two CCTV recording clips and these were viewed during the hearing.

9. The respondent called Stuart Austin, Managing Director, who decided to dismiss the claimant and Lee Dines, another Managing Director who dealt with the appeal process. The claimant gave evidence himself but did not call any other witnesses.

## **Preliminary Matters**

10. The claim form contained a reference to the claimant being discriminated against on the basis of his knowledge of problems in the business and that he had in fact been dismissed at the instruction of the building manager because he 'knew too much' about alleged shortcomings and illegalities in the running of the business. No cause of action arose in relation to any alleged discrimination of this sort.
11. There was also a reference in the Claimant's documentation to whistle blowing, again related to information about business practices. The question of whether the Claimant sought to amend his claim in relation to a protected disclosure that led to dismissal and caused him detriment was dealt with at the beginning of the hearing. This would be a matter that would need to be heard by a full panel and would require adjournment. I heard from the Claimant and the Respondent's representative. I also took account of the Respondent's Request for Further and Better Particulars that had been served on the Claimant in relation to his allegations and the response that answers would be provided in the Claimant's statement and I considered that statement. I determined that although the Claimant stated that he had made some earlier complaints, the main and most significant complaints he raised about the work place had been made after his dismissal and that this was not a case in which the Tribunal had to determine whether a protected disclosure leading to a detriment had occurred. The Claimant did not seek to amend his claim.
12. The claimant had at one stage sought redundancy from his employer and this had been mentioned in his tribunal documentation and redundancy related code had been allocated, but it was clear that there had been no dismissal by reason of redundancy.
13. The Claimant had complained that the Respondent had not assisted him in relation to calling a co-worker as a witness (Zaid Hassan) whom the Respondent originally intended to call, but later decided would not be called. There had been correspondence as to the Claimant being free to contact this witness and call him, but he considered it appropriate for the Respondent to do this. I considered that a fair hearing could be held without this witness. His short statement was in the bundle and I would accord it appropriate weight given he was not present to be questioned. There had been an opportunity for the Claimant to call this witness which had not been taken.
14. An issue was raised by the Respondent at the start of the hearing as to the length of the Claimant's continuous service. The Respondent took over the business of the Claimant's previous employer on 4 February 2021. There was agreement that there had been a TUPE transfer. The Claimant put his continuous service as starting in May 2007 and the Respondent had also used this date in the particulars of response and witness statements. The

Respondent now sought to use a date in August 2017 as the start of continuous employment and being a date when a previous business transfer had taken place. There was insufficient evidence to determine the issue and whether such an amendment should be permitted. As length of service here was relevant largely to any award that may be made I decided that, if necessary, documentation could be provided and argument heard, on any remedy hearing.

## **Findings of fact**

15. The Respondent is a security and facilities company. The Claimant was a security guard and provided his services at the Relay Building in London which was managed by John D Wood. He had worked there for a number of years and was an experienced security guard. The Respondent took over the business of the Claimant's previous employer in February 2021. There was agreement that there had been a TUPE transfer. For some time he was security supervisor but had stepped down from that position in 2017 for family reasons.
16. On 22 September 2022 the Claimant was suspended because of an incident early that morning in which he was alleged to have behaved in an aggressive and intimidating way to a third party supplier, a cleaner named Rodrigo, at the Relay Building.
17. An investigation meeting took place on 27 September. On 30 September the Claimant was informed that disciplinary proceedings were commenced. He was invited to a meeting on 8 October which was postponed at the Claimant's request and took place on 20 October. The meeting was then adjourned part-heard and concluded on 28 October, as it became clear on 20 October that a particular statement had not been made available to the Claimant.
18. In the meeting on 28 October Mr Austin summarily dismissed the Claimant and confirmed this in a letter on 1 November 2021. The Claimant appealed on 3 November and an appeal hearing was held on 11 November, conducted by Mr Dines. Further investigations were then undertaken. The outcome of the appeal, confirming the dismissal, was sent to the Claimant on 13 January 2022. The Claimant found new employment on 18 December 2021.

## **Contract of Employment and guidance**

19. The Contract provided in relation to gross misconduct under the heading Standards of Performance or Behaviour:

*'The Company is entitled to dismiss you without notice if you are found to have committed an act of gross misconduct. A list of acts which constitute gross misconduct can be found within the disciplinary rules.'* (bundle p 62)

20. The Disciplinary Procedure document (p 66 onwards) provided key principles:

*'2. No formal disciplinary action will be taken unless there is sufficient evidence to warrant such action and until the case has been carefully investigated.'*

3. *Each case will be considered on its own merits, in order that any decision should be reasonable in all the circumstances.*

4. *At each stage of the procedure, employees will be informed of the nature of the complaint(s) and/or allegation(s) against them and will be given the opportunity to state their case before disciplinary decisions are made...*

...8. *Employees will not be dismissed for a first breach of discipline except in case of gross misconduct when dismissal may take effect without notice or pay in lieu of notice.'*

21. The Disciplinary Procedure document (p 69 bundle) set out the forms of disciplinary action and stated, in relation to summary dismissal:

*'If, on completion of an investigation and a disciplinary hearing, the disciplinary manager is satisfied that gross misconduct has occurred, the employee may be dismissed with immediate effect without any notice or pay in lieu of notice.*

*In such cases, the employee will be provided with written reasons for dismissal, confirmation of the date on which employment terminated and details of the right of appeal. Examples of offences which are normally regarded as gross misconduct are given in the Company Rules.'*

22. The Company rules, found in the Employee Handbook, provide (p 120 bundle):

*'The following acts are examples of gross misconduct offences and as such may render you liable to summary dismissal without notice and without previous warnings. It is not possible to provide an exhaustive list of examples of gross misconduct. However, any behaviour or negligence resulting in a fundamental breach of contractual terms that irrevocably destroys the trust and confidence necessary to continue the employment relationship will constitute gross misconduct. Illustrative examples of offences that will normally be deemed as gross misconduct include serious instances of:...*

- *...serious cases of bullying, offensive, aggressive, threatening or intimidating behaviour or excessive bad language.'*

## **22 September incident**

23. It is common ground that there was an incident at around 05.15 or 05.30 in and around the control room where the Claimant was based, in which there was a dispute between the Claimant and the third party cleaner named Rodrigo. What is not agreed is whether the Claimant was aggressive, intimidating, bullying or threatening as alleged.

24. It is agreed, and can be seen from the CCTV clip 1, that the claimant was sitting in a chair in the control room when Rodrigo entered the room, plugged in his vacuum cleaner and immediately left. The claimant rose, turned off the vacuum, opened the door to the corridor and could be seen speaking to someone in the corridor. Clip 2 is from a CCTV camera in the corridor outside the room and focuses on the door at the other end of the relatively short corridor. The claimant can be seen moving along the corridor towards the cleaner and an interaction takes place near to the doorway at the other end of the corridor. Both participants then go through that doorway and there is a period of a few minutes when nothing can be seen until the door opens again, both parties are briefly visible, along with another security guard, and the cleaner then comes back into the corridor towards the control room.

25. An issue had arisen during the investigation and disciplinary proceedings about the length of the incident and the significance of the times given for the various actions in the CCTV incident report prepared by K Hussain. There appears to be a 19 minute gap between the actions shown on each camera. Having viewed the CCTV and heard from the Claimant and the Respondent I find as a fact that the time stamps on one of the cameras must have been inaccurate. It is clear that there is no significant time lapse between the claimant leaving the control room by the only door and entering the corridor immediately outside. The CCTV in the corridor then picks up the action and as a matter of fact I found that the clips of some two minutes and six minutes ran directly one after the other and that the incident did not take over 20 minutes. This is relevant to understanding aspects of the evidence.

### Investigation

26. The suspension letter of 22 September indicates that Nicky Thomas, Contracts Manager would undertake the investigation and that 'the allegations of misconduct made are that you allegedly behaved in an aggressive and intimidating manner to a 3rd party supplier, on the morning of 22 September 2021'.
27. The investigation produced: a statement from Rodrigo the cleaner; two statements from Zaid Hassan, the security guard, who witnessed part of the exchange (though one of these statements was not seen by the Claimant until later in the process); the CCTV evidence and the incident report that described what was shown in the CCTV (prepared by guard K Hussain); a statement from the Claimant. The investigation meeting took place on 27 September.
28. The statement from Rodrigo noted that the incident occurred when he went into the control room to plug his hoover in and left to clean. He stated that he would not clean in the control room until after 7 am as the Claimant 'became annoyed' with him. He stated that the Claimant started: *'screaming very loudly, put his face on my face saying I don't respect because I'm counting [sic] and making noise and it's his room...and he doesn't want noise and I [sic] continue to threaten me by telling me to hit him and calling me on the street to fight with me, he pulled over in me is very angry and stressed screaming a lot with hate, I didn't scream or fight I just looked at him, the other security guard saw everything. I asked to see camera because it was about 20 minutes he was threatening me and wanting to hit me. i was very nervous, shaking and almost got punched'*.
29. In his statement the Claimant contended that Rodrigo was *'shouting and screaming with his ear pods in his ears'*. He *'tried to talk him (cleaner) but Rodrigo had either deliberately ignored [him] or could not hear him due to the fact he had his ear pods in...the Claimant then stood...and turned his hoover off so that [he] could speak to him about his shouting and swearing'*. The Claimant says he *'asked him to come to control room to discuss his shouting and screaming'* but the cleaner told the Claimant that he should come to him.
30. The Claimant's statement continues: *'Rodrigo [sic] then told Asif Butt that he will do whatever he likes in a very rude way. At this moment in time he*

*had made Asif Butt very angry... Asif Butt then told him in a very high pitched voice that he should stop annoying people. Asif Butt also told him that if he thinks he is a bad boy. Asif Butt also reminded him that about him previous warnings about destroying client's property, being disrespectful to his other fellow officers. Asif Butt also reminded him about destroying keyboards and computers. Hitting the walls and doors with hoover...'*

31. He stated that six months previously he complained about the cleaner to a supervisor that: the cleaner used ear buds, which meant he did not hear when he was making loud banging noises; the cleaner had caused damage to keyboards and computers by heavy-handed cleaning methods; he had knocked CCTV monitors out while cleaning; the Claimant reported seeing the cleaner kick his colleague Zaid Hassan's leg to get him to move out of the way whilst cleaning and the cleaner should not come into the control room without permission and that GDPR issues arose if he did so. The Claimant stated that Rodrigo's behaviour had continued despite the supervisor speaking to him and he had '*completely given up on him*' and had not spoken to him for almost six months. He referred to Rodrigo's behaviour as '*mental torture when he comes in to clean in the morning*' and complained that '*nobody paid any attention to his nefarious activities.*'
32. The typed statement of Zaid Hassan said that he had seen the Claimant '*standing right in front of Rodrigo enraged shouting in his face with his hands up all in a aggressive manner...I recall Asif uttering such as "you don't know who I am, you don't know what I can do", he also told Rodrigo more than once to punch him and he also told him to come outside all in an aggressive manner...I could see the situation perhaps turning physical.*'
33. A note of the investigation meeting on 27 September was in the bundle. The Claimant stated: '*Rodrigo came into the control room with earpods in, singing and swearing...he swears and I'm the only one in the room...I went to where he was and asked him why he was ignoring me. He then got up in my face. Zaid told me to calm down and said "he's trying to push your buttons". I then told Rodrigo that he annoys everyone and that one day he's going to get it*'. The Claimant was asked why he was so angry and replied '*he is always breaking equipment. He[His?] behaviour is intimidating*'. When asked if he meant annoying or intimidating the Claimant stated intimidating.

### **Disciplinary proceedings**

34. Following the investigation meeting, by letter dated 28 September 2021, the Claimant was informed that formal disciplinary proceedings were being commenced. The letter stated '*the allegation of misconduct made was that you assaulted a third party*' and '*although no decision has been taken as to what, if any disciplinary sanction, maybe imposed you should be aware that given the nature of allegations made against you than any disciplinary sanction up to and including dismissal under the grounds of gross misconduct may be issued.*'
35. After being postponed at the Claimant's request, the disciplinary meeting took place on 20 October 2021 (the minutes incorrectly state 20 September). Mr Austin was the decision maker and the claimant was accompanied by Jan Topping, representative from Unite, the union. Mr Austin had viewed the



CCTV footage and stated *'it appears to me that your behaviour in the footage seems aggressive. Can you please tell me your side of it?'*. The Claimant stated *'when I talk I use hand gestures. This is not me being aggressive... he came towards me, I stepped back. He planned all of this. He did stand with his hands behind his back but with a smirk on his face. He was up in my face he then lied in his statement he's trying to gain some sort of payment from the company. He is malicious'*. The Claimant also raised complaints about his colleague Zaid Hassan who had been late and had not undertaken his duties that night correctly.

36. The union representative pointed out that the discrepancy with the CCTV evidence; that the interaction was *'approximately 3 minutes long'* and not 20 minutes. She asked whether the issue was misconduct or gross misconduct and Mr Austin responded *'we cannot make that decision until I have answered the questions raised to me today as I don't have all the information'*. Mr Austin also agreed to consider an additional statement from another staff member (Abdi Jama Ali) that had been sent to the union representative on 18 October.
37. An issue arose in the meeting about there being two versions of Zaid Hassan's statement, one typed statement dated 22 September and another handwritten statement dated 29 September. The latter had not been seen by the Claimant and the meeting was adjourned to 28 October for that to be provided and for Mr Austin to investigate further as to whether issues about Rodrigo had been raised with the building manager and look into the question of the security of the control room.

### **Between 20 and 28 October**

38. The short statement from Abdi Jama Ali was provided. It related to general issues with Rodrigo's behaviour, stating that he had an attitude problem, sang with a raised voice causing disturbances, would knock PCs out of power, damage keyboards and generally be disruptive to security operations. He said that complaints had been made but to no avail.
39. The handwritten statement of Zaid Hassan was provided. It was substantially the same as the typed version, though there was the addition of the following *'Asif later on called me to the office saying that I should not say that he had shouted at Rodrigo and that he spoke to him with a raised voice.'*
40. The union representative complained by e-mail that the handwritten statement of Mr Hassan had not been provided prior to the hearing, quoting the ACAS code that employees should be sent copies of all materials including witness statements and raised the issue that it appeared to be longer than the typed version. The contracts manager responded that Mr Hassan originally typed up a version at work while it was fresh in his head and had later forwarded her the hand written version having thought about it as he was *'nervous as to Asif's possible response'*.

### **28 October Disciplinary meeting**

41. The disciplinary process was concluded at the hearing on 28 October 2021. The key points were:

- 41.1 Mr Austin indicated that Nicky Thomas had fully investigated the points about which he had wanted further information.
- 41.2 Mr Austin agreed that the CCTV did not show the Claimant 'grabbing' anyone.
- 41.3 The Claimant reiterated that the CCTV report incident report was wrong in describing him as 'charging' at Rodrigo.
- 41.4 The Claimant alleged that Zaid Hassan had not told the truth in his statement and had omitted important facts. He added *'I did go up to Rodrigo as I couldn't suffer anymore. Most of what happened is off camera and Zaid did not any add everything to his statement. Rodrigo should not have been allowed to clean unsupervised... even Zaid said that Rodrigo continued to make strange noises.'*
- 41.5 Mr Austin asked the union representative if she would like to add anything she replied *'yes I have a lot to say'*. The minute shows Mr Austin 'reading a letter citing gross misconduct'. It is not explicit in the minutes, but it appears from the surrounding information that Mr Austin then confirmed the dismissal in the meeting.
- 41.6 The union representative complained that she had not been allowed to summarise, that she had put a lot of work into this and found Mr Austin's behaviour 'uncourteous' and that it was 'outrageous'. Mr Austin apologised saying *'sorry I thought everyone had finished'*.
- 41.7 The meeting then ended with Mr Austin stating that the contracts manager would be writing to the Claimant and he had five days in which to appeal.

### Confirmation of Dismissal

42. In a letter dated 1 November 2021 Mr Austin confirmed the outcome of the meeting on 28 October and the dismissal on that date; *'having reviewed the evidence and the representations made during the hearing, I decided that you should be summarily dismissed without notice. This was communicated to you during the follow up meeting on 28 October. The allegation against you was aggressive and intimidating manner to a third party contractor.'*
43. The decision was supported by the following findings set out in the letter:
- 43.1 That having reviewed the CCTV footage and other evidence there were reasonable grounds to believe the Claimant had committed the alleged misconduct. The footage showed him *'behaving in an aggressive and intimidating manner'* and in relation to periods when the participants were off camera Mr Austin relied on the statements from Rodrigo and from Mr Hassan. *'We believe such behaviour to be sufficiently serious as to amount to gross misconduct.'*
- 43.2 The defences and responses raised by the Claimant did not justify his actions. He found the Claimant's claim that the cleaner had entered the room shouting, swearing and making horrible noises was not consistent with CCTV footage or statements. He had not been aware of the history between the Claimant and the cleaner, but did not

consider any such past behaviour to be a justification and said *‘the statement that you have not spoken to the contractor for almost six months, if anything, makes the contact even more serious as for the previous six months you have had little to contact with the contractor.’*

43.3 In relation to the Claimant’s allegation that Rodrigo had been ‘up in the claimant’s face, smirking’, Mr Austin found that the video footage was not consistent with that claim.

43.4 The allegations about other staff members’ behaviour was not relevant to the decisions at hand.

### **Evidence relating to the dismissal decision**

44. Mr Austin’s evidence to the Tribunal about the investigation and decision-making process confirmed that he saw no evidence of actual violence or ‘grabbing’, but the way Claimant *‘stormed up’* to Rodrigo, was getting close to and *‘standing over’* him appeared aggressive; it was not a *‘full charge’* but he did go *‘flying out of the room’*. It was not acceptable. Rodrigo had clearly put his hands down by his sides, toward the back, whereas the Claimant was gesturing. Rodrigo looked uncomfortable. Regarding the history with Rodrigo, Mr Austin said he was not aware of the extent of it, but even if all the previous allegations were true he did not consider it justified the response. Rodrigo had been wrong to enter the control room without knocking but again this was not justification. During his investigations he uncovered no other negative feedback from colleagues or employer about Rodrigo. Although he perceived the behaviour as intimidating from viewing the CCTV he said that he had not made a decision about anything prior to the meetings.

45. Mr Austin gave evidence that he placed weight also on the statement of Zaid Hassan that the Claimant was shouting aggressively, and squaring up to him and offering him to fight. He had been unaware of complaints to building manager about company failings so could not have taken those into account in decision-making. The decision was made on the behaviour of the Claimant on 22 September. It was behaviour that came within the definition of gross misconduct as defined in company policy and could be seen as coming within the intimidatory or harassment and bullying categories. Mr Austin gave evidence that other options were explored, but he considered that any physical intimidation was unacceptable, particularly in the security business and from someone experienced and who was effectively a representative of the Respondent at the building. He could not be seen to sit back and do nothing. He could not have an unhappy client after an incident like this; there was no appropriate other sanction in his view.

### **Appeal against dismissal**

46. By letter dated 3 November 2021 the Claimant appealed against his dismissal. He made the following points:

46.1 His, and others’, previous concerns about Rodrigo’s conduct and Abdi’s written statement about it had not been properly taken into account. The conduct had not been dealt with over a long period of

time and was *'bound to have erupted into something more if not properly addressed'*. His actions had been a direct result of the provocation, that Rodrigo had sworn directly at the Claimant saying *'no, you fucking come to me'* when he was asked to come to the control room and that the Claimant *'took the bait after he [Rodrigo] continually succeeded in goading the Claimant'*.

- 46.2 The characterisation of his behaviour as aggressive and intimidating was exaggerated. It was a heated conversation lasting a matter of minutes in which the Claimant admitted raising his voice but was not shouting or screaming. There was no physical contact and he had only waved his hands about out of frustration and not aimed at Rodrigo's face. He had taken a backward step during the exchange and had not lunged or charged at him. The Claimant justified the use of a raised voice because Rodrigo was wearing earpods and often could not hear what was being said to him.
- 46.3 Mr Austin had been biased, opening the meeting on 20 October with his view that the CCTV showed an act of aggression.
- 46.4 There was confusion over whether the allegation was misconduct or gross misconduct.
- 46.5 The union representative had not been given the opportunity to sum up the case.
- 46.6 Mr Austin announced the dismissal in the meeting in contravention of the ACAS code. The disciplinary hearing should have been adjourned for Mr Austin to take time to consider all the evidence. This suggested that the outcome had been predetermined
- 46.7 The handwritten witness statement had not been given to him in the first meeting.
- 46.8 The CCTV incident report was unfair because its writer had malicious intent and referred to attempts to 'grab' Rodrigo and that the Claimant aggressively charged at him when both claims were false.
- 46.9 That Zaid Hassan had his own motivations for making the statement he did and omitting a number of key facts, because the Claimant had recently raised problems with his conduct. Somebody other than Zaid Hassan had typed up his statement and the respondent had not intended for the Claimant to see the handwritten version.
- 46.10 The sanction of summary dismissal was far too harsh and did not take into account his unblemished work record, his 15 years' continuous service and the value that he brought to the company.

### **Appeal hearing 11 November 2021**

- 47. This meeting was held by Lee Dines, director, also present were Guy Woodcock, external HR advisor, the Claimant and his union representative.

Claire Baker was a note taker. The claimant argued that his key points had not been understood, the provocative behaviour of the cleaner had not been taken into account and nothing had been done to help him. He acknowledged that he had been angry and did not deny what he had said to Rodrigo. Malicious reports had been given by people who resented him because he enforced the rules and may have had cause to criticise their work.

48. The union representative challenged the use of an external HR resource without having informed them, the CCTV was not conclusive and she had not been able to fully represent him in the first hearing. Rodrigo's behaviour had not properly been investigated, there was an issue with Zaid's statements and questions over who had prepared them. The representative argued that the Claimant should have not have been dismissed across the table at the end of a hearing; the dismissal had been incorrectly undertaken.
49. Mr Dines agreed that it had been an error not providing Zaid's statement before the meeting, hence the adjournment for a week. He stated that Rodrigo had not been shown the CCTV as alleged by the Claimant (who said that Rodrigo made the allegation that the incident was 20 minutes long because he relied on the incorrect timings on the CCTV report). The meeting was adjourned with Mr Dines saying everything further should be sent to him and he would contact the Claimant in due course.

#### **Following the appeal meeting**

50. Notes of the appeal meeting were sent to the Claimant for comment. On 21 November Abdi Jama Ali informed Claire Baker that he wished to retract the witness statement he made about Rodrigo; he felt that the problems with Rodrigo had been raised and dealt with.
51. There was a delay in the outcome of the appeal being issued. On 21 December the union representative wrote to Mr Dines and expressed concern about the length of time it was taking to resolve, (acknowledging that Zaid Hassan had been on holiday and that Mr Dines had been unavailable, both possible causes of some delay up to that point). On 6 January the union further chased, requesting confirmation of the outcome of any subsequent investigations, reason for any delays or otherwise to produce the outcome.
52. There was then correspondence between Mr Dines and the representative about an apparent misunderstanding that the Claimant had referred his case to ACAS and that there was some active involvement other than him obtaining the early conciliation certificate. The company was urged to issue the outcome of the appeal.

#### **Outcome of appeal**

53. By letter dated 13 January 2022 the Claimant was informed of the outcome of the appeal:
  - 53.1 Mr Dines considered that Rodrigo's previous conduct had been dealt with by his employer; the building manager had confirmed there were

no ongoing concerns about damaged property or general conduct. In any event it did not justify the Claimant's conduct. Abdi's statement about that past conduct did not add anything and he had withdrawn it as no longer relevant. He had not been a witness to the 22 September incident.

- 53.2 The decision to dismiss was not inappropriate despite the length of service and Claimant's previous good conduct. A high standard of conduct in respect of any conflicts was required of him Mr. Dines concluded that the Claimant's behaviour on 22 September was a clear act of gross misconduct justifying summary dismissal.
- 53.3 Mr Dines accepted that the union representative had not been allowed to sum up in the original disciplinary hearing and this had been a deficiency in the process. However, there had been further opportunities for representations and the appeal process could remedy that deficiency. The Claimant had a full opportunity to state his case. Mr Austin may have formed an initial view of the behaviour in the CCTV, but had asked for the Claimant's interpretation and had also indicated an open mind to the overall case and had not been biased.
- 53.4 Zaid Hassan's typed statement had been prepared by him and not anyone else; the metadata was provided showing it had been created on 23 September 2021 at 07.18 on a company laptop. No other members of the company were present at the time. The longer handwritten statement had been provided by Mr Hassan later. It had been an error not to provide this at the meeting on 20 October, but this was remedied by adjourning for a week and immediately providing the claimant with that statement.
- 53.5 There was no evidence that the CCTV incident report had been maliciously produced; the statement in it that the Claimant *'can be seen with both hands showing, as if he wants to grab him'* was not a misrepresentation as it did not go so far as to say that the Claimant had grabbed him. As to the length of the incident Mr Dines wrote *'you have also stated that the incident did not last 20 minutes as suggested in Rodrigo statement but the CCTV shows that the incident commenced at 05:15 and then there is a gap from 05.16 to 05.35 which is off camera but then appears to be continuing at 05.34 when you both appear reappear on camera'*. As indicated above, I found this to be an incorrect understanding of the timings relating to the video evidence.
- 53.6 Mr Dines acknowledged there could be motivation for malice on behalf of Mr Hassan who had been criticised by the claimant for work, but this was not proven and his evidence was *'materially consistent with Rodrigo's and with the CCTV footage.'*
- 53.7 Mr Dines confirmed that he was satisfied that the decision to terminate the Claimant's employment on the grounds of gross misconduct was correct and referred to the video evidence *'clearly showing you*

*conducting yourself in an apparently physically threatening manner to Rodrigo and this is confirmed by the statements provided by Rodrigo and Zaid.’ There may have been some provocation both at the time and previously but this was in no way sufficient to justify the Claimant’s conduct ‘especially given [his] role as a security operative.’*

### **Further Evidence Relating to the Appeal and decision-making**

54. Mr Dines gave evidence that his assessment of the CCTV footage accorded with that of Mr Austin; it provided no evidence of provocation by Rodrigo. The Claimant was seen waving his hands, Rodrigo was standing with his hands behind his back. The Claimant had lost his temper and control for a moment. Shouting in that way was not acceptable, he was the public face of the company and this was detrimental to the business. There may have been some provocation at the time or before but it would not have been a justification. He should have walked away and used control. He saw no reason to question the veracity of Zaid Hassan’s statement.
55. In relation to the allegations of poor business practice and illegality, the Claimant had not made the company aware, other than regarding the guard ‘SJ’. In fact, Mr Dines was disappointed that the Claimant had not raised it properly. They had made mistakes with the SIA licencing due to some incorrect advice from a consultant, but had always undertaken immigration checks. He should, as part of his role, have brought these things to the attention of the company and not keep them to himself until after the whole process was over.

### **Claimant’s account of the September incident**

56. The Claimant gave evidence to the Tribunal, during a viewing of the CCTV evidence and in answer to questions. The Claimant maintained that Rodrigo was making ‘a horrible noise’ and shouting in another language just before he came into the room and kicked the wall or door. He did not scream inside the room. The Claimant was challenged by Counsel for the Respondent that in the CCTV footage he did not appear to react until Rodrigo entered the room, suggesting that he had not been disturbed by noise in the corridor. The Claimant said it was for about 5 seconds before and was a horrible noise. He said he thought about whether to say anything about the persistent noisy and disruptive behaviour and then decided to. He unplugged the hoover and stood in the doorway and gestured and spoke to the cleaner who was by now at the other end of the corridor. The Claimant maintained that he was calm and Rodrigo swore at him and refused to come, which made him angry. He did not launch himself or charge and argued that watching particular frozen frames of CCTV footage, which it was argued showed him moving at speed and gesturing in certain ways, was misleading.
57. The Claimant admitted being angry and talking loudly, he asked if Rodrigo wanted to hit him and invited him outside. He asked if he thought Rodrigo was a bad boy and spoke to him about the unacceptable way he went about his job. He was gesturing out of frustration but not in a threatening way. At one point he stepped back. Rodrigo was trying to provoke him by smirking. Zaid told him to calm down and Rodrigo was trying to provoke. The Claimant

said he wanted Rodrigo to know he was annoying people and that his work was unacceptable. The Claimant stated he did not lose his temper

### **Wrongful dismissal findings**

58. Whilst for the purposes of the unfair dismissal case I must consider the Respondent's knowledge and belief, as discussed below, for the wrongful dismissal claim I must make my own determination of the conduct and whether it justified the dismissal.
59. My determination is that the Claimant's behaviour to Rodrigo amounted to aggressive and intimidating conduct. I found that the Claimant had been ruminating over many months about the behaviour of Rodrigo and had stopped speaking to him as he had become very frustrated. Whilst he spoke of nefarious activities and abusive behaviour on the part of Rodrigo, there was no evidence of such, though there was evidence that the Claimant was irritated by the level of noise and lack of consideration of the cleaner. He believed that the cleaner caused damage to property but the evidence did not support that this had happened at the level alleged. I found that the Claimant had raised this once and continued to be dissatisfied, but did not take reasonable further steps to bring any problems to the attention of management. Instead he brooded on the matter and, as he said, he felt that some form of outburst was inevitable.
60. He considered he was justified in taking the cleaner to task on this particular day. He had had a bad night with a colleague. It was accepted by the Respondent that the cleaner acted inappropriately in coming into the control room without permission, but there was no evidence that Rodrigo had done any other acts on that day to provoke and I assessed that it was a build up of frustration that led the Claimant to become so angry. I found as a fact that he attempted to exert control by switching off the hoover and trying to insist that the cleaner come to the office and then moved at speed and loomed over the much smaller man while making his points about the situation. His body language including his movements, posture and arm gestures indicated that he was irate and insistent in delivering those thoughts.
61. There was no recording of the words spoken, though there was evidence in the statement of Zaid Hassan; I have placed limited weight on that written evidence as Hassan was not called as a witness. I treated the evidence of Rodrigo with some caution as his assessment of the incident lasting 20 minutes appeared to be an exaggeration in the light of the CCTV evidence, however, much of his account accorded with what was shown in the video recording. I found that on the evidence of the Claimant alone there was enough information to assess that he had been angry, had raised his voice and berated the cleaner, called him to a physical fight, persistently criticised him and attempted to provoke physical retaliation. He also made threats, admitting to saying 'he's going to get it.' His behaviour was such that he was warned to calm down by a junior colleague. It was possible that Rodrigo had said words during this interchange that provoked the Claimant and which may have been unacceptable. However, taking into account the Claimant's job, his experience and the nature of his training and responsibilities, his behaviour fell short of what could be expected of him in



his role as a security guard and representative of the company responsible for security in a large multi-use building. I assessed that his behaviour was aggressive and intimidating.

**Issues relating to complaints made by Claimant regarding business practices**

62. In the documentation and in the hearing the Claimant focussed a considerable amount of attention on the deficiencies he perceived in the running of the Respondent company and in the company managing the Relay Building, John D Wood. This relates to the discussion earlier about whether protected disclosures were made. There was a letter in the bundle dated 10 January 2022, but not sent until after the receipt of the outcome letter of 13 January, to Kieron at John D Wood, referring to a telephone call between them on 7 December and setting out a number of complaints. Briefly, these included complaints that the building manager was biased against the Claimant, was rude and dismissive and blocked his progress. The other key concern was that the Respondent employed staff without the necessary security licences, experience or immigration status to legally undertake the work. In addition there were concerns about the security practices and certain breaches that undermined the building's security. In the letter the Claimant asks that these issues be investigated and says that it was being sent after the appeal as he did not want anyone to think that he was trying to influence the outcome of the appeal.
63. The failure to obtain Security Industry Authority (SIA) licences for all appropriate staff and directors was a matter of some considerable importance to the Claimant. He had contacted the SIA for disclosure of licences and produced the report that indicated that there had been periods of time when key personnel had not held licences.
64. In evidence the Claimant suggested that the Management resented him reporting the licence issue and that this contributed to the decision to dismiss him. There was evidence that he had raised the issue in relation to one particular member of staff, that an investigation had been undertaken but that this member of staff had left prior to the issue being resolved. This was the only specific example that the Claimant was able to give that he had drawn attention to. Mr Austin acknowledged this in his evidence. Other than that, there was no evidence that these matters had been raised prior to the telephone call of December 2021 and the letter of January 2022. There was an SIA investigation in May 2022 and the Claimant obtained a report from SIA for these proceedings that provided answers to questions the Claimant raised about licences.
65. As a matter of fact I found that these were, with the exception of the issue of a guard colleague, 'SJ', issues that had been raised after the Claimant's dismissal and after the whole disciplinary process was concluded. Whilst these were issues of importance to the Claimant they were not relevant to the determination of this case.

## Relevant Legal Principles and Conclusions – unfair dismissal

66. Section 94 of the Employment Rights Act 1996 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 s/he was dismissed by the respondent under section 95. In this case the respondent admits that it dismissed the claimant on 28 October 2021.
67. Section 98 of the 1996 Act 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.
68. In this case it is not in dispute that the respondent dismissed the claimant because it believed he was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). The respondent has satisfied the requirements of section 98(2).
69. Section 98(4) provides that the determination of the question of 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.
70. In assessing fairness in cases of misconduct dismissal, the Tribunal must apply the 'Burchell test', originating in British Home Stores v Burchell [1980] ICR 303, a decision of the Employment Appeal Tribunal, subsequently approved in a number of decisions of the Court of Appeal. The test involves consideration of three aspects of the employer's conduct:
  - 70.1 Did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case?
  - 70.2 Did the employer genuinely believe that the employee was guilty of the misconduct complained of?
  - 70.3 Did the employer have reasonable grounds for that belief?
71. In determining 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 or whether that band falls short of encompassing termination of employment. The assessment should consider the fairness of all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed and not on whether the employee has suffered an injustice. 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).

72. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and also whether it acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854.
73. There was no dispute that the reason for dismissal, misconduct, was a potentially fair reason relating to the Claimant's conduct. The issue for me to determine was whether it was fair or unfair applying the general test in section 98(4) of the Employment Rights Act 1996. That required me to take into account the relatively limited size and resources of this employer as well as equity and the substantial merits of the case. I reminded myself of the case law summarised above.

#### **Genuine belief**

74. I was satisfied that there was a genuine belief on the part of the Respondent that the Claimant was guilty of misconduct. Mr Austin made that clear in his evidence that he dismissed the claimant because his aggressive and intimidating behaviour. His interpretation of the behaviour seen in the CCTV was of the Claimant being intimidating and this was corroborated by the evidence of the others present. Whilst the very first letter had referred to an assault, later letters referred to intimidating and aggressive behaviour. That was what Mr Austin based his decisions on. In any event, I noted that an assault could comprise putting another in fear of a physical assault and that this wording was not a barrier to the belief about the behaviour being genuine. Likewise in the appeal procedure I was satisfied that Mr Dines had a genuinely held view that the Claimant had behaved in the way complained of.

#### **Reasonable Grounds**

75. The next question was whether the conclusion that the claimant was guilty of misconduct was based on reasonable grounds. I was satisfied that the CCTV evidence, the statements referred to and the admissions of the Claimant himself gave the Respondent reasonable grounds to conclude at the time that the Claimant had behaved in an aggressive and intimidating way. It followed that it was within the band of reasonable responses to decide to summarily dismiss.

#### **Reasonably Fair Procedure**

76. I then considered whether a reasonably fair procedure had been followed. In my judgment the respondent failed to follow a fair procedure. There were a number of flaws; some were minor and others more significant. Together the flaws amounted to the procedure failing to meet the standard of reasonable fairness:

- 76.1 The Claimant was not provided with the handwritten statement at the first disciplinary meeting. This was an error, but the meeting was adjourned and a time given for it to be considered. There was nothing substantively problematic about the two statements as had been alleged.
- 76.2 The union representative was not allowed time to sum up at the end of the resumed meeting. It would perhaps have been preferable for her to have made it clearer that she still wished to do so, the opportunity should have been afforded to her under ACAS code and from the general perspective of fairness. This was a flaw in the process.
- 76.3 The fact that the Respondent in the meeting on the 28 October read from a prepared letter regarding gross misconduct and dismissed the Claimant in the meeting did contribute to the sense the Claimant had that the case had been prejudged. I did not find that the comment by Mr Austin that the Claimant's behaviour appeared in the CCTV to be aggressive indicated unfairness, though it may have played into the Claimant's ongoing perception that he had been treated unfairly.
- 76.4 The investigation failed to fully explore the issue of the timing on the CCTV and thus to explore the validity of the evidence of the cleaner that the incident lasted substantially longer than the Claimant asserted.
- 76.5 There was an unreasonable delay in concluding the appeal process and reasons for delays were not provided. There were legitimate reasons for some delay but not informing the Claimant of the outcome until 13 January was an undue period of uncertainty and was a further flaw in the process.
- 76.6 I took into account the size and resources of the Respondent but noting that they had engaged HR services it was not unreasonable to expect them to have avoided these procedural flaws
77. The combination of these procedural flaws rendered this an unfair dismissal and therefore the unfair dismissal complaint succeeded.

### **Sanction**

78. Had the matter been dealt with following a fair procedure I would have found that the decision to dismiss was within the band of reasonable responses. The behaviour that the Respondent held a genuine and reasonable belief had occurred appears in the list of examples of gross misconduct in company policy and the maintenance of trust in the ability of the Claimant to maintain calm, to effectively resolve disputes and to represent the company without resorting to intimidating or aggressive behaviour was of crucial importance to the Respondent .

### **Relevant Legal Principles and Conclusions – Polkey**

79. I considered whether any adjustment should be made to the compensation on the grounds that a fair procedure might have led to the same result and a fair dismissal at a later date, under the principles in Polkey v A E Dayton

Services Limited [1988] ICR 142 and the subsequent guidance from the Employment Appeal Tribunal in Software 2000 v Andrews & others [2007] ICR 825.

80. In this exercise I am assessing what the employer before me would or might have done on the assumption that the employer would this time have acted fairly though it did not do so beforehand: Hill v Governing Body of Great Tey Primary School [2013] IRLR 274 at para 24. I found that had the flaws in the procedure not taken place and the procedure had been fair it was inevitable that the Respondent would still have dismissed the Claimant. I took into account the matters outlined as defects above and how seriously management took his actions and the importance in his role of him not exhibiting behaviour that could be viewed as aggressive or intimidating. I do not consider that a fair process would have taken any longer than the actual procedure took, in the light of the delay that had already occurred at the appeal stage.

### **Relevant Legal Principles and Conclusions – Contributory fault**

81. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards. Where re-employment is not sought, compensation is awarded through the basic award and compensatory award.

82. The basic award is a mathematical formula determined by section 119. Under section 122(2) the basic award can be reduced because of the employee's conduct:

“Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.”

83. The compensatory award is primarily governed by section 123 as follows:

“(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer....

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.....”

84. The Tribunal must be satisfied that the action by the claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award. The leading authority is the decision of the Court of Appeal in Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 111. Culpable behaviour need not amount to a breach of

contract or a tort but is 'unreasonable in all the circumstances', though not all unreasonable conduct is necessarily culpable or blameworthy.

85. In the circumstances I consider that the Claimant's behaviour on 22 September was blameworthy and not only contributed to, but caused, the dismissal. I consider it just and equitable for any award to be reduced by 100% to reflect that his conduct was the sole cause of the dismissal and that the claim for unfair dismissal succeeded only on procedural unfairness.

### **Unfair Dismissal Award**

86. For the reasons set out above relating to contributory fault and reduction because a fair procedure would have produced the same result. I find that any award that may have been payable is extinguished.

### **Relevant Legal Principles and Conclusions – Breach of Contract - Notice Pay**

87. An employer will be in breach of contract if they terminate an employee's contract without the contractual notice, unless the employee has committed a fundamental/repudiatory breach of contract (gross misconduct) which would entitle the employer to dismiss without notice. The aim of damages for breach of contract is to put the Claimant in the position they would have been in had the contract been performed in accordance with its terms.
88. The question was whether on the evidence I was satisfied that the Claimant was guilty of gross misconduct. I explained above why I concluded, on assessment of the facts, the Claimant was guilty of aggressive and intimidating behaviour. Such behaviour came within the definition of gross misconduct, as defined in the company policies. The Respondent was entitled under the contract to dismiss the Claimant without notice for gross misconduct. I found that there were no particular factors in this case that should prevent the Respondent from applying the policy to the Claimant's behaviour.
89. The claim for wrongful dismissal fails.

**Employment Judge Thackray  
Date: 19 July 2022**