EMPLOYMENT TRIBUNALS

Claimant: James Lewis

Respondent: Sofidel UK Limited

Heard at: Wales Employment Tribunal, Cardiff (by CVP)

On: 21st July 2022

Before: Employment Judge Mason

Representation

Claimant: Oliver Lawrence, Counsel
Respondent: Paul Bownes, Solicitor

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is well founded.

2. The Respondent is ordered to pay to the Claimant for his unfair dismissal claims £937.38 for the basic award and £2460.96 for the compensatory award (inclusive of 10% ACAS uplift).

REASONS

Introduction

1. This is a claim brought by Mr James Lewis, the Claimant against the Respondent, Sofidel UK Ltd for unfair dismissal.

2. The Claimant argues that the Respondent's dismissal of him for gross misconduct was unfair under s.98(4) of the Employment Rights Act 1996 ("ERA 1996"). He argues that the investigation following an accusation that he called a colleague "*a Polish bitch*" was flawed, and that the investigation, disciplinary hearing and subsequent appeal procedure was unfair.

3. In its ET3 response, dated 8th October 2021 the Respondent resisted the complaint. They contend that the Claimant said the offending words and was therefore dismissed fairly for gross misconduct, contrary to its Equal Opportunities & Dignity at Work policy. Further, that its disciplinary actions were consistent with its own internal disciplinary procedure, and dismissal was within the range of reasonable responses.

4. The Respondent had argued that the claim should be struck out for being out of time under s.111(2)(a) and (b) of the ERA 1996. However, in a ruling dated 23rd February 2022, ETJ Thomas ruled that the ET1 had been presented in time to the Tribunal on 10th June 2021 and not 24th August 2021 and was therefore in time.

5. Both parties appeared before me via CVP. The Claimant was represented by Mr Lawrence of Counsel, and the Respondent by Mr Bownes.

6. There was an agreed bundle of documents, an agreed bundle of witness statements, and an agreed chronology.

7. The witness bundle comprised one statement from the Claimant **[6-16]**; and one from Mr Changarnier, Plant Manager at the Sofitel site in Baglan and Appeal Officer for the Respondent **[2-5]**.

8. I heard oral evidence from both.

9. It was agreed by both parties, that judgment would be reserved, given the lack of time. It was agreed also that both parties would make written submissions. I have had regard to these also.

Preliminary Matters

10. The Respondent had submitted a USB drive to the Tribunal containing CCTV from the date of the incident. I gave Mr Lawrence time to view it and take instructions from the Claimant. I also viewed it during the hearing.

Issues For The Tribunal To Decide

11. There was an agreed list of issues. It was agreed that the issues of *Polkey* and contributory conduct concerned remedy and would only arise if the Claimant's succeeded. I agreed with Mr Lawrence and Mr Bownes that I

would consider them at this stage and invited them to deal with them in evidence and in later written submissions.

12. It was accepted by the parties that the Claimant had been dismissed. It was also accepted that he had been dismissed for conduct, a potentially fair reason under s.98(2)(b) of the ERA 1996.

13. The remaining issues for the Tribunal to decide were, therefore:

    a. Was a fair process followed when reaching the decision to dismiss the Claimant?

    b. Was the decision to dismiss within the range of reasonable responses?

    c. Did the Respondent follow the ACAS Code of Practice on Disciplinary and Grievance Procedures?

    d. If the dismissal was unfair owing to procedural defects, would the Claimant have been dismissed fairly in any event had a proper process been followed?

    e. If the dismissal was unfair, did the Claimant's conduct contribute to his dismissal? If so, to what degree?

Relevant Legal Framework

14. Section 94 of the ERA 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under s.111.

15. Section 98 sets out the two stages of fairness of dismissals. First, the employer must show that it had a potentially fair reason for the employee's dismissal under s.98(2). Second, if the employer 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 employer acted fairly or unfairly in dismissing for that reason.

16. As noted above, there is no dispute here 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).

17. Section 98(4) provides determination of whether the dismissal was fair or unfair. In misconduct dismissals, the correct approach to assessing fairness is set out in the decisions in *British Home Stores v Burchell* 1978 IRLR 379

and *Post Office v Foley* 2000 IRLR 827. The Tribunal should also have reference to the *ACAS Code of Practice on Discipline and Grievance Procedures 2015 and* take account of the whole process including any appeal (*Taylor v OCS Group Ltd* [2006] IRLR 613).

18. The Tribunal must decide whether the employer genuinely believed that the employee was guilty of misconduct. If so, the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, the Tribunal must decide whether the employer acted reasonably or unreasonably within s.98(4). That assessment requires an evaluation of whether the employer acted within the band range of reasonable responses open to them.

19. It is immaterial how the Tribunal would have handled the events or what decision it would have made. Further, it 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).

20. Where any one of a group of employees could have committed a particular offence, the fact that one or more members of that group are not dismissed does not render dismissal of the others unfair. This is provided an employer can demonstrate solid and sensible grounds for differentiating between members of the suspected group (*Frames Snooker Centre v Boyce* 1992 IRLR 472).

21. *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 established that where an employee has been unfairly dismissed due to procedural failings, the Tribunal may reduce the compensatory award to reflect the likelihood that the employee would have lost their job in any event, even if a fair procedure had been followed. Although this inherently involves a degree of speculation, tribunals should not shy away from the exercise.

22. The Tribunal has to consider not what a hypothetical employer would do but what the Respondent would do, on the assumption the employer would this time have acted fairly. Could this employer have fairly dismissed and, if so, what were the chances that it would have done so?

23. For the issue of contributory fault, there is no requirement for a causative relationship between the conduct and the dismissal. In *Steen v ASP Packaging Ltd* [2014] 42 ICR 56 the Employment Appeal Tribunal suggested the following should be assessed:

    a. what is the conduct which is said to give rise to possible contributory fault?

    b. Is that conduct blameworthy? The Tribunal has to assess as a matter of fact what the employee actually did or failed to do, not what the employer believed;

c. did any such blameworthy conduct cause or contribute to the dismissal to any extent (this is only relevant to the compensatory award)?

d. If so, to what extent should the award be reduced and to what extent is it just and equitable to reduce it? Here the EAT noted that "*It is very likely, but not inevitable, that what a Tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so."*

24. *Nelson v BBC No 2 [1980*] ICR 110 noted that the concept of culpability or blameworthiness:

> *"includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish ... It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."*

25. An award for compensation can be increased by up to 25%, if the employer has failed, unreasonably to comply with the *ACAS Code of Practice 1: Disciplinary and Grievance Procedures* (2015). In *Slade & Hamilton v Biggs and others* EA-2019-000687-VP/EA-2019-000722-VP, the EAT suggested that Tribunals apply the following four-stage test when assessing whether an ACAS uplift is appropriate:

a. *Is the case such as to make it just and equitable to award any ACAS uplift?*

b. *If so, what does the ET consider a just and equitable percentage, not exceeding although possibly equalling, 25%?*

c. *Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the ET's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?*

d. *Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the ET disproportionate in absolute terms and, if so, what further adjustment needs to be made?"*

26. Such uplifts cannot be made to the basic award (s.124A ERA 1996) but apply to the compensatory award for unfair dismissal.

Findings of Fact

27. The relevant facts are as follows. Where there is a dispute over those facts, I set out my findings and reasoning.

28. The Respondent is a manufacturer and converter of soft tissue products.

29. The Claimant began working for the Respondent on 22nd January 2018 as a production operator. On 15th October 2020, the Claimant and his three colleagues Mr McLaughlan, Mr Harries and Mr Lower were in the work canteen at around 0630. A cleaner Ms Borcyka, alleged that as she asked the four men to leave the canteen, one said "*no problem*" but another said "*fucking Polish bitches*" and the others laughed.

30. Ms Borcyka stated later in her witness statement **[77]** that she told a colleague called 'Alex' and then reported the matter to her supervisor, Richard Jenkins.

31. On 23rd October 2020, all four men were invited to an investigation meeting with Matthew Cove, the Investigatory Officer and Matthew Roberts from HR **[58-76].**

32. The Claimant was interviewed about the incident and denied making the comment. He accepted that he said something like "*here we go start of the shift*". He said that he did not have any communication with Ms Borcyka, nor did anyone speak to her. Mr Cove also interviewed the three other staff men, who were present at the alleged incident. They too denied making the comment.

33. Mr McLaughlan and Mr Harries both said that they heard one of the men say something but did not know what it was. Mr McLaughlan said he did not know who it was, or what it was **[66]**. Mr Harries said that the Claimant (whose nickname it was accepted is 'Beef') "*said something when he stood up but I can't remember exactly what he said but it wasn't … it was a figure of speech I think what he said*" **[71]**.

34. It was not until 26th October, three days after the investigation meeting that a witness statement was taken from Ms Borcyka **[77]**. She stated that "*the last people who went out said "fucking Polish bitches" ... I then want* (sic) *and told Alex what happened and then we went to find the supervisor who was Richard".*

35. The conclusion of the investigation meeting was set out in an undated document by Matthew Roberts **[78-80]**. It concluded that the matter should proceed to disciplinary proceedings. The reason stated was the inconsistent

accounts given by the four men during their interviews. It appears that the Respondent accepted Ms Borcyka's allegation that the insult had been said.

36. There was no witness statement taken from the person referred to as 'Alex' in Ms Borcyka's witness statement. This may be Aleksandra Snichota, who witnesses Ms Borcyka's statement, but I did not hear any evidence about that. Nor was there any witness statement taken from Ms Borcyka's supervisor, Richard Jenkins.

37. In a letter dated 6th November 2020 **[81]**, all four men were invited to separate disciplinary hearings. The letter set out the allegation of gross misconduct, referring to Ms Borcyka's allegation.

38. The Claimant's hearing and Mr McLaughlan's hearing was took place 11th November 2020 **[83-95]**. Mr Harries's hearing was on 20th November **[96-99]** and Mr Lower's on 1st December **[100-103]**.

39. The disciplinary hearing panel for all four hearings comprised Mr Davies, the Disciplinary Officer and Chloe Morgan from HR. The Claimant also had a representative, Gareth Pugh at his hearing. The Claimant was asked about the incident on 15th October 2020 and given the opportunity to state his case. He repeated that he had not spoken to Ms Borcyka **[86]**, and that he had said "*here we go start of the shift*" **[85]**.

40. In a letter dated 19th March 2021 **[104]**, the Claimant was dismissed. Mr Davies concluded that on the balance of probabilities the Claimant was "*the person that* (Ms Borcyka) *heard abusing her*".

41. The reasons for dismissal provided by Mr Davies were that (1) the Claimant stated in his disciplinary meeting that he was the only one to speak to Ms Borcyka but did not mention that in his investigation meeting; and (2) the Claimant was inconsistent in what he said he heard Ms Borcyka say and what he didn't hear.

42. The letter explained that Mr Davies found that the Claimant's conduct amounted to bullying as defined in the Respondent's Equal Opportunities and Dignity At Work Policy **[43-51]**; and that he had committed an act of gross misconduct as set out in the Respondent's Disciplinary Policy. The Claimant was summarily dismissed **[52-57]**.

43. The Claimant exercised his right to appeal in an email dated 25th March 2021 **[107]**. He denied the allegation and the reasonableness of the conclusion that it was him who had abused Ms Borcyka, based on the evidence before the panel. In particular, the Claimant challenged the assertion by Mr Davies that he, the Claimant had been inconsistent in his evidence about speaking to Ms Borcyka. Further, he cited excessive delay; brevity of the investigation and disciplinary meeting; and flaws in the investigation process.

44. In an email dated 9th April **[110]**, the Respondent attached a letter to the Claimant, inviting him to an appeal hearing on 13th April. On 13th April, the Claimant's representative objected to the short notice of the hearing **[112]** as

the Claimant only received a hard copy of the letter by post on 13th April. In fact, the Claimant conceded at the hearing that he had received the email containing the letter. In any event the appeal hearing was rescheduled to 21st April [**119].**

45. That was also adjourned **[119-122]** as the Claimant did not have the transcripts of the investigation or disciplinary hearing. The meeting eventually took place on 5th May 2021 **[126-132]**. The appeal was chaired by Brice Changarnier, the Respondent's Appeal Officer. Also present were the Claimant, Kirsty Williams from HR and Gareth Pugh, the Claimant's representative.

46. In a letter dated 10th May **[133]**, Mr Changarnier confirmed that he was upholding the original decision to summarily dismiss the Claimant. He found that proper procedure had been followed; Mr Davies's conclusion that the Claimant has abused Ms Borcyka was supported by the evidence; the decision to dismiss the Claimant was one open to the Respondent; and that no new information was forthcoming at the appeal hearing that could have materially changed the outcome.

Conclusions

(a) Did the Respondent genuinely believe that the Claimant was guilty of misconduct?

47. In my view the Respondent did genuinely believe that the Claimant was guilty of misconduct. Undoubtedly, the phrase "fucking Polish bitches" would fall within the Respondent's definition of gross misconduct **[49; 54]** as racial abuse of another employee.

48. It is clear from the Respondent's questioning of the four men in both the investigatory and disciplinary hearings that the Respondent believed Ms Borcyka. They took the view that the allegation was specific enough that she would not have made it up. They did not consider there to be any explanation why she would fabricate the insult.

49. From that starting point, the Respondent considered that it was the Claimant who must have said it, as he was the only person who admitted making any comment as the men left the canteen. The Respondent considered that this was supported by the evidence of Mr McLaughlan and Mr Harries both of whom heard something said, and in particular Mr Harries who heard the Claimant say something, albeit he did not know what.

50. It is clear also that the Respondent relied upon what it considered to be significant inconsistencies in the Claimant's account to the other three men, and between his account at the investigation and disciplinary interviews.

(b) If so, was that belief based on reasonable grounds?

51. The first issue is whether it was reasonable for the Respondent to accept the evidence of Ms Borcyka without challenge.

52. The Claimant points to the delay in taking a witness statement from Ms Borcyka. It is unfortunate that this occurred 11 days after the incident, and three days after the investigation meeting. It is also surprising that there was no witness statement from 'Alex' or from Richard Jenkins, to whom Ms Borcyka first spoke.

53. There is a risk that the Respondent engaged in a reversal of the burden of proof here: believing Ms Borcyka and then requiring the four men to prove it was not them who said it. The scenario must also be considered in light of the pandemic. All four men wearing masks at the time, and they were some distance apart in the canteen. However, for the reasons set out at (43) and (44) above, I do consider it to be reasonable for the Respondent to accept that the phrase was said.

54. However, I do not consider there are the solid and sensible grounds referred to *Frames Snooker Centre*, for the Respondent to decide that it was the Claimant who said it.

55. The Respondent argues that nothing was said by anyone, apart from the Claimant. Consequently, given the phrase was said, it must have been the Claimant who said it. The Claimant contends that Mr Davies's disciplinary letter incorrectly asserts that the Claimant was the only one who spoke to Ms Borcyka. This, he argues is not what the Claimant said in his investigation or disciplinary interview.

56. In my view, the Respondent erred in its reading of the evidence. It was not reasonable to infer the Claimant abused Ms Borcyka when he consistently denied speaking to her at all. There was no inconsistency in the Claimant's evidence on this point. He maintained that he said something like "*here we go another shift*" but also that he did not speak to Ms Borcyka. This is consistent also with the evidence of Mr McLaughlan and Mr Harries, neither of whom said that the Claimant spoke to Ms Borcyka.

57. I accept the Claimant's evidence on the issue as credible and reliable. I do not accept the Respondent's submissions that errors and inconsistencies in his witness statement on some matters make him either a liar or unreliable on the central relevant issues here. The Respondent's submissions on the Claimant's credibility are somewhat overstated.

58. I reject also the Respondent's argument that nothing was said by anyone else. This too is a misreading of the evidence, and any conclusion based upon is therefore flawed and unreasonable. Mr Laughlin accepted that he and Mr Lower both said "*ok no worries*", or "*yeah no problem*". Mr Lower also stated that in his interviews.

59. The appeal process did not address that error in assessing the evidence and appears to have repeated it. Nor were the appeal points raised by the Claimant properly considered. The Claimant asked in his appeal hearing why he has been singled out - effectively requesting the sensible and solid grounds from *Frames Snooker Centre* - and was told by Mr Changarnier that "*we'll come back"* **[132]**. The appeal letter from Mr Changarnier does not deal with the issue.

(c) Did the employer follow a reasonably fair procedure?

60. I have set out above the flaws in the procedure concerning the evidence against the Claimant. I find also that the four month delay between the disciplinary hearing and the decision to dismiss the Claimant was excessive. Mr Changarnier accepted that four months was a long time.

61. The ACAS *Code of Practice* states that dealing with issues fairly requires dealing with them promptly and without unreasonable delay. This was not the case here.

62. Mr Changarnier told the Tribunal that Mr Davies's reasons for taking four months to dismiss the Claimant was because Mr Davies needed time to balance his decision. It is not clear to me what that meant, or how it accounts for such a long delay. The last disciplinary meeting was that of Mr Lower on 1st December 2021. In my view that delay was unreasonable.

Remedy

63. In relation to *Polkey*, I find that, contrary to the Respondent's submissions, there is a 0% chance that the Claimant would have been fairly dismissed by the Respondent

64. First, as set out above there is insufficient evidence to support allegations against the Claimant. Second, given the Respondent's failure to carry out a fair procedure in respect of either the investigatory, disciplinary or appeal procedure, I consider it unlikely that the Respondent would have carried out a fair procedure.

65. The basic award is a standard calculation. It is based upon the Claimant's date of birth of 9th March 1998, 3 years' service and a weekly gross pay of £468.69.

66. I do not consider it to just and equitable to reduce the award based on any conduct of the Claimant before the dismissal. No evidence has been placed before the Tribunal to that effect.

67. The basic award is £937.38

68. The compensatory award is made in respect of the financial losses suffered by the Claimant due to his dismissal.

69. The Claimant provided evidence that he started a new job in agency work through Vibe Recruitment on 14th July 2021 **[150-155]**. He has also provided pay slips and an average weekly salary in his Schedule of Loss of £349.78, which is £250 a week less than his job with the Respondent **[147-148]**.

70. The Claimant provided medical evidence to support his assertion to the Tribunal that he was signed off from work for two months from 25th May 2021 to 25th July 2021 **[149]**. There is no evidence to support a failure to seek alternative work between 22nd March and 25th May.

71. The Claimant's provided mitigation documentation showing similar jobs advertised as "Swansea Jobs" between March and December 2021 **[198-222]**; several machine operative jobs in Baglan and Port Talbot and other roles which offered lower hourly rates. He told the Tribunal that there were no jobs available that paid the same as his previous job. He also noted that jobs were all in Swansea and he lived in Port Talbot and did not have a lift. The distance between the two by car is around 20 minutes.

72. I accept there may have been a period where the Claimant would have adjusted to his new circumstances. There was limited evidence about why he could only work locally and why it would be unreasonable for him to travel to jobs paying a similar salary in Swansea or Pencoed. Further, he provided no evidence that he had applied for any of the jobs advertised.

73. I consider it to have been reasonable for the Claimant to have applied for at least the lower hourly rate during part of the period between his dismissal on 22nd March and him being signed off from work on 25th May. Accordingly, the Claimant is awarded 4 weeks' lost wages in compensation. That award is on a gross basis (£1874.76). I remind the Claimant that it is his obligation to settle any tax due. Pension loss is awarded on the same basis at £28.12 a week for four weeks (£112.48). I award £250 for loss of statutory rights.

74. I do not consider there to have been any contributory fault attributed to the Claimant for his dismissal. This is not argued with any force by the Respondent in any event.

75. The compensatory award is £2237.24.

76. I have considered the issue of the ACAS uplift. I bear in mind the test in *Slade.* I do not consider there to be the "egregious failures" the Claimant contends there were. There was not a wholesale failure to comply with the requirements of the ACAS Code of Practice. There was an investigation, the allegations were set out in advance to the Claimant before he attended the disciplinary hearing, and the Claimant was permitted to bring a representation to both the investigatory and disciplinary hearings. There was also an opportunity to appeal the decision.

77. On the other hand, the investigation was very brief. There were no witness statements taken from either Richard Jenkins or 'Alex' on the day. Ms Borcyka was not approach for a witness statement until after the investigation. There appeared to be little attempt to corroborate her account or investigate what she meant by "*the last four people*" to leave the canteen.

78. Further, the appeal process failed to deal in any meaningful way with the grounds of appeal raised by the Claimant. In particular, the errors in assessing the accounts given by the Claimant and the other men in both the

investigation and disciplinary stages. Finally, the four month delay in dismissing the Claimant after his disciplinary hearing was inexcusable and unreasonable.

79. I consider it necessary to mark the Respondent's failures in compliance with the ACAS Code. In my view the correct uplift is 10%. For the compensatory award, this meant the additional compensation was £223.72.

Employment Judge Mason
2nd August 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 17 August 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche