EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105459/2020

Held in Glasgow on 21, 22 and 23 March; 23, 24, 25 and 26 August 2022

Employment Judge P O'Donnell

Mr G Stewart	**Claimant** **Represented by:** **Mr A Baird -** **Trade Union** **Representative**
Rolls Royce Plc	**Respondent** **Represented by:** **Dr Sharp -** **Counsel [Instructed** **by Pinsent Masons]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:-

1. The Claimant was not unfairly dismissed and his claim of unfair dismissal is hereby dismissed.

2. The Claimant was not dismissed in breach of contract and this claim is also dismissed.

REASONS

Introduction

1. The Claimant brought a number of complaints relating to the termination of his employment with the Respondent. At the final hearing, the remaining claims were unfair dismissal and breach of contract (in relation to a failure to give notice of dismissal). These claims were all resisted by the Respondent.

2. The final hearing took place over two hearing diets; 21-23 March and 23-26 August 2022.

Case management issues

3. At the outset of the first hearing diet, a number of preliminary issues arose:-

   a. The Claimant sought to add three additional documents to the bundle. The Respondent did not object to two of these documents but did object to the third. On the basis that no evidence had been heard at that stage and with the caveat that the Tribunal had come to no view on the relevancy of those documents, they were admitted to the bundle.

   b. The Claimant also sought to adduce a letter from his GP as a witness statement. The Tribunal admitted this letter under explanation that little or no weight may be given to it in the absence of a witness to speak to it and be cross-examined.

4. During the second hearing diet, the Tribunal exercised its power under Rule 45 to timetable the evidence-in-chief and cross-examination of both the Respondent's second witness and the Claimant. The reason for this is that the Tribunal became concerned that the progress being made in leading the evidence was such that the case would not conclude within the time allocated for the second diet; the hearing had already been continued once as a result of the time taken to cross-examine the Respondent's first witness where a significant proportion of the questions being asked in cross-examination related to matters which were not relevant to the legal tests to be applied in determining the claims; the second witness for the Respondent had dealt with the appeal but was being asked questions about the whole process from the suspension of the Claimant onwards to which the witness could not speak directly; the Tribunal did not consider it would be in keeping with the Overriding Objective for the case to be continued again and so exercised its powers under Rule 45 to ensure that the case would conclude in the time allocated.

Evidence

5. The Tribunal heard evidence from the following witnesses:-

a. The Claimant.

b. George Addison (GA), the Respondent's head of manufacturing (aerofoils) who made the decision to dismiss.

c. Gordon Hutchison (GH), the Respondent's manufacturing executive at the Inchinnan plant who heard the Claimant's appeal.

6. There was an agreed bundle of documents prepared by the parties. A reference to page numbers below is a reference to pages in the bundle.

7. In addition to the witnesses listed above, a number of other people will feature in the findings in fact:-

a. Derek Kerr (DK) – another employee of the Respondent who was involved in the incident giving rise to the Claimant's dismissal.

b. Jim Shaw (JS) – the manager who carried out the investigation into the incident.

c. Stephen Murray (SM) – a manager who witnessed the incident and suspended the Claimant.

d. Kathryn Leedham (KL) – a HR case manager who assisted GA.

e. Anne Marie Roe (AR), Joan Pratt (JP) and Nathanial Hutchison (NH) – employees of the Respondent who were interviewed as part of the investigation into the incident.

f. Andrew Baird (AB) – the Claimant's trade union representative from the point of the case proceeding to a disciplinary hearing.

8. This was not a case where the relevant facts were significantly in dispute. In particular, there was no real dispute about what happened during the disciplinary process in terms of the correspondence and what happened at the various meetings which are recorded in documents which were not in dispute.

9. It was quite clear that the Claimant did not agree with the findings of the disciplinary process in relation to the finding of physical contact between him and DK. It was the Claimant's clear position that he was not the aggressor in the incident and any physical contact was made by DK. However, as the Tribunal pointed out repeatedly during the hearing, it was not for the Tribunal to decide what happened during the incident or substitute its decisions for those of the Respondent.

10. In these circumstances, this was not a case where the Tribunal had to resolve any significant dispute of fact. It did consider that GA and GH were reliable and credible witnesses whose evidence it accepted especially as it coincided with the contemporaneous documents. The Claimant was clearly still upset about his dismissal and, unfortunately, this did impact on his evidence; he often fell into the trap of arguing with counsel for the Respondent or asking questions of her rather than giving an answer; he had formed his view of events and was unwilling to see other perspectives or how others could take a different view. However, the Tribunal did not consider that the Claimant was being dishonest in his evidence in any way; he simply had taken a firm position on the events of the case and would not move from it. This does mean that his evidence was not always reliable and, in the few instances where there was a difference in the relevant evidence between the Claimant and the Respondent's witnesses (which were not resolved by a contemporaneous document), the Tribunal preferred the evidence of the Respondent's witnesses.

Findings in fact

11. The Tribunal made the following relevant findings in fact.

12. The Claimant was employed by the Respondent from 18 May 1987 until he was dismissed with effect from 10 July 2020. He worked in the Respondent's factory at Inchinnan. The Claimant's job title was polisher.

13. An incident occurred between the Claimant and another employee, DK, in the workplace on 18 December 2019. This was witnessed by a manager, SM, who suspended both the Claimant and DK on the same day with this being

confirmed by letter dated 18 December 2019 (pp212-214). The suspension was on full pay.

14. A manager, JS, was appointed to investigate the incident and he wrote to the Claimant by letter dated 19 December 2019 (pp215-216) inviting the Claimant to an investigation meeting on 23 December 2019. The matter to be investigated was described as *"You had an altercation with another employee on site at 3.00pm on Wednesday 18 December 2019".* The letter states that this is a potential breach of the Respondent's Discipline and Grievance Procedure Agreement (pp90-101 and 102-112) and At Our Best: Our Code (pp113-146).

15. The investigation meeting went ahead on 23 December 2019 as planned. In addition to the Claimant and JS, the meeting was attended by a supporting officer from HR, the Claimant's trade union representative and an observer.

16. A record of the meeting, which is not a verbatim transcript, is at pp224-231:-

    a. The meeting started with JS introducing those present, setting out the purpose of the meeting and confirming the procedure which he intended to follow in conducting the investigation.

    b. The Claimant was asked to explain what had happened on 18 December and he started by explaining that he had recently taken on the role of trade union steward and had raised an issue about DK working two shifts on the same day.

    c. He went on to explain that when he was leaving the workplace on 18 December, DK was outside the room the Claimant had been working in and asked the Claimant what issue he had with DK working two shifts.

    d. The Claimant stated that he replied to this and turned around to walk away but DK knocked his bag off his shoulder. He said that AR and JP came out of the room in which they had been working in and that he could see SM *"racing"* down the passageway.

e. The Claimant stated that DK came towards him and that the Claimant had told him to go away and put his arms up. He stated that he said *"get the f—k away from me"* and that he thought AR stepped between them.

5

f. He confirmed that DK raised his hands but that he did not hit the Claimant. The Claimant stated that DK touched him. He described DK as angry and shouting.

g. He was asked if both of them used foul language and he accepted that was the case.

10

h. The Claimant made reference to DK being a former soldier and that this was not the first altercation in which he had been involved.

i. It was accepted by the Claimant that both he and DK had raised their voices.

j. JS spent some time asking about the nature of the physical contact between the Claimant and DK. The Claimant described both of them having their hands up and DK having hold of the Claimant's hands. He stated that DK made the first contact.

15

k. After a second adjournment, the Claimant was asked about DK pulling the Claimant's bag off his shoulder. The Claimant replied that they were both shouting at each other and that DK's arms were up as well as the Claimant's arms.

20

l. He was informed that JS had received information that a manager had to separate him and DK. He replied that it was AR who got between them and SM only told them to walk away.

25

m. He was also informed that JS had received information that punches had been thrown. The Claimant denied this.

17. JS had conducted an interview with DK earlier that same day and the note of that meeting is produced at pp217-223:-

a. The meeting starts with JS providing the same introductory information as he did in the meeting with the Claimant.

b. DK was asked to describe what had happened on 18 December and he explained that when he came into work he was informed that the Claimant had been *"mouthing off"* about DK's shifts.

c. DK described meeting the Claimant outside the inspection room and there being a discussion about DK's shifts. He stated that as he turned away to leave, the Claimant's bag came off his shoulder and DK thought the Claimant was going to hit him. He raised his arms to block any blow and they came into contact. At this point, AR came out of her room and DK described the Claimant and him separating.

d. JS asked further questions about how the contact between the Claimant and DK came about and what was involved. DK described his training as a soldier to deflect attacks and that this is what he perceived as happening at the time. On reflection, he accepted that the Claimant was only trying to catch his bag as it fell.

e. DK accepted that there was shouting and swearing by both him and the Claimant.

f. JS stated that he had information that punches had been thrown and DK denied this.

18. JS went on to conduct further interviews with other employees who had been identified in the interviews with the Claimant and DK:-

a. He interviewed NH on 10 January 2020 with a follow-up interview on 27 January 2020 (pp232-238). NH stated that he was informed that there was a fight going on by another employee and came out of the room in which he had been working. He described seeing the Claimant and DK pushing each other, grabbing each other's shirt and throwing punches. He stated that both of them were very angry and SM was trying to separate them. He could recall both men swearing.

b. AR was also interviewed on 10 January 2020 (pp239-243). She described seeing the Claimant and DK when she came out of the room in which she had been working. She saw DK knock the Claimant's bag off his shoulder and step up to the Claimant. At this point, she stepped between them and then SM arrived and took charge. She described DK as being *"riled up"* and the Claimant as being *"chalk white".* She stated that she heard raised voices but couldn't recall what was specifically said. She denied that there had been physical contact between the two men because she stepped between them. When asked about whether there had been any punches, she stated *"no".*

c. JP was also interviewed on 10 January 2020 (pp244-248). She described seeing the Claimant and DK having an argument on 18 December. She stated that they were both loud and angry with AR stepping between them. She could not recall the words used by them and denied there was any physical contact. She was specifically asked if punches were thrown and replied *"definitely not".*

d. Finally, SM was also interviewed on 10 January with a follow up on 27 January 2020 (pp249-255). He described seeing the Claimant and DK having a discussion which escalated into an altercation. He identified two other employees who were present but who were not subsequently interviewed. He stated that both men walked away but that a fight then started with punches being thrown. He stated that foul language was used but could not recall the detail of this. He stated that his objective was to break up what was happening.

19. A follow-up interview with the Claimant was held on 22 January 2020 (pp265-270):-

a. He was asked about foul language being used during the incident and he stated that this was used more than once, describing the incident as a *"full blown argument".*

b. He was asked whether there was pushing and replied that he put his hands up but there was no pushing. He accepted that it might look like that and that DK may have walked into his hands. He also denied that there was any shirt-grabbing or punches involved in the incident.

c. He stated that he was trying to get away and that he did put his hands up out of instinct. He described feeling threatened.

20. A follow-up interview was also carried out with DK on 15 January 2020 (pp258-262):-

a. He accepted that it was possible that there had been bad language used.

b. He denied any pushing or that punches were thrown.

c. He described there being physical contact between him and the Claimant in the same terms as his first interview.

21. JS produced an investigation report dated 27 January 2020 (pp271-285). This summarised the time line of the investigation, set out the relevant policies and summarised what was said in each of the interviews conducted by JS. The interview notes were appended to the report as were photographs of the area in which the incident took place, a diagram prepared by JS showing the position of the Claimant and DK and the Claimant's training record.

22. JS concluded that the matter should proceed to a disciplinary hearing and GA was appointed to deal with this part of the process. The Claimant was invited to a disciplinary hearing by letter dated 6 February 2020 (pp290-292). This letter enclosed the investigation report and its appendices. By this point, the allegations had been expanded to three issues; physical assault; use of inappropriate language; arguing and shouting. The invitation set out that these may amount to gross misconduct and a breach of the Respondent's code of conduct.

23. By letter dated 7 February 2020, DK was dismissed without notice in relation. The reasons for his dismissal were the same three allegations which formed the basis of the disciplinary hearing against the Claimant.

24. The Claimant's disciplinary hearing was due to take place on 19 February 2020. On 17 February, AB emailed GA (pp302-303) to confirm he would be representing the Claimant and informing him that the Claimant was seeing his doctor regarding stress with an appointment on "Thursday" after which the Claimant would be able to confirm his fitness to attend the hearing.

25. GA replied by email dated 18 February 2020 (p301) to confirm that the hearing on 19 February would be postponed and that a referral would be made to Occupational Health.

26. An Occupational Health report dated 25 February 2020 (pp304-305) was produced which confirmed that the Claimant was unfit to attend a disciplinary hearing. The position was to be reviewed in a few weeks.

27. A further Occupational Health report dated 17 March 2020 (pp310-311) was produced which confirmed that the Claimant remained unfit to attend a disciplinary hearing. The position was to be reviewed in three weeks.

28. On 23 April 2020, Occupational Health attempted to contact the Claimant to carry out the intended review. This was a different person from the previous reports and she emailed the Claimant's line manager on 23 April (p316) to inform him that the Claimant was not willing to speak to her and wished to speak to the person he had spoken to previously. The Claimant's position was that he was phoned while out for a walk and was not comfortable with talking in public. However, he did not make any attempt to re-arrange the call.

29. KL contacted the Claimant about this matter on 28 April 2020. She set out a note of the call in an email of the same date (pp317-318). The Claimant also emailed his line manager about the call on 1 May 2020 (p319). In both descriptions of the call, there was some common ground in relation to the purpose of the call (that is, KL was informing the Claimant that he could not

pick and choose whom he spoke to from Occupational Health) but there were also differences in that the Claimant stated that KL had been difficult whereas KL stated that it was the Claimant who was difficult. This is not a dispute which it was necessary for the Tribunal to resolve. The Claimant's email concludes that this had not helped his situation and that he would prefer to discuss things once and not over and over again. There was no further correspondence from either the Claimant or his line manager in relation to this email and the issues raised in it.

30. On 4 May 2020, KL was contacted by Robin Banks who was a contractor that had previously worked for the Respondent. He had been mentioned in DK's interview notes as the source of the information that the Claimant had raised an issue about DK's shifts. A note of the call was taken by KL (p320) and was subsequently added to the documents appended to the investigation report. The note records events prior to the incident between DK and the Claimant describing the Claimant as being annoyed about matters relating to DK in the weeks before the event and how Mr Banks provided information about this to DK. It did not describe the incident itself which Mr Banks did not witness.

31. A further Occupational Health report was produced dated 20 May 2020 (pp325-327) by a different person than whom the Claimant had seen previously. The person who had produced the first two reports was on furlough by this point. The conclusion in this report was that the Claimant was fit to attend a disciplinary hearing (although he remained unfit for work).

32. By letter dated 3 June 2020 (pp328-334), the Claimant was invited to a disciplinary meeting to be held on 10 June 2020 at 2pm. This letter was in almost identical terms to the previous invitation other than the date of the meeting and the addition of the Banks statement to the list of documents accompanying the letter. It was said in subsequent correspondence that the Claimant did not receive this invitation but he and his representative were clearly aware of it as they requested a postponement

33. The meeting on 10 June 2020 did not proceed on the request of AB who was unavailable. It was originally to be rescheduled for 17 June 2020 but was ultimately rescheduled to 22 June 2020.

34. On or around 10 June 2020, the Claimant expressed an interest in voluntary severance. Due to the impact of the Covid pandemic, the company had seen an adverse effect on the amount of work it had and had previously applied a temporary reduction in pay to all staff in April 2020 (p313). It was now looking to reduce the number of staff as a result of the continued downturn in work by asking for volunteers for redundancy. The Claimant expressed an interest in this but he had not been accepted for voluntary severance by the time of his dismissal.

35. By letter dated 12 June 2020, AB raised issues about the Claimant's health and whether he was fit to attend a hearing. The letter makes criticisms of the Occupational Health report dated 20 May 2020.

36. The Claimant was invited to the disciplinary hearing on 22 June 2020 by letter dated 15 June 2020 (pp343-346).

37. The hearing proceeded on 22 June 2020 with the Claimant and AB in attendance. GA chaired the hearing and KL was present by telephone to support him. The meeting started with AB objecting to the presence of KL on the basis that she had displayed bias to the Claimant in the telephone call of 28 April 2020. AB complains that the Claimant had raised a grievance about this (a reference to his email of 1 May 2020) which had not been dealt with by the company. He also raises the Banks' statement and how it came to be added to the investigation pack. AB also raised issues relating to the Claimant's health, his fitness to attend the hearing and the Occupational Health report in similar terms to his letter of 12 June.

38. The Tribunal does not intend to record the detail of the discussions at that meeting which are produced in a transcript of a recording made by AB (albeit without the knowledge or permission of GA) at pp365-372. Suffice it to say, the meeting lasted over an hour but did not involve any discussion of the incident between the Claimant and DK, the investigation by JS or any other

substantive matter. It was entirely focussed on the issues raised by AB about KL and the Claimant's health.

39. The meeting concluded with GA noting the points raised about the Claimant's health and that some of the matters concerned him. He indicated that the Claimant did not appear to be "in a great place" (the Claimant had not spoken throughout the meeting) and he wanted to be sure that the Claimant was fit to proceed. It was agreed that further contact would be made with Occupational Health in this regard. It was specifically said that consent would be sought to obtain the Claimant's medical records.

40. GA did make further contact with Occupational Health and spoke to the doctor who had prepared the 20 May 2020 report. A further report dated 1 July 2020 (pp393-394) was provided in which the doctor set out the criteria he had used to decide whether the Claimant was fit to attend the hearing and re-affirmed his opinion that the Claimant was fit to attend.

41. GA decide to re-convene the disciplinary hearing and, on 2 July 2020, emailed an invitation to the reconvened hearing to the Claimant and AB. The re-convened meeting was to be held on 8 July 2020.

42. By email dated 6 July 2020, AB emailed KL to state that he was not available on 8 July and that he would not be available until 14 July. He also raises complaints that what had been done regarding Occupational Health differed from what had been agreed at the 22 June meeting.

43. GA was unavailable in the next week due to annual leave. He was concerned at the fact that delaying the hearing past his leave would add another month to the process and that this needed to be resolved given the passage of time. There had also been an indication from Occupational Health that the Claimant's health was being impacted by the fact that the process had not been resolved.

44. The disciplinary hearing was moved to 10 July given that AB was unavailable on the original date. GA advised AB and the Claimant of this by email dated 8 July 2020. By email dated 9 July 2020, GA provided AB and the Claimant

with the most recent letter from Occupational Health and confirmed that he intended to proceed with the hearing on 10 July 2020.

45. The hearing proceeded on 10 July 2020. Neither AB nor the Claimant attended the hearing. GA produced a note of his deliberations (pp413-417):-

a. He confirmed that he had reviewed the investigation pack and noted from the Claimant's interview that there had been an altercation involving physical contact. The contact was by both parties and this was unacceptable behaviour in the workplace.

b. He also noted that the Claimant had confirmed that he used inappropriate language.

c. There had been a need for others to intervene from which GA concluded that there had been an aggressive act.

d. Note was made of the Claimant's position that he was acting in self-defence but that SM had described both parties as aggressive.

e. Reference was made to the statement from Robin Banks as an indication that there had been a build-up between the parties.

f. The Claimant's length of service was noted but GA felt that such an experienced employee should have known better.

g. In relation to the allegation of physical assault, GA concluded that there was a heated argument with raised voices and inappropriate language. There had been physical contact between the parties to which the Claimant admitted and, although the Claimant had said he had acted in self-defence, there had been physical contact which resulted in a colleague stepping between the Claimant and DK. GA concluded that he had a reasonable belief that there had been gross misconduct in relation to the first allegation.

h. GA dealt with the second and third allegations together and noted that the Claimant had admitted that he had used inappropriate language and engaged in a heated argument.

i. The Claimant's length of service was noted as was the seriousness of the incident and impact of the Claimant's actions. It was noted that there had been discrepancies between the various accounts of the incident. It was also noted that the Claimant had not apologised or shown remorse.

j. GA recorded that the Claimant had received training on the Respondent's code of conduct only a few months before the incident.

k. He also recorded the relevant provisions of the Respondent policies which describe what can amount to gross misconduct.

l. He concluded that the Claimant would be dismissed on the grounds of gross misconduct.

46. The decision to dismiss was confirmed to the Claimant by letter dated 10 July 2020 (pp418-420). It set out the reasons why GA had reached his conclusions in similar terms to his note of the hearing. It confirmed the Claimant's right of appeal.

47. The Claimant appealed his dismissal by letter dated 14 July 2020 (pp425-427) which set out a number of grounds of appeal:-

a. It was said that his suspension had been unfair because he had been suspended by one of the complainers (that is, SM) and the suspension should have been reviewed.

b. The Claimant alleged that the investigation had been improper as the investigator had not been objective or impartial; he failed to interview all the witnesses; he did not take into account statements from witnesses which supported the Claimant; he failed to question SM in detail or question the location of witnesses.

c. The decision to proceed to a disciplinary hearing was said to be wrong as there had been no proper scrutiny of the investigation report and, given the conflicting reports, no reasonable person would have taken the decision to proceed based on the limited evidence available.

d. Reference was made to the Claimant's mental health and the effect of the disciplinary process on this. The letter complains that the only concern was whether the Claimant had been fit to attend a hearing and there was no assessment of the impact of the hearing on his mental health.

e. The letter complains about the fact that his grievance against KL had not been dealt with by the Respondent.

f. The Claimant also relies on the fact that the disciplinary hearing proceeded in his absence in circumstances where his representative had complied with the Employment Relations Act in seeking a different date due to his availability.

g. This complaint is repeated under the heading of "disciplinary hearing outcome". The letter goes on to make several comments about DK and sets out the Claimant's version of the incident between them.

48. GH was appointed to hear the appeal and this was arranged for 5 August 2020. A letter inviting the Claimant to this hearing was sent by email and is dated 21 July 2020 (pp433-434). The invitation does not specify whether the appeal is to be a review of the disciplinary hearing or a re-hearing; both options are permitted under the Respondent's disciplinary process (p97).

49. On 16 July 2020, the Claimant application for voluntary severance was removed from the list of applications in light of his dismissal.

50. The appeal hearing proceeded on 5 August 2020 with GH, AB and the Claimant in attendance. GH was accompanied by a supporting officer, Debbie Hindley.

51. The Respondent produced a note of the hearing (pp435-445) and AB, again, recorded the proceedings (again, without the knowledge or permission of GH) and a transcript of this recording is at pp446-482.

a. GH proceeded by going through each ground of appeal and inviting the Claimant and AB to comment on each. The Claimant's case was presented by AB.

b. During the course of the hearing, GH sought to review the purpose of the hearing and explained that it was to go over the appeal points and not for the Claimant to present information which would normally be presented at the disciplinary hearing (for example, p439, p444, p458 and p462).

c. The hearing concluded by GH summarising the appeal points (pp444-445) and explaining that he would not make a decision that day.

52. A meeting was arranged for 13 August 2020 for GH to give his decision and the Claimant was invited to this by letter dated 11 August 2020.

53. A note of the meeting was prepared by the Respondent (pp488-499) and the decision was set out in a letter dated 13 August 2020 (pp500-503) which was handed to the Claimant at the meeting.

54. GH decided not to uphold the appeal and went through each of the grounds of appeal:-

a. He noted the reasons for the suspension and did not consider that it was longer than necessary due to the actions of the investigating or disciplining manager.

b. The timeline of events relating to the disciplinary hearing was set out and GH noted that the Claimant had stated that he would not be in attendance. He considered that it was not unreasonable to proceed in the Claimant's absence in these circumstances. He also considered that there was no evidence that the Respondent had wanted to proceed with the hearing to avoid giving the Claimant voluntary severance.

c. GH noted that the investigation report was a collation and summary of all the evidence gathered in the investigation. The disciplining

manager had all the information available to him and not just the report. He noted that the Claimant admitted certain matters.

d. In terms of KL's involvement, GH was clear that GA had made the decision to dismiss with the support of someone other than KL and KL had no involvement in the decision.

e. GH could see no evidence that any issue with the Claimant's mental health affected the outcome of the process.

Respondent's submissions

55. The Respondent's counsel produced written submissions and supplemented these orally.

56. The submissions set out, at various points, the facts which the Respondent says the Tribunal should find. This has been noted by the Tribunal but, for the sake of brevity, the Tribunal does not intend to record these submissions on the facts in detail.

57. The written submissions start by setting out the background of the case and what Dr Sharp considered were the issues to be determined.

58. The submissions then turn to the relevant law. To avoid duplication with what is set out below, the Tribunal will not repeat this section of the submissions in detail and will focus on particular matters.

59. Reference is made to the relevant statutory provisions and the well known cases of *Iceland, Burchell & Hitt.*

60. It was submitted that the issue of reasonableness in an investigation does not require that everyone in the vicinity of a fight to be interviewed (*Harkins v Scottish Region, British Gas Corp* EAT593/80) and the context in which an incident took place needs to be considered (*Greenwood v HJ Heinz & Co Ltd* [1977] 7 WLUK 140).

61. Where an employee admits the misconduct then the employer may not need to conduct an investigation (*RSPB v Croucher* [1984] IRLR 425).

62. Some time was spent distinguishing the case of *Talon Engineering Ltd v Smith* [2018] IRLR 1104 from the present case. This case was specifically referred to during the disciplinary process and Dr Sharp sought to explain why the facts of that case were very different from the present case.

5 63. Turning to the issues to be determined, it was submitted that there was a potentially fair reason for dismissal, namely, conduct.

64. Dr Sharp then turned to the elements of the *Burchell* test and started with the issue of whether there was a genuine belief by the Respondent. She set out the allegations which emerged from the investigation and made reference to
10 various policies of the Respondent relevant to these allegations. It was submitted that the Claimant made various admissions during the course of the investigation.

65. Turning to the question of reasonable belief, the submissions again made reference to the admissions by the Claimant during the course of the
15 investigation and to the evidence of other witnesses in support of the argument that there was a reasonable belief.

66. Finally, in relation to the *Burchell* test, the submissions addressed the reasonableness of the investigation. Again, reference was made to the admissions made by the Claimant before setting out the steps taken in the
20 investigation which, it was submitted, was reasonable.

67. The submissions then turned to the procedure followed by the Respondent which was broken down into various elements.

68. First, it was submitted that the information given to the Claimant was sufficient and Dr Sharp set out what was provided.

25 69. Second, it was argued that the arrangements for the hearings were reasonable and a chronology of the Respondent's attempts to convene the disciplinary hearing was set out. It was submitted that the Respondent had tried, over a period of 7 months, to hold the disciplinary hearing but was faced with multiple delays.

70. Third, Dr Sharp submitted that the decision making process was reasonable and she set out the factors which show this.

71. Fourth, it was submitted that Occupational Health was engaged throughout the process.

72. Fifth, it was said that the appeal hearing was fair in all of the circumstances of the case. Reference was made to the terms of the appeal letter and it was submitted that the points actually raised at the hearing sought to extend the scope of the appeal. It was submitted that, despite, this GH sought to give the Claimant the opportunity to present his case and took all matters into account in coming to his decision.

73. The submissions then turned to the band of reasonable responses test. It was said that the allegations fell into the scope of gross misconduct and fell below the standards expected by the Respondent of its employee.

74. The submissions concluded with the Respondent's position on the matter of remedies.

75. In rebuttal, Dr Sharp made the following submissions:-

    a. Any suggestion that the disciplinary hearing only took 45 minutes is not correct. The process went on over 7 months and the documents had been read during that time.

    b. Any notes made by the Respondent were not intended to be verbatim.

    c. Both GA and GH made it clear that it was not an issue as to who was to blame for the incident but what actually happened between the Claimant and DK.

    d. The disciplinary process should be looked at as a whole.

Claimant's submissions

76. The Claimant's agent made oral submissions on behalf of the Claimant.

77. Much of the submissions involved the Claimant's representative reading out extracts from various policy documents, witness statements, correspondence and other documents to which the Tribunal had been taken in evidence. As with the submissions for the Respondent, for the sake of brevity, the Tribunal does not intend to set out the detail of what was read out and will, instead, focus on the points made as to why the Tribunal should find in the Claimant's favour.

78. As with the evidence being led on behalf of the Claimant, a number of submissions were also directed towards the Tribunal deciding whether or not the Claimant had done anything wrong and substituting its own decision for that of the employer.

79. The Tribunal identified the following submissions from what was said on behalf of the Claimant:-

a. The appeal manager had the opportunity to advise the Claimant in advance whether the appeal was to be a review or re-hearing but did not do so.

b. The Claimant lodged a grievance and this should have been dealt with by the Respondent. Instead, it was ignored and this was an issue of consistency.

c. The Claimant's suspension should have been reviewed.

d. Nine witnesses to the incident were identified but only six of them were interviewed in the investigation.

e. JS asked leading questions when interviewing the Claimant.

f. There were clear discrepancies in the conclusions of the investigation.

g. The Claimant was not allowed to raise DK's previous conduct issues.

h. The Claimant raised an issue of health and safety which was not addressed.

i. In relation to the interaction with Occupational Health, a fair process was important and an employee should be personally examined rather than conclusions being reached on the basis of a report or a review of medical records. The Claimant was not able to deal with matters by himself which was supported by fit notes and GP records.

j. It was the Respondent's decision to go ahead with the disciplinary hearing in the Claimant's absence.

k. It was not accepted that Occupational Health was independent and that the assessment of the Claimant was not conducted properly.

l. The statement provided by Mr Banks should not have been used. It had been taken by someone who was not the investigator.

m. The Claimant had been honest and admitted what he had done.

n. The Claimant's length of service must have some value in the case.

o. There is a difference between physical contact and physical assault.

p. The Claimant could have exited the company in July under voluntary severance.

q. There was a disregard for the Claimant's mental health.

r. There had not been a reasonable investigation.

s. There had not been a reasonable belief; GA had made his decision on the basis of physical contact and changed it to physical assault.

t. The appeal was a sham with no intention to deal with the issues.

80. There were also submissions relating to remedy which are not relevant given the Tribunal's decision on the issue of liability.

Relevant Law

81. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA).

82. The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98 and, for the purposes of this claim, the relevant reason is conduct.

83. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

84. The test for whether a dismissal on the grounds of conduct (or misconduct) is set out in the well-known case of ***British Home Stores Ltd v Burchell*** **[1978] IRLR 379.**

85. The test effectively comprises 3 elements:-

a. A genuine belief by the employer in the fact of the misconduct

b. Reasonable grounds for that belief

c. A reasonable investigation

86. It is important to note that, due to changes in the burden of proof since *Burchell*, the employer only has the burden of proving the first element as this falls within the scope of s98(1) with the second and third elements falling within the scope of s98(4).

87. In order for there to be a reasonable belief, especially where there is a dispute as to whether or not the employee committed the misconduct in question, the employer must have some form of objective evidence on which to base their conclusion.

88. Delay in carrying out an investigation is capable of rendering the dismissal unfair (on the basis that the investigation is then not reasonable) even with no evidence of actual prejudice cause by the delay (***RSPCA v Cruden*** **[1986] IRLR 83** and ***A v B*** **[2003] IRLR 405*****, EAT***).

89. On the question of whether the investigation was reasonable, the case of **Sainsbury's Supermarket v Hitt [2003] IRLR 30** is authority for the

proposition that the band of reasonable responses test applies to conduct of the investigation and to the dismissal procedure generally.

90. If the Tribunal is satisfied that the requirements of Burchell are met then they still need to consider whether dismissal was a fair sanction applying the “band of reasonable responses” test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable band of options available to the employer.

91. Section 86 of the ERA provides for minimum periods of notice depending on the employee’s length of service; notice of dismissal of at least one week must be given by the employer for employees with more than one month’s service; the length of notice then increases to two weeks after two years’ service with further increases of one week for each year worked up to a maximum of 12 weeks’ notice.

92. Where an employer does not give the correct notice of dismissal then an employee can recover damages for this breach of contract equivalent to the salary they have lost for the relevant period. The Tribunal was given the power to hear breach of contract claims by the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.

93. An employer is not required to give notice where an employee is dismissed in circumstances where the reason for dismissal is a fundamental breach of contract by the employee. It is commonly the case that such reasons are described as “gross misconduct”.

Decision – unfair dismissal

Was there a potentially fair reason for dismissal?

94. The Tribunal considers that the Respondent has shown that they had dismissed the Claimant for reasons which would fall within “conduct” for the purposes of s98(1) ERA and that there was, therefore, a potentially fair reason for dismissal.

95. The Claimant had not sought to expressly argue that the reason for his dismissal could not fall within the description of "conduct" (or that there was some other reason for his dismissal) and the Tribunal was of the view that the reason given by the employer clearly fell within that category of potentially fair reason.

96. The Tribunal did hear evidence about the Claimant's application for voluntary severance and it was not entirely clear what relevance this had to the issues to be determined in the context of the unfair dismissal claim. To the extent that the Claimant was seeking to argue that the prospect of voluntary severance somehow meant that the reason for his dismissal was not that asserted by the Respondent then the Tribunal does not consider that this is the case.

97. It was quite clear from the sequence of events that the prospect of voluntary severance arose some months after the incident which triggered the disciplinary process leading to the Claimant's dismissal. Indeed, had the Claimant's disciplinary hearing taken place on the date originally proposed in February 2020 then this disciplinary process would have concluded long before the prospect of voluntary severance even arose.

98. There was absolutely no evidence to suggest that the Claimant was dismissed for any reason other than those set out in the dismissal letter. The reasons set out in the dismissal letter are clearly matters of conduct and so the Tribunal finds that the Respondent has demonstrated that there is a potentially fair reason for dismissal.

Did the respondent have a genuine belief in that the claimant had committed the misconduct in question?

99. The Tribunal considers that there was clear evidence from GA that he had a genuine belief in the conduct giving rise to the Claimant's dismissal.

100. Again, the Claimant did not seek to advance an argument that there was not a genuine belief by the Respondent that he had carried out the conduct in question or that there was some other reason for his dismissal.

101. In his evidence, the Claimant did make a number of comments about the Respondent (in terms of those managers involved in the process) only being concerned with getting him to the next hearing so that they could sack him but he did not assert that they wished to do so for any reason other than the reasons set out in the various pieces of correspondence which record the allegations against him. There was no evidence before the Tribunal that the Respondent had some ulterior motive for his dismissal.

102. To the extent that the issue of voluntary severance has been raised by the Claimant to suggest that there was not a genuine belief in the conduct giving rise to his dismissal then, for the same reasons as set out above, the Tribunal does not consider that there is any basis on which it can conclude that the Respondent did not have a genuine belief given the chronology of events.

103. In these circumstances, there being no evidence to suggest some other reason for the Claimant's dismissal, the Tribunal concluded that there was a genuine belief by the Respondent.

Had there been a reasonable investigation?

104. In assessing this issue, the Tribunal bears in mind that the band of reasonable responses applies in this context; it is not a case of whether the Respondent could have carried out the investigation in some other way but whether what they did was within the band of reasonable actions open to them. In particular, the Tribunal should not substitute its own decision as to what it would have done in the same circumstances.

105. The Tribunal notes that the investigation involved both the Claimant and DK being interviewed at an early stage and then re-interviewed after other witnesses had been interviewed. The investigator interviewed four other witnesses, took photographs of the area in which the incident took place and created a diagram of what had been described.

106. On the face of it, this is a reasonable investigation; the Claimant was given an opportunity to describe his version of events on two occasions; other

witnesses were interviewed which allowed for the Respondent to gain a broader picture of the incident.

107. However, the Claimant makes a number of criticisms of the investigation which require to be considered.

108. First, he complains that two persons who were described as being present by SM were not interviewed. Whilst it would be good practice for all potential witnesses to be spoken to by an investigator, the Tribunal does not consider that, in the circumstances of the case, this is something which is outwith the band of reasonable responses. The Tribunal notes that none of the other witnesses nor the Claimant describe these individuals as being present; they are not said to have been close to the incident; they did not have to intervene between the Claimant and DK as other witnesses had. For these reasons, the Tribunal does not consider that not interviewing these witnesses means that the investigation was unreasonable.

109. Second, the Claimant complains that he was asked "leading questions" during his two interviews. Having read the notes of the interviews, the Tribunal does not consider that the questions asked were leading questions. The Claimant's objection relates to having information put to him about the investigator's understanding of events but that is not a leading question and it is perfectly proper for an investigator to put such information to the Claimant to give him a chance to respond. Indeed, not putting such information to the Claimant could potentially render the investigation unfair.

110. Third, and related to the second, the Claimant sought to suggest that the investigator must have carried out some interviews before speaking to the Claimant and DK to have the information they were putting to them but that there was no record of any such interviews. However, this is to ignore the fact, as explained by GH, that the investigator would not have been operating in a vacuum and would have some information about what he is investigating from the outset of the process.

111. Fourth, it was said that there were discrepancies in the conclusions reached. Whilst there were some discrepancies between the various witnesses (which

the Tribunal will address further below), it was not clear what discrepancies there were in the investigation. The Tribunal considers that the Claimant has confused the section of the investigation report where JS set out a summary of what each witness described to him with JS having reached conclusions about what actually happened. However, a plain reading of the investigation report shows that JS was simply summarising the various interviews and was not reaching any conclusions, which would be a matter for GA.

112. Fifth, there was the statement from Robin Banks which has received at a later date and was noted by KL rather than JS. It is not entirely clear how it is said this renders the investigation as unreasonable; an employer is entitled to take account of any information that comes into their possession before making their decision to dismiss. Presumably if some form of exculpatory information had come to light after JS concluded his investigation, the Claimant would have expected that to be taken into account in his favour. The statement was provided to the Claimant ahead of the disciplinary hearing and he was, therefore, aware of it and had the opportunity to address it.

113. Having taken these into account, the Tribunal does not consider that, either individually or taken as a whole, these are sufficient to take the investigation out of the band of reasonable responses and for it to be unreasonable.

Did the Respondent have a reasonable belief?

114. In considering whether the Respondent held a reasonable belief that the Claimant had committed the misconduct in question, the Tribunal bore in mind that it was not a question of whether or not the Tribunal believed that he had done so.

115. The question for the Tribunal was whether there was objective evidence from which the Respondent could come to the view which they had. In this regard, the Tribunal noted that the facts of the case were not significantly in dispute; both the Claimant and DK describe the incident in broadly similar terms (although from their own perspectives in terms of thinking that the other was going to strike them); two of the witnesses (AR and JP) also describe the event in terms similar to the Claimant and DK.

116. The only significant discrepancies come from SM and NH who describe punches being thrown which is denied by the Claimant, DK, AR and JP. The Tribunal notes that GA did not find that punches were thrown (simply that there was physical contact) and so resolves this discrepancy in the Claimant's favour.

117. It is important to bear in mind that the Claimant faced three allegations; much of the evidence was focussed on the first allegation of physical contact but there were other allegations and this was not a case where the Claimant significantly disputed the accuracy of those latter allegations. He accepted that he used bad language and that he had been shouting. This, in effect, amounts to him accepting the second and third allegations against him to be true. In such circumstances, it is difficult to see how the Respondent could have anything other than a reasonable belief that the Claimant carried out those acts of misconduct.

118. The only issue disputed by the Claimant was the first allegation relating to physical assault. It was accepted by the Claimant that there had been physical contact but that he was not the one who made the contact. DK states that there was physical contact between them with both of them placing hands on each other. The other witnesses either state there was no physical contact at all (AR and JP) or that there were punches being thrown (SM and NH).

119. In these circumstances, the Tribunal considers that it was reasonable for GA to conclude that there had been some form of unwanted physical contact between the Claimant and DK. It is not the case that there was no information from which such a conclusion could be reached. Rather, the Respondent faced a situation where there was no consistent description of what physical contact took place and how this occurred. The Tribunal considers that GA reached a reasonable conclusion that there had been physical contact between the Claimant and DK for which both of them bore responsibility when the incident is viewed as a whole and account is taken of the admitted conduct in terms of shouting and the language used.

120. The Tribunal, therefore, concludes that the Respondent had a reasonable belief in all three allegations.

Was the dismissal procedurally fair?

121. The Tribunal has already addressed the conduct of the investigation above and, for the reasons set out previously as to why the investigation was reasonable, has concluded that there was no procedural unfairness in that element of the process.

122. In relation to the disciplinary process itself, the Tribunal notes that the Respondent gave the Claimant multiple opportunities to attend a disciplinary hearing in order to answer the allegations. The Claimant only attended on one occasion and did not attend the hearing at which the final decision to dismiss was made.

123. The Claimant was also given the opportunity to appeal which he did and an appeal hearing was convened. The Claimant attended that hearing and had the opportunity to put his case.

124. The Tribunal also considers that the Claimant was given all the relevant information during the process; he was provided with the investigation pack which included all the information gathered by JS; when additional information came into the Respondent's possession in the form of the Bank's statement then this was provided. There was some evidence about a handwritten statement by DK being removed from the investigation pack between one iteration and the next but the Claimant clearly had this in his possession and there was no evidence that the decision to dismiss was made on the basis of information not available to the Claimant.

125. The Tribunal has given particular consideration to the fact that the final decision to dismiss was made in the absence of the Claimant. It is important that an employee is able to put their case to the employer and where a decision to dismiss is made in the employee's absence then this can be capable of rendering a dismissal unfair.

126. However, this has to be considered in the context of the specific facts of this case:-

    a. The incident giving rise to the disciplinary process had occurred in December 2019 and by July 2020 the process had not been able to conclude. It had been ongoing for over 7 months.

    b. The Respondent had arranged multiple hearing dates but, with one exception, these had all been postponed and those postponements had all been at the instance of the Claimant or his representative.

    c. The one occasion when the disciplinary hearing went ahead, the hearing had been derailed by matters raised by the Claimant's representative who, rather than engaging with the substantive issues, objected to the involvement of the note-taker and disputed the medical opinion from Occupational Health that the Claimant was fit to attend the hearing. These matters being raised meant that there was no discussion of the actual issues of the case.

127. In these circumstances, the Tribunal does consider that it was within the band of reasonable responses for the Respondent to proceed in the Claimant's absence; the Claimant had been given multiple opportunities to attend a disciplinary hearing over a lengthy period and, at some point, the process needed to be brought to an end. Indeed, if the Respondent did not take steps to bring the process to an end then they ran the risk that the length of the process could render the dismissal unfair.

128. There were submissions made on behalf of the Respondent that the various postponements of the disciplinary process were, in fact, a deliberate attempt by the Claimant (or on his behalf) to delay the disciplinary process. In particular, reference was made to the recording of the hearing on 22 June 2020 made by AB which continued during an adjournment when GA left the room. The recording was provided to the Respondent in the course of these proceedings and they produced their own transcript at pp372A-372K which includes some differences from the transcript lodged by the Claimant.

129. The relevant passage is at p372I where it is said that AB was encouraging the Claimant to say that he was extremely tired, had a headache or could not focus so that a further adjournment could be sought. AB then went to ask the Claimant how he was feeling and he replied *"not bad, so far".*

130. The Tribunal can see how, in light of that, the Respondent has come to a view that there has been a strategy of delay. However, that recording was not available to them at the time and the reasonableness of the decision to proceed with the disciplinary process has to be assessed on the basis of the information known to the Respondent at the time.

131. The Tribunal does not consider that it needs to take a view on this in order to assess whether it was within the band of reasonable responses for the Respondent to proceed with the disciplinary hearing on 10 July 2020. The factors set out above are sufficient for the Tribunal to have reached the conclusion which it has reached on this issue.

132. There was a brief reference to the *Talon Engineering* case (above) in the submissions made on behalf of the Claimant and it was referred to during the internal process so the Tribunal considers it should address this. The Tribunal agrees with the Respondent that the present case can be distinguished from Talon on the facts. The factual matrices of the two cases are very different; in Talon, there was little to no effort by the employer to afford the employee the opportunity to attend a disciplinary hearing whereas, in the present case, the Respondent had made multiple attempts to hold a disciplinary hearing over a lengthy period and the fact that a hearing of substance did not proceed was not something which could be laid at the feet of the Respondent.

133. The Claimant raises a number of other complaints regarding the process.

134. First, there is the fact that he was suspended and that this was for a long period of time with no review. The Tribunal considers that the decision to suspend the Claimant was entirely within the band of reasonable responses; it was allowed for by the Respondent's disciplinary policy; the allegations, at

the early stage, involved physical violence; there was a need to ensure the integrity of any investigation.

135. The length of time was an inevitable by-product of the fact that the disciplinary process could not be concluded at an early date due to the various postponements to the disciplinary process.

136. There was no evidence of any review by the Respondent but the Tribunal also had no evidence that any review would have had a material difference on the Claimant's suspension. At best, the suspension may have been lifted but the Claimant would have remained absent from work due to health reasons.

137. Second, the Claimant complains that his complaint about KL was not treated as a grievance and taken through the grievance process nor was any action taken when he had raised the fact that DK had worked two shifts. It was said that this shows inconsistency on the part of the Respondent.

138. The Tribunal has some difficulty in seeing how these matters in any way go to the fairness of the disciplinary process followed in the Claimant's case. It certainly does not mean that the Respondent was not entitled to take action about the incident involving the Claimant and DK nor does it impact on what was actually done in the process followed in the Claimant's case or the decision reached.

139. Further, the Tribunal can see why the Respondent did not treat the Claimant's complaint about KL as a grievance. The email is not framed in such a way as to be clearly raising a grievance (although an employer erring on the side of caution could have treated it as such) and it is noteworthy that the Claimant did not follow-up the email when no action was apparently being taken by the Respondent. It is only raised six weeks later at the outset of the 22 June 2020 hearing in the context of objecting to KL participating in that hearing rather than asking for the grievance procedure to be engaged. If the Claimant had been raising a grievance that he expected the Respondent to action then the Tribunal considers that either he or his trade union representative would have followed this up sooner than that.

140. Third, there was much said in evidence about the conclusion reached by Occupational Health that the Claimant was fit to attend a disciplinary hearing. As the Tribunal made clear during the hearing, none of the witnesses were expert witnesses who could speak to the assessment that had been made and it was not for the Tribunal to decide if that assessment was a proper assessment. The question for the Tribunal was whether it was within the band of reasonable responses for the Respondent to prefer this assessment over what was being said by the Claimant or his GP. The Tribunal considers that it was within the band of reasonable responses to prefer their own Occupational Health adviser.

141. Fourth, there was a complaint that GH did not make it clear in advance of the appeal whether it would be a review or a re-hearing. This is correct but the Tribunal notes that neither the Claimant nor his representative sought any such clarification ahead of the hearing. It would certainly have been best practice for this to have been clarified by all sides to avoid confusion.

142. However, it was quite clear from the transcript of the appeal hearing that GH made it clear during the course of the hearing that he was not re-hearing the disciplinary hearing nor was he re-opening the investigation. It was, therefore, clear by that point as to what would be involved in the appeal.

143. In these circumstances, none of these matters, taken individually or as a whole, mean that the process followed by the Respondent was outwith the band of reasonable responses. In particular, the Claimant was given every opportunity to put his case before he was dismissed and afforded a right of appeal. The Tribunal does not consider that there was any procedural unfairness.

Was dismissal in the band of reasonable responses?

144. The Tribunal notes that the other person involved in the incident was also sacked and so there was a consistent approach.

145. Again, the Tribunal reminds itself that it is not for it to substitute its own decision and that the question is whether dismissal was within the reasonable band of responses.

146. It is very difficult to see how dismissal would not be in the band of reasonable responses for an incident involving shouting and swearing in the workplace in which the employer has concluded there was also physical contact. This clearly falls within the definition of gross misconduct within the Respondent's own policies for which dismissal is a penalty. There was no evidence that the Respondent tolerates such conduct.

147. Reference was made to the Claimant's length of service but the Tribunal does not consider that this assists him where there is an act of gross misconduct. There is some force in the argument for the Respondent that the expectation on a long serving employee in terms of knowing how to conduct themselves in the workplace may well be greater. It was clear that the Respondent took this factor into account but did not find that it mitigated the Claimant's conduct. The Tribunal finds that the Claimant's service does not mean that the decision to dismiss is outwith the band of reasonable responses.

148. The Tribunal, therefore, concludes that dismissal was within the band of reasonable responses.

Conclusion

149. In these circumstances, the Tribunal has determined that the Claimant's dismissal was not unfair, there being a potentially fair reason for dismissal which the Respondent was entitled to rely on having come to a genuine and reasonable belief, after a reasonable investigation, as to the Claimant having committed the misconduct in question. Dismissal was clearly within the band of reasonable responses in all the circumstances of the case and there was no procedural unfairness.

150. The claim of unfair dismissal is, therefore, dismissed.

Decision – Breach of Contract

151. The Claimant's breach of contract claim relates to the fact that he was dismissed without notice.

152. There were no particular submissions made on behalf of either party in respect of this claim.

153. The Tribunal proceeds on the basis that if the Claimant was dismissed in circumstances where the Respondent was entitled to dismiss him summarily then there would be no breach of contract. It is commonly the case that such dismissals are described as "gross misconduct" although the legal principle is that where the Claimant has acted in a manner which would amount to a fundamental breach of contract then the Respondent is not bound by the contractual requirement to give notice of dismissal.

154. The Tribunal must be satisfied that the Respondent has proven, on the balance of probabilities, that there was a repudiatory breach by the Claimant and that this was sufficiently serious so as to justify summary dismissal.

155. In the Tribunal's view, the allegations of misconduct in this case, either singly or taken as a whole, are ones which are serious enough to justify summary dismissal

156. As noted above, the Claimant effectively admitted the second and third allegations relied on as reasons for his dismissal and accepted in his evidence that he had behaved in the manner described. In these circumstances, there is no question that these allegations were proved.

157. It was a feature of this case that almost all of the focus of the evidence was on the allegation of physical assault which meant that the impact of the admissions in relation to the other allegations were effectively ignored by all parties. The Tribunal considers that the admitted matters are, in and of themselves, capable of amounting to a repudiatory breach of contract; they fall within the description of "verbal assault" under the heading of gross misconduct within the Respondent's own policy; such conduct is clearly capable of creating a loss of trust and confidence by an employer in an

employee; there was no evidence that the Respondent tolerated such conduct.

158. The Tribunal, therefore, concludes that the Respondent was entitled to dismiss the Claimant summarily and so the breach of contract claim also fails and is dismissed.

Employment Judge: Peter O'Donnell
Date of Judgment: 16 September 2022
Entered in register: 20 September 2022
and copied to parties