

EMPLOYMENT TRIBUNALS

Claimant: Mr. K Pokowa
Respondents: London Borough of Croydon
Heard at: London South Hearing Centre
On 20/21 September 2022 and in chambers 25 October 2022
Before: Employment Judge McLaren
Members: Mr. N Shanks
Ms. R Bailey

Representation

Claimant: In Person
Respondent: Ms. Venkata, Counsel

JUDGMENT

The unanimous decision of the tribunal is that: -

1. The complaint of automatically unfair dismissal does not succeed. The claimant was dismissed for conduct.
2. The complaint of unfair dismissal does not succeed. The claimant's dismissal was for a fair reason and was both substantively and procedurally fair.
3. The complaint of wrongful dismissal does not succeed. The claimant had breached the contract of employment by his actions and was not therefore entitled to be paid notice.

REASONS

Background

1. The claimant was employed by the respondent as a neighbourhood Caretaker from February 2007 until 25 February 2020. The claim was summarised at the preliminary hearing as being about the claimant's dismissal which he believes to be unfair, both on ordinary grounds, and automatically unfair because of trade union activities. In summary, he alleges he was undertaking trade union activities in the respondent's public library, was racially abused by a member of the public, that person subsequently complained about the claimant's behaviour, he was disciplined and subsequently dismissed.

2. The claimant believes the respondent did not investigate his complaint of racial abuse, shifted its ground several times as to the reason for dismissal and ultimately dismissed him for his trade union activities. The respondent denies the claim and alleges that the claimant was dismissed without notice for gross misconduct because of a complaint by a member of the public about his aggressive behaviour.
3. We heard evidence from the claimant on his own account. The witnesses for the respondent were Stephen Tate, Director of Housing, Estates and Improvement and Jennifer Sanker, Head of HR. We were provided with a bundle of 478 pages. We agreed with the parties that the hearing would address liability only, as the listing was reduced from 3 to 2 days.
4. The findings of fact set out below were reached by the tribunal, on a balance of probabilities, having considered all the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the tribunal's assessment of the witness evidence. We were also assisted by the parties helpful submissions.

Issues

5. There are three complaints, unfair dismissal on ordinary grounds, unfair dismissal on the grounds of trade union membership/activities, and wrongful dismissal.
6. The issues in this matter were agreed at a preliminary hearing on 18 June 2021 as these:-

Ordinary unfair dismissal

- a. Was the claimant dismissed?
- b. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
- c. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
 - i. there were reasonable grounds for that belief;
 - ii. at the time the belief was formed the respondent had carried out a reasonable investigation;
 - iii. the respondent otherwise acted in a procedurally fair manner;
 - iv. dismissal was within the range of reasonable responses.

Automatic unfair dismissal for trade union activities

- d. If the reason or principal reason for the claimant's dismissal was because he had taken part, or propose to take part, in the activities of an independent trade union at "an appropriate time" then it will be automatically unfair under section 152 of the Trade Union & Labour Relations (Consolidation) Act 1992.
- e. "An appropriate time" is defined with section 152 as a time outside the claimant's working hours or a time within the claimant's is working hours at which, in accordance with arrangements agreed with or consent given by the respondent, it is permissible for him to take part in the activities of the trade union or (as the case may be) make use of trade union services.

Wrongful dismissal / Notice pay

- f. What was the claimant's notice period?
- g. Was the claimant paid for that notice period?
- h. If not, was the claimant guilty of gross misconduct? In other words, did the claimant do something so serious that the respondent was entitled to dismiss without notice?
- i. If not, what damages is he entitled to?

Finding of facts

The claimant's contract and respondent policies

- 7. The claimant was employed by the respondent as a neighbourhood caretaker in the housing department. The claimant explained that his role included cleaning duties only and he had minimal contact with the general public.
- 8. Mr Tate explained that in roles he has held, including within the housing department, caretakers were used as the eyes and ears of Department and, for example, were asked to check on residents during the last excessive heat wave. We accepted his evidence, because as a senior employee and Director, he is in a position to set expectations and determine which roles are public facing and which are not, We find, that, whatever happened in practice in the claimant's job role, the respondent properly regarded his role as public facing, since he could come into contact with members of the public and could be asked to do so. It was therefore reasonable to take into account the public facing aspect of the claimant's role in any decision making.
- 9. At the date of his employment the claimant was issued with an appointment letter which included a summary of principal conditions of employment. This included a notice period and, as the claimant had been employed for 13 years by the date of his dismissal, he was entitled to 12 weeks notice.
- 10. The appointment letter stated that the claimant was required to comply with the Code of Conduct. More details of this were given in the summary which specified that the Code of Conduct set out expected standards of

behaviour and included that staff must treat colleagues and service users with respect and dignity. The summary made reference to disciplinary issues being dealt with in accordance with the respondents' agreed procedures and stated that copies of those procedures will be made available.

11. The disciplinary procedure was included in the bundle at page 208 – 225, and the Code of Conduct at page 226 – 257. A non exhaustive list of examples of what constituted gross misconduct were set out in the disciplinary procedure which included
 - deliberate and wilful negligence in job performance, likely to damage the council's reputation or have serious implications for service users or colleagues,
 - bringing the council into disrepute or acts which damage the reputation or credibility of the council or service provision ;and
 - conduct or activities, including those outside of work, that damages (or have the potential to damage) the council's reputation, or destroyed confidence in the employment relationship.
12. Part 7 of the Code of Conduct set out some of the behaviour expected which included that customers are entitled to be treated with dignity, respect, courtesy and fairness.

The initial complaint and investigation

13. On 26 June 2019 a disabled service user sent an email to a member of the Council raising a complaint about an incident that he described as happening that day in the Croydon central library while he was using the computers at level III of the building. The email of complaint was at page 149. It described the individual as wearing a Croydon Council ID lanyard and said he "*became very aggressive, swearing, being abusive and that he kept threatening to kick me.*" Initial enquiries were made by the HR consultant with the library staff to identify the individual who was referred to in the complaint. Library staff confirmed that it was the claimant who had the altercation with the service user.
14. Statements were taken from all four of the library staff who were on duty on level III on 26 June at the time of the incident. One individual had not witnessed the incident as he was serving customers at the time. The Library Supervisor, Mr Moreira- Yeoell, had only become involved as a colleague had called him to assist and had not therefore seen the incident but dealt with the aftermath. His statement at page 151 recorded that he found the situation confusing because he was quite friendly with the claimant and found him to be amiable. He spoke to the claimant who was adamant that he wasn't eating any food that he had not been rude. The service user also came over by this point, he informed Mr Moreira -Yeoell that he was autistic, knew the local councillor and thought the claimant ought to be sacked.
15. The statement also explained that some 15 minutes after the incident another regular library user, Mr Rattenbury, met Mr Moreira Yeoell in

reception to tell him that he had a similar incident with the claimant a month or so back and he implied that the service user account was accurate.

16. The Library Support Assistant, Ms Inam gave an account (page 153) of what she saw and identified that the claimant had turned to the service user *“and told him angrily to “shut up” and kicked against his leg”*. Her colleague, also a Library Support Assistant, Ms Filani (p155) said that she noticed there was an argument between two of the customers and one reported the issue about eating in the library to her and her colleague. Her colleague accompanied the service user back to assess the situation and when she came back Ms Inam told her, Ms Filani, that the man eating acted all nice to her *“but started kicking the chair of the other man who reported when he spoke up”*.

Decision to investigate the incident and the first interview with the claimant

17. On 23 July the Director of Housing Assessment and Solutions instructed HR to facilitate an investigation into the complaint. The Operations Manager of Housing Solutions, Mr Mulak, was tasked with the investigation and he was supported throughout by Ms Sanker who gave evidence to this tribunal. We find that it was reasonable and legitimate for the respondent to begin a further investigation. It had received a serious complaint from a service user and had carried out a thorough and reasonable initial investigation by interviewing all those who had potentially witnessed the incident. Those who had been present had confirmed that an incident had occurred.
18. On 24 July (page 41 – 42) the claimant was sent notice of a disciplinary investigatory interview which set out that on 26 June 2019 it was alleged that he was verbally abusive to a member of the public and threatened to physically harm him, he failed to seek approval from his line manager to carry out his union duties, and his actions may have brought the Council into disrepute ,or his actions were such that they could damage the reputation or credibility of the Council or service provision.
19. The claimant was invited to attend an interview on 2 August 2019. The letter identified that he was entitled to be accompanied by an appropriate fellow worker or represented by a trade union representative. We find that the letter clearly set out the allegations that were being investigated, it set out the right to be accompanied and also directed the claimant to sources of assistance during what was acknowledged could be a difficult time for him.
20. Prior to the claimant’s interview, Ms Sanker interviewed the service user. In this interview he gave a slightly different account to that set out in the initial email of complaint. He stated that the claimant had *“threatened to hit me and became very aggressive”* and that the claimant had *“threatened to hit me and he kicked my bag”*. He also explained that the incident lasted *“approximately five minutes and that when he kicked me, I went to get the library staff. When the library staff came, he was still threatened to hit me and swearing at me in front of the staff ”* . He could not remember what the claimant had said to him as it was a long time ago that he felt the behaviour was unacceptable and the claimant was very aggressive and should know better as he worked for the respondent. The service user also said that

another library user came to him after the incident and told him that the claimant had done this before.

21. The service user had also experienced other similar incidents and when reporting these to security staff they had been moved to other floors. He identified that in the last six months he had experienced this approximately 10 times "now and again". On those occasions he had confronted the individuals directly. He reiterated the claimant had "*kicked my bag before the staff came, he just kicked my bag*" and said that he felt that the claimant's conduct brought the Council into disrepute.
22. The claimant attended two investigative meetings, the first on 2 August and a further one on 3 September. He was accompanied by a trade union representative at both.
23. During the first meeting the claimant was asked to give his account and he explained what had happened. He stated that when he was using the computer a gentleman on his right hand side had said that he was not allowed to eat. He had replied that he was able to eat a snack but the gentleman pointed to the notice on the wall prohibiting drinking and eating. The claimant explained again that he had been recently told by staff you can have a drink and snack, but not hot food and drink and he continued to eat his crisps. The gentleman became agitated and then got up and came back. When he came back the claimant said the gentleman made reference to the no eating sign and said "*what is the matter with you, you can't eat, this is not a jungle*". The claimant told him to shut up as he could not stand it any more and he pushed his chair in. The claimant stated it was at that point that the gentleman went to the library supervisor. The claimant said he left the library completely after that.
24. The claimant stated that he did not kick the service users bag, just pushed his chair in. He had no interaction with the library staff. There was a short adjournment after which the statement by Miss Inam was read to the claimant at which point he said he did have a polite conversation with her. This was noted at the time as an inconsistency in the claimant's position. He also stated that when Miss Inam came he pushed his chair back and that's why she thinks he kicked the service user's bag. This account towards the end of the meeting differed from his description originally in which he described that he pushed his chair in.
25. The claimant was asked why he did not report the service users offensive and racist comments to the library staff and he said that he had put up with a lot of racist remarks in the past and did not feel reporting this would make the difference. He decided not to take it further because he felt this would not go anywhere.
26. The claimant was asked what time he finished work on 26 June and said that he had left his patch around 10.30 -10.45 and sent a message to "Jo" on his personal mobile to tell her that he was not well. He was unable to find the text. He was asked about the policy for union duties and said that he informed his line manager and he did not need permission. He then said that union duties representing employees required him to seek permission and that no manager had problems with that. He agreed that his previous

manager had lots of problems with him carrying out union duties, but that Jo has put a system in place. He meets her on a regular basis and they agreed the best way forward for his union duties. He also explained that he had four hours facilities time a week for union duties.

27. Both of the trade union representatives who were present were asked if the claimant need to seek permission from his line manager before he carried out union duties and both confirmed that that was correct. After a short adjournment the claimant was asked about the procedure to gain permission to carry out union duties.
28. He said that he had agreed it with Jo a few weeks ago and in a one-to-one this week that had been reconfirmed. Before that he explained that he sent texts to her phone or called her but that, since Jo took over, very little union duties had been carried out during his working hours. He called or texted her but did not wait for permission or authorisation from the line manager. He was asked if he accepted this was unauthorised absence as he did not receive any permission from Jo and he replied "yes, *but not deliberately*". The claimant also confirmed that he did not follow the correct procedure on some occasions. However, he said that no manager had complained about his union duties and his section was always chaotic.

Investigation into the allegation of racial abuse

29. Once the respondent was aware that the claimant considered he had been subjected to racial abuse, the service user was asked by email if he had made a comment "*what is the matter with you, you can't eat, this is not a jungle.*" The response was that this had not occurred.
30. In addition to asking the service user by email, in their interviews the library staff who were present at the time of the incident were asked if they had heard these comments. None had done so. The library supervisor was asked in his interview on the 15th of August about whether the service user had made any complaints before. He agreed to look into this and later, when he was questioned about this during the disciplinary hearing on 3 December 2019, confirmed that he could not find any previous complaints.
31. We find that at the time steps were taken to investigate any other complaints made by the service user and none could be found. We also note that the question of the abusive comments was raised during the disciplinary hearing as referred to below. The matter was therefore properly considered as part of the disciplinary process and again properly considered during the disciplinary hearing.

Interviews with library staff and a manager

32. It became apparent during the course of the investigation meetings with the library staff and the claimant that the claimant was a frequent user of the central library. It appeared that he was attending during normal working time, although the claimant's account of what was his normal hours was contradictory. In order to establish the claimant's computer usage and library bookings a dates and times report showing his use of the computer was requested from 30 January 2019 to 18 July 2019. This was at page 160-162.

33. On 15 August Mr Mulak and Ms Sankar met with Ms Inam and she was asked to give her account of what happened on 26 June. She explained that she was sitting at the reception desk on the third floor when she heard a dispute between two gentlemen, it was getting louder and voices were raised. The service user came to her to tell her that claimant was eating and refused to stop eating and he said that the claimant had sworn at him. She therefore approached the claimant and she said that he spoke politely to her, but the service user kept saying that you are not allowed to eat at the computer. The claimant then said that had been allowed to eat in the past but the service user kept saying you are not allowed to eat here you need to stop. She described the claimant's demeanour suddenly changed, he then *"kicked (the service user) violently and told him to shut up aggressively"*.
34. On the same day, 15 August, Mr-Moreira- Yeoell was interviewed. His statement at page 106 was in very similar terms to that given initially. He again referred to the incident with Mr Rattenbury who, on 5 September 2019 sent a letter to the respondent. This letter was at page 117 of the bundle and describes a verbally aggressive reaction by the claimant. It was received on 12 September.
35. On 19 August Ms Filani was interviewed. She stated that she did not witness the claimant kicking the service user *"as I was sitting at the reception desk"*. She said there were voices raised but that they weren't shouting, the service user raised his voice but the claimant did not. She was asked whether she had heard the comment about you can't eat here it is not a jungle and she said *"no, if this was said, I would have heard it as I am not that far away from them"*. She was asked to clarify who told her that the claimant had kicked the service user and she said it was Miss Inam who told her that he had kicked the chair and not the service user. Ms Filani was asked why she was told something different by Miss Inam who had told the disciplinary investigators that the kicking had been of the service user. Ms Filani clarified that Ms Inam told her the claimant was sitting on a chair and kicking the service user violently. She did not tell her whether the claimant was kicking the service user or the chair.
36. On 23 August an investigatory meeting was held with Jo Joannou, who the respondent identified as the claimant's line manager, in order to consider the second allegation raised against the claimant, namely that he failed to seek approval from his line manager to carry out his union duties. The notes of the interview are at pages 119 – 193.
37. Ms Joannou confirmed that she had been managing the claimant since January 2019, first as agency staff and then from June permanently. There had been a gap in management as her access had not been sorted out properly until June 2019 and therefore the claimant had been booking leave through another manager, Mr Eze, between January and June 2019. She confirmed the claimant had not asked for time off for trade union duties since he had to attend a conference in February 2019. She was asked about the process of him carrying out of union duties during working days and she explained he is contracted to do three days a week, Tuesday, Wednesday and Thursday and that he needed to seek permission from her before he carried out any union duties during his working hours. If she was

not around the claimant would need to seek permission from other managers.

38. The line manager confirmed that the claimant was fully aware of the process and having checked her emails and phone, there were no other requests for time off other than to attend a conference in February and to attend a meeting on 14 March. Ms Joannou did not recall the claimant had informed her that he was unwell on 26 June as she did not receive any text from him. She telephoned him on site, but could not reach him on that day.
39. As part of the interview Ms Joannou had seen and reviewed the spreadsheet regarding the claimant's computer booking in the central library over the previous six months. She confirmed that the times the claimant had sought permission from her to carry out his union duties was in February and March 2019.

Second interview with the claimant

40. The claimant attended a second investigatory interview on 3 September. He was asked about how he sought approval from his line manager for his union duties. He stated that his union duties are carried out on Monday and Friday or on his annual leave, very rarely on Tuesday to Thursday during his working hours. He confirmed that Jo had started as agency in January and should have been managing him permanently since March 2019. He explained that he called her and asked her for permission to undertake union duties. On some occasion he asked her by email but he reiterated the fact that he rarely represented anybody on Tuesdays and Wednesdays and Thursdays.
41. The claimant was asked about his normal working hours and said that they were 8.00 to 15.30 with a one hour lunch break. He was shown the printout of access to the library computer and was asked what he was doing on the library on his normal working days Tuesday, Wednesday and Thursday. He was also shown the comments from his line manager. Following a 15 minute adjournment the claimant said he could not discuss that today, someone may have used his card and he had lost his library card. He did not get a replacement or report it. He could not recall when he had lost the card but it was sometime between January and June. He lost it for five days.
42. It was agreed that the claimant would provide his comments on his line manager's report and the library printout by adding these next to his line manager's column. He was given from 3 to 16 September to do so.
43. The claimant was sent copies of the notes of his interviews and was asked to make any amendments he thought were needed. On 11 September (page 49) the claimant responded wishing to clarify one point the statement. He wanted to add *"a man I do not know and had never seen before came and sat next to me... I was eating crisps, without saying anything to me, he just said Hey, you are eating like you in the jungle, this is not the Jungle. I ignored him and continue doing what I was doing. He shouted at me again and said I want to continue like I was in the Jungle, I*

should go back to the Jungle”. The claimant made no other amendments or additions to the notes.

44. The claimant did not, as he had been requested, provide any response as to whether he sought permission to be absent from work on the dates which were detailed in the report. He also had not provided the investigation with any text or emails when he had requested time off to carry out his trade union duties, although he had been reminded of this.

Management statement of case

45. Having carried out the investigation, a detailed management statement of case was prepared (pages 120 – 130). The report was finalised on 18 November 2019. It provided a detailed account of exactly what steps had been taken to investigate. It concluded that, having reviewed all the evidence available, an altercation did take place on 26th of June between the claimant and the service user. It concluded that on the balance of probabilities the claimant was verbally abusive, he was aggressive towards the service user and threatened him with physical violence. It was also clear that the claimant made a kicking motion to the member of the public. The report also concluded that there was substantial evidence to show the claimant had failed to seek approval from line managers to carry out his union duties on many occasions when he had been absent from work.
46. Having considered the report compiled by Mr Mulak we find that it is a fair and reasonable recital of the steps that had been taking to investigate the incident. It identified the relevant evidence and discrepancies within that evidence. We find that investigation had spoken to all relevant witnesses and obtained all relevant documentary evidence. We find that the respondent had taken all reasonable steps to investigate the allegation of racial abuse that the claimant had raised. We find that it fairly and reasonably reached the conclusion that there was a case of gross misconduct to answer and a disciplinary hearing should be convened.
47. The management statement of case and the 22 appendices were sent to the claimant in advance of the disciplinary hearing which took place on 3 December 2019.

The disciplinary hearing

48. This took place before a panel of three, one of whom was Mr Tate who gave evidence to this tribunal and he confirmed that he was the decision-maker. The claimant was accompanied by a trade union representative throughout and was allowed to introduce new documentation and to call witness evidence. While the decision-making panel had received the management report and appendices prior to the hearing, the panel heard from witnesses directly and four individuals, Miss Inam, Mr Moreira-Yeoell, Ms Joannou and Mr Eze attended and were questioned.
49. The notes of the hearing were at pages 259 – 293. The meeting took place on two dates, the first was 3 December and began at 9 AM finishing at 12 PM. The reconvened hearing took place on 12 December and took place between 10 AM and finished at 2:15 PM. The claimant confirmed that the notes were an accurate record of the hearing. The hearing considered

three main issues, did the incident occur, was the claimant provoked and was he absent without authority.

The incident/racial abuse

50. The service user attended the hearing and was asked whether he had told the claimant to go back to the jungle. He reiterated that he had not done so. He also explained that the claimant kicked his bag but had aimed for his leg. He said the claimant was standing and that he was swearing. The service user said that he got the staff after his bag had been kicked. The service user stated that he would go to a lie detector about the kicking and he had nothing to hide.
51. The library supervisor attended next and said that he had found the claimant to be friendly, approachable and amiable and he did not see any of the incident. He had not witnessed anything directly and he confirmed, as referred to above, that he had not found any previous complaints made by the service user although he had investigated this as requested.
52. Miss Inam was questioned at the reconvened meeting on 12 December. She reiterated that she remembers the claimant kicking out at the service user and told him to shut up. She stated that the claimant was seated and the service user was standing. She said she was standing in front of both individuals and the claimant kicked in the sitting position. She was asked if she could be mistaken and she said that it did happen a long time ago but that she remembered there was kicking but she could not remember whether it was at the bag or the leg. She definitely confirmed the kicking.
53. She was asked about Ms Filani's statement and why this records that she had been told the claimant kicked the chair. She said that she might be getting confused on the small details as it was a long time ago, but she remembered that there was definitely kicking and she told Ms Filani the claimant again aggressive and kicked the service user. She remembered the claimant kicked out at the service user.
54. The claimant reiterated that the kicking did not take place. He said that he was shouting at the service user and realised that was wrong and apologised for that.
55. The claimant was asked questions and gave further information about the comments he said had been made to him by the service user. He stated that as well as the service user referring to the jungle, there were other comments about "monkeys" and he had reported this as a hate crime to the police. The claimant was asked about this as it was the first time that he had mentioned it. The claimant confirmed he did not report the incident to the library staff and that he had reported to the police when he said he realised HR were not investigating this. He could not recall the date of his police report. We note that when he had an opportunity to correct what was said to him on 11 September he did not add these comments to his account.

Time off and trade union facility arrangements

56. It was agreed that the claimant worked as a trade union representative for Unison and was entitled to facilities time during his working hours to carry out his union duties. That included attending meetings and training, representing members at formal hearings and appeals, and any other duties as agreed under the trade union facilities time agreement.
57. Pages 110 – 119 were the staff consultation and trade union facility arrangements agreed on 11 November 2015 and effective from 1 January 2016. That provided that council employees who are appointed representatives of one of the recognised trade unions were granted facility time, that is release from their contractual duties for the purpose of carrying out trade union duties on behalf of trade union members who are employees of the council.
58. The agreement provided predetermined facility time for each trade union of two days per week plus an additional half a day a week per 100 trade union members. Each trade union could be flexible on how it allocated its predetermined facility time across local representatives, but the Director of Human Resources had been notified in advance of who the release was allocated to.
59. In addition the agreement provided for ad hoc facility time for trade union duties. This specifies that reasonable paid release would be granted on request, and subject to the approval of the line manager, to union representatives to allow them to carry out trade union duties. This was then explained as being to accompany members to employee relations meetings, for training and during times of unusually high corporate activity. The latter was to be agreed with the Director of Human Resources.
60. There was further provision for ad hoc facility time for trade union activities. This provided by exception and with prior approval from the line manager paid for release from work might be granted the delegate to attend national annual conference. Names of delegates had to be provided to the head of HR specialist services. 10 working days a year could be agreed attended other trade union conferences, and release would be given to attend an annual general meeting the Croydon branch with up to 1 hour of paid work in time for that purpose. Paid release could also be granted at the discretion of the Director of Human Resources for attendance at regional or national bodies.
61. Both respondent's witnesses gave evidence that they understood time off for trade union duties was granted in accordance with this agreement and therefore any time the claimant took off in order to carry out his trade union duties were subject to the approval of his line manager which should be sought before he was absent from work.
62. The line manager, Ms Joannou, was asked whether she was aware of the claimant requesting time off for trade union duties prior to 26 June. She also confirmed that apart from annual leave, the claimant had not had authority to be away on the time shown on the log of library use. She confirmed that Mr Eze was managing the claimant at the same time until June. She did not give the claimant permission to be away from work on 26 June.

63. Mr Eze was interviewed as part of the hearing and he said that he been managing the claimant as part of his team until it was divided between him and Ms Joannou. He said that from January to June they were sharing management of the team. If she was not there he would manage her team and vice versa. He accepted, however, that from 21 January Jo was the line manager.
64. Mr Eze initially said that he remembered the claimant contacted him for time off on the 26 June, but he was not sure if it was for union work. When he was asked about this again he said that he did not have a record in his 'phone to look at, he did not have dates and days during this period he had said to Jo that the claimant could call him. He said "*I am not seeing 26 June for certain that he called me,..... I am saying it is possible that he called me on this day. I would have to look into the records and I think that would be one of the days he called me*". He was unable to find any notes in his records.
65. Mr Eze was asked whether, if he was shown the information of the 40 occasions on the spreadsheet which showed the claimant's absence, would he have those recorded. He explained that he had already sent all information about the absences that he had recorded that he had to Jo. These had therefore already been taken into account when she reached her view that the absences were unauthorised. Mr Eze was asked about the number of times the claimant contacted him and over the six months he said it happened a few times.
66. Mr Eze did, however, say that when he had been managing the claimant they had agreed Thursday afternoons for his trade union work and this was agreed with managers when the claimant was full-time.
67. When the claimant was asked about arrangements with his manager for time off he stated that there was a difference between the trade union arrangements and work arrangements. He said that in 2009 it was agreed he could have time off on Thursdays to carry out union activities. This was for four hours as Mr Eze had confirmed. This arrangement had been in place for nine years and if there had been issues they would have been raised but this had never happened. These hours were not recorded and it was a matter of local practice.
68. He also said that work arrangements meant that you had a work patch and you started work between 8 and 8.30 and you do your work. You can phone your manager and asked to work through lunch or leave work earlier and have been doing so for 10 years with no issues having been raised. In the last six months he said he had never left his post without informing his manager and he had never done anything without his manager's agreement.
69. The claimant handed up some handwritten notes which he had compiled as a response to the library printout. These were included in the bundle at page 319 – 325. For the purposes of the hearing the claimant had also produced a typed version of these notes. While there were some minor discrepancies between the two, the details as to dates and times and the explanation given by the claimant as to dates and times was the same.

70. While the claimant in the note handed to the tribunal during the hearing stated that the handwritten notes were ignored, we find that this was not the case as Mr Tate confirmed. The notes of the hearing show that the panel considered the handwritten notes and asked the claimant to explain them which he did in some detail. He stated that Thursdays were agreed. He identified a number of dates of attendance at the libraries were outside working hours, or was annual leave or sick days. Other dates shown were his lunch hour.
71. The claimant's evidence as to his lunch hour was confused. He suggested that he could take an hour for lunch but this was flexible and it could be early or late. Some of his library attendances were for longer than an hour.

Outcome letter

72. The panel considered the position and on 6 January 2020 sent the claimant a detailed letter setting out its findings. The letter was signed by Mr Tate. The letter dealt with each allegation, set out a synopsis of the management case, a synopsis of the claimant's response and details of the panels' deliberation and conclusion.
73. In reaching a decision on the first allegation the panel took into account inconsistencies in evidence between the service user and Ms Iman. It also considered the provocation the claimant said occurred from racially offensive language. Having considered all the evidence the panel concluded on the balance of probabilities that there was sufficient evidence that the claimant was verbally abusive and acting in a physically threatening and aggressive way towards a service user by directing a kick towards him.
74. The panel concluded that the claimant acted towards a service user in a manner that falls well below the standards of behaviour expected as outlined in the Code of Conduct. They concluded that the claimant's actions were in breach of discipline procedure as a matter of gross misconduct that involved assault upon a service user and was conduct outside of work which damaged the council's reputation or destroyed confidence in the employment relationship.
75. On the second allegation, failure to obtain approval to carry out union duties on many occasions, the panel concluded that while the claimant said he had contacted Mr Eze during the period, the manager's evidence was that he had only been contacted on a few occasions. The panel did not accept that the claimant had been given permission to take four hours off every Thursday and that the trade union facilities agreement document was clear that requests are subject line manager approval. The panel considered that the finding in relation to allegation two was one of gross misconduct, repeated acts a pattern of behaviour that destroyed confidence in employment relationship.
76. On allegation three the claimant confirmed he was wearing his ID badge at the time identifying him as a respondent employee and considered that was sufficient evidence on the balance of possibilities that charge three was proven. That was an act of gross misconduct.

77. The panel concluded that each allegation charge separately was an act of gross misconduct and therefore the claimant should be dismissed without notice for any of them but in particular where 3 had occurred. In reaching its decision the panel was asked to consider mitigation. The factors to take into account were raised by his trade union rep and included his good track record. In the note of the decision in the disciplinary notes reference was made to his long service
78. The outcome letter refers to the panel taking into account the claimant's willingness to apologise to the service user and his character testimonials. We find that potential mitigation was considered but the panel concluded that in the circumstances this did not balance against the seriousness of the disciplinary charges. We find this is a reasonable conclusion.
79. We find the outcome letter is thorough and reflects the reasonable and thorough nature of the process and the panel's conclusions. The panel reached its conclusion taking into account the discrepancies and reaching a reasonable conclusion on these.
80. We accepted Mr Tate's evidence and find that the reason for dismissal was conduct. The decision maker had a genuine belief that the claimant had committed 3 separate acts of misconduct. The belief was formed following a reasonable investigation which included a disciplinary meeting that involved the witnesses attending and being questioned. Mr Tate had reasonable grounds for his belief and the respondent acted in a fair manner procedurally. Given the nature of the allegations dismissal was within the reasonable range of responses.

Appeal process.

81. The claimant appealed the dismissal. We were not taken to the appeal process other than to be referred to the response prepared by Mr Tate to the claimant's appeal statement which is at pages 308 – 318. In that document Mr Tate set out in considerable detail exactly why he had reached the conclusion that he had. The appeal upheld the original decision.
82. The appeal panel considered the claimant's complaint that the sanction was too severe based on both what happened and because of his good character and work record. This was considered and the panel believed there was a lack of sufficient mitigating circumstances. They found that the claimant's long service meant that he should have responded appropriately.
83. We find that the appeal panel reached a fair and reasonable conclusion that the claimant had carried out three acts, each on its own amounting to an act of gross misconduct. The belief was genuine and was reached after a fair and reasonable investigation process during which the claimant had a full opportunity to challenge evidence and to put his side of the case. There were discrepancies in the evidence and the panel acknowledged these and took these into account in reaching its conclusion. It also considered mitigation and reached a reasonable conclusion. It upheld the penalty that was within the range of reasonable responses

The claimant's witness evidence

84. The claimant's witness statement expanded on what occurred on 26 June and provided significantly more detail as to what he said were the abusive comments made to him by the service user than he had done at any stage in the disciplinary process. These matters could not therefore be considered by the respondent as he had not raised them at the time. We have found that the respondent reasonably investigated the allegations made by the claimant based on the detail that he gave at that point. They interviewed all witnesses who could reasonably be expected to have witnessed this event and, on the balance of probabilities, concluded that the words had not been said.
85. In considering the allegation of racist abuse the panel fairly and properly took into account that the claimant did not report the matter to the library staff or to his employer in any formal way. It took into account the fact that he expanded on the language that had been used only at the disciplinary hearing on 3 December, despite offering a correction to the notes of the investigation interview which did not add this, and that he had not filed a police report in a timely way. In cross-examination the claimant confirmed that as an experienced trade union official he would advise anyone in this situation to raise complaints with their employer and to report this as a hate crime straightaway. He had not done so.
86. The claimant's witness statement and his questioning of the respondent's witnesses drew out the inconsistencies in the accounts of the service user and challenged what he saw as differences between the evidence of Ms Inam and Ms Filani. We have found that these were taken into account by the panel who reached a reasonable conclusion on the evidence it heard.

Reason for dismissal

87. Throughout his evidence Mr Tate was consistent in his account. The claimant in his witness statement said that the respondent's HR department had cooked up the allegations to make them more serious in order to have a strong case and it was really because they felt they had the opportunity they had been looking for to dismiss him at last. It was the claimant's perspective that the original complaint talked about aggressive swearing. He stated that some sort of violent behaviour was invented.
88. When he was taken to the original complaint by the service user the claimant did accept that the service user had referred to threatening to kick him. It is noted that the notice of disciplinary investigatory interview this characterises the event 26 June as threatening to physically harm the service user. We find that this is consistent with the original complaint by the service user. We do not find that the respondent has expanded on the original complaint.
89. The claimant also complains that the reason for his dismissal was his trade union activities as a long-standing trade union official. The claimant did not put this to either of the respondent's witnesses but the panel asked Mr Tate about this.

90. Mr Tate was aware that the claimant was a trade union representative as he had been involved in an internal hearing at which the claimant had represented an employee. That was the only contact he had had with the claimant in that capacity. He had not discussed the claimant with anybody before the hearing or indeed after. He was unaware of whether the claimant did or did not have any particular reputation as a trade union representative.
91. We accept Mr Tate's evidence that he reached his conclusion on the basis of the evidence that he heard having carefully weighed up everything that he was told by the witnesses and taking into account the inconsistencies. We find that he dismissed the claimant for the reasons set out in the outcome letter and that this had nothing whatsoever to do with the claimant's trade union activities.
92. We also accept Mr Tate's evidence that he was not advised or told by anybody else to reach this conclusion. He did so entirely on the basis of the evidence that he heard and it was his own decision. We are satisfied that this is not a case in which there is a hidden decision-maker behind the scenes, the decision-maker was Mr Tate.

Wrongful dismissal

93. When considering unfair dismissal we need to make findings only as to whether the respondent acted reasonably. To consider wrongful dismissal we need to make our findings as to whether we think there was an act of gross misconduct or not.
94. The crux of this case, as identified by both parties in their submissions to the panel at the end of the hearing, is credibility. The claimant says he did no more than shout "shut up" at the member of the public after suffering racial abuse and that all his absences from work were authorised. He submitted that the dismissal was therefore wholly unreasonable for simply shouting when he was a victim of racial abuse and it was not his fault that management were disorganised and had not properly communicated with each other about his absences which are all entirely agreed. The respondent believed otherwise.
95. The claimant was inconsistent in his account of events throughout the investigation and disciplinary proceeding and the tribunal hearing, both in his written witness statement and in the answers he gave in cross-examination.
96. By way of example, in his initial interview on 3 August the claimant stated that he had no interaction with library staff and then agreed that he did in fact have some. He referred to having pushed his chair in and also to having pushed his chair out. This is relevant to his repeated assertion that he could not have kicked the service user because his chair was pushed in. However, in the initial investigation meetings he suggests that Ms Inam may have been confused about the kicking because he had pushed his chair out.
97. In answers to questions during the hearing the claimant gave three different accounts of his start time. These contradicted the start times he had identified during the disciplinary process. He also stated originally that he had to obtain and indeed had obtained permission from a manager for his long lunch breaks, late start and early finishes. He then stated he did not need to get such permission if the time away from work was only up to 15 minutes. He

stated at various times he had not been in the library for more than 10 to 15 minutes on any occasion. This is clearly not the case when you consider the log of his attendance. That shows some occasions of nearly 2 hours in the library. His explanation that you can just do this without asking the manager as part of the general flexitime is inconsistent with his own statements that he had to obtain permission and did so.

98. The claimant in answer to questions denied that he had shouted at the service user but was taken to 2 different places in the notes of the various meetings in which he acknowledged that he was shouting.
99. The claimant expanded on the allegations of racial abuse only at the hearing of 3 December. He had been given an opportunity by the respondent to confirm that his statements and the notes of the investigation process were accurate. The only point he had clarified was the racial abuse that he did not add the matters that he raised in December and certainly did not raise all the details he set out in his witness statement. We do not find it credible that this occurred or that an individual of his experience would not have reported this to the library staff and reported it to the police as a hate crime much earlier than he says he did. The claimant's explanation for this conduct was also contradictory. He said variously that because he regularly suffers abuse he did not feel reporting this incident would make any difference but then at a much later point he then reported it to the police himself. He then says several times that it was the respondent's obligation towards him as an employee to investigate this and they failed to do so. But that is not the case, the respondent did investigate this as far as they were able.
100. During his evidence the claimant stated that he had never seen the document library times in that format but the documents sent to him clearly identified it as appendix 9 and it was sent to the claimant in advance. Further the claimant produced at the time a handwritten document which clearly responds to the information on the document. We conclude that he did see it, despite his assertion that he did not see it in that form.
101. The claimant made much of the fact that he had been given general permission to take every Thursday afternoon for trade union duties. However, he does not mention this until after Mr Eze makes reference to it in the disciplinary hearing. Indeed, when the claimant is asked in the investigation process at some length as to how he got permission for time off for trade union duties he makes no mention of this whatsoever. The existence of such an agreement was also unknown to the two trade union officials who attend hearings with him.
102. The claimant suggested in his witness statement that he was off sick on the 26 June and was attending the library to access and print off some documents for a hospital appointment. He does not raise this at any earlier stage. Given the number of contradictions made by the claimant throughout the process we find that he is not a credible witness and generally prefer the account of other witnesses to his where there is a conflict for this reason.
103. In considering whether we conclude the claimant had committed an act of misconduct we have taken account of the inconsistencies within other individual's witness statements. We have noted that the service user gave a

number of different accounts but we find that he was consistent there had been some kicking. He made a complaint one hour after the incident occurred and this was corroborated very shortly after the incident and initial statements taken from the library staff.

104. We also note that while Miss Inam was unclear as to what had been kicked, she was certain that a kicking motion had occurred and she told her colleague this immediately after the incident. We also find that Ms Filani, when she says she did not see anything as she was sitting at the reception desk meant that she was unable to see anything because of the distance, not that she was so close she would have seen something had happened. We think this is the natural interpretation of her statement and not the construction given to it by the claimant which was that she was able to see and had seen nothing that nothing happened. For the reasons set out above we prefer the evidence of other witnesses to that of the claimant, despite some inconsistencies in their evidence
105. On the balance of probabilities, we find therefore that the claimant did, as he admits shout shut up at the service user and we also find, as the disciplinary panel did, that the claimant did direct a kick towards the service user. We are satisfied that this is an act of gross misconduct.
106. We note that Mr Eze did make reference to an agreement for the claimant to have Thursday afternoons off. This agreement was something that the claimant failed to raise until 3 December meeting. When he was asked in the investigation to give a clear account of how he asked for time off for trade union duties he did not mention this agreement.
107. We also take into account the very clearly written terms of the facilities agreement and the fact that the two trade union officials believed that consent was required from the line manager. Based on our findings of the claimant's credibility, despite the reference by Mr Eze, we do not accept his position on this and find that his attendance at the library on Thursday afternoons was unauthorised. It was clearly outside the terms of the negotiated facilities agreement.
108. We also find that his attendance in the library on other days which took place during working hours was unauthorised as, neither his line manager nor Mr Eze had given permission for the majority of these absences. The claimant originally said that he did inform his managers of these absences and later seemed to suggest that in fact he did not need to. We find that he did need to and that he had not. We therefore accept that the claimant had carried out repeated acts a pattern of behaviour that destroy the confidence of the employment relationship.
109. As to the third allegation, the claimant was accepted that the incident in the library took place while he was wearing his council lanyard and we also agree with the panel conclusion that this was an act of misconduct which was to the detriment of the respondent's interests and destroyed confidence in the employment relationship.
110. We find that the claimant did commit three acts each of which on its own amounts to gross misconduct. The claimant was absent without leave

during working times and was involved in a violent altercation with a service user while wearing an item that identified him as a worker of the respondent.

Relevant Law

Dismissal on trade union grounds

111. The right not to be dismissed on trade union grounds is contained in S.152(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A). This provision states that a dismissal will be automatically unfair if the principal reason for it is that the employee:

- was, or proposed to become, a member of an independent trade union
- had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time
- had made use, or proposed to make use, of trade union services at an appropriate time
- had failed to accept an offer made in contravention of S.145A or S.145B (unlawful inducements relating to trade union membership or activities or collective bargaining), or
- was not a member of any trade union, or of a particular union, or of one of a number of particular unions, or had refused, or proposed to refuse, to join or remain in a union.

112. In contrast to 'ordinary' unfair dismissal cases: the question of whether the employer was reasonable in dismissing does not arise. Once the reason (or principal reason) for dismissal is shown to be one of those specified in S.152(1) TULR(C)A, the dismissal is deemed to be automatically unfair.

113. Where an employee who alleges that he or she was dismissed for a reason prohibited by S.152 TULR(C)A has sufficient qualifying service to claim unfair dismissal in the normal way, then the burden of proving the reason for dismissal is on the employer, as it is in an ordinary unfair dismissal claim under S.98 ERA.

114. Counsel for the respondent referred us to 2 authorities. The first Marley Tile Co Ltd v Shaw [1980] IRLR 25 considers the question of whether an employer's consent to trade union activities taking place during working hours can be implied from the general relationship between management and unions. In this case the majority held that consent can be implied on some occasions but it cannot be deduced from employer silence. It was submitted that the line manager could not be held to have consented to the claimant's absences, even if they were habitual, by her silence on the point. This could not be taken to be express or implied consent.

115. The second authority was Dundon v GPT Ltd [1995] IRLR 403. This dealt with the question of compensation and identified that contributory fault may still be considered even where dismissal was found to be unfair on the grounds of union activities.

Unfair dismissal general

116. There are five potentially fair reasons for dismissal under section 98 of ERA 1996: capability or qualifications, conduct, redundancy, breach of a statutory duty or restriction and "some other substantial reason" (SOSR). In this case the parties agree that the reason was conduct and it was the respondent's position that the conduct included dishonesty.

117. Once the employer has established a potentially fair reason for the dismissal under section 98(1) of ERA 1996 the tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason.

118. Section 98(4) of ERA 1996 provides that, where an employer can show a potentially fair reason for dismissal:

"... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

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

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

119. By the case of Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23 tribunals were reminded that throughout their consideration in relation to the procedure adopted and the substantive fairness of the dismissal, the test is whether the respondent's actions were within the band of reasonable responses of a reasonable employer. In this case the Court of Appeal decided that the subjective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. The tribunal is not required to carry out any further investigations and must be careful not to substitute its own standards of what was an adequate investigation to the standard that could be objectively expected of a reasonable employer.

Wrongful dismissal

120. Wrongful dismissal is a dismissal in breach of contract. Fairness is not an issue: the sole question is whether the terms of the contract, which can be express or implied, have been breached. The employee will have a claim in damages if the employer, in dismissing them, breached the contract, thereby causing them loss.

121. There may be cases where a misconduct dismissal is fair, but a tribunal considers that the conduct in question was not sufficiently serious to amount to a repudiatory breach warranting summary dismissal.

Conclusion

122. We have then considered the findings of fact as we have made them and the applicable law as we have set it out above.

Automatically unfair dismissal

123. If the reason or principal reason for dismissal is because the employee had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, the dismissal will be automatically unfair.
124. We found that the decision-maker was Mr Tate and he made his decision based on the evidence presented to him in the disciplinary process. We also found that there was no cooking up of any evidence or allegations by the respondent's HR department. No one influenced the decision which was based entirely on the fair and proper evidence put before the disciplinary panel.
125. This is a case where the decision to dismiss was made by Mr Tate on the evidence of 3 acts of gross misconduct which were reasonably investigated. We have found that Mr Tate's decision was within the range of reasonable responses. It was because of the claimant's conduct and had absolutely nothing to do with trade union activities.
126. On the facts as we have found them the claim cannot succeed. The complaint of automatically unfair dismissal therefore does not succeed.

Unfair Dismissal

127. We have considered whether or not the dismissal was an ordinary unfair dismissal in the sense of not being automatically unfair. We have found that the reason for dismissal was conduct which is a fair reason for dismissal.
128. We have found that the respondent carried out a fair and reasonable investigation, asking all those who are relevant to provide their testimony, giving the claimant a proper opportunity to respond to that evidence before concluding that there was a case to answer and the matter should proceed to disciplinary hearing.
129. We have found that the disciplinary hearing was before an independent panel who were given all the relevant information in advance but who also themselves interviewed all the witnesses in the presence of the claimant who had an opportunity to ask them any questions that he wished. We find that the procedure was reasonable and fair.
130. We have accepted the testimony of Mr Tate and conclude that he had a genuine belief that the claimant had committed three separate acts of misconduct. We conclude that he reached this belief following a reasonable investigation and therefore had reasonable grounds for this belief at the time he formed it.
131. We have considered the question of penalty and find that, given the three separate acts of misconduct as described in the respondent's disciplinary policy, the response of dismissal fell within the range of reasonable responses open to an employer. We have found that the claimant's character, work record and service were considered when penalty was determined.

132. The appeal process also considered the discrepancies and mitigation and again we have found that it acted within the range of reasonable responses.
133. For these reasons the claim of unfair dismissal does not succeed, we conclude that the dismissal was both substantively and procedurally fair.

Wrongful dismissal

134. We have found that the claimant did carry out the actions which led to his dismissal. We conclude that these actions amounted to breaches of the code of conduct. We also find that they breached the implied term of trust and confidence as the claimant was absent without leave during working times and was involved in an altercation with a service user while wearing an item that identified him as a worker of the respondent.
135. For these reasons we find that the complaint of wrongful dismissal does not succeed as the claimant was guilty of three separate acts each of which is an act of gross misconduct. It was appropriate for the claimant to be dismissed without pay as his actions had breached the contract of employment.

Employment Judge McLaren

Date 25/10/22