



EMPLOYMENT TRIBUNALS

Claimant: Mr S Hanson

Respondent: Fordbridge Town Council

Heard at: Birmingham (in public on the Cloud Video Platform)

On: 15 & 16 August 2022

Before: Employment Judge Kenward (sitting alone)

Representation

Claimant: Mr S Hanson (in person)

Respondent: Mr D Cole (lay representative)

JUDGMENT

1. The complaint of unfair dismissal is well-founded. This means that the Respondent unfairly dismissed the Claimant.
2. The Respondent is ordered to pay to the Claimant compensation for unfair dismissal in the sum of £1,060.41 comprising of:
 - (1) a basic award in the sum of £592.88 (on the basis that the conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the sum calculated of £1,185.75 by 50%);
 - (2) a compensatory award in the sum of £467.53 consisting of a prescribed element (loss of earnings in respect of the period from 23rd December 2021 to 25th January 2022) of £331.16 and a non-prescribed element (loss of statutory rights) of £136.37, with these sums having been reduced from the sums calculated of £767.92 (for the prescribed element) and £316.20 (for the non-prescribed element) on the basis of being:
 - (a) subject to a reduction of 50% under the principles in *Polkey v A E Dayton Services Limited* [1988] ICR 142;
 - (b) subject to an increase of 15% by reason of the Respondent's failure to comply with the ACAS Code of Practice on disciplinary procedures; and

(c) subject to a further reduction of 25% as being just and equitable in respect of the dismissal having been caused or contributed to by any action of the claimant.

REASONS

Background and preliminary matters

1. This is a case in which oral reasons were given at the end of the hearing, and written reasons have subsequently been requested by the parties.
2. In his Claim Form, the Claimant described himself as a Caretaker who was employed by the Respondent between the 23 May 2016 and 22 December 2021 working 16 hours per week. In its Response, the Respondent describes the Claimant as an “*evening/weekend/relief caretaker*”. It gives his pay before tax as £558.00 a month.
3. The Claim is essentially one of unfair dismissal. The Claimant had ticked a box in relation to other types of complaint, but it was established in correspondence before this hearing that no further complaint arose out of that.
4. The Claimant claims that he was unfairly dismissed, notwithstanding having had an exemplary disciplinary record, at least up until the time when he received a verbal warning in November 2021, and he claims that his dismissal was both substantively and procedurally unfair.
5. The Response takes issue with the case put forward by the Claimant and it does so largely by setting out what is essentially a narrative version of the Respondent’s take on events leading up to the Claimant’s dismissal and subsequent appeal.
6. I should deal with the steps that were taken in this case in terms of preparing for this hearing. Directions were given on 26 May 2022 when the matter was listed for this hearing. There was then a requirement for the Respondent to prepare a trial bundle, in other words a bundle setting out the documents relevant to the case in a paginated order as a single set of documents. That requirement was not complied with by the Respondent. The documents were simply sent as separate attachments contained within a zip file at the point in time when Statements of Evidence were provided. As far as Statements were concerned, the Claimant provided his Statement and that of his sister, Susan Smith, on the 3 August 2022 which was in time. The Respondent did not do so until the 11 August when the Respondent provided a Statement from Sarah Blackburn, but not really any meaningful or substantial Statements in relation to any other witnesses. Thus, as far as witness evidence from the Respondent is concerned, I had a lengthy Statement from Sarah Blackburn. I also had a Statement from her confirming that the minutes of meetings are correct. I also had a very short Statement from Councillor Matthew Blackburn confirming that the minutes of the appeal meeting were correct and I had a short Statement from Councillor Steven Hinton saying

that he had attended the appeal meeting as an observer (he was, I understand a relatively newly appointed Councillor). Councillor Blackburn and Councillor Hinton were two of the three Councillors in attendance as the appeal meeting in respect of the Claimant's dismissal.

7. Neither Matthew Blackburn nor Stephen Hinton attended to give evidence before the Tribunal. Similarly, the Claimant's witness, Susan Smith (who gave her version of events having accompanied him to the appeal meeting), did not attend to give evidence. I made it clear in the course of the hearing that any written Statements given by witnesses who had not attended the Tribunal hearing would be taken into account, but any weight given to their evidence would take account of the fact that they had not been tested on their evidence through being questioned.
8. I had no written Statements of Evidence from Councillor David Cole, Councillor Florence Nash or Councillor Pauline Allen, who were the three Councillors who formed the panel that heard the disciplinary case and effectively arrived at the decision to dismiss the Claimant. In other words, they were the key decision makers in this unfair dismissal case. I also had no written Statement of Evidence statement from Councillor Marcus Brain, a non-practising lawyer who had acted as chairman of the appeal panel which had heard the Claimant's appeal against his earlier verbal and written warnings. Councillor Florence Nash also participated in the appeal hearing. All of these individuals attended at the start of the Tribunal hearing on the basis that they were attending as witnesses. It was clarified that the extent to which they were proposing to give evidence was on the basis that their evidence was that which was set out in the minutes of the various meetings and it was on that basis that I agreed that they should be allowed to give evidence having regard to the overriding objective and on the basis that there seemed to be no prejudice to the Claimant in so far as the Claimant had had access to those various minutes (and indeed the Claimant confirmed that he would not be prejudiced if I proceeded on that basis).

The issues to be determined

9. In relation to liability, the relevant issues to be determined were as below.
 - (1) What was the reason or principal reason for dismissal? The Respondent said that the reason was conduct. The Tribunal needed to decide whether the Respondent genuinely believed the Claimant had committed misconduct.
 - (2) If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant, having regard to the following issues:
 - (a) were there reasonable grounds for that belief;
 - (b) at the time the belief was formed had the Respondent had carried out a reasonable investigation;
 - (c) did the Respondent otherwise act in a procedurally fair manner;
 - (d) was dismissal within the range of reasonable responses?
10. In the event that the issue of remedy arose and on the basis that the Claimant was seeking compensation only, the relevant issues to be determined were as below.
 - (1) What basic award is payable to the Claimant, if any?

- (2) Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?
- (3) If there was a compensatory award, how much should it be having regard to:
 - (a) what financial losses had the dismissal caused the Claimant (it was not argued that there had been a failure by the Claimant to mitigate his loss in obtaining new employment which turned out to have started 34 days after his dismissal);
 - (b) was there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed;
 - (c) if so, should the Claimant's compensation be reduced;
 - (d) if so, by how much;
 - (e) did the Respondent or the Claimant unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures;
 - (f) if so, was it just and equitable to increase or decrease any award payable to the Claimant;
 - (g) if so, by what proportion, up to 25%;
 - (h) if the Claimant was unfairly dismissed, did he cause or contribute to that dismissal by blameworthy conduct;
 - (i) if so, would it be just and equitable to reduce the Claimant's compensatory award;
 - (j) if so, by what proportion?

Evidence and findings of fact

11. The Claimant had an exemplary disciplinary record in so far as no formal disciplinary action had been taken against him up until November 2021, although by November 2021 the Respondent had some concerns as to how well he was doing his job.
12. Matters came to a head on 8 November 2021 when the Respondent received a report from a couple called Mr and Mrs Kausar who had hired the Council's hall two days previously. The Claimant had handed them a blue broom and told them they had had to clean up after their function as it was not his job to do this. They had also given the Claimant some left over food and £10.00 as a goodwill gesture as a result of the fact that the hire of the hall had overrun by half an hour until 11.30 p.m and that had involved the Claimant having to stay later than he otherwise would have done.
13. One of the concerns of Councillor Florence Nash was that the Claimant had accepted money for carrying out what she was suggesting were essentially the duties of his paid post. In fact, the Claimant was having to stay after the time when he would ordinarily have been expected to stay because of the function over running. The Claimant was asked to return the money and he came back, on 8 November, and did so, although it was suggested that he was aggressive in doing so, in that he slammed the money on the desk. He then left the room and Sarah Blackburn and Florence Nash contacted Mrs Kausar who said that the money could be donated to a good cause.
14. After that, Florence Nash and Sarah Blackburn decided that they needed to call the Claimant back into the office and a meeting duly took place in which the

Claimant was issued with a verbal warning. The Statement of Sarah Blackburn describes that verbal warning as also having been for various other matters, namely leaving the emergency exit door open overnight, leaving the clerk's office open overnight, conduct towards members of the Council, conduct towards hirers and users, cleaning standards, leaving the building unsecured and accepting money off hirers. However, it seems clear that the verbal warning was intended to cover the Claimant's conduct towards Mr and Mrs Kausar and indeed this is confirmed in the attachment to the Respondent's Form of Response where it is stated that Florence Nash had issued the Claimant with a verbal warning and it is described in such a way as to make it clear that it involved his conduct on the 6 November. This was also effectively confirmed by Councillor Nash in her evidence to the Tribunal.

15. Thus, in effect, there appears to have been a disciplinary meeting on 8 November 2021 which imposed a verbal warning, but with no notice having been given to the Claimant regarding that disciplinary hearing.
16. On 12 November 2021 the Respondent then sent the Claimant a letter confirming the verbal warning. The letter listed various matters, including conduct towards members of the Council, conduct towards hirers and users, cleaning standards, leaving the building unsecured and accepting money off hirers. Clearly the reference to conduct towards hirers and accepting money off hirers was capable of covering what had happened on 6 November 2021. The warning was to stay on the Claimant's file for 12 months and he was told that he could appeal against the decision. There was nothing in the letter to indicate that it was a restricted right of appeal so that he could only appeal on procedural grounds or if there was new evidence.
17. However, a further disciplinary meeting then took place on 12 November 2021 for the purposes of considering a number of incidents which had been set out and listed in a table with 16 separate entries. Virtually all of the matters listed predated the verbal warning. The exception is that there were two references or entries for 9 November, but one of these two entries related to events on the 8 November when the Claimant had come into the office to pay back the money and was considered to have been aggressive at that point in time to Sarah Blackburn and Councillor Nash. The other entry for 9 November also related to 8 November in that it related to an issue over the alarm not being set overnight.
18. The disciplinary meeting on 12 November 2021 was conducted by Councillor David Cole, described by the minutes as the Chairman of the meeting, Councillor Florence Nash, described as the Chairman of the Council, and Councillor L Sorrell, described at that point in time as the Vice-Chairman of the Council. However, this was also a disciplinary meeting in relation to the other Caretaker who was Lance Ratcliffe. Although the evidence of David Cole was to suggest that it was only an appraisal meeting as far as Lance Ratcliffe was concerned, the minutes start by explaining to the Claimant and Lance Ratcliffe that this was a disciplinary meeting and then record that David Cole gave them both a sheet of paper listing the latest incidents from the last seven weeks and "*gave them time to read over the list of incidents that had taken place*". This was rather limited notice of the detail of the disciplinary case which was to be considered but it is clear that the Claimant made it plain that he did not agree with what was recorded. Nevertheless, after a fairly

brief discussion recorded in the minutes, the Claimant was issued with a written warning to follow the verbal warning that he had been given on the 8 November. Indeed, this was confirmed by a letter which was also dated 12 November (the same date as the letter confirming the verbal warning). The letter confirming the written warning does not specifically refer to the list of incidents, but it provides a very similar list to the list that had appeared in the letter giving the verbal warning, namely it included conduct towards members of the Council, conduct towards hirers/groups, standards of cleaning, leaving the building unsecured and accepting money off hirers.

19. In short, the unsatisfactory situation is that the Claimant was being given a written warning on 12 November 2021 for much the same matters as he had been given a verbal warning on the 8 November. In other words he was being disciplined for the same matters twice. He was also told that he could appeal against the written warning, although the letter telling him this similarly did not indicate that it was a limited right of appeal in the way that was subsequently to be suggested.
20. I have not seen any document or letter by which the Claimant did appeal, but an appeal meeting did then take place on the 15 December 2021 about five weeks after the warnings had been given. I note that that appeal was heard by Councillor Florence Nash as the Chairman of the Council, Councillor Marcus Brain and Councillor Pauline Allen, as a panel of three. I make the obvious point that Florence Nash was the individual who had been involved in both giving the Claimant the verbal warning and in giving the Claimant the written warning, so effectively she was hearing an appeal against her own decision. The Claimant was asked what he would like to appeal and he made it clear that he wanted to appeal the list of incidents, but he was told by Marcus Brain that he could not do so because any appeal was limited. I accept the evidence of Marcus Brain in this regard, in that he says that the minutes are incomplete because they do not record the fact that he told the Claimant that the right of appeal was limited to procedural issues and the situation where there was new evidence. As a result, the appeal meeting ended with Florence Nash saying, "*that there was no appeal to be answered*". It was not entirely clear what was meant by that in terms of whether the appeal was being rejected or that it was being found that there were not any grounds for an appeal because the Claimant had not raised any procedural issues or brought up any new evidence.
21. The minutes of this appeal meeting also end by saying that Councillor Nash stated that there would be a meeting with the Claimant and the Staffing Committee on the 22 December 2021 by way of "*an opportunity to discuss anything that needs raising*". This was raised with the witnesses in the course of the Tribunal hearing and the position appeared to be a confused one. Councillor Brain seemed to understand that this was really a management matter. In other words, it was to involve looking at the issues which could be learnt so as to take any management steps that were necessary. Councillor Allen, on the other hand, seemed to suggest in her oral evidence that she understood that this was to be a further disciplinary meeting and explained this in terms of not dismissing the Claimant on 15 December as they needed to follow procedure. This gave the impression that what was happening was that a process was being instigated to dismiss the Claimant but that it was recognised that a procedure needed to be followed in order to do

that. Indeed, at some point prior to the 22 December, a disciplinary meeting was convened for that date.

22. I have not seen any letter which sets out the disciplinary case that the Claimant was being asked to meet or particularises the allegations or lists the disciplinary charges against him. The Claimant's case is that he effectively received four written complaints very shortly before the disciplinary meeting. Those complaints were undated. The first complaint is an anonymous complaint which seems to have been typed out by Sarah Blackburn as the Clerk to the Council. Thus, it is not the original complaint but records an anonymous complaint from an individual saying that the Claimant was rude and aggressive towards people who hire out the Council's room. No real details were given and no dates were given, although it was suggested that the Claimant's *"aggression and ill-manners towards us"* (noting the use of the plural) *"is still an ongoing matter"*. The other individuals to whom the Claimant was alleged to be aggressive or ill-mannered were not identified either, but the complainant seemingly explained that he or she wanted to remain anonymous because of being worried that if the Claimant found out who it was, he *"may become abusive towards a pensioner"*. This was the first complaint.
23. The second complaint was a letter seemingly from Mr Kausar, albeit not the original in that it had also been typed out by Sarah Blackburn. This document raised the same matters as had been raised on 8 November 2021. There was a reference in the letter to the Claimant having been rude and very aggressive, but that seems to refer to the matters which had been raised previously and which had been raised on 8 November and 12 November with the Claimant resulting in the verbal and written warning being given to him.
24. The third complaint was an undated letter from Sarah Blackburn herself which was addressed to the Chairman of the Council. Thus, it was effectively addressed to Councillor Florence Nash. It arose out of events on 30 November 2022 (I take that date from the Statement of Sarah Blackburn). The undated letter stated that *"I was having a conversation with Lance Ratcliffe"* when the Claimant joined the conversation and stated that he thought that Councillor Alan Nash (the husband of Councillor Florence Nash) *"fancied his girlfriend"* and *"he would beat Alan Nash up if he went anywhere near her"*, at which point he made *"sparring motions and noises of fighting"* and starting laughing about it. Insofar as the letter from Sarah Blackburn gives any clue as to the context or the way in which these matters were being raised by the Claimant, it is fair to say that she recorded having herself said to the Claimant *"that he wouldn't stand a chance of beating him"* and *"(d)on't be so stupid, saying comments like that will get yourself into trouble"*. This would seem to indicate that she realised that the Claimant was not intending to be taken seriously in the comments that he was making, but even if that was the case, it does not alter the fact that the comments that he was making and the way in which he was conducting himself were, on the face of it, inappropriate. The Claimant's case is that essentially he was acting in jest and, indeed, the undated letter described him as carrying on laughing after Sarah Blackburn had told him not to be stupid. The undated letter concluded by saying that Sarah Blackburn reported the matter to Florence Nash on the same day.

25. The fourth and final complaint was really the same complaint as the third complaint in that it was a letter from Councillor Alan Nash, again, undated. It is unclear whether this letter had been typed up from an original document. Alan Nash stated that he was offended by the comments that had obviously been reported back to him regarding supposedly fancying the Claimant's girlfriend. However, he went on to say that "*I am very concerned that this type of behaviour is leading on to something more of a personal nature as this is threatening behaviour*" and then added that "*I am very annoyed at this behaviour towards Flo Nash and Sarah Blackburn, as he is aggressive and rude*". Thus, he was effectively introducing another matter, namely the conduct of the Claimant towards Florence Nash and Sarah Blackburn, although no detail was given regarding that by Alan Nash and so it was not clear whether he was simply reporting what had been reported to him, or whether he had seen anything else in that regard. However, there was no further evidence as to this and it was not something that was investigated further.
26. A letter was sent convening the disciplinary meeting with the letter making it plain that the Claimant could attend with a witness but the witness would not be allowed to take notes. The oral evidence of Sarah Blackburn was that this wording was based on advice from an external HR adviser.
27. From the minutes of the disciplinary meeting on 22 December 2021 it can be seen that the Chairman of the meeting was Councillor David Cole, with Councillor Florence Nash and Councillor Pauline Allen also on the disciplinary panel. Florence Nash was on the panel despite the fact that one of the complainants was her husband whose complaint also raised an issue as to the Claimant's conduct towards Florence Nash herself. The issue arises as to whether it was appropriate and fair for Florence Nash to be hearing the disciplinary case against the Claimant. There were at least seven other Councillors and the only explanation for Councillor Nash hearing the case was that there were issues regarding the availability of other Councillors. No more detail was provided. For example, it is not clear as to the reason the meeting could not have been arranged on a different date, so that a different Councillor, other than Florence Nash, could have been a part of the panel.
28. The disciplinary meeting proceeded by reference to the four complaints and the Claimant was taken through those complaints which are set out verbatim in the minutes of the meeting.
29. Beginning with the anonymous complaint, it seems clear that there was no further investigation regarding that complaint and, in particular, the other people besides the anonymous complainant to whom the Claimant was allegedly rude and aggressive when they hired out the room. There seems to have been no attempt to interview other hirers or to establish the dates of anything having happened, or what was said, or how the Claimant conducted himself. Thus, although, as I have indicated, the complaint says or suggests that these were still ongoing matters, it was unclear to what extent that took the matters complained of beyond the date of the verbal and written warning. If it did, then there was no meaningful detail as to any more recent matters. The Claimant himself did raise the issue that really this was covering the same ground as the verbal warning and stated that the procedure was "*wrong*" because he had not done anything wrong since the warnings, to which David Cole is recorded as having stated "*that something must have happened to*

have these complaints against you", but there does not seem to have been any investigation as to the precise dates or details of the complaints that were being referred to as part of the first complaint.

30. As far as the second complaint was concerned, again, that was set out in full in the minutes, and the Claimant commented upon it. There was no evidence other than what was in the letter. The Claimant denied certain features of what was in the letter. As a result of that, the problem that arose is that the disciplinary panel was potentially in the difficult position of having to decide whose evidence they preferred. The panel had Mr Kausar saying one thing, and the Claimant saying another. The issue of deciding whose version of events was correct might have been resolved by hearing evidence from the Kausars, either by interviewing them, or inviting them along to the disciplinary meeting, but that does not seem to have taken place. Mr and Mrs Kausar had spoken to Sarah Blackburn and Councillor Florence Nash on 8 November 2021 but it is not clear that there was any written contemporaneous record of that meeting, and, in any event, the matters raised on 8 November 2021 seem to have been taken into account in imposing the subsequent verbal and written warnings.
31. The third complaint being considered was that of Sarah Blackburn. Clearly there were three people involved in the conversation with the Claimant that she was describing, with the third individual being Lance Ratcliffe. There was no evidence from him, although I was told by Councillor Pauline Allen that she understood that he had been interviewed which, in itself, begs the question as to any reason for his evidence not having been provided in that it was not given to the Claimant and it does not seem to have been taken into account by the panel.
32. However, the disciplinary panel did have the Claimant's version of events regarding the incident on the 30 November as set out in the minutes, which record that he stated "*that it was called having a laugh, I was having a laugh with friends, it was supposed to be a joke, I talked to Alan, he is a nice guy, I said Merry Christmas to him the other day, is it forbidden to have a laugh?*". In the minutes, Councillor Florence Nash at that point in time is recorded as having stated "*that is isn't forbidden to have a laugh, but what you said is serious*". In this respect, the minutes appeared to be inconsistent with the oral evidence given by Florence Nash to the Tribunal, which was that, although she was taking part in the disciplinary panel, she was not involved in the consideration that the panel was giving to one of the complaints, namely the complaint which involved her husband. It can be seen here, from the minutes of the meeting, that she had become involved in a consideration of that complaint and had made the point that she regarded the complaint as being a serious matter.
33. The minutes then record that the Claimant stated "*that he is not denying he said it, but it was not in a malicious way, it was just a bit of banter, I did not mean it the way it sounded*". The attempt to explain the language used as simply being intended as banter would not excuse the use of language which was inappropriate. Indeed, the Claimant seems to have recognised this when he said "*I did not mean it the way it sounded*", which recognises the risk, of what he says he was saying "*in jest*", being taken seriously. The fidelity of Councillor Alan Nash, and indeed violence, were not matters for humour. The Claimant was also being disrespectful

to Councillor Alan Nash and, by extension, Councillor Florence Nash, who was the leader of the Council.

34. Based on the evidence of the minutes themselves, I find that Councillor Florence Nash was acting as a member of the disciplinary panel. It was clear that she was involved in deciding whether or not the Claimant should be disciplined. This can be further seen in the minutes where, when Councillor David Cole at one point asked the Claimant to explain why he had said what he had said, Florence Nash stated that *"we have had this meeting because we are very concerned with your attitude and aggression towards people"* (which potentially covers his attitude and aggression towards both herself and her own husband, both of which were issues raised as part of the disciplinary case).
35. It can also be seen that, in the further course of the meeting, Councillor Florence Nash also raised the issue of the Claimant's standard of working as not up to scratch and suggested various ways in which it was not up to scratch. This was despite the fact that this does not seem to have been part of the disciplinary case against the Claimant and he had had no notice of that being part of the disciplinary case against him. Despite this, it was now being raised in the course of the disciplinary meeting as a matter which the panel was presumably taking into account in deciding whether or not the Claimant needed to be disciplined. Indeed, Councillor Pauline Allen also started asking the Claimant questions about the cleaning issue.
36. The point in the disciplinary meeting was then reached where the Claimant was asked to leave the room so that the panel could deliberate. The minutes recorded that when the Claimant returned to the room the only information given about the decision and the reasons for it is that Councillor David Cole stated *"that the panel had considered the case in depth"* and the Claimant *"was bringing the Council into disrepute"*. No more explanation was provided as to how that was the position. The Claimant was simply told that his employment would be terminated effective immediately due to gross misconduct. Thus, no information has been given in the minutes as to the findings that the panel had made about the evidence it had heard, how it resolved the matters that were in dispute or as to what actual findings of misconduct had been made.
37. The decision letter that was received by the Claimant was no different in that respect. This was a letter which was in the name of Florence Nash. Her name is the name that appears on the bottom, despite the suggestion she made in evidence that she was not have been involved in making a decision about the disciplinary case which involved her husband as one of the complainants. The letter simply said, *"I confirm the decision taken during your disciplinary hearing"* to *"dismiss you for gross misconduct"*. No findings were stated in the letter as to what it was that the Claimant was being found guilty of by the panel. This creates a problem for the Tribunal in terms of understanding exactly what it was that the Respondent had believed the Claimant to be guilty of in terms of misconduct.
38. The Claimant then appealed. I do not have details of, or a document setting out, his grounds of appeal: it has not been provided to the Tribunal. There is only a letter convening the appeal meeting which contains wording saying that the Claimant could bring *"an independent witness"* but this *"witness will be unable to*

make comments or notes". There is a dispute as to the date when the Claimant's appeal was received and the Tribunal is not in a position to resolve that dispute, but it does note that the Respondent was advertising the Claimant's post by the point in time when the appeal meeting was being arranged.

39. The appeal meeting took place on 31 January 2022. The members of the appeal panel hearing the appeal included Councillor Matthew Blackburn (the husband of Sarah Blackburn, the Clerk, who was also one of the complainants in the disciplinary case for which the Claimant was being disciplined as well as being a key witness in relation to that complaint). The list of those present also effectively lists Councillor Florence Nash as one of those present and involved in dealing with an appeal from a decision which she herself had been involved in making. She told the Tribunal in oral evidence that she was only present as an observer, but that was not stated anywhere in the record of the meeting. It was not recorded that it was explained to the Claimant that Florence Nash was only attending as an observer, or that the decision maker was simply Matthew Blackburn. Indeed, the suggested fact that Councillor Steven Hinton was merely an observer was not recorded as having been explained either. There was no suggestion that the three Councillors listed would not be making the decision.
40. The appeal meeting began with Councillor Matthew Blackburn introducing himself and the Councillor members present. He then went on to say that the Claimant would have ten minutes to state his case. Even if the Claimant was told that he had ten minutes (rather than the five minutes that the Claimant has suggested) to state his case, the Tribunal has not been provided with any explanation as to why it was necessary to limit the time that he had for setting out his appeal in that way.
41. Looking at the minutes of the appeal meeting, it seems clear that Councillor Florence Nash was involved in considering and discussing the matters raised at the meeting. There are various references to her having commented or made contributions in the course of the meeting.
42. It is clear that the appeal meeting became an ill-tempered meeting. The Claimant was accompanied by his sister, Susan Smith. The minutes record that Susan Smith was raising her voice and it was also recorded that the Claimant was having to be told to stop swearing. The Claimant accepted in his oral evidence to the Tribunal that he did swear in the course of the appeal meeting although he told the Tribunal that he was not swearing at the people conducting the meeting but he was swearing in exasperation. Certainly, he accepted that it was a bad-tempered meeting and, in those circumstances, I accept that the Respondent acted appropriately in bringing that meeting to an end.
43. The minutes actually recorded that it was Councillor Matthew Blackburn who had made the decision to close the meeting but the minutes gave the impression that a decision was nevertheless going to be made as Councillor Florence Nash stated that they would write with a decision within five working days. Florence Nash, in her oral evidence, seemed to suggest that she was the individual who had made the decision to close the meeting and certainly she is the author of the letter that was sent to the Claimant on 1 February 2022. However, the letter does not really amount to a decision on the Claimant's appeal, so is inconsistent with the suggestion in the minutes that there would be a decision. What the letter said was

that “the panel have agreed not to amend their original decision of gross misconduct due to the aggression and hostility that was shown towards members of the Council in the meeting on the 31 January 2022”. The Claimant’s conduct in the appeal meeting would not, in itself, be reason to reject his appeal. It did not obviate the necessity of the Respondent considering the grounds of his appeal and the merits or otherwise of the appeal, notwithstanding the fact that the Tribunal accepts that it was not possible to continue the meeting beyond the point reached in the minutes. Clearly, if it had not been possible to reach a decision at the point when the meeting closed, then the meeting could have been reconvened in different circumstances, for example without the Claimant’s witness present, or a decision could have been made by considering the documents or asking for written representations from the Claimant. However, for present purposes, the letter of 1 February 2022 brought an end to the process.

The relevant law

44. Section 98 of the Employment Rights Act 1996 (“ERA 1996”) sets out the relevant law on unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within ERA 1996 section 98(2). Conduct is a potentially fair reason for dismissal. In **Abernethy v Mott, Hay & Anderson [1974]** it was said that “*a reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee*”
45. Once the employer has shown a potentially fair reason for dismissal, the Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the Claimant for that reason. ERA 1996 section 98(4) states that this (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 sufficient reason for dismissing the employee; and (b) shall be determined in accordance with equity and the substantial merits of the case.
46. In relation to a conduct dismissal, **British Home Stores Limited v Burchell [1978] IRLR 379**, sets out the test to be applied where the reason relied on is conduct. The Tribunal must first decide whether the employer had a genuine belief in the employee’s guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation.
47. In **Whitbread plc v. Hall [2001] EWCA Civ 268**, it was confirmed that the Tribunal must consider the issue of both substantive and procedural fairness, as set out below.

“Section 98(4) of the 1996 Act requires the Tribunal to determine whether the employer ‘acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee’ and further to determine this in accordance with the ‘equity and the substantial merits of the case’. This suggests that there are both substantive and procedural elements to the decision to both of which the ‘band of reasonable responses’ test should be applied”.

48. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within ERA 1996 section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones [1982] IRLR 439**, **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23**, and **London Ambulance Service NHS Trust v Small [2009] IRLR 563**).
49. In addition, the decision as to whether the dismissal was fair or unfair must include the appeal (**Taylor v OCS Group Limited [2006] IRLR, 613**).
50. In reaching a decision, the Tribunal must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and, if any provision of the Code appears to the Tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.
51. If the dismissal was unfair, the issue arises, in accordance with the principles established in the case of **Polkey v A E Dayton Services Limited [1988] AC 344**, as to whether any adjustment should be made to any compensatory award to reflect the extent of any possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed.
52. The ACAS Code is also relevant to compensation. Under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, if the Claim concerns a matter to which the Code applies and there is an unreasonable failure by either the employer or the employee to comply with the Code, there can be an increase or reduction in compensation (respectively) according to what is just and equitable of up to 25%.
53. Under ERA 1996 section 122(2), the Tribunal shall reduce the basic award where it considers that any conduct of the Claimant before dismissal was such that it would be just and equitable to do so. Under ERA 1996 section 123(6), where the Tribunal finds the dismissal was to any extent caused or contributed to by any action of the Claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.
54. However, in deciding the extent of the employee's contributory conduct and the amount by which it would be just and equitable to reduce the award for that reason under ERA 1996 section 123(6), **Rao v Civil Aviation Authority [1994] ICR 495, CA** made it clear that the Tribunal should bear in mind that there has already been a **Polkey** deduction. In **Granchester Construction (Eastern) Ltd v Attrill [2013] EAT 0327/12**, it was noted that it may be "*appropriate to moderate what would otherwise be the degree of contributory fault that would reduce an award because there have been matters of conduct taken into account in assessing the chances of a fair dismissal*". Were this not so, "*it might be in effect double-counting to impose upon the claimant a further reduction by way of contributory conduct*".

55. However, the effect of the same cases is that the reason for reducing the percentage contributory fault reduction of the compensatory award would not apply to the basic award.

Conclusions

56. I accept that the reason for dismissing the Claimant was conduct. Part of the Claimant's case, as set out in his Claim Form, is that there was an agenda on the part of certain individuals to get him dismissed for reasons which were not satisfactory reasons. Indeed, he goes on to say that effectively the allegations against him were fabricated. I was not satisfied that there was any meaningful evidence of the allegations being fabricated and there was certainly no evidence of this beyond there being evidence of some bad feeling between the various parties involved.

57. However, it is still part of his case that there was an agenda to get him dismissed and that raises the issue as to the extent to which certain individuals were involved in his dismissal and whether that involvement, and the extent of that involvement, was itself appropriate.

58. Did the Respondent have a genuine belief in the Claimant's guilt? I have concluded that the Respondent acted on a genuine belief that various incidents had occurred in which the Claimant had misconducted himself so that the Respondent formed the view that it was appropriate to dismiss him.

59. The issue then arises as to whether or not the Respondent acted reasonably in all of the circumstances in treating that reason as a sufficient reason to dismiss the Claimant. In this regard, the range of reasonable responses test applies to all aspects of what the Respondent did. This issue involves the Tribunal considering, first of all, whether or not there were reasonable grounds for the Respondent's belief. In this regard, it is not clear what the Respondent's belief was (save that I am satisfied as to the extent of the genuine belief identified above). The decision letter makes no reference to any findings other than to find the Claimant guilty of gross misconduct. The basis for that conclusion has not been set out, whether in the minutes or in the decision letter. Indeed, if one looks at the complaints themselves, the first complaint, which was the anonymous complaint, lacked any particularity. The second complaint was regarding matters which, on the face of it, had already been the subject of a disciplinary sanction, so that it was not reasonable to arrive at a belief based on those matters. The third and fourth matters had not been investigated in a meaningful way and were not the subject of any specific findings made by the disciplinary panel.

60. In all of those circumstances, the Tribunal does not accept that any belief as to the Claimant having conducted himself in a way which amounted to gross misconduct was based on reasonable grounds in terms of being within the band of reasonable responses.

61. At the time that any belief was formed had the Respondent carried out a reasonable investigation? The Tribunal finds that the investigation was not within the band of reasonable responses. There was no real investigation beyond typing up the letters of complaint and putting them to the Claimant at the disciplinary meeting. With the

first complaint, there was no attempt to identify and particularise the occasions when the Claimant was alleged to have been rude and aggressive or the language or the conduct being alleged to amount to that. The second complaint seems to have involved simply producing a letter largely repeating complaints that had been made on or around 8 November and there was no clear explanation as to how that letter of complaint came to be provided by Mr Kausar after the matter had seemingly been dealt with through the earlier warnings. If there were any new features to that second complaint, then the Kausars might have been interviewed or called as witnesses so that those features could be clarified and understood: for example, the language and conduct which was considered to be rude and aggressive.

62. With the final two complaints, which mostly amount to one complaint, namely as to the conversation on 30 November 2021, there seems to have been no evidence obtained or considered from the other party to the conversation, namely Lance Ratcliffe. Alternatively, if, as Councillor Pauline Allen seemed to suggest, evidence had been obtained from Lance Ratcliffe, but not provided to the Claimant and / or panel, then the investigation procedure would be unfair insofar as the outcomes of the investigation were not shared fully with the Claimant and / or considered at the disciplinary hearing (and the investigation will also be lacking in so far as it had not informed the decision making process). The fourth complaint had also introduced the issue of the Claimant's behaviour towards Florence Nash and Sarah Blackburn, but there was no further evidence as to this and it was not something that was investigated further

63. Did the Respondent act in a procedurally fair manner? The Tribunal finds that the procedure in this case was unfair as it was not within the band of reasonable responses. The Respondent was, in part, defectively disciplining the Claimant for matters for which he had already been disciplined through the verbal and written warnings. Indeed, the disciplinary process leading to the Claimant's dismissal seems to have arisen out of the appeal hearing in respect of the warnings, in relation to which Councillor Pauline Allen sought to explain the further meeting referred to in the minutes in terms of not dismissing the Claimant on 15 December 2022 as they needed to follow procedure. However, this creates the impression that the outcome was predetermined and a procedure was being put in place to secure that outcome. As a result of the original written complaints for the first two complaints not having been produced, there was also a lack of clarity as to how those written complaints had come to be provided and whether they were unsolicited or otherwise. Indeed, the second complaint, namely the written complaint of Mr and Mrs Kausar, begins by making reference to Mrs Kausar having "*received a phone call of the chairman of the council a while back about our event and how the caretaker had made some allegations towards us*". This process resulted in a disciplinary hearing being convened for 22 December 2022 with the Claimant not being given adequate notice of the disciplinary case which he had to meet. I accept the Claimant's evidence that he effectively received four written complaints very shortly before the disciplinary meeting. This was compounded by the fact that the allegations in the first complaint were largely unparticularised, as were the allegations in the fourth complaint regarding his conduct towards Sarah Blackburn and Councillor Florence Nash. Indeed, the disciplinary case seems to have developed further in the course of the disciplinary meeting insofar as

Councillor Florence Nash and Councillor Pauline Allen started to consider other issues regarding the adequacy of the Claimant's performance of his duties.

64. It was not within the band of reasonable responses to have the disciplinary case heard by one of the complainants and / or wife of a complainant and / or witness, Councillor Florence Nash, who was then involved to an inappropriate extent in the appeal hearing given that it was an appeal against a decision that she had made. It was similarly unfair having the appeal heard by the husband of one of the complainants and key witnesses.
65. The fact that the Respondent was advertising the Claimant's post by the point in time when the appeal meeting was being arranged would also suggest that the outcome of the appeal had been prejudged and / or the Claimant was not being given a meaningful right of appeal. Indeed, he was effectively denied his right of appeal by the fact that the Respondent chose to reject his appeal, not on its merits, but by reason of the circumstances in which the appeal meeting had come to an end.
66. Was the dismissal within the band of reasonable responses? For the reasons given above, the Tribunal finds that the dismissal was not within the band of reasonable responses. In particular, in the absence of there having been clear findings as to the conduct for which the Claimant was being found guilty and which was being found to amount to gross misconduct, the Tribunal finds that the dismissal was outside the band of reasonable responses.
67. If the dismissal was unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed (the Polkey question)? It is for the Respondent to adduce any relevant evidence on which it wishes to rely in relation to this issue. I have considered evidence from various of the decision makers at both the disciplinary and appeal stages. I am also required to have regard to all of the material and all of the reliable evidence when making that assessment, including any evidence from the Claimant. Indeed, it is inevitable that a degree of uncertainty is a feature of the exercise. In answering the predictive questions, I must be careful to assess the chances of what this particular Respondent would have done on the assumption that it acted fairly. The difficulty here is assessing whether or not the Claimant would still have been dismissed had a fair and reasonable procedure been followed, given that I have found that the decision is also substantively flawed in that the substance of the anonymous complaint lacked sufficient particularity and the complaint about his conduct on 6 November should not have been considered as it had already been considered when the verbal warning had been given. So really the Polkey question mainly turns on whether or not the Claimant would have been dismissed for his conduct in relation to Councillor Alan Nash. Had the appeal not been conducted by the husband of one of the complainants and main witnesses, had there not been the involvement in the appeal process of the wife of Councillor Alan Nash, and had evidence been obtained from the other main witness, Lance Ratcliffe, then the outcome would have depended upon an assessment as to the gravity of the Claimant's conduct, which he himself admitted to be inappropriate, having regard to the extent to which it was accepted that the remarks were not meant to be taken

seriously and the extent to which this was taken into account as mitigation. I note that the conduct in issue had occurred within the currency of both a verbal and written warning, but the written warning had not been stated to be a final warning (indeed, the possible consequences of further misconduct within the period of the warning had not been spelt out the warning letter). Ultimately, I consider that there was a 50% chance that, had that allegation been reasonably investigated and had a fair procedure been followed, the Claimant would have been dismissed for that matter. Another way of putting it is that I assess the possibility of a different outcome by which the Claimant was not dismissed as being 50%. Accordingly, the Claimant's compensatory award will be adjusted to reflect that percentage finding.

68. The next matter I have to consider is whether or not the Claimant contributed to his dismissal by blameworthy or culpable conduct. For the reasons set out above, I do not have the evidence to make an assessment as to the Claimant's contributory conduct in relation to the anonymous complaint. The conduct on 6 November 2022 had already resulted in a warning being imposed, and should not have been considered as part of the disciplinary process, or in arriving at any sanction, other than on the basis that the Claimant had a live warning (but not a final written warning) on his record. In these circumstances, and having regard to the findings that I have made regarding his conduct in relation to Councillor Alan Nash, I would have found the degree of contributory fault to be 50%. However, I am conscious that to make two separate reductions of 50% would not be just and equitable because inevitably I have taken account of the conduct of the Claimant in deciding that there was a 50% chance that he would have been dismissed in any event. So, having regard to the case law authorities referred to above, I have decided that it would be just and equitable to reduce compensation by 25% in respect of contributory fault in order to avoid the injustice of an excessive and disproportionate reduction. I should stress though that that reasoning does not apply to the basic award, and I have concluded that the conduct of the Claimant before dismissal was such that it would be just and equitable for the basic award would be reduced by the same 50%.

69. Finally, there is the issue of the extent to which there has been non-compliance with the ACAS Code of Practice and whether or not I should adjust any compensation to take account of any non-compliance. I found that the Respondent did not act reasonably for the reasons I have already given and that this impacted on the both the requirement in the ACAS Code for a fair disciplinary hearing and the requirement for a fair appeal hearing. Three specific breaches can be pointed out: employers should obviously carry out any necessary investigations to establish the facts of the case and in this regard I have found there were the deficiencies set out above. If it is decided that there is a disciplinary case to be answered, the employee should be notified of that in writing and the notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting and I have found there were also deficiencies in that regard. Thirdly, any appeal should be dealt with impartially and, wherever possible, by a decision maker who was not previously involved in the matter, and the involvement of Councillor Florence Nash in the previous decision meant that she should not have been involved in the appeal meeting. So, in all of those circumstances, I consider that it is just and equitable to increase the compensation award by 15%.

70. For completeness, I do not consider that the Claimant's own conduct in the appeal hearing, which may partly have been explained by frustration at the process, gave rise to a specific breach of the ACAS Code in respect of which it would be just an equitable to reduce his compensation.
71. In terms of quantum, I indicated that I was proposing to deal with the matter on the information that I had, even if it was not completely precise, rather than seeking to put the issue of remedy off to a later point in time when more detailed information might be provided, as, having regard to the amounts involved, it would have been disproportionate and not in accordance with the overriding objective for there to be further delay, cost, and use of public resources, involved in assessing any award. The parties consented to this approach.
72. The first award to be made is the basic award which is the equivalent of a statutory redundancy payment, so it basically awards an employee one week's pay for every year that they were under 41 years of age and 1½ week's pay for every year of service for which they were over 41 years of age. The Claimant was over 41 years old for all of his period of employment with the Respondent, so the multiplier is 7½ (five years of service x 1½). The multiplicand is his figure for normal pay. I accepted evidence to the effect that the Claimant's hourly rate was £9.30 and that he would work an extra hour on top of his 16 contractual hours so that the figure for normal pay is 17 x £9.30 amounting to £158.10. Thus, the appropriate calculation is 7½ x £158.10 and that produces a figure of £1,185.75 but that then has to be reduced by 50% to take account of the just and equitable reduction of the basic award explained above, so the figure due to the Claimant by way of the basic award for unfair dismissal is £592.88.
73. The next element of the award is the compensatory award beginning with loss of earnings up to the date of the Tribunal hearing. The document provided by the Claimant as a schedule of loss essentially stated that he was claiming compensation for a period of seven weeks. I originally indicated that I would accept the Claimant's evidence that he was out of work for seven weeks. However, upon further enquiry, it was established that the Claimant's precise date of commencing his new employment was earlier than the date which would have been derived from the period of seven weeks put forward, and was, in fact, 26 January 2022. Ultimately, the Claimant confirmed that this was the date and he had been putting forward his figure for loss of earnings to take account of the fact that he was out-of-pocket for the initial starting period of his new employment, because presumably he was being paid in arrears, but he recognised, when it was pointed out to him, that ultimately he did receive pay for this initial period.
74. Accordingly, loss of earnings was calculated to cover the period from the 23 December to the 25 January 2022. Using the weekly figure for pay of £158.10 (in the absence of clear evidence as to any other figure or any deductions from that figure, which, if there were any, would have been minimal) multiplied by 34 days, the figure for loss of earnings would be £767.92. I then reduced that figure by 50% to take account of the percentage finding that I made that the Claimant would have been dismissed in any event, had a fair procedure been followed, so as to reduce the figure to £383.96. I then uplifted that figure by 15% to take account of the non-

compliance with the ACAS Code of Practice, which takes the figure to £441.46. I then reduced the figure to take account of the finding of contributory fault on the basis that it is just and equitable to reduce it by a further 25%. So, the final figure for loss of earnings is £331.16.

75. The final element of the compensatory award was in respect of the loss of statutory rights because the Claimant was fully protected after two years of service whereas it will take him two years in any new job to have protected employment rights. In respect of this head of claim, I awarded the Claimant £316.20, being the figure for two weeks' pay (2 x £158.10 = £316.20). That figure falls to be reduced by 50% to recognise the finding that he might have been fairly dismissed in any event. It is then increased by 15% because of the non-compliance with the ACAS Code of Practice and it is then reduced by a further 25% in respect of contributory fault on the basis that it is just and equitable. That means that the final figure in respect of this head of claim is £136.37.
76. After the decision was announced, further representations were made on behalf of the Respondent. I rejected a submission made on behalf of the Respondent that an award for loss of statutory rights should not be made on the basis that the Claimant had got new employment and there was continuity of employment and service between his former job and his new job. I concluded that, based on a start date of 26 January, there was a break of approximately five weeks between his old job and his new job with there being no basis for there to be continuity of service between the two jobs. As such, I concluded that this further submission was misconceived.
77. The Respondent also raised an issue, after the decision was announced, to the effect that the payments which had been made by the Respondent to the Claimant in respect of holiday pay should be deducted from any award in respect of loss of earnings. The problem was that the Tribunal had heard no evidence regarding any specific amounts of holiday pay being paid to the Claimant which the Respondent was not otherwise obliged, as a matter of contract or statute, to pay to the Claimant. The dismissal letter stated that the Claimant would receive payment for the rest of his holidays but was unclear as to whether this was in respect of any holiday entitlement which had already accrued or in respect of any future holiday entitlement. The ET3 Form of Response suggested that the amount involved was £213.90. In these circumstances, in so far as it was being suggested that any *ex gratia* payment had been made, the Tribunal did not have the evidence before it to adjust any award to take account of any such payment and any evidence to that effect should have been put before the Tribunal at the beginning of the case. Moreover, I was not satisfied that it was proportionate or in accordance with the overriding objective or in the interests of justice to allow the Respondent to revisit this part of the case after the decision had been announced.
78. All of this meant that the Claim of unfair dismissal succeeded and the total in terms of the award to the Claimant arising out of his unfair dismissal was **£1,060.41**.

Employment Judge Kenward
29th November 2022