EMPLOYMENT TRIBUNALS

Claimant: Mr Guy Earle

Respondent: City Plumbing Supplies Holdings Limited

Heard at: Reading **On: 3 and 4 April 2023**

Before: Employment Judge Gumbiti-Zimuto

Appearances
For the Claimant: Mrs S Lennon, Lay representative

For the Respondent: Mr P Bownes, Solicitor

REASONS FOR JUDGMENT

[Provided at the request of the respondent]

1. In a claim form that was presented on the 1 September 2021 the claimant made a complaint which included allegations of disability discrimination and unfair dismissal. The claimant's case of disability discrimination is now no longer before the tribunal I am only concerned with unfair dismissal.

2. The claimant gave evidence in support of his case and also relied on witness statements which were provided by his granddaughter Denise Earle and his erstwhile colleague Kim Hockley. The respondent relied on the evidence of Sean Dowling and Luke Wilson. I was also provided with a useful chronology and a trial bundle running to 396 pages of documents. From these sources I made the following findings of fact which I considered necessary to decide this case.

3. The claimant is 64 years old. He began employment with the respondent at its their Reading Branch from 25 October 2011, initially employed as a Driver. The claimant was promoted to the role of Warehouse/Transport Supervisor from 1 July 2019. He was in that position at the time of his dismissal. The claimant's role as Warehouse/Transport Supervisor was to oversee the running of the warehouse and to supervise 7 Drivers and 4 Pickers.

4. Unfortunately, in July 2020 the claimant contracted legionnaires disease. He

spent 8 days in intensive care in the Royal Berkshire Hospital and remained in hospital for some weeks before discharge. Anticipating his return to work and also maintaining contact with his former employers the claimant met with Mr Lewis the Reading Branch Manager at his home. During that meeting Mr Lewis told the claimant he was happy for the claimant to return; that the branch had become busier during the claimant's absence as another branch had been absorbed by Reading; the workload had increased; and "*that the place was an absolute mess*". They discussed some adjustments that would need to be made for the claimant on his return to work. Sometime later, in September 2020, the claimant was able to return work having been absent for some months.

5. On his return to work the claimant makes several complaints about what he experienced. These complaints are no longer the subject of this case which is no longer concerned with disability discrimination issues. I will however briefly mention them for the simple reason that they inform the claimant's attitude towards the respondent, which is that the claimant felt that he was no longer wanted by the employer, and that they took certain steps or failed to take steps because they no longer wanted him as an employee.

6. The claimant says that despite his requests for support, particularly in relation to lifting of heavy goods, because following illness his strength had not returned to the level he had been before his illness, he was not given any support. The claimant says that there was a failure to carry out a return-to-work interview. He complains that there was no referral of him to occupational health for advice to ease his way back into the workplace. The claimant says that he was not advised of the company employee assistance programme. All of these matters indicate, the claimant says, that there had been a change, by management in their behaviour towards him and that this informed his belief that they wanted to get rid of him.

7. On one occasion the claimant says he was mocked by Mr Lewis in front of his team some of whom then took advantage of the situation, and became extremely difficult to supervise. The claimant says that he approached Mr Lewis and Ms Stow who made it very clear they were not stepping in to help him; the working relationship with both of the claimant's line managers and some team members became very difficult for him. The claimant says that his mental health suffered. The claimant says that whilst in his absence the branch had increased in size and was a mess, he was the one who was being blamed for the mess that the branch was in.

8. There is a dispute between the claimant and the respondent about an allegation that the claimant makes that his role had been offered to one of his team during his absence. This is disputed by the respondent, and it is suggested by the respondent that the relevant employee had merely expressed his own aspirations during an interview in the course of investigating the claimant's grievance. It seems to me that this is an important issue between the claimant and the respondent because if it is right that the respondent did not want the claimant as an employee anymore and had been making plans for his replacement that is an important factor to bear

in mind when considering the circumstances giving rise to the subsequent instances of alleged misconduct which cumulatively resulted in the claimant's dismissal. The claimant considers that this was all part of the clear plan to remove him from his role.

9. How do I resolve that dispute of fact between the claimant and the respondent? I do it by considering the evidence given by the claimant which is in substance a simple assertion, I also have regard to any evidence given by his witnesses bearing in mind that the evidence that is given by the claimant's witnesses is only in writing and therefore to the extent that it is disputed by the respondent has not been tested and I have to keep that in mind. Finally, I have regard to the position as it was put forward by the respondent including any documents presented.

10. I am not satisfied on the balance of probabilities that the evidence that has been put before me does show that there was an intention to replace the claimant with one of his colleagues. The passage from the documentation produced during the course of the hearing shows one of the claimant's colleagues being interviewed during the course of the claimant's grievance and during the course of that he expressed his own aspirations for advancement within the respondent. It does not in my view, on the basis of what is written, support the contention that the respondent made a promise to awork colleague that they would get the claimant's role, it does not say that it does not bear that construction.

11. Another aspect of dispute between the claimant and the respondent is that the respondent says that the claimant's performance had been one which had been the cause of concern for Mr Lewis for a period of time which extended prior to the claimant's sickness absence due to legionnaires. The respondent says that the claimant after his return to work was counselled and advised by Mr Lewis in relation to how he was expected to perform his role but this was something that started to cause the claimant stress and so Mr Lewis backed off on that. The claimant says that before he went off work with his illness there were no issues brought to his attention no complaints made by the respondents about his performance but on his return, what happened was that Mr Lewis started holding meetings with him frequently. It was suggested that it was on a daily basis, and during the course of these meetings he would find fault with his work and where the claimant was expressing a request for support from the management in order to be able to carry out some of the many tasks he was asked to perform and about which criticism was being made his requests for support were ignored.

12. The claimant and the respondent are at odds about whether there had been any real concerns about the claimant's performance prior to his illness.

13. On his return the claimant says that Mr Lewis began holding meetings with him frequently in which he found fault in the claimant's work and despite requests for support from management, the claimant was ignored. All this evidence comes from the claimant. The respondent has not engaged with that part of the evidence directly in terms of calling evidence before me in

this hearing to address it but I have heard from Mr Dowling and Mr Wilson who both carried out investigations following the claimant's disciplinary hearing and I have also had the opportunity of considering the grievance which was raised by the claimant and some of the observations which were made in the course of that and the conclusions that were reached. I bear in mind that this material is second hand other than in so far as the claimant has addressed it. My view is that the change in the nature of the Reading Branch in increasing its size appears to have resulted in a series of issues which the branch was not necessarily dealing with perfectly some of which may have reflected on the claimant as the Warehouse / Transport Supervisor but it is not really possible for me to form a view on the material I have before me that the claimant was either performing so poorly that there was a risk of him being dismissed or subject to performance improvement or alternatively that he was performing so well and and that he was being targeted for dismissal by having spurious allegations made about his performance. That appears to me to be an untenable series of propositions which are unsupported by the evidence. My conclusion is that there may have been issues about the claimant's performance which may well from time to time not have been at the level that he would want or the respondent would want but there was no underlying difficulty in respect of the claimant's overall performance of his role.

14. The claimant was suspended from work for the first time between 24 February and 2 March 2021. This came about because there had been an altercation in the warehouse between one of the claimant's team Mr Griffith and Mr Lewis. The claimant was told that he had to work with Mr Griffith. Mr Griffith has been for many years a family friend to the claimant. The claimant says that he jokingly said to Mr Griffiths, without any offence being intended, nor any offence being taken: "*Come on you're going to be my bitch today*". The claimant states that he made this comment because he was trying to make light of what had been a heated situation.

15. The respondent subjected the claimant to disciplinary action and the finding in respect of this incident was that the claimant's conduct was inappropriate. The expectation of the respondent was for the claimant to show leadership to his team, the choice and use of the language by the claimant was inappropriate and derogatory. I am able to readily accept the claimant's evidence that in the workplace there was the use of offensive and ribald language from time to time and that it did not cause offence when used between employees. I am also satisfied that an employer is entitled to expect a level of behaviour from its staff, even those working in the warehouse, especially from a person in a supervisory position, that they desist from using such language such as that used on this occasion.

16. It is not clear to me why the course adopted on this occasion was to issue a verbal warning to the claimant. It is however clear that a verbal warning is not a disproportionate sanction when accompanied with an explanation of the expected behaviour. A simple explanation of the expected form of behaviour may have been an alternative way of dealing with matters, however nonetheless the sanction imposed does seem to me to be a

proportionate one.

17. Following a disciplinary hearing on 2 March 2021, the claimant received a verbal warning for making the comment which was deemed inappropriate and derogatory. The warning was to remain on the claimant's personnel file for a period of six months. The claimant was advised of his right of appeal but he chose not to appeal. I am not sure that I understand fully what the claimant says was the reason for not appealing the disciplinary sanction, but it appears to me that the reason for the lack of an appeal was a considered and certain decision made by the claimant not to appeal. There is no question of the claimant being put off an appeal by the respondent.

18. Not long after, two weeks or so later, the claimant was again suspended on 23 March 2021. This was following an incident that occurred on 22 March when the claimant drove a company vehicle on the highway, knowing it was overloaded. The respondent says that it was the claimant's responsibility as both the driver of the vehicle and the warehouse supervisor to ensure this does not happen.

19. There is a serious dispute between the claimant and respondent in respect of this incident. That dispute arises from what the claimant did or did not say about this incident in the disciplinary process and what is recorded.

20. The claimant attended an investigatory meeting with John Fowler, Branch Manager at City Plumbing Supplies in Swindon. Mr Fowler decided there was a case to answer. The claimant attended a disciplinary hearing on 15 April, chaired by Luke Wilson, Branch Manager at City Plumbing Supplies in Southampton.

21. In the record of the disciplinary hearing the claimant is recorded as saying that he had deliberately overridden the warning in our PCS system about the weight as he wanted to "*see how far it would go*" as he believed Mr Lewis and Ms Stow were out to get him.

22. In his evidence today before me the claimant denied that he said this. In his witness statement it is not clear that he was putting forward a case that was significantly different to what was recorded. What the claimant said to me was that he had checked the vehicle and it was safe. He also stated that he had made it clear to Mr Wilson and Mr Fowler that the vehicle was overloaded, however, the claimant accepts that he did not put his in his witness statement and it is not addressed in his claim form. Mr Wilson in his evidence was clear that this was not how the claimant had put his case at the disciplinary hearing and he continued to support the version as recorded at the disciplinary meeting.

23. What I have to decide on this issue is whether the claimant did tell Mr Wilson that the vehicle was not overloaded or whether Mr Wilson is entitled to conclude that the claimant was entitled to conclude that the claimant was saying to him that he had deliberately overridden the warning on the system because he wanted to see how far it would go. The evidence that I have

before me leads me to conclude that it is more likely than not that Mr Wilson is right when he says that he believed that the claimant had said that he had overridden the system. The claimant's version as presented in the evidence is such a clear and definite assertion that there is no disciplinary action justified were it the case. I am satisfied that it would have been set out somewhere in the contemporaneous documentation if it were and it is not. There is not even an indication of it. I am satisfied that if it had been the claimant's intention to say the things, he said to me to Mr Wilson, I am satisfied that he did not say them so that they could be reasonably understood by Mr Wilson. When Mr Wilson issued the claimant with a final warning which was to be on the claimant's record for a period of 12 months he was acting reasonably having formed a view of what is a proportionate sanction for something that would have been a serious infraction of the respondent's rules and would in any event have been a breach of the general law.

24. Another reason why I accept what Mr Wilson says is because the claimant did not appeal the decision. The claimant in his evidence says that he did not appeal because he was suspended and therefore not allowed to approach anyone. The claimant accepted that this is not set out in his witness statement or his claim form or in his grievance. His answers to questions about this in my hearing were not easy for me to understand as he appeared to interpret a clear direction that he could appeal against the decision to issue him with a final written warning as somehow being overridden by his suspension for a further alleged infraction which related to stock counts. Yet the same perceived injunction which would have prevented the claimant appealing would prevent the claimant presenting his grievance, did not act as a bar on him making a grievance complaint. I am unable to follow the internal logic of the claimant's position on that matter. I am satisfied that the claimant could have appealed, but for his own alleged misunderstanding and that there was nothing that the respondent did that put him off putting an in appeal if he wanted to or could have misled him into thinking that he would not put in an appeal.

25. Following the disciplinary hearing the claimant had a meeting with Mr Dan Stevens, Regional Director, the claimant's evidence about this meeting was that he was told that there was no point in putting in a grievance "*in an off the record talk"*. However, the claimant ignored this and did later raise a grievance.

26. Following the claimant's return to work he was given a list of daily expectations by Mr Lewis, I understood this to be jobs or tasks that the claimant was expected to perform. One of his tasks was to carry out a PI count. The purpose of this is to have an accurate count of the stock held by the respondent. The claimant states that he explained to Mr Lewis that it would not be impossible to get an accurate count due to stock being "*all over the place*". The claimant says that he was instructed by Mr Lewis to put a zero count on the PDA machine and did as he was instructed. The claimant says that it was an action that he knew he should not do but he did it because he was instructed to do it. It was this action that resulted in the

claimant being suspended for falsifying stock counts.

27. The claimant states that he had nothing to gain from doing this. He also states that if he had not done this, he would have been subject of disciplinary action for not following instructions. I find the claimant's speculation on this difficult to understand as had the claimant failed to follow the instruction he would have been doing the right thing, that is was what he was supposed to be doing in the first place, it is difficult for me to understand how he could be subjected to disciplinary action which would lead anywhere if the disciplinary investigation and any disciplinary hearing were taking place, as required by ACAS procedure, by an independent manger there would be no apparent reason to suspend him if he did do his job properly, whereas by following the purported instruction he would be doing something that he knows is wrong and therefore liable to some form of action including disciplinary action.

28. When the claimant's actions were discovered, he was subjected to further disciplinary action. This was the third time that the claimant had been subject to disciplinary action in a short period of time. The claimant was suspended on the 22 April 2021.

29. During the suspension the claimant submitted a formal grievance on 3 May 2021. The grievance was investigated before the disciplinary hearing took place The grievance hearing took place on 19 May 2021. The fact that the claimant put in the grievance seems to runs contrary to the claimant's alleged belief that he could not appeal against his disciplinary sanction but he could raise a grievance.

30. The claimant had been suspended for a period of about 10 weeks. In this period the claimant had been signed off work due to stress for a period of only two of those weeks. The claimant complains that the delay had an adverse effect on his mental health.

31. The claimant's third disciplinary hearing took place on 25 June 2021, it was conducted by Mr Wilson. The claimant attended the hearing and his position was that he was only following the orders of Mr Lewis by zeroing off the counts. It was clear that the claimant was accepting that he had done something that he knew was wrong, but he had done it because he was told to.

32. Mr Wilson gave evidence that he investigated the claimant's assertion that he was doing this on the direction of Mr Lewis, and he rejected this. In his conclusions Mr Wilson considered that the claimant ought to be dismissed because he was on a final written warning that had been imposed by Mr Wilson himself. Mr Wilson did not believe that the claimant has been told by Mr Lewis to put in a zero the counts.

33. The claimant was advised of his right of appeal and he did appeal. The claimant appealed this decision by letter dated 29 June. The claimant was invited to the disciplinary appeal meeting that took place on 12 August. The

claimant's grounds of appeal were that he did not feel that he had been given a fair hearing, the investigation had not been thorough, and he had been bullied and harassed.

34. During the appeal hearing the claimant indicated he had new evidence. There appears to have been some confusion on the part of the claimant and Mr Dowling about the claimant providing this information to Mr Dowling and the claimant did not provide further information for Mr Dowling's investigation or decision making.

35. Mr Dowling conducted further investigations and interviewed Matt Ashton, the investigating manager and Luke Wilson the dismissing manager. Mr Dowling wrote to the claimant on 16 August to advise him of the delay, but also to give the claimant another opportunity to share the evidence he had in order this could be taken into account. The claimant did not respond to this letter.

36. Mr Dowling was satisfied that a reasonable investigation had taken place into the allegation of falsifying PI claims and he found no evidence to suggest bullying or harassment as alleged. Mr Dowling noted that the claimant had been on a final written warning at the time of dismissal and therefore as this was a "totting up" of warnings rather than an act of gross misconduct, the claimant was entitled to be paid his pay in lieu of notice. Mr Dowling dismissed the claimant's appeal. Mr Dowling notified the claimant of this in his outcome letter of 13 October 2021 and made arrangements for the monies owed to be paid to the claimant.

37. Section 98 of the Employment Rights Act 1996 ("ERA") provides that in determining whether the dismissal of an employee was fair or unfair, it shall be for the employer to show the reason (or, if there was more than one, the principal reason) for the dismissal, and that must be a reason falling within subsection (2) of section 98. The conduct of an employee is a reason falling within the subsection.

38. Where an employer has shown a potentially fair reason the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- 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 shall be determined in accordance with equity and the substantial merits of the case.

39. The Respondent must show that: (a) it believed the claimant was guilty of misconduct; (b) it had reasonable grounds upon which to sustain the belief; (c) at the stage which it formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances of the case. It is not necessary that the tribunal itself would have shared the same view of those circumstances.

40. After considering the investigatory and disciplinary process, the tribunal has to consider the reasonableness of the employer's decision to dismiss and (not substituting our own decision as to what was the right course to adopt for that of the employer) must decide whether the Claimant's dismissal "fell within a band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band, it is unfair". The burden is neutral at this stage: the Tribunal has to make its decision based upon the evidence of the claimant and respondent with neither having the burden of proving reasonableness.

41. Among a number of other cases, I have been directed to Davies v Sandwell [2013] EWCA Civ 135, which provides guidance on how and employment tribunal should treat a case where an employer is dismissed when on final written warning. It is stated that

> 22. The first, the guiding principle in determining whether a dismissal is fair or unfair in cases where there has been a prior final warning does not originate in the cases, which are but instances of the application of s. 98(4) to particular sets of facts. The broad test laid down in s.98(4) is whether, in the particular case, it was reasonable for the employer to treat the conduct reason, taken together with the circumstance of the final written warning, as sufficient to dismiss the claimant.
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> 23. Secondly, in answering that question, it is not the function of the ET to re-open the final warning and rule on an issue raised by the claimant as to whether the final warning should, or should not, have been issued and whether it was a legally warning or a "nullity." The function of the ET is to apply the objective statutory test of reasonableness to determine whether the final warning was a circumstance, which a reasonable employer could reasonably take into account in the decision to dismiss the claimant for subsequent misconduct.
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> 24. Thirdly, it is relevant for the ET to consider whether the final warning was issued in good faith, whether there were prima facie grounds for following the final warning procedure and whether it was manifestly inappropriate to issue the warning. They are material factors in assessing the reasonableness of the decision to dismiss by reference to, *inter alia*, the circumstance of the final warning.

Conclusion:

42. In this case it is important to bear in mind that the final written warning was given to the claimant in respect of the vehicle overweight incident and the claimant did not appeal that decision. The claimant has put forward an explanation for why he did not appeal but notwithstanding that explanation for a failure on his part to appeal, I consider I am entitled to take into account the fact that the claimant did not appeal because I do not consider that it was reasonable for the claimant to form a view that he was debarred from appealing. It is my view that the claimant did not in fact believe that he was debarred from appealing. He put in a grievance in circumstances where if his internal logic is accepted about the appeal he would not have put in a

grievance. I am of the view he chose not to appeal and instead decided to make a grievance.

43. A final written warning for what was therefore an admitted breach of what the claimant recognises could be a breach of the general law (driving an overweight vehicle) is in my view a proportionate sanction and I am entitled to view the employer's treatment of the claimant in issuing the final written warning as issued in good faith, for which there were prima facie grounds for imposing a final warning procedure and that it was not manifestly inappropriate to issue the warning.

44. I attempted to stand back and consider overall whether the circumstances of this case are such that a reasonable employer might reasonably consider it justifiable to dismiss the claimant.

45. This is a case where the claimant was dismissed with notice. This is a case where the misconduct alleged, the failure to do the stock count correctly and the overloading of the vehicle, were admitted. The failure to do the stock count correctly was a serious failing. It was not done correctly by the claimant who knew how to do it correctly and knew it was not being done correctly. The claimant was on a final warning. Taking all matters into account this is a case where an employer could conclude that dismissal was an appropriate sanction.

46. There is in my view nothing in the conduct of the disciplinary hearing by Mr Wilson that leads me to the conclusion that he did not follow a fair procedure. There is no criticism that can be made on the evidence I have heard that the way Mr Dowling conducted the appeal is unfair.

47. Considering matters in the round, the claimant was dismissed with notice following three separate instances of misconduct in a short period of time, none of which individually would necessarily have merited a dismissal. The last of those matters however took place after the claimant was on a final written warning. A reasonable employer could have considered that the dismissal of the claimant was within the range of reasonable responses to the misconduct found.

48. The claimant's complaint of unfair dismissal is not well founded and is dismissed.

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Employment Judge Gumbiti-Zimuto
Date: 5 April 2023
Sent to the parties on:12/5/2023

N Gotecha for the Tribunals Office

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