EMPLOYMENT TRIBUNALS

Claimant: Mr N Partridge

Respondent: Unilever UK Limited

Heard at: Liverpool **On:** 2 and 3 February 2023

Before: Employment Judge Aspinall

Representation
Claimant: in person supported by friend Mr Whiteside
Respondent: Mr Arnold, Counsel

JUDGMENT having been sent to the parties on 9 February 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. By a Claim Form dated 23 October 2020 the claimant brought a complaint for unfair dismissal. He had worked for the respondent for three years when he was dismissed for gross misconduct. The respondent defended the complaint by its response form dated 8 December 2020.

2. The matter was listed for final hearing on two previous occasions and postponed at the request of the parties.

3. There was an agreed list of issues, Mr Arnold had helpfully inserted the allegations made by the claimant into the list.

The List of Issues

4. The List of Issues is as follows:

1. Does the Respondent show the reason (or principal reason) for the dismissal is a statutorily-fair reason, namely conduct?

   The Claimant contends the following:

   1.1 *His mangers were targeting him as he was not a business fit*

   1.2 *The Claimant contends the same is evidenced by the following:*

      1.2.1 *The Claimant was informed in March 2020 by Phil Hardy that managers were 'out to get him'*

      1.2.2 *In December 2019 and January 2020, his manager (Ann Donaghey) attempted to put the Claimant on a performance plan*

      1.2.3 *From April – July 2020, his manager continued to collect data on him*

      1.2.4 *The Disciplinary Officer, Poppy Tasker, led the Claimant to believe that the main reason for dismissal was PPE adherence, but Alan Jope, CEO, travelled to the site in lockdown and also forgot to wear his glasses*

2. Whether the Disciplinary Officer (Poppy Tasker) dismissing the Claimant had a genuine belief in his misconduct?

   The Claimant contends the following:

   Allegation 2

   2.1 *The Claimant believed he was in a non-operational area at the time he failed to wear the correct PPE for Covid, but his questions were dismissed at the Disciplinary Hearing on 29 July 2020*

   2.2 *The information in the Claimant's direct managers' statements about the dates and circumstances of the dates and circumstances of Allegation 2 was incorrect*

   Allegation 4

   2.3 *The Claimant merely asked the Safety Leader to follow the agreed process for safety tags, but it was found that he had failed to respond to a request to the safety leader*

3. If so, whether that genuine belief was sustained on reasonable grounds?

4. If so, whether the Respondent carried out as much investigation into each of the allegations as was reasonable in the circumstances?

5. Whether the procedure to dismiss the Claimant was fair within the meaning of s.98(4)?

   The Claimant contends the following:

   Allegation 1

   5.1 *He was not informed until June that he was to be investigated for a failure to complete a task on 23 April 2020*

   5.2 *He had a witness (Peter Martin) who was with the Claimant when he completed the task on 23 April 2020, and was willing to be interviewed. Poppy Tasker, the Disciplinary Officer, dismissed this when raised by the Claimant at the Disciplinary Hearings of 29 July and 5 August 2020*

   Allegation 3

   5.3 *Despite it being alleged that the Claimant was aggressive towards the Safety Leader and his manager in a meeting on 23 April 2020, it was only brought to his attention in June 2020*

   5.4 *A witness heard some of the discussion but, although willing to make a statement, was not called*

6. *Whether the decision to dismiss was within the range of reasonable responses*

7. *To what remedy is the Claimant entitled? The Claimant seeks compensation.*

8. *Should the Tribunal reduce any financial award it makes by reference to the following:*

   8.1 *The Polkey principle?*

   8.2 *Contributory fault on the part of the Claimant?*

9. *What financial award should be made?*

   9.1 *Basic Award*

   9.2 *Compensatory award:*

      9.2.1 *Whether the Respondent shows that the Claimant has failed to reasonably mitigate his loss?*

      9.2.2 *What is the appropriate quantum of the Claimant's losses?*

      9.2.3 *Does the compensation need to be capped by virtue of the statutory cap?*

The Hearing

Documents

5. The parties had prepared a bundle of 358 pages.

Oral Evidence

6. The Tribunal heard oral evidence from the claimant. He gave his evidence in a straightforward way.

7. The respondent called Ms Tasker who had made the decision to dismiss. She had a good grasp of the documents and recalled the reasons why she had decided to dismiss. She gave her evidence in a direct and helpful way and readily admitted when there were matters outside her knowledge. She was careful to answer as accurately as she could. She no longer worked for Unilever but was happy to give evidence because she had taken her role as a dismissing officer very seriously, she had even gone and reinterviewed witnesses in the investigation to be sure for herself of the seriousness of the allegations before considering a dismissal. She was clear that she had taken mitigation into account but because the claimant did not accept that his behaviour was inappropriate, particularly in refusing to accept instruction from Mike Richardson, she saw no prospect of him changing his behaviours and felt that dismissal was the appropriate sanction in those circumstances.

8. The respondent called Mr Pastena. He heard the claimant's appeal against dismissal. He appeared remotely from a UK location. He no longer worked for the respondent but was happy to give evidence. He had agreed with Ms Tasker's decision to dismiss. He gave his evidence in a straightforward way and was happy to speak directly to the claimant explaining why the claimant's behaviour had gone beyond challenging (something Unilever employees have the right to do) and become an unreasonable refusal and an aggressive and rude response, behaviours that could not be condoned. He had upheld the decision to dismiss because he agreed with Ms Tasker that the claimant had not accepted that he had done anything wrong in saying he would not accept instruction from Mike Richardson, and that this amounted to gross misconduct. He too considered the claimant's mitigation and felt the appropriate sanction was dismissal.

The Facts

The claimant and his job role

9. The claimant worked for the respondent from 2017. He worked as a Process Improvement Leader in No 1 factory at Port Sunlight. He was responsible for the manufacture of bleach. At the time of the events leading to his dismissal in 2020 the respondent was operating 5 production lines for bleach, 24 hours a day with 5 crews on shift patterns.

10. At the end of 2019 following PDR which revealed some behavioural issues he was put on Performance Enablement Plan by his line manager Ann Donaghey but never received paperwork to set out the terms of the plan.

11. In March 2020 the coronavirus pandemic affected the way the factory had to operate. Unilever set up a global response committee and cascaded instructions to its sites around the world. Managers and leaders at Port Sunlight were meeting every two hours some days to respond to the crisis, to check on safety measures in place and to keep up to date with measures to limit the spread of disease amongst their workforce.

12. On 20 April 2020 as one of many measures the respondent introduced it sent an email to all staff informing them of the need to wear glasses and masks at all times in all areas. There were also daily tannoy announcements requiring the staff to maintain a 2m social distancing rule and to wear glasses and masks at all times.

13. There was a deadline to be met for putting in place demarcation tape for social distancing at 23.59 for each factory line on 23 April 2020, the implication being that if there was not compliance the line might have to be shut down.

Not wearing safety glasses

14. On 23 April 2020 (or on some other date around that time – the date not being critical to the incident) at approximately 13.15 the claimant had been challenged by his line manager Ann Donaghy for not wearing a mask during a meeting in the leader's office. In response he said words to the effect of *show me the policy where these are mandatory.*

15. At approximately 2pm on 23 April the claimant was instructed by Safety Adviser, Mike Richardson to put tape markers down on his line for social distancing. He refused to do this for Mike, he said that Mike should do it himself and that he the claimant would only do it if he was told to do it by Ann. He said that he wanted to see a policy that said there had to be tape lines 2 metres apart before he would do it.

16. Ann heard the heated exchange and moved the discussion into the manager's office. The claimant said that putting tape lines down wouldn't work as he would not be able to train the manpower employees he was required to train if they had to abide by the tape lines. Ann suggested they could be trained elsewhere in a room with social distancing in place or using headphones if working at a distance. The claimant said this would make his life more difficult so he was not going to do it. He turned away from her and waved his hands in the air as an expression of his frustration with her for challenging him. During this meeting the claimant shouted at Mike and repeated that he would not take instruction from him and that Mike should do the taping himself.

17. At 16.45 that same day (or on some other date around that time, the date not being critical to the nature of the incident) the claimant was walking towards the clocking out machine through the factory and then met with colleague John Whiteside and spoke to him and Ann observed the claimant not to be wearing his

glasses at those times. Ann asked the claimant where his glasses were, and he said they were in his car and turned his back on her to continue talking to John.

18. At 17.32 Ann sent an email to confirm to staff how to mark the lines with tape. The claimant was not on that circulation list.

19. The claimant sent an email at 17.45 to John, who was due to come on shift that evening, saying that the tape line was in place.

20. On 22 May 2020 a gate on a platform on Line 2 needed repairing. Mike asked the claimant to repair it. The claimant said that the process for it to be fixed was to speak to FLL (the shift engineer team carrying out repairs) and they will fix it. He told Mike that he would not take responsibility for it and that Mike should follow process and go to FLL. The claimant said the shift engineer should fix the gate and not him.

Code

21. The respondent's employees are required to comply with the Unilever Code of Business Principles. The Code is supported by 24 code policies that provide a framework of "must and must not" behaviours that apply to all employees. Within the code is the policy called Respecting People which provides that people should be treated with dignity, honesty and fairness. Within the Respecting People policy there is a framework for respecting dignity and fair treatment that requires that employees must not engage in any direct behaviour that is offensive, intimidating, malicious or insulting.

22. There is also an Occupational Health & Safety policy which provides that employees must comply with health and safety procedures and instructions relevant to the work and/or about which they have been trained or notified.

Disciplinary Procedure

23. The respondent's disciplinary procedure lists the following examples of gross misconduct:

(1) Refusing to accept a reasonable request made by an authorised person or other serious failure to comply with company rules and procedures;

(2) Disregard of safety procedures; and

(3) Breach of Unilever's Code of Business Practice Principles and code policies

It provides:

> "If you are found to have committed an act of gross misconduct you will be dismissed without notice or payment in lieu of notice. Any decision to dismiss will only be taken after full investigation.

You may appeal after any disciplinary decision. To do so you should set out the grounds of your appeal, in writing, addressed to the person highlighted in your decision letter.

At any stage of the disciplinary procedure including appeal you may be accompanied by a work colleague or an appropriate trade union official.

Investigation

24. In June 2020 the respondent decided to carry out an investigation into the claimant's conduct. Nick Maher was appointed to carry out the investigation and compile a report.

25. Nick interviewed Shaun Wylde, Ann Donaghy, Gary Malone, Phil Hardy and Phil Bale and the claimant.

26. During his investigatory interview the claimant did not deny that he spoke dismissively and rudely to Mike.

27. Nick's report recommended that there was a disciplinary case to answer for each of 6 allegations.

28. On 20 July 2020 the claimant was sent a letter inviting him to disciplinary hearing. The letter set out the allegation of misconduct for matters including health and safety and behaviours displayed towards members of the leadership team in PS 1 specifically:

1. Failure to implement the Chief Supply Chain Officer's Global COVID 19 factory social distancing standards on the lines within his area of responsibility before the given deadline of 23.59 on 23 April 2020, which may have resulted in the factory suspending operations which could have significantly impacted the continued supply of essential hygiene products during the COVID 19 pandemic and placed personnel at greater risk of infection transmission.

2. Dishonestly reporting to John Whiteside, after handing over the shift to him by email timed 17.45 hours on 23 April 2020, that a demarcation line was put in place, stating *the line is there* when in fact it was not.

3. On the morning of 23 April 2020 you spoke dismissively and rudely to a colleague on the morning of 23 April 2020 you spoke dismissively and rudely to a colleague Mike Richardson who was tasked with implementing the Covid 19 social distancing and zoning plans in PS one in accordance with the Unilever tiered market response system specifically it is alleged:

3.1 you responded to Mike Richardson refusing to put the measures in place and said in relation to willingness to implement them not until somebody shows in the policy

3.2 you said to Mike Richardson *I don't work for you I work for Ann and she has to tell me*

3.3 you responded to Mike Richardson who made it clear that he was acting on behalf of the site OS HE manager, the factory operations manager and the site incident management team with *"it's impossible to do this zone because so many manpower and I don't want to do it all because of this"*

4. Failure to comply with a reasonable request to wear mandatory personal protective equipment in the factory, resulting in Ann Donaghy, factory operations manager, instructing you on 2 occasions on 23 April to wear said personal protective equipment. You responded in a way Ann found to be rude and insubordinate, stating *show me the policy where it says these are mandatory.* In response to the later request when Ann Donaghy asked you where your protective glasses were you rudely said *they are in my car* turned your head and continue a conversation with a 3rd party.

5. Shouting at Ann Donaghy and Mike Richardson in an unprofessional aggressive and angry manner and causing them considerable stress on 23 April 2020 in the leader's office. This meeting took place after Ann Donaghy raised the need to implement the Unilever tiered market response system requirements specifically social distancing and zoning the same day. Specifically, you shouted the following:

   a. the number of temporary operators in the factory on line 2 meant that it would *be impossible* to adhere to the new zoning requirements

   b. that splitting the line with hazard tape was *unworkable* and *how are we supposed to train new people on the line*

   c. you wished to see the policy for the hazard tape, said that it would not work and that you refused to do the work without seeing the policy and instructions from the OSH E manager

6. On 22 May 20 spoke dismissively and rudely again to Mike Richardson about the need to repair the gate to the line 2 case erector platform and falsely and aggressively accused him of knowing about a camera that had been covered up in order that the operators could work unsafely.

29. The invitation letter included a copy of the investigation report and copies of the statements of those who had been interviewed as part of the investigation together with a number of appendices.

30. The letter warned the claimant that the outcome might result in disciplinary action being taken, that the allegations amounted to potential gross misconduct and might result in dismissal. The letter included a copy of the company's disciplinary procedure. The claimant was informed of his right to be accompanied by a trade union representative or workplace colleague.

31. The disciplinary hearing was originally arranged for 22 July 2020 but was postponed at the claimant's request so that he and his union representative would have the time to prepare, until 29 July 2020.

32. Ms Tasker was appointed to conduct the disciplinary hearing.

Disciplinary hearing

33. The claimant was represented by Andrew Johnson his Union representative. Ms Tasker was the decision maker and there was a note taker and HR Support person ER present. The claimant was given an opportunity to respond to each of the allegations.

34. In response to allegations one and two the claimant said the first he had known about the requirement to put tape down was 23 April 2020 and that he had asked for more information. He said the investigation notes were wrong in that regard, he had asked for information not a Policy Document. He said it was a bad 24 hours on the line, that there was no black and yellow tape, that his dream holiday had been cancelled the week before. He said he had put down one line of tape.

35. He said in relation to not wearing safety glasses that there was a lack of clarity about the date.

36. The claimant apologised to Ann Donaghy and Mike Richardson for any offence he had caused in relation to not wearing PPE.

37. In relation to allegation three he accepted that he had been forceful and obstructive with Mike Richardson. He did not apologise for the altercation on 23 April 2020. He said he had been emotional. The claimant wanted to know if, and if not why not, Mike Richardson had been investigated for breach of Unilever Code in that altercation.

38. The claimant did not say that he had been unwell, nor did he say that Ann Donaghy, Mike Richardson or Fabio Pastena were setting him up to manage him out of the business.

39. On allegation 4 the claimant said it was a mistake that he had not worn PPE. He had heard the tannoy announcements and read the instructions but not worn PPE by mistake. In relation to not wearing glasses he challenged the date but

accepted he had not worn glasses and had known he was supposed to wear them. He pointed out that the CEO of the respondent had been photographed without PPE.

40. On allegation 5 the claimant accepted the exchange had been heated and he had waved his hands in frustration. He did not think what he had done had been inappropriate.

41. On Allegation 6 the claimant said he had been trying to follow correct procedures. He referred to still being on a PIP.

42. The claimant was asked if there was any mitigation he wished to be taken into account. During the meeting he had spoken about his stress, bereavement, passion for his role and desire to perform well on PIP.

43. Following the hearing the notes of it were amended by the claimant, signed as agreed and were provided to the claimant.

Ms Tasker reinterviews people

44. On 30 July 2020 a workplace colleague Peter Martin emailed the claimant to say: *"I'm writing to confirm I saw you lay down black/yellow tape on line 2 which effectively split the line into two halves. I remember this specifically because it initiated a conversation between us about how it would hinder my training if I could not be on the same half of the line as CH…*." It did not give a date.

45. The claimant forwarded the email to Ms Tasker on 31 July 2020.

46. The claimant also sent Ms Tasker an email showing a photograph of socially distanced workplace colleagues including Ann, in which Ann was not wearing a mask.

47. Ms Tasker did not feel it necessary to talk to Peter Martin because the email did not say the date on which yellow and black tape had been seen on line 2, and because she had already concluded that even if the tape had been laid down as the claimant described, the allegation was about the behavioural response.

R*econvened hearing*

48. The hearing reconvened on 5 August 2020. The claimant was again represented by his union. Ms Tasker went through each of the allegations and explained each of the findings that she had made. She felt that there were contradictory statements as to whether or not the claimant had actually laid tape on the line on 23 April 2020. Overall, she found that in his resistance to instruction, allegation 1 was proven.

49. She did not uphold allegation 2 because she could not say that the claimant had dishonestly informed John Whiteside that a taped line was in place.

50. She found allegations 3, 4, 5 and 6 to be substantiated. She said she had looked at allegations 1, 3, 4, 5 and 6 holistically and concluded that the claimant had demonstrated a general disregard for safety and a clear disrespect for his line manager and for the safety adviser. She referred to the relevant parts of the respondent's disciplinary procedure pointing out the breaches which constituted gross misconduct:

- refusing to accept a reasonable request made by an authorised person or other serious failure to comply with company rules and procedures
- disregard the safety procedures
- breach of the Unilever code of business principles and policy

51. Overall the conclusion was that the claimant's conduct amounted to gross misconduct. She set out the mitigation that she had taken into account in the claimant's case including:

- the pressure felt due to an equipment breakdown on Line 2 on 23 April 2020
- pressures due to operator absences on 22 April 2020
- disappointment he felt at having had to cancel his holiday
- the bereavement he suffered when he lost his father in January 2019

52. Ms Tasker also said that she'd taken into account the fact that the claimant had not accepted that his behaviour at any stage of fallen below the expected standards. She concluded that his behaviour amounted to gross misconduct and that because he'd not accepted that his behaviour fell below expected standards, the appropriate sanction was dismissal. Ms Tasker set out the next steps including payment of any outstanding holiday and the date of termination of employment of 21 August 2020. She informed the claimant of his right to appeal and informed him that an appeal must be lodged within 5 working days with works director Fabio Pastena.

53. The letter of dismissal dated 5 August 2020 enclosed copies of the minutes from the hearings on 29 July 2020 and 5 August 2020.

54. The claimant instructed solicitors to prepare his grounds of appeal. Those solicitors wrote to the respondents Mr Pastena on 11 August 2020 setting out the grounds of appeal. The claimant was invited to an appeal hearing to take place on 4 September 2020. He attended and was again represented by his union. The hearing was chaired by Mr Fabio Pastena and HR support person was present Jaco Smit.

55. On 11 September 2020 Mr Pastena wrote the claimant providing details reasoning and his conclusion in the appeal. He decided to uphold the decision of Ms Tasker to dismiss the claimant gross misconduct.

Relevant Law

56. Section 94 Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed by his employer.

57. Section 98 provides:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) The reason (or, if more than one, the principal reason) for the dismissal; and**
>
> **(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it –**
>
> **a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;**
>
> **b) Relates to the conduct of the employee;**
>
> **c) Is that the employee was redundant; or**
>
> **d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**
>
> b. **In subsection (2)(a) -**
>
> **a) 'Capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality; and**
>
> **b) 'Qualifications', in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held."**

58. The burden of proof lies on the employer to show what the reason or principal reason was, and that it was a potentially fair reason under section 98(2). According to Cairns LJ in **Abernethy v Mott, Hay & Anderson [1974] ICR 323**:

> **"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 cause him to dismiss the employee."**

59. This requires the Tribunal to consider the mental processes of the person who made the decision to dismiss. In **Linfood Cash and Carry v Thomson**:

> **"The Tribunal must not substitute their own view for the view of the employer, and thus they should be putting to themselves the question -could this employer, acting reasonably and fairly in these circumstances properly accept the facts and opinions which it did? The evidence is that given during the disciplinary procedures and not that which is given before the Tribunal".**

60. **Jhuti** in the Court of Appeal cited Arnold J in the EAT in **Burchell v British Home Stores [1978] IRLR 379** which set out the standards for determining whether dismissal for (mis)conduct is fair:

> **"First of all there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds on which to sustain that belief. And thirdly, we think that the employer, at the stage at which he formed that belief on those grounds...had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."**

61. Where the employee has admitted his misconduct the employer will be acting reasonably in believing that the misconduct has been committed so the requirement for investigation will be reduced **Royal Society for the Protection of Birds v Croucher [1984] IRLR 425**.

62. Where the employer does show a potentially fair reason for dismissing the claimant the question of fairness is determined by section 98(4).

> **"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> a. **depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and**
>
> b. **shall be determined in accordance with equity and the substantial merits of the case."**

63. In **Iceland Frozen Foods Limited v Jones [1982] IRLR 439,** Browne-Wilkinson J formulated the correct test in the following terms

> **"…the correct approach for the Industrial Tribunal to adopt in answering the question posed by Section 98(4) Employment Rights Act 1996 is as follows:**
>
> **(1) The starting point should always be the words of Section 98 (4) themselves;**
>
> **(2) In applying the section the Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;**

> **(3) In judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;**
>
> **(4) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take the one view, another quite reasonably take another;**
>
> **(5) The function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the 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."**

64. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee (instead of imposing a lesser sanction) was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer had reasonable grounds for treating the misconduct as gross misconduct: see paragraphs 29 and 30 of **Burdett v Aviva Employment Services Ltd UKEAT/0439/13**.

65. Generally gross misconduct will require either deliberate wrongdoing or gross negligence. Even then the Tribunal must consider whether the employer acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38). The Tribunal must determine whether dismissal was a response that no reasonable employer could have adopted in the circumstances.

66. In **London Ambulance Service NHS Trust v Small 2009 EWCA Civ 220** Mummery LJ reminded Tribunals that it is all too easy to slip into a substitution mindset. A Tribunal must avoid conducting its own fact-finding forensic analysis. The real question is whether the employer acts fairly and reasonably in all the circumstances at the time of the dismissal.

67. When applying Section 98(4) the Tribunal must take into account the size and administrative resources of the respondent, any relevant Code of Practice and the Human Rights Act 1998. The ACAS Code on Disciplinary and Grievance Procedures provides at paragraph 4:

- Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- Employers and employees should act consistently.

- Employers should carry out any necessary investigations, to establish the facts of the case.

- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.

- Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.

- Employers should allow an employee to appeal against any formal decision made.'

68. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.** The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice.

69. The ACAS Code at paragraphs 5-7 addresses the elements of an investigation:

> **"5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.**
>
> **6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.**
>
> **7. If there is an investigatory meeting this should not by itself result in any disciplinary action. Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under an employer's own procedure."**

70. The Tribunal should consider procedural fairness together with the reason for dismissal **Taylor v OCS Group Ltd [2006] EWCA Civ 702.** The Tribunal must decide whether in all the circumstances of the case the employer acted reasonably in treating the reason they have found for the dismissal as a sufficient reason to dismiss.

71. There is no obligation for an employer to investigate wholly speculative matters advanced as possible mitigation. Where an employer has previously treated another employee guilty of similar misconduct more leniently a dismissal may be considered unfair because it would not be equitable within the meaning in Section 98(4). Brandon LJ in **Post Office v Fennell [1981] IRLR 221** said:

> ***"The expression equity as there used comprehends the concept that employees who misbehave in much the same way should have meted out to them much the same punishment"***

72. However, allegedly similar situations must be truly similar **Hadjioannou v Coral Casinos Limited [1981] IRLR 352**, the employer must have been aware of

the similar conduct **Wilcox v Humphreys and Glasgow Limited [1975] IRLR 211,** an employer may distinguish between two cases where there is a rational basis for the distinction made, though not that there were different decision making managers, and consistency may have to give way to flexibility. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613**.

73. **Polkey v AE Dayton Services Limited [1987] IRLR 50 HL** established that where a claimant is successful a reduction may be made to an award on the basis that if the employer had acted fairly the claimant would have been dismissed in any event at or around the same time. This may take the form of a percentage reduction, or it may take the form of a Tribunal making a finding that the individual would have been dismissed fairly after a further period of employment (for example a period in which a fair procedure would have been completed). The question for the Tribunal is whether the *particular employer* (as opposed to a hypothetical reasonable employer) would have dismissed the claimant in any event had the unfairness not occurred.

74. The Employment Rights Act 1996 at section 122 and section 123 provides for a reduction in compensation because of contributory fault by the claimant.

Applying the Law to the Facts

75. In an unfair dismissal case a key question is what was the reason for dismissal. The Tribunal had regard to the factors operating on the mind of the dismissing officer at the time of dismissal. The Tribunal found Ms Tasker to be a reliable and wholly straightforward and clear witness who took her role as dismissing officer very seriously. Ms Tasker having seen the investigation report then went and reinterviewed some of the witnesses herself because of the apparent contradictions on a number of points. She took great care to satisfy herself as to the allegations and the evidence to substantiate them. She did not uphold allegation 2, because of a lack of evidence. This showed the Tribunal that she weighed each allegation separately.

76. The claimant advanced arguments that he was dismissed because of the following:

    a. that his managers were targeting him for exit,

    b. that Ann Donaghy had told him that Fabio Pastena wanted him managed out of the business,

    c. that he'd been put on a performance improvement plan in December 2019 so as to manage him out of the business,

    d. that Phil Hardy had told him in March 2020 that managers were "sorting him out" or "out to get him",

e. that from April to July 2020 Ann Donaghey collated data on him, and

f. that Poppy Tasker's main reason for his dismissal was in not wearing PPE (which he thought was unfair when he could point to the CEO of the business travelling to the site during lockdown forgetting to wear PPE glasses).

77. The Tribunal finds there is no evidence other than the claimant's assertions, of any truth of any of (a) – (f).

78. The claimant's 2019 PDPR revealed that he had been put on a performance improvement plan (PIP). He protested that he had not received a documented PIP and that the absence of the documentation was evidence of a plan to get rid of him. The Tribunal put to the claimant that surely if the respondent had been trying to manage him out, it would be more plausible for them to have written up a plan with strict targets and watched and waited and hoped for him to fail to meet them. The claimant said he had expected this to be the case but that it had not happened. It was not plausible that the absence of PIP documentation meant that the claimant was being managed out of the business.

79. The claimant's arguments at (a) to (f) were not plausible because he did not raise them at the time. He did not bring any such concerns to the attention of the investigating officer or Ms Tasker. He did not inform his solicitors of them so that they did not feature in his grounds of appeal and he did not object to Fabio Pastena being appointed appeal officer at the time. The Tribunal concluded that the arguments at (a) to (f) were constructed after his dismissal to bolster a complaint to the Tribunal.

80. The Tribunal finds that the reason for dismissal was the claimant's conduct in that the allegations at 1,3,4,5 and 6 of the disciplinary invitation letter were found by Ms Tasker to be proven against him.

81. Conduct is a potentially fair reason for dismissal. The law requires that the Tribunal got on to consider the reasonableness of the dismissal.

82. The Tribunal finds that Ms Tasker had a genuine belief in the guilt of the claimant of the misconduct at allegations 1,3,4,5 and 6 individually. Her belief was held on reasonable grounds because she had looked at the investigation report and had interviewed witnesses herself and heard from the claimant during the course of the disciplinary hearing.

83. Further the Tribunal finds that Ms Tasker had a genuine belief held on reasonable grounds of the guilt of the claimant of the misconduct at that time when it was taken together, holistically, so that his conduct particularly in relation to allegations 3 and 5 amounted to gross misconduct when seen in the context of allegation 1. It was the way he responded to the instructions that was the problem; not whether or not he laid down tape or whether or not on occasion he failed to wear his PPE.

84. The respondent carried out a full, thorough and fair investigation into each of the allegations. The respondent applied its disciplinary procedure.

85. The Tribunal has had regard to the ACAS code and finds that the respondent complied with each of the requirements of the ACAS code in the investigation and the disciplinary procedure throughout.

86. There was some delay in the decision to investigate the claimant's misconduct. The Tribunal accepts the respondent's explanation that this was a time of peak response to the global coronavirus pandemic within the respondent organisation. The Tribunal notes that if the claimant's contention that the respondent was trying to set him up to manage him out of the business had any credibility in it then surely the respondent would have acted immediately in April 2020 and moved to dismiss him.

87. The claimant alleged that he had a witness Peter Martin who saw him lay the tape on 23 April 2020 and that the respondent failed to interview this witness. The Tribunal finds that Ms Tasker's decision not to interview the witness does not render the investigation process unfair nor the procedure for dismissal unfair. Ms Tasker reached the entirely reasonable decision that it was not necessary to interview Peter Martin because (i) there was such contradictory evidence as to whether the tape had been laid or not such that she made no definitive finding on that point and (ii) Mr Martin did not say the date on which he said he had seen the tape laid. For her, the point in allegation 1 was the claimant's response to the instruction. Even if one line of tape had been laid as he said Ms Tasker found his response to the instruction unacceptable.

88. The claimant also alleged that Gary Malone had overheard some of the altercation between him and Mike and Ann on 23 April 2020. The Tribunal notes that the claimant did not call Gary Malone to be interviewed, did not ask Gary Malone to support him or provide a written statement. Even if Gary Malone had been interviewed, Ms Tasker's view was that the claimant by his own admission had been forceful in that altercation, had refused to comply with Mike's instruction, had said that he works for Ann and would need instruction to come from her, and had also demanded documentation before agreeing to comply. Ms Tasker's view was that that was sufficient to amount to gross misconduct.

89. The Tribunal finds that the decision to dismiss was in the range of reasonable responses. The allegation letter had set out how the allegations would amount to gross misconduct within the respondent's procedure. The claimant had been shown the disciplinary procedure and knew that dismissal was a possible outcome. The claimant was asked about mitigation and with his representative put forward his points in mitigation. Ms Tasker took that mitigation into account.

90. What mattered for her was that the claimant was not saying that the mitigation had caused his behaviour or contributed to it in any way. The claimant was persisting in saying particularly in relation to the altercation on

23 April 2020, that he had not acted inappropriately. For her this meant that there was unlikely to be behaviour change and that meant that the only appropriate sanction was dismissal.

91. The claimant at the Tribunal hearing raised things that other people had done that he had not done, to seek to point out the unfairness of his dismissal. Some of these were matters that had not been raised during the course of the disciplinary process, disciplinary hearing or at appeal. Some of them are particularly unpleasant and despite the claimant saying repeatedly that he did not want to get anybody else into trouble during this hearing, he has named colleagues and made allegations against them to seek to exonerate himself. The Tribunal deals with each of them here.

92. The claimant wanted to know why Mike was not interviewed on 23 April 2020. He sought to argue that it was an equal altercation. It may well be that the respondent took action against Ann or Mike, whether it did or didn't does not exonerate the claimant for the things he admitted he did on 23 April 2020.

93. The claimant wanted to know who made the allegation against him that led to the investigation. He believed that the answer to that question would support his argument that he was being managed out. This was not a matter for the Tribunal to determine and the claimant adduced no evidence to support his allegations that there was collusion to manage him out of the business. Quite to the contrary, the delay in instigating the investigation and the breadth of that investigation and the fact that Ms Tasker went and reinvestigated herself, the fact that there was no written PIP that was in force after December 2019, all discredits the claimant's assertion of a collusion to manage him out.

94. Ann was photographed not wearing a mask. The claimant included in the bundle a photograph and what's app messages showing Ann without a mask. The fact that somebody else may on another occasion have failed to wear PPE does not exonerate the claimant from the behavioural ways in which he responded to instruction from Mike and Ann and challenges to him not wearing PPE.

95. The claimant alleged that Alan Jope travelled when he should not have during lockdown. Again this is not relevant to the claimant's complaints. The fact that somebody else may on another occasion have failed to comply with health and safety guidelines does not exonerate the claimant from the behavioural ways in which he responded to reasonable management instructions in relation to health and safety.

96. The claimant alleged that Mike Richardson knew and had condone a cover being put on a camera to prevent recording of unsafe practices. This was a particularly malicious allegation. The Tribunal notes that the claimant had not reported it at the time. Had there been any truth in this allegation the Tribunal finds that the claimant, who had no trouble challenging his managers, referring Mike to FLL for example and calling for information,

would have reported it immediately and used it in investigatory interview and disciplinary hearing. The fact that the claimant did not report it at the time means it lacks credibility.

97. The claimant said Mike put a tag to fix the gate on the platform on line 2 in the claimant's name and shouldn't have. It may be that Mike did not comply with the procedure for initiating a repair, what mattered for Ms Tasker was that the claimant did not address that in a way that was behaviourally appropriate within the Code. Ms Tasker describes the importance of challenging and the difference between the "what" and the "how". If the claimant was right and MR was not following the usual procedure then there would have been a behaviourally appropriate way to raise that challenge. Ms Tasker felt that the claimant's response was not behaviourally appropriate.

98. The claimant alleged that Nick talked to him aggressively. The claimant suggested that Nick Maher should not have been appointed as the investigating officer at Tribunal. He had not raised this point when the investigation was instigated, during the disciplinary process nor at appeal. If the claimant was spoken to aggressively at the time he could have reported it at the time. His failure to do so at the time makes it less credible that this happened. Even if it did happen, it does not exonerate the claimant from the behaviours that he was dismissed for.

99. The Tribunal finds that dismissal, in this case in these circumstances, cannot be said to be an outcome that no reasonable employer would apply. The decision to dismiss fell within the range of responses of a reasonable employer.

100. The claimant made no complaint about the appeal. However, the Tribunal had regard to the grounds of appeal. The Tribunal finds that the appeal was conducted thoroughly and fairly. The claimant did raise at appeal the point about Mr Martins email and it was again addressed. Mr Pasteno found the allegations at 1, 3, 4, 5 and 6 were substantiated and amounted to gross misconduct. He agreed that the claimant's mitigation in a context in which the claimant was not accepting that he had behaved inappropriately could not outweigh the nature of the misconduct and that dismissal was the appropriate sanction.

101. For those reasons the dismissal was fair and the claimant's claim must fail.

_____

Employment Judge Aspinall

Date: 28 June 2023

REASONS SENT TO THE PARTIES ON

Date; 5 July 2023

.....
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employmenttribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.