EMPLOYMENT TRIBUNALS

Claimant: Mr P Laxton

Respondent: Southern Car Sales Limited

Heard at: London South Employment Tribunal, by video

On: 27 November 2023

Before: Employment Judge Annand

Representation
Claimant: Mr Laxton, in person, accompanied by his brother, Calvin Laxton
Respondent: Mr Mills, Director of the Respondent

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is well-founded and succeeds on procedural grounds.

2. In respect of the calculation of remedy, the Claimant is not awarded any compensation.

3. The Claimant's compensatory award is limited to the losses he suffered in the two-week period after his dismissal. He did not suffer any losses over this period and his compensatory award is therefore nil.

4. In any event, the Claimant's conduct wholly caused his dismissal and therefore any compensatory award is reduced by 100%.

5. The Claimant's basic award is also reduced by 100% to nil because of his conduct.

REASONS

Introduction

1. A final hearing was listed on 27 November 2023 to hear the Claimant's claim for unfair dismissal. I was provided with a bundle of 26 pages, including a witness statement from Mr Mills for the Respondent. The Claimant did not provide a witness statement. At the start of the hearing, it was agreed the Claimant's Claim Form would be treated as his witness statement. When the

hearing began, I explained the process that the hearing would follow. I offered the Claimant a break so that he could write down any questions he had for Mr Mills for cross examination purposes. After the break, the Claimant's brother asked questions of Mr Mills on behalf of the Claimant. However, at the end of this process, the Claimant then also had some questions he wished to ask Mr Mills which I allowed. After Mr Mills had given his evidence, the Claimant gave evidence and was cross-examined by Mr Mills.

2. Prior to the lunch break I explained to the parties the legal test set out in *British Home Stores Ltd v Burchell*, the principles relating to *Polkey* (to what extent it was likely that even if a different process had been followed the Claimant would have been dismissed in any event), and contributory conduct. I explained that after the lunch break, I would hear the parties' submissions, and explained that I would also be making decisions about the *Polkey* point and contributory conduct if the Claimant's claim were to succeed. I invited the parties to make any comments they wanted to on these issues when they made their submissions.

3. After the lunch break, I heard the parties' submissions. It had been my intention to give an oral judgment within the time allocated for the hearing. Unfortunately, this was not possible, and I reserved my judgment.

4. When writing my judgment, I noticed the Claimant had issued his claim against "Carl Mills, Unit 1, Southern Car Sales". It was clear the correct Respondent was Southern Car Sales Limited. I therefore changed the Respondent's name to reflect the correct name of the Respondent.

Findings of fact

5. The Respondent is a company which sells second hand cars. It is a small company consisting of two Directors, Mr Mills and his wife, and 7 other employees. One general manager, two who work in sales, and then mechanics and valets, who clean the cars.

6. The Claimant worked as a car valet. The Respondent previously used the Claimant's services when the Claimant ran his own valeting firm, known as RL Valets. In around 2016, the Claimant lost several of his clients and he could no longer keep his own premises. The Respondent suggested the Claimant work from the Respondent's premises, and he would be permitted to carry out third party valets at the unit. In the period that followed the Respondent became the Claimant's only client.

7. In 2018, the Claimant and the Respondent discussed the Claimant's employment status. The Claimant was concerned in particular about receiving holiday pay. Mr Mills said he offered the Claimant the option of becoming a PAYE employee or drawing up a contractor's agreement, which would also entitle the Claimant to holiday pay. The Claimant opted for the latter as it was to his benefit as he wanted to take periods of unpaid leave to visit his second home in the Philippines. I was not provided with a copy of the contractor's agreement by either party.

8. The agreement was that the Claimant would be paid a daily rate of £110 per day. Initially he invoiced Mr Mills, but over time this stopped, and the Claimant

worked 5 days a week each week and was paid £550 per week. The Claimant was responsible for paying his own tax and national insurance. Mr Mills accepted the Claimant did not have the right to send a substitute in his place. He accepted that the Claimant was supervised by Mr Mills to the extent that this was required. Mainly the Claimant would get on with his role without the need for supervision, but Mr Mills accepted that he could ask the Claimant to complete tasks if he wished and that he oversaw the Claimant's work generally. Mr Mills also accepted that the norm was that the Claimant would attend work for 5 days a week and he said he would have expected the Claimant to have asked him if he planned to take a day off mid-week. The Claimant would need to speak to Mr Mills regarding when he wanted to take holiday leave. He was however the only worker in the company who could request and be granted lengthy periods of unpaid leave in December or January.

9. On 17 November 2022, Mr Mills was approached by the general manager, Mr Tim Wenham. Mr Wenham said he had been approached by a colleague, Simon, who also worked as a valet. Mr Wenham reported to Mr Mills that Simon had said that he was sick of being verbally abused by the Claimant and that he was going home. Mr Wenham reported that he had calmed Simon down and said he would report it to Mr Mills.

10. The following day, 18 November 2022, Mr Mills started an investigation into the allegations. He spoke to Simon first of all. Simon said he did not wish to submit a formal grievance, said he did not want any trouble, and said it would just be easier if he left. Mr Mills did not consider this to be a satisfactory resolution and asked him to stay while the investigation was carried out.

11. On 21 November 2022, Mr Mills interviewed Mr Wenham. Notes were made of the conversation, they were typed up, and signed by Mr Wenham. In the interview, Mr Wenham said that Simon had reported to him that on 17 November 2022, the Claimant had called Simon "a cunt" twice. He had said the Claimant was always using this phrase and calling him an idiot. He said he was sick of it, he did not need it, and he was leaving. Mr Wenham said he had asked Simon not to leave and said it was "not on". Mr Wenham said he reported the matter to Mr Mills. He said he felt "the situation had got out of hand".

12. On 23 November 2022, Mr Mills interviewed another valet, Mr Dodson. Notes were made of the conversation, they were typed up, and signed by Mr Dodson. Mr Dodson said he had not been present for the conversation on 17 November 2022, but said he had heard the Claimant use abusive phrases to Simon on a number of occasions. The examples he gave were "cunt, useless wanker, spastic". He said this happened "not every day, but it's a lot". When asked if he had experienced this sort of behaviour from the Claimant himself, he replied he had, he confirmed he had raised this previously with Mr Mills, and that after Mr Mills had spoken to the Claimant about it, he had stopped. Mr Dodson also said that the Claimant had made a number of "digs" to Simon after Simon's mother's death. Mr Dodson reported that he had heard the Claimant say, "it's alright for you, you've had more paid holiday than us" (referring to Simon's bereavement leave), and "well at least you've got one less present to buy this Christmas."

13. On 25 November 2022, Mr Mills called the Claimant into a meeting. Ahead of the meeting, the Claimant was not sent a letter informing him of the allegations in writing and he was not given warning about what the meeting would be about. In the meeting, the Claimant was informed of the allegations. Mr Mills said he had the interview notes from his interviews with Mr Wenham and Mr Dodson on his computer screen and he explained to the Claimant what they said. Mr Mills says the Claimant said in the meeting that he could not recall the exact conversation, but he accepted that his language towards Simon could be better, he said he got frustrated, and he did not realise it was a problem. Mr Mills said that he had reminded the Claimant of a previous occasion when Mr Mills had spoken to the Claimant about his behaviour towards Mr Dodson. Mr Mills said the Claimant replied that he had stopped speaking to Mr Dodson that way since they had spoken about it, but he did not realise that also applied to Simon. He then said he would stop speaking to Simon that way, and Mr Mills replied that in his view it had gone too far and advised him that he was suspending him whilst he took advice, and that the outcome of the process could be that the Claimant would be dismissed.

14. Mr Mills said he took legal advice and was advised that it was a clear case of gross misconduct, and that immediate dismissal was appropriate. However, the Claimant's step-father died and so Mr Mills sent a text message to the Claimant on 5 December 2022 stating that it would not be right to continue with the disciplinary process at that time, and that they would re-visit the matter in a few weeks' time. The Claimant continued to be paid whilst suspended.

15. On 21 December 2022, Mr Mills telephoned the Claimant and informed him that he was being dismissed for gross misconduct. Mr Mills said he considered the behaviour to have been repeated and of a bullying nature. He said it was not appropriate in today's workplace. Mr Mills said it was not a decision he had taken lightly, they had a long working relationship, and he was aware of the time of year. He also was aware the Claimant was due to spend time in the Philippines in January 2023, and he offered to pay the Claimant four weeks' notice pay. He was not offered an appeal.

16. The Respondent paid the Claimant a further four weeks' pay after his dismissal.

17. In the hearing, the Claimant accepted that he used inappropriate language to Simon, in that he used the words, "wanker" and "tosser", but said this was common in the workplace and it was the type of language that was used by others too and said to him as well. The Claimant denied having used the words "cunt" and "spastic". He also denied having made comments about how Simon would have one less present to buy at Christmas and commenting on Simon having had more paid holiday than everyone.

18. The Claimant asserted in the hearing a number of times that Simon had been off work for several weeks for bereavement leave and when he had returned, he had not been fit for work. He had been crying each day and very upset. He suggested that he had raised this a number of times with Mr Mills and Mr Wenham, and they had not done anything about this. In his evidence, Mr Mills said this was not accurate. He said that at most, the Claimant had said to him once that Simon was not fit to be at work. He said that this had not however

been said out of concern for Simon, but frustration about the fact that Simon had been crying each morning and his work was not at its usual standard.

The issues for the Tribunal to decide

19. The issues which I had to decide were as follows:

    a) Was the Claimant an employee of the Respondent within the meaning of section 230 of the Employment Rights Act 1996?
    b) The parties were agreed the Claimant was dismissed. What was the reason or principal reason for dismissal? Was it a potentially fair reason? The Respondent said the Claimant had been dismissed for gross misconduct.
    c) Did the Respondent genuinely believe the Claimant had committed misconduct?
    d) Were there reasonable grounds for that belief?
    e) At the time the belief was formed, had the Respondent carried out a reasonable investigation?
    f) Had the Respondent otherwise acted in a procedurally fair manner?
    g) Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?
    h) Did dismissal fall within the range of reasonable responses?

20. In respect of remedy, the issues which I had to decide were as follows:
    a) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
    b) If so, should the claimant's compensation be reduced? By how much?
    c) If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
    d) If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
    e) What basic award is payable to the claimant, if any?
    f) 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?

The relevant law

<u>Employee Status</u>

21. Section 230(1) of the Employment Rights Act (ERA) defines 'employee' as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'. Section 230(2) provides that a contract of employment means 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'. However, no further definition of 'contract of service' is provided in the ERA.

22. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433, QBD, the court held: "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will

be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service." The relevance of this paragraph was confirmed in *Autoclenz Ltd v Belcher and ors* [2011] ICR 1157, SC.

23. Since the decision in *Ready Mixed Concrete*, the courts have established that there is an 'irreducible minimum' for a contract of service to exist. This entails three elements:
    • control
    • personal performance, and
    • mutuality of obligation.

24. Under ordinary contractual principles, the ability of courts to look behind the written terms of a signed contract is limited to situations where there is a mistake that requires rectification or where the parties have a common intention to mislead as to the true nature of their rights and obligations under the contract. However, in *Autoclenz Ltd v Belcher and ors* [2011] ICR 1157, SC, the Supreme Court accepted the premise that employment contracts are an exception to ordinary contractual principles in this regard. In *Autoclenz* an employment tribunal found that car valets whose contracts specified that they were self-employed subcontractors were, in reality, employees. The contracts contained a clause which allowed the 'subcontractors' to supply a substitute to carry out the work on their behalf, and a clause stating that there was no obligation on the company to offer work or on the claimants to accept it. The tribunal found that these clauses did not reflect the reality of the claimants' working situation. It was never intended or realistically expected that the 'right' to refuse work or the 'right' to send a substitute should ever be exercised. The valets were expected to turn up and do the work provided, were fully integrated into the business and were subject to a considerable degree of control by the company.

25. In *Uber BV and ors v Aslam and ors* [2021] ICR 657, SC, the Court held that not only is the written agreement not decisive of the parties' relationship, it is not even the starting point for determining employment status.

Control

26. In *Catholic Child Welfare Society and ors v Various Claimants and Institute of the Brothers of the Christian Schools and ors* [2013] IRLR 219, SC, Lord Phillips noted that it is no longer 'realistic to look for a right to direct how an employee should perform his duties… Many employees apply a skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus the significance of control today is that the employer can direct what the employee does, not how he does it.'

Mutuality of obligation

27. 'Mutuality of obligation' means there is an obligation on the employer to provide work, and a corresponding obligation on the employee to accept and perform the work offered. In *Khan v Checkers Cars Ltd* EAT 0208/05, the EAT held that mutuality of obligation does not require the employee to be obliged to work whenever asked by the employer. It permits him or her to refuse work, although this may involve a factual assessment as to whether

any refusal is so extensive as to deny the existence of an obligation even to do a minimum of work.

Personal performance

28. One of the requirements in the *Ready Mixed Concrete* case is that the employee must have agreed to provide his or her own work and skill in exchange for a wage. The court noted: "Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, although a limited or occasional power of delegation may not be."

Other factors

29. Other factors that may be relevant to considering employee status are financial considerations, whether the employee receives any other benefits, tax and national insurance, the extent of integration within the organisation, whether someone works through a service company, the intention of the parties and custom and practice.

Unfair dismissal for conduct

30. Section 94 of ERA 1996 gives employees the right not to be unfairly dismissed.

31. Section 98 of ERA 1996 deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

32. Misconduct is a potentially fair reason for dismissal under section 98(2)(b) of ERA 1996, which refers to a reason that 'relates to the conduct of the employee'.

33. In *British Home Stores Ltd v Burchell* [1980] ICR 303, EAT, the EAT set out a three-fold test. The Tribunal must consider -
• if the respondent believed the employee was guilty of misconduct
• it had in mind reasonable grounds upon which to sustain that belief, and
• at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

34. An employer need not have conclusive direct proof of the employee's misconduct, only a genuine and reasonable belief.

35. In *Singh v DHL Services Ltd* EAT 0462/12, His Honour Judge McMullen QC indicated that it is only the first of the three aspects of the Burchell test that the employer must prove. The burden of proof in respect of the other two elements of the test is neutral.

36. The type of behaviour that will amount to gross misconduct will depend on the facts of the individual case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract. It must be repudiatory conduct by the employee going to the root of the contract - *Wilson v Racher* [1974] ICR 428, CA. The non-statutory Acas guide, 'Discipline and grievances at work' (July 2020), gives examples of what may amount to gross misconduct, which includes bullying and harassment.

37. A conduct dismissal will not normally be treated as fair unless certain procedural steps have been followed. In *Polkey v AE Dayton Services Ltd* [1988] ICR 142, HL, Lord Bridge itemised the procedural steps as follows:
• a full investigation of the conduct, and
• a fair hearing to hear what the employee wants to say in explanation or mitigation.

38. When assessing whether the employer adopted a reasonable procedure, tribunals will use the range of reasonable responses test that applies to substantive unfair dismissal claims. As Lord Justice Mummery said in *J Sainsbury plc v Hitt* [2003] ICR 111, CA: "The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."

39. 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).

40. In *Taylor v OCS Group Ltd* [2006] ICR 1602, CA, the Court of Appeal further stressed that a tribunal's task under section 98(4) of ERA 1996 is not simply to assess the fairness of the disciplinary process as a whole but also to consider the employer's reason for the dismissal, as the two impact on each other. It stated that where an employee is dismissed for serious misconduct, a tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee. Conversely, where the misconduct is of a less serious nature, so that the decision to dismiss is nearer the borderline, the tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee.

41. The Acas Code of Practice on Disciplinary and Grievance Procedures ('the Acas Code') sets out basic requirements for fairness that will be applicable in most conduct cases. It is not legally binding, but a tribunal must take its provisions into account where they are relevant to the case in question. Under sections 207 and 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, a failure to follow the Code can result in an adjustment in compensation of up to 25 per cent in a subsequent employment tribunal claim.

42. The Acas Code's section on handling disciplinary issues (paras 5–31) sets out the steps employers must normally follow, namely:
    • carry out an investigation to establish the facts of each case
    • inform the employee of the problem
    • hold a meeting with the employee to discuss the problem
    • allow the employee to be accompanied at the meeting
    • decide on appropriate action
    • provide employees with an opportunity to appeal.

43. The Code does acknowledge that it may sometimes not be practicable for employers to take all of the steps set out above and that dismissal in such cases may still be reasonable.

44. The non-statutory Acas guide, 'Discipline and grievances at work' (July 2020) accompanies the Code. By way of general advice, the guide states that procedures should be in writing, tell employees what disciplinary action might be taken, require employees to be informed of the complaints against them and supporting evidence, before a disciplinary hearing, give employees a chance to have their say before management reaches a decision, provide employees with the right to be accompanied at disciplinary hearings, provide that no employee is dismissed for a first breach of discipline, except in cases of gross misconduct, ensure that employees are given an explanation for any sanction and allow employees to appeal against a decision.

45. It is recognised both in section 98(4) ERA and in the Acas Code that allowances must be made for the particular circumstances of each case and for the size and administrative resources of the employer's undertaking. Furthermore, while application of the principle in *Polkey v AE Dayton Services Ltd* [1988] ICR 142, HL puts great emphasis on the importance of a fair procedure, the House of Lords in that case also stressed that a failure to comply with procedural safeguards would not automatically render a dismissal unfair as there would be cases where a proper disciplinary procedure would be 'utterly useless' or 'futile', in which case the employer might well be acting reasonably in ignoring it. However, Lord Bridge expressed the view that such cases would be 'exceptional'.

Polkey principle

46. Compensation for claims of unfair dismissal is made up of a 'basic award' and a 'compensatory award'. The basic award is calculated by applying a formula based on the employee's age, length of service and weekly pay. The compensatory award is based on the amount the Tribunal considers just and equitable for the loss which the employee has suffered because of the dismissal.

47. Where the employer has dismissed for a substantively fair reason but has failed to follow a fair procedure, the compensatory award may be reduced so long as it can be shown that a fair procedure would have resulted in a dismissal anyway. It is possible to make a reduction of 100 per cent on the basis that any procedural failure that served to render the dismissal unfair made absolutely no difference. The outcome would have been the same even if a fair procedure had been adopted, meaning that the employee would have been fairly dismissed on the same date as he or she was unfairly dismissed.

48. In *Cormack v Saltire Vehicles Ltd EAT 209/90* a car mechanic was dismissed for misconduct. He was refused an internal appeal. The employment tribunal found his dismissal unfair as a result of this breach of procedure but held that it was not just and equitable to make a compensatory award as the employer had, in all other respects, acted reasonably, and a fuller appeal procedure would ultimately have made no difference at all. The EAT upheld this decision on appeal.

49. In *Singh v Glass Express Midlands Ltd* [2018] ICR D15, EAT, the claimant was dismissed for conduct. His dismissal was found to be unfair on procedural grounds, but the employment tribunal reduced both his basic and compensatory award to nil on the basis that he had contributed entirely to his dismissal and, had a fair process been followed, he would have been dismissed in any event. On appeal, Her Honour Judge Eady observed that, even allowing for the fact that the tribunal had found the claimant to be entirely responsible for his dismissal, it should have proceeded to carry out the further assessment as to whether it was just and equitable to reduce his compensatory award for unfair dismissal to nil. Although it might be said that the tribunal was entitled to take the view it had already concluded that the claimant's conduct merited a reduction in the basic award under section 122(2) ERA, the case law made clear that it is not inevitable that the percentage reductions in respect of the basic and compensatory awards should be the same.

50. Making a percentage reduction is not, however, the correct method of proceeding where a tribunal categorically finds that the employee would have been dismissed in any event at the end of the period during which fair procedures would have taken place. In such a case, the compensatory award will properly be confined to compensating the employee for the losses he or she has sustained during the time it would have taken for a fair procedure to be completed. This approach was approved by the Court of Appeal in *O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615, CA.

Contributory conduct

51. Section 123(6) of ERA 1996 states that: 'Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.'

52. For conduct to be the basis of a finding of contributory fault, it must have the characteristic of culpability or blameworthiness. The words 'culpable' and 'blameworthy' are synonyms. Culpable just means 'deserving of blame' (*Sanha v Facilicom Cleaning Services Ltd* EAT 0250/18).

53. In *Hollier v Plysu Ltd* [1983] IRLR 260, EAT, the EAT suggested that the contribution should be assessed broadly and should generally fall within the following categories: wholly to blame (100 per cent); largely to blame (75 per cent); employer and employee equally to blame (50 per cent); slightly to blame (25 per cent).

54. However, a finding that an employee's conduct is the sole cause of his or her dismissal will not inevitably result in a nil compensatory award. In *Lemonious v Church Commissioners* EAT 0253/12 the EAT said that even where a tribunal finds no reason for dismissal other than the employee's conduct, it might still have to modify the percentage reduction in light of what is just and equitable.

Reduction in the basic award

55. A reduction on the ground of the employee's conduct must be made where 'the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent' — S.122(2) ERA.

56. In *Steen v ASP Packaging Ltd* [2014] ICR 56, EAT, the EAT, summarising the correct approach under section 122(2), held that it is for the tribunal to:
• identify the conduct which is said to give rise to possible contributory fault
• decide whether that conduct is culpable or blameworthy, and
• decide whether it is just and equitable to reduce the amount of the basic award to any extent.

The Tribunal's findings

The Claimant's employment status

57. On the evidence I heard, I found that the Claimant was an "employee" of the Respondent and is therefore able to bring a claim for unfair dismissal.

58. There were some factors which pointed away from the Claimant being an "employee" including the fact that he was not paid on the PAYE system, Mr Mills made payments to the Claimant's limited company, and the Claimant was liable for his own tax and national insurance. However, the majority of the other relevant factors indicated the Claimant was an employee. In particular, Mr Mills accepted the Claimant did not have a right to send a substitute, and hence personal performance was required. Mr Mills accepted that he had control over the Claimant, in that he could direct the Claimant to do certain tasks if he wished.

59. In terms of mutuality of obligation, the Claimant worked 5 days a week, and there was an expectation that he would do so. He needed to request time off when he wanted to take a paid holiday. It was also expected that the Claimant would let Mr Mills know if he was unlikely to attend work on a particular day. He was not free to accept or reject the offer of work as he pleased.

60. Although the Claimant was the only worker who was permitted to take four weeks unpaid leave per year, I did not find that this negated the mutuality of obligation that existed. Other than during this period of unpaid leave, the expectation was that the Respondent would provide the Claimant with work and the Claimant would accept that work. The Claimant was treated in every other respect like the other employees.

61. For these reasons, I found the Claimant was an employee of the Respondent.

Reason for the Claimant's dismissal

62. The Claimant was dismissed for a potentially fair reason, namely conduct. I accepted Mr Mills' evidence that at the time that he dismissed the Claimant he genuinely believed the Claimant was guilty of the misconduct in question, namely using abusive language to Simon, and I found that Mr Mills had reasonable grounds upon which to sustain that belief.

63. Mr Mills had spoken to Mr Wenham twice. On the first occasion, on 17 November 2022, Mr Wenham had reported that Simon had told him that he was sick of being verbally abused by the Claimant. On 21 November 2022, Mr Mills interviewed Mr Wenham, who said that Simon had reported to him that on 17 November 2022, the Claimant had called Simon "a cunt" twice. He had said the Claimant was always using this phrase and calling him an idiot. He said he was sick of it, he did not need it, and he was leaving. Mr Mills also interviewed Mr Dodson. Mr Dodson said he had not been present for the conversation on 17 November 2022, but said he had heard the Claimant use abusive phrases to Simon on a number of occasions. The examples he gave were "cunt, useless wanker, spastic". Mr Mills' evidence was that when he spoke to the Claimant at a meeting on 25 November 2022, the Claimant said in the meeting that he could not recall the exact conversation, but he accepted that his language towards Simon could be better, he said he got frustrated, and he did not realise it was a problem. There was therefore ample evidence which allowed Mr Mills to reasonably form the belief that the Claimant was guilty of misconduct.

64. It was also reasonable for Mr Mills to consider that the allegations amounted to gross misconduct. I accepted that there was a culture of "banter" in the workplace in which the employees used inappropriate language such as "wanker" and "tosser". However, I accepted that Mr Mills had reasonably concluded that the Claimant's use of more offensive language, including the words "cunt" and "spastic", when berating Simon was abusive, rather than being light hearted banter said in jest.

65. At the time that Mr Mills formed the belief that the Claimant was guilty of gross misconduct he had carried out a reasonable investigation. He had interviewed Simon (who declined to provide the details of what had occurred), Mr Wenham, Mr Dodson, and held a meeting with the Claimant. There was no further investigation that he could have undertaken in the circumstances.

66. Based on the allegations that the Claimant faced, and Mr Mills' genuine belief in the Claimant's guilt, which was based on reasonable grounds, following a reasonable investigation, I found that the dismissal of the Claimant fell within the range of reasonable responses open to the Respondent. The allegations were serious and the language the Claimant was accused of using was abusive. It is not language anyone should have to tolerate in the workplace. The Respondent acted reasonably in treating the Claimant's conduct as a sufficient reason to dismiss the Claimant. The Claimant complained he was not given a warning, but in fact he was previously warned about how he was speaking to Mr Dodson. The Claimant cannot reasonably argue that he thought the warning related only to abusive language towards one employee, but he believed he was permitted to continue using abusive language to other

employees. The Claimant had been warned and it had not stopped him continuing to use abusive language.

67. The process which was followed was however unfair. Mr Mills met with the Claimant at a meeting to discuss the allegations with him on 25 November 2022. It was not made clear to the Claimant beforehand if this was to be an investigation meeting or the disciplinary meeting. The Claimant was not formally invited to the meeting or advised what it would be about beforehand. He was not informed of the allegations he faced in writing, which would be expected if it were to be the disciplinary hearing. He was not informed of his right to be accompanied at the meeting. He was not provided with copies of the interview notes that were made when Mr Mills spoke to the other members of staff. When the Claimant was informed of his dismissal by telephone, he was not informed that he had a right to appeal, and no appeal took place.

68. The process followed by Mr Mills was not completely flawed. Mr Mills did carry out a full investigation, and he did give the Claimant an opportunity to respond to the allegations he faced. He also reasonably paused the process when the Claimant's step-father died and continued to pay him over that period. He also paid the Claimant for a further four weeks after he had dismissed him, even though he had formed the view that the Claimant had committed gross misconduct, and he was aware that meant he did not have to pay the Claimant notice pay. He decided to pay the Claimant for a further four weeks anyway because he was aware the Claimant was due to spend three to four weeks at his house in the Philippines and he did not want him to be "broke" when he got back.

69. The process that was followed overall was however procedurally unfair, mainly because the Claimant should have been informed of the allegations in writing before the disciplinary hearing and advised that he could be accompanied, and he should have been given a chance to appeal. I accepted Mr Mills' evidence that it was a small company and the only other person who could have heard the appeal was the other director, his wife. However, I did not consider that the circumstances were exceptional and justified a finding that despite the lack of any appeal process, the dismissal was still procedurally fair.

70. For this reason, I found the Claimant's dismissal to be procedurally unfair and therefore upheld his claim of unfair dismissal.

Decision on *Polkey*

71. During the hearing, I informed the parties that I would decide the issue of whether the outcome would have been different if a fair process had been followed and would also decide whether to reduce the Claimant's compensation due to contributory conduct when I decided whether or not to uphold the Claimant's claim.

72. I have decided that this is a case where even if the Claimant had been offered an appeal the outcome would have been the same. I also believe the outcome would have been the same even if the Claimant had been informed of the allegations in writing before the disciplinary hearing and had been

informed of his right to be accompanied at the disciplinary hearing. In other words, I have concluded that even if a fair process had been followed, the Claimant would still have been dismissed for gross misconduct on 21 December 2022.

73. The allegations that the Claimant faced were serious, and the evidence against the Claimant was compelling. When giving evidence to the Tribunal, the Claimant set out his version of events regarding what occurred on 17 November 2022. He said that Simon was sitting in his car crying again. This had become a common occurrence since Simon had returned to work after the death of his mother. The Claimant said he had asked Simon to come and do some work, and when he had refused, he had become angry and sworn at him a number of times. Although in his version, he did not use the word "cunt", he claimed to have said "fucking" more than once, whilst shouting angrily at Simon for not being willing to come and work. The Claimant's account relayed an abusive and inappropriate way to speak to a colleague. It was particularly inappropriate given that Simon was grieving the loss of his mother and was crying at the time. Even on the Claimant's account of what occurred, his behaviour amounted to gross misconduct, particularly as the Claimant had previously been warned about his language. Further, Mr Mills' reported (and I accepted) that the Claimant was generally particularly insensitive about Simon's loss, making it clear he could not believe that Mr Mills was paying Simon three weeks' bereavement leave.

74. The Claimant was given a chance to give his version of events when he spoke to Mr Mills on 25 November 2022. At that time, he said he could not recall the conversation with Simon on 17 November 2022. Yet in the hearing, he said he could recall it clearly. He then gave the version of events set out above. Even if the Claimant had been offered an appeal, and had relayed this version of events, I find his dismissal would have been upheld. The Claimant's misconduct, as described in his version of events, was only marginally less serious than the allegations that he faced.

75. Even if the Claimant had not relayed this version of events in an appeal hearing, and he had simply relied on his argument that inappropriate language was used by others in the workplace as banter, I still do not find that would have made any difference to the outcome. Banter relates to the use of (at times) inappropriate language in a light-hearted and teasing manner. There is a clear distinction between that and speaking abusively to a colleague. The allegations the Claimant faced were of repeated abusive language used in a demeaning manner, and on 17 November 2022 it was language used in anger. That is categorically different from banter. I therefore find that even if the Claimant had been offered an appeal, and had relied on this argument, his dismissal would have been upheld.

76. The only mitigation which the Claimant put forward at the Tribunal was that he had raised a number of times with Mr Mills and Mr Wenham that Simon was not fit for work and was sitting in his car crying. When asked to explain how this was relevant to the allegations he faced, he said that Simon was not doing his work properly, the Claimant was then being told by others that the cars were not clean enough, and this was making the Claimant angry. I did not find this to be persuasive mitigation for the allegations that he faced, and

I did not consider that if he had raised this as mitigation at an appeal it would have made any difference to the outcome.

77. Rather than making a percentage reduction, in this case, it is appropriate to limit the Claimant's compensation to the period of time it would have taken for an appeal to have been carried out. This is because I have reached the conclusion that a fair procedure would not have made a difference to the outcome. In this case, the Claimant was informed of his dismissal on 21 December 2022. I found that if an appeal had taken place, it would have been held within 2 weeks of his dismissal, and therefore the Claimant's compensatory award is limited to the losses he incurred in that period of time. The Claimant went to the Philippines in early January 2023. However, I find that it is likely that the appeal would have been heard before he left, between 27 December 2022 and 2 January 2023. I do not believe the Respondent would have left the appeal until he returned, given he intended to be away for a lengthy period of between 3-4 weeks.

78. The Claimant did not suffer any losses in that two-week period after his dismissal. The Claimant was not entitled to be paid notice pay in that period as he was dismissed for gross misconduct on 21 December 2022, and that would have remained the outcome even if he had been offered an appeal. Further, the Claimant was in fact paid over that period by the Respondent. The Claimant's compensatory award is therefore nil.

Contributory conduct

79. While the decision I have made above reduces the Claimant's compensation for the compensatory award to nil, I have considered the position regarding contributory conduct in any event. The Claimant's conduct caused his dismissal. His behaviour towards Simon, and his use of abusive language, had the characteristics of culpability and blameworthiness.

80. Applying the categories in *Hollier v Plysu Ltd,* I find the Claimant is wholly to blame for his dismissal and I would have reduced the compensatory award by 100% on this basis. There did not appear to me to be any other reason for the Claimant's dismissal other than his conduct. I have taken into account the fact that a finding that the Claimant was wholly to blame for his dismissal does not inevitably mean I should reduce his compensation to nil, but I found in this case it would be just and equitable to reduce the Claimant's compensation to nil.

81. The Claimant admitted in cross examination that when Mr Dodson had started working for the Respondent, aged 18, that the Claimant had said to him that he did not like him, and he thought he was going to take his work. When asked by Mr Mills, why he thought it was appropriate to speak to an 18-year-old that way, the Claimant had no reasonable justification for his behaviour. He accepted he had been warned by Mr Mills about his conduct towards Mr Dodson. He also accepted that Mr Mills had said to him, "If I spoke to you the way you speak to other people you would have quit". The Claimant accepted that Mr Mills had said this, and he had agreed with him. This clearly indicated to me that the Claimant was aware that his language and behaviour to others in the workplace was offensive and was not behaviour he would tolerate himself.

82. The Claimant said in his evidence that he now had a good relationship with Mr Dodson. On that basis, I found it was unlikely that Mr Dodson had been lying when he said the Claimant called Simon "cunt, useless wanker, spastic" not every day, but "a lot". He had also reported to Mr Mills that the Claimant had said to Simon, after his mother's death, "it's alright for you, you've had more paid holiday than us" (referring to Simon's bereavement leave), and "well at least you've got one less present to buy this Christmas." I found that the Claimant had behaved in this manner, as it was consistent with the Claimant's comments to Mr Mills that he could not believe that Mr Mills was paying Simon for three weeks of bereavement leave.

83. Overall, I found the Claimant's conduct in relation to the events that led to his dismissal, and his conduct more generally, was such that it would be just and equitable to reduce the Claimant's compensatory award to nil. For the same reasons, I found it would be just and equitable to reduce the Claimant's basic award to nil.

84. As a result, the Claimant's claim for unfair dismissal is upheld on the basis that the process that was followed was procedurally unfair, but the Claimant is not entitled to any compensation.

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Employment Judge Annand
Date: 4 December 2023