EMPLOYMENT TRIBUNALS

Heard at: London South (by video)

On: 5 December 2023

Claimant: D Heward

Respondent: UHV Design Limited

Before: Employment Judge Ramsden

Representation:

Claimant Mr M Withers, Counsel

Respondent Mr D Soanes, Solicitor

JUDGMENT

1. The Claimant's claim of unfair dismissal is not well-founded and is dismissed.

REASONS

Background

2. The Respondent is a developer and manufacturer of vacuum manipulation solutions based in Laughton, East Sussex.

3. The Claimant was employed as a Machine Room Manager from 23 September 2014 until 24 January 2023. His role included responsibility for ensuring that components used by the Respondent were cleaned to the requisite standards, and he managed a number of employees, including Louise Durrell.

4. The Claim centres around a single event and its aftermath, namely an altercation between the Claimant and Ms Durrell on 20 December 2022 (the **Incident**).

5. The Claimant was dismissed with notice on 24 January 2023 by reason of misconduct pertaining to the Incident. The parties disagree as to whether the Claimant's conduct was sufficient to justify his dismissal, and they disagree as to whether a fair process was followed by the Respondent.

6. The Claimant seeks compensation.

7. The Respondent contends that the Claimant was dismissed fairly, for a fair reason, following a fair and reasonable process. In the alternative, it says that the Claimant was fairly dismissed for "some other substantial reason", namely:

   a) that Ms Durrell suggested she would not be comfortable working with the Claimant again; and

   b) the Respondent had concluded that the Claimant had lost the respect of his colleagues as a result of his actions relating to the Incident.

8. The Respondent avers that it followed a fair procedure, but in the event that the Tribunal finds the Claimant's dismissal unfair because a fair process was not followed, the Respondent says that the Claimant would have been dismissed in any event.

9. The Respondent avers that any compensation payable to the Claimant for unfair dismissal should be reduced on the grounds of contributory conduct.

The facts

10. The parties agreed that the Claimant had been provided with a copy of the Respondent's:

    a) Non-contractual Rules for Employees, which included:

    "*Employees must at all times comply with working directions and reasonable requests issued by Managers or Directors*";

    "*Threatening behaviour, abusive language … will be treated as gross misconduct and may result in the dismissal of those responsible*"; and

    "*Some acts, termed gross misconduct, are so serious in themselves or may have such serious consequences that they may call for dismissal without notice for a first offence. The following are examples of acts which [the corporate group of which the Respondent was part] regards as gross misconduct…*

    iii. Physical violence, assault or threatened assault…

    vi. A serious act of insubordination or wilful disobedience of a lawful and reasonable instruction".

    b) Non-contractual (in respects relevant to this claim) Disciplinary Procedure, which included:

    "*The aim of the management will always be to combine consistency in the operation of this Procedure with the administration of justice for individuals. It will always be the intention of the Company, whenever reasonably practicable, to help employees whose conduct gives cause for dissatisfaction to achieve improvement so that the required standards may be met*";

"*Written Warnings, Precautionary Suspensions and Dismissal Decisions: These may only be implemented by the Managing Director or his nominated deputy*";

"*It is recognised that in many instances a minor case of misconduct… will probably best be dealt with by the issue of informal advice, coaching or counselling to encourage and help the employee to improve rather than by adopting formal disciplinary steps*";

"*[The Respondent's corporate group] recognises that the involvement of an independent third party or mediator can sometimes help resolve disciplinary issues. The process set out within this Disciplinary Procedure may be suspended for a specified period under circumstances where the Company concludes that mediation may be an appropriate method of being able to assist in resolving the situation*";

"*[Written warnings] are issued where infringements of rules are regarded as being serious… A written warning may be issued in respect of a first instance of serious misconduct…*"; and

"*Only the Managing Director (or his nominated deputy) shall have the power of dismissal…*".

Examples of gross misconduct listed in the policy included:

"*iii. Physical violence, assault or threatened assault*"; and

"*v. … any act of harassment, bullying or intimidation…*".

11. On 20 December 2022, the Claimant instructed Ms Durrell that the method she had used for cleaning several components was not acceptable and the components would need to be cleaned again. Ms Durrell reacted angrily and her response was, as both parties agree, inappropriate, involving foul language and aggression. The Claimant responded reasonably, before leaving the room for a short period.

12. The Claimant then returned to the room to speak to Ms Durrell again (an action which both parties agree was ill-judged). Ms Durrell again reacted angrily towards the Claimant and raised her voice to him, again using foul language in an aggressive way. The Claimant responded by raising his voice towards Ms Durrell. At this point, the parties' accounts differ:

    a) The Claimant says that Ms Durrell pushed past him and that he stood his ground, while asking her to stop and listen, with his hands raised in a defensive gesture to encourage her to stop, while she was shouting at him.

    b) The Respondent says that Ms Durrell told him that she needed a five-minute break, but that the Claimant deliberately blocked Ms Durrell's path to the door. It says that when Ms Durrell moved around the room's central furniture to reach the exit by another means, the Claimant walked around to physically block Ms Durrell's exit, raising his hands in a stopping

gesture, and continuing to raise his voice towards her. The Respondent says that the Claimant physically blocked the Claimant's exit on at least three occasions, before Ms Durrell, in great distress and agitation, pushed past him to run out of the room.

13. The parties agree that, at this point:

    a) The Claimant swore loudly, as Ms Durrell was leaving the room; and

    b) The Claimant sent Ms Durrell home shortly thereafter.

14. The Claimant then immediately went to speak to his line manager, Tom Yates (Operations Director), and to Patrick O'Farrell (Production Manager), to inform them of the incident.

15. A couple of hours later the Claimant was sent home.

16. He was formally suspended from work two days later, and simultaneously invited to a disciplinary hearing. No formal disciplinary process was undertaken with Ms Durrell, though she was spoken to about the Incident. The Respondent says that there are two differences of significance between the Claimant's behaviour and that of Ms Durrell:

    a) The Claimant was a more senior employee than Ms Durrell; and

    b) Ms Durrell immediately apologised for her behaviour and the manner in which the altercation had escalated. The Respondent says that the Claimant did not apologise at this time.

17. As for the disciplinary process involving the Claimant:

    a) Mr Yates requested written witness statements from the Claimant, Ms Durrell and three witnesses in the room at the time: Charlie Elliott, Richard Ford and Nicholas Greenfield. Those witness statements were provided on the same day as the Incident from the Claimant and the three witnesses, and from Ms Durrell the following day. Mr Yates sensibly took steps to separate out the witnesses, as he had previously been involved in a disciplinary process where the witnesses had spoken to each other for several days before writing their statements, and wanted to ensure that in this case the witnesses' reports were uninfluenced by the recollections of the others.

    b) The individuals who provided those witness statements, besides the Claimant himself, were not proffered as witnesses before this Tribunal. The value of their contemporaneous statements as part of this Tribunal's consideration is therefore, at best, limited, as they have not been made available by the Respondent for questioning. The two ways in which those statements are informative are that:

        (i) they explain why Mr Yates recommended that the Claimant's conduct in relation to the Incident proceed to a disciplinary hearing; and

(ii) Mr Hardy took them into account when he met with the Claimant at the disciplinary hearing, and so they aid our understanding of his decision-making. However, Mr Hardy's evidence was clear that the view he reached of the ways in which the Claimant's actions fell short of those that were expected of him was corroborated by the Claimant himself – as best described in the minutes of the disciplinary hearing. As Mr Hardy's witness statements observes: "*Dave had suggested the witnesses may have colluded, but actually their version of events was not much different from his on the key allegations.*"

c) Mr Yates reviewed those statements, and decided that:

(i) the Claimant should be suspended. In oral evidence Mr Yates said that this was because the Claimant managed several of the witnesses, and that it would be better for all involved for him not to manage those individuals until the conclusion of the investigation and any following disciplinary process, to ensure there were no further incidents and that people did not retract or alter their statements; and

(ii) the Claimant had possibly been guilty of:

I. threatening behaviour, using abusive language and physical assault, which are examples of gross misconduct under the Respondent's Rules for Employees; and

II. threatened assault or bullying or intimidation, which are classed as gross misconduct under the Respondent's Disciplinary Policy,

and he also observed that, in his statement, the Claimant did not accept that he had done anything wrong.

d) The invitation to the disciplinary hearing, sent by Mr Yates two days after the Incident, on 22 December 2022:

(i) Set out the allegations against him, being:

"*… you:*

- *Raised your voice to a colleague,*
- *Used aggressive and abusive language towards a colleague,*
- *Physically blocked a colleague from leaving a room; and*
- *Pushed a colleague back into the room when she had made it clear she wanted to leave*";

(ii) Attached the five statements gathered, from the Claimant, Ms Durrell and each of the three witnesses;

(iii) Warned the Claimant that if the allegations were upheld, he may be dismissed without notice or pay in lieu of notice;

(iv) Stated that "*Due to the nature of the allegations made, we feel it is appropriate to extend your period of suspension…*"; and

(v) Informed the Claimant of his right to be accompanied at the hearing. Subsequently, the Claimant asked if he could bring his wife, which the Respondent did not permit as she was neither an employee of the Respondent or a trade union representative. The Claimant was unaccompanied at the disciplinary hearing.

e) Copies of the Respondent's disciplinary and grievance procedures, together with a copy of the Claimant's contract of employment, were subsequently sent to him ahead of the disciplinary hearing.

f) Each of the three witnesses and Ms Durrell were separately interviewed by the Respondent's Managing Director, Trevor Nicholls, in the presence of a member of the Respondent's HR team, Angela Toates, on 11 January 2023. Copies of the notes of the interviews with the three witnesses were provided to the Claimant on 16 January 2023, ahead of the disciplinary hearing, but not the notes of the interview with Ms Durrell.

g) The Claimant wrote to the Respondent on 16 January 2023, summarising his position ahead of the disciplinary hearing. The key points from that letter are:

(i) The Claimant was unaware that he was suspended when he was sent home on the day of the Incident. He only became aware of his suspension on 22 December, when he received a letter to that effect. He complained about the way his suspension was communicated.

(ii) He also said that his suspension was not reasonable, and that the Respondent should have updated him about the progress of the investigation while it was ongoing.

(iii) He averred that the Respondent's investigation was too hasty to conclude that he had a disciplinary case to answer, and that no investigation report had been shared with him.

(iv) He considered that the Respondent was biased against him, and that it had already made a pre-determined decision.

(v) He pointed to his eight years of service and his good record with the Respondent, and he referred to his diabetes and the fact that hyperglycaemia can induce "diabetic rage".

(vi) He accepted that he raised his voice and did not handle the situation very well. He expressed contrition: "*It was not my intention to come across with an aggressive tone and I feel terrible that that was the perception, which is out of character for me. However, I was taken aback at the time from being sworn at, being refused a direct order, and then to be physically pushed by her. I was provoked and to my dismay, the stressful situation got the better of me.*"

(vii) He pointed out that Ms Durrell had been insubordinate, overly emotional and aggressive towards him and, to his knowledge, had not been suspended or disciplined.

(viii) He also pointed out that none of the statements from Ms Durrell or the witnesses accuse him of pushing Ms Durrell.

(ix) As regards physically blocking Ms Durrell from leaving, the Claimant said that he was stood in the room and "*In no way was I trying to stop her from leaving*".

h) The Respondent replied to the Claimant on the same date:

(i) Agreeing that the fourth allegation, that the Claimant had "*Pushed a colleague back into the room when she had made it clear she wanted to leave*", was not supported by the statements, and withdrawing it; and

(ii) Noting that Ms Durrell had said to Mr Nicholls that she would not be comfortable being on her own with the Claimant again, and asking the Claimant to be prepared to speak at the disciplinary hearing about how the relationship between the two of them could be repaired if they are going to continue to work with each other.

i) At the start of the disciplinary hearing the Claimant was given a copy of the interview notes with Ms Durrell, and given an opportunity to review those notes before the disciplinary hearing got underway.

j) As for the disciplinary hearing itself on 19 January 2023, Russell Hardy, the Respondent's Sales Director, chaired the meeting, with HR support provided by Ms Coates. It was expected at that time that Mr Hardy would make a recommendation to the Respondent's leadership team, for that team to collectively decide on the outcome. The Claimant attended (unaccompanied). Minutes were taken of the key points of this meeting, and the Claimant was subsequently given the opportunity to comment on them, which he did, confirming in oral evidence that they (as marked up by him) accurately captured the key points discussed. The key points shown in those minutes (as marked-up by the Claimant) are:

(i) Mr Hardy opened the meeting, outlining that the purpose of the meeting was to:

I. Establish the facts;

II. Determine whether there are proper grounds to take disciplinary action against the Claimant; and

III. If so, to determine the level of such disciplinary action.

(ii) The Claimant was aware of his right to be accompanied, he would have liked his wife to be present but understood and accepted the Respondent's policy on that.

(iii) Mr Hardy noted that the meeting could be adjourned if it appeared necessary or appropriate to do so, including for the purpose of gathering information.

(iv) Mr Hardy outlined the three (remaining) allegations against the Claimant, reminded the Claimant that an outcome could be summary dismissal, and this was the Claimant's chance to put across his case.

(v) The minutes (as commented on by the Claimant in a small number of places) record the Claimant as having said:

I. "*In hindsight I should have let her go*";

II. "*I did raise by voice – because she was yelling at me*";

III. "*I did not swear directly at her, I did swear after she left the room, through exasperation, I regret that*";

IV. "*I am experienced and I should have handled it better, I let the situation get the better of me, in hindsight I would handle it differently. My intentions are honourable – finding the solution to the problem, I was frustrated, I wasn't chastising Louise, at no point did I swear at her, I did stand my ground when she was in my face as she was animated*";

V. "*I admit I raised by voice, but I was not shouting, I put my hands up in a passive manner, it was not my intent to shout her down*";

VI. When Mr Hardy asked "*Do you think that you aggravated Louise?*", the Claimant replied "*Yes*";

VII. When Mr Hardy asked "*Did you back off?*", the Claimant said "*No I stood my ground, I should have stepped back and let her leave, I was not expecting it to elevate to a shouting match. I know what I should have done, if we were doing a role play, I would handle it differently*";

VIII. "*I have struggled with my diabetes recently… the high blood sugars can make you more anxious and tense and I think this was definitely a contributory factor*";

IX. "*I may have been more pointed, but aggressive, than I would normally be. At no point did I raise my voice, all I said was stop, calm down let's talk. No swearing, nothing aggressive*";

X. Mr Hardy: "*we need to consider the impact on the other people involved.*" The Claimant replied: "*I can't deny it – it is an absolute challenge to come back from this… I have not been in this position in my whole career. It's out of character. You've known me for 8 years*";

XI. The Claimant also said that members of the management team were "*fully aware*" of the fact his "*diabetes was out of control*";

XII. When asked how he felt about it, the Claimant said "*Terrible, absolutely terrible, I wish I handled it differently. I haven't stopped replaying it. What could I have done differently, what I should have done, I've let myself down, as you say I am an experienced manager, it should not have happened… I regret it*", and later on: "*I hold my hands up to my wrongdoing, my intention was ill judged, my behaviour was ill judged. I acknowledge I could have handled it differently. I've got to live with that, it wasn't my greatest day*";

XIII. Mr Hardy asked the Claimant how he would find it, if he went back to work. The Claimant answered: "*It will be challenging… I can give an apology but that won't cut it, I can explain that I've been affected by diabetes… I'm not sure how recoverable this is, I'm open to suggestions. I'm willing to do my part, to mitigate this, have conversations. I don't have any answers right now, but there needs to be a management discussion around it*";

XIV. The Claimant criticised the investigation: "*Regarding the allegations in the letter, in my opinion you reopened investigation, I should have been informed, in my eyes that was a process failure…*". Mr Hardy countered: "*In my view, that shows we are following the process and considering the evidence we have; it was removed as a result*". The Claimant goes on to say: "*From my perspective it has felt pretty pre-determined*";

XV. Ms Toates explained that the next step was for Mr Hardy to make a recommendation for outcome to Mr Nicholls, the Managing Director, and the leadership team, if appropriate; and

XVI. In closing, Mr Hardy observed that "*The tricky part is with regards to the allegations; most have been confirmed – we need to decide whether this is misconduct or gross misconduct. My view is that this is definitely misconduct, but not gross misconduct; it shouldn't have happened. You clearly regret it*".

k) The following day, on 20 January 2023, Mr Hardy repeated his view to the Respondent's leadership team. He wrote:

"*My recommendation communicated with Dave in the meeting is that this is a case of misconduct. Dave confirmed all of the following allegations were accurate with the exception noted below:*

- *Raised your voice to a colleague, (Confirmed by Dave)*
- *Used aggressive and abusive language towards a colleague (Excpetion [sic]: Dave agreed that his raised voice and choice of words could have been perceived as aggressive even though there is no evidence to say any abusive language was directed at Louise)*
- *Physically blocked a colleague from leaving a room; (Confirmed by Dave)*

Dave showed a serious lack of judgement in the handling of the situation with Louise and our staff have right to come to work without fear or anxiety.

Although technically this is gross misconduct, Dave showed genuine regret and remorse in the meeting and was visibly distressed throughout. He was also incredibly professional and even sympathetic to my position. As a result, in my judgement a fair recommendation is that Dave should be dismissed due to misconduct with paid notice period etc."

l) Subsequently, it was decided that Mr Hardy should be the sole decision-maker. His evidence is that he was the sole decision-maker, and that "*no-one else influenced [his] decision or sought to influence [his] decision in any way*".

m) Mr Hardy's decision was communicated to the Claimant on 23 January 2023. That included:

"*Having considered all of the evidence and having taken into account your responses to the allegations, including those you set out in our meeting, I'm sorry to tell you that I have decided that your employment should be terminated. However, rather than summarily dismiss you, I have decided that you should be paid in lieu of notice...*

"*You admitted to raising your voice and to physically blocking a colleague from leaving a room. You did not admit to using aggressive and abusive language towards a colleague and I accept that you only swore after Louise left the room.*

"*I cannot be certain whether you physically touched Louise but I am satisfied that you put your hands up and stood in her way, thereby physically blocking her from leaving the room.*

"*I have considered whether raising your voice to a colleague and, more particularly, physically blocking her from leaving the room amount to acts of verbal or physical assault and/or threatening behaviour – which are classed as gross misconduct under the company's disciplinary procedure. I have decided that they do…*

"*I have carefully considered what sanction I should impose. I have taken into account the fact that there was a certain amount of provocation on the part of Louise… I have also taken into account your years of service with the company and the fact that you have no disciplinary warnings against you… Finally, I have also considered whether your conduct may have been influenced by your diabetes… I accept what you say about blood sugar levels potentially impeding self-control, causing irrational behaviour and loss of control and intensifying agitation. However, I also note that you have made it clear throughout that you did not lose self-control… I have taken into account the fact that you suggested in our meeting you did regret your actions and that you would be willing to apologise to try to find a way back… However, I have decided that it would be unreasonable to put Louise in that position. Also, I'm afraid I don't see a way back for you among those colleagues – as you have clearly lost their respect as a result of your actions on that day.*

"*There are no other roles which you could do away from those colleagues – Louise in particular.*"

The letter noted the Claimant's right to appeal, and how he should appeal (by email to Mr Nicholls).

n) The Claimant did not appeal the decision to dismiss him.

o) Early conciliation was conducted in the period 13 March to 18 April 2023, and the Claimant filed his Claim Form on 17 May 2023.

Disputed fact

18. There is only one fact of significance that is disputed by the parties.

<u>Did the Claimant physically block Ms Durrell's path as she tried to leave the cleaning room?</u>

19. Mr Hardy understood that the Claimant admitted that he had blocked Ms Durrell from leaving the room in the course of the disciplinary hearing, but it is clear from his oral evidence his position to the Tribunal that is that he did not deliberately block the Claimant.

20. The evidence in support of the Claimant's position is:

    a) His statement sent to the Respondent on 16 January 2023, which included:

    "*With regards to physically blocking a colleague from leaving, I was already standing there when she pushed me and was swearing at me. I put my hands up in a stopping gesture (I did not touch her) to try and calm her down. I was not deliberately blocking her from leaving. I was trying to diffuse the situation… In no way was I trying to stop her from leaving…*"; and

    b) The Claimant's witness statement in these proceedings contains the following:

    "*Out of the two routes to the double door exit, I was standing on one side… Louise stormed towards me, and tried to push me out of the way. She was now shouting and swearing in my face. Her behaviour was aggressive and intimidating. I was in complete shock. Instinctively, I put my hands up towards my own chest in a passive gesture… Louise then turned around and went the other way around the tanks past Nick, Richard, and Charlie, to leave… I turned to face her way and said that if she continued with this behaviour then I would send her home. She said ,'I will then' and I replied 'Okay, go'. She then left through the double doors.*"

21. The evidence in support of the fact that he did is the following:

    a) The evidence of Ms Durrell and the three other people in the room at the time, Mr Elliott, Mr Greenfield and Mr Ford. Each refer to the Claimant blocking Ms Durrell's exit on at least one occasion.

    b) The minutes of the disciplinary hearing record the Claimant as having said:

    "*I stood my ground, I should have stepped back and let her leave*" (indicating that he didn't let her leave, i.e., he prevented her from leaving);

    c) The minutes of that meeting also record Mr Hardy as saying:

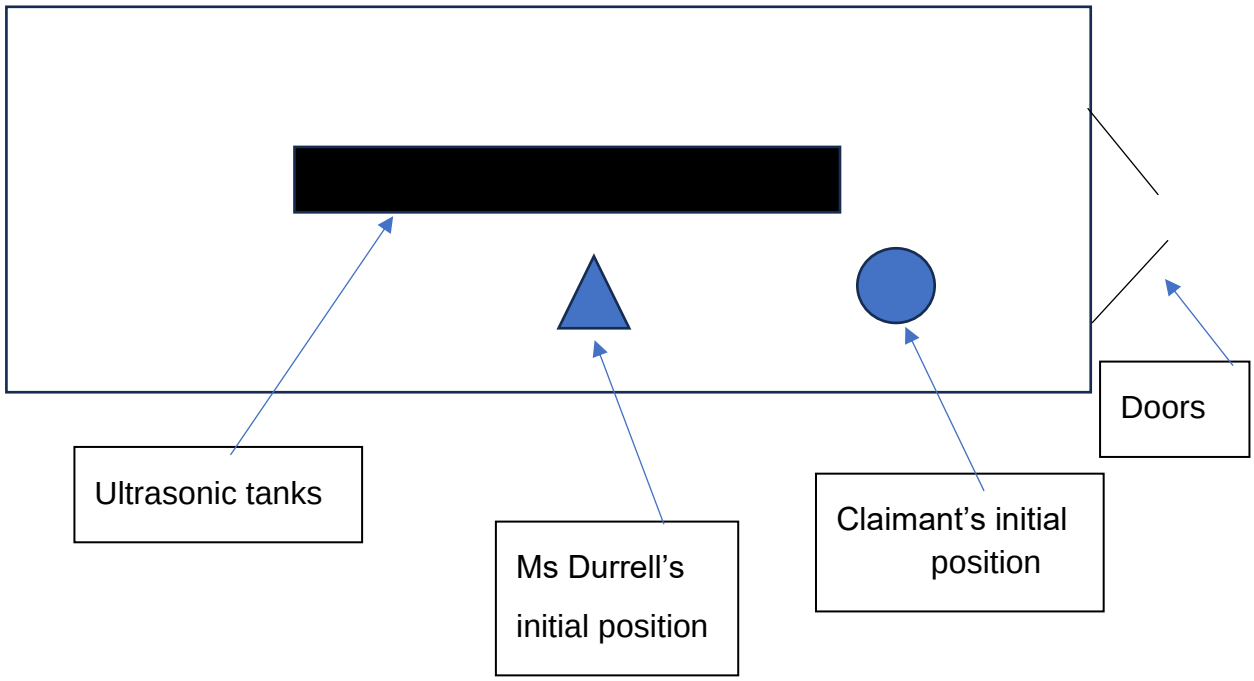
    "*The tricky part is with regards to the allegations; most have been confirmed*".

    This was not challenged by the Claimant at the time, nor in his review of the minutes (when he did comment on other aspects of those minutes);

    d) When Mr Hardy emailed the Respondent's leadership team the following day, he went through each of the three remaining allegations and summarised where the Claimant had confirmed or confirmed part of them.

This records that the Claimant confirmed that he "*Physically blocked a colleague from leaving the room*";

e) In oral evidence to the Tribunal, the Claimant spent some time explaining the plan drawings of the cleaning room in which the Incident occurred. The room, he explained, is rectangular, and taking a birds eye view (as the plan drawings do) its width (left-to-right) is more than twice its depth (top-to-bottom). The exit doors are on the right-hand side, on the short depth side. In the centre of the room are ultrasonic tanks for cleaning. The route around the room therefore involves walking around the tanks.



In oral evidence, the Claimant said, when asked about the other evidence from the people in the room that he had blocked Ms Durrell: "*I didn't, but what you need to understand if you look at plan drawing, width where I was standing was only 1m wide – I didn't move out of the way, but she moved at me so quickly I couldn't*". He went on to describe how Ms Durrell then walked around the other side of the cleaning tanks (i.e., to the top of the diagram above), and attempted to leave that way. For the Claimant to be stood in her way when she attempted to leave the other way, he must have moved in response to her movements, i.e., upwards so that his body was then positioned so as to prevent her exit from that side of the tanks. This fits with his written witness statement, where he says "*I turned to face her way*" – according to his own description of where he was in the room, he would have had to have stepped (upwards in the diagram) to inhibit her exit, which in oral evidence he seemed to concede. When asked whether he agreed that he physically blocked her leaving, the Claimant said "*Choice of words*

could be seen as aggressive – could be seen as aggressive, but that wasn't the intention. The intention was not to block Louise per se*. The whole incident was a split second.*"

This act, of stepping into her path as she attempted to leave by stepping around the cleaning tanks, would have seemed more like "blocking" her if, in that narrow space, the Claimant also raised his hands up to shoulder height, as he indicated in evidence that he did. That action would have made the space around him even smaller for Ms Durrell to exit.

22. Consequently, I find that even if the Claimant was inadvertently blocking Ms Durrell's initial attempt to leave the room by physically being stood where he initially was, his action – which I find he took – of moving (upwards in terms of the diagram) advertently inhibited her exit.

The hearing

23. The Claimant was represented by Mr Withers, Counsel, and the Respondent by Mr Soanes, Solicitor.

24. The parties had agreed a hearing bundle of 208 pages.

25. Evidence was given by Mr Yates and Mr Harvey for the Respondent, and by the Claimant on his own behalf.

26. As neither the Bundle nor the witness statements had arrived ahead before 15 minutes ahead of the start time of the hearing, time was lost as the Employment Judge read those materials before oral evidence could be given. Submissions followed, finishing at 5pm, and so judgment had to be reserved.

The Claim

27. The Claimant has brought a single claim of unfair dismissal. He avers that:

    a) His dismissal was substantively unfair:

        (i) Because the Claimant was dismissed despite a finding that he was provoked by an insubordinate member of staff who used foul and inappropriate language at him;

        (ii) The substantive unfairness of the Claimant's dismissal is illustrated by the disparity in treatment between him and Ms Durrell;

        (iii) The Respondent failed to properly weigh up his eight years' clean disciplinary record, the impact of his diabetes on his behaviour on the day, and the facts that he apologised, showed professionalism and honesty, and wanted to make amended; and

    b) His dismissal was procedurally unfair:

(i) Because he was suspended without notice and without being told that had occurred;

(ii) The investigation was too quick, without hearing from the Claimant, and then it was re-opened;

(iii) The investigation led to an unsubstantiated disciplinary allegation against him (namely the fourth allegation, that the Claimant "*Pushed a colleague back into the room when she had made it clear she wanted to leave*");

(iv) A disciplinary hearing was convened, but the Claimant was not given an opportunity to ask questions of or hear from the witnesses, in breach of the Respondent's policy;

(v) The Respondent failed to give any proper consideration to sanctions short of dismissal; and

(vi) The Respondent's offered appeal was tainted, and would not have changed the outcome.

28. The Respondent says that it had a fair reason and followed a fair procedure, and that its dismissal of the Claimant was fair.

Law and good practice guidance

Unfair dismissal: The law on dismissal for misconduct

29. The protection of employees from unfair dismissal is set out in section 94 of the Employment Rights Act 1996 (the **1996 Act**).

30. Section 98(1) sets out that that an employer may only dismiss an employee if it has a **fair reason** (or principal reason) for that dismissal:

"*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."

31. The Supreme Court in *Royal Mail Group Ltd v Jhuti* [2020] ICR 731 held that:

"*In searching for the reason for a dismissal... courts need generally look no further than at the reasons given by the appointed decision-maker*".

32. Subsection (2) of section 98 identifies "*the conduct of the employee*" as a reason falling within subsection 98(1).

33. In the context of a dismissal for "conduct", the employer must have reasonably believed the employee guilty of misconduct at the time of the decision to dismiss

them. The seminal decision of *British Home Stores Ltd v Burchell* 1980 ICR 303, EAT, as refined in subsequent authorities such as *Singh v DHL Services Ltd* EAT 0462/12 and *Boys and Girls Welfare Society v McDonald* [1996] IRLR 129, set out three questions to be answered when assessing the fairness of a conduct dismissal:

a) Did the employer believe the employee guilty of misconduct at the date of dismissal?

b) Did the employer have reasonable grounds for that belief? and

c) At the stage when the employer's belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances?

34. As for the degree of thoroughness required for an investigation to be reasonable, that is, according to the EAT in the case of *ILEA v Gravett* [1998] IRLR 497:

"*infinitely variable; at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including questioning of the employee, is likely to increase. At some stage, the employer will need to face the employee with the information which he has. That may be during an investigation prior to a decision that there is sufficient evidence upon which to form a view or it may be at the initial disciplinary hearing*".

35. The requisite degree of thoroughness of an investigation is not only assessed by reference to the weight of initial evidence of what the employee is alleged to have done (e.g., whether they have been "*caught in the act*"), but also by the gravity of the charges and their potential effect upon the employee (*A v B* [2003] IRLR 405).

36. Subsection (4) of section 98 provides:

"*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."

37. In other words, when the employer has been shown to have a potentially fair reason for dismissal, a further enquiry follows as to whether, looked at 'in the round', the dismissal was fair or unfair.

38. The test in section 98(4) is an objective one. When the employment tribunal considers the fairness of the dismissal, it must assess the fairness of what the

employer in fact did, and not substitute its decision as to what was the right course for that employer to have adopted (*British Leyland v Swift* [1981] IRLR 91).

39. 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 one view, another quite reasonably take another. The correct approach is for the tribunal to focus on the particular circumstances of each case and determine whether the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted in light of those circumstances. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439).

40. Therefore, if all three of the *Burchell* questions are answered in the affirmative, a further question must be answered by the Tribunal – whether, in light of its genuine and reasonable belief in the employee's misconduct, the sanction of dismissal was within the range of reasonable responses open to it on an objective basis (*Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* [2012] EWCA Civ 903).

41. Section 98(4) (i.e., the fourth question referred to above) requires a tribunal to "*consider the fairness of procedural issues together with the reason for the dismissal and decide whether, in all the circumstances, the employer had acted reasonably in treating it as a sufficient reason to dismiss*" (*Taylor v OCS Group* [2006] EWCA Civ 702). As Smith LJ, giving the judgment of the Court, said in (paragraph 48 of) that case: "*it may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not… the employment tribunal … should consider the procedural issues together with the reason for the dismissal, as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss.*"

42. Consequently, not every procedural defect will render a dismissal unfair. As Mr Justice Langstaff (President) stated, in the EAT case of *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/SM:

> "*It will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process. It will be and is for the Tribunal to evaluate whether that is so significant as to amount to unfairness*".

43. It is the entirety of the employer's process (together with its reasons for dismissal) that should be assessed when considering whether the employer acted fairly in dismissing the employee (*Taylor*).

44. Moreover, the assessment of the fairness of the dismissal required by section 98(4) takes account of the particular factual circumstances, including the "*size and resources of the employer*".

Mitigating factors?

Diabetic rage

45. The decision of the Manchester Employment Tribunal in *Dytkowski v Brand FB Limited* (Case No: 2402856/2019) was brought to this Tribunal's attention in the course of oral argument by the parties. In that matter, the claimant was accepted by the respondent as disabled by reason of his diabetes, and the claimant sought to establish that the behaviour he disabled was something arising from his disability. The Tribunal in that case – which is, of course, not binding on this Tribunal – took judicial notice of the fact that variation in blood sugar can have an impact on a person's emotions. The Tribunal in that case paid "some regard" to articles cited by the claimant in that case relating to the phenomena of 'diabetic rage' – which support the proposition that uncontrolled blood sugar levels in diabetic sufferers can leave sufferers more susceptible to strong emotions, including anger.

Length of service

46. The EAT in *Johnson Matthey Metals Ltd v Harding* [1978] IRLR 248 found that the Industrial Tribunal in that case had been entitled to take account of the claimant's 15 years' unblemished service with the company when considering whether the respondent had acted fairly in dismissing the claimant for misconduct, i.e., whether it was a reasonable penalty in the circumstances (in this case, where the employee had been found to have stolen a colleague's watch).

47. Where there is more than one way to interpret the facts in a given case – for example, that either the employee was trying to defraud the company or had made a stupid mistake - an employee of long service and good conduct ought to be better believed than one of short service and poor conduct (*O'Brien v Boots Pure Drug Co Nottingham* [1973] IRLR 261).

48. However there are cases where the gravity of the employee's conduct means that their length of service is of no materiality (*AEI Cables Ltd v McKay* [1980] IRLR 84). As the EAT put it in *London Borough of Harrow v Cunningham* [1996] IRLR 256, "*in cases of serious misconduct length of service will not save the employee from dismissal*".

Parity of treatment

49. The Court of Appeal in *The Post Office v Fennell* [1981] IRLR 221 considered the language in the predecessor legislation to section 98(4) of the 1996 Act which also referred to the assessment of fairness of dismissal involving consideration of "*equity and the substantial merits of the case*". The Court held that this encompasses the concept of parity of treatment – that an employer will not be regarded as having acted reasonably if it treats an offence as a sufficient reason for dismissal when it has not done so for others who have committed similar offences in the past:

"*It seems to me that 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, and it seems to me that an Industrial Tribunal is entitled to say that, where that is not done, and one man is penalised much more heavily than others who have committed similar offences in the past, the employer has not acted reasonably in treating whatever the offence is as a sufficient reason for dismissal.*"

50. However the Court in that case also recognised that:

"*there is an area of manoeuvre within which it cannot be said that an employer is being unreasonable*",

i.e., identical treatment is not always required for similar offences, but on the facts of the case it found that "*latitude*" for variation had been exceeded. The President, Sir John Arnold, went on to say:

"*the question whether inconsistency was demonstrated to the point of unfairness seems to me to be a matter for industrial judgment*".

51. The authorities are clear that there must be true parity between the comparison cases in order for past treatment of a different employee to bear on the fairness of the dismissal of an employee now (*Paul v East Surrey District Health Authority* [1995] IRLR 305). Each case will turn on its own facts and circumstances, and even in cases of similar misconduct, the employer (and tribunal) should also, as per section 98(4), look at the facts and circumstances of the particular individual concerned – even if their conduct is very similar to that of another employee, their personal circumstances may be quite different, and so whether dismissal is within the range of reasonable responses may differ between them.

<u>Unfair dismissal: The ACAS code</u>

52. Section 207 of the 1992 Act provides that:

"*(1) A failure on the part of any person to observe any provision of a Code of Practice issued under this Chapter shall not of itself render him liable to any proceedings.*

(2) In any proceedings before an employment tribunal or the Central Arbitration Committee any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provisions of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."

These provisions apply to the Acas Code of Practice on disciplinary and grievance procedures (the **ACAS Code**).

53. The relevant extracts of the ACAS Code are set out below:

"*3. Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when*

deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code.

…

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

…

23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct."

Application of the law to the facts here

54. As set out above, "*the conduct of the employee*" is a potentially fair reason for dismissal (under section 98(2) of the Employment Rights Act 1996). In light of the line of authority stemming from *Burchell*, the questions then become:

a) Whether the Respondent genuinely believed the Claimant guilty of misconduct at the date of dismissal;

b) Whether the Tribunal regards the Respondent as having had reasonable grounds for that belief;

c) Whether the Tribunal finds that, when the Respondent's belief was formed, it had carried out as much investigation into the matter as was reasonable in the circumstances; and

d) Whether the Tribunal considers that the Respondent's response – of dismissing the Claimant – was within the range of reasonable responses available to it.

Question 1: Did the Respondent genuinely believe the Claimant guilty of misconduct?

55. Yes, Mr Hardy was the Respondent's decision-maker (*Jhuti*), and his evidence was absolutely clear that he believed the Claimant guilty of misconduct – he considered the three allegations of misconduct made out. He did so based on the Claimant's own acknowledgements of the ways in which the Claimant's conduct fell short of the standards the Respondent expected. Specifically, he considered that:

a) The Claimant had confirmed that he had raised his voice to Ms Durrell (and the Claimant accepted in evidence before the Tribunal that he did this);

b) The fact that the Claimant had raised his voice, together with his choice of words could have been perceived as aggressive; and

c) The Claimant confirmed he had physically blocked a colleague from leaving a room.

56. This Mr Hardy regarded as "*Threatening behaviour*" (an example of gross misconduct given in the Respondent's Rules for Employees), and verbal or physical "*assault*" (an example of gross misconduct given in the Respondent's Rules for Employees and its Disciplinary Procedure).

Question 2: Did the Respondent have reasonable grounds for that belief?

57. Yes, the evidence before Mr Hardy was weightily in favour of finding that three of the four allegations were made out. The Claimant had agreed (and he repeated that agreement in his evidence before the Tribunal) that he had:

a) raised his voice to Ms Durrell; and

b) the fact that the Claimant had raised his voice, together with his choice of words could have been perceived as aggressive.

58. As for Mr Hardy's conclusion on the third allegation, that the Claimant had physically blocked Ms Durrell from leaving a room (and as described in the Disputed Fact section above), while the Claimant's statement sent to the Respondent on 16 January 2023 disputed this:

a) The evidence of Ms Durrell and the three other people in the room at the time, Mr Elliott, Mr Greenfield and Mr Ford each referred to the Claimant blocking Ms Durrell's exit on at least one occasion;

b) The Claimant said in the disciplinary hearing that: "*I stood my ground, I should have stepped back and let her leave*" (indicating that he didn't let her leave, i.e., he prevented her leaving);

c) Mr Hardy also understood that he had gone through those three allegations and confirmed that the Claimant had admitted them when summing up their discussion at the end of the disciplinary hearing, recorded in summary form in the minutes (which note that Mr Hardy said: "*The tricky part is with regards to the allegations; most have been confirmed*"). The Claimant did not challenge that part of those minutes; and

d) The Respondent had no reason to consider that the Claimant disputed that position – it was reflected in the disciplinary outcome letter, and the Claimant did not appeal the decision to dismiss him (and this is relevant, as per *Taylor*, because the totality of the process should be examined when assessing the reasonableness of the Respondent's belief).

59. The Respondent did have reasonable grounds for that belief.

Question 3: At the time when the Respondent formed that belief, had it carried out as much investigation into the matter as was reasonable in the circumstances?

60. Again, yes it had.

61. The Claimant has complained about Mr Yates' investigation, describing it as "*quick*", conducted "*without hearing from [the Claimant]*", and having been "*re-opened*", but (besides the error of the fourth allegation, which the Respondent withdrew ahead of the disciplinary hearing) the Tribunal finds no fault with it as an initial first-part of an investigation – but it was not the totality of the Respondent's investigation.

62. As for whether the investigation was "*re-opened*", this is to misunderstand the facts. Mr Yates was never presented by the Respondent as having *completed* its investigation – his role was simply to advise whether there was a disciplinary case to answer, and further investigation was then conducted by Mr Nicholls, interviewing Ms Durrell and the three other people present in the Incident.

63. The Claimant had prepared a statement and sent it to the Respondent on 16 January 2023, which was considered by Mr Hardy ahead of the disciplinary hearing, and discussed by him with the Claimant in that meeting. That consideration formed part of Mr Hardy's part in the Respondent's investigation of the matter.

64. Moreover, Mr Hardy discussed each of the allegations and all of the evidence at length with the Claimant in the disciplinary hearing, and thoroughly examined and discussed the Claimant's 'take' on what had occurred. That was part of the investigatory process. That discussion followed the Claimant having been given:

    a) on 22 December 2022, copies of the written statements from Ms Durrell and the three others;

    b) on 16 January 2023, copies of the interview notes of Mr Nicholls with the three others; and

    c) at the start of the disciplinary hearing itself on 19 January 2023, a copy of the interview notes Mr Nicholls took of his discussion with Ms Durrell. The hearing only proceeded when the Claimant had been given time to read those notes.

65. As per *Taylor*, it is the totality of the Respondent's process that should be considered.

66. In addition, paragraph 5 of the ACAS Code acknowledges that a separate investigatory meeting with the subject of the disciplinary process is not always necessary.

67. The Claimant has also criticised the fact that there was no investigatory report produced. While it is common for the results of an investigation to be set out in

an investigation report, there is no legal requirement to do so, and nor does the ACAS Code refer to an investigation report.

68. The ACAS Code does include the following:

"*6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing*"; and

"*7. If there is an investigatory meeting this should not by itself result in any disciplinary action*",

but the Tribunal does not consider either of those principles breached (and nor would a breach, of itself, render the Claimant's dismissal unfair).

69. As for paragraph 6 of the ACAS Code, it was perfectly proper for Mr Hardy to continue to investigate the matter at the disciplinary hearing. It would have been absurd if he had refused to hear from the Claimant, and there was no need to adjourn the meeting and reconvene at a later point for further investigation to be conducted (even though Mr Hardy had set at the outset of the meeting that that may happen). There was no need because of what the Claimant said at the meeting.

70. In relation to paragraph 7 of the ACAS Code, Mr Hardy did in fact think further on the matter after the disciplinary hearing (where further investigation was done to understand the Claimant's perspective). As he put it, "*I spent two hours afterwards [thinking about it]. I asked myself whether I was overreacting because [Ms Durrell] is a girl and I have a daughter. It was a fairly horrific period [thinking about it], but the outcome was still the same [as the outcome he anticipated at the end of the disciplinary hearing and discussed with the Claimant].*"

71. Mr Withers for the Claimant has also alleged that the Claimant was not given the opportunity to ask questions of or hear from the witnesses, in breach of the Respondent's policy. In fact, the Respondent's Disciplinary Procedure provides that "*If facts are in dispute the employee will be entitled to put questions to any witnesses or to ask for additional witnesses to be called.*" Here, at least at the time of the disciplinary hearing, it did not appear that there were facts in dispute.

72. Moreover, when assessing the 'scale' of the degree of thoroughness required for an investigation to be reasonable as per the *Gravett* case: this was a case where the Claimant sensibly and admirably admitted his mistakes and his misconduct in the disciplinary hearing with Mr Hardy, and so the degree of thoroughness required of the investigation was less than it would otherwise have been. In any event, the combination of the work of Mr Yates, Mr Nicholls and Mr Hardy was a very thorough job, which Mr Hardy considered appropriate in light of the consequences not only for the Claimant, but also for Ms Durrell and their colleagues affected by the Incident. I find the investigation – taking account of the possible (and actual) disciplinary sanction for the Claimant of dismissal (as per the *A v B* case) to be reasonable in all the circumstances.

Question 4: Was the Respondent's response – of dismissing the Claimant – within the range of reasonable responses available to it?

73. Mr Withers made much of this point in submissions, positing that, at its widest, the range of reasonable responses would, at the maximum sanction end, permit the Respondent to impose a final written warning on the Claimant in all the circumstances of the Incident, his length of service with no disciplinary blemish, his diabetes, and the provocation he faced from Ms Durrell. The Tribunal disagrees.

74. As per the *British Leyland* decision, the Tribunal must not substitute its decision as to what was the right course for that employer to have adopted, but rather:

    a) identify, in light of the particular circumstances of the case, what the range of reasonable responses were to the facts and circumstances of the Claimant's case; and then

    b) determine whether the Respondent's decision to dismiss him fell within that band

    (*Iceland Frozen Foods*). That analysis must be conducted in light of the Respondent's genuine and reasonable belief in the Claimant's misconduct (*Graham*).

75. On the bare facts here, the Claimant had used threatening behaviour, and had blocked Ms Durrell's exit from the cleaning room. His actions used physical force, even if he did not reach out to touch her when doing so, because his actions in blocking her necessitated physical force from her so that she could exit the room. As the Claimant himself put it in the disciplinary hearing, "*I've let myself down*", and "*it is an absolute challenge to come back from this*". He knew he had committed serious misconduct.

76. The Respondent properly needed to consider the impact of its decision on the Claimant and the others involved in the Incident. Ms Durrell had said that she would not be comfortable being on her own with the Claimant again, and a reasonable employer would understand that position, as Mr Hardy did. The Claimant had been asked to prepare himself to discuss at the disciplinary hearing how the relationship between the two of them could be repaired if they were to work with each other going forwards, and he did talk to that. The Claimant conceded that "*It will be challenging… I'm not sure how recoverable this is... I don't have any answers right now, but there needs to be a management discussion around it*". In other words, the Claimant, despite having had some time to think about this ahead of the disciplinary hearing, had no solution to suggest to the Respondent.

77. The Tribunal finds that, both on the basis of the bare facts set out above, and the Claimant's own position about the fact that it may not be possible for his relationship with his colleagues to be recovered, dismissal was within the range

of reasonable responses open to a reasonable employer in the circumstances of this case.

78. There were mitigating circumstances, as Mr Withers outlined, including the highly provocative behaviour he faced from Ms Durrell, and the Claimant's eight years' unblemished service. The Claimant also apologised and acknowledged his errors at some point during the disciplinary process.

79. However, mitigating circumstances – as per the *Cunningham* case cited above – can only take a person so far, and at times the seriousness of their misconduct cannot be overcome by mitigating features. The Claimant here was the manager in this difficult situation, and by his own admission he let himself down. The mitigating circumstances do not change the fact that dismissal was within the range of reasonable responses because of (to use the Claimant's own terminology) the irrecoverability of the situation between the Claimant and his colleagues. Mr Hardy's (very confident, cogent and believable) evidence was that he had given real consideration to whether a lesser sanction than dismissal could work practically, in light of that irreparable relationship, but the Claimant and Ms Durrell would still be working in the same building, and he reasonably did not think it was fair on Ms Durrell to potentially see the Claimant there.

80. The mitigating circumstances did not remove dismissal from the range of reasonable responses open to the Respondent.

81. The Claimant has also pointed to his diabetes as influencing his behaviour – but Mr Hardy was entitled to find, based on the Claimant's own evidence in the disciplinary hearing, that it did not. The Claimant's clear position in that hearing was that he had not lost his temper or failed to control his emotions (and he contrasted this aspect of his behaviour with that of Ms Durrell). This is inconsistent with his assertion before this Tribunal that his diabetes was a factor in how he behaved. The much more credible position – which fits with the Claimant's (more) contemporaneous account in the disciplinary hearing – is that he made an error of judgement, not that judgement was beyond him because of his medical condition.

82. The Claimant has also argued that the Respondent's failure to discipline Ms Durrell indicates that dismissal of the Claimant was not a reasonable response, but the Tribunal disagrees. As per the *Paul* case, Ms Durrell's circumstances were not 'on a par' with those of the Claimant's: he was the manager and she the subordinate, and he used his physical presence to inhibit her exit, which was viewed by Mr Hardy as "*amount[ing] to … assault and/or threatening behaviour*". These were two factors which made both his behaviour and his circumstances significantly different to Ms Durrell's in Mr Hardy's view, and the Tribunal considers that view a reasonable one. There is no disparity of treatment between the Claimant and Ms Durrell as their situations are not sufficiently similar to warrant comparison. Comparing the Respondent's treatment of Ms Durrell to that

of the Claimant does not change the fact that, taking account of all the circumstances, the Respondent's dismissal of the Claimant was fair.

Conclusions

83. The Claimant's claim of unfair dismissal is not well-founded and is dismissed.

_____
Employment Judge Ramsden
Date: 18 December 2023