CASE NUMBER: 2301787/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr G Jeffery**

Respondent: **Givaudan UK Limited**

Heard at Ashford **On: 22-24 May 2023**
17 January 2024 (In chambers)

Before: **Employment Judge Corrigan**

Representation
Claimant: Mr I Rees Phillips, Counsel
Respondent: Mr D Northall, Counsel

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. The claimant was wrongfully dismissed by the respondent

REASONS

1. The delay in having an in chambers day and producing this reserved judgment and reasons is because of the unexpected absence of the Employment Judge from 5 September 2023-8 January 2024, following a planned absence in the summer of 2023. This decision has been given priority on my return.

2. The claimant claims unfair dismissal and wrongful dismissal. The parties prepared a written list of issues relating to liability only on the first day of the hearing. The agreed issues are set out below. We agreed I would consider liability only at this stage as the claimant is seeking reinstatement.

Claims and issues

UNFAIR DISMISSAL

3. What was the reason or, if more than one, the principal reason for the Claimant's dismissal on 20 December 2019? Was the reason a potentially fair reason? The respondent relies on conduct.

    3.1. Was it the Claimant's conduct relating to an incident of 26 June 2019 involving his colleague in the warehouse?

    3.2. Alternatively was it, as the Claimant claims, the history of complaints that the Claimant had raised to the Respondent both informally and formally regarding workplace practice and an overall bullying, intimidating and 'ganging up' culture in respect of his colleagues, including specific attempts to goad and provoke him.

4. Did the Respondent act reasonably in treating the reason as sufficient for the Claimant's dismissal? In particular:

    4.1. Did the Respondent hold a genuine belief in the Claimant's misconduct?

    4.2. Was the Respondent's belief formed on reasonable grounds?

    4.3. Did those grounds follow a reasonable investigation?

5. The Claimant contends that one or more of the requirements of paragraph 4 were not met because:

    5.1. He rebutted the allegations coherently and thoroughly;

    5.2. The investigation was unreasonably delayed and insufficiently thorough**;**

5.3. He was provided only with summaries of the witness evidence of the two alleged witnesses but not their original statements nor with any other evidence relied upon by the Respondent. He was only ever provided with over-redacted and largely illegible handwritten versions in a SAR response, insufficiently shortly before the appeal hearing;

5.4. The only evidence against him obtained in the investigation was the witness evidence of the two witnesses which was inconsistent and conflicting and the investigation report's conclusions on objective evidence to corroborate these accounts (CCTV and swipe card evidence) was unsafe yet incorrectly relied upon by the Respondent.

5.5. The Respondent unreasonably concluded that the allegations were substantiated.

6. Did the decision to dismiss fall within a range of reasonable responses open to a reasonable employer? The Claimant contends that:

6.1. The Respondent acted unreasonably in concluding that the misconduct, if substantiated, amounted to gross misconduct;

6.2. The Respondent failed to give proper weight to mitigation comprising: (1) the Claimant's length of service; (2) his clean disciplinary record; (3) the alternatives to dismissal; and (4) the consequences of dismissal;

6.3. The conduct warning relied upon by the Respondent as having been given to the Claimant supposedly on 30 November 2019 was not actually ever provided as a matter of fact.

6.4. The Respondent's treatment of the Claimant was completely inconsistent with its treatment of other staff, including the Distribution Team Leader (who was found guilty of using 'inappropriate and offensive' language and issued with a written warning) who had committed similar acts towards the Claimant as those alleged against the Claimant.

7. Should the tribunal find the Claimant's dismissal procedurally unfair in any respect, would a hypothetical fair procedure have resulted in the Claimant's dismissal in any event?

8. If so what, if any, discount ought to be applied to the Claimant's compensatory award?

9. Did the Claimant's blameworthy conduct contribute to his dismissal?

10. If so what discount, if any, ought to be applied to the Claimant's compensatory or basic awards?

WRONGFUL DISMISSAL

11. On a balance of probabilities, did the Claimant conduct himself on 26 June 2019 in a manner that was in repudiation of the contract of employment?

ACAS UPLIFT

12. Did the Respondent fail to follow the ACAS Code of Practice by delaying the investigation stage of the disciplinary process concluding until 13 August 2019 because the investigating officer appointed was on annual leave?

Hearing

13. On behalf of the respondent I heard evidence from Mr Tom Arnott (Regional Quality Assurance Manager), Mr Simon Ellwood (Head of Health and Wellbeing), and Mr Ian Messenger (HR Director).

14. Where other personnel of the respondent are referred to in these reasons they are referred to by job role or similar description rather than name as these reasons will be published online and be publicly available. With respect to the colleagues involved in the alleged incident on 26 June 2019 I refer to them as the complainant and witness respectively, even when they are referred to prior to the incident on 26 June 2019. They have not given evidence and therefore it is not appropriate to name them in these reasons.

15. The Tribunal heard evidence from the Claimant on his own behalf.

16. There was a 567 page bundle. The parties' representatives had the opportunity to make submissions.

17. Based on the evidence heard and the documents before me I found the following facts.

Facts

18. The Claimant was employed by the Respondent as a Warehouse Operative from 15 June 1992 until his dismissal on 20 December 2019. Up until the decision to dismiss he had a clean disciplinary record.

19. The respondent has about 750 employees across 10 UK sites. It is part of a wider global group but a separate legal entity.

20. The company's dignity at work policy, dated 2010, states at page 68 that harassment is unwanted conduct that intentionally or unintentionally violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive working environment for the person. It states the intention at page 69 that all complaints of harassment and bullying will be treated very seriously. The disciplinary policy includes examples of misconduct likely to result in disciplinary action being taken up to and including summary dismissal for gross misconduct. This includes discrimination, bullying, harassment or victimisation (p78).

21. There had been some issues with respect to the behaviour in the department in which the claimant worked which were investigated by Mr Arnott in late 2018. He produced the report at pp 127-135. He found a systemic and high level of inappropriate behaviour that had persisted for many years without effective management of the problem; an unacceptable level of animosity between members of the team including the claimant, the Distribution Team leader and others; concerns for the claimant's health and state of mind; and the team frowning on a "near miss" being reported had raised a concern over the safety culture from within the department. The Distribution Team leader was the subject of the most accusations but there were also a significant number against the claimant though some were concerns about his health.

22. The chart on page 135 provides more substance to the issues raised and shows a number of incidents of offensive swearing and banter, including by the Distribution Team leader. These include two separate allegations that he swore in a racist manner at lorry drivers. The concerns about the claimant were that he could be frustrating, difficult to work with and provocative. There were a number of other serious allegations against the Distribution Team Leader including damage to cars, leaving faeces on the claimant's doorstep and slashing a colleague's clothing.

23. There was a meeting with the claimant to discuss the findings involving him on 1 November 2018 (p 136-137). It was not treated as a disciplinary matter. He said he was seeing a counsellor. He complained about the way he was treated by

members of the team including a colleague leaving a copy of his hand putting up the middle finger on the claimant's desk.

24. The Distribution Team Leader was invited to a disciplinary and capability meeting and was given a first written warning for a swearing gesture towards the claimant. The disciplinary meeting had also involved the allegations about racist comments to the drivers but they were denied and he was not ultimately disciplined for those comments. There is no evidence of any further investigation into those comments. He was also put on a performance improvement plan. He complained of the claimant's behaviour towards him and he was given advice about managing the claimant.

25. There was a note that a further meeting was to take place with all team members on 27 November in which they were to be told that there was a "lot of 6 of one and half a dozen of the other…everyone is responsible for changing their behaviour and treating their colleagues with respect". They were advised that if they had an issue to talk to the individual first to try to sort it out and then their Line Manager if necessary.

26. The respondent has an email record of the plan intended to be discussed with the claimant in particular at page 159. The claimant made rough notes after the meeting which he then wrote up more fully two or so weeks later. He says the meeting did not go as the respondent had planned. It is agreed that he was told that the respondent had taken action and the investigation was over. The respondent wanted to draw a line under the past and have the team move forward. He was told to take issues to the team leader and manager. He was told that all distribution staff were being reminded that they needed to be respectful of each other and he was told in particular that he could be less sarcastic. The claimant raised that his working life had been difficult, he had been working with 8 bullies, that they wanted him to "bite the bait" but he avoided confrontation with them. He said he had raised it many times and nothing had been done. He was getting his own counselling.

27. The respondent's preparatory note also included the following directed at the claimant: your behaviour, whether conscious or not can antagonise people. You need to learn to work in a harmonious way with your colleagues to build a team environment. You need to listen to people, talk to people, build relationships and respect people's personal space. You should share …equipment, avoid sarcasm and also not assume the worst of everyone's intentions." He was told not to come to HR unless he had spoken with the line of management and not reached a satisfactory outcome. He was told that if he approached HR without going through the proper channels this could be seen as ignoring a reasonable management request.

28. I find it likely these points were said at the meeting as they were part of the important message the respondent intended to get across in the meeting and the claimant's notes were neither contemporaneous nor verbatim. The email was placed unamended on the claimant's personnel file. I also note that when the HR

witness in the claimant's disciplinary was approached she said she had said this and quoted the above, calling them her notes of the meeting (p462).

29. The claimant raised further concerns in February 2019 as confirmed by the letter to the claimant from the Production Manager dated 18 February 2019. This records disappointment that an improvement in team working following the above report had not been sustained. The claimant's conduct in monitoring colleagues was criticised and he was told of his right to raise a formal grievance. He was told again that any further concerns should be first raised with his team leader or coordinator as appropriate (pp 166-167)

30. In the bundle there are unsigned notes on the respondent's headed paper in respect of two further incidents. The first notes that there was a conversation between the team manager/coordinator and the claimant on 3 April 2019 recording that the Distribution Team Leader had used foul and abusive language aimed at the claimant. It notes that the incident had been reported and the Distribution Team Leader (who was subject to the first written warning) had been spoken to. It appears no further disciplinary action was taken (p168).

31. The second is a record of the claimant raising, on 5 April 2019, that his locker had been defaced with food waste and that the expected behaviour had been reinforced in informal discussions with those who could be responsible (p169).

32. Also in April 2019 the claimant raised that the Distribution Team Leader had referred to the team manager as "that fucking dickhead" (p 171).

33. On 25 May 2019 the claimant raised a near miss report in respect of his colleague [the alleged witness to the incident on 26 June 2019 below] who he said had been driving a forklift truck dangerously and almost hit him. The Production Manager reviewed the CCTV and said that at times the closeness of the trucks was alarming. He gave feedback to the driver concerned and stressed the importance of safe driving. Other safety measures were implemented and fed to staff via a toolbox talk on 3 June 2019 (pp181-182).

34. Meanwhile on 29 May 2019 the "entire daytime warehouse staff" (7 people including the complainant and witness with respect to the incident on 26 June 2019) raised a collective complaint about the claimant which included that he "has been a constant source of disruption, confrontation, and ill feeling which has consistently lowered the morale of the warehouse staff. He has continues to make regular remarks to members of staff which are now being considered as mild verbal bullying. [The claimant]'s work load is consistently way below everyone else's and he regularly disappears from his workplace which is causing animosity…The whole department has no trust in [the claimant] and he has made it clear that he is keeping secret files on all staff members…He is constantly provoking other members of

staff in order to gain a reaction." They also complained of procedures being adapted as a result of his actions.

35. Meetings took place with the colleagues raising the collective complaint between 19 June 219 and 25 June 2019. In the meeting on 19 June one colleague gave an example of the recent toolbox talk on "the lines" and signs regarding walking up and down the ramps. The mild verbal bullying was said by another member of staff to be banter that went too far that was directed at the witness (to the incident on 26 June 2019) because he was temporary staff and at the complainant with little digs about his age. He could not give a specific example of this (p189). There was also reference to a historic comment made by the claimant about the Distribution Team Leader's age. This reference to digs about age was not referred to in evidence/submissions by either side during these proceedings. They were also not repeated by the complainant himself either within his collective grievance interview or in the later investigation into the incident on 26 June 2019. He did say in his collective grievance interview about the above near miss that he thought the claimant was trying to get the contractor concerned (the witness) into trouble. The focus of the complainant's own interview as part of the collective grievance was about the claimant's productivity and issues with his allegedly not being a team player. His paramount concern was that issues with the claimant could cause an issue with safety. He did describe the claimant as a "bad apple".

36. The witness himself felt the claimant lied against him in the "near miss" and the new procedure complicated the job. He specifically said he did not want to "get him sacked" he just wanted him to change and work with them not against them. However a number of other colleagues expressed in their meetings that they wanted the claimant moved from the department.

37. Turning now to the incident of 26 June 2019 for which the claimant was ultimately dismissed. It is agreed that on that date there was an altercation between the complainant and the claimant about a list of products. It occurred just after 1pm. The witness says it was around 1.05pm. The claimant around 1.10pm.

38. The next day the complainant wrote the following statement:

> "After dinner I approached [the claimant] about the list, asking for a copy. He stated he had no list. I said are you sure he said yes I repeated the question…Then [the claimant] got aggressive said that I was calling him a liar and called me an "old cunt"….I approached and told him not to talk to me like that and then turned and removed himself from any more aggressive behaviour." He said the witness was present and that he had spoken to the team manager about the incident (p 266).

39. The witness wrote a statement which is undated. He said the incident occurred around 1.05pm. He said that the complainant had asked the claimant about the list. He described how the complainant asked three times and said the third time the claimant responded "there was nothing there you old cunt". He said that the

complainant approached the claimant and said "what did you call me, don't call me …that and that the claimant became intimidating, looking for an argument saying "are you threatening me?" He said that the complainant went to the team manager and then avoided the claimant until the end of his shift until 2pm (p267).

40. There was also a statement from the team manager as follows (p264). He said he mentioned the list to the complainant and the claimant and told them it was on top of the printer. He described the conversation about the list between the complainant and the claimant and said

"[the claimant] then proceeded to call [the complainant "A silly old [cunt"] all of which was witnessed. [the complainant] told me about it and was clearly very annoyed…5 minutes later [the claimant asked me to come…] This was an excuse so he could tell me that the [complainant] had spoken to him in a rude and intimidating way and had threatened him….[the witness] was in the very near vicinity of the incident and claims he heard everything that was said. [the complainant] is going to HR today to make a formal complaint on grounds of bullying in the workplace."

41. The team manager was interviewed as part of the collective grievance on 4 July 2019. He said the claimant targeted the contractors (including the Witness) and the Complainant as he's quite quiet. He confirmed the claimant was over monitoring colleagues (in his view) and that procedures were modified to try to manage the claimant's behaviour. The team manager expressed some sympathy for the claimant and what might be causing his behaviour to the team. He said the complainant had come to the end of his tether. He said the catalyst for the collective complaint was the claimant having said "I am going to shaft the lot of you" and the complainant had said he was not going to put up with that. He also expressed considerable sympathy for why the team felt as they did about the claimant's conduct and himself described how it was difficult to manage and impacting recruitment and progression. The focus in that meeting was how the situation could be resolved with the team, including the claimant, continuing to work together.

42. On 8 July 2019 the claimant submitted his own grievance about a decision to stop him driving a fork-lift truck pending retraining and to stop him doing overtime.

43. The outcome to the collective grievance as communicated to the Complainant starts at page 305 (dated 12 July 2019). It found there were behaviours by the claimant that caused frustration to the Complainant and the team. It found the claimant was not aware of the impact or the frustration caused and there was limited evidence the behaviour was deliberate or intended to have a negative impact on the team. It found lack of trust between the team and the claimant and lack of confidence in management to address the team's concerns. The allegations about regular remarks which were considered mild verbal bullying were found unsubstantiated, apart from the incident on 26 June 2019. The conclusion

with respect to that was that there was substance to the allegation and further action required.

44. The action points/outcomes identified (p307) were that there would be management action with respect to the work performance and ineffective management of the claimant; "appropriate management action will be taken in response to the incident which occurred on 26 June 2019" and mediation should take place. It concluded that there have been a number of underlying issues for many years and successful resolution would require the commitment of all team members to foster improved working relationships.

45. The outcome letter to the claimant dated 17 July 2019 informed him that "appropriate management action" would be taken in response to the incident on 26 June 2019 and that Tom Arnott had been appointed as investigating manager. With respect to work performance there was to be a meeting with the claimant and the team leader to identify how the claimant could be supported to improve. He was also informed of the proposal for mediation in similar terms to the complainant (p322).

46. On the same date the claimant was invited to a meeting into his own grievance and also to an investigatory meeting into the incident on 26 June 2019, by separate letter for each. The investigatory meeting letter said it was being considered in line with the disciplinary procedure and was to consider his alleged aggressive behaviour and use of inappropriate language directed towards another member of staff.

47. On 22 July 2019 the claimant wrote to HR with his account of the incident which was that the complainant had threatened him aggressively and swore at him. He believed this had been with the intention of getting a reaction from him. He raised a number of other issues. (pp330-333). This was responded to by HR on 26 July 2019, treating it as his response to the way his grievance was handled.

48. Mr Arnott met with the complainant on 24 July 2019 (he believes references to this being 6 August 2019 are an error). The notes of that are at page 328 and 329. They state:

49. "-Looking for list asked where it was and …[the claimant] said are you calling me a liar

-[the complainant] asked Gary what did you say and Gary reacted with [ ] of repeating the word
-reported to the [team manager] immediately
…
-the complainant considers this complaint of a serious nature along the lines of bullying and ageism". He also said the witness was about 10 feet away.

Mr Arnott's own handwritten version has a word where the square brackets fall that is illegible but does not appear to be "old cunt". Mr Arnott accepted those words were not written down in the notes. He said this was in the context that he had the statement in front of them and the two words that had caused the offence were "old cunt" so this was not something he would ask further questions on. He accepts that the complainant did not repeat the phrase in the meeting. It was put to Mr Arnott that the key thing in this altercation that made it worse than swearing which was rife was the use of the word "old", which Mr Arnott accepted. This was in the context that the complainant was significantly older than the claimant. The claimant himself estimates that he was 10 years older than himself. Mr Arnott accepts he did not explore the inconsistencies between the witnesses as to precisely what was said.

50. Mr Arnott then met with the claimant on 25 July 2019. Handwritten notes are at pages 361-363. The claimant said it was the complainant who had said "fucking cunt" about him and gone on to say "you watch yourself you shit", with a gesture, twice. The claimant said the witness was 60 or 70 feet away from the incident. He also said that at about 2.15pm he had gone to see the union representative in the TGWU meeting room to tell him about the incident. Mr Arnott accepted in evidence that these two accounts (of the claimant and the complainant) were very different and there was no reason at this stage to believe one and not the other.

51. The claimant was sent the outcome to his grievance on 2 August 2019, which was that the actions that had been taken had been deemed necessary and support the company policy. Equivalent action had been taken in similar circumstances and are now custom and practice.

52. Mr Arnott met with the alleged witness to the incident of 26 June 2019 on 6 August 2019. The witness said he could not hear every word due to loud music. He did say he heard the claimant say "it's not my problem you old cunt". He said it was said loud as things escalated. He also heard the claimant say "are you threatening me". He said he did not hear the complainant use bad language. He said he could see he was losing control and was upset about what the claimant had said. He said that he said to the claimant "watch what you do". His account different from his written statement where he had said the claimant said "there was nothing there you old cunt". Mr Arnott accepted he did not explore this difference with the witness as in his view the 2 words he was looking at were "old cunt".

53. On 12 August 2019 the claimant appealed the outcome of his grievance. This process continued independently of the disciplinary process.

54. On 13 August 2019 Mr Arnott wrote up his report. In addition to summarising the three witnesses he said he checked the CCTV cameras and confirmed that the witness was in the relevant area at the time. He said he had also been supplied ID swipe card information to be able to ascertain that the witness was in the area

of the incident. He recommended disciplinary action against the claimant only. He took into account what the claimant had been told about his behaviour in November 2018.

55. In his witness statement he explained that CCTV cameras are in use in the general load bay area. They did not cover the goods receipt area where the altercation occurred (despite the notice observed by the claimant that CCTV is in use in that area). There is no CCTV footage inside the building. No sound is captured in any event. There was therefore no CCTV of the incident itself. In evidence he said one other operative can be seen in the general area and he assumed that was the witness. He accepted he cannot be sure it is him but said he decided it was him from the swipe card data (see next paragraph). He accepts there is no evidence that places the witness right where the incident occurred, only that it is possible he was there as he came in and out of the area around the right time.

56. He also viewed the witness's swipe card data at page 260 which shows he exited the area at both 1.01pm and at 1.41pm and concluded that he must have been in the area prior to each of those times. Mr Arnott accepted that all this shows is that he was active in the area at those times, coming in and out, and was not particularly helpful either way. He placed more weight on the witness's statement and the fact that he said things that were unfavourable about both the claimant and the complainant.

57. He accepts he did not explore the discrepancies between the accounts of the complainant, the witness and the team manager's account.

58. The claimant was informed that the matter would be considered in a formal disciplinary hearing by letter dated 16 August 2019. He was told disciplinary action would be considered with regard to breach of the company Dignity at Work policy through the use of inappropriate and offensive language directed towards another member of staff; serious breach of the dignity at work policy through the use of discriminatory language regarding another member of staff 's age.

59. He was told the outcome could be formal sanction up to and including summary dismissal. He was told the disciplinary hearing would be chaired by the Production Manager.

60. The claimant was told his grievance appeal was not upheld on 19 August 2019.

61. The claimant challenged the appropriateness of the Production Manager to hear the disciplinary on the basis of his friendship with the complainant. He initiated another grievance based on historic complaints on 5 September 2019.

62. The claimant prepared the statement at pages 380- 382. He said he had seen the complainant and the witness talking after the incident on 26 June 2019. He referenced the fragile working relationship in the distribution department. He said the witness was too far away to hear apart from when the complainant had raised

his voice. He said the radio was on loud throughout. He suggested that the witness had a vested interest in a vacancy because he is an agency worker. He said he had made numerous complaints against the witness on the basis he was trying to intimidate the claimant with the fork lift. He also suggested his near miss report had triggered the collective grievance in retaliation.

63. In the bundle at page 386 – 388 are what appear to be a script for the production manager to follow in conducting the claimant's disciplinary hearing.

64. It includes the paragraph on page 388 "It is very disappointing to me that there are allegations of discriminatory and offensive language being used, particularly when in conflict as this is clearly not intended as banter or used in jest. This language is not conducive to building a positive working environment and is harmful to the business achieving its goals. This matter is considered to be very serious and the alleged behaviour cannot be tolerated within the organisation."

65. In the event the respondent decided to accept the request for an alternative chair, though it was not accepted that there was a friendship between the complainant and the production manager as alleged. Simon Ellwood was appointed instead.

66. The claimant was on sick leave from 23 September up to 7 October 2019 and the claimant requested an adjournment of the hearing (p409). The respondent responded proposing a referral to occupational health to obtain advice about the claimant's health and likely duration of absence. The claimant agreed to a referral to occupational health.

67. The occupational health report said the claimant had symptoms of stress and was not yet fit to work, displaying physical signs of anxiety when discussing the situation. It was not possible to state at this time how long the absence would be (p426). It recorded that the claimant did not feel able to proceed with the disciplinary meeting at present. It recorded that he did understand the need for resolution and offered to attend mediation.

68. On 6 November 2019 the respondent wrote to the claimant acknowledging that occupational health had confirmed he was unfit to attend a disciplinary hearing and they were unable to predict whether this would change in the foreseeable future. The respondent proposed that a disciplinary hearing would proceed on 21 November 2019, with the offer that the claimant's representative attend. It confirmed that the claimant's written representation dated 9 September 2019 would be considered and he could provide further written representations. It also said that if he was unhappy with the outcome he could appeal and attend the appeal hearing.

69. The claimant responded on 12 November 2019 making no objection to the proposal but seeking an extension of time to decide whether he or the representative would attend (p438). The respondent agreed to this (p439).

70. Occupational health provided a further report dated 13 November 2019 which said the claimant was still not fit to attend work and the process of the disciplinary procedure was exacerbating his symptoms. The report stated "whilst I see the benefit of proceeding with the investigation to reach a resolution, I am unsure if [the claimant] will feel able to attend". The claimant then confirmed by letter dated 18 November 2019 that he would not attend and nor would a representative. He made a number of points in that letter (pp 444-445). Essentially these were that the culture of bullying and the previous investigations should be considered as his case was that these allegations were another example of this, and his being "ganged up on"; that the Trade Union representative referred to in his statement should be interviewed; that an HR colleague be interviewed about a conversation he had had with her; the outside Low-Bay camera system should be considered along with the CCTV inside the Low-Bay area as signs stated that area was under CCTV surveillance. At some stage he also provided the revised witness statement at pages 383-385.

71. Following the hearing on 21 November 2019, which the claimant did not attend, HR wrote to the claimant requesting more information that had been requested by Mr Ellwood. Whilst Mr Ellwood did not intend to review the personnel file he invited the claimant to identify specific documents that he considered relevant. Although the respondent did not consider the witnesses proposed by the claimant to be relevant as they had not witnessed the incident he was given the opportunity to supply statements from them or to explain what the evidence was that he wanted them to present. The matter was also adjourned to give the claimant time to receive the response to a subject access report he had made, due by 5 December 2019, and to provide the disciplinary hearing with any relevant documentation in that.

72. The claimant was also provided with the email record of the key points of discussion with the claimant following the investigation in 2018 and invited to provide his own evidence of this if he had any.

73. The claimant gave a detailed response to this at pp 454-457. He answered the questions he had been asked, explained the relevance of his personnel file (previous complaints of bullying); previous offensive treatment of him; the relevance of the union representative and the HR colleague's evidence; and a reminder to check the CCTV and camera evidence referred to previously.

74. The respondent wrote to the claimant on 2 December 2019 to confirm that the witnesses would be invited to attend the hearing and the hearing would then be adjourned again pending anything further from the SARS request (p458).

75. The union representative attended the meeting and confirmed the claimant had reported the incident to him on 26 June 2019 shortly after it occurred. He confirmed that the claimant said it was the complainant who was verbally aggressive and had called the claimant "a shit" and they had had an argument. He described the claimant as "precise". The other witness responded by email (p462). She

confirmed that the claimant had previously raised concerns that he was being bullied and felt the team were goading him to react. She provided what she said were her notes of a conversation with the claimant on 29 November 2018 (p462- already referred to above). She said her own belief was that at the time of her involvement both the claimant and the other team members had a difficult relationship. She did not believe either party was "whiter than white" and behaviour on both sides could be improved.

76. On 5 December 2019 the respondent wrote to the claimant that, following his receipt of his data in response to his data subject access request also sent on 5 December 2019 the disciplinary hearing would reconvene on 13 December 2019 to allow him to provide any of the data he considered relevant by 12 December 2019.

77. The claimant responded on 11 December 2019 asking for an extension until 3 January 2020 for him to provide the data he wished to rely on, with the disciplinary hearing being reconvened after that. He gave the date of receipt of the data (9 December 2019 and the number of documents (230) as reasons). He also asked that Mr Ellwood was given the unedited version of two sets of notes from his personnel file. The respondent did not agree to this extension but did agree to adjourn the hearing until 18 December 2019 and that the claimant should provide any further data/evidence by the start of the meeting. It was confirmed that Mr Ellwood had been given the sets of notes requested. He was also provided with the email from his colleague at page 462, described at paragraph 75 above and the evidence by the trade union representative.

78. The claimant responded to request an extension until 10.00 on 19 December 2019 to provide a further written statement and the disciplinary hearing was moved to that date to accommodate that request. The claimant also provided his notes of the meeting of 9 July 2019 and the grievance outcome letter dated 22 July 2019.

79. Mr Ellwood communicated his decision to HR on 19 December 2019 as per the email at page 482. He said that based on the details and summary of the investigation and that the claimant had been made aware of the importance of behaving professionally the claimant had breached the dignity at work policy by using inappropriate and offensive language directed toward the complainant and a serious breach with respect to the use of discriminatory language regarding the complainant. He proposed summary dismissal.

80. This was expanded on in the letter from HR to the claimant communicating the decision, sent on 20 December 2019. That said

"Having taken your written representations into account, fully considering all the facts known and reviewing the evidence presented at this time, a decision has been made in that the allegations have been founded [sic] and are considered to be a very serious matter and Simon Ellwood's decision is that summary dismissal is the appropriate sanction. …based on the following:

-despite the company outlining clear standards of behaviour and the importance of you behaving professionally being reiterated to you by Company management at the end of November 2018 you used inappropriate, offensive and discriminatory language toward a colleague.
-your actions and lack of accountability for these has resulted in a significantly divided working environment due to the damage, tension and conflict caused.
-the above has resulted in a breakdown in the employment relationship due to lack of trust and confidence in your commitment to promoting a harmonious working environment as a result of your actions. The claimant was given the right to appeal.

81. The claimant had previously been told he would get a response in the outcome to his request for video evidence to be reviewed but this was not included.

82. Mr Ellwood in his witness statement said he reviewed the investigation report summary and the hand written notes of the claimant's meeting with Mr Arnott along with the documents provided by the claimant. He did review the witness statements of the complainant and the witness (paragraph 35). He noted inconsistencies but found these unsurprising. He accepted the evidence that the claimant had used the words "old cunt". He confirmed in evidence that he did not speak to the complainant, the witness or the team manager. He also accepted that there would not have been a dismissal if it had just been an altercation with ill feeling and raised voices. The decision to dismiss was because of the use of the words "old cunt". He took Mr Arnott's description of the CCTV and what it showed at face value. He did not explore the claimant's position that there was animosity with the complainant and the witness and that they had made up the allegation. The stance adopted was to keep the wider grievance about the claimant and this incident very separate, even though the claimant was asking that the background be taken into account. He said in evidence that he took the view that the wider grievance was not mitigation and not relevant and effectively accepted that his mind was closed to the point the claimant was making about the history to support his case that the complainant and witness had reason to wrongly accuse him.

83. He explained in evidence that he considered the claimant had not shown any accountability, in contrast to the complainant who he believed had acknowledged he had responded in a way he regretted (this is not in the statements and interview with Mr Arnott described above). He believed this caused damage to the working environment in the team and there had been a total breakdown in trust and confidence in his ability to promote a harmonious working environment. He said in his witness statement that he was made aware through the evidence that the claimant had submitted that working relationships were already unhealthy. His view of what the claimant had submitted in the disciplinary process was that his documentation was irrelevant and the claimant was trying to cloud the issues.

84. He said he discussed with HR what sanctions had been applied for similar incidents in the past and was told that other employees had received formal disciplinary warnings for swearing and obscene gestures. He said in his witness statement he was not aware of any other case which included allegations of discriminatory

conduct on grounds of age. He also said that all others had admitted their misconduct and taken responsibility whereas the claimant had not. He felt the discriminatory nature and the claimant's lack of accountability distinguished his case.

85. He also said in oral evidence that once he made the judgment that the incident occurred for him it was clear the decision that had to be made as it was a clear breach of policy. He was asked in cross examination if a clear breach of policy outweighs 27 years service. His response, tellingly, was that the policy does not state leeway. He considered that having found that it was discriminatory that it fell within the definition of gross misconduct then there is no leeway.

86. The claimant exercised his right to appeal by letter dated 6 January 2020 (pp486). He raised his length of service of 27.5 years and that he had had a completely clean disciplinary record; he challenged the strength of the evidence against him, referencing the inconsistencies between the different accounts of what had happened (p487) (by then he had seen the statements of the complainant, the witness and the manager involved on 26 June 2019); he raised again the issue of whether or not the CCTV evidence had been viewed as he had requested; he raised the culture of swearing including those incidents when they had been directed at him; he again challenged what had been said to him on 30 November 2018 and specifically queried whether it had been treated as a warning when it was not; he said he and the complainant were the nearest in age and he had never discriminated against him on age grounds and any assertion to the contrary was not true. He said he was however aware of other younger colleagues making derogatory comments regarding the complainant's age during "workplace banter". He also raised concerns about the response to the DSAR.

87. Mr Messenger was responsible for the appeal. He conducted a further investigation and met with the HR personnel responsible for responding to the DSAR. He met with Mr Ellwood. Mr Ellwood said that though length of service and previous employment record was in mind, his focus was on the actual incident. He did not expect the witness statements to be exactly the same. The tone was similar and the key phrase (old cunt) was consistent. The complainant had made the complaint straight away showing he was clearly upset about it.

88. Mr Arnott was also interviewed and repeated what he had said about the CCTV and clocking data suggesting the witness had been in the area at the time of the incident. Though he also said there was no CCTV cover in the area it was likely to have happened. He considered the witness was giving a balanced view of the incident including that the complainant had become intimidating towards the claimant as well. He said in his own experience of the area the radio is not usually too loud to prevent loud conversations being heard. He said he interviewed the claimant and the complainant before he interviewed the witness and felt the witness brought clarity and was believable as he said things recalled on both sides that were unfavourable to each side. He was satisfied that the fact he said "old

cunt" was true. He also said the area was not big enough for two people to be 60-70 feet apart.

89. The claimant was then invited to an appeal meeting on 23 January 2020. It was then moved to 31 January 2020 at the claimant's request.

90. The claimant then decided not to attend and sent an amended appeal hearing statement instead. He raised the fact that his team leader in 2018 had received a written warning for using offensive language and an offensive gesture caught on CCTV. He invited Mr Messenger to contact him if he had any questions.

91. On 31 July 2020 Mr Messenger wrote again to the claimant to clarify some 7 points with him (p523). He proposed to reconvene the hearing on 7 February 2020. The claimant again asked for more time and this was granted with the hearing being moved to 13 February 2020. The claimant responded with the letter at page 527 dated 10 February 2020. He referenced all the previous comments about CCTV and that he had not been given sufficient information of what the CCTV showed and that he had been told he would get a response with the outcome on the CCTV issue but did not. He himself had not been shown the CCTV.

92. Mr Messenger confirmed in evidence that he did not consider it necessary to reinterview the complainant and witness again himself. He confirmed he had not looked at the CCTV himself and took Mr Arnott's description at face value. He was asked whether the fact that the swipe card data showed the witness leaving at 1.01pm, 4 minutes before he said the altercation occurred, would change his view. His response was that he would have to think about it.

93. Mr Messenger wrote to the claimant with the outcome of the appeal on 14 February 2020 (p533). He said that he considered Mr Ellwood's decision was fair, that it was made on the evidence before him and within the range of possibilities for such a serious breach of the standards of behaviour; "a lack of accountability and resultant breakdown in the employment relationship, trust and confidence and [the claimant's] lack of commitment to promoting a harmonious environment". He was satisfied Mr Arnott's investigation had been thorough, objective and fair and that length of service does not preclude strongest action when the behaviour in question was sufficiently serious.

94. Mr Messenger accepted that the accounts of the events differed but that this was not unreasonable or sufficient evidence to show the claimant did not direct the words at the heart of the allegation. He said the CCTV footage does not cover the incident but does show all three were in the area at the time. It was not a significant factor in the decision and so it was not deemed necessary for the claimant to see it. He said he had no doubt that other employees swore from time to time and this was unlikely to warrant serious disciplinary action, but distinguished this from language that infringes on an individual's dignity, discriminates or offends those hearing it. He said he was satisfied that other cases have been treated in a similar

way but each case depends on its own circumstances so he would not expect the same outcome each time. He was satisfied the claimant had been given all relevant documentation.

95. No disciplinary action was taken in respect of the complainant's part in the altercation. Following a question from me about this Mr Messenger covered it in his evidence and said that a particular member of HR had told him she had spoken to the Production Manager to ask him to have a management conversation with the complainant. That should have been an informal conversation with him and Mr Messenger expects that would have happened but it has not been recorded on his personnel file.

96. The claimant said in evidence that he does not use the word cunt other than in jest with close male friends he knows really well, in circumstances where they would know it was a joke. He said if he did have to refer to it he would spell it out not use the word. He says he would never use it in this kind of argumentative situation and never at work. Not even in jest. He could not afford to. He said he did not know they were accusing him of saying "old cunt" until he saw Tom Arnott's notes attached to Ms Wright's letter at pages 358-360 (dated 16 August 2019), several weeks after his investigatory meeting with Mr Arnott. He said he had been expecting some exaggeration about the incident but was really shocked when he saw what they were accusing him of saying. He said he knew that there was a witness when he met with Mr Arnott but not what the witness had said. I note that the allegation had not been put to him prior to this in the invitation to the meeting or during the meeting itself, which is supported by the notes of his interview. I found this credible evidence and accept that the claimant only became aware of what he was accused of at this late stage and that he genuinely believes he did not make the comment. I do also note however that there is no acknowledgement from him that he played a part in the difficulties in the department and that the evidence suggests there was some fault on both sides.

97. As the claimant's representative pointed out, there was not any exploration of what the intent was behind the use of the word "old" (if it was used) in the context that the complainant was not that far apart in age to the claimant when compared with other colleagues who were much younger than both of them, but the assumption was made that it was discriminatory.

98. The Team Manager had received a final written warning on 18 September 2013 for swearing at the claimant and pushing him in a way that could be perceived as aggressive, though he had maintained he did not consider it "assault". He was offered an anger management course and further management training (p115). The respondent's represented noted that the claimant had applied to amend his claim to include a comparison with the Team Manager and this was refused. However there are a number of other incidents including the team leader's written warning listed at paragraph 26.8 and 26.9 of the claim. I have not discounted this completely but note it was an older warning dating back to 2013 and have drawn

conclusions based on the more recent written warning to the claimant's team leader and the documented incidents since November 2018.

Relevant law

Unfair dismissal

99. The law in relation to ordinary unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it-**
>
> **(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
>
> **(b) relates to the conduct of the employee,**
>
> **(c) is that the employee was redundant, or**
>
> **(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**
>
> **(3). . .**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

100. In considering reasonableness in cases of dismissal for suspected misconduct the relevant test is that set out in *British Home Stores Ltd v Burchell* 1978 IRLR 379, namely whether the employer had a genuine belief in the employee's guilt, held on reasonable grounds after carrying out as much investigation into the matter as was reasonable in all the circumstances of the case.

101. In applying section 98(4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer's decision to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances. The range of reasonable responses test applies as much to the investigation as to the substantive decision to dismiss *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23.

102. I was referred to **Hadjioannous v Coral Casinos** [1981] 1WLUK 473 and the principle that in a consistency of treatment case the treatment of other employees is only relevant (1) if there is evidence that the dismissed employee was led to believe he would not be dismissed for such conduct; (2) where the other cases give rise to an inference that the employer's stated reason for dismissal is not genuine; or (3) in "truly parallel" circumstances, when an employer's decision can be said to be unreasonable having regard to decisions in other cases.

103. I was referred to **Paul v East Surrey District Health Authority** [1995] IRLR 305 in which it was considered that the attitude of the employee to his conduct may be a relevant factor in deciding whether repetition is likely. Thus an employee who admits that the conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely.

104. If an employer's decision that there are differences between cases is one which the reasonable employer could have made the Employment Tribunal should not interfere even if it would have made a different decision (**Wilko Retail Limited v Gaskell & another** [UKEAT/0191/18/BA).

105. The respondent's representative referred me to **Orr v Milton Keynes Council** [2011] EWCA Civ 62 and the principle that when deciding the reason for dismissal what is relevant is what is in the mind of the person tasked with making the dismissal decision who cannot be imputed with knowledge that he could not reasonably have acquired through the appropriate disciplinary procedure.

Conclusions

What was the reason or, if more than one, the principal reason for the Claimant's dismissal on 20 December 2019? Was the reason a potentially fair reason? The respondent relies on conduct.

Was it the Claimant's conduct relating to an incident of 26 June 2019 involving his colleague in the warehouse?

Alternatively was it, as the Claimant claims, the history of complaints that the Claimant had raised to the Respondent both informally and formally regarding workplace practice and an overall bullying, intimidating and 'ganging up' culture in respect of his colleagues, including specific attempts to goad and provoke him.

106. The reason for Mr Ellwood's decision to dismiss was the fact that he believed the claimant had said "old cunt" to an older colleague on 26 June 2019 but he also drew conclusions about the way the claimant had conducted the disciplinary process and the context that working relationships were already unhealthy (see paragraph 82 above). From his words at paragraph 80 he blamed the claimant for the issues in the department.

Did the Respondent act reasonably in treating the reason as sufficient for the Claimant's dismissal? In particular:

Did the Respondent hold a genuine belief in the Claimant's misconduct?

107. I accept Mr Ellwood genuinely believed that the claimant had said "old cunt" and that he had not taken responsibility and had sought to cloud the issues in the way he responded to the disciplinary process.

Was the Respondent's belief formed on reasonable grounds?

Did those grounds follow a reasonable investigation?

108. The grounds for the belief were that the witnesses were consistent about the phrase "old cunt", even if there were other inconsistencies in what they said about the investigation and that the complainant had complained about it straight away showing he was upset about it. Mr Ellwood did not consider the background introduced by the claimant to be relevant and felt his approach showed he lacked accountability and was seeking to cloud the issues. However he did then take the history into account in drawing the conclusions set out at paragraph 80 above that the claimant's "actions and lack of accountability for these has resulted in a significantly divided working environment due to the damage, tension and conflict caused…the above has resulted in a breakdown in the employment relationship due to lack of trust and confidence in your commitment to promoting a harmonious working environment as a result of your actions."

109. I consider there were some issues with the investigation that were unreasonable, which impinge on the reasonableness of the grounds.

110. Firstly, the claimant was not informed of the specifics of the allegation at or during the investigation meeting and so the investigation meeting did not elicit his response to the allegation, but rather his independent account of the incident. It was not until the invitation to the disciplinary meeting that he was aware of the specifics. Moreover his account of the incident was not put to the complainant or the witness. There was no further exploration of the disputed facts with any of the witnesses at any time.

111. Mr Arnott did not include in his report all the inconsistencies between the statements and interviews and the limitations of the CCTV and swipe card information. Instead he presented his conclusions that the two witnesses were in agreement that "old cunt" had been said, the reasons he did not consider they had colluded (the witness also mentioned intimidating behaviour from the complainant) and misrepresented that the CCTV and swipe card placed the witness in the area. Whereas at the highest the CCTV and swipe card show he could have been in the area but also could not have been. It's not clear that all the accounts were included with his report, though the witness statements were before the decision maker and at some point before the appeal were shown to the claimant. The dismissal officer and appeal officer did not themselves speak with the witnesses and so did not themselves engage in a fact finding exercise weighing up the claimant's account on the one hand with the varied accounts of the others on the other hand.

112. The CCTV did not cover the area, and therefore did not show the witness in the area. The swipe card information showed that the witness could have been in the area though he had in fact swiped out shortly before the time he gave the incident. The way the evidence was presented meant the fact that he had swiped out shortly before the time he said the incident occurred, was never explored with him.

113. The claimant's request that the credibility of the allegations against him be considered in the context of the wider difficulties including with the complainant and the witness, and his view that he was being persistently bullied leading him to have long-term counselling, was not taken seriously or investigated. Rather the respondent took the view that this one incident should be considered in isolation to the history when considering whether or not it occurred.

114. The claimant agreed to the process continuing in his absence and the respondent acted reasonably in adjusting the process to encourage the claimant to submit further representations. I consider the process of engaging with the claimant in writing was done well. However, it was unreasonable to then hold that against him as Mr Ellwood did in concluding he was trying to cloud the position and lacked accountability. The Claimant was seeking to put his position across (having not had the allegations put to him in the investigation) and respond to the questions asked of him, whilst suffering from anxiety. The case he put was consistent and was seeking to support his explanation that the history did matter and should cast some doubt on the allegations, which he strongly disputed. It was not reasonable to then hold that thorough written process against the claimant, at least not without

considering the fact that he was at a disadvantage in not being able to attend the hearings because of his ill health, that he was nevertheless trying to engage with the process in writing, both sides were trying to compensate for his absence by engaging in a thorough written process and the impact the anxiety itself might have on the manner of his engagement with the process.

115. It was unreasonable to look at the incident in isolation of the history of difficult relationships but then hold the history against the claimant in deciding that "[his] actions and lack of accountability for these [had] resulted in a significantly divided working environment due to the damage, tension and conflict caused….resulted in a breakdown in the employment relationship due to lack of trust and confidence in your commitment to promoting a harmonious working environment as a result of your actions." The grievance that looked into those relationships had not drawn that conclusion but had proposed mediation. It also found fault on both sides. There was no evidence that this was the impact of the incident itself. Mr Ellwood clearly did take the history into account and held the claimant responsible for the issues in the department. This was unreasonable when he was looking into the one isolated incident and the claimant had not been warned that he was being disciplined for the history. It was also unreasonable as it was not what that grievance process had concluded.

116. Mr Ellwood also said he did not consider he had discretion once he accepted the word "old" had been used. He considered that made the matter discrimination and therefore gross misconduct and therefore summary dismissal should follow. I also note that the wider grievance had considered this allegation under the heading minor verbal bullying and had categorised similar incidents as such.

117. Insufficient consideration was given to the claimant's length of service and clean disciplinary record both in deciding whether the incident occurred and in deciding what the correct penalty should be. No consideration was given to the fact that the words were used in an altercation where the other participant was also potentially abusive, threatening and swearing.

118. The recent collective grievance concluded that both sides were responsible for the issues in the department and that mediation was the way forwards. The claimant himself expressed willingness to engage with this. There were insufficient grounds for concluding that he was no longer willing to work towards harmonious relationships.

119. Mr Ellwood said he took into account that the complainant reported the matter straight away and that he was remorseful. There is no evidence to support that he was remorseful. The claimant also reported the matter to the same team manager and to his union.

120. There is some agreement that the complainant also behaved badly in the altercation but there has been no decision as to what exactly he did. On the

claimant's account he also used the word "cunt". It was never explored with the complainant, though the witness does say he did not hear him use bad language he accepts he did not hear every word.

121. Did the decision to dismiss fall within a range of reasonable responses open to a reasonable employer?

122. In my view it did fall outside the range of reasonable responses in all the circumstances to dismiss the claimant for saying the words "old cunt"; the history in the department and the way he conducted the disciplinary process.

123. There was a long-term history of swearing and other serious abusive conduct between colleagues in the department as set out in the investigation in 2018. Others had been accused of discriminatory conduct and very serious abusive conduct. On the whole there have not been disciplinary consequences save for a final written warning when a supervisor assaulted the claimant (back in 2013) and a written warning to the team leader for a swearing gesture directed at the claimant. In both cases these members of staff were in more senior positions than the claimant.

124. There is a dignity at work policy that is supposed to be communicated to colleagues when they are inducted but this is dated many years after the claimant was employed. Although there was an attempt to draw a line and improve the culture in 2018 this was limited to an oral instruction to treat colleagues with respect and avoid sarcasm. Neither account of the November 2018 suggest it went so far as to say that discriminatory or abusive language would not be tolerated and could lead to disciplinary action including dismissal. It is clear that issues have continued and that it is a department wide problem. There have continued to be examples perpetrated by the team leader since then with minimal management action in response as was documented in the bundle.

125. The respondent accepts that use of the word "cunt " alone would not have justified dismissal and it is the use of the word "old" which set this conduct apart.

126. Whilst the use of the words "old cunt" to someone older does fall foul of the dignity at work policy, so does much of the other conduct and language reported. The respondent has not made clear that a one off moment of abusive and discriminatory language will be treated as gross misconduct and lead to summary dismissal. The policy falls far short of saying that. Likewise the conversations in November 2018 did not say that.

127. I find the culture was such that swearing and abusive conduct including discriminatory conduct was not usually responded to more seriously than a written warning, if it was responded to at all.

128. Taking into account all the circumstances including the claimant's length of service and the history and background between the claimant and those involved on 26 June 2019, the fact that the comment was made during an altercation when

the other party also did not react well, was threatening and potentially swore abusively at the claimant, dismissal for using the word "old" spoken in the heat of the moment fell far outside the range of reasonable responses. The circumstances also include that the claimant had a clean formal disciplinary record, although there were difficulties in the department. The claimant was not the only cause of the problems and he has consistently complained of being the recipient of bullying from the team himself and has been seeing a counsellor long-term. The recent collective grievance concluded that both sides were responsible for the issues in the department and that mediation was the way forwards. The claimant himself expressed willingness to engage with this.

129. There has also been an ongoing suggestion that a contributory factor was that management of the department was ineffective.

130. I find the cursory investigation into what happened during the incident itself (not withstanding the other ways in which the investigation was thorough) and the much stricter treatment of the claimant in comparison to others means it likely that here the claimant has been dismissed not just because of that incident but that disproportionate weight has been given to the way he responded in the process and that he has been inappropriately "scapegoated" for the problematic history in the department. Mr Ellwood said as much in the dismissal letter. Alternatively the view was taken that the easiest solution to the wider problem was to take the opportunity to dismiss the claimant for this incident.

Should the tribunal find the Claimant's dismissal procedurally unfair in any respect, would a hypothetical fair procedure have resulted in the Claimant's dismissal in any event?

131. There is a possibility that even with a fair investigation into the incident and the issues raised by the claimant about the evidence the respondent would still have relied on the witness evidence to find the words were used by the claimant. It was not unreasonable for example to consider that the witness was independent because he made accusations against both the claimant and the complainant and therefore give more weight to his account.

132. However I have found that dismissal was outside the range of reasonable responses in all the circumstances of this case including the culture of the respondent and the claimant's length of service and disciplinary record.

133. So it would not be proper to find that a hypothetical fair procedure would have led to his dismissal in any event.

If so what, if any, discount ought to be applied to the Claimant's compensatory award?

134. Therefore no discount should be applied to the Claimant's compensatory award to reflect a chance of dismissal after a fair procedure.

Did the Claimant's blameworthy conduct contribute to his dismissal?

135. For the reasons set out in the wrongful dismissal claim below I do not find it more likely than not that the claimant said "old cunt". He did however participate in a two-way altercation with his colleague. This could be considered blameworthy conduct which contributed to the dismissal.

136. Moreover there were the wider difficulties in the department which the claimant did play a part in. He was not just a victim of bullying himself. Again this could be considered blameworthy conduct which contributed to the dismissal.

137. I do not consider the way the claimant participated in the disciplinary process was blameworthy. It is right that he did not take accountability but that is because he was denying the incident occurred in the way alleged, and I have not found that it did occur.

If so what discount, if any, ought to be applied to the Claimant's compensatory or basic awards?

138. I do not consider it would be appropriate to discount any awards because of the blameworthy behaviour. The grievance into the wider issues did not recommend anyone be dismissed or disciplined for the wider behaviour but that mediation be the way forwards, along with some other action points. It would not be just and equitable to penalise the claimant for that conduct here. The claimant's colleague only received an informal management conversation, at most, for his part in the altercation so I also consider it would not be just and equitable to discount the claimant's award for his part, when that was the only consequence for his colleague.

WRONGFUL DISMISSAL

On a balance of probabilities, did the Claimant conduct himself on 26 June 2019 in a manner that was in repudiation of the contract of employment?

139. I have heard the evidence of the claimant that he did not use those words and I accept it. I was particularly influenced by his recollection stated orally "on the spot" in response to questions whilst he was giving evidence, that the first time he became aware that those were the words he was accused of using was when he was given Mr Arnott's report. I read back through the documentation and find these support that fact in that the claimant made no mention of the words in his account and there was no questioning from Mr Arnott about whether he had used those words. I find his account given at that time is consistent with his expecting his

colleagues had accused him of something but he did not know what. I find this credible evidence which supports the fact he did not say these words.

140. I find the detail with which he approached the disciplinary process did not cloud the issues but rather was consistent with his trying to find a way to persuade the respondent that he genuinely had not used the words alleged.

141. I have considered the accounts of the witness and the complainant, including their interviews in the wider grievance. They do not come across as being "out to get" the claimant as he suggests. They do read as though they genuinely have complaints about the claimant's behaviour. I agree with the respondent that the fact that the witness also accused the complainant of inappropriate and aggressive behaviour is a reason why he could be considered an independent witness. However I have not heard from either of them orally and they have not been cross examined about the incident in the way the claimant has. Moreover the investigation did not question them thoroughly about the incident and the discrepancies between their statements about what was said or the fact that the witness appeared to have just left the area when the incident happened (or at least the timings of his clocking out does not accord with his account that he had returned from lunch and this incident occurred straight away).

142. In these circumstances I prefer the evidence of the claimant which I found credible for the reasons I explain above. I find it more likely than not that he did not say the words.

143. However I have also found that even if he did say the words they did not in all the circumstances amount to gross misconduct in this case. Worse or commensurate behaviour by other colleagues had not led to summary dismissal. There was a culture of severe swearing and abusive and offensive language between colleagues. The respondent accepts the use of the word "cunt" alone would not amount to gross misconduct from this respondent. Whilst there are other workplaces where the culture is such that it could amount to gross misconduct in the circumstances of this workplace culture I do not find the words "old cunt" said in the heat of an altercation where the other person is also alleged to have sworn abusively to amount to gross misconduct (especially where the other person was not considered to have committed gross misconduct).

ACAS UPLIFT

144. Did the Respondent fail to follow the ACAS Code of Practice by delaying the investigation stage of the disciplinary process concluding until 13 August 2019 because the investigating officer appointed was on annual leave?

145. I do not find that there was an unreasonable breach of the ACAS Code of Practice. In fact, apart from the criticisms of the investigation, I find the respondent's adaptation of the disciplinary process to accommodate the claimant's absence to have been done well (in circumstances where the claimant was accepting that it should continue in his absence).

.....
Employment Judge Corrigan
22 January 2024