EMPLOYMENT TRIBUNALS

Claimant: **Mr. J Latimer**

Respondent: **Life Technologies BPD UK Limited**

Heard at: **Newcastle Employment Tribunal** **On: 3rd and 4th April 2024**

Before: **Employment Judge McGregor**

Representation
Claimant: Represented by lay representative, Mr. Karl Latimer
Respondent: Represented by Solicitor, Ms. Moretti

RESERVED JUDGMENT

1. The Claimant's claim for Unfair Dismissal is not well founded and is therefore dismissed.

REASONS

Introduction

2. The Claimant was employed by the respondent from the18th of February 2019 until the 25th of August 2023. He was employed as a Band 4 Lead Manufacturing Technician. This case is about his dismissal from his employment at Thermo Fisher Scientific on the 25th of August 2023, for gross misconduct, following an investigation into bullying and harassment of another colleague, Adam Pearce. At the time of the dismissal the Claimant had an unblemished formal disciplinary record. The Claimant alleges that he was unfairly dismissed. The Respondent says that the Claimant was fairly dismissed due to his misconduct following a proper and reasonable investigation having been carried out.

The Issues

3. The issues in the were confirmed at the start of the hearing. It was not in dispute that the claimant was dismissed on the 25th of August 2023. The issues were therefore as follows:
    1) What was the principal reason for dismissal? The respondent relies upon conduct, having confirmed at the start of the hearing that they were not relying upon some other substantial reason.
    2) If the dismissal was for conduct, was it fair in accordance with section 98(4) of the Employment Rights Act 1996 ("the ERA")?
    3) If the respondent failed to follow a fair procedure, but the reason for dismissal was fair, would the claimant have been dismissed had a fair procedure been followed? (Applying the principles in Polkey).
    4) Did the Claimant or Respondent unreasonably fail to comply with the a ACAS Code of Practise on Disciplinary and Grievance Procedures, and if so, is it just to increase or reduce the size of any award by up to 25%?
    5) If the Claimant was unfairly dismissed, did the Claimant by blameworthy or culpable actions cause or contribute to his dismissal to any extent and, if so, by what proportion if at all would be just and equitable to reduce the amount of any award?

4. It was agreed that the issues of Polkey and contributory fault would be determined as part of the liability judgment. Judgment in the case was reserved, the question of remedy was also therefore reserved pending this judgment.

The Hearing

5. The hearing was listed for two days at the Newcastle Employment Tribunal. The Claimant was represented by his father, Karl Latimer. The Respondent was represented by Solicitor, Ms Ilaria Moretti. Before the hearing commenced, preliminary issues were addressed with the parties, including whether the Claimant required any special measures. It was confirmed that he did not require such measures.

6. On day one of the hearing, the Tribunal heard evidence from the Respondent's witnesses, Alan Singh, David Scrimgeour and David Taylor. On day 2, the Claimant gave his evidence. The Tribunal had been provided with statements of other Claimant witnesses Brian Bell, Alexander Bell, Michael Smith and Jordan Latimer. It was agreed by both parties that it would be unnecessary for them to give evidence as their statements went to what happened at the time of specific incidents and were therefore of limited significance to the questions before the court about the reasonableness of the procedure and decision that was made.

7. I was provided with two separate bundles, one being a bundle of witness statements that was 59 pages long. There was also a bundle of evidence that ran to 654 pages. These were given due consideration by the Tribunal throughout the hearing and in reaching this decision.

8. At the end of the two days hearing, judgment was reserved. Based on the evidence heard, and insofar as relevant to the issues that must be determined, I make the findings set out below. I am not obliged to rehearse all of the evidence heard and shall not do so in this written judgment. The

Tribunal based the judgment, and the reasons as follows, upon the relevant, salient parts of the evidence considered.

The Law

9. Section 98 of the Employment Rights Act 1996 (the ERA) states:

"(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 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 –

(b) relates to the conduct of the employee"

10. There is no burden of proof in assessing fairness, it is an assessment of the actions of the employer. It is not for the Tribunal to substitute its own views for that of the employer.

11. There is no statutory definition of "conduct", but the parties accepted that "gross misconduct" might include the type of behaviours in question in this matter including threatening or abusive language, harassment and intimidation or serious breaches of company policy.

12. The starting point for a Tribunal considering a misconduct case, is the test set out in the case of **British Home Stores v Burchell**. Applying the test, the Tribunal must consider:

a) Did the Respondent genuinely believe that the Claimant was guilty of misconduct?

b) If so, was that belief based on reasonable grounds?

c) Had the Respondent carried out such investigation into the matter as was reasonable?

d) Did the Respondent follow a reasonably fair procedure?

e) If all those requirements are met, was it within the band of reasonable responses to dismiss the Claimant rather than impose some other disciplinary sanction such as a warning?

13. The question is not whether the Tribunal would have itself chosen to dismiss the employee in the circumstances, but whether the decision to dismiss fell within 'the band of reasonable responses' open to a reasonable employer. The Tribunal must not substitute its own view for that of the employer. The Tribunal may think that the dismissal was harsh, but nevertheless, it may remain within the band of reasonable responses. It is not unfair dismissal when one employer might reasonably retain the employee, but another might decide not to dismiss them, even if the Tribunal would not have chosen to dismiss (**Iceland Frozen Foods v Jones, Linfood Cash and Carry v Thompson, West Midland Cooperative Society v Tipton and Sainsbury's Supermarket Limited v Hitt, London Ambulance Service NHS Trust v Small**).

14. In **Sainsbury's Supermarkets Limited v Hitt** the Court of Appeal confirmed that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to any other procedural and substantive aspects of the decision to dismiss the person from his employment for misconduct reason.

15. The ACAS "Discipline and Grievances at Work Guide" ("the ACAS Guide"), states that, "The nature and extent of the investigations will depend upon the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and consider evidence that supports the employee's case as well as evidence against."

16. In **Ulsterbus Limited v Henderson** the Northern Ireland Court of Appeal said it was not incumbent on a reasonable employer to carry out a quasi judicial investigation into an allegation of misconduct with a confrontation of witnesses and cross-examination of witnesses. Whilst some employers might consider that necessary or desirable an employer who fails to do so cannot be said to have acted unreasonably. The Tribunal considered the decision of **A v B** in which the Employment Appeal Tribunal reminded tribunals that in determining whether an employer has carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and the potential effect upon the employee. This decision was reaffirmed by the **Court of Appeal in Salford Royal NHS Foundation Trust v Roldan**.

17. What is a reasonable investigation will depend upon the particular circumstances of the case. There is no hard and fast rule as to the level of inquiry the employer should conduct into the employee's (suspected) misconduct in order to satisfy the above Burchell test. In **Ilea v Gravett** the following advice was offered by the Employment Appeals Tribunal:

'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.'

18. **Miller v William Hill Organisation Ltd**, the EAT acknowledged that there is a limit to the steps an employer should be expected to take to investigate an employee's alleged misconduct. How far an employer should go will depend on the circumstances of the case, including the amount of time involved, the expense and the consequences for the employee of being dismissed. In that case, the EAT considered that it would not have been too onerous for the employer to watch five hours of CCTV footage which would have supported M's version of events and not involved any additional expense.

19. However, in contrast to this case, in the case of **Shrestha v Genesis Housing Association Ltd** the Court of Appeal upheld an employment tribunal's finding that it was not necessary for an employer to investigate every incident and explanation in respect of an employee who was dismissed for claiming mileage that was in excess of the recommended

journey times. The employee had put forward a number of explanations for higher mileage claimed. The employer's investigation revealed that the mileage claimed was almost twice that recommended by the AA and RAC and exceeded that claimed for the same journeys in the previous year, and the disciplinary hearing had given consideration to all of the defences put forward by the employee. The Court considered that the employer's assessment that the explanations did not provide a plausible reason why every single journey had a higher mileage was reasonable in the circumstances and no further inquiry was necessary. The tribunal considered what the employer did by way of investigation and why the employer did not go further.

20. In that case Lord Justice Richards stated that, *"To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole. Moreover, in a case such as the present it is misleading to talk in terms of distinct lines of defence. The issue here was whether the appellant had over-claimed mileage expenses. His explanations as to why the mileage claims were as high as they were had to be assessed as an integral part of the determination of that issue. What mattered was the reasonableness of the overall investigation into the issue."*

Findings of Fact

Background

21. The Claimant commenced employment with the Respondent on the 18th February 2019 as a Band 1 BPC Operator at the Respondent's Cramlington site. The Claimant rose quickly through the ranks to the position of Band 4 Lead Manufacturing Technician. In Performance Management Development ("PMD") reviews, the Claimant had received positive praise and feedback. He was on ambitious employee described in his 2021 PMD to have, "great energy and passion to make sure work is completed well and in good time", but also, "some lapses in good judgement with regards to attitude and behaviour that still need some work," (Claimant's statement page 42).

22. The Claimant was initially friends with fellow employees Adam Pearce and Caroline Mein. The Claimant's relationship with Adam Pearce deteriorated when the Claimant says that Adam Pearce lied in a statement in a grievance he had against Clare Miller, who was his line manager in 2022. The Claimant had raised a grievance about her behaviour towards him, alleging bullying. The Claimant believes that the bullying contributed to a deterioration in his mental health. The Claimant was absent from work for 7 months due to mental health difficulties. The Claimant was not satisfied with how this grievance was dealt with. The grievance against Claire Miller was not upheld. The Claimant appealed the decision and the appeal was unsuccessful with the outcome communicated to him on the 9th December 2022.

23. The Claimant suggests that members of staff at the Cramlington site, including managers have a hostile attitude towards him. Clare Miller, in her Grievance Investigation Meeting on the 26th July 2023 (page 273) described that in relation to the Claimant and Adam Pearce, "they just don't like each other, they don't get on…There are people who don't like Adam or Jake (the Claimant), its difficult to judge the truth." When asked if she wished to add anything she stated that, "there are some people in there who despise Jake, and he has shown he can be excitable and loud but a lot calmer at the minute which is good and is more focused on work and people are more forgiven [sic] than should be and people have it in for Jake."

24. In December 2022, the Claimant returned to work following his period of sick leave. The Claimant was allowed a period of phased return and eased back into his role. Criticism was made of the Respondent's handling of the Claimant's sickness period and return to work. The Claimant submits that as a result of the mis-handling, he returned to work as a "different" person, and that was reflected in a downturn in his performance.

25. The Claimant's relationship with Adam Pearce broke down some time after the Claimant returned from sick leave and the Claimant accepts that they had a poor relationship. He denied that he had ever said anything abusive to Adam Pearce. On the 18th May 2023, an alleged incident occurred that was a catalyst to an investigation about the Claimant's behaviour towards Adam Pearce. The Claimant was alleged to have called Adam Pearce a highly insulting and derogatory name, commenting that, "see, he's a fucking "spacker"". This was said in front of around 30 of his colleagues attending what is called a "Tier Meeting". The Claimant states that he did say something at the meeting. On the Claimant's account, he stood up for Adam Pearce, as when a comment was made about an error that Adam Pearce was believed to have made, he told the meeting that, "this is the sort of conversation that should take place in the office"… "Now this is just wasting my time." The Claimant got up to leave the meeting, but was told that the meeting had not finished and he returned as he was told to do by Manager, Colin Moore.

26. On the 18th of May 2023, Adam Pearce, wrote an e-mail to Colin Moore about the incident making his complaint giving the above account (page 200). In a formal grievance letter to Stephen Thompson on the 19th June 2023, Adam Pearce describes, "over the past few weeks and months I have been subjected to continual harassment and bullying," by the Claimant (p213). Mr Pearce states in that document that he has tried to raise things unofficially with the Claimant but there has been no improvement in their working relationship, the reported difficulties are indicative that the Respondents believed that the 18th May 2023 was not an isolated incident and part of a pattern of problems between them both. A grievance procedure commenced in relation to Mr Pearce's complaint.

27. In the meantime on the 19th May 2023, the Claimant submitted an e-mail, "Potential Official Slander Complaint". This was timed at 1:52 am, sent during the same night shift when the incident occurred. At this stage no formal complaint had been made against the Claimant but he felt it necessary to get his account put forward. His complaint related to fabrication of statements, or slander of him, by persons unknown at that

stage. The "false statements" related to the allegation about the comment made to Adam Pearce. He provided a list of witnesses who he states were all fellow tube cutters and operators and could corroborate his account. The witnesses were named as Brian Bell, Paul Fulthrope, Chris Clark, Alex Bell, Michael Ainsley and Jenna Tennant. In the e-mail he stated that he would like all of these witnesses to be interviewed. The witnesses Brian Bell and Alex Bell who are brothers and friends of the Claimant provided witness statements to the Tribunal refuting the allegations. Alex Bell was interviewed as a witness, alongside Michael Ainsley.

28. Management were clearly concerned about the growing situation on shift. Stephen Thompson, Manager wrote to HR about the developing situation on the 19th May (p201) and referred the involvement of, "multiple people" and, "allies" making counter allegations about bullying. On the 12th June, the Claimant e-mailed Stephen Thompson, (page 209) including in the title, "Now official complaint." He highlighted that he believed that the "slander" was being brushed under the carpet. The Claimant alleged that Adam Pearce and Caroline Mein were the persons responsible for the slander against him. He alleged that Adam Pearce and Caroline Mein were asking people to give false statements about him, allegations that were denied by everyone spoken to, including the persons allegedly approached. The Claimant asserted that, as he got in his official complaint in first, the Respondent mishandled the procedure by speaking to Adam Pearce before they spoke to him. The Tribunal noted that the grievance procedures were commenced in relation to both complaints when they were made. It was not unreasonable that the Claimant investigated the grievance raised by the Claimant once they had received the email of June 12th, entitled, "Potential Official Slander/ Now Official Complaint" (p209), highlighting that the compliant is "now" official.

29. On the 23rd of May 2023, five days after the incident, Caroline Mein and Jordan Routledge, provided emails to Colin Moore, giving their accounts as to the events at the Tier Meeting. Caroline Mein described the comment as follows: *"Look man if you want to have a conversation with that "spacker" (Adam Pearce) then at least take it in the office and have it with him in there!"* The comment was recalled slightly differently by Jordan Routledge, who described hearing the Claimant say: "Howway man this is something to talk about in the office… if you wanna be a spacker about it [sic].

30. Both accounts differ from that put forward by Adam Pearce and the Claimant, (para 23 above). The Claimant submits that insufficient weight was given to inconsistencies between witnesses during the investigation. The Tribunal was referred to differences in the recorded language that had been used, there are also consistencies in relation to the context about the office in which the abusive word was used and the nature of the abusive word itself. The Claimant alleged that he was a member of staff who was "despised" (Clare Miller p 312), therefore the investigation against him was tainted by falsification of evidence that influenced the investigation and its outcome. The role of the Tribunal was not to revisit and re investigate what had been said but to determine whether the dismissal was fair or unfair.

Relevant Company Policy

31. The Respondent provided the Claimant with access to the Code of Conduct Business and Ethics, Claimant's Contract of Employment, Disciplinary Policy (UK), Diversity, Dignity and Equality at Work Policy (UK) and the Grievance Policy and Procedure (UK) throughout his employment and provided copies during the investigation. The Contract of Employment (page 69) sets out that the company may terminate the contract summarily or similar for any serios breach of terms of employment or incident of gross misconduct. Use of the word 'may', as opposed to 'will' or 'must' demonstrates that there is scope for an outcome other than dismissal to be considered upon a finding of gross misconduct.

32. Appendix 1 to the Disciplinary Policy sets out examples of types of behaviour amounting to misconduct and gross misconduct. Categories of gross misconduct, include amongst other factors, "any act or behaviour constituting any form of unlawful harassment or victimisation, including harassment or victimisation on the grounds of age, disability, gender reassignment or gender identity, race, religion or belief, sex, sexual orientation, marriage and civil partnership or pregnancy and maternity", and , "serious breach of company policies, procedures and rules on matters including… ethics, confidentiality." The Disciplinary Policy goes on to provide definitions of Harassment and Bullying (page 95). The Claimant did not seek to persuade the Tribunal that the alleged behaviour would not fall within the definitions provided. In cross examination the Claimant accepted that conduct such as calling as person something so offensive would, if proven, amount to gross misconduct.

The Investigation

33. Both the Claimant and Adam Pearce had raised their formal grievance in line with the formal grievance procedure. The Respondent promptly launched two separate procedures with the overlapping issues justifying the appointment of a single investigator, Alan Singh. Mr Singh' s evidence was that as an employee from the Respondent's Perth site, he had no connection to the Claimant or Adam Pearce, or any person at the Cramlington Site. Alan Singh was appointed due to his experience in conducting disciplinary investigations and because as an employee from Perth, he was appropriately independent. In evidence he confirmed that he had received training and has substantial experience in the conduct of such investigations.

34. It was suggested to Mr Singh that the Claimant had submitted his grievance first, therefore he should have been spoken to first that it was an error speaking to Adam Pearce first and that error led to Mr Singh pre-judging and forming preconceptions about the Claimant. Adam Pearce was spoken to by Alan Singh on the 13th July 2023. Alan Singh was a credible witness who denied that the delay in speaking to the Claimant prejudiced him against the Claimant. When it was suggested to him that as he spoke to Adam Pearce before the weekend, Mr Singh then had the weekend to develop those pre-conceptions about the Claimant, he denied this and described that over the weekend he had other things to concentrate his mind on and was not pre-occupied or "obsessing" over the investigation into the Claimant.

35. On the 13th July 2023, in accordance with the grievance policy, the Claimant was invited to a Grievance Hearing on the 18th July, about the matter he had raised. In the meeting of the 18th July 2023 (page 241), the Claimant again puts forward names of persons who were present at the Tier Meeting and who could be witnesses, referring to Brian Bell, Paul Fulthrope, Chris Foul, Carol Allouche and Sandra Long. In a follow up email the Claimant also gave the names of Chris Clark, Alex Bell, Michael Ainsley and Jenna Tennant. Alan Singh established that witness Carol Allouche was on holiday and Paul Fulthrope, he concluded, it would be inappropriate to contact, because was unavailable due to being on garden leave. Witnesses Sandra Long (Witness C), Alex Bell (Witness G) and Michael Ainsley (Witness H) were spoken to. The Claimant suggested that it was unfair that all of the witnesses named by the Claimant and all 30 persons present at the meeting should have been interviewed by Alan Singh. Alan Singh's evidence was that he interviewed both the Claimant and Adam Pearce, and selected names based upon the names put forward to him. When it was suggested to him that he treated Adam Pearce more favourably and was inconsistent in his selection of witnesses with reference to both parties, Alan Singh denied this. Alan Singh also interviewed witnesses, Caroline Mein (Witness A), Jordan Routledge (Witness B), Clare Miller (Witness D), Colin Moore (Witness E), Stephen Thompson (Witness F), Anthony Lawson (Witness I) and Andy Dixon (Witness J). Witnesses Stephen Thompson and Andy Dixon were not present at the meeting but relevant witnesses to the investigation who were also interviewed.

36. On the 21st July 2023, Adam Pearce emailed Alan Singh directly, alleging that he had been the target of intimidatory behaviour by the Claimant who had been, "staring at me menacingly whilst smiling and rubbing his hands at myself." As a result of the allegation, on the same date, the Claimant was issued with a letter confirming his, "Suspension Pending Investigation." A period of suspension is in accordance with the ACAS Code when considered necessary and the ACAS Guide refers to suspension being considered, "exceptionally if there is a serious allegation of misconduct and includes situations whereby the employee might seek to influence witnesses and/ or to sway an investigation into the disciplinary investigation." The Claimant does not deny that the allegations were serious and the Respondent believed that there may have been intimidatory behaviour towards a witness in a grievance procedure, justifying the exceptional step. They acted reasonably in suspending the Claimant when the investigation and disciplinary proceedings were ongoing. The fact of his suspension did not demonstrate a pre-determination of the disciplinary procedure.

37. The Claimant was informed formally of the outcome of his grievance on the 31st July 2023. Alan Singh set out the results of his investigations and found that there was no evidence that Adam Pearce had made false allegations against him or that others had been approached to make false statements against the Claimant. The Claimant appealed the outcome of the grievance. The crux of the appeal was the denial of involvement with the alleged incidents, therefore the witnesses must be making it up.

38. Records were made of all formal investigation hearings with parties and interviews with witnesses. 10 witnesses were interviewed as well as the Claimant and Adam Pearce. An investigation report (page 277) was

completed by Alan Singh 10 days after the Claimant's suspension, on the 31st July 2023. The investigation went beyond the Tier meeting incident, highlighting concerns that there was a pattern of incidents that may demonstrate repeated targeting of Adam Pearce by the Claimant.

39. Alan Singh determined that there was a case to answer and set out the allegations against the Claimant in the Investigation Report. The allegations were set out as follows:
    1) The use of abusive language – calling Adam Pearce a "spacker" at the Tier Meeting on the 18th May 2023.
    2) Intimidatory behaviour on 4 separate occasions
        i. 21st July 2023 at 5am – rubbing hands and staring at Adam Pearce
        ii. 22nd April 2023 – walking past the cutting room area, stepped towards Adam Pearce and tried to barge him
        iii. 8th or 15th May – Caroline Mein overhearing the Claimant say to Alex Bell that while Adam Pearce is on holiday, he hopes, "he fucking dies."
        iv. 21st March 2024 – walked past Adam Pearce and called him a "fat cunt."
    3) Wilful and gross insubordination from the Claimant leaving the Tier Meeting on the 18th May 2023 without authorisation due to a discussion that was going on that frustrated the Claimant and caused him to walk away and say something.
    4) Serious breach of ethics and policy by calling a colleague a derogatory term.

40. The allegation at paragraph 3) above related to the Claimant's actions of seeking to leave the Tier Meeting when a comment was made by the Claimant. This allegation was not upheld. The Claimant denies all allegations and did so throughout the investigation. The Investigation Report is clearly set out and makes the Claimant fully aware of what was being alleged against him. He received the evidence that had been gathered, annexed to the report.

41. The Investigation Report sets out Mr Singh's findings. In relation to the Tier Meeting incident, the report sets out that Adam Pearce and witnesses Caroline Mein and Jordan Routledge all stated that the Claimant called Adam Pearce a "spacker", as indicated in emails they sent in the immediate aftermath of the Tier Meeting (p205-206). One witness stated that they have poor hearing and like to, "keep out of everything". Three witnesses referred to something having been said but they did not hear what was said. Alex Bell who provided a statement to the Tribunal told Alan Singh that something was said but the word "spacker" was not used. A number of witnesses referred to there being tension between the Claimant and Adam Pearce. Caroline Mein and Stephen Thompson described that Adam Pearce was upset and angry, "after the event". This is relevant as Alan Singh indicated in evidence that he found the reaction of Adam Pearce was, "important" and he found, added credibility to his allegation. Mr Singh spoke to the Claimant who denied using the word and also stated that, "he is partial to slip his tongue and say a swear word… those words are not in my vocabulary, I have the utmost respect for the disabled" (Para 7.2.10 Alan Sigh statement). The Claimant suggested that, as nobody reacted by challenging him in the immediate aftermath, that lack of reaction was

equally as compelling and Alan Singh did not properly apply his mind to all of the facts and evidence. Mr Singh denied this in evidence and described using his own judgment to analyse the evidence including assessing the credibility of those he heard from.

42. Another key aspect of Alan Singh's investigation was incidents between the 21st March 2023 and the 21st July 2023 that were set out under the umbrella term, "intimidatory behaviour." Adam Pearce was the principle witness to incidents on the 22nd April, barging incident and the 21st July, staring incident. Caroline Mein gave evidence describing that she overheard the comment about hoping Adam Pearce "dies." In the interview report, Alan Singh states that Adam Pearce reports these incidents occurring in front of friends of the Claimant. The Claimant suggests that others should have been asked to provide their accounts of these incidents. Whilst the evidence relating to the barging incident, staring incident and comment incident were reliant upon accounts from persons the Claimant alleges are biased against him, the incident on the 21st March was supported by physical evidence in the form of an entry upon his personnel "Fact File", that was disputed as falsified by the Claimant and this shall be considered shortly.

43. The Investigation Report of Alan Singh sets out the evidence that both supports and undermines the case against the Claimant. Alan Singh was credible when he stated in evidence that he weighed up all of the evidence that he had gathered, including the evidence from the witnesses who said incidents hadn't happened, and determined that on the balance of probabilities, he was satisfied that there was a case to answer against the Claimant. Alan Singh was not making the final determination about the outcome of the investigation. The ACAS Code paragraph 6 states that, "In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing". On the 3rd August 2023, the Claimant was sent an "Invitation to Disciplinary Hearing" letter by David Scrimgeour who was assigned to conduct the disciplinary process. The letter refers to the following: *"If you would like to submit any documentation for consideration at the hearing please let me have copies, along with the names of any witnesses you wish to bring forward, by no later than 7 August 2023 at 12 noon."*

44. The letter was sent in accordance with the Respondent's disciplinary policy and goes on to give details about the right to be accompanied by a colleague or Trade Union representative, in accordance with paragraph 4 of the ACAS Code. The Claimant suggests the witness instructions above should have been more prominently displayed. They are easily ascertainable in paragraph 3 of a 10 paragraph letter. David Scrimgeour was cross examined upon the practicalities of bringing forward witnesses at the Disciplinary Hearing and he was vague upon how this may take place. David Scrimgeour described that this does not work for the Human Resources Department and is unaware of the process for facilitating this. This was speculative as the Claimant did not ask to bring witnesses to his meeting. Upon the Claimant's account he had read the letter but not noticed or appreciated the contents of paragraph 3 due to the stress and anxiety caused by the situation he found himself in.

The Disciplinary Hearing

45. On the 1st August 2023, the Claimant had sent a letter to the Respondent entitled, "Grievance Appeal". In that letter he again raised his concerns about discrepancies in the evidence. The Claimant's grievance was being handled separately to the disciplinary proceedings and the outcome of the grievance appeal, which found against the Claimant, was determined and communicated to the Claimant on the 18th August 2023. David Scrimgeour, Manager from the Perth Site, had no involvement with the grievance process dealt with by Steven Shanks. Mr Scrimgeour, like Alan Singh did not know anyone at the Cramlington site and was tasked to conduct the disciplinary, partly due to his independence. This was appropriately dealt with separately from the Claimant's grievance about fabrication. Within the grievance appeal, the Claimant raised that witness Carol Allouche had not been interviewed, that she and Sandra Long were approached and intimidated into providing false statements by Caroline Mein. In the outcome letter Steven Shanks confirms investigating these matters and found no evidence in support. The same point was raised by the Claimant as a "factual inaccuracy", in Alan Singh's Interview Report. None of the Claimant's points were upheld. The Tribunal was not considering the handling of the grievance but found it of significance that the points raised, and raised repeatedly, had been investigated and findings made about them.

46. The Disciplinary hearing was re-scheduled to accommodate the grievance procedure outcome. Davd Scrimgeour denied in evidence that he had failed to give the Claimant adequate time to prepare for the hearing, in breach of paragraph 11 of the ACAS Code which states that: "The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case." A balance needed to be had in this case to prevent undue delay and allow time to prepare. The Claimant received his outcome on the 18th August via Teams meeting, the follow up documents were sent to him on 21st August 2023 at around 11am. The only outstanding information at that point related to the written outcome of the grievance appeal which had been communicated to the Claimant orally. The disciplinary meeting was at 8am the following day. He was not working at the time due to being suspended from work and therefore had the rest of the 21st August to complete his preparation for the postponed hearing on the 22nd August 2023. This was a reasonable amount of time considering the hearing had already been postponed once for the grievance outcome. David Scrimgeour stated in evidence that he believed that 18 days from the original letter, was a reasonable period of time to prepare his case.

47. The Claimant suggests that he it was unfair to fail to allow him to ask questions of witnesses who had provided evidence at Investigation Meetings, at the hearing. The Claimant relies upon the defined scope of the Companion, who at the disciplinary meeting was Alan Bramley. Their role is defined on the Formal Disciplinary Hearing Minutes, provided to the Tribunal (p441). The document states that the companion has the right to: "… confer with you and ask questions of witnesses but has no right to speak or answer questions on your behalf." David Scrimgeour's evidence was that he believed the Claimant was misunderstanding the use of the word witnesses, as witnesses from the investigation would not usually be present, therefore this refers to the persons conducting the meeting.

48. The ACAS Code at paragraph 12 deals with the requirements for a disciplinary hearing and states that: *"At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this."*

49. The Claimant had not indicated before the meeting that he wanted witnesses to be called. David Scrimgeour stated that the purpose of the hearing was not to reinvestigate, but was to set out the case and explore the issues raised. The Claimant had been informed that he could bring forward witnesses in the invitation letter, but his evidence was that the Respondent had failed to make the contents of the letter prominent enough.

50. The Minutes of the Grievance Hearing demonstrate thorough questioning by David Scrimgeour, exploring the issues that had been raised in the investigation and allowing the Claimant his opportunity to put forward his case. In evidence David Scrimgeour described he believed he established all the facts, he can only do his best and where there were discrepancies raised, he spoke to other witnesses. This is demonstrated in relation to further enquiries that were carried out by Davd Scrimgeour, immediately following the Hearing, about the alleged incident during which the Claimant called Adam Pearce a "fat cunt", part of the 4 incidents amounting to allegation 2. The Claimant alleges that there has been a case of mistaken identity and Allegation 2) iv., that it involved an incident between Michael Smith and Adam Pearce. Michael Smith provided a statement to the Tribunal to say that he was the person who called Adam Pearce by this derogatory term. Micheal Smith was not cross examined on his statement as to whether he did make such a comment, that was not an issue that the Tribunal must decide. The statement made no reference to the date upon which Michael Smith made such comment and his statement was afforded little weight.

51. As the Claimant was denying the allegation, David Scrimgeour contacted the Claimant's Line Manager at the time, Colin Moore, to establish whether he had additional information available. The Claimant had suggested that Colin Moore and Alan Pearce were connected and therefore Colin Moore could not be trusted, effectively that Colin Moore would align himself to Adam Pearce. The Claimant stated that Colin Moore's notes should be checked and they would confirm that it was Michael Smith who made the comment. Colin Moore was contacted by David Scrimgeour on the 22nd August 2023 and he provided an excel spreadsheet that recorded information about staff members, used to inform their PMD conversations. There were a number of entries upon the Claimant's "Fact File." In evidence, witness David Taylor who spoke to Colin Moore, described finding him to be a credible witness.

52. In the Fact File there were a number of entries. On the 19th of February 2023, an entry by Martin Quince is a positive one, it states: *"Excellent feedback received from colleague regarding Jakes leadership and people*

skills in regards to helping deal with concerns and improve colleagues mood. Positive comments fed back to Jake by MJQ, well done." An entry dated the 20th March 2023, states as follows: *"Allegation from another LL Adam Pearce (APE) where Jake (JL) has called APE a 'Fat Cunt' directly. Investigated in Lab and asked as to what context this was meant, i.e. "Lab Banter" or something more sinister? Advised both to be mindful of surroundings and perceptions this has to others. Advised language of that nature should not be used in these instances. NFA"*. On the day of the incident on the 18th May 2023, the following entry was made in the Claimant's Fact File by Colin Moore: "*allegation from another LL Adam Pearce (APE) where Jake (JL) has used foul and abusive language forwards him [sic] in a tier one meeting chaired by myself. This was not heard by myself but will follow up with investigation and obtain witness statements for supporting evidence."*

53. The Claimant claims that the entry dated the 20th March 2023, had been falsified by Colin Moore, that he accessed the file on the 22nd of August 2023, which was not disputed by the Respondent, and modified information relating to the Claimant, to include the 20th of March entry. The Claimant states that the file was accessed 35 minutes before Colin Moore sent the document to the investigation team and the matter was not properly investigated by the Respondents who should have identified the falsification of evidence.

54. The Claimant was issued with an Outcome of Decision letter dated 25th of August 2023 by David Scrimgeour. The letter (page 478) informs the Claimant that his employment is terminated on the grounds of gross misconduct. David Scrimgeour made the decision following a full investigation, having given careful consideration to all of the facts, " I have decided that your employment should be terminated on the grounds of your gross misconduct." David Scrimgeour found allegations 1, 2 and 4 made out. In relation to allegation 3 he found that there was no case to answer. He found that attempting to walk away from a tier meeting was inappropriate but not sufficient to amount to misconduct.

55. The claimant is told of the right to appeal against his dismissal and is provided with a copy of the minutes from the disciplinary hearing. The letter states in conclusion, that: *"Whilst you denied all allegations, I have taken into account the campaign of inappropriate behaviour between March and July 2023 in coming to my decision. I also considered that you have attempted to move blame to another colleague that has been discredited by a team leader leading me to question your credibility in response to all allegations. As a lead operator, this is a position of seniority where role model leadership is expected. There's been no responsibility taken for any of your actions and no recognition of the impact of these behaviours on others which is not in line with the expectations of a lead operator at Thermo Fisher. Thermo Fisher Scientific strives to ensure that the company is a great place to work, grow and succeed recognising that, in order to attract and retain the highest quality people and to help the company achieve its goals, it needs to promote equal opportunities and a harmonious working environment, free from any form of harassment, bullying or victimisation, where all employees are treated with dignity and respect. These behaviours go directly against this and I find it to be a serious breach of company policies, procedures and rules on matters including but not limited to Code*

of Conduct and Business Ethics and Diversity, Dignity and Equality at Work Policy. I have considered your current clean disciplinary record and your length of service however, based on all of the above, dismissal on the grounds of gross misconduct, is the correct course of action."

56. The claimant appealed the decision and the appeal procedure was handled by David Taylor. On the 7th of September 2023, the Claimant received a letter inviting him to an appeal hearing. The Claimant was told of his right to be accompanied to the appeal but chose to attend unaccompanied. Tensions became heightened during the meeting and the claimant was allowed time to cool off and regather himself. He apologised for being rude at the end of the meeting. The scope of the appeal was not a re-hearing but to concentrate upon the grounds of appeal at which the Claimant could put forward new evidence which was not available during disciplinary proceedings and/ or complaints of any flaw in the original decision making process (page 503). The Claimant put forward 5 appeal points which were:
    1) Conflict of interest regarding relationship between Colin Moore and Adam Pearce
    2) Colin Moore changed his story relating to the Fact File
    3) Claire Miller's testimony omitted intentionally to maintain a narrative against the claimant
    4) Investigation did not consider "dislike" for the claimant
    5) Caroline Mein not a credible witness

57. The Respondent's evidence was that these 5 points were considered, as demonstrated by the Appeal outcome letter (page 559-563).

58. The Appeal Hearing was held on the 12th of September 2023. The Claimant did not attend with anyone, but the evidence of David Taylor was that it was made clear to him he was entitled to be accompanied. The Claimant accepted that he decided to attend unaccompanied. He described that the Appeal, he felt was his "weakest", in terms of putting his case forward. The issue in relation to the Fact File was raised again by the Claimant in his Appeal Hearing. David Taylor asked questions, allowing the claimant to put forward his allegations about conflict of interest, bias and fabrication by Colin Moore. This was followed up by David Taylor who made inquiries about whether the contents of the Fact File could have been changed by Colin Moore on the 22nd of August 2023. Colin Moore was spoken to by David Taylor on the 18th of September 2023 in a formal investigation meeting during which he confirmed that the entry dated 20th March 2023 was an entry that he had made. He also noted that the incident had occurred on his daughter's birthday so he remembered it happening. The Respondent also spoke to manager Martin quince, the Claimant's team leader when the incident occurred. Mr Quince confirmed he remembered having a discussion with Colin Moore, who told that Mr Quince that he had a discussion with the Claimant and Adam Pierce about the situation between them that was resolved informally. This evidence was reasonably considered to be corroborative evidence, used by David Taylor to determine the appeal outcome. In evidence, the Claimant stated that Martin Quince was also lying and simply backing up his best friend Colin Moore. The fact of the meeting on the 18th of September with Colin Moore, and discussion with Martin Quince demonstrated the Respondents carrying out further investigation into explanations put forward by the Claimant and checking facts before making the final determination of the Claimant's appeal.

59. In cross examination it was suggested to David Taylor that he should have looked into this allegation in more depth. David Taylor established that an entry on the Fact File was modified on the 22nd of August 2023 at 9:00 pm by Colin Moore, the same day that he was asked for information. However, his enquiries revealed that the Fact File related to 31 people and the edit could relate to any one of the 31 people contained within the excel spreadsheet. In the Outcome of Disciplinary Appeal Hearing, David Taylor dealt with the suggestion that Colin Moore had been preferential to Adam Pearce. He confirmed that he had investigated the Fact File entries and the results of his investigation. Mr Taylor's evidence was that he found that Colin Moore did not demonstrate bias and did not drive the investigations against the claimant. His evidence was that in his discussions with Colin Moore, he was generally positive about the claimant. There was no reasonable explanation put forward as to why Colin Moore would go to the lengths of fabricating evidence against the Claimant. David Taylor's evidence was that he took account of all evidence available to him he was satisfied that there were no flaws in the procedure. The appeal was unsuccessful and the decision to dismiss was upheld.

60. The Claimant had a strained relationship with Adam Pearce as he felt that he had not backed him up in relation to his 2022 grievance. The Claimant denied ever saying anything abusive to Adam Pearce or acting in any of the ways alleged against him. The Claimant's evidence before the Tribunal was that he always speaks to people with respect. The Claimant was respectful in the face of the Tribunal but this is an entirely different arena to working on the manufacturing floor where problems and tensions can build up and be expressed between employees or groups of employees, as in this case. During the appeal hearing with David Taylor, the Claimant denied that he became aggressive. He had to apologise for being rude. The Claimant's statement includes his own PMD evaluation from 2021, that refers to, "some lapses in good judgement with regards to attitude and behaviour." The Claimant admitted that he is prone to an occasional, "slip of the tongue." It was well known to many persons within the Respondent company that's there were tensions between the Claimant and Adam Pearce, this was referred to by witnesses during the investigation. However, upon the evidence of the Claimant, he had not acted inappropriately towards Adam Pearce. The Tribunal found that the Claimant lacked credibility in this regard.

61. The Claimant did not know Alan Singh, David Scrimgeour or David Taylor, but stated in cross examination that he would have liked to have spoken to them about how well they know each other from the Perth site where they all work together. He describes that his mental health was not in the best place throughout the procedure. He was not offered any adjustments and it was never made known to him that adjustments could be made for his mental health if needed. The Claimant did not raise any requirements for adjustments to assist him through the disciplinary process. The Claimant's evidence was effectively that any witness who did not support his account was lying. The Claimant demonstrated that he would not accept the Respondent's findings or any responsibility for any difficulties with Adam Pearce. He believes that he was someone who did not fit in with the company and that managers wanted to get rid of him, especially those

against whom he made the IPA complaint, including Colin Moore and Claire Miller. The Tribunal found this theory lacked credibility.

Conclusions

62. The parties agreed that the reason for the Claimant's dismissal is conduct. Based on the findings of fact above and considering the relevant law as it applies to the agreed issues I conclude as follows:

63. The Respondent conducted grievance investigations in relation to matters put forward by both the Claimant and Adam Pearce. The respondent appointed an independent investigator Alan Singh who was not known to any party involved in the case and was located at the Perth as opposed to Cramlington site. Mr Singh spoke to both Adam Pierce and the Claimant before he decided upon an appropriate, proportionate, representative number of witnesses to put forward accounts about what had happened at the team meeting on the 18th of May. At the outset of the investigation, the 18th of May was his main focus but the investigation was widened when further alleged misconduct was identified. Mr Singh held investigation meetings with 10 further witnesses who were present at the Tier Meeting. The Tribunal found that the Respondent was reasonable in considering this an appropriate number of witnesses to speak to. The evidence of these witnesses provided a balanced account of the events of the 18th of May. Discrepancies between the witnesses who did hear the comment made were taken into account by Mr Singh, alongside the evidence of witnesses who did not hear the alleged comment being made. Mr Singh considered the reaction of Adam Pearce immediately following the incident concerned and also that the Claimant admitted saying something. It was reasonable for Mr Singh to determine that the reaction of Adam Pearce was inconsistent with the Claimant's account. In relation to the pattern of incidents, Mr Singh gathered evidence and made the recommendation that there was a case to answer. Mr Singh explained in his evidence in a measured and consistent way how he balanced the evidence obtained, appropriately weighing up that evidence in order to come to the conclusions he did in his Investigation Report.

64. There were some evidential weaknesses in relation to witness accounts. It was reasonable for the Respondents to take a balanced view of the all of the evidence and conclude that it demonstrated a pattern of behaviour by the Claimant. It would have been unreasonable to expect the respondent to interview every single person who was present at the team meeting and other incidents. Whilst there were witnesses who have provided statements to the Tribunal refuting the allegations made, the Respondent's investigations did identify undermining evidence that was appropriately weighed against other evidence as was demonstrated by the credible evidence of Mr Singh, Mr Scrimgeour and Mr Taylor. As described in the case of **Shrestha v Genesis Housing Association Ltd**, there is no requirement that each and every line of defence put forward needs to be investigated. The investigation as a whole should be looked at when considering the question of reasonableness.

65. Having reasonably decided that there was a case to answer following their investigation, the matter was passed to David Scrimgeour, again an appropriately independent and impartial person. He held the formal

disciplinary hearing after having allowed a postponement for the grievance procedure, this demonstrates fairness in his handling of the procedure. He allowed the Claimant sufficient time to prepare his case and informed him, by letter, that he could present evidence and witnesses at the hearing. The suggestion that the Claimant had been given insufficient time to prepare for the disciplinary hearing lacked credibility. He had the bulk of information required 18 days before the hearing and additional information he received was easily digestible having been present at the grievance hearing days earlier. The Claimant was not working so had time to prepare. The Claimant provided a document setting out his case to the Respondent's in time for the hearing. The Claimant suffered a decline in his mental health due to the stress the process was putting upon him. The Claimant did not request any reasonable adjustments to assist during the process and therefore there was no unreasonable failure to make adjustments for him.

66. The Claimant suggests that it was insufficiently clear that he was able to call witnesses to the disciplinary hearing was implausible. There was no attempt to hide this information within the letter that was sent to the Claimant. It is a short letter written in plain, understandable language. The Claimant did not read the letter properly. The Claimant was informed of his right to be accompanied at the disciplinary hearing and he was told the details of the allegations, which were set out fully and fairly. The letter also informed him that that the meeting may result in disciplinary action being taken which could include dismissal. He was given information about his right to appeal. The process followed was reasonable and consistent with the ACAS Code.

67. The Claimant was given the right to appeal and his concerns were considered by David Taylor. The Claimant attended the appeal hearing without representation by choice and it was not unfair that it continued without the Claimant being accompanied. Following both the disciplinary hearing and the appeal David Scrimgeour and David Taylor carried out additional enquiries investigating concerns put forward by the Claimant in the meetings. This demonstrated that the Respondents took a fair approach. They didn't sweep the Claimants concerns under the carpet. This was evident in the Respondents handling of the complaints that Colin Moore had fabricated evidence. By checking and producing the contents of the Fact File, and speaking to Colin Moore and Martin Quince, the Respondent reasonably investigated what was being alleged. It was reasonable that the decision makers found the allegations of dishonesty against Colin Moore to be unfounded. Colin Moore had spoken positively about the Claimant, there was no evidence that he bore a grudge against the Claimant or was so closely associated with Adam Pearce that he would fabricate evidence and risk losing his own job to do so. The theory lacks credibility and is demonstrative of a broader pattern of the Claimant seeking to undermine the credibility of anyone who took a view contrary to his own. In his evidence, the Claimant stated that he would have wished to explore more the relationship between Alan Singh, David Scrimgeour and David Taylor. The Claimant denied believing there was a conspiracy against him at the company, but the Claimant demonstrated a deep and unreasonable mistrust for the persons and the process involved.

68. The Claimant sought to suggest that the decision makers in the case misapplied the balance of probabilities. That test can also be described as, "more likely than not." A decision maker applying this test does not have to

be “sure”. That would be to place to high a burden or proof upon a decision maker in the work-based investigatory process. The decision to dismiss the Claimant for gross misconduct was made by David Scrimgeour who balanced the evidence before him and found that on the balance of probabilities allegations 1, 2 and 4 had taken place. He reached this conclusion based upon the evidence from the investigation, his formal meeting with the Claimant, his denials and his follow up discussions with others. The fact that he did not uphold allegation 3 demonstrates that he took a balanced approach to making the decision. Mr Scrimgeour was independent from the Cramlington site and had no preconceptions about the Claimant. He took into account information from the investigation that included accounts of negative feelings of colleagues about the Claimant and Adam Pearce in his decision making. The Claimant in his own evidence indicated that what was being alleged against him would amount to gross misconduct because of its serious nature. The behaviour found proven amounted to a pattern of harassment against a colleague that amounted to bullying. The Tribunal found that such behaviour can, within the Respondent company policies, in particular the Diversity, Dignity and Equality at Work Policy, be described as a serious breach of the policy and falls within the examples given of gross misconduct.

69. When cross examined about whether the Claimant had to be dismissed, Mr Scrimgeour was credible and balanced when he stated that his hands were not tied to dismissal. Mr Scrimgeour considered whether a final warning was an appropriate, alternative sanction. The Claimant’s role came with a level of authority that meant there were expectations of leadership and to act as a role model to colleagues. The breaches found proven were very serious. Mr Scrimgeour was concerned about the lack of insight into the effects such behaviour may have had upon his colleagues. On the Claimant’s evidence there were tensions and difficulties between himself and Adam Pearce, yet the Claimant sought to blame others. Mr Scrimgeour considered the Respondent’s disciplinary record during his 4 years of employment with the company. There is no evidence to support the theory that Mr Scrimgeour, independent of the Cramlington site, was part of a management agreement or conspiracy to get rid of the Claimant. The decision to dismiss the Claimant was within the band of reasonable responses and was upheld following a fair appeal procedure. The Tribunal considered the test in section 98(4) of the act and considered the size of the Respondent and the resources available to it. They are a large company who have options available to them for redeployment or demotion. I am satisfied that the Respondent acted reasonably in treating the incidents of bullying and harassment in the form of verbal abuse, intimidatory behaviour and a serious breach of ethics policy, using such an appallingly derogatory term in reference to a colleague, as a sufficient reason for dismissing the Claimant by reason of gross misconduct.

70. Considering the approach set out in the case of **British Home Stores Ltd v Burchell**, a genuine belief does not have to be a correct or justified belief. The Respondent truly and genuinely believed that the Claimant had committed acts that were reasonably considered to be gross misconduct. That belief, in all the facts and circumstances of the case was based upon reasonable grounds following a comprehensive, reasonable investigation. The decision to dismiss was made following a reasonably fair procedure. The Tribunal found that it was within the band of reasonable responses,

considering the serious nature of the matters found proven, against a person in authority within the company, for the Respondent to conclude that summary dismissal, as opposed to some other sanction was appropriate. The Claimant's claim of unfair dismissal is therefore unfounded and is dismissed.

Employment Judge McGregor

Date 22 April 2024

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