# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| **Mr M Braithwaite** | **-v-** | **Refresco Drinks UK Ltd** |

**Heard at:** Nottingham

**On:** 28,29,30,31 May and 3,4,5,6 June 2024
7 June 2024 (In chambers)

**Before:** Employment Judge L Brown

**Members** Mr Tansley

Mr Edmondson

**Appearances**

**For the Claimant:** In person.
**For the Respondent:** Ms Gilbert, Counsel.

# RESERVED JUDGMENT

The Judgment of the Tribunal is:

(1) The Claimant's claim for unfair dismissal succeeds.

(2) The Claimant's claim for age discrimination partially succeeds.

# REASONS

## Procedure at the Hearing

1. The Claimant gave evidence and also called his wife Mrs Braithwaite, and Brendan Rigby a former work colleague.

2. The Respondent called the following witnesses: -

   2.1 Gavin Clarke – Maintenance Manager

   2.2 Russell Keers – Factory Manager.

   2.3 Sarah Hudson - Human Resources Business Partner.

   2.4 Katie Darcy – Senior Human Resources Partner.

   2.5 Michael Wigham - General Manager of its Milton Keynes & Pontefract sites.

3. We had a bundle of 464 pages.

4. The Claimant produced oral recordings during the hearing from both the investigatory meeting and the disciplinary meeting, and we listened to recordings of parts of both the investigation meeting, and of the disciplinary hearing.

5. During the hearing the Respondent produced a further email dated 21 June 2022 inviting the Claimant to the investigation meeting, and they also produced on the fourth day of the hearing, their Hybrid Working Policy, and their Managing Sickness Absence Policy and Procedure.

## Rule 50 Application

6. The Respondents made an application for a restricted reporting order ('RRO') pursuant to Rule 50 of the Employment Tribunal Rules of Procedure 2013 in that they submitted an RRO should be made to prevent the reporting of the ill-health of the daughter of the Claimant, who at the time of the incident on the 14 June 2022 was still a minor.

7. In particular they said in their opening note on this issue that they invited the Tribunal to consider whether documents in the bundle should be excluded, and whether a recording of the Claimant's daughter should be listened to, and whether references in Claimant's witness statement should be redacted.

8. They invited the Tribunal to consider making an order under rule 50 of the Employment Tribunal Rules, and that the Tribunal would need to consider the balance between Claimants' daughter's Article 8 right to privacy and the principles of open justice (Article 6 right to a fair trial) and freedom of expression

(Article 10) and referred to **A v B 2010 ICR 849, EAT and F v G 2012 ICR 246, EAT.)**

9. They invited the Tribunal to consider making an order that:

    a. Restricted the availability of documents referring to her. These could be placed in a separate bundle that was not made available to the public.

    b. A restricted reporting order ("RRO") which restricts publication of details of and the severity of her condition.

10. The Claimants daughter had sent an email to this Tribunal stating that she gave permission for any details about her to be referred to by her father in bringing this claim. As a result of this issue the Respondents had removed certain pages from the joint bundle due to them disclosing information and images about the Claimant's daughter mental illness which was anorexia and bulimia. The Claimant had produced a supplementary bundle containing the removed pages.

11. We rejected the application for an RRO under Rule 50 for reasons that we gave during the oral decision given during the hearing which we do not repeat in full here. However, in summary we did not consider that the submissions by the Respondent, that the identity of a minor at the time of the incident should not be reported on due to her mental illness, when that person, now an adult, specifically consented to any reference to her in these proceedings. We found no valid grounds for the strong principle of open justice being interfered with, especially where the person did not allege an interference with her convention rights in these proceedings.

12. We also did not order that the documents in the supplementary bundle be restricted in some way so that it was not made available to the public.

13. However, we did state to the Claimant we did not feel it necessary to listen to his daughter in the relevant recording in a state of distress. We directed that the recording would not be played, as Counsel confirmed she would not be putting it to the Claimant that his daughter was not as ill as he said she was and so we saw no relevance in the recording being played. This was agreed to by the Claimant following our discussion with him about this.

## Background

14. The Claimant issued his claim form on 12 October 2022 and brought the following claims: -

    14.1 Age Discrimination – section 13, Equality Act 2010.

    14.2 Unfair Dismissal – section 98 of the Employment Rights Act 1998.

15. The Respondent filed its Response on the 15 November 2022 denying all claims.

16. There was a Preliminary Hearing on the 24 January 2023 and the case management summary sets out the matters discussed. The issues were not definitively set out as the Claimant was ordered to provide Further Information about his claim for age discrimination which he did on the 14 March 2023 [P.42].

**Issues**

17. As the issues had not been finally agreed at the outset of the hearing, and the Claimant produced his own draft List of Issues, the List of Issues for this Tribunal to determine were then agreed after discussion with both parties at the outset of the hearing, and were further refined during the hearing as issues arose.

18. In particular the Claimant, while being cross examined, withdrew one allegation as set out at paragraph 3.2.3 of the List of issues which was as follows: -

    *Did the Respondent do the following things:*

    *……..*

    *3.2.3 Send younger employees to visit SAP Italia in March 2022 instead of the Claimant?*

19. Adopting the List of Issues as agreed during the hearing the issues in this case were therefore as follows:

    *1. Unfair dismissal*

    *1.1 Was the claimant dismissed?*

    *1.2 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.*

    *1.3 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:*

    *1.3.1 there were reasonable grounds for that belief;*

    *1.3.2 at the time the belief was formed the respondent had carried out a reasonable investigation;*

    *1.3.3 the respondent otherwise acted in a procedurally fair manner;*

*1.3.4 dismissal was within the range of reasonable responses.*

*2. Remedy for unfair dismissal*

*2.1 If there is a compensatory award, how much should it be? The Tribunal will decide:*

*2.1.1 What financial losses has the dismissal caused the claimant?*

*2.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*

*2.1.3 If not, for what period of loss should the claimant be compensated?*

*2.1.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?*

*2.1.5 If so, should the claimant's compensation be reduced? By how much?*

*2.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*

*2.1.7 Did the respondent or the claimant unreasonably fail to comply with it?*

*2.1.8 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?*

*2.1.9 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?*

*2.1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?*

*2.1.11 Does the statutory cap of fifty-two weeks' pay or £86,444 apply?*

*2.2 What basic award is payable to the claimant, if any?*

*2.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?*

***3. Direct age discrimination (Equality Act 2010 section 13)***

***Time limits***

*3.1 The claimant contacted ACAS on 6 September 2022. Therefore, prima facie any acts or omissions that occurred prior to 7 June 2022 are out of time. In respect of any acts or omissions prior to that date:*

*3.1.1 Did they form part of a series of acts amounting to a continuing course of discriminatory conduct, the last of which occurred on or after 7 June 2022?*

*3.1.2 If not, would it be just and equitable to extend the time within which the claimant was required to bring those claims, and if so to when?*

*3.2 Did the respondent do the following things:*

*3.2.1 Dismiss the claimant;*

*3.2.2 Consider his use of language to be misconduct;*

*3.2.4 Send younger employees to visit EMS (Palletisers) in Italy on the 25,26 and 27 April 2022 instead of the claimant;*

*3.2.5 Seek to assign some of the Claimants tasks to Chris Simons and remove the claimant from his role in the period from March 2022 onwards and replace him with a younger employee (Chris Simons), and*

*3.2.6 On 15 June 2022 did Luke Beckingham state to the Claimant that the Respondent thought he was getting too old to handle the demands of the new equipment.*

*3.2.7 Discipline the claimant for failing to attend a disciplinary investigation meeting on 15th June 2022.*

*3.3 Was that less favourable treatment?*

*The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.*

*If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.*

*The claimant was aged 58 at the time of these events. He says he was treated less favourably than Luke Beckingham [34 yrs], Chris Simons [39 yrs], Gavin Clarke [42 yrs], Darren Innes [49 yrs], Luke Partridge [41 yrs], Paul Fitton [40 yrs], and G Watkins [38 yrs].*

*The Claimant says he was treated less favourably than other employees under the age of 50 as set out above.*

*3.4 If so, was it because of age?*

*3.5 Did the respondent's treatment amount to a detriment?*

*3.6 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:*

*3.6.1 to maintain high standards of behaviour within the workplace and to ensure that the most appropriate employees were utilized in specific roles and tasks.*

*3.7 The Tribunal will decide in particular:*

*3.7.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;*

*3.7.2 could something less discriminatory have been done instead;*

*3.7.3 how should the needs of the claimant and the respondent be balanced?*

*4. Remedy*

*4.1 How much should the claimant be awarded?*

## Findings of Fact on Disputed Issues

20. From the information and evidence before us we made the following findings of fact. We made our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgment all of the evidence which we heard but only our principal findings of fact, and those necessary to enable us to reach conclusions on the issues to be decided.

21. Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgment about the credibility or otherwise of the witnesses we heard based upon their overall consistency and the consistency of accounts given on different occasions when set against any contemporaneous documents. We have not referred to every document we read or were directed or taken to in the findings below, but that does not mean it was not considered.

### *Claimants use of the PG Laptop at home*

22. It was not in dispute, and we found, that the Claimant carried out his duties with a high level of skill and competence.

23. In February 2022 the Claimant requested permission to work from home two days a week due to his then 15-year-old daughters ill-health as set out in the witness statement of Gavin Clarke for the Respondent [Para. 2 and 3]. His wife worked as a Clinical Nurse Specialist and so at times was not present in the home which meant the Claimant needed to share in the care of her. His daughter suffered from anorexia nervosa and was in the words of Gavin Clarke *'seriously ill.'* In the Claimant's witness statement, he described her ill-health in great detail, and this included [Para.3] that his daughter had started to become unwell with anorexia nervosa in September 2021. At the time she was a minor and was 15 years old. She was admitted to Milton Keynes hospital in a life-threatening condition. She spent two weeks in hospital. A further admission followed after being discharged, and she was readmitted in or around January 2022, when she was put on an intravenous drip and was under 24-hour surveillance. She was by this time under the care of CAHMS and after a hospital stay of five weeks she was discharged. We also heard evidence from Mrs Braithwaite that their daughter had attempted to take her own life.

24. The working from home request was granted by Sarah Hudson Human Resources Business Partner of the Respondent and it began in February 2022. It was not in dispute, and we found, that this working from home arrangement for two days a week was a temporary arrangement. It was agreed he could work at home on a Tuesday and a Thursday each week. We found that the Claimant wished to be with his daughter on those days so that he could provide her with general emotional support, and while his wife went to work. There was no dispute about this by the Respondent and no suggestion was ever made to the Claimant that, whilst at home caring for his daughter, he was not carrying out his duties to a satisfactory standard. Sarah Hudson, confirmed in her evidence that the arrangement was reviewed in bi-monthly meetings with her, the Claimant and Russell Keers. However, we found that nothing was put in writing by Sarah Hudson about this working from home arrangement, and it was this lack of clarity that then gave rise to this dispute.

25. The Claimant's job title was 'Controls Engineer' and his duties included writing code and fixing software issues for the automated system in the Respondents Milton Keynes factory. In particular the Claimant described himself as the *'gatekeeper'* for the maintenance and running of the Respondents automated bottling plant, and we found that he was. We also found that the Claimant was the main user of the sole PG Laptop which had the only licence to fix bugs in the automated system at the plant and to write code for that system.

26. In or around the early summer of 2022 Chris Simons, who had previously been a night shift software engineer, was placed on a seconded temporary basis to work with the project team working on Line 53, which was a new line under construction, and on which the Claimant was working. In particular they had an automated palletiser system which received bottled drinks in packs from a conveyor belt onto pallets for distribution to the third parties for whom they produced the bottled drinks.

27. It was also not in dispute that Line 53 and its construction came in over budget and that the Respondent decided to halt construction of it. It was the Claimants case, and we found, that with Line 53 halted, there were two people in effect covering his role, and that with Chris Simons seconded to work on Line 53 it meant, in effect, that the two of them were therefore doing the Claimants role which previously only he had carried out. No evidence was provided about the exact duties of Chris Simons in his seconded role, and how they overlapped with the Claimant, but it was not in dispute during the hearing, and we found, that there was an overlap in the work both the Claimant and Chris Simons were doing but there was only one PG Laptop which at times both of them needed to use. We also found that whilst they both also had their own ordinary laptops neither of these laptops could be used for going onto the live automated system to look at bugs and then write software code to fix any bugs. We found that this resource issue in relation to the PG Laptop was the partial cause of the dispute that then arose between the Claimant and the Respondent.

28. Until the incident in question on the 14 June 2022 we found that the Claimant had no prior disciplinary record and worked well in his team. We found he had a good working relationship with Chris Simons.

29. We also found that the Claimant, throughout the period of working from home for around four months, had regularly taken the laptop home to carry on doing his job at home, and no one had ever suggested to him that he must not do this. We found there was a lack of clarity over this issue from the Respondent, and we found they were aware he was taking the laptop home, and until the 14 June 2022 that they were content for him to do so. We found that a working practice had come about that the Respondents were content with and that they ignored the issue of him taking it home for his days working at home until the day in question.

30. We found that the failure to put anything in writing about the Claimants home working, or to even show him the Hybrid Working Policy and discuss it with him amounted to poor management of the Claimant. We found that had the Respondent discussed the policy with the Claimant and the way the working from home arrangement would work, and whether he could take the PG laptop home, then the whole dispute over the Claimant taking the laptop home would have been avoided. We found he would either have been told he could take it home but if it was required back in the factory he would either return it the day it was requested or, instead, allow them to visit his home on an agreed number of hours' notice to collect it, or that he could not take it home at all.

31. We found that there was no formal assessment of the Claimant's working environment pursuant to the Hybrid Policy, and instead we found that some questions were asked of the Claimant by the Respondent about his working environment in his home. However no Home Working Assessment Form, as referred to on page 3 of the policy, was ever filled in by the Claimant, due to the failure of Sarah Hudson to retrieve the Hybrid Policy, discuss with the Claimant and in fact apply the policy, and we found that this was poor management of the Claimant.

32. In relation to the section of the Hybrid Policy that referred to 'Arrangements while working remotely' it said as follows on page 2 of the policy:

*While working remotely, you must be available and working during your normal hours of work, as set out in your contract of employment.*

*We ask you to be mindful that you are not overworking - downtime from work is essential. To help maintain your well-being at, please make sure that you take adequate rest breaks:*

- *Ensure you take your lunch break each day*
- *Ensure if you are busy, it is essential that you find the time to take a break of at least 20 minutes during each working day that lasts more than six hours.*
- *Ensure the time period between stopping work one day and beginning the next is not less than 11 hours.*

*Please be clear as possible with your line manager about your hours of work for days on which you are working remotely. Making use of tools such as shared calendars and out of office messaging can help colleagues to be aware of your availability on these days.*

33. In relation to the section headed 'Data Protection' it said as follows:

*Employees who are working remotely are responsible for keeping information associated with our organisation secure at all times. Specifically remote workers are under a duty to:*

- *Ensure that LMS cybersecurity learning modules are completed in a timely manner*
- *practise good computer security, including a unique password for your work laptop and any other devices you use for work*
- *keep all hard copies of work-related documentation secure, including keeping documents locked away at all times except when in use; and*
- *ensure that work related information is safeguarded when working in public spaces, for example by:*

  *positioning your laptop so that others cannot see the screen;*

  *not leaving your laptop unattended; and*

  *not having confidential slash business sensitive conversations in public spaces.*

*In addition, the laptop and other equipment provided by us but must be used for work related purposes only and must not be used by any other member of your household or third party at any time or for any purpose.*

34. Nowhere in that policy did it state an employee must seek permission to take any laptop home, and any other equipment provided by them, before doing so. We found that the policy set out specific security measures so that devices used at home were kept secure.

35. The suggestion by the Respondent, and in particular Gavin Clarke, that permission should have been sought by the Claimant to take the PG Laptop home was not made out, and we found they were aware of, and allowed him to take the PG Laptop home.

36. We found the comment by Gavin Clarke that *'..I will have to control the issuing of the laptop in the future in future to ensure we are not in this situation again...'* [P.142] evidenced the lack of control placed on the Claimant in relation to his use of the PG Laptop at home up to this point. We therefore found that no controls had been placed on the Claimants use of the laptop and taking it home for his home working days on Tuesdays and Thursdays. The Respondents knew, and accepted that the Claimant took the laptop home in order to carry out his software coding on the Reverse Osmosis work ('RO Work'), and that this aligned in any event with the Hybrid Policy where permission to use devices at home, and security measures to be implemented, were set out.

37. We also heard evidence from the Claimant, and we found, that he had asked that a second Siemens PG laptop be purchased for Chris Simons so that when they both needed to use the software there were two PG Laptops and two licences for each of them. However, we found that despite the Claimant obtaining a quote for the cost of a second PG Laptop the Respondent did not grant this request and the issue of the sole PG Laptop and how it should be shared on the days the Claimant worked from home was ignored by the Respondent.

38. We also found the Claimant needed the PG laptop at home to do part of his role, which we find amounted to around 50-60% of his duties.

39. In relation to the assertion [P.240] about this issue by Gavin Clarke that the Claimant ought to have asked for permission each day he took it home this was not supported by the Hybrid policy or the evidence of Sarah Hudson. When she was asked by this Tribunal if any prior discussions had taken place with her and anyone else about the Claimant being able to take the laptop home, she confirmed no such discussions took place.

40. We also found that the Claimant became anxious when Chris Simons was seconded to work alongside him on Line 53 as there was a lack of clarity over Chris Simon's role and the way it overlapped with the Claimants, and we found

the Claimant discussed this issue with his wife and expressed his anxiety to her over the lack of clarity on this issue.

**Communications between the Claimant, Chris Simons and Gavin Clarke on the 14 June 2022 about the return of the PG Laptop**

41. On the 14 June 2022 the Claimant was working from home. We found that the day before he had checked that all was in working order in terms of the automated systems before leaving work, and that he also came back into work that evening at around 9 pm to check all was in working order, and we found that this demonstrated the high degree of professionalism of the Claimant and his dedication to his role.

42. A series of text messages ensued between Chris Simons and the Claimant, and between the Claimant and Gavin Clarke on the 14 June 2022 about his use of the laptop that day [P.169].

43. We find that whilst detailed discussion took place about its return between the Claimant, Chris Simons, and Gavin Clarke we found the communications were disjointed in that two separate conversations were taking place by text between the Claimant and Chris Simons, and between the Claimant and Gavin Clarke during the same time frame. This was an important issue as some of the Respondents witnesses gave evidence, they didn't know specifically about the two different streams of communication going on that morning between the Claimant and Gavin Clarke and Chris Simons.

44. Chris Simons at 8.36 am that morning of the 14 June 2022 initially asked the Claimant if he had the laptop and he immediately replied that yes, he was using it at home [P.169].

**The Disputed Phone call by Gavin Clarke to the Claimant at 8.49 am**

45. Thirteen minutes after the text messages between the Claimant and Chris Simons at paragraph 42-44 above the Respondent alleged that Gavin Clarke called the Claimant at 8.49 am and that the Claimant agreed to return the laptop. Gavin Clarke said in an email giving his account of the incident [P.138] that:

*'I called mark at 8:49 and told him that we required the laptop and asked him please bring the laptop in before 12:00 PM as it is required, and he agreed to this on the phone. There are witnesses to this conversation (Chris Simons, Jack Pierce) I also mentioned it was not his to take home and if you require to take it home, he should have asked for permission to do so. We had no further contact. Until later as he agreed to bring it in.'*

46. At this juncture we comment on an allegation by the Claimant that there was a discrepancy between the alleged time of the call by Gavin Clarke to the Claimant at 8:49 and evidence that Gavin Clarke then produced for the disciplinary chair Michael Wigham of that call. The image he emailed to him showed a call that he made to the Claimant [P.240. at 8.59 am, and not 8.49

am. The Claimant asserted that he had no record of either of the two different stated times of the call made to his company phone and he produced a screenshot of the calls to his company phone that day [P.235]. We found there was no record of any call made to his company mobile phone at 8.49 or 8.59 that day.

47. The email sent by Gavin Clarke with an attachment [P.241] (and this attachment was not a screenshot but an image of a phone showing two calls made at 08.59 for 4 minutes and 33 seconds, and another call made at 11.34 for 0 mins 2 seconds), showed calls to what appeared to be the Claimants personal phone as opposed to his work mobile phone. Counsel put it to the Claimant that this discrepancy between the time of the stated call at 8.49 am, as set out by Gavin Clarke, when the image suggested it was made at 8.59 was a simple error whereas the Claimant suggested the document [P.241] may have been a fraudulent image [P.241] produced by Gavin Clarke using the Microsoft tool *'Paint'* which he then sent to the disciplinary chair Michael Wigham.

48. On the balance of probabilities, we concluded that it was more likely than not that Gavin Clarke did not produce a fraudulent image for the disciplinary chair but instead made a mistake about the time of the call when he said it was made at 8.49 instead of 8.59 am.

49. We did not accept the assertion by Gavin Clarke that when he called the Claimant at 8.59 am, this being the phone call the Claimant could not recall to his personal phone, that the Claimant agreed to return the PG Laptop, and we preferred the Claimants evidence on this matter. In view of the Claimants obvious reluctance to agree to its return by him that day, it was simply not credible he would have told Gavin Clarke he would return it that day. We also noted that in the email sent by Gavin Clarke that he implied to the Respondent that contact ceased with the Claimant after the initial disputed phone call when he said (our emphasis added) [P.138]:

*'I called mark at 8:49 and told him that we required the laptop and asked him please bring the laptop in before 12:00 PM as it is required, and he agreed to this on the phone. There are witnesses to this conversation (Chris Simons, Jack Pierce) I also mentioned it was not his to take home and if you require to take it home, he should have asked for permission to do so.* ***We had no further contact. Until later as he agreed to bring it in.'***

**Alleged Delay by the Claimant in communicating with Gavin Clarke**

50. At 10.11 am, following his reply to Chris Simons at 8.36 am, the Claimant then sent another text message to Chris Simons saying as follows: -

*'If you need to make any urgent changes ask the KHS guy to do it'* and *'it is their kit after all.'*

51. The reference to the KS guy was a reference to an agency software engineer that the Respondent had engaged. We found this was a reasonable attempt by

the Claimant to ensure his use of the PG laptop at home would not delay the Respondent making any necessary changes to the software system in relation to the production line issues.

52. The Claimant then received a message from Gavin Clarke, and we note that Chris Simons, who was trying to fix an issue that had arisen about the receptors on the production line, was not appearing to impress any urgency on the Claimant about the issue of needing the PG Laptop returned, whereas Gavin Clarke, his Line Manager, was we found impressing on the Claimant a sense of urgency on the issue.

53. Gavin Clarke at 10.15 am sent his first text message following the disputed phone call at 8.59 am to the Claimant saying as follows: -

*'HI Mark, what time do you think you will be able to bring the laptop in as we will need it before 12.'*

54. The Claimant did not reply to this text message from Gavin Clarke, and we found at this point the Claimant was with his very unwell daughter and could not leave her alone at home and bring the laptop in on less than two hours' notice. We found that as he had just sent a message to Chris Simons at 10.11 am (just four minutes prior to this message at 10.15 am from Gavin Clarke) suggesting that the agency worker look at the issue that the Claimant believed he had already suggested a solution to remedy this problem to Chris Simons. We found there was some clear tension developing at this point over the issue and that this was the reason the Claimant then failed to reply to Gavin Clarke and instead chose to correspond with Chris Simons about the issue. The Claimant gave evidence that he was attempting to fix the issue with Chris Simons who he worked with on Line 53, and we accepted the Claimant's evidence on this.

55. The next message was then sent over two hours later by Chris Simons at 12.37 am to the Claimant and it said that Gavin Clarke *'is on my back'* about the laptop [P.169] and *'I told him I'd text you, but he wants to know exactly what is going.'*

56. The Claimant then immediately replied [P.169]:

*'So, I am using it at home on the RO plant. What's the problem?'*

In reply Chris Simons said:

*'Nick said in the morning meeting that there's a problem with the buildback. Khs guy says he's not allowed to touch conveyor programme.'*

The Claimant replied: -

*'So, what is the problem with the buildback then?'*

Chris Simons replied:

*'I don't know, EMS haven't managed to empty the infeed yet. I am not sure if there is an issue but because Nick has said it they want to look into it.'*

The Claimant replied:

*So its not stopping them running EMS have other issues to solve first. Have you looked at the buildback code offline yet using your laptop?*

Chris Simons replied:

*'Not yet they have been dry cycling the machine for a while and are looking to start up imminently so will have a look.'*

The Claimant replied:

*'If you look at the code offline you will be able to identify the build-back sensor and then test the operation without having to go online.'*

Chris Simons replied:

*'I'm not convinced there is an issue but it seems to have become political. In reality the build-back philosophy is unchanged on our side.'*

The Claimant replied:

*'Okay but have you identified the KHS build-back sensor on your laptop?'*

Chris Simons replied:

*'EMS still have problems so can't observe it running. I'm focusing on the right side infeed for now, drive 50 is controlled by F850, looks as though tailback signals are set by FC257?'*

57. We found that it was only at 12.37 am that day that the Claimant was first aware that the agency worker could not fix the problem with the sensors on the conveyor belt. It was by this point of the day lunchtime. Whilst it would have been more courteous for him reply to his manager Gavin Clarke, who had requested he return the laptop at 10.15 am over two hours earlier, and by 12 noon, instead of simply communicating with Chris Simons on the issue, we found that the Claimant would have reasonably assumed that Chris Simons was sharing his responses with Gavin Clarke.

58. The Respondents case was that Chris Simons didn't share his text messages with the Claimant with Gavin Clarke. The Respondents relied on this to demonstrate the long delay from when Gavin Clarke sent the text message at 10.15 am asking for the laptop back by 12 noon [P.170] to his next chasing message at 13.12 am asking again for the laptop. However we found as set out in the text messages of Chris Simons at 12.37 am that Chris Simons did tell Gavin Clarke about his messages with the Claimant throughout and as referred

to by Chris Simons when he said *'I told him I'd text you but he wants to know exactly what's going on,'*[P.169] and this was in flat contradiction to the assertion by Chris Simons he didn't share his text messages with the Claimant with Gavin Clarke.

59. We therefore found Gavin Clarke did know about the communication between the Claimant and Chris Simons about how to fix the issue that morning. We did not therefore found there was an overall failure by the Claimant to communicate about the issue of the laptop and the only thing that could be said was the Claimant chose to communicate with Chris Simons instead of his Line Manager Gavin Clarke but that Gavin Clarke was well aware of the text messages the Claimant had send suggesting solutions to the problem. The Respondents did not call Chris Simons as a witness despite the fact he is still employed by them.

60. We also found it was reasonable of the Claimant to assume that his messages to Chris Simons were being discussed between Chris Simons and Gavin Clarke.

61. A further text message, shortly after the messages between the Claimant and Chris Simons at 12.37, was sent by Gavin Clarke to the Claimant at 13.12 [P.141] on that day, which read as follows,

*'Mark we are a critical point of the commissioning on the palletizer. We have issues with the build back on our side and we need to investigate. As requested, we need the laptop ASAP, I appreciate you are using the laptop please stop we will be running full production tomorrow and we need to get the build back issue sorted whilst running water. If you want me to come and collect it, I can.'*

At this juncture we note that when he said '*I appreciate you are using the laptop please stop'* this was clear evidence that Chris Simons and the Claimants text messages were being shared by Chris Simons with Gavin Clarke.

62. In reply to this text from Gavin Clarke telling him to stop using the laptop the Claimant then said as follows:

*'So why hasn't Chris looked at the code on his laptop then?'*

Gavin Clarke replied:

*'it's not the point Mark.'*

The Claimant then replied:

*'it is if Chris wants to understand the build back issue'*

Gavin Clarke replied:

*'Mark if we use Chris's laptop it will upgrade the PLC software.*

1. *The laptop should not be with you*

2. *It's not yours it's mine Refresco own it it should be on site.*

3. *I will have to control the issuing of the laptop in future to ensure we are not in this situation again.*

The Claimant then replied:

*He doesn't need to go online though to look at the logic code does he? Let's have the conversation about the laptop tomorrow when I am on site.*

Gavin Clarke then replied:

*This has now gone above my head*

63. The Claimant then replied: *'whatever.'* This last message was sent by the Claimant to Gavin Clarke at 13.54 pm. [P.142]

64. The Claimant gave evidence, and we found, that he could not simply leave his very unwell daughter at home on her own, her care by him being the sole purpose of the home working arrangement, and which we found Gavin Clarke was well aware of.

65. Evidence was also given, which was not disputed, that Gavin Clarke's daughter also had an eating disorder, though it was suggested not of the same severity of the Claimant's daughter, and so we found that Gavin Clarke was well aware of the extremely stressful home environment in which the Claimant was working.

**Genuine Belief of Michael Wigham in the delay in replying to Gavin Clarke and returning the laptop**

66. We reminded ourselves that the only issue we must decide upon is whether the decision maker Michael Wigham genuinely believed the Claimant had initially agreed to return it and then continued to delay in doing so. We deal with this in detail below.

67. We found that Michael Wigham, the disciplinary chair, did, by the time of the disciplinary hearing, have a genuine belief that the Claimant had agreed to and then delayed in personally returning the laptop, though we note that Michael Wigham knew the Claimant was caring for his mentally unwell daughter at the time.

68. In particular Michael Wigham had the following evidence before him: -

    a. The call log that confirmed a call was made by Gavin Clarke to the claimant lasting 4 minutes and 33 seconds at 8:59 [241] was provided as evidence of Gavin Clarke requesting the return of the laptop. We do

find it was evidence upon which Michael Wigham could genuinely base his belief that a call had been made about its return by Gavin Clarke and that the Claimant had agreed to return it and then failed to do so.

b. Chris Simons confirmed that Gavin Clarke had told him that the claimant would return the laptop shortly [P.202].

c. The fact that Gavin Clarke did not then text the claimant until 10:15 could lead Michael Wigham to conclude a plan was in place for the return of the laptop [P.170].

d. Michael Wigham could conclude that Gavin Clarke's account was correct that a plan was in place to return the laptop rather than the Claimant's assertion he never did agree to return it as it was simply the Claimants word against Gavin Clarke. The Claimant during the disciplinary proceedings and during the hearing never denied that a call may have been made at 8.59 am and his evidence was simply that he could not recall it. In these circumstances then Michael Wigham could conclude such a call had been made and that it had been requested that it be returned, and that the Claimant agreed to this [P.277 and P.279].

e. There was also evidence before Michael Wigham that for a period of 4 1/2 hours, from the call Gavin Clarke made at 8.59 am, that he could reasonably and genuinely conclude that there were several calls made which the claimant did not dispute he did not pick up [P. 143,144 and 241] although we also accepted the Claimants evidence that he was working and would not have necessarily heard his phone ring.

f. It was also not in dispute that texts sent by Gavin Clarke to the claimant at 10:15, were not responded to by the Claimant until 1:36 PM [P.141-142, 261].

g. When the Claimant did communicate the Claimant simply debated whether the laptop should be returned and whether it was needed or not as in the Claimant's view it was not needed [P.142]. The discussion with the Claimant ended with Gavin Clarke stating *'this has now gone above my head'* to which the claimant replied *'whatever'* [P.142]. We noted that the last message from the Claimant was sent at 13.57 am.

69. However, we also concluded as follows in relation to the reasonable belief of Michael Wigham: -

a. On the question of the failure of the Claimant to reply to the communication sent at 10.15 by Gavin Clarke where he said *'Hi Mark what time do you think you will be able to bring the laptop in as we will need it before 12.00'* [P.141] until 13.36 pm when the Claimant replied stating *'so why hasn't Chris looked at the code on his laptop then?'* and whether this amounted to a deliberate failure by the Claimant to communicate with Gavin Clarke, and to return the laptop the Claimants

case was that he was debating the issue with Chris Simons during that time lapse, and Michael Wigham had evidence he was doing so.

b. We found that on the evidence before him Michael Wigham could not genuinely believe that the Claimant was refusing to communicate with anyone but only that he was avoiding communicating specifically with Gavin Clarke his Line Manager. Michael Wigham, by the time of the disciplinary meeting, had seen the text messages between the Claimant and Chris Simons where the Claimant made repeated suggestions about how the issue could be fixed without him returning the laptop. We also found that based on the content of the texts, and our findings on that, that there was clear evidence Chris Simons had told Gavin Clarke what the Claimant had said to him about how the problem could be fixed without the laptop being returned (as set out in our findings on this at paragraph 50, 55, 58 and 61 above) and so we found that Michael Wigham could only genuinely conclude he avoided communicating with Gavin Clarke and communicated with Chris Simons instead.

c. We also did not find that Michael Wigham could genuinely conclude that the Claimant knew his communications with Chris Simons were not being passed on to Gavin Clarke. Chris Simons stated [P.202] that he did not tell Gavin Clarke about the text messages with the Claimant because he didn't want to get the Claimant into trouble. However, we did not find it unreasonable for the Claimant to assume his communications with Chris Simons would be passed on to Gavin Clarke. We found that Michael Wigham, viewing the entirety of the communications, would know that the Claimant had no way of knowing his communications with Chris Simons were, according to Chris Simons, not passed on to Gavin Clarke. He could not therefore genuinely believe that the Claimant had ceased to communicate with anyone about the problem in the factory as he replied to all Chris Simons messages, and also belatedly replied to Gavin Clarke's messages.

d. We therefore concluded that although Michael Wigham could form a genuine belief that the Claimant was delaying in returning the laptop, and that the Claimant had delayed in communicating with Gavin Clarke for a period of around three and a half hours that morning when it was requested by text at 10.15 am, which would have involved him leaving his house and his daughter alone in order to return it, the evidence was plain to Michael Wigham that the Claimant did carry on communicating with Chris Simons about ways to fix the problem without the laptop being returned during the gap in communications between him and Gavin Clarke.

e. The text from Gavin Clarke saying *'this has now gone above my head'* we found amounted to Gavin Clarke closing the discussion down, and we found that it was Gavin Clarke who ceased to communicate at 13.56 when he sent that message and it was not the Claimant who ceased to communicate in the last text sent in reply by the Claimant to Gavin Clarke when he replied *'whatever'* [P.170]. That evidence was before Michael

Wigham and so we find based on this evidence he could not genuinely conclude that it was the Claimant who had ceased to communicate, thus justifying the unannounced home visit.

70. The Claimant in oral evidence to this tribunal asserted that he would have returned the laptop when his wife returned from work at 5:00 PM. However, we found that the Claimant never offered to do this in his communications with the Respondents. He also asserted the Respondents would have known that his wife returned by 5.00 pm but no evidence was put before us that they knew his wife's working hours and we didn't accept this assertion by the Claimant.

**Failure to accept the offer by the Respondent to collect the laptop**

71. On the related issue of whether they offered to collect the laptop at 13.19 pm [P.141] and he failed to accept the offer by his silence, we find he failed to reply to the offer, and that he did so because he was working on the laptop and writing code and needed it to work that day, and also because he was caring for his unwell daughter who was very mentally unwell in his home and he did not want them to come to his home address that day. Whilst this was no doubt inconvenient to the Respondent we found that in circumstances where he was looking after a suicidal daughter in a highly charged home the allegation he had failed to accept their offer to collect it had to be viewed in context where he was at home with a distressed daughter, and the Claimant had a right to privacy in his own home.

72. We found there was nothing in the Hybrid policy giving the Respondent permission to attend at his address without his permission.

**The unannounced home visit to retrieve the laptop, the knowledge of Sarah Hudson and the genuine belief of Michael Wigham**

73. We found that by the time the debate had developed, and then concluded when Gavin Clarke said *' this has now gone above my head,'* [P.142] around the need for the laptop, it was 13.57 pm and at this point there was only three working hours left in the working day.

74. We found that the text from Gavin Clarke which said that *'this has gone above my head'* [P.142] indicated that Gavin Clarke was clearly talking to Sarah Hudson and others. We found that Gavin Clarke would have told Sarah Hudson of the Claimants texts to him by virtue of his statement to the Claimant that *' this has gone above my head.'*

75. We did not find Sarah Hudson a credible witness. She refused to answer simple questions on the issue of the working from home policy by saying initially *' I cannot comment on that,'* and when pressed by this Tribunal that she must know as the HR Business Partner whether there was such a policy, she said initially words to the effect of *'there is no working from home policy at Refresco.'* This struck us as lacking in any credibility as it was not in dispute that they had a number of remote IT workers. She then, after a short break, later changed

her evidence by saying she didn't know where to find such as policy, as she had never been asked for it before. We found that she had implemented the approval for the Claimant to work at home without looking at the Hybrid Working policy, or checking what any policy said about home working, and by simply discussing it with him.

76. When this tribunal at this point asked for the policy that covered working from home to be disclosed to this Tribunal it was promptly produced by the Respondents without delay and was entitled *'Hybrid Working.'* and we noted that it was dated the 1 July 2021.

77. We preferred the Claimants evidence about what the Respondents, and in particular what Sarah Hudson knew about the communications between the Claimant, Chris Simons and Gavin Clarke, and we found that Sarah Hudson must have known the Claimant had communicated about the return of the laptop with Gavin Clarke when he sent further messages between 13.12 pm and 13.57pm, and that she knew that Gavin Clake last heard from the Claimant by text at 13.57 pm. We did not accept her evidence that it was Gavin Clarke who had probably lied to her saying it had *'been hours'* since he heard from the Claimant at the time she authorised the home visit. At the time she authorised the home visit we found she knew the Claimant had just recently been in communication with Gavin Clarke.

78. We also found that Michael Wigham could only form a genuine belief that at the time Sarah Hudson authorised the home visit the Claimant had just been in contact with Gavin Clarke at 13.57 pm and had also been communicating without delay at all times with Chris Simons.

79. We find on the balance of probabilities that Gavin Clarke would have told Sarah Hudson shortly after the message from the Claimant at 13.57 pm about that message from the Claimant. She gave evidence that she would have made the decision, after consulting with Russell Keers, to authorise the home visit at around 2.15 pm, and they would have left at around 2.30 pm to go the Claimants house. We found therefore the time lapse in communication from when the Claimant sent his last message to Gavin Clarke at 13.57 pm to when she made the decision about the home visit at 2.15 pm was only around 20 minutes. In relation to the welfare visit, which we deal with below, this issue of timing was key evidence as Sarah Hudson relied on the issue of alleged delay in communications from the Claimant to justify her alleged welfare concerns about the Claimant this justifying the unannounced home visit, which then led to the unannounced home visit to the Claimant to retrieve the PG Laptop.

80. We find therefore there was no delay in communication from the Claimant justifying any welfare concerns, between the last message sent by the Claimant at 1.57 and the decision taken by Sarah Hudson at 2.15 pm for the home visit.

81. We found that the dismissing officer Michael Wigham could not have held a genuine belief that there was a delay in communication from the Claimant messaging at 1.57 and the home visit then authorised by Sarah Hudson at 2.15 pm nor that Sarah Hudson genuinely held welfare concerns about the Claimant.

82. In any event even if Sarah Hudson was told by Gavin Clarke it had been hours since he had heard from the Claimant by the time of the disciplinary hearing Michael Wigham had before him all the text messages and would have seen that the Claimant did text Gavin Clarke at 1.57 pm and that it was not true that it had been hours since he had heard from the Claimant when he then spoke to Sarah Hudson who authorised the home visit.

**Visit to Claimants home address on welfare grounds**

83. We found Michael Wigham's evidence that the Claimant was *'hiding something'* on the laptop very telling, and which we return to below in relation to the disciplinary hearing when he asked the Claimant questions about MSB Automation.

84. We found that the home visit that then ensued arose not purely from the allegation the Claimant was refusing to return the laptop, or that he had ceased to communicate, which we found he had not, and that this delay caused them to be worried about his welfare, which we found was a false reason put forward by the Respondent, but that it arose in the main due to a suspicion on the part of the Respondent, and in particular Sarah Hudson and Russell Keers, that the Claimant was using the laptop for some unauthorised reason.

85. We found that the reason for the request for the laptop to be returned was in the main due to a lack of trust about his use of the PG Laptop in the home working arrangement, and that hostility had also developed towards the Claimant in the management team. We found on the balance of probabilities that due to the Claimant's strong personality that management were also reacting to his strong views that day that the return of the laptop was not required.

86. It was confirmed during evidence by Mr Wigham that no software changes were in fact made to deal with the build back issue after the laptop was taken from the Claimant that day.

87. In relation to the decision to carry out the home visit being based on an alleged 'welfare concern' by the Respondents about the Claimant, we found that the Respondents defence on this issue lacked any credibility. It was not credible to suggest that they were concerned for his welfare after a passage of time of around twenty minutes from 1.57 to 2.15 pm. We found this was an unsustainable reason, and that the decision to make the visit was in reality probably based on advice within the Respondent that a visit without permission could only be made for 'welfare reasons.'

88. Evidence was given, and we found, that the Respondents had many remote workers. There was only one example of another employee receiving a home visit. Katy Darcy explained this was a mentally unwell employee who had appeared unwell the day before at home and when he did not attend at work

the next day, they made a home visit to check on his welfare around half an hour after he failed to turn up at work. However, we found the Claimant had been responding to messages in a detailed manner that morning and showed no evidence of being unwell.

89. Every witness for the Respondent stated they had a genuine concern for his welfare. The Claimant stated they could not have had any concern for his welfare as he was communicating with them until his last message to Gavin Clarke where the Claimant replied *'whatever.'* [P.170] At no point did Gavin Clarke express any concern for his welfare nor did any other witness express any concern for his welfare prior to the visit to his home. It was only Russell Keers for the Respondent who admitted that the main reason for the visit was to retrieve the laptop, but this Tribunal noted that even he tried to state it was also due to welfare reasons.

90. We found that their decision to visit the Claimant at his home address when he had not replied to an offer for them to collect the PG Laptop showed a lack of concern for his welfare. The Respondent may have arrived at a moment when his daughter was in a state of distress, which the Claimant may have been trying to manage. We found that when they visited unannounced and, we find, then trespassed on the Claimants property that day, that this distressed and angered the Claimant, and that this then led to a 'heat of the moment' altercation.

91. During submissions Counsel for the Claimant stated that the Respondent '*without wishing to sound callous'* had no responsibility for his daughter. Whilst legally it is correct that they had no responsibility for his daughter, where a Respondent agrees to home working for the sole purpose of an employee taking care of his severely unwell daughter, whilst also carrying out his work, deciding to make an unannounced home visit to his home on false grounds of his 'welfare' when in so doing they risked raising his stress levels, was we found, both a trespass on his property, and was unreasonable conduct by the Respondent.

92. In the event, after the altercation at the Claimant's home address then occurred, he did hand over the PG Laptop about fifteen minutes after their arrival.

**Sharing the Claimant's home address**

93. In relation to the disclosure of his home address to his managers the Respondents privacy policy made clear [P.94] that: -

*'We may use your personal data:*

*……..*

*'For any additional purposes that we advise you of and where your consent is required by law, and we have obtained your consent in respect of the use of your personal data.'*

94. We found the Claimant never gave his permission for his address to be shared and we also found that the managers who visited his home address did not know the Claimants home address prior to the visit on the 14 June 2022. However, we found that pursuant to his contract he had consented to the processing of his personal data. We also found that the Respondents did have a legitimate interest in processing his data to recover the PG laptop.

95. Michael Wigham stated that [Paragraph 30 WS] that: -

*'I did not consider that visiting Mr Braithwaite at his home was a misuse of his personal data (that is to say his home address); the managers involved were entitled to use the data in order to check on his welfare and recover the laptop. I did not consider that standing outside his front door and ringing the doorbell, and then having a conversation with Mr Braithwaite amounted to trespass – although I would not claim to be an expert on that area of law.'*

We found that Michael Wigham had no genuine belief anyone was concerned about the Claimants welfare and so the first stated reason for processing his data was we found disingenuous and could not stand. However as set out above we found there was a legitimate interest in recovering the laptop. However, on the issue of trespass we also found that he deliberately ignored Luke Beckingham placing his hands through the Claimants letterbox and shouting through it. Whilst this Tribunal does not expect the Respondent to know about the finer details of the law on trespass it would be clear to any reasonable employer that was a breach of an employees privacy to insert your hands into their letterbox and shout through it when they have already closed the door and made clear they are not welcome.

96. No evidence was led by the Respondents as to why they gave out his home address without first seeking his permission. However, we accept that they say they had his general consent to process his data and relied on their legitimate interests to recover the laptop. At around 2.30 pm, after processing his personal address and data, giving out his home address to Luke Beckingham and Russell Kears without his permission, they then arrived at his house unannounced.

97. In submissions it was said that it was necessary to disclose the Claimant's address to two managers in order to secure the return of the laptop and that the Respondent had no other alternatives. We find they did have another alternative which was to seek his permission to disclose his address to the two managers, something they failed to do, but we also recognise there was no legal obligation to obtain his specific consent to share his address in these circumstances. On the issue of the legitimate interests of the Respondents in recovering the PG Laptop whilst we recognise that the Claimants rights and freedoms must be balanced against the Respondents legitimate interests, we

found it was not disproportionate in these circumstances to share his home address.

**Swearing and Aggressive Behaviour on the 14 June 2022**

98. Gavin Clarke gave evidence [Para, 11 of witness statement] that after discussing the situation with colleagues including HR, they decided they had *'..no alternative but to go to Marks house to collect the laptop. I took another member of my team, Luke Beckingham, with me.'*

99. After knocking on the Claimant's door, we find that when the Claimant initially opened the door that they simply told him that they '..*were there to pick up the laptop.'*

100. We found that the Claimant stated *'You're not coming in'* or words to that effect. We also found that he told Mr. Clarke and Mr Beckingham that *'I am upset'.* The Claimant also gave evidence that they ignored his distress and did nothing about it. We found that despite the Claimant telling them he was upset, and despite the purported nature of this visit being about the Claimants welfare, Mr. Clarke and Mr Beckingham did nothing whatsoever to address the Claimants clear distress and instead ignored his clear statement that he was upset, being entirely focused on retrieving the laptop.

101. We found that the Claimant then shut the door. The Claimant gave evidence that Luke Beckingham and Gavin Clarke were being bullying and intimidatory and that he shut the door because Luke Beckingham was standing on the threshold of his doorway and so close that '*the veins were bulging on his forehead.'* We found that Luke Beckingham, on the balance of probabilities, did stand on the threshold of the doorway in an intimidating manner. Luke Beckingham was not called as a witness by the Respondent though we note he no longer worked for the Respondent by the time of this hearing. We did not find the Claimant somehow slammed the door with more force than necessary but found that Luke Beckingham was standing on the threshold so the Claimant could not avoid the door shutting in his face.

102. We found at this juncture that Gavin Clarke his Line Manager would have been aware that the Claimant was not willing to allow them into his house, and also that he was upset. Whilst this was no doubt inconvenient to the Respondent we found where the Claimant was looking after a daughter with anorexia and was severely unwell that the Claimant was entitled to close the door of his home and tell them they could not enter his property, especially in circumstances where this visit was unannounced.

103. During evidence Gavin Clarke confirmed that after the Claimant initially closed the door on himself and Mr Beckingham that he then called Russell Keers who told him to persevere in his attempts to communicate with the Claimant. Gavin Clarke went on to say that *'Luke therefore called through the letterbox that all we wanted to do was to collect the laptop.'* He confirmed during evidence that this was why Luke Beckingham opened the letterbox and put his

fingers through the letterbox into the Claimant's property i.e., so that he could speak through the letterbox. It was not disputed, and we found that Luke Buckingham did insert his fingers though the Claimants letterbox holding the letter box open with his fingers so that he could shout through it. We found that this was invasive and amounted to a trespass on the Claimant's property. We found that less invasive ways of communicating with the Claimant could have been attempted to persuade him to hand over the laptop, i.e., by text message or by telephoning him.

104. The Claimant gave evidence that when Luke Beckingham put his fingers through his letterbox and started talking directly into his house that *'I lost my temper and told them to fuck off and said they didn't need the fucking laptop.'* We found this outburst occurred after the trespass on his property.

105. We find that telling other colleagues to *'fuck off'* is a forceful and an offensive way of asking colleagues to leave your property. It is not however insulting or abusive in the sense of calling them names using profanities. The Claimant clearly should have remained calm and said, *'I am asking you to leave my property'* and the Claimant admitted that he had a *'red mist'* moment. It is also not in dispute that the Claimant later apologised for using this language to his colleagues and he did so during the disciplinary hearing to Michael Wigham as set out below.

106. The Claimant was said by Gavin Clarke [Para. 15 WS] to have then opened the door again with his daughter in view and that he asked them to look at her in the sense of how unwell she was. The Claimant did not dispute this, and we find that he did reappear at the door with his daughter in view asking them to look at her and how unwell she was.

107. It is then said by Mr. Clarke that the Claimant repeated *'you don't fucking need it'* and that he shut the door again kicking in their direction as he did so. The letter from Michael Wigham confirming the Claimant's dismissal [P.365] did not allege or find that he had tried to kick out at this point at Luke Beckingham and Gavin Clarke and we find on the balance of probabilities that this did not occur.

108. It was then said that the Claimants daughter then opened the door without her father present asking why *'her dad was acting like he was,'* and that they explained to her what it was about. We found that these facts were made out. We found it was inappropriate for the Respondents to engage with the Claimant's mentally unwell daughter in this way, and they were on notice of her condition. We found it would have been highly distressing for the Claimant for this conversation to occur with his unwell daughter. Mrs Braithwaite gave evidence her daughter was extremely self-conscious about her appearance and that she found strangers seeing her very upsetting. We accepted this evidence and found the situation of the Claimant's daughter feeling she had to open the door to try and calm the situation down would have been distressing for the Claimant to witness.

109. It was then said that when the Claimant opened his door for the third time that he said, *'you can have the fucking laptop then; how many pieces do you want it in?'* and that he then slammed the front door in their faces again, and then appeared for the fourth time with the laptop in its bag and handed it over to them, and that they then left at 3.15 pm and we found that this was approximately 25 minutes after they arrived at 2.50 pm. There was cross-examination about whether he kicked out at them when he handed over the laptop and the Claimant denied he kicked out at them. We find that he did not and note however this was not a stated reason for dismissal and so the genuine belief of Mr Wigham on this issue is not relevant as it was not a stated reason for dismissal.

110. As to whether we find that Michael Wigham found that the Claimant genuinely held the belief he was refusing to return the laptop initially and was being verbally aggressive to his managers on the 14 June, these being stated reasons for his dismissal, whilst we find that Michael Wigham did hold a genuine belief he didn't hand it over for the first fifteen minutes and was being verbally aggressive, we find he also knew the home visit was unauthorised and would have been provocative to the Claimant, and particularly so when Luke Beckingham shouted through his letterbox, and also inserted his fingers through his letterbox. The Claimant had made clear they were not welcome on his property, and this was all set out clearly in the Claimants submissions for his disciplinary hearing [P.242-P.249].

111. We found that when the Claimant lost his temper and when the fingers of Luke Beckingham were pushed through his letterbox, and when the Claimant had a *'red mist'* moment when he told them to *'fuck off'*, that he was asking them to leave his property, and he lost control, and we found that Michael Wigham knew that the Claimant believed his privacy being invaded, and that he believed it was also a trespass on his home.

112. We accepted the Claimant's evidence and found that a more appropriate way to communicate with him, where he had closed the door, would be to send him a text message asking him to open the door and to hand the laptop over. We found talking through the letterbox to the Claimant in his home when he shut the door to be highly invasive and provocative conduct by the Respondents employee Luke Beckingham and it unnecessarily escalated the situation.

113. As to whether Michael Wigham could form a genuine belief that there was a threat to damage company property we find that he could form this genuine belief but that it was also incumbent on him to weigh against that the trespass on the Claimants property, and that these words were said 'in the heat of the moment,' and that he never actually damaged the company PG Laptop. We note in any event threatened damage to company property was never set out in the allegations against the Claimant as an act of gross misconduct [P.208].

**Use of the 'F' word in the workplace**

114. When the Claimants previous colleague, Mr Rigby, gave evidence, he confirmed that the Claimant could express himself in a forceful manner, but that the nature of the role necessitated quick decision making in a pressurised situation when the system had faults in it. He confirmed that he had never seen the Claimant become aggressive with another colleague despite his direct communication style. We therefore found that the incident on the 14 June 2022, when at home caring for his seriously unwell daughter, was the first time the Claimant had behaved in a verbally aggressive way to his colleagues.

115. Mr Rigby gave evidence, and we found, that this was an environment in which the *'fuck'* word, was used frequently in conversations between the Claimant and others, and we found that no one had ever been disciplined for this. When Mr Rigby was asked if he had ever heard anyone telling someone else to *'fuck off'* during a heated conversation about how to fix a problem he confirmed that he had overheard such conversations and had heard that phrase being spoken to one employee by another employee. We therefore found that an employee telling another employee to *'fuck off'* on occasion happened between employees of the Respondent with no action being taken against the speaker of this phrase. We also found that in environment where employees in the IT team were working under pressure in a factory situation that this was not a surprising state of affairs.

**Initial Request for Suspension Meeting – Refusal to follow a reasonable management order and genuine belief of Michael Wigham in this allegation of gross misconduct**

.

116. On the 15 June 2022 at 9.00 am the Claimant was asked to attend an investigation meeting only fifteen minutes later at 9.15 am.

117. We find that he did not refuse to attend that meeting but instead reasonably asked for a copy of the *'home visit policy'* before attending such an investigation meeting.

118. In particular in the witness statement of Russell Keers [P.145] for the disciplinary hearing he states: -

*'Just after 900 hours I went to the shop floor to let Mark know he was required to attend the meeting, he was in the engineering office and I approached him to let him know he was required to attend a meeting. He asked what it was about and I said it was to do with the events that had happened yesterday. Mark was very agitated and kept asking to see a policy that states house visits are allowed. I explained at this time there is no policy to review and I again asked him to attend the meeting at 9:15 hours with Dan. Mark refused to attend the meeting until he had seen a policy.'*

Mr Keers then went on to say:

*'I contacted Sarah Hudson to explain that Mark was refusing to attend a meeting which I believed to be a reasonable request. Sarah sought advice from the central HR team and called me back around 09/30 hours. The advice I was given was to try and get a statement from him if possible, however based on my initial interaction with him this wasn't going to be possible as he appeared to angry and upset. Sarah agreed that Mark had failed to carry out a reasonable request on multiple occasions and therefore I was able to spend suspend him pending further investigation.'*

'Mr Keers also went on to say: -

'*I explained to mark I was suspending him as he had failed to comply to a reasonable request and that his behaviour had been unacceptable. Mark didn't take too kindly to me challenging his behaviours. He stated that sending two managers to his house wasn't good behaviour.'*

119. Evidence was given by Russell Keers [Paragraphs 8-17 of WS] about this request to attend the investigation hearing. In particular he said that *'under the circumstances it was too late for that,'* when the Claimant confirmed he would attend unconditionally. He also said that *'based on the events of the morning so far, I felt Mark was not going to cooperate. I believed he would continue to interrupt and challenge what was going to be said whether he was suspended or not.'*

120. We did not find the Claimant's desire and need to challenge the visit to his home address to be a valid reason for the Respondent to then refuse to accept his belated offer to attend the investigation meeting without first seeing the 'Home Visit Policy', and we found that in those circumstances any employee would reasonably wish to ask to see any relevant polices justifying a visit to their home, before giving their version of events in an investigation meeting, and to challenge what occurred.

121. We find that Michael Wigham could not have genuinely believed he was refusing to attend the requested investigation meeting on the 15 June 2022 and this was supported by the undisputed evidence of the Claimant, that Michael Wigham had before him at the Disciplinary Hearing, [P.248 of Claimant's second grievance] where the Claimant said, in relation to the allegation in the suspension letter that he was asked multiple times by Russell Keers to attend an investigatory meeting, and which he refused to attend, as follows (our emphasis added):-

*'The above text is all misleading in the following ways*

*1. I never refused to attend the meeting*

2. *I put in a reasonable request to RK to see a copy of the Refresco welfare policy which was a very reasonable request from my behalf as it should have covered the actions of RK took against me the previous day*

3. *RK gave me less than 15 minutes notice for the meeting. That was unreasonable as it did not give me enough time to go through the Refresco welfare policy.*

4. *In RK's witness statement he fails to mention that after I asked him what policy covered his actions of the previous day he smiled and said 'the welfare policy.' I believe that as a serious omission in his witness statement.*

5. *As he came down to suspend me at around 9:35 AM I said I would attend the meeting without any preconditions. RK refused to allow me to do that. Why not? That was unfair.'*

122. Michael Wigham also had the account of the Claimant about the alleged refusal of the Claimant to attend the investigation meeting at the reconvened investigation meeting [P.179].

123. In addition in the statement of Russell Keers [P.145], that Michael Wigham had before him, he refers to the Claimant asking for a copy of the policy and does not refer to him point blank refusing to attend the requested meeting but instead makes clear that he wants to see the policy before he agrees to attend. We do not find where an employee asks for a copy of a policy before attending a meeting that Michael Wigham could reasonably interpret that response, and genuinely believe that response to amount to the Claimant refusing to attend such a meeting, and for it to amount a failure by the Claimant to follow a reasonable management instruction. We also noted that the Claimants behaviour is simply described as *'agitated.'*

124. Evidence was given by Russell Keers [Paragraphs 8-17 of WS] about this suspension at the hearing. In particular he said that *'under the circumstances it was too late for that,'* when the Claimant confirmed he would attend unconditionally. He also said that *'based on the events of the morning so far, I felt Mark was not going to cooperate. I believed he would continue to interrupt and challenge what was going to be said whether he was suspended or not.'*

125. No explanation was given by Russell Keers in this hearing as to why it was 'too late', for him to conduct the investigation meeting that day. We did not accept this evidence and preferred the Claimants evidence he did cooperate and say he would attend the investigation meeting upon being told he was being suspended.

126. We found that there was no evidence that could have led Russell Keers to the conclusion that it was 'too late' for the Claimant to agree to attend the meeting.

**Investigation Meeting of the 28 June 2022**

127. We also found as follows in relation to the subsequent investigation meeting that then took place on the 28 June 2022: -

126.1 The Claimant was only told that he was being suspended and investigated for refusing to attend an investigation meeting and no mention was made of the incidents on the 14 June 2022 and he was not told that this amounted to potential gross misconduct [P.158].

126.2 During the investigation meeting we found that the Claimant was then asked, with no notice in advance, to comment on the incident that took place on the 15 June 2022 whilst at this stage not being aware of what the allegations were against him [P.181].

126.3 The investigator Jo Strachan confirmed she did not know what the contents of the suspension letter said even though she had been asked to investigate the matter and we found the investigator had carried out no preparation for the meeting whatsoever something we found to be poor on her part [P.171]. We noted that the suspension letter had been drafted by Sarah Hudson the HR Business Partner who was highly experienced in handling such matters [P.158].

126.4 We found during the meeting the Claimant provided some information about the incident but then reasonably refused to discuss the events of the 14 June 2022 further as he had nothing in writing about what he was being accused of in relation to the events that day [P.183 - 185] and he said he would instead provide a statement after the meeting. We found that at this point Jo Strachan then asked to adjourn the meeting for five minutes [P.183].

126.5 We found that she asserted that the invitation to the investigation meeting stated that it was to *'investigate the matter fully,'* thus justifying her request for him to explain his actions on the 14 June 2022 [P.183].

126.6 We found the Claimant then reasonably pointed out to her that the suspension letter detailing what the investigation would be about only referenced his alleged refusal to attend an investigation meeting and nothing else.

126.7 We found that Jo Strachan, unreasonably asserted that this would be the only investigation meeting and would in effect cover the events of the 14 June 2022 and not just his subsequent refusal to attend an investigation meeting and said, *'look, you can take five minutes just to have a think, gather your thoughts and come back, but this will be the only meeting that were having.'* We found that this was unfair on the Claimant as he had no time to prepare to defend himself with nothing about that day being put in writing prior to the meeting whereas they had put in writing his alleged refusal to attend the investigation meeting.

126.8 We found that following the Claimant's email of the 19 July 2022 when he asked for a postponement of the disciplinary meeting set for the 21 July 2022 that he was only then advised for the first time, over a month after he was suspended, and following the investigation meeting, of what the allegations were against him in relation to his alleged gross misconduct. [P.207]

126.9 We found that this was an unfair investigation as by choosing to involve him in the investigation they only advised him of one allegation, and we found that this was the least serious allegation, and then failed to advise him of the two more serious allegations of refusing to return the PG Laptop and verbal aggression to his two colleagues.

126.10 Counsel submitted that when in Jo Strachan's report she stated that this *'leads to me to a decision of gross misconduct'* that this was simply inelegant phrasing by the investigator. We found that this was not simply inelegant phrasing and instead found that it was evidence of pre-determination by the Investigator of the allegations against the Claimant which became 'baked in' to the process at an early stage.

126.11 We also found that at no time prior to that investigation meeting did the investigator Jo Strachan have any account from the Claimant of what happened on the 14 June 2022 due to the fact the Claimant was not on notice that would be discussed. Her recommendations as an investigator and conclusion that this *'leads to me to a decision of gross misconduct'* in her report dated the 29 June 2021 [P.189-193] was issued the day after the investigation meeting on the 28 June 2021 and before the Claimants full account that was only sent to the Respondents on the 23 July 2022 [P.233 – 245] which he sent four days after first receiving the allegations of gross misconduct in writing on the 19 July 2022 [P.208-209]. We therefore found that was an unreasonable and unfair investigation process that was concluded before the Claimant had even been told in writing what the allegations of gross misconduct against him were.

126.12 In making these findings we did so after reminding ourselves that the process should be judged at the end of the process, i.e., by the end of the disciplinary process and we make those findings in conjunction with and as part of our findings of the disciplinary process set out below.

**Disciplinary Meeting and Letter of Dismissal**

128. Prior to the disciplinary meeting we noted that the documents sent to the Claimant by Sarah Hudson on the 19 July 2022 as attachments to the invitation to the disciplinary hearing did not include any document from the Claimant that gave his account of the allegations against him [P210]. This was due to the fact that it was only on this date that when he received the letter that he learned of the allegations against him in full [P.208].

129. We also noted that the attachments did not include the messages between him and Chris Simons on the 14 June 2022 and only enclosed the text messages between him and Gavin Clarke which at this stage did not give the full picture of his communications with Chris Simons as well as Gavin Clarke and we found this was clearly key evidence about his communications about the need for the PG Laptop and the issues on Line 53 that day.

130. The letter set out he was being accused of gross misconduct in relation to all three allegations as follows [P.208]: -

129.1 Gross misconduct by verbally abusing Gavin Clarke, and Luke Beckingham, by using offensive language and then slamming the door during the interaction.

129.2 Refusing to give back the company laptop, that this was a reasonable management request with which he chose not to comply which was gross misconduct.

129.3 That he was asked to attend an investigatory meeting to understand the issues that happened on the 14 June 2022, that he stated he would not attend until he had seen a 'home visit policy', and that he chose not to attend.

131. Whilst we noted that the introduction to the three allegations described them all as gross misconduct, the allegation detailed at paragraph 129.3 above did not use the words 'gross misconduct' in that paragraph. When the Claimant asked Mr Wigham during the meeting whether or not this was gross misconduct [P.269] Mr Wigham replied, '*Failing to follow a reasonable management request and gross insubordination is considered to be gross misconduct.'* We therefore found that the Claimant was disciplined in part for the issue over his alleged refusal to attend an investigation meeting and that this was treated as gross misconduct by the Respondent.

132. We also found that the three allegations were not said to be standalone incidents of gross misconduct which on their own could each justify gross misconduct and summary dismissal but were all considered together by the Respondent as a composite whole. There was no reference in this letter to damaging company property, this being referred to as a reason for his dismissal [P.366]

133. The Claimant then submitted three grievances against Russell Keers, Gavin Clarke and Refresco, and he was told that they would be treated as part his evidence and defence in the disciplinary hearing on the 26 July 2022 [P.250]. On the 25 July Sarah Hudson then forwarded the messages between Chris Simons and the Claimant [P.253] to Michael Wigham for the first time. The Claimant also sent a further statement on the 25 July 2022 [P.255-P.259] where amongst other things he set out that when he told Gavin Clarke and Russell Kears they were not welcome on his property they remained there for 15 minutes after he had told them to *'fuck off'* and that he considered this to be

trespass [P.258]. He said, *'they even continued to trespass after I started to tell them to 'fuck off'.'*

134. We therefore found that when Mr Wigham decided on the sanction of instant dismissal for the allegations against the Claimant, he was aware that the Claimant regarded the visit to his property as an act of trespass while he was caring for his mentally unwell daughter. The Claimant also said that: -

*'Russell Keers and Gavin broke the employee/employer bond of trust when they carried out this home visit in the say they did. Refresco's actions immediately caused Mark Braithwaite to feel anxious and intimidated. This triggered his understandably distressed behaviour during the trespassing incident. But Refresco showed no concern whatsoever for the feelings of their loyal and trustworthy employee Mark Braithwaite on that day.'*

135. During the disciplinary meeting we found that Michael Wigham asked the Claimant about MSB automation when that was not an allegation against him i.e. an implication that he had set up his limited company for the purposes of trading on his own account while working for the Respondent. He said in justification for that question to the Claimant that, *'I am trying to understand why you wouldn't return the laptop okay?'* [P.291]

136. The Claimant replied with a full explanation, and we found that the Claimant was not setting up his own company nor doing anything improper while working for the Respondent. However, Michael Wigham then said,

*'The implication is, because I've got to fully investigate this matter, is that the reason why you wouldn't want to give the laptop back was because you were using it for something other than Refresco's business.'* [P.292]

We found that this suspicion towards the Claimant, which was evident both in the Investigators report where she concluded gross misconduct before she had even had a full account from the Claimant, was also in evidence in the disciplinary meeting, where Mr Wigham in effect accused the Claimant of using the laptop for the purposes of MSB Automation when this had never before been raised with him. We found it was unfair of the Respondent to raise a new allegation against the Claimant for the first time in the disciplinary hearing.

137. We found that in both the investigatory and disciplinary meetings the Respondent looked for inculpatory evidence against the Claimant instead of looking also for exculpatory evidence, and that this was evidence of a pre-determination mindset towards the Claimant.

138. We also found that in the disciplinary hearing the Claimant told Mr Wigham that Gavin Clarke and Luke Beckingham arrived at his home without his permission and trespassed on his property [P.294].

139. Mr Wigham responded by saying, *'I think you were in Refrescos paid employment at the time,'* and also said, *' I think that if the postman comes on your property without his [sic] permission..'* to which the Claimant replied *'the*

*postman has a..'* , but Mr Wigham then interrupted him without allowing him to finish and said, *'..is that trespassing? No..'* to which the Claimant replied *'..by implicit agreement.'* and here he was referring to the postman having implicit agreement. He then added, *'He had his fingers through my letterbox..'.*

140. Eventually the debate continued by Mr Wigham stating, *'I don't really know why you have to give permission for us to come and knock on your door.'* We found this statement by Mr Wigham demonstrated a lack of respect and understanding towards the Claimant who had a right to privacy in his own home caring for his unwell daughter, and in view of the fact that we found the welfare concerns justifying the visit were without substance, and we do not find that Mr Wigham could have held any genuine belief there were reasons for the Respondent to be concerned for the Claimants welfare when the visit was authorised. We also find that he ignored the clear provocation and trespass of Mr Beckingham shouting through the Claimant's letterbox and inserting his fingers through his letterbox.

141. We found that despite the Claimant telling them *'I am upset,'* Mr Beckingham persisted and put his hand through his letterbox and shouted through it at the same time. [P.294] Even if any welfare concerns did exist at the time the visit was authorised there was, we found, a complete disregard for the Claimant's welfare during the visit. The Claimant replied to the comment about why they needed permission to knock on his door during the disciplinary hearing and said, *'yes, because it's my private property, and I'm looking after a mentally ill daughter. Do you get that?'* [P.295].

142. A discussion then followed about a lack of concern for his welfare that day by Refresco and this part of the meeting concluded with Mr Wigham asking the Claimant, if the way he responded was appropriate and proportional?

143. The Claimant then set out in detail the circumstances he was in. [P.297] He admitted it was not proportional but that he was upset and under duress. He set out that his father had died within a month that he had gone *'through hell with the care of his mentally ill daughter,'* and that he had to spend 40 minutes physically restraining her from seriously harming herself in the previous two weeks, and that she had to be admitted to A&E to stop her harming herself. He then said:

> *'I've had all this to contend with. When two people turn up, and they demonstrated that the company doesn't trust me, and they haven't even got my permission to turn up to my own private address, they've invaded my privacy, they've used my personal data for the wrong purpose, in my opinion they've not respected me or trusted me; I'm getting upset, at that point. I'm sorry, and I apologise completely for the use of the offensive language, but it was not abusive towards..'* [ p.297]

144. In response Mr Wigham said, in part, *'It feels like a very, very big jump to go from somebody knocking on your door to*,*'Refresco doesn't trust me,'* and '*When all they did was knock on your door.*' In giving this response, we found Mr Wigham ignored the fact they didn't just knock on his door, but they refused

to leave his property and instead trespassed by inserting their hand through his letterbox and shouting through it.

145. Whilst the Respondents were no doubt frustrated at the delay in returning the laptop the lack of clarity about him taking it home, the lack of any written agreement about his use of the PG Laptop during his home working was we found entirely the fault of the Respondent and arose from their poor management of the Claimant.

146. Ultimately, we found that it was the Respondents decision to allow him to carry out his role in this home environment and they were not forced to agree to this. However, having agreed he could work from home, we found it was incumbent on them to treat this situation with sensitivity having regard to his very unwell daughter, and we found they did not do so on the day in question when they trespassed on the Claimant's property, after he asked them to leave his property albeit by the Claimant telling them to *'fuck off,'* in the heat of the moment.

147. We also noted the confusion caused by the Respondent as to whether the refusal to attend the first requested investigation was or was not classified as gross misconduct. Michael Wigham asserted it was potential gross misconduct [P.269] whereas the Claimant maintained it was not stated to be potential gross misconduct in the suspension letter he received [P.158].

148. In particular in the invite to the disciplinary hearing [P.220] it was said that he would be asked to respond to the *'following allegations of gross misconduct'* and item 3 was said to be as follows:

> ' *…you stated that you would not attend any meeting until you have seen a 'home visit policy..',* and that it was explained to him that *'..Russell explained that there was no such policy,'* and that *'You chose not to attend which was a reasonable management request which subsequently resulted in Russell suspending you on full pay.'*

149. We found that there was no gross misconduct by the Claimant in asking to see a copy of the home visit policy but then belatedly agreeing to attend shortly thereafter.

150. We also found that the Claimant was never accused of behaving inappropriately to Russell Keers at the time of the request to attend the Investigation Meeting and it was simply said that he was 'agitated.'

151. As a result we found that there was no genuine belief by Michael Wigham that the Claimant was refusing to follow management orders in attending an investigation meeting, as he had clearly stated he would comply and attend, and we therefore find that belief, on the part of the Michael Wigham, that he had refused to follow a reasonable management instruction, could not be a genuine belief in these circumstances.

**Three Stated Reasons for Dismissal and Refusal to Attend Investigation Meeting**

152. We also noted that despite the dismissal of the Claimant being predicated on three allegations of gross misconduct, that Counsel for the Respondent only based her written submissions on two allegations of gross misconduct i.e., in relation to the laptop incident and the verbal abuse by the Claimant of Gavin Clarke and Russell Keers, and this third allegation of gross misconduct relating to refusing to attend the investigation meeting was seemingly abandoned by Counsel for the Respondent with no mention being made of it whatsoever in her written submissions.

153. However the Claimant's dismissal, and the reason for that, were stated in the letter of dismissal as composite allegations, when the Claimant was advised that *'the reason for your dismissal was:* …'[P.365] and there then followed a description of the allegations including the reference to the Claimants request for the 'home visit policy' when asked to attend the investigation meeting.

154. The reference to his request for the home visit policy was contained within the reasons for his dismissal, albeit there was a grudging admission that *'You eventually agreed to attend a meeting,'* yet it was still left to stand as a reason for his dismissal. This assertion was contradicted in the ET3 form on this issue where it was said as follows: -

*'7. The following day the Claimant was requested to attend an investigation meeting to consider his conduct on 14 June 2022. The Claimant refused to attend that meeting on the basis that the Respondent could not produce a 'home visits policy'. The Claimant was advised no such policy existed and there was no reason for it to exist. He still refused to attend the meeting.'*

This paragraph was in plain contradiction to what was set out in the letter of dismissal, and this was not addressed in submissions and so stood as a stated reason for dismissal.

155. There was no suggestion by the Respondent throughout that the three allegations had been treated as standalone allegations and were instead always treated as three composite reasons. We found it was not open to the Respondent to argue that he could have been dismissed for two of the allegations while ignoring the third allegation.

**Decision to dismiss with no prior warnings – sanction.**

156. Having found that there was no genuine belief in one of the stated acts of gross misconduct i.e. failing to agree to attend an investigation meeting, we go on in any event to make findings on the issue of the decision by Michael Wigham to instantly dismiss him for gross misconduct whilst stating that they had reduced the sanction against the Claimant to misconduct from gross misconduct in view of his mitigation, arising from his father's death and his funeral and his daughters illness [P.365-367]. In particular he said as follows:

*'Due to mitigation of your ongoing daughter's illness, your father passing in April 2022 and this his funeral on 16 May 2022, I appreciate that you may have been under additional stress, I have decided to reduce the sanction from gross misconduct to misconduct and ultimately dismiss with notice.'*

157. The policy of the Respondent stated that they could dismiss for a first act of misconduct as follows, and relied on their policy to do so [P. 60]:

*'**Dismissal with notice**: Where the employee has committed a further act of misconduct (these being acts of misconduct other than gross misconduct) following a previously issued final written warning and where the warning remains live on their file, or where the misconduct is sufficiently serious, the employee may be dismissed with notice or with pay in lieu of notice.'*

158. The Claimant had no prior disciplinary record. We found that the allegations were always put as gross misconduct and not as 'acts of misconduct other than gross misconduct'.

159. We found that this clause in their policy could not apply to acts that had been characterised as gross misconduct as it was stated to apply to acts of misconduct **other than** gross misconduct. We did not find that they could simply reframe the allegations after the event from gross misconduct to misconduct in light of his mitigation so as to bring the events into the scope of this clause. Either the acts were characterised as gross misconduct which they were in this case, and in which case this clause did not apply or they were characterised simply as misconduct from the outset, which in this case they were not.

160. In any event, in the alternative, even if they could reframe these allegations after the event as misconduct from gross misconduct, we found the reference to 'sanction' by the Respondents in the dismissal letter to be confused. Sanction is the act of dismissal not the nature of the allegations themselves and how they are characterised.

161. Regardless of this error, and even if they could reframe the allegations as misconduct and still dismiss for them with no prior warnings we found one allegation was not even made out, and we found that Michael Wigham on behalf of the Respondent had no genuine belief in one allegation, which formed part of the composite reasons for dismissal.

162. We found that there was in essence an unfair strand running through the whole investigation and disciplinary procedure which was the alleged refusal to attend the investigation and in which we found the Respondent held no genuine belief. We also found that this demonstrated that throughout the whole process and judged at the end of that process the Respondent sought inculpatory evidence against the Claimant and we found that the disciplinary hearing was approached with a *'pre-determination'* mindset, as was the decision to dismiss.

## Appeal

163. The Claimant appealed against his dismissal [P.381-396]. In the event the Claimant did not attend his appeal hearing.

## *Age Discrimination*

### *Dismissing the claimant.*

164. In relation to the dismissing officer's decision to dismiss the Claimant we asked ourselves if facts had been established from which we could infer that discrimination may have tainted the decision to dismiss because of the Claimants age. In short, the Claimant put his case on the basis that they dismissed him to make way for the younger employee Chris Simons.

165. Whilst no specific allegation were made about the differential in salary between the Claimant and Chris Simons, in that after the Claimant was sacked Chris Simons salary was increased within the pay band he was in, in we make findings on this in any event as it was an evidential matter that arose during the hearing.

166. Having noted that after the Claimant was dismissed that Chris Simon's salary was increased to a level greater than the Claimants when he was then appointed to the Claimant's role, and that this increase was approximately five thousand pounds greater than the Claimants salary, we did therefore find that facts were established which shifted the burden of proof on this allegation to the Respondent.

167. However, we noted the explanation of the Respondent that they advertised the role, and no one applied apart it apart from Chris Simons and who we found was carrying out the role on a temporary basis after the Claimant was dismissed.

168. The Respondents witnesses gave evidence that due to market forces *'going crazy'* at that time they decided to raise the salary within the Hay 15 band to the higher end of the scale. Ms Darcy gave evidence that they often reviewed salaries in the Hay Band to attract candidates and keep them. We therefore found that the Respondent did provide a non-discriminatory explanation for the salary differential.

169. We also noted that Chris Simons, even after they had increased his salary, was still being paid less than he was paid as a night shift engineer and we found the Respondent did increase what they could pay him in order to keep him in that role on a permanent basis and so as to be competitive in the market place so that he would stay in the role thereafter.

170. Having regard to our findings of fact above we found that the decision to dismiss the Claimant revolved around the Claimants conduct that day and we found no evidence that the decision to dismiss had been tainted by age discrimination.

***Respondent Considering his use of language to be misconduct.***

171. In relation to considering the Claimants language that day when he used the 'f' word in his communications with Russell Keers and Luke Beckingham, we asked ourselves if facts had been established from which we could infer that age discrimination may have tainted the decision to regard his use of language as misconduct. We found that the Claimant did not establish facts from which we could infer that the treatment of his language to have been tainted by age discrimination and so having found no such facts were established on the decision to dismiss we did not find the burden of proof even shifted on this issue to the Respondent.

***Send younger employees to visit EMS (Palletisers) in Italy on the 25,26 and 27 April 2022 instead of the claimant.***

172. The Claimants case on this was mainly focussed on the fact Chris Simons was sent on this trip whereas he wasn't. Chris Simons was 39, and at the time the Claimant was 58 years old. We did not find that facts were established by the Claimant from which we could infer that the treatment may have been tainted by age discrimination and that his age was in part the reason for not being sent on the trip to Italy.

173. Evidence was given that the choice of who to send to Italy on this trip was based purely on who could contribute the most to the trip to the customer based on their experience and skill set. It was also said that the Claimant wasn't a project manager, whereas the Claimant pointed out that neither was Gavin Clarke, but he was still selected to go on the trip.

174. Whilst the Claimant gave evidence his experience and skill set was suited to the trip, and that he had been sent on similar visits in the UK, we did not find the decision not to send him was in any way based on his age, but was simply based on a business decision on who was best suited to contribute on the trip. We found that the Claimant did not establish facts from which we could infer the decision may have been tainted by age discrimination and so having found no such facts were established on this decision we therefore found the burden of proof failed to shift to the Respondent.

***Seek to assign some of the Claimants tasks to Chris Simons and remove the claimant from his role in the period from March 2022 onwards and replace him with a younger employee (Chris Simons)***

175. No detailed evidence was led by the Claimant on how his duties were in fact assigned to the Chris Simons and we found that from around March 2022

onwards there was at the highest a sharing of duties that formerly only the Claimant had conducted. We found that was because the demands of getting Line 53 operational necessitated the secondment of Chris Simons to that Line but that unfortunately no one at the Respondent set out in writing how this would work as between the Claimant and Chris Simons. We did not find this failure to document it in writing meant facts were established from which we could potentially infer discrimination may have occurred in relation to assigning some of his tasks to Chris Simons and ultimately replacing him with a younger employee i.e. Chris Simons, and so having found no such facts were established on these issues from which we could infer discrimination, we therefore found the burden of proof failed to shift on these issues to the Respondent.

***On 15 June 2022 did Luke Beckingham state to the Claimant that the Respondent thought he was getting too old to handle the demands of the new equipment.***

176. We found the Claimant overall an honest and credible witness. Counsel for the Respondent put it to him that if that had been said to him i.e. that the Respondent thought he was getting too old to handle the demands of the new equipment he would have raised it in the Disciplinary Hearing. However, we accepted the Claimants evidence he was too busy defending himself and trying to stop himself being dismissed. We noted that this allegation was mentioned for the first time in ET1, and the Claimant stated he ran out of space on the ET1 Form to give more detail. We found the remark was made and that the burden of proof on this allegation did move to the Respondent to provide a non-discriminatory reason.

177. We heard no evidence from the Respondent on this allegation. We found that this comment was made to the Claimant, and we therefore found that this allegation was made out and succeeds.

178. However our findings are limited to the fact this was said to him by Luke Beckingham and we find on the balance of probabilities that this reflected Luke Buckingham's discriminatory mindset but we did not find that this could be imputed to the decision maker Gavin Clarke, nor that it proved others in the organisation also had this discriminatory mindset.

179. This allegation succeeded.

***Discipline the claimant for failing to attend a disciplinary investigation meeting on 15th June 2022.***

180. We found above there was no evidence that the Claimant had ultimately refused to attend this investigation meeting and so we found on this allegation that facts were established from which we could infer discrimination and so we found the burden of proof did pass to the Respondent on this allegation.

181. The burden of proof having passed on this allegation, and although we found the Respondents never had a genuine belief in this allegation for which he was disciplined, we did not find that this was because of the Claimants age.

182. We found that the Respondents pursued this unfounded allegation against the Claimant because they found him a difficult employee to manage who had a strong personality and who would not hesitate to express himself forcefully and so we found this unsustainable allegation was not pursued in any way because of his age but was pursued because they were reacting to the way he expressed himself that day when being asked to attend the investigation meeting and when he then became in their words *'agitated.'*

183. This allegation therefore failed.

184. We received both written and oral submissions from both parties. Both were taken into account but are not recited in this Judgment.

## The Law

185. Section 13 of the EqA 2010 provides as follows: -

*13 Direct discrimination*

*(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

*……...*

*(6) If the protected characteristic is age—*

186. The difference in treatment must be shown to have been 'because of his age.'

187. The correct approach to establish causation for unlawful discrimination is to ask whether age was the effective and predominant cause, i.e. to ask 'why' the Claimant was treated as he was. This test is set out in **Nagarajan v London Regional Transport** [1999] IRLR 572 (HL); **Chief Constable of West Yorkshire Police v Khan** [2001] UKHL 48, [2001] IRLR 830 and **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11, [2003] IRLR 285, all of which were confirmed in **Martin v Lancehawk Ltd (t/a European Telecom Solutions)** [2004] All ER (D) 400 (Mar), and **Amnesty International v Ahmed** [2009] ICR 1450. In the latter case the EAT considered the application of the 'but for' test on the Respondent's mental processes leading up to the alleged discriminatory act, and commented that 'all that matters is that the proscribed factor operated on his mind', equally, that 'the fact that a Claimant's sex or race is a part of the circumstances in which the

treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason for that treatment'.

188. The discriminator's motives are irrelevant in deciding whether there has been discrimination. The correct test is objective rather than subjective and, in the words of Lord Bridge, 'the purity of the discriminator's subjective motive, intention or reason for discriminating cannot save the criterion applied from the objective taint of discrimination on the ground of sex'. Considerations of motive may, however, be relevant to the assessment of compensation (see **Chief Constable of Greater Manchester Police v Hope** [1999] ICR 338(EAT)).

**Burden of Proof**

189. S.136 of the EqA provides as follows: -

> **136 Burden of proof**
> ……..
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

190. In four key cases, all of which were decided under the antecedent legislation guidance on the two-stage approach to the shifting of the burden of proof in discrimination cases were set out: **Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases** 2005 ICR 931, CA; **Laing v Manchester City Council and anor** 2006 ICR 1519, EAT; **Madarassy v Nomura International plc** 2007 ICR 867, CA; and **Hewage v Grampian Health Board** 2012 ICR 1054, SC.

191. In **Hewage** Lord Hope (giving a judgment with which all members of the Court agreed) endorsed the two earlier decisions of the Court of Appeal in **Igen** and **Madarassy** as providing ample guidance.

192. **Igen** still remains the leading case in this area. There, the Court of Appeal established that the correct approach for a tribunal to take to the burden of proof entails a two-stage analysis.

193. At the first stage the Claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the Respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.

194. The Court of Appeal in **Hewage** repeated the guidelines previously set down by the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd** 2003 ICR 1205, EAT, albeit with some adjustments, and confirmed that

they apply across all strands of discrimination. The guidelines in short were as follows:

(i) it is for the Claimant to prove, on the balance of probabilities, facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. If the Claimant does not prove such facts, the claim will fail.

(ii) in deciding whether there are such facts, we bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that 'he or she would not have fitted in.'

(iii) the outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(iv) the tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination — it merely has to decide what inferences could be drawn.

(v) in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(vi) when there are facts from which inferences could be drawn that the Respondent has treated the Claimant less favourably on a protected ground, the burden of proof moves to the Respondent.

(vii) it is then for the Respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act

(viii) to discharge that burden, it is necessary for the Respondent to prove, on the balance of probabilities, that its treatment of the Claimant was in no sense whatsoever on the protected ground

(ix) not only must the Respondent provide an explanation for the facts proved by the Claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment.

195. In **Madarassy**, Lord Justice Mummery noted that most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts. It is vital that, as far as possible, the law on the burden of proof applied by the fact-finding body is clear and certain. Another point made by Mummery LJ, when dealing with S.136 EqA, is that: -

'*the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination'.*

196. Pursuant to the approach adopted in disability discrimination as set out in **Williams v Trustees of Swansea University Pension & Assurance Scheme** [2018] UKSC 65, [2019] IRLR 306, 'unfavourable' treatment is to be measured against an objective sense of that which is adverse as compared with that which is beneficial. As was stated in the EAT by Langstaff P in Williams: -

*'treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous … Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be.'*

197. In cases, like this one, where there are allegations of age discrimination, it is imperative to find that there is a causal connection between the treatment and the characteristic of age, and put simply a Tribunal must ask itself why the complainant was treated less favourably? This test was stated in **Johal v Commission for Equality and Human Rights** UKEAT/0541/09, [2010] All ER (D) 23 (Sep)).

## Unfair Dismissal

198. The Claimant was continuously employed by the Respondent for more than two years and in those circumstances had the right not to be unfairly dismissed by it (section 95 of the Employment Rights Act 1996).

199. Section 98 of the Employment Rights Act 1996 ('the Act') provides that:

***98 General***

*(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 … (b) relates to the conduct of the employee,*

200. The correct approach for the Tribunal to adopt in considering section 98(4) of the ERA (as set out in **Iceland Frozen Foods v Jones [1982] IRLR 439)** is as follows:

*'… 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.'*

201. The ACAS Code of Practice on Disciplinary and Grievance procedures set out matters that may be taken into account by tribunals when assessing the reasonableness of a dismissal on the grounds of conduct, as follows:

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

*Employers and employees should act consistently.*

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

*When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on 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 look for evidence which supports the employee's case as well as evidence against it. Be careful when dealing with evidence from a person who wishes to remain anonymous. In particular, take written statements that give details of the time, place, dates as appropriate, seek cooperative evidence check that the person's motives are genuine, and assess the credibility and weight to be attached to their evidence.*

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

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

*If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case of the disciplinary hearing.*

*It would normally be appropriate to provide copies of any written evidence, which may include any witness statements within the notification. At the meeting, the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should also be given a reasonable opportunity to ask questions, present evidence, and call relevant witnesses. They should also be given the opportunity to raise points about information provided by witnesses.*

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

202. For guidance on the level of investigation and on the Respondent's belief that an act of misconduct has occurred, **British Home Stores v Burchell [1979] IRLR 379** provides as follows:

*'What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.'*

203. As at the time of the Claimant's dismissal, the Tribunal is to ask: -

(i) did the Respondent believe the Claimant was guilty of the misconduct alleged,

(ii) if so, were there reasonable grounds for that belief,

(iii) at the time it had formed that belief had it carried out as much investigation into the matter as was reasonable in the circumstances, and

(iv) was the decision to summarily dismiss the Claimant within a range of reasonable responses open to an employer in the circumstances **(Yorkshire Housing Ltd v Swanson [2008] IRLR 609)?**

(v) The range of reasonable responses test applies as much to the procedure which is adopted by the employer as it does to the substantive decision to dismiss **(Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23).**

204. The employer cannot be said to have acted reasonably if he reached his conclusion in consequence of ignoring matters which he ought reasonably to

have known and which would have shown that the reason was insufficient **(W Devis & Sons Ltd v Atkins [1977] IRLR 314, HL).**

205. An employee can challenge the fairness of a dismissal if an agreed procedure was not correctly followed **(Stoker v Lancashire County Council [1992] IRLR 75).**

206. The fairness of the procedure adopted by an employer is to be assessed at the end of the internal process, including any appeal process. **(Taylor v OCS Group Limited [2006] IRLR 613).** The process must be considered in the round. Smith LJ stated:

*'If [the Tribunal] find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceedings with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or review, but to determine whether due to the fairness or unfairness of the process procedures adopted, the thoroughness or lack of it of the process and the open mindedness or not, of the decision maker, the overall process was fair, notwithstanding any deficiencies at the earliest stage'*.

207. Case law has identified that the reason for dismissal will be a set of facts known to the employer at the time of dismissal or a genuine belief held on reasonable grounds by the employer which led to the dismissal **(Abernethy v Mott, Hay & Anderson [1974] IRLR, 213, CA).**

208. In the event of an unfair dismissal the Tribunal must determine what would have been likely to have occurred if a fair procedure had been adopted, in accordance with the guidance in **Software 2000 Ltd v Andrews [2007] IRLR 569**. The EAT stated:

*'If the employer seeks to contend that the employee would or might have ceased to be employed in any event, had fair procedures being followed, or alternatively, would not have continued in employment indefinitely, it is for him to adduce relevant evidence on which he wishes to rely. … However, there will be circumstances where the nature of the evidence which the employer wishes to adduce or on which he seeks to rely, is so unreliable that the Tribunal may take the view that the whole exercise of seeking to reconstruct what might have been so riddled with uncertainty that no sensible prediction based on that evidence can properly be made'.*

209. Recent case law has moved away from the distinction between a finding of Unfair Dismissal on procedural grounds as opposed to dismissal on substantive grounds such as in **Gover and ors v Propertycare Ltd 2006 ICR 1073, CA; Thornett v Scope 2007 ICR 236, CA; Software 2000 Ltd v Andrews and ors 2007 ICR 825, EAT; and Contract Bottling Ltd v Cave and anor 2015 ICR 146, EAT.**

210. While all these cases recognise the remarks made by Lord Prosser in **King and ors v Eaton Ltd (No.2)** the courts are increasingly drawing back from

the view that there is a clear dividing line between procedural and substantive unfairness, and as a result that line is no longer used to determine when it is and is not appropriate to make a Polkey reduction. Lord Prosser observed:

*'[T]he matter will be one of impression and judgement, so that a tribunal will have to decide whether the unfair departure from what should have happened was of a kind which makes it possible to say, with more or less confidence, that the failure makes no difference, or whether the failure was such that one cannot sensibly reconstruct the world as it might have been.'*

211. In the case of **Wilson v Racher, Court of Appeal (Civil Division) [1974] I.C.R. 428,** it was said that the use of obscene language by a normally efficient employee on a solitary occasion when severely provoked by his employer would not justify dismissal. In that case Wilson was employed by Racher as a gardener; and it was found that he was diligent and efficient and did nothing which could be regarded as blameworthy by a reasonable employer. When Racher aggressively and provocatively criticised Wilson he attempted to walk away but in the face of continued unjustified criticism used obscene language to Racher in front of Racher's wife and children. As a result Racher dismissed Wilson. The appeal against the findings the dismissal was unfair failed and the Court of Appeal upheld the Tribunals findings. It was held that in the light of the background to the case Wilson's behaviour was not such as to be incompatible with the continuance of the master-servant relationship. (Dictum of Hill, J. in Edwards v Levy 175 E.R. 974, [1860] 1 WLUK 3 considered).

212. In **Quintiles Commercial UK Ltd v Barongo EAT 0255/17** the EAT held that an employment tribunal erred in assuming that dismissal without prior warning for 'serious' misconduct, as distinct from gross misconduct, could not be fair. An employment tribunal upheld B's claim of unfair dismissal, finding that the ultimate characterisation of B's misconduct as 'serious' rather than 'gross' was significant. In the tribunal's view, 'serious' misconduct should meet with a warning and, given that B had a clean disciplinary record, the failure to issue a warning rendered the dismissal unfair. The EAT, said that S.98(4) does not lay down any rule that, a lack of any earlier disciplinary warnings, results in a conduct dismissal for something less than gross misconduct must be unfair. It may be that in most cases a tribunal will find that dismissal falls outside the band of reasonable responses, but it should be careful not to simply assume this is so.

213. As the 'principal reason' for dismissal test we had regard to the case of **Smith v Glasgow City District Council 1987 ICR 796, HL.** In that case, in a letter to S from the committee, four reasons for dismissal were set out, all relating to conduct or capability. A tribunal found that the Council had not established one of charges against S; it also indicated that it viewed the fourth charge as less serious than the others. Nevertheless, the tribunal held that dismissal was fair in all the circumstances and the EAT agreed. The House of Lords, upholding the Court of Session, held that the tribunal had found that one serious charge against S was neither established in fact nor believed to be true on reasonable grounds. The Council had failed to show what the principal

reason for dismissal was and, in any case, it was not shown that the charge which was not established was neither the principal reason for dismissal nor formed part of the principal reason. Since what was at least an important part of the reason for dismissal was not made out at all, the tribunal should have found that the Council had failed to show a reason and that S's dismissal was consequently unfair.

214. In **Robinson v Combat Stress EAT 0310/14** an employment tribunal identified three separate complaints, including one of sexual assault, which together formed the employer's reason for dismissal ('the composite reason'). The tribunal found that the investigation into the allegation of sexual assault was 'deeply flawed', since no reasonable employer would have carried it out in the way CS had. It nevertheless concluded that dismissal based upon the remaining two complaints was fair. The EAT held that the tribunal had erred and that the tribunal's reasoning — that CS could have come to a perfectly fair decision to dismiss if it had eliminated from its consideration the allegation of sexual assault — was undermined by the fact that CS had taken that allegation into account. The tribunal should have considered not what it would have been reasonable and fair for an employer to have thought, but what CS actually thought and whether, having regard to the totality of its reasons, dismissal was reasonable.

215. In **Broecker v Metroline Travel Ltd EAT 0124/16** MT Ltd relied on four examples of misconduct as a composite reason for dismissing B. An employment judge found that it would have been entitled to dismiss B for two out of the four incidents but acted unreasonably in relying on the other two. The EAT held that it was not open to the employment judge to conclude that MT Ltd had dismissed fairly in reliance on two of the reasons since that was not how MT Ltd had put its case. It held that the case was indistinguishable from Smith — in both cases, the employee was dismissed for all the strands on which the employer relied, not for one or two. It did not matter that MT Ltd would have been entitled to fairly dismiss if it had not acted unreasonably in relying on two of the examples of 'misconduct' which it did in fact rely on.

**Trespass**

216. In relation to the allegation by the Claimant that there had been a trespass on his property we had regard to the cases that establish a licence to enter land to communicate with the occupier will generally be implied (see Clerk & Lindsell on Torts (24th Edn) para. 18-48 'Justification by licence: bare licenses'). However it does not mention employers having an implied licence to enter their employees land:

*18-48 It is a defence to show that the defendant is on the land with the leave and licence (express or implied) of the owner. A licence to enter land in order to communicate with the occupier will generally be implied. Accordingly, people delivering post or packages are not trespassers. Nor are neighbours, or even police officers, who call in order to check up on the occupant's welfare.*

217. . Whilst it is not necessary for this Tribunal to set out a full explanation of the law on trespass, we note what is said in Clerk & Lindsell on Torts Chapter 18 - 18-01 that; -

*Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another. The slightest crossing of the boundary is sufficient. "If the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it".* ***Ellis v Loftus Iron Co (1874) L.R. 10 C. & P. 10 at 12.***

218. It has been established that the slightest crossing of the boundary will suffice, for example putting a hand through an open window, (in **Franklin v Jeffries, The Times, 11th March, 1985** (unreported) there was a trespass when an unwanted arm came through an open window) or by placing your body on the Claimants land will amount to a trespass.

**Disclosure of Claimant's address**

220. As to whether the disclosure of the Claimants address, or making an unauthorised visit infringed the Claimants right to privacy we note the case of **McGowan v Scottish Water [2005] IRLR 167**.In **McGowan** the EAT considered whether covert surveillance of an employee's home infringed his Art. 8 right to privacy. The employer had undertaken covert surveillance of the employees' home as part of investigation into potential misconduct (it was suspected employee had falsified records of when he had attended work and for how long). The employee alleged dismissal was unfair on the basis that the employer had infringed his right to privacy. The EAT held that the Tribunal was entitled to find that employer's actions did not infringe his right to privacy.

221. In **Turner v East Midlands Trains Ltd 2013 ICR 525, CA** the Court of Appeal held that the 'range of reasonable responses' test is already flexible enough to afford whatever protection Article 8 requires.

**Applying The Law to The Facts**

**Unfair Dismissal**

***List of Issues***

***1. Unfair dismissal***

***1.1 Was the claimant dismissed?***

***1.2 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.***

**1.3** ***If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:***

**1.3.1 there were reasonable grounds for that belief.**

222. It was not in dispute that the Claimant was dismissed for misconduct. We turn now to whether the Respondent genuinely believed the Claimant had committed misconduct. We found the Respondents defence on this issue of genuine belief in his misconduct to be implausible for one of the allegations of misconduct for the reasons we set out below.

**Genuine Belief in the Three Allegations**

***Refusing to attend Investigation Meeting on the 15 June 2022***

*223.* In the submissions Counsel for the Respondent did not make any submissions about the reason for dismissal being partly due to the Claimants refusal to attend the investigation meeting on the 15 June 2022. However, this was one of the stated reasons for the Claimants dismissal [P.365] and so we address this first reason, which was said to be gross misconduct, as the stated reason for the dismissal of the Claimant in any event.

224. Having found above at paragraphs 116-126 that he did not refuse to attend that meeting but instead reasonably asked for a copy of the *'home visit policy'* before attending such an investigation meeting, we also did not find Michael Wigham genuinely believed the Claimant was refusing to follow a reasonable management order to attend the investigation meeting.

225. In short, we found as follows: -

225.1 The Claimant was asked to attend an investigation meeting only fifteen minutes later at 9.15 am.

225.2 He initially asked for a copy of the 'home visit policy but then said he would attend in any event a short time thereafter.

*225.3* Mr Keers stated that: -

, *'Mark didn't take too kindly to me challenging his behaviours. He stated that sending two managers to his house wasn't good behaviour.' and, 'The advice I was given was to try and get a statement from him if possible, however based on my initial interaction with him this wasn't going to be possible as he appeared to angry and upset. Sarah agreed that Mark had failed to carry out a reasonable request on multiple*

*occasions and therefore I was able to spend suspend him pending further investigation.'*

We found that there was no refusal and that Mr Keers and Mrs Hudson in fact suspended him because he was angry and upset, and *'agitated'* , and we found that Mr Keers comment about the offer for the Claimant to attend where he said, *'under the circumstances it was too late for that,'* was not justified and we found that in those circumstances any employee would reasonably wish to ask to see any relevant polices justifying a visit to their home, before giving their version of events in an investigation meeting, and to challenge what occurred.

225.4 We find that Michael Wigham could not have genuinely believed he was refusing to attend the requested investigation meeting on the 15 June 2022 and this was supported by the undisputed evidence of the Claimant, that Michael Wigham had before him at the Disciplinary Hearing, [P.248 of Claimant's second grievance] and he also had the account of the Claimant about the alleged refusal of the Claimant to attend the investigation meeting at the reconvened investigation meeting [P.179].

225.5 We found that no explanation was given by Russell Keers in this hearing as to why it was *'too late',* for him to conduct the investigation meeting that day. We did not accept this evidence and preferred the Claimants evidence he did cooperate and say he would attend the investigation meeting upon being told he was being suspended.

226 As a result we found that there was no genuine belief by Michael Wigham that he was refusing to follow management orders, as he had clearly stated he would comply and attend, and we therefore find that belief, on the part of the Michael Wigham, that he had refused to follow a reasonable management instruction, could not be a genuine belief in these circumstances, and we found there were no reasonable grounds for the belief that he was refusing to follow a reasonable management instruction.

***Failure to comply with reasonable management instruction: return of the laptop.***

227 We did find Michael Wigham held a genuine belief that the Claimant delayed in returning the laptop, based on our findings of fact as set out at paragraphs 66 above onwards.

228 We found as set out above and in summary as follows: -

228.1 We reminded ourselves that the only issue we must decide upon is whether the decision maker Michael Wigham genuinely believed the Claimant had initially agreed to return the PG Laptop but then continued to fail to do so.

228.2 We found that Michael Wigham, the disciplinary chair, by the time of the disciplinary hearing, held a genuine belief that the Claimant had agreed to and then delayed in personally returning the laptop, though we note that Michael Wigham knew the Claimant was caring for his mentally unwell daughter at the time.

228.3 Michael Wigham knew, and it was also not in dispute that texts sent by Gavin Clarke to the claimant at 10:15, were not responded to by the Claimant until 1:36 PM [P.141-142, 261].

228.4 We also concluded on the evidence before him Michael Wigham could not genuinely believe that the Claimant was refusing to communicate with anyone and that Michael Wigham, by the time of the disciplinary meeting, had seen the text messages between the Claimant and Chris Simons where the Claimant made repeated suggestions about how the issue could be fixed without him returning the laptop. We also found that based on the content of the texts, and our findings on that, that there was clear evidence Chris Simons had told Gavin Clarke what the Claimant had said to him about how the problem could be fixed without the laptop being returned and so we found that Michael Wigham could only genuinely conclude he avoided communicating with Gavin Clarke and communicated with Chris Simons instead, and that he delayed in personally returning it.

***Visiting the Claimant as his home address – welfare concerns/being verbally aggressive/ threatened damage to company property.***

229 On the issue of visiting the Claimant at home we firstly note that the decision to do so was justified by the alleged 'welfare concern' by the Respondents about the Claimant. We find that the Respondents defence on this issue lacked any credibility about this alleged welfare concern. We did not find that there was any welfare concern by the Respondent for the Claimant whatsoever. It was untenable to suggest that they were concerned for his welfare in these circumstances. They had many remote workers. There was only one example of another employee receiving a home visit. Katy Darcy explained this was a mentally unwell employee who had appeared unwell the day before at home and when he did attend at work the next day, they made a home visit to check on his welfare. However, there was no evidence before the Respondent that the Claimant was unwell so as to raise any welfare concerns. He had been responding to messages in a detailed manner and showed no evidence of being unwell. Every witness expected us to believe this was a genuine belief for his welfare and it was only Russell Kears who stated that the main reason for the visit was to retrieve the laptop but even he tried to state it was also welfare reasons. We found not one shred of evidence that they had any welfare concerns about the Claimant.

230 What we found was that their decision to visit the Claimant at his home address when he had already turned down an offer for them to collect it showed a lack of concern for his welfare.

231 We also find they trespassed on the Claimants property. There was no implied licence for them to attend on the Claimants property, as the category of an implied licence only extends to the public authorities, the general public such as the postal service and neighbours.

232 In any event, and in the alternative, such an implied licence could not extend, after he had closed the door on the two employees and told them specifically, they could not come into his home, to one of them sticking his fingers through the letterbox and shouting through it. This is akin to **Franklin** where an arm went through a window, and we found it was a clear trespass on the Claimants property.

233 What then followed after this unauthorised visit and trespass led to an unfortunate escalation in behaviour between the Claimant and the Respondents. We found that both were equally at fault in that first the Respondent trespassed which then led to the Claimant losing control and swearing in the heat of the moment telling them to *'fuck off.'*

234 In relation to genuinely believing that the Claimant was verbally aggressive we do find they held that genuine belief, but that Michael Wigham also knew the Claimant was provoked by the trespass.

235 We also found that in the invitation to the disciplinary hearing that there was no reference in the allegations of gross misconduct in threatening to damage company property yet this this was referred to as a reason for his dismissal [P.366], and we find relying on this to dismiss the Claimant when it was never set out as an allegation against him rendered the dismissal unfair.

***If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:***

**1.3.1 there were reasonable grounds for that belief.**

**Failure to return laptop, failing to agree to attend Investigation Meeting, and being verbally aggressive.**

236 In all the circumstances of this case where an employee is at home looking after his mentally unwell daughter, we do not find the Respondent acted reasonably in treating these three stated reasons as sufficient reasons to dismiss the Claimant.

237 Having found that he did not fail to agree to attend the Investigation Meeting, and that there was no genuine belief that he did so, then in all the circumstances of this case the Respondent did not act reasonably in treating that as a sufficient reason to dismiss the Claimant.

238 Having found that there was a genuine belief that he had agreed to return the laptop, following the phone call at 8.59 am and a text at 10.17 am stating that

they wanted it back by 12 noon, a delay in returning it by the time the home visit was authorised at around 2.15 pm, where the Claimant was at home looking after his unwell daughter, then we do not find that the Respondent acted reasonably in all the circumstances of this case in treating that as a sufficient reason to dismiss the Claimant.

239 In relation to being verbally aggressive where the Respondent had trespassed on his property then in all the circumstances of this case, we do not find that the Respondent acted reasonably in treating that as a sufficient reason to dismiss the Claimant.

**1.3.2 at the time the belief was formed the respondent had carried out a reasonable investigation.**

240 We do not find that at the time that the belief was formed that the Respondent had carried out a reasonable investigation.

241 In summary at paragraph 126 above we found that: -

241.1 The Respondent only set out one allegation in writing prior to the Investigation Meeting to which he was invited.

241.2 He was never told prior to the Investigation meeting he had been suspended for gross misconduct.

241.3 The allegations of gross misconduct were in effect sprung on him at the Investigation Meeting with the Investigator unreasonably asserting that this would be his only opportunity to respond to the allegations of which he had no notice.

241.4 The investigator had not even read the invitation to the Investigation Meeting.

241.5 He only learned of the allegations against him after the meeting concluded.

241.6 She concluded that this 'leads to me to a decision of gross misconduct' prior to any disciplinary hearing effectively pre-empting the decision of the disciplinary chair Michael Wigham.

242 We did not find that the investigation was a reasonable investigation within the reasonable band of investigations of any other reasonable employer.

**1.3.3 the respondent otherwise acted in a procedurally fair manner.**

243 We found the Disciplinary Hearing was infected by a 'pre-determination mindset', and we found as set out above that the disciplinary hearing was infected by the unfair investigation that had taken place, and that Gareth Wigham approached the hearing with a mindset of 'suspicion' against the Claimant.

244 This was evidenced by his questions about the MSB automation by Gavin Clarke as set out at paragraph 134 above, and we found the disciplinary hearing was unfair when the Claimant was asked to answer a question about MSB Automation, a company he had set up prior to joining the Respondent, as this had never been put to him as a reason for his use of the PG Laptop prior to the disciplinary hearing.

245 We found that whilst by the time of the disciplinary hearing the Claimant knew the three main allegations against him it was only due to the Claimant offering his account of what happened that the disciplinary chair had any evidence from the Claimant at all, as no statement was attached to the documents sent to the Claimant by Sarah Hudson as at this stage no statement had been obtained from the Claimant [P.212]. His account of the allegations against him were sent in a series of emails by him, and he was forced to ask for the hearing of which he had only two days' notice to be postponed from the 21 July to the 26 July 2022. [P.218]. He then set out in a grievance a complaint about how he had been treated on the day in question [P.219].

246 In the rescheduled hearing there was still no copy of the text messages between the Claimant and Chris Simons [P.222]. The Claimant then sent a series of emails [P.226-236, P.242-249, P.251-252 and 255-267] setting out his defence. Eventually Sarah Hudson sent the text messages between the Claimant and Chris Simons on the 25 July 2022 to Michael Wigham this being the day before the disciplinary hearing [P.253].

247 The lack of any evidence from the Claimant until he proffered it was troubling to this Tribunal.

248 Whilst reminding ourselves that any defect in the procedure must be considered in the round, and after viewing the totality of the procedures followed, we asked ourselves what would have likely occurred had a fair procedure been adopted, and in particular had a fair investigation been conducted?

249 As set out above recent case law has moved away from the distinction between a finding of Unfair Dismissal on procedural grounds as opposed to dismissal on substantive grounds.

250 However, we went on to ask the question what would have likely occurred had a fair procedure been adopted in accordance with the case of **Polkey v AE Dayton Services Ltd [1987] UKHL 8, ICR 142.**

251 Firstly, if a fair procedure had been followed, they would have set out the allegations of gross misconduct against the Claimant with specificity dividing them into the three allegations instead of only setting out his alleged refusal to attend the investigatory meeting. The failure to set out the other allegations meant the Claimant attended the investigatory meeting in the dark as to what would be discussed at the meeting.

252 We did not find this defect remedied as asserted by Counsel when they sent the invitation to the investigatory meeting and referred to 'allegations' as opposed to 'allegation' as they still did not set out what the other allegations against him were and this was only later done in the invite to the Disciplinary Hearing only two days before it was originally scheduled to take place [P.208].

253 If the Claimant had known what he was being accused of in terms of gross misconduct about the events of the 14 June, he would have prepared for the investigation meeting and would have then given the Investigator a full account of what had happened.

254 During cross-examination it was put to the Claimant that he knew he would be asked about the events on the 14 June, and while he accepted that he knew that would be under discussion he maintained that he had no idea in the meeting itself that he was being accused of gross misconduct in relation to the events of the 14 June 2022, and so was not able to properly defend himself at the investigatory meeting. We accepted this contention by the Claimant and found that he was not able to give a full account of his actions at the investigation meeting as he had not prepared to do so prior to the meeting.

255 Counsel contended for the Respondent that the ACAS code does not require allegations to be put in writing prior to an investigation meeting, but in this case they did in any event put the less serious allegation in writing about allegedly refusing to attend the investigation meeting, and we found that when he attended the investigation meeting the Claimant was under the erroneous impression that this alleged refusal was the only reason he had been suspended as set out in that letter [P.158]. The letter did not say that it was considered to be gross misconduct and so was unaware of the serious nature of the investigation or that his job was at risk when he attended the meeting. We found the failure to specify the other two allegations of failing to return the laptop, and in particular he had behaved aggressively towards employees and had threatened to damage company property to be a failing on the Respondent part that made the whole investigation an unfair investigation outside the reasonable band of investigations of any other employer.

256 In the minutes of the investigation summary report [P.171] Jo Strachan confirmed that she had not read the suspension letter sent by Sarah Hudson. We therefore found that the Investigator did not even know the basis of the suspension when the meeting commenced.

257 She confirmed that the suspension was *'from my point of view, from what I've seen in statement from Russ, was due to you refusing to attend this meeting.'* The Claimant then told her that he would not provide an account of his actions until all allegations were put in writing.

258 We then asked ourselves if all three allegations had been put in writing whether this would have resulted in the investigator reaching a different conclusion. We found that her summary report was unfair as it stated conclusively, '*This leads me to a decision of gross misconduct against Mark Braithwaite,'* [P.192] which was evidence of pre-determination of the allegations against him, as also

evidenced by the poor and unfair approach to the meeting in that two of the allegations were not set out.

259 We find that had she set out the three allegations in full to the Claimant in advance that she may have changed her approach and she may have reached a different conclusion, and it is possible she may have not concluded that the Claimant in all the circumstances had committed gross misconduct.

260 In any event if the Claimant had been able to give his full account to all three allegations to the Investigator his account would have been set out more fully in the minutes of the meeting thus giving the Disciplining Officer a fuller account of the Claimants account. We therefore find that had a more balanced Investigation Summary Report been produced the outcome may have been that the Claimant may not have been dismissed.

261 As to whether it is possible to say what that percentage chance was that the Claimant would have been fairly dismissed in any event had a fair procedure been followed by the time of the disciplinary hearing we found that the unfairness of the investigatory report meant that Gareth Wigham did not approach the disciplinary hearing with an open mind.

262 We found that by the time of the Disciplinary Hearing a pre-determination mindset had been baked into the process.

263 In any event even had a fair procedure been followed such that no pre-determination mindset had infected the procedure we went on to try and '*recreate the world as it would have been'* (**King** and **Polkey)** i.e. we asked ourselves what would have occurred had a fair process been followed.

264 We find that there was a nil chance that the Claimant would have been fairly dismissed in any event and so make no deduction on the grounds of **Polkey.**

265 Firstly, we found Michael Wigham did not have a genuine belief in the allegation of gross misconduct that the Claimant had refused to attend the Investigation Meeting and so the dismissal was unfair and outside the range of reasonable responses of any other reasonable employer in any event in the absence of this genuine belief.

266 We therefore find that both the investigation hearing, judging it overall in the context of the disciplinary hearing that followed, which was also infected by pre-determination of the issues so evident in the investigation hearing, that the overall procedure conducted by the Respondents was outside the reasonable band of investigations and procedures of another reasonable employer and accordingly, the Claimants claim for Unfair Dismissal succeeds.

**Trespass**

267 We found that there was no implied licence for the Respondent to visit the Claimant at his home address and in any event if it did exist that could not justify them putting their hand through his letter box and shouting through it and we found that this amounted a trespass and was highly provocative which caused the Claimant to lose control and tell his colleagues to '*fuck off'.*

268 In accordance with **Wilson** in the context in which the Claimant lost control and swore we did not find this meant the behaviour of the Claimant was incompatible with the continuation of the employment relationship.

**Breach of Data Protection**

269 We have found that the simple step to take in this case was to first ask for his permission to process his data before giving out his address.

270 However, on the legal issue of whether the Respondents were entitled to process his address for the purposes set out in Counsels submissions we found that they were entitled to process his address for the following reasons: -

**Processing of Data – Contractual Basis**

270.1 The processing of his address was necessary to ensure performance of the Claimant's contractual obligations to the Respondent by securing the return of the laptop, and whilst we find they could have obtained his permission to share his address we find that pursuant to his contract they were not legally obliged to do so as the Respondent needed the return of the laptop and it was their property.

**Processing of Data – Legitimate Interest**

270.2 ICO guidance suggests a three-part test for ascertaining whether this condition applies:

a. The Purpose test: is there a legitimate interest behind the processing?
b. The Necessity test: is the processing necessary for that purpose?
c. The Balancing test: is the legitimate interest overridden by the individual's interests, rights or freedoms?

270.3 We found that the tests were satisfied after considering whether the disclosure did infringe the Claimant's right to privacy at all, or to a degree that outweighed the Respondent's legitimate interest. **McGowan v Scottish Water [2005] IRLR 167** provided a useful illustration in this regard where an employee said covert monitoring of him breached his privacy rights. This was ultimately not upheld.

270.4 In this case whilst we were of the view his consent could have first been sought for the home visit and the disclosure of his address, and it would have been more respectful of the Respondents to do so in circumstances where he was looking after his very unwell daughter, we found that the Respondents were entitled to process his address as they had a legitimate interest in recovering his laptop, the processing was necessary for that purpose and the legitimate interest of needing the laptop back was not overridden by the Claimant's interests rights and freedoms and his Article 8 rights.

### 1.3.4 Was the dismissal within the range of reasonable responses.

#### The Three Allegations

271 The Respondents decision to dismiss was put on the basis of all three allegations as a cumulative whole in that they were all acts of gross misconduct. We comment on each of the three allegations below separately but in so doing bear in mind the dismissal was for all three of the allegations in a cumulative sense. We emphasise that it is not open to this Tribunal in accordance with the cases of **Broecker** and **Robinson** to find that one of the allegations on their own could justify the Claimant's dismissal as the reasons for dismissal in the letter of dismissal were set out as composite allegations when the Claimant was advised that *'the reason for your dismissal was:* **…'[P.365]** and there then followed a description of all of the allegations.

#### Dismissal for first act of Misconduct

272 As set out above the policy of the Respondent stated that they could dismiss for a first act of misconduct and relied on their policy to do so [P. 60]. The Claimant had no prior disciplinary record. We found that the allegations were always put as gross misconduct and not as 'acts of misconduct other than gross misconduct'. We found that this clause in their policy could not apply to acts that had been characterised as gross misconduct as it was stated to apply to acts of misconduct other than gross misconduct. We did not find that they could simply reframe the allegations after the event to be ordinary misconduct in light of his mitigation so as to bring the events into the scope of this clause. Either the acts were characterised as gross misconduct, which they were in this case, and in which case this clause did not apply or they were characterised simply as misconduct from the outset, which in this case they were not.

273 In any event, in the alternative, even if they could reframe these allegations after the event as misconduct from gross misconduct, we found the reference to 'sanction' by the Respondents in the dismissal letter to be confused. Sanction is the act of dismissal not the nature of the allegations themselves and how they are characterised.

274 Regardless of this error, and even if they could reframe the allegations as misconduct from gross misconduct and still dismiss for them with no prior warnings we found one allegation was not even made out, and so the decision to dismiss for the three stated composite reasons, albeit now reframed as misconduct, when the Claimant had no prior warnings, and in light of our finding that Michael Wigham on behalf of the Respondent had no genuine belief in one allegation, was we found unfair and outside the reasonable band of responses of any other employer.

275 We had regard to the case of **Quintiles** and remind ourselves an employee can be dismissed for misconduct summarily where there have been no prior warnings but in all the circumstances of this case, we find such a sanction was outside the band of reasonable responses of any other employer.

276 In any event as set out above the Respondents reduced the allegation from gross misconduct to misconduct and whilst, in accordance with **Quintiles,** and their own stated policy, where said they could dismiss for a first offence and where the misconduct is sufficiently serious, we did not find it was within the band of reasonable responses to do so in these circumstances.

277 We found that there was in essence an unfair strand running through the whole investigation and disciplinary procedure which was the alleged refusal to attend the investigation and in which we found the Respondent held no genuine belief. We found that this demonstrated that throughout the whole process and judged at the end of that process the Respondent sought inculpatory evidence against the Claimant and we found that the disciplinary hearing was approached with a 'pre-determination' mindset, as was the decision to dismiss.

278 In addition having found that Michael Wigham held no genuine belief that an unauthorised visit to the Claimants house, which involved trespassing on his property, was necessary on the grounds of his welfare, then it was incumbent on him, when judging the reaction of the Claimant to the very forceful actions of the Respondent in retrieving the PG Laptop, to consider that the Claimants reaction was a 'heat of the moment' reaction and we find he failed to do so in any meaningful way.

279 Whilst this Tribunal accepts the Respondent was entitled to ask for the laptop back Michael Wigham had to fairly and reasonably assess the methods used which caused the reaction from the Claimant. We found he failed to do so when he did the following: -

279.1 maintained a false belief he knew could not be justified that the visit was on 'welfare grounds,'

279.2 In the disciplinary hearing refused to acknowledge that Luke Buckingham's actions were provocative to the Claimant instead maintaining the Respondents had done nothing wrong.

279.3 Showed an overall lack of understanding of the Claimant's reaction when they trespassed and shouted through his letterbox and failed to factor into his decision to dismiss that the Claimant felt that they had trespassed on his property.

279.4 Did not acknowledge the lack of clarity on the Respondent's part of the Claimant's use of the PG Laptop in his home which was entirely down to the Respondents poor management of him.

279.5 Did not weigh into the balance that the Claimant was working in a highly stressful home environment into which the Respondent trespassed and at no point accepted putting fingers through his letterbox and shouting through it was provocative and upsetting for the Claimant.

280 We now deal in turn with the sanction of summary dismissal for the composite alleged acts of misconduct.

**Allegation 1 – Refusing to return the laptop - Sanction.**

281 We find that the Respondent could reasonably conclude he agreed to return it but then delayed in doing so. However having found that they knew he was looking after his unwell daughter in a highly charged home environment, and that he had continued to correspond with Chris Simons, and he did then hand over the laptop after an initial disagreement, that the Respondents case at its highest was that he caused a delay when they said they wanted it back by 12 noon and instead he handed it over at around 3.15 pm that day and so caused a delay of three hours.

282 However we found that the Respondents themselves, after taking into account the Claimants mitigation in that he had recently suffered the bereavement of his father, and was also caring for his suicidal daughter, themselves accepted it could not stand as gross misconduct and downgraded this to misconduct and in so doing accepted it was not gross misconduct in all the circumstances of this case.

283 Whilst they could still arguably dismiss summarily for misconduct, despite it being a first offence in accordance with **Quintiles,** however it was classified, we do not find that this reason, as part of composite reasons with the two other allegations, could justify the summary dismissal of the Claimant nor that it would be in the reasonable band of responses of any other employer to dismiss summarily for this incident.

**Allegation 2 – verbally abusive to his colleagues - Sanction**

284 We found that whilst the Respondents had a genuine belief he had been verbally offensive to his colleagues we also found that the Claimant was subjected to provocation by the Respondents in their unlawful actions when they trespassed

on his property, and that in any event he apologised during the disciplinary hearing for telling his managers to *'fuck off'.*

285 In accordance with the case of **Wilson** we also found that the Respondent was just as much at fault in this case as the Claimant as on the findings of fact we made the incident at home due to the Respondents trespass which severely provoked the Claimant.

286 We also found that this was an environment in which swearing was commonplace.

287 As the Respondents themselves conceded this could not be left as an allegation of gross misconduct, after factoring in that he had recently suffered the bereavement of his father, and was also caring for his suicidal daughter, they themselves downgraded it to misconduct.

288 Whilst they could still arguably dismiss summarily for misconduct, despite it being a first offence in accordance with **Quintiles**, however it was classified, we do not find that this reason, as part of composite reasons with the two other allegations, could justify the summary dismissal of the Claimant nor that it would be in the reasonable band of responses of any other employer to dismiss summarily for this incident combined with the other reasons.

**Allegation 3 – refusing to comply with a reasonable management instruction.**

289 We did not find that the Respondents had a genuine belief that the Claimant had refused to follow the reasonable management instruction to attend the Investigation Meeting first requested. This was part of the composite reasons for dismissal for misconduct.

290 There being no genuine belief by the Respondent in this allegation then we find that the sanction of summary dismissal in these circumstances was not within the reasonable band of responses of any other reasonable employer.

**Decision to dismiss for the three allegations.**

291 We find it was not within the band of reasonable responses to summarily dismiss the Claimant for these allegations cumulatively and the claim for unfair dismissal succeeds.

292 Michael Wigham stated that [Paragraph 30 WS] that: -

> 'I did not consider that visiting Mr Braithwaite at his home was a misuse of his personal data (that is to say his home address); the managers involved were entitled to use the data in order to check on his welfare and recover the laptop. I did not consider that standing outside his front door and ringing the doorbell, and then having a conversation with Mr Braithwaite amounted to trespass – although I would not claim to be an expert on that area of law.'

293 We found that Michael Wigham had no genuine belief anyone was concerned about the Claimants welfare and so the first stated reason for processing his data was we found disingenuous and could not stand.

294 We also found that he ignored Luke Beckingham placing his hands through the Claimants letterbox and shouting through it. Whilst this Tribunal does not expect the Respondent to know about the finer details of the law on trespass it would be clear to any reasonable employer that was a breach of an employee's privacy to insert your hands into their letterbox and shout through it when they have already closed the door and made clear they are not welcome. We found that Michael Wigham failed to factor this issue into the decision to dismiss the Claimant, and the reaction it caused on the part of the Claimant in the 'heat of the moment.' We found overall the decision to dismiss the Claimant was outside the reasonable band of responses.

295 The Respondents had trespassed on the Claimants property and provoked the Claimant causing his outburst for which he later apologised.

296 In all of these circumstances we found the Claimant's dismissal both procedurally and substantively unfair and outside the reasonable band of responses of any other employer.

**Did the Claimant contribute to his own dismissal?**

297 We found that the Claimant was under severe emotional pressure that day when caring for his very unwell daughter whilst also working at home. In these circumstances we do not find that he contributed to his own dismissal, and we do not reduce his compensation on these grounds, as we do not find it just and equitable to do so.

**Age discrimination**

298 As set out above we found that the allegation on the discriminatory remark was made out in that the Claimant established facts from which we could infer discrimination, and we found that the burden of proof moved to the Respondent, and that having failed to prove a non-discriminatory reason for this remark then this allegation succeeds.

_____

Employment Judge L Brown

Date: 1 August 2024

Sent to the parties on:

For the Tribunal Office