EMPLOYMENT TRIBUNALS

Claimant: **Mr Tony Wright**

Respondent: **R.H. Claydon Ltd**

Final Hearing

Heard at: **Bury St Edmunds by Video**

On: 3 and 4 June 2024

Before: Employment Judge Boyes (Sitting Alone)

Representation
Claimant: Ms K Inglis (lay representative and family friend)
Respondent: Mrs Ruby Claydon, Director

Written Reasons

1. Judgment and Reasons were given orally at the hearing on 4 June 2024. Judgment was as follows:
    i. The Claimant's claim of unfair dismissal is well founded. The Claimant was unfairly dismissed.
    ii. There is a reduction of 10% from the unfair dismissal compensatory award for contributory fault on the part of the Claimant.
    iii. There is no *Polkey* reduction.
    iv. There is an increase of 10% in the unfair dismissal compensatory award for failure to follow the ACAS code.
    v. The Claimant's claim of wrongful dismissal is well founded. The Claimant was wrongfully dismissed.
    vi. On withdrawal, the Claimant's redundancy pay and holiday pay claims are dismissed.
2. These written reasons are provided at the request of the Respondent. I apologise to the parties for the delay in providing these written reasons and for any inconvenience caused.

The Proceedings/Hearing

3. After a period of early conciliation through ACAS from 8 March 2023 to 10 March 2023, the claim form (ET1) was lodged with Tribunal on the 21 April 2023. The Claimant made complaints of unfair dismissal, being owed a redundancy payment, failure to pay notice pay and failure to pay holiday pay. During the course of the hearing, the Claimant withdrew his holiday pay and redundancy pay claims. The Respondent filed a response to the claim (ET3).

4. The Claimant gave evidence. He adopted his witness statement. He was cross examined by the Respondent and asked by me questions by way of clarification.

5. The Respondent called three witnesses. These were Ruby Claydon (Director), Marius Koch (Warehouse and Operations Manager) and, Greg Watson (Branch Manager, Handforth depot). Each witness was cross examined by the Claimant and asked questions by me by way of clarification.

6. Evidence relating to liability was heard on day 1 of the final hearing. The Respondent made oral closing submissions. Ms Inglis for the Claimant relied upon her written submissions.

7. Judgment and reasons were given orally on day 2. Evidence relating to remedy was heard on day 2 and then Judgment relating to remedy was given orally.

Documents

8. As well as the documents held on the Tribunal file, various documents had been provided by both the Claimant and Respondent. The documents were in some state of disarray but I was satisfied that I had before me all of the documents that both parties wished to refer to and rely upon.

Issues to be determined

9. The issues that the Tribunal was required to decide were:

Unfair dismissal

i. What was the reason or main 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. ii. If the reason for dismissal 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:

-there were reasonable grounds for that belief;

-at the time the belief was formed the Respondent had carried out a reasonable investigation;

-the Respondent otherwise acted in a procedurally fair manner; -

the dismissal was within the range of reasonable responses.

Wrongful dismissal / Notice pay iii. Was that a breach of contract? iv. Was the Claimant paid for that notice period?

v. If not, did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

Findings of Fact

Chronology of events

10. Where there is no dispute between the parties as to a particular fact, my findings of fact are recorded below without any further explanation. Where the facts are not agreed by both parties, I have explained why I prefer one party's account over the other. Where the facts are not clear, I have explained why I have made the finding of fact concerned. My findings of fact are as follows.

11. The Respondent is a tyre wholesaler. It operates across eight sites. It has around 90 employees. It deals with human resources issues in house. It does not have a dedicated human resources department, rather human resources issues are dealt within each department by managers, heads of department and directors.

12. The Claimant was employed by the Respondent as a driver and warehouse worker from 1 June 2018 to the 23 February 2023 on which date he was summarily dismissed for gross misconduct.

13. Prior to his dismissal the Claimant had a clean disciplinary record. No past history of conduct issues have been raised by either party.

14. The Claimant had a period of sick leave from 12 September 2022 through to his return to work on the 30 January 2023. He was initially off work due to stress and leg pain, hypertension and various other symptoms. During the course of that sick leave, absence review meetings were held on 15 November 2022 and 26 January 2023. It had initially been planned that the Claimant would return to work on 21 November 2022. This return did not go ahead because of the Claimant's continued health problems and so his return to work took place on the 30 January 2023.

15. On 2 February 2023, the events occurred that led to the Claimant's dismissal.

16. The Claimant arrived at work at around 6am and was loading fans for deliveries. He asked Greg Watson if he could see the delivery sheet so that he could decide the order in which to stack the tyres onto one of the vans. Greg Watson did not provide the Claimant with the delivery sheet initially because he needed to refer to it himself. The Claimant asked to see the sheet on three occasions. The Claimant accepts that he was frustrated and agitated, as he felt that Greg Watson was being deliberately obstructive.

17. In his witness statement, the Claimant states that Greg Watson then threw the clipboard and sheet in his direction. In live evidence he said that the clipboard and sheet hit him. In contrast, Greg Watson stated that he threw the clipboard delivery sheet onto some tractor tyres that were in between him and the Claimant. Having heard the evidence before me, I formed the view that Greg Watson did not throw the clipboard directly at the Claimant but rather onto the tyres in the direction of the Claimant. The Claimant made no mention in his witness statement of clipboard and sheet hitting him. I formed the view that he would

have done so if that was indeed what happened. What is clear is that both the Claimant and Greg Watson were irritated with one another, so rather than handing the clipboard and sheet to the Claimant, Greg Watson threw it in the Claimant's general direction onto the tyres.

18. The Claimant them felt dizzy and fell from the back of the van, injuring his ankle and causing him pain. The Claimant accepts that Greg Watson approached him showing concern, and also accepts that he was angry about Greg Watson's refusal to give him the delivery sheet. The Claimant accepts that he told Greg Watson to "fuck off" on several occasions or words to that effect. In live evidence Marius Koch's recollection was that he said things such as "*fuck off*" *"fuck off away from me" and "don't come fucking near me"* repeatedly. No other expletives were used. Greg Watson confirmed in live evidence that the swearing occurred after the Claimant hurt his ankle. The Claimant states that he then wanted to get away from the conflict, and so, as he describes it, he bolted from the premises and drove home.

19. When he got home, he rang Marius Koch, and told him what happened explaining why he left work so quickly. His wife then took him to accident and emergency. Investigations were undertaken at the hospital, ultimately, confirmed that the Claimant had a sprained ankle which subsequently took some time to mend.

20. There is a dispute of fact between the parties as to whether or not Greg Watson swore back at the Claimant during the incident. Greg Watson's evidence is that he does not recall doing so. The Claimant's evidence is that Greg Watson did swear back him. Based on the evidenced before me, on balance, I think it more likely than not that Greg Watson did swear at the Claimant perhaps once, rather than repeatedly, or he may have used an expletive which was not directly aimed at the Claimant. I accept that Greg Watson may not recall having done so bearing in mind that the exchange was a heated one and they were frustrated with one another. There is no mention of Greg swearing at the Claimant in the Claimant's email of 3 February 2023 but the Claimant did state in the investigation meeting that Greg Watson swore, although he confirmed that he could not recollect if it was on more than one occasion. In forming this view, I have borne in mind that the Claimant was honest in the meeting in confirming immediately that he swore at Greg Watson on more than one occasion during the incident. He made no attempt to cover this up or deny it. It seems unlikely to me that he would have lied about Greg Watson swearing at that stage in the investigation.

21. On 2 February 2023, Greg Watson spoke to Marius Koch to tell him what had happened after the Claimant left the premises. He then sent him an email at 9:45am in which he recounted events from his perspective. He stated, inter alia, that he could see that the Claimant's ankle was hurting.

22. On 3 February 2023, the Claimant sent an email to Marius Koch. He raised a grievance against Greg Watson following the events of 2 February 2023. In that email he also explained that he had recently been experiencing episodes of light headiness and dizzy spells. His grievance was, in effect, that Greg Watson had handled matters inappropriately on the morning of the 2 February 2023. This resulted in the Claimant getting angry. He just wanted to leave. He stepped out

of the van spraining his left ankle and was now unable to walk. He states that the injury was as a consequence of a completely avoidable situation aggravated by Greg Watson. He then complains in general terms about Greg Watson's management abilities.

23. On 9 February 2023, the Claimant was sent a letter by Marius Koch inviting him to an investigation meeting to be held on 14 February 2023. It is stated that the reason for the meeting was "*Gross Misconduct – Company rule number 23. All employees must not engage in any form of physical or verbal abuse, threatening behaviour, or harassment on Company premises*." The Claimant was told that he had a right to be accompanied by a work colleague and that the possible outcome of the meeting may lead to a disciplinary hearing.

24. The Claimant attended the investigation meeting on 14 February 2023. Marius Koch chaired the meeting and another employee attended as a notetaker. The meeting lasted 15 minutes, which included a 5 minute break. The Claimant was asked whether he left the premises without Greg Watson's authority and he stated that there were mitigating circumstances as he would have been useless if he stayed because he could not stand up. He admitted that he used abusive language on more than one occasion and asserted that Greg Watson had used abusive language, although he could not recollect on how many occasions. He said that there was not anything that he wanted to change with his statement. The Claimant also stated that he did not believe that Greg Watson took his health and well-being into consideration on his return to work: he was not offered any help. He said that this was one of the many occasions on which he and Greg had clashed, although it had not been as bad as this previously. He stated that Greg Watson did not behave as a manager should and that Marius Koch needed to speak to other people as well as Greg Watson. The Claimant was then informed that the matter would be referred to a Director.

25. Ruby Claydon then wrote to the Claimant on 16 February 2023 stating that, following the investigation meeting, a disciplinary hearing had been arranged for 23 February 2023 and that she would be chairing the hearing. The letter again refers to Gross Misconduct - Company rule 23. It states that due to the severity of this case, the Company considers that there may have been a potential act of Gross Misconduct which could ultimately lead to his dismissal.

26. The Claimant attended the disciplinary hearing. The meeting lasted 16 minutes which included a 5 minute break. The Claimant was told that the hearing had been convened because of rule 23 gross misconduct, in that when loading the van he swore at Greg Watson more than once and left without authorisation.

27. The Claimant then stated that he and Greg Watson had sworn at each other, Greg Watson threw a clipboard at him and he left work because he had an injured ankle. He reiterated his concerns regarding the lack of support on return to work following sickness Ruby Claydon told the Claimant that she had a meeting with Greg Watson afterwards, and that the Claimant will get a letter with the outcome. She informed him that the sickness process was separate. The Claimant stated that he thought that they were interconnected. She said that she was sympathetic to his medical situation, but the hearing was only to discuss the disciplinary

matter. The meeting was then adjourned for five minutes, after which the Claimant was told that he was being summarily dismissed for gross misconduct and would be paid until the next day.

28. In live evidence, Ruby Claydon stated that during the 5 minute break she read through the documents and considered whether to take wider factors into account but she came to the conclusion that the Claimant broke the rules and so she thought that it was a straightforward decision. She said that if he was found guilty of breaching rule 23 it was fairly straightforward that it would result in dismissal and there was no debate in this case as to whether rule 23 had been breached. I asked her if any other factors formed part of her decision to dismiss and she said “no”, she just made the decision based on the evidence from that. She stated that swearing would always amount to verbal abuse. She did not take into account anything to do with Greg Watson’s behaviour as the Claimant had confirmed that he broke the rules so it was not a grey area. She did not take into account his clean disciplinary record or length of service in reaching the decision to dismiss.

29. On 27 February 2023, Ruby Claydon wrote to the Claimant confirming that he had been dismissed for gross misconduct because of a breach of Company rule 23.

30. On 28 February 2023, Ruby Claydon wrote to the Claimant to inform him that, following interviews carried out by Marius Koch, the Claimant’s grievance against Greg Watson had been upheld and the matter had been dealt with accordingly.

31. There was no documentary evidence before the Tribunal about this grievance or any subsequent action taken against Greg Watson despite it relating to the same incident that resulted in the Claimant’s dismissal. There was no documentary evidence before the Tribunal relating to any investigation interview and/or disciplinary hearing conducted with Greg Watson about the incident. Ruby Claydon said in live evidence that she dealt with the disciplinary hearing and that she thought it took place after the decision was taken to dismiss the Claimant, but she would have to check. She stated that she knew that Greg Watson was disciplined but she was not sure what the sanction was. Given that Ruby Claydon dealt with the disciplinary proceedings I found it surprising that she could not remember what the sanction was.

32. During the course of the hearing, each of the Respondent’s witnesses queried the relevance of the grievance taken by the Claimant against Greg Watson and the relevance of any disciplinary sanction imposed upon Greg Watson. I found each of them to be evasive in answering questions about this particular issue. After initially asking why it was relevant, Greg Watson confirmed that he was given a verbal warning. He said that the reason for the warning was because of his reaction to the situation on 2 February 2023 and for not dealing with it in a better way. Such matters are material because, firstly, the interview with Greg Watson was relevant evidence, which one would have expected to be taken into account by the Respondent at both the investigation and disciplinary stages. Secondly, differential treatment between employees in terms of disciplinary sanction, where there are accusations that both have used expletives, is

potentially a relevant factor that this Tribunal may take into account when deciding on the fairness of the dismissal. ***Disciplinary Procedure***

33. The Respondent has a written disciplinary procedure which includes the following:

"[…] Stage 2. Disciplinary Hearing

It is important that in all cases and stages of disciplinary process the outcome of a hearing must not be pre-judged. […]

Format of the hearing:-

[…]

During the adjournment the following should be considered before deciding any disciplinary outcome:' • The outcome imposed in similar cases in the past.

- *Special circumstances which might make it appropriate to lessen the severity of the penalty.*
- *The employees disciplinary record and general work record.*
- *Whether the proposed outcome is reasonable in view of all the circumstances.*
- *The length of the warning should be considered. This is usually 6 months for verbal and 12 months for written, although these can be reduced in mitigating circumstances.*
- *In cases of potential dismissal, alternatives should be considered such as demotion or suitable alternative work.*

CODE OF CONDUCT

If an employee takes action that is not consistent with the rules outlined below, the Company has the responsibility to act to correct the matter. The Company has identified the following set of rules:

- *Breach of rule 17 to 24 inclusive will be considered as gross misconduct and may result in dismissal.*
- *Serious breaches of any of the rules, or an equivalent incident, will be considered to be misconduct and may result in dismissal. […]*

GROSS MISCONDUCT

Any breach of rule 16 to 24 inclusive, or an equivalent incident, will be considered to be gross misconduct

[…] All employees must not: […]

23. Engage in any form of physical or verbal abuse, threatening behaviour or harassment on Company premises […]

The above list is not exhaustive of all examples of possible offences of gross misconduct and the company reserves the right to allege further acts or omissions by the employee as constituting an offence of gross misconduct."

The Relevant Law

Unfair Dismissal

34. The question of whether or not an individual was unfairly dismissed is a two stage process. The first stage is that it is for the Respondent to show a potentially fair reason for dismissal, and secondly, if that is done, the question then arises as to whether the dismissal is fair or unfair.

35. The reason for the dismissal and the reasonableness of the dismissal is based on the facts or beliefs known to the employer at the time of the dismissal (as per *W Devis and Sons Ltd v Atkins* 1977 ICR 662, HL). However, a Tribunal should consider facts that came to light during the appeal in considering whether the employer's decision to dismiss was reasonable (as per *West Midlands Cooperative Society Ltd v Tipton* 1986 ICR 192, HL).

36. In an unfair dismissal case in which the employee had been employed for two years and no automatically unfair reason is asserted, the burden lies on the employer to show what the reason or principal reason for dismissal was, and that it was a potentially fair reason under section 98(2) of the Employment Rights Act 1996 ("ERA"). Once that is done there is no burden on either party to prove fairness/unfairness.

Reason for dismissal

37. Section 98(2) ERA identifies a number of potentially fair reasons for dismissal which include conduct. In this case, the Respondent says that the Claimant was dismissed because of his conduct. ***Fairness***

38. Section 98(4) ERA specifies the test to be applied by the Tribunal in order to determine whether a dismissal is fair or unfair. It reads as follows:

"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b)shall be determined in accordance with equity and the substantial merits of the case."

39. In conduct dismissals, there is well-established guidance for Tribunals on the approach to be taken when assessing fairness under section 98(4). This can be found in the cases of *British Home Stores v Burchell* 1978 IRLR 379 and *Post Office v Foley* 2000 IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's misconduct. The Tribunal must then decide whether the employer held such genuine belief on reasonable grounds after carrying out a reasonable investigation. The Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. The Tribunal must take into account all aspects of the case including the investigation, the grounds for belief, the penalty

imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4).

40. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones* 1982 IRLR 439, *Sainsbury's Supermarkets Limited v Hitt* 2003 IRLR 23, and *London Ambulance Service NHS Trust v Small* 2009 IRLR 563).

41. In considering the fairness of the dismissal, the appeal should be treated as part and parcel of the dismissal process (*Taylor v OCS Group Limited* [2006] ICR 1602). The Tribunal's task under S.98(4) of the ERA, is to assess the fairness of the disciplinary process as a whole. Where procedural deficiencies occur at an early stage, the Tribunal should examine the subsequent appeal hearing, particularly its procedural fairness and thoroughness, and the open-mindedness of the decision-maker.

42. The range of reasonable responses test that applies to substantive unfair dismissal claims must also be used when assessing the reasonableness of the investigation [as per *J Sainsbury plc v Hitt 2003 ICR 111, CA*].

43. In *Newbound v Thames Water Utilities Ltd [2015] IRLR 734 CA*, the Court of Appeal stated that Tribunals should not consider the band of reasonable responses as one which is infinitely wide, and to focus on the statutory language and the words "in accordance with equity and the substantial merits of the case" at section" at 98(4)(b) of the ERA.

44. In the unfair dismissal context, a finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances [*Brito-Babapulle v Ealing Hospital NHS Trust* [2013] IRLR 854]. The employee's length of service and disciplinary record are relevant [*Trusthouse Forte (Catering) Limited v Adonis* [1984] IRLR 382) as well as the attitude of the employee to his conduct (*Paul v East Surrey District Health Authority* [1995] IRLR 305]. However, even if the misconduct in question is not correctly characterised as 'gross misconduct', this does not necessarily mean that the employer cannot reasonably dismiss [*Quintiles Commercial UK Ltd v Barongo EAT 0255/17*]

Wrongful dismissal/Failure to pay Notice Pay

45. If there is an express contract term as to notice (written or orally agreed), this will apply, provided this is not less than the period of notice required by s.86 Employment Rights Act 1996 (after the employee has been employed for at least one month, one week, then one week for each completed year of service up to a maximum of 12 weeks).

46. If there is no expressly agreed period of notice, there is an entitlement at common law to "reasonable" notice of termination. This must not be less than statutory minimum notice but, in some circumstances, could be more. What is "reasonable" notice may depend on the type of job and what is common for that sort of role/sector.

47. An employer will be in breach of contract if they terminate an employee's contract without the contractual notice to which the employee is entitled, unless the

employee has committed a repudiatory/fundamental breach of contract which would entitle the employer to dismiss without notice. A per *Laws v London Chronicle (Indicator Newspapers) Ltd* 1959 1 WLR 698, CA. for behaviour to amount to a repudiatory breach, it must disclose a deliberate intention to disregard the essential requirements of the contract.

48. The Tribunal must be satisfied, on the balance of probabilities, that there was an *actual* repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct.

MY CONCLUSIONS

Unfair Dismissal

Reason for the Dismissal

49. When identifying the reason for dismissal, I must first make findings as to the employer's own reasons for dismissal, and then assess how those reasons should be characterised in terms of statute.

50. The Respondent relies upon conduct.

51. The Claimant was dismissed summarily on the 23 February 2023 because of his behaviour on the 2 February 2023, that is the use of abusive language aimed at Greg Watson. I find that the reason for his dismissal on that date his conduct on the 2 February 2023.

52. The Respondent has therefore shown that a potentially fair reason for dismissal existed, namely conduct. Given the Claimant's acceptance that he used the language concerned, I accept that Ruby Claydon would have had a reasonable belief based on reasonable grounds that conduct was the reason for dismissal.

Fairness

53. Firstly, I address whether the investigation and disciplinary process was procedurally fair. Having considered all of the evidence before me I find that there were deficiencies in the process for the following reasons.

54. The investigation meeting and disciplinary hearing were extremely perfunctory both lasting in the region of 15 minutes. The investigation meeting lasted only 10 minutes if the break is taken into account. The disciplinary hearing lasted only 11

minutes if the break is taken into account. Whilst brevity does not, in itself, mean there was inadequacy in the procedure, it does show that only limited fact-finding occurred in both those meetings. It is clear from the notes of those meetings that no real effort was made to drill down into the context of the incident that occurred on 2 February 2023.

55. The investigation was inadequate because on the evidence before the Tribunal no finding was made by the investigating officer as to whether or not Greg Watson

swore at the Claimant. It may be that the findings were made in the investigation and disciplinary proceedings relating to Greg Watson, but that evidence was not been presented to the Tribunal and it is not clear whether that process took place before or after the Claimant's dismissal.

56. Ruby Claydon made the decision to dismiss the Claimant. Ruby Claydon was quite candid in evidence that the only matter of relevance in her view was that the Claimant had admitted that he breached rule 23 of the Company's rules. She told the Claimant in the disciplinary hearing that sickness was not relevant to the disciplinary matter that she was dealing with. She confirmed in evidence to the Tribunal that she did not consider that the Claimant's length of service or clean disciplinary record were relevant to the outcome. In essence, her evidence was that the outcome was clear: the Claimant admitted he swore repeatedly at Greg Watson, he had breached rule 23 and therefore he had to be dismissed. In addition, Ruby Claydon told the Claimant in the disciplinary hearing that she intended to speak to Greg Watson. However, she then went on to dismiss the Claimant before having spoken to Greg Watson. It is clear from the record of the disciplinary hearing that Ruby Claydon made no attempt to understand the context in which the incident occurred and any mitigating factors. In essence, having admitted that he swore at the Greg Watson, there was nothing that the Claimant could have said in the disciplinary meeting which would have altered the outcome.

57. The Tribunal should have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures when reaching its conclusions. In this case, the ACAS code states, at section 5, that employers should carry out the necessary investigation of potential disciplinary matters without reasonable delay to establish the facts of the case. In this case, the Respondent did not establish all of the facts of the case because it was solely focused on whether or not the Claimant had sworn at Greg Watson. Relevant facts such as whether Greg Watson swore at the Claimant were not resolved even though such findings were important to the context of the incident.

58. Section 12 of the code states that in disciplinary hearings an employee should be allowed to set out their case and answer any allegations that have been made. They should be given a reasonable opportunity to ask questions and present evidence. They should also be given an opportunity to raise points in relation to any information provided by witnesses.

59. The Respondent's disciplinary procedure states that gross misconduct may result in dismissal. It does not state that it will result in dismissal. It is clear that the Respondent's procedure envisages that the decision maker will exercise discretion when deciding the sanction to impose. In forming the view that summary dismissal was the inevitable outcome of a breach of rule 23, Ruby Claydon therefore misunderstood and misapplied the Respondent's own disciplinary procedure.

60. The Respondent's disciplinary procedure makes it clear that, before reaching a decision on a disciplinary matter, a whole range of factors should be considered including the outcome imposed in similar cases in the past, special circumstances which might make it appropriate to lessen the severity of the

penalty, the employees disciplinary record and general work record and whether the proposed outcome is reasonable in view of all the circumstances. In addition, in cases of potential dismissal, alternatives should be considered such as demotion or suitable alternative work. On Ruby Claydon's own evidence none of these factors were taken into account.

61. It simply cannot be said that the Claimant was given any real opportunity to set out his case prior to being dismissed. In his disciplinary hearing he was discouraged from elaborating upon how his sickness and health problems had been affecting him since he returned to work. He was not provided with Greg Watson's version of events so he had no opportunity to comment upon that. It is clear from the notes of the disciplinary hearing that the Claimant did not really have an opportunity to properly and fully present his case.

62. The Claimant did not appeal against the decision to dismiss him. Taking into account the perfunctory nature of both the investigation meeting and the disciplinary hearing, I accept the Claimant's evidence that he did not think that there was any point in appealing because he did not consider that it would make any difference. On the particular facts of this case, bearing in mind Ruby Claydon's evidence that the only issue was whether or not rule 23 was breached, I find that appealing would have been unlikely to make any difference to the ultimate outcome. As the Claimant accepted that he swore on several occasions and as Ruby Claydon did not consider any other factors to be relevant when deciding whether or not to dismiss the Claimant, it seems very unlikely that a different conclusion would have been reached on appeal, regardless of what the Claimant had pleaded in mitigation.

63. On the facts of this case, I do not consider that a full and fair investigation was carried out, nor was the Claimant given a proper opportunity put his case. The procedural flaws were material in that had a fair procedure been followed the outcome may have been different.

64. Secondly, I must decide whether in the circumstances the Respondent acted reasonably or unreasonably in treating the Claimant's conduct as a sufficient reason for dismissing him, taking into account equity and the substantial merits of the case. In deciding whether the employer acted reasonably or unreasonably as per section 98(4), I must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances taking into account all aspects of the case including the investigation, the grounds for belief, the penalty imposed and the procedure followed. I must not substitute my own view for that of a reasonable employer.

65. On the particular facts of this case, I find that the Respondent's decision to dismiss the Claimant for conduct reasons falls outside the range of reasonable responses that were open to the Respondent. No consideration whatsoever was given to the circumstances surrounding the Claimant's use of expletives towards Greg Watson. Those circumstances included that the Claimant had been off work for some months with health problems including stress and high blood pressure and this was only his third day back at work. The swearing occurred in what appears to have been a heated exchange in which the Claimant and Greg Watson were frustrated and irritated with each other's behaviour.

66. However, what is key in this case is the Respondent's failure to take into account that the Claimant swore at Greg Watson after he had injured his ankle and was in pain. Greg Watson confirmed in live evidence that the Claimant swore at him after he had fallen and injured his ankle. It is not asserted that the Claimant has a history of using abusive language. I find that any reasonable employer would have borne this in mind as a very important mitigating factor when reaching its decision. Further, there is nothing in the evidence before me to suggest that Greg Watson found the exchange particularly troubling or upsetting. The Claimant has a previously unblemished disciplinary record.

67. There was no consideration given by the Respondent as to whether Greg Watson and the Claimant would be able to work together in the future. There was no thought given to actions that may assist their working relationship such as the whether the Claimant should be asked to apologise, or whether mediation would be appropriate. There is no suggestion that the Claimant used abusive languages in front of customers or third parties such that it would cause reputational damage to the business. It has not been shown that serious or significant consequences flowed from the Claimant's outburst.

68. In the circumstances I find that the decision to dismiss was outside the range of reasonable responses open to the Respondent.

69. Further, no consideration whatsoever was given to alternative an alternative sanction to dismissal.

70. The Respondent is a medium sized employer with around 90 employees. It deals with its human resources issues in house but had the capacity to seek outside advice prior to taking the decision to dismiss the Claimant had it wished to do so.

71. Taking into account all of the circumstance of this case, and all of the factors above, I find that the Respondent's decision in this case to dismiss the Claimant was unreasonable in treating the Claimant's conduct as a sufficient reason for dismissing him, taking into account equity and the substantial merits of the case.

Adjustments to unfair dismissal award

72. I have also to consider whether there should be any adjustments to any award of compensation. There are three type of adjustments I need to consider.

73. The first is whether, even if the Respondent had followed a fair procedure, the Claimant would have been dismissed in any event. I am not satisfied on the evidence before me that the Claimant would have been dismissed had a fair and full investigation taken place, had full findings of fact been made and if all of the relevant factors been taken into account prior to the decision to dismiss. They were more than mere technical breaches: they were key to the fairness of the process. I therefore make no reduction to any award of compensation on that basis.

74. Secondly, I have to consider whether the Claimant contributed to his dismissal. In other words, was their contributory fault. I find that there was contributory fault in this case. I consider that an appropriate award in this case is 10% contributory fault. I do not consider that higher award is appropriate, given that the Claimant's

use of expletives towards Greg Watson occurred after he had injured his ankle and was in pain.

75. Thirdly, I have to consider whether there should be any adjustment in the compensation awarded because of breach of the ACAS code. An award can be increased or reduced by up to 25 percent for this reason. In this case the Respondent's overarching procedure was broadly compliant with the ACAS code, but it was the execution of the investigation and disciplinary process that was unfair. In the circumstances I consider that there should be an increase of 10% for breach of the ACAS code.

Wrongful Dismissal/Breach of Contract

76. Dismissal without adequate notice is wrongful unless an employer can show that the summary dismissal was justified because of the employee committed a repudiatory breach of contract. The circumstances in which a repudiatory breach can be said to have occurred is usually where the conduct by the employee is so serious that would undermine the implied term of mutual trust and confidence between the employer and employee to the extent that the employer should no longer be required to retain the employee in his employment.

77. The Claimant was not given notice of the termination of his employment nor was he paid in lieu of that notice.

78. I was not provided with the Claimant's terms and conditions of employment by either party. The Claimant has therefore not shown that he was contractually entitled to more than the statutory minimum notice, which, with four years full service, is four weeks.

79. The reason for the Claimant's dismissal was that he repeatedly swore at Greg Watson.

80. The Respondent's position is that the Claimant breached rule 23 which amounted to gross misconduct so he had to be summarily dismissed. The Respondent's own disciplinary procedure makes it clear that an act of gross misconduct may result in dismissal. It also makes it clear that special circumstances, previous disciplinary record, general work record, whether the proposed outcome is reasonable in view of all the circumstances and alternatives to dismissal should all be taken into account. None of these factors were taken into account prior to summary dismissal.

81. Considered in context, I do not find that the Claimant's swearing amounted to a repudiation of the whole contract. There is no history in this case of insolence, swearing or offensive comments on the part of the Claimant. The behaviour which was categorised as gross misconduct, and which resulted in his summary dismissal, was a one-off outburst by the Claimant, which occurred after he had injured his ankle, was in pain and when he was frustrated and upset. There were clearly surrounding special circumstances. He had only recently returned to work after a period of sick leave. At some point Greg Watson was also given a warning for his behaviour during the same incident. On the particular facts, the Claimant's behaviour did not justify summary dismissal. In essence, the conduct when

considered in context was not so serious as to amount to a repudiatory breach of contract.

82. On that basis, I find that the Claimant was wrongfully dismissed and is entitled to any outstanding notice pay.

Approved by:
Employment Judge Boyes
Date: 3 April 2025

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Written Reasons sent to the Parties on
16 April 2025

FOR EMPLOYMENT TRIBUNALS