EMPLOYMENT TRIBUNALS

Claimant: Mr G Lal

Respondent: Honda of the UK Manufacturing Ltd

Heard at: Bristol **On:** 21 December 2015 and 24 May 2016

Before: Regional Employment Judge Parkin

Representation
Claimant: Mr R Owen Thomas, Barrister
Respondent: Mr C Harries, Barrister

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1) the claimant was unfairly dismissed;

2) the claimant contributed towards his own dismissal to the extent of 75%; and

3) consideration of remedy is adjourned to a date to be fixed.

REASONS

1 The Claim

By his claim form presented on 7 January 2015 the claimant claimed unfair dismissal and race discrimination. His brief account at box 8.2 was: "I was strangled at work, Both of us suspended after 5 days from day of incident. I was stopped to put in a formal complaint, my manager sat me down and told me nothing would happen if I went to HR as they the management have the final say, three weeks later the accused is back at work, nine weeks later they terminate my contract due to misconduct." His race discrimination claim was later dismissed for non-payment of a deposit.

2 The Response

The respondent resisted his claim in its response presented on 17 April 2015 contending that, before its company shut down in August 2014, two associates came forward to their section manager with concerns about claimant's conduct. Whilst that information was forwarded to HR, another incident happened on 5 September 2014 between the claimant and another coordinator, involving a verbal argument about work errors with physical contact, insults and bad language. It suspended both and took witness statements. The other coordinator was subjected to a final warning. However, complaints from other employees led to further investigation relating to the claimant's conduct. At a formal disciplinary hearing, it was concluded that the claimant had committed several acts of gross misconduct contrary to the Disciplinary Procedure and the Equal Opportunities and Diversity Policy. The dismissal was upheld on appeal. It was not an unfair dismissal, but within the band of reasonable responses and the respondent acted reasonably in all the circumstances.

3 The issues

The issues for determination by the tribunal were the classic ones relating to a conduct dismissal: whether the respondent proved the potentially fair reason for dismissal relating to the claimant's conduct and, in short, whether that dismissal was fair or unfair having regard to the investigation, procedure and decision-making of its management. The Tribunal indicated on the 1st day that it would seek submissions on contributory fault at the same time as the parties made submissions on liability.

4 Evidence and credibility

4.1 There was an agreed Bundle (1-266), with additional documents R1 (file properties document, showing creation on 3 September 2014), R2 (respondent's organisation chart) and R3 (clean copy of 152). The Tribunal heard oral evidence from the respondent's investigating manager Mr Shawn Butler; disciplinary manager, Mr Mark Thomas; appeal manager, Mr Ray Bunce, and HR manager, Mr Michael Pye, and from the claimant himself.

4.2 The hearing was initially only listed for one day but went part-heard. The Tribunal refused the respondent's application to call an additional witness after the first day. The claimant objected to the application and the witness statement was only served at that late stage whereas an earlier case management order had expressly required exchange of all witness statements ahead of the hearing. Initially, the respondent had indicated on the first day that its HR manager Mr Pye did not need to give evidence; in the event, he did so on the second day.

4.3 The claimant was often not accurate and relaible in his account; he was often inconsistent even within the course of a passage of oral evidence, for instance when he changed his evidence about whether or not he was expecting to be dismissed when he attended his disciplinary hearing. He could not remember having been represented by a trade union representative, yet was represented throughout at investigatory and disciplinary hearings. He was wrong in stating that he did not have the full investigation report and statements prior to his disciplinary hearing. The Tribunal also found that Mr Pye played down his involvement in the investigation process and did not accept his evidence that Mark Thomas

took a separate decision that there was a case to answer and to proceed to a disciplinary hearing. That evidence wholly contradicted Mr Thomas's own version, which the Tribunal preferred as being wholly convincing and consistent**.** Had there been such a stage where the disciplinary manager decided upon whether there was a case to answer, that manager would have remembered it and it would have been recorded in this exhaustively documented process. The Tribunal concluded on the balance of probabilities that Mr Pye, called as the final witness for the respondent on the second day, gave his evidence more about what should have happened under the disciplinary procedure than what did happen on this occasion.

5 The Facts

The Tribunal made the following findings of fact on the balance of probabilities:

5.1 The claimant was first employed by the respondent on 30 November 2004 as a general associate. By September 2014 he had progressed to a C2-1 coordinator role on Mould Maintenance within the engineering side of the department. Although he did not directly manage or supervise anybody, this was technically at junior management seniority level, above general associates who were supervised by team leaders who themselves reported to managers on his C2 grade. He was therefore seen as a role model for those general associates and team leaders on the production side. He reported to Shawn Butler, Section Manager - Plastic Operations.

5.2 In September 2009 the claimant was given a second written warning for inappropriate language sent in a text message (33). This was to stay on his file and as an active warning for 12 months.

5.3 In November 2013 the claimant raised a grievance about treatment by work colleagues, but only after he had himself been accused of driving his car at an associate Glenn Fernandes. Whilst the claimant's grievance was turned down, no disciplinary action was taken against him. Glenn Fernandes had indicated that he had raised his concern about the claimant's driving informally and did not want to progress any concerns. Mr Butler took the view that the two had outside personal concerns which should not be discussed within the workplace and told both to refresh their understanding of the equal opportunities policy (36-37).

5.4 While recommending him for grade progression in March 2014, Mr Butler had written: "Pete works in a very small team; however, information transfer is vital to success of their core roles. And this is a concern, as on many occasions information has not transferred between team members (during production and new model concerns). This is down to either the inability for effective communication methods or the acceptance of poor information flow from other team members. Both way, at Pete's responsibility level (C2) these failures should not continue and immediate improvement must be seen (7)."

5.5 Although it it had no separate Social Media policy, the respondent had a formal Equal Opportunities Policy/Diversity Policy (p22 onwards) which expressly included the following statements of principle:

- "All associates must uphold the principles of the Equal Opportunities and Diversity Policy and if, following an investigation you are found to have breached this policy, disciplinary action will be taken up to and including dismissal…
Working together we can continue to maintain a strong company with excellent working relations where it is recognised that everyone is a valued member of the team…

- (Honda) is committed to the principle of creating equal opportunities in employment and values everyone as an individual… Aims to harness differences (sex, race, age, background, culture, disability and personality) to create a productive environment in which everybody feels valued; their talents are fully utilised…"

The Purpose of the policy included clarifying (Honda)'s Equal Opportunities standards and explaining the extended standards of conduct and behaviour and demonstrating one of the ways in which it implements the philosophy of "Respect for the individual".

5.6 The respondent had a structured formal disciplinary policy (9 onwards). The policy recorded that gross misconduct amounts to a fundamental breach of employment and where it was established employment would not normally continue (11). The extensive and non-exhaustive definition of gross misconduct includes "physical violence, actual or threatened against or towards another person; use of abusive or threatening conduct or language towards fellow Associates or behaviour that creates an intimidating, hostile or offensive working environment; harassment of, or discrimination against fellow associates or any person on the grounds of gender; race, age, religion, disability and/or sexual orientation, or any breach of the Equal Opportunities and Diversity Policy; bullying…(12). The detailed investigation procedures show that when the investigation paperwork is passed to the disciplinary manager by the different manager who has carried out the fact-finding investigation, that disciplinary manager will decide if there is a case to answer (16).

5.7 The factory was on works shutdown between 4 August and 18 August 2015. Very shortly before that Mark Bailey (another coordinator on the production side) and Andy Davies (team leader on the production side) had complained to Shawn Butler about the claimant's conduct towards colleagues. He had taken advice from Michael Pye and had been advised to gather evidence of the claimant's conduct which could be acted upon.

5.8 After the works shutdown, nothing was done immediately about compiling evidence about the claimant but after another incident with a production associate, Paul Patterson, Mark Bailey and Andy Davies then created a joint schedule of 8 allegations, 6 of which were dated between 15 July and 3 September 2014 and 2 of which were completely undated (152). Paul Patterson, who clearly felt he had suffered extensively at the hands of the claimant, also prepared a statement which included 25 examples of conduct by the claimant which he criticised. Headed: "Below are a number of incidents which I believe have created a hostile/uncomfortable atmosphere towards me or the people around me and in my opinion is unacceptable behaviour coming from a coordinator whose main job is to support production (152-158). They suggested a pattern of behaviour by

the claimant of demeaning colleagues to their face and undermining them behind their back, swearing at or being rude to them or simply ignoring them when work problems were reported to him. None of the alleged incidents were dated, but some went back not just several months but over three or four years; the first had apparently been reported to management. Mr. Patterson recorded that the claimant had boasted about trying to run Glenn Fernandes over in the car park and had made jokes about Mr Fernandes' Goan nationality.

5.9 On 5 September 2014 there was a very major incident between the claimant and another coordinator, Jeremy Lumbers, witnessed by their colleague coordinator Colin Armstrong. Whilst the exact details were disputed between the claimant and Mr. Lumbers, Mr. Lumbers's statement prepared on 9 September 2014 suggests that following a disagreement with Colin Armstrong during which Mr. Lumbers had said Mr Armstrong the claimant should prove to the department that they were as good as they kept saying they were, Colin Armstrong said "you'd better tell Pete Lal (the claimant) that as well" whereupon Jeremy Lumbers did go to speak to the claimant, criticising his workmanship. When the claimant refused to listen, making the noise "blah blah blah" as he spoke, Mr. Lumbers said: "you can't take it, can you? You give a lot of mouthy chat but when I am asking why you are incapable of completing a relatively simple task, you can't give the constructive or meaningful answer". He recorded that the claimant replied: "Go fuck your mum and suck on her hard nipples", to which he crouched lower down behind the claimant, tilted his head slightly and pointed at the tool by the claimant and said calmly and clearly: "I ought to knock your head into that tool for that comment!". He said that he then stepped back but that the claimant rose to confront him face-to-face pumping his chest saying: "Do you know who I am? Who are you? You are nobody. You are 12 years old" and that he would sort Mr Lumbers out. Mr Lumbers said he then walked off and went to report the incident to the managers to book (163-164).

5.10 Colin Armstrong wrote a handwritten statement very soon after the incident on 5 September 2014. Describing how Mr. Lumbers had approached aggressively criticising him and the claimant using bad language, he recounted how the claimant said: "stop crying and shouting like a baby and go and suckle on your mother's nipples" whereby Mr. Lumbers attacked the claimant from behind, with his left hand around the claimant's neck and with his right hand pushed the claimant's head forward so the claimant banged his head on the A/C machine. Mr Armstrong intervened to tell Mr. Lumbers to let go, which Mr. Lumbers did after several seconds, and then told both of them to stop. The claimant then got up and sought to engage with him saying: "Go on, try it again to strangle me" (169-171). This was the earliest detailed account of the incident, written by a witness albeit one very closely involved.

5.11 On 1 May 2014 the claimant had written to Blair Pollard on Facebook, copying in other work colleagues: "Tony Blair go and fuck your mum as that is the only person that's going to fuck you. Prick… Plus your(e) shit at your job, take the VR block head". However, Blair Pollard only complained about this personal abuse some four months later on 8 September 2014, soon after the claimant had been involved in the major incident with Jeremy Lumbers (38). The Tribunal inferred that he only did so then

because he was aware of that incident or because the investigation had started which was clearly seeking to find evidence of misconduct towards colleagues by the claimant.

5.12 On 10 September 2014 the claimant was suspended pending investigation of allegations of potential gross misconduct: a physical and verbal altercation with Jeremy Lumbers on 5 September and separate allegations of "creating a hostile working environment". The claimant was told he must not communicate with any associates unless authorised by HR (42-42A).

5.13 Jeremy Lumbers was suspended at the same time in respect of his part in the incident on 5 September. His case was dealt with separately, by an investigatory meeting on 17 September 2014 and the disciplinary hearing on 29 September 2014 which resulted in Mr Lumbers being subject to a final written warning for 12 months for gross misconduct. His case was dealt with by Dave Davies, Department Manager - Plastic Operations who found swearing and shouting between both Mr Lumbers and the claimant, when Mr Lumbers was challenging the claimant and Mr Armstrong about their work performance and that he also "put his hands on the claimant's neck and head in response to his inappropriate comments". Mr Davies somewhat generously found that Mr Lumbers did not intend to be violent with this physical gesture and that it had not been the forceful action that the claimant had himself described. He found mitigation in Mr Lumbers' long hours and continuous work for 12 days. The outcome was notified to Mr Lumbers on 2 October 2014 is (68-69) and he returned to work.

5.14 Obviously the suspensions and the investigation into the claimant's conduct became common knowledge amongst the workforce. Another coordinator, Josh Watkins, who had not been a witness to the incident between Jeremy Lumbers and the claimant, provided an unsolicited character testimonial in support of Mr Lumbers' professionalism, knowing that he had been suspended pending an enquiry regarding violent conduct which he saw as very out of character and could only presume he had acted aggressively because he was antagonised. Without giving any examples, Mr Watkins said he could list a number of occasions in the past few months whereby the claimant had acted inappropriately to himself or others (47). He went on to give details in an interview on 30 September 2014, (192-194) saying the claimant shouted at colleagues "You're shit and you know it" and to show the investigator the Facebook entry sent by the claimant about Andrew Sloper (194). Mr Sloper had put out a message saying that he was going out (for a drink) later, asking if anyone was coming. The claimant's copied to others was: "You have no friends. Noone will be out. ATT has gone your only friend. Can't see the two fat coordinators from the other shifts coming out. They have problems moving." This was undated but towards the end of August/September according to Joshua Watkins.

5.15 With support from Mr Pye, Mr Butler prepared his investigation plan for the 5 September incident (48-49), involving interviewing just 3 colleagues: Colin Armstrong, Craig Evans and Peter Massingham as well as Jeremy Lumbers. Peter Massingham (178) recorded that Colin Armstrong had said Jeremy Lumbers had gone up behind the claimant and strangled him. Craig Evans (179-180) recorded that Colin Armstrong had told them

Jeremy Lumbers had grabbed the claimant by the back of the head and pushed his head into the A/C machine.

5.16 In respect of the other allegations, a great number of witnesses were interviewed: Amanda Dorrell, Blair Pollard, Paul Patterson, Joshua Watkins, Martin Carpenter, Peter Houston, Leigh Curtis and Andy Davies were all interviewed between 25 and 30 September 2014. Two associates, Glenn Fernandes and Andrew Sloper, specifically mentioned by others as victims of the claimant's behaviour, were not interviewed. Another individual, Steve Gosling, was interviewed on 30 September 2014, but said nothing significant which was adverse to the claimant (61-62). His interview was not contained in Mr Butler's investigation report. Two further individuals identified as possible witnesses, Jamie Steer and Mike Lusty, were not interviewed.

5.17 Mr Butler did not fully explain how these witnesses were selected, but page 63 is his investigation plan, a key working document but not part of the report disclosed to the claimant. It summarised a variety of allegations and incidents and possible witnesses. The descriptions in brackets are the Tribunal's (not part of the document):

- Fat comments (describing colleagues as fat with rude comments about them);
- Race/colour (racist comments and comments about colleagues' race especially Goan workers, in particular Glenn Fernandes, by calling him "a smelly Goan" and making jokes about his race: "Where you Goan? I'm Goan to the toilet…);
- Derogatory NHC comments (relating to denigrating those who had been congratulated for promoting new ideas to improve processes under the New Honda Circle);
- Run over Glen in car park (the allegation that the claimant had tried to run over Glenn Fernandes in the car park and had later boasted of doing so).
- Chanting "shit and you know you are" at colleagues;
- Calling Paul Patterson "Jeremy Beadle";
- Referring to associates as pricks and telling them to "F Off";
- Deliberately damaging parts (the claimant boasting/threatening that he would do so);
- Kill Mark's kids (Paul Patterson's allegation that the claimant told him he hated Mark Bailey and would kill his kids);
- Should be fired (suggesting colleagues, particularly Blair Pollard, should be fired as they were so poor at their job);

5.18 The claimant was first interviewed on 18 September 2014, about only the 5 September incident. Excluding a break, the meeting lasted 22 minutes (175-177).

5.19 The claimant was called to an investigation meeting on 6 October 2014, by then aware that Mr Lumbers had been reinstated to his post. By that time, the general second allegation of "creating a hostile working environment" had been expanded to 7 more specific allegations (but without any detail or dates):

1) making comments about fellow associates demeanour (actually more than one incident – calling others fat and the Blair Pollard facebook comment);
2) making comments regarding associates race/colour, specifically Goan associates ;
3) making derogatory comments regarding NHC participation;
4) stating that you attempted to run over fellow associate in the car park;
5) chanting and swearing at associates (this allegation had been two separate allegations in the letter of 1 October originally calling the claimant to the meeting (66-67);
6) stating that you intend to deliberately damage Honda car parts;
7) stating ill intent to an associate's children.

During this meeting (206-209), the claimant was shown some witness statements supporting these allegations. He accepted (207) that he had said laughingly, joking that he had tried to run over an associate (Glenn Fernandes) in the car park but maintaining that the CCTV proved he had not in fact done so.

The claimant was represented by Carmello Granato, who asked why these serious allegations had come out then, suggesting that people had jumped on the bandwagon after the 5 September incident. Ms Granato was highly critical of the respondent having said nothing to the claimant before then if complaints had already been made about him. She suggested that the questioning should really be about that incident. Mr Butler extended the suspension, saying that he believed there may be a risk to associates if the claimant returned based upon the quantity of allegations and evidence he had received. It was stressed to the claimant that he should only discuss the allegations with his accompanying associate or representative. Excluding a break, this meeting took 36 minutes.

5.20 At the investigatory meeting, the claimant had suggested his Facebook identity had been hacked. Mr Butler looked into this and firmly concluded that the claimant had made the Facebbok entry about Blair Pollard in particular (219).

5.21 On 14 October 2014 the claimant was called to a disciplinary meeting on 21 October (220). Enclosed with the letter was Mr Butler's undated and lengthy management investigation report report (138-209). As before the claimant was told he should not discuss the contents with anyone other than his representative. The two allegations at 220 were slightly different from those discussed on 6 October:

> 1. That in conjunction with a fellow associate you created a hostile and intimidating working environment on 5 September 2014, namely by having a verbal allocation through shouting and swearing and your general self-conduct; and
>
> 2. That he had created a hostile and intimidating working environment over a period of time within the Plastics Operation Department (but then broken down into 6 headings at 147):

a) racial discrimination evidenced by comments you have made specifically against associates from Goa;
b) bullying fellow associates;
c) harassing fellow associates;
d) swearing at fellow associates;
e) general conduct towards fellow associates; and
f) your actions outside of the workplace in particular posting unacceptable comments about fellow associates on the Internet

5.22 The second global allegation, although broken into these 6 headings, comprised a significant number of specific incidents and some very general allegations (142 & 147):

1) making comments about fellow associates demeanour;
2) making comments regarding associates race/colour specifically Goan associates;
3) making derogatory comments regarding NHC participation;
4) stating that you attempted to run over fellow associate in the car park;
5) chanting and swearing at associates (this allegation had been two separate allegations in the letter of 1 October originally calling the claimant to the meeting (66-67) and/or using derogatory terms when referring to them;
6) stating he intended to deliberately damage Honda car parts;
7) stating ill intent towards an associate's children;
8) saying he intended to inform an associate's husband she was having a relationship with another associate;
9) writing a letter to the associate's husband to allege she was having a relationship with another associate;
10) referring to a female associate as a bitch and on 2 occasions stating he would rape her;
11) posting on Facebook derogatory and obscene comments about fellow associates; and
12) general behaviour at work: ignoring associates, not answering the phone when assistance was needed, talking behind colleagues' backs, winding up situations which did not involve him, making offensive remarks about associates who wear uniform hats.

5.23 Mr Butler had sought to summarise his findings into the allegations against the claimant. Despite the recognition that many of the allegations made against the claimant were historic, there was no attempt made to omit these or to put firm dates to most allegations. Although he concluded his report by indicating that he was passing his findings to Mark Thomas to determine whether there was a disciplinary case to answer, it was an exceptionally strong report with a very clear implication as to what the answer should be:

> "As Gurprit has denied all the points except one it will require an independent Manager to form a reasonable belief as to whether Gurprit is guilty of the alleged acts that form the allegations against him. There are a large number of witnesses to th(ese) allegations and I have not been provided with any information that gives me reason to doubt any of the evidence provided." (150)

Whilst Mr Butler clearly appreciated that Colin Armstrong had watered down his original allegation of physical violence by Jeremy Lumbers towards the claimant, he accepted the version in Mr Armstrong's later

written statement without any questioning why this had taken place and gave no regard to the apparent support for the original version in what Mr Armstrong had immediately told Peter Massingham and Craig Evans about the incident. Mr Butler effectively included every allegation made against the claimant. Although in evidence he was clear that it was important for him to ascertain if any allegation made by an associate was supported by any other witnesses, he did not himself sift out any allegations which were not corroborated in this way, leaving it for Mr Thomas as disciplinary manager to decide whether there was case to answer.

5.24 In respect of the misconduct allegations, Mr Butler was much more concerned with the validity of the allegations than their timing. In evidence, however, he acknowledged that not putting a timeframe on allegations put the claimant at a disadvantage in the disciplinary process.

5.25 The respondent never made any separate determination that there was a case to answer. In effect, by the time the report with its conclusions was put forward including many vague and historic allegations alongside some more focused and detailed ones, it was inevitable that there would be a disciplinary hearing. The volume of evidence and allegations was so great that Mr Thomas needed to prepare detailed schedules relating to the allegations and how many individuals supported each allegation (216, 218). These were not shared with the claimant. Mr Thomas was adamant in giving evidence that he did not believe there was any intermediate stage at which the disciplinary manager needed to decide on a case to answer. Notwithstanding the disciplinary procedure, he understood that once Mr Butler's report recommended disciplinary proceedings, it was for him as disciplinary manager to determine what if any offence had been committed and, if so, what disciplinary sanction to apply.

5.26 On 21 October 2016 claimant was represented by Ray Spurr, union representative. However, the discussion of the main allegations of misconduct other than the Lumbers incident cover only 2½ pages of notes with Mr Thomas asking the claimant why people would make the allegations or what evidence he could provide make him doubt the evidence provided by others. This was the main disciplinary hearing, lasting only 32 minutes (225-228). Mr Thomas himself was surprised that the claimant did not give fuller answers or deal individually with more of the allegations against him; he felt the claimant did not engage fully with the allegations at this hearing.

5.27 At the end of the hearing the meeting was adjourned to 23 October 2014 (235-238) when Mr Thomas announced his decision that the claimant was to be dismissed with immediate effect. Beyond not finding anything proved unless there were 2 witnesses or more to each allegation, Mr Thomas gave little explanation for his decision-making. The claimant was again represented by Ray Spurr.

5.28 The decision to dismiss was confirmed in writing on 30 October 2014 (239-242) by Mr Thomas. He set out the two main acts of gross misconduct, as at 5.21 above and indicated that he did not consider any of the individual points of evidence where there were less than two witnesses; he did not explain which allegations he was therefore discounting. He rejected the

suggestion that there was any kind of conspiracy against the claimant following the incident of 5 September, but acknowledged that incident may have been the catalyst for more associates to come forward. He rejected the claimant's argument that his Facebook account had been hacked, saying the claimant had provided no evidence of this and that there was great similarity with other Facebook entries he had made. In dealing with the claimant's case that many of the allegations against him were historic, Mr Thomas acknowledged this but said the respondent could not determine when associates chose to bring allegations to its attention. On the Glenn Fernandes' incident, he expressly wrote:

> " I am surprised that you do not seem to understand how other associates may feel if you claim that you have attempted to run another associate over in the car park. This is potentially another reason why associates did not come forward sooner with their individual concerns...".

He noted that the claimant did not appear to see his response to the build-up of events on 5 September as unacceptable, despite being a manager. Mr Thomas expressly said he did not find any indication by the claimant that he was taking medication which might explain some acts as a reasonable explanation. He concluded his letter:

> " My belief is that you had committed the acts of gross misconduct as stated. The usual sanction for even one act of gross misconduct is dismissal. I considered the mitigation you had provided and had I been considering allegation one on its own, I may be able to mitigate to an alternative sanction such as a final written warning. However I had to consider both allegations against you in there for my decision was to terminate your employment with immediate effect on 23 October 2014 …"

5.29 The claimant appealed that dismissal on 6 November 2014 (244-245). He raised six main points: that the investigator was his own line manager, that his original complaint about Jeremy Lumbers assault on him was put to one side when Mr Butler investigated his own conduct, but it had taken the respondent five days before taking any action, but Mr Butler has undertaken a witch hunt going back three years, that if he had created a hostile environment those issues should have been raised with him when the instance occurred and that Jeremy Lumbers returned to work after three weeks when he waited 8 weeks while management found or made up allegations against him.

5.30 The appeal took place on 25 November 2014, the claimant was represented by Carmelo Granato (254-258). Mr Bunce made no working notes and did not have Mr Thomas's spreadsheets to work with. Although he said at the outset that his role would be to consider any new information, ensure that the respondent's disciplinary policy had been followed and consider if the decision to dismiss was fair and reasonable, his approach was very much to require the claimant to show why the decision was wrong. The claimant's representative made a very strong argument about the unfairness to the claimant that what had begun with an assault on him where he was the victim, which had resulted in the assailant being back at work and with him being dismissed. Mr Bunce

asked the question: "Why do you think there has been a witch hunt against you?" to which the representative replied that although the set of allegations were made before the incident they were not looked into until afterwards. Mr Bunce was more concerned to verify that allegations against the claimant had indeed been made before 5 September 2014, the date of the Lumbers incident than to question why many associates had come forward only after that incident to refer to the claimant's conduct.

5.31 The appeal decision rejecting the claimant's appeal was sent by letter dated 10 December 2014 (259-263). The detailed analysis rejecting point by point the matters raised by the claimant's representative in the appeal was in marked contrast to the content of the notes of the appeal hearing which, in common with Mr Bunce's evidence, showed a light touch review by him of the disciplinary decision reached by Mr Thomas.

6 Submissions

6.1 The Tribunal had invited the parties to address it on contributory conduct as well as liability.

6.2 The claimant contended that Mr Armstrong's initial statement about the 5 September incident supported much of his case: that he was the victim of a vicious assault and he approached his disciplinary hearing on that basis. The investigation could not reasonably support any misconduct by the claimant in respect of 5 September whereas Mr Lumbers' behaviour including laying hands on the claimant was sufficiently serious to warrant dismissal or a final written warning. There was no detailed script for questions of the claimant at the investigation meeting (206-9) which lasted only 19 minutes. It could not be said that the claimant did not engage at this meeting, but he came cold to it and could do no more than answer questions. It was unclear how the respondent weighed up the evidence of allegations to see if there was a case to answer. The disciplinary meeting (225 onwards) gives very cursory coverage of what the respondent says was so serious as to warrant dismissal; the claimant was barely asked a single question. In particular, no questions were asked about race discrimination - the claimant raised that himself saying he didn't do it, which was all he could do. The respondent had already formed the view that the claimant was to be dismissed before the disciplinary hearing and did not hold a reasonable belief in the claimant's guilt of misconduct. Any bad language should be viewed in the context of the respondent's workplace. Dismissal fell outside the band of reasonable responses for the behaviour the respondent could reasonably find had happened - 235 (2) a-f which was no more than occasional unpleasantness/swearing/banter between colleagues. Even if by September 2014 some were saying it had gone too far, it still fell far short of conduct justifying dismissal. The appeal hearing was a review which could not cure any earlier defects and plainly did not deal with things thoroughly. There was no reasonable investigation, no reasonable belief on the part of the respondent and dismissal was outside the range of reasonable responses. Although the claimant had to accept some culpability in his own behaviour on 5 September, that should be judged lightly in view of the attack on him; his use of childish language had no real causal connection with his dismissal. Any contributory fault should be no more than 10% relating to the claimant's use of bad language towards colleagues.

6.3 The respondent expanded upon its skeleton argument and relied upon Governing Body of Beardwood Humanities College v Ham UKEAT/03791/13/MC as well as standard authorities. When workplace bullying/harassment existed people often did not come forward until an opportunity presented itself for them to do so; Mr Pye said in evidence that it was not unusual in HR terms that evidence came in with a rush. There was an exceptionally detailed investigation report and appendices prepared. The claimant had acknowledged his Facebook posts were "poisonous" and there were numerous themes such as calling people "prick" and references to their mothers. The claimant did not engage with the investigation giving no further explanation than "I did not do it" when it was incumbent upon him to try to explain why others should make their allegations. Page 151 shows the number of people who were broadly saying what the claimant was doing and how it was unacceptable. At the 21 October meeting (227), the claimant acknowledged he had been told it was offensive at the time; others clearly told him he should not be saying what he was. He was provided with a comprehensive investigation report and in his disciplinary meeting accepted a number of things including that he didn't really know Blair Pollard; although he said his Facebook account must have been hacked, he did not pursue or evidence that during the internal investigation. Internally, he only accepted having sworn at an associate on 5 September but was much more frank in admissions at the hearing. There was a weight of evidence against him but a lack of explanation by him; he failed to engage with the investigation and could not explain why he had not gone to others to support him, especially Colin Armstrong. His evidence was inconsistent. Use the expression "banter" often to explain unacceptable or inappropriate behaviour which he went way beyond banter and was behaviour which in the round amounted to gross misconduct. Beardwood at paragraph 12 shows that the proper focus of the tribunal should have been on the nature and quality of the claimant's conduct in totality and the impact of such conduct on the sustainability of the employment relationship. The evidence overwhelming supports both the reason for dismissal and the reasonableness of the decision. If the dismissal was unfair, there should be a 100% contribution by the claimant towards his own dismissal.

7 The Law

7.1 The main statutory provisions are at Section 98 of the Employment Rights Act 1996. By sub-section 98(1) ERA:

> "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 sub-section (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."

Then by sub-section (2):

> "A reason falls within this sub-section if it -...
>
> (b) relates to the conduct of the employee..."

Then by sub-section (4):

> "... where the employer has fulfilled the requirements of sub-section (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 undertakings) 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."

7.2 In considering this alleged misconduct case, the tribunal applied the long-established guidance of the EAT in British Home Stores v Burchell [1980] ICR 303. Thus, firstly did the employer hold the genuine belief that the employee was guilty of an act of misconduct; secondly, did the employer have reasonable grounds upon which to sustain that belief and thirdly, at the final stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances. The burden of proof in establishing a potentially fair reason within Section 98(1) and (2) rests on the respondent and there is no burden either way under Section 98(4).

7.3 Thus, as confirmed by the EAT in Singh v DHL Services Ltd UKEAT/0462/12, this means that the respondent only bears the burden of proof on the first limb of the Burchell guidance (which addresses the reason for dismissal) and does not do so on the second and third limbs (which do not).

7.4 The tribunal reminded itself that its role in respect of Section 98(4) was not to substitute its own decision for what it would have chosen to do, had it been the employer for that which the employer had taken. It followed the guidance of the Court of Appeal in Post Office v Foley/HSBC Bank v Madden [2000] IRLR 827 together with that in Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, where the Court of Appeal stated that the range of reasonable responses approach applied as much to the question whether the investigation into the suspected misconduct was reasonable as it did to other procedural and substantive aspects of the decision to dismiss. The tribunal also had regard to the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures (2015).

7.5 On appeals, in Taylor v OCS Group Ltd [2006] IRLR 613, the Court of Appeal stated:

> "What matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair."

Thus, the approach of considering whether an appeal amounted to a full rehearing so as to put right any defects from the initial disciplinary hearing is no longer sound. The Court of Appeal's guidance also reminded the tribunal of the need to stand back, recognising that every case turns on its own facts as to the nature of the investigation and extent of the procedure which is appropriate in all the circumstances having regard in particular to Section 98(4)(b).

8 Contributory fault

By Section 123 (6) ERA, for any reduction of the compensatory award, the conduct needs to have been culpable or blameworthy in the sense that it was foolish, perverse or unreasonable. Thus, applying the test recommended in Steen v ASP Packaging Ltd [2014] ICR 56 the Tribunal considered the claimant's conduct; was the conduct blameworthy; did it cause or contribute to the dismissal and finally is it just and equitable to reduce compensation and if so in what proportion. For the basic award, section 122 (2) lays down a slightly different test: whether any of the Claimant's conduct prior to his dismissal makes it just and equitable to reduce the basic award, even if that conduct did not necessarily cause or contribute to the dismissal.

9 Conclusions

9.1 The respondent readily established that its reason for dismissal related to the conduct of the claimant. However, when considering reasonableness, the Tribunal found a number of flaws in the respondent's approach. Whilst the respondent correctly submitted that this was an extremely detailed and thorough investigation, in reality it afforded the claimant little chance to refute so many wide-ranging and often historic allegations. This was a claimant who was well known by colleagues to behave badly in terms of teasing and inappropriate language and conduct towards them yet had been allowed to get away with it and even recently progressed to the C2-1 grade. By a coincidence of timing, when some investigation into his general conduct towards colleagues have been commenced it was overtaken by the investigation of the Jeremy Lumbers incident but then developed into a comprehensive exercise. Although the evidence does not go so far as to support the claimant's representative's assertion of a witch hunt, it certainly does show a "bandwagon" effect whereby more and more associates were approached or came forward to make allegations of recent or much more historic misdemeanours by the claimant.

9.2 Whilst a schedule of alleged misconduct obviously does not need the formality of a criminal charge sheet, specific allegations need to be much more carefully set out than were adopted by the respondent. Rolled up allegations such as "bullying" even where examples are set out in the witness statements relied upon are far too vague to enable an employee to contest them. Elementary principles of natural justice within disciplinary procedures mean that the individual must know what the charges are. Some of the allegations plainly dated back 2 or 3 years. Mr Butler described himself as much more concerned with the validity of the allegations than the timing of them, acknowledging that not putting a time timeframe for an allegation put the claimant at a disadvantage. What was initially described as allegation 2 against the claimant was in fact about 17 different allegations of generalised or specific comments or behaviour by the claimant across that period. Indeed the first statement by Mr Patterson contained 25 separate elements in itself.

9.3 There was no clear decision to proceed to a disciplinary hearing by Mr Thomas when he received the investigation report. In reality, the respondent with Mr Pye heavily involved in the disciplinary process felt there were so many allegations raised against the claimant that formal disciplinary proceedings must inevitably follow. This was a "No smoke

without fire" approach to disciplinary process which contrasted greatly with the respondent's structured disciplinary procedure. However, on its own, this breach of the respondent's own disciplinary procedure in missing the "case to answer" step would not have made the dismissal unfair.

9.4 When the claimant was told he must not communicate with any associates unless authorised by HR and could only share the allegations with his representatives, Mr Butler's investigation with the HR support of Mr Pye, proceeded afoot. Whilst this may be typical of a disciplinary investigation in a very large and well-resourced employer, it created a significant imbalance in terms of the claimant ever being able to dispute allegations put forward by so many colleagues in so many interviews and witness statements, most of which were made at a time when those colleagues were fully aware that he and Mr Lumbers had both been suspended following the 5 September incident (and before the decision that Mr Lumbers was to return to work was known). The inference is strong that associates were actively coming forward or presenting their version when approached, with them having an agenda to do down the claimant at the same time as assisting Mr Lumbers' cause whether directly (as Josh Watkins) or indirectly. Mr Butler's report (and evidence) did not fully explain how all the witnesses interviewed had been identified or come forward and why significant witnesses such as Andrew Sloper and Glenn Fernandes were not interviewed.

9.5 The letter calling the claimant to the disciplinary hearing and the conduct of the hearing itself did not show clearly which of the myriad of individual incidents under the general second allegation of "creating a hostile working environment", by then expanded to the 6 more specific allegations, were being pursued; if it was each single incident or allegation cited in Mr Butler's report, that was never made clear and the detail of the second "hostile working atmosphere" allegation had varied considerably over the course of the investigatory and disciplinary hearings. The dismissal letter in itself did not clearly identify which individual allegations were found proved, but only stated that those where there was only one witness were disregarded without identifying which those were. The claimant was not able to identify readily and precisely which acts of misconduct he had been found guilty of and which he had not. The complexity of Mr Thomas's spreadsheets, which were never shared with the claimant, show how the detail of so many statements and allegations had caused the process to go awry. The way the disciplinary hearing and appeal hearing proceeded was in marked contrast with the more detailed interview process especially with the claimant during the investigatory stage. By the time of the disciplinary hearing, although the claimant did have the opportunity with his representative to put a case, it was effectively for the claimant to disprove every one of the allegations without them being put individually to him.

9.6 In respect of the 5 September incident, there was little analysis by the respondent's investigatory, disciplinary and appeal managers of the dramatic change of tack by Mr Armstrong once it was clear to him that both the claimant and Mr Lumbers had been suspended and thus that Mr Lumbers' job was in jeopardy. On Mr Armstrong's earliest version, corroborated by Craig Evans' version of what Mr Armstrong told him shortly after the incident, Mr Lumbers was guilty of actual violence towards

the claimant albeit under strong provocation: "…JL grabbed (the claimant) by back of head and pushed him into A/C … bracket". This was broadly consistent with what Peter Massingham had heard Mr Armstrong say: Mr Lumbers had gone up behind at the claimant and "strangled" him, and Mr Armstrong seemed to want something to be done about it. Craig Evans' version of what Mr Armstrong had told him very soon after the incident also corroborated Mr Armstrong having heard the claimant use the even worse and more personal insult about Mr Lumbers' mother than the claimant admitted making.

9.7 However, it was the other allegations of misconduct within which brought about the claimant's dismissal, since both Mr Thomas and Mr Pye acknowledged that the claimant would not have been dismissed only for his part in the 5 September 2014 incident (which was consistent with the fact Mr Lumbers, apparently guilty of a still more serious act of gross misconduct involving starting the whole incident off and specific physical contact on that occasion, was not dismissed). There was no significant analysis by Mr Thomas evident as to how the avalanche of complaints against the claimant came about. If all had been true, it is remarkable and regrettable that many were not brought to the attention of senior management sooner especially when the claimant was progressed to C2-1 as little as six months previously, by which time many of the acts of misconduct alleged against him had already taken place. Whilst Mr Thomas approached his task in good faith and conscientiously, with Mr Butler's report before him as the basis for his disciplinary hearing, having failed to narrow down the charges against the claimant to those where there was indeed a case to answer based upon a clear allegation which the claimant could indeed try to answer, the process was almost bound to end with a finding of gross misconduct against the claimant on the basis of "no smoke without fire" described above.

9.8 Finally, the Tribunal found the approach to the appeal by Mr Bunce somewhat perfunctory. Whilst there is no need for rehearing as distinct from a review appeal, that stage does need to be thorough and meaningful if it is to put right any earlier defects. Although the appeal stage in itself would not have made the dismissal unfair, when looked at broadly it certainly did not eradicate the earlier flaws.

9.9 The Tribunal was throughout aware of the need not to substitute its own decision for that made by the respondent. It found no specific breach of the ACAS code but nonetheless found the dismissal unfair in all the circumstances when it stood back and viewed the case as a whole. This was a major employer with very extensive managerial and human resources to give to the disciplinary procedure, as was evidenced by the extensive investigation. Having regard to the cumulative effect of the flaws and defects identified above, the respondent did not act within the range of reasonable responses in treating the claimant's misconduct as a sufficient reason for dismissing him in all the circumstances here.

10 <u>Contributory fault</u>

Notwithstanding this finding of unfair dismissal, the Tribunal finds that the claimant contributed towards his own dismissal in very large part. It was conscious that it must not fall into the same trap of "no smoke without fire" as the

respondent. The Tribunal had heard the claimant's evidence and did not find him a witness of truth in his denials of those of the allegations which were specific, recent and attested to by a number of others. Even on his own version, he admitted swearing at and speaking in very disrespectful terms to Mr Lumbers about his mother; the Tribunal concludes that he certainly made both of the grossly offensive personal comments: "Go fuck your mum and suck on her hard nipples"; even if Mr Lumbers instigated that incident, the claimant rose readily to the bait. Yet this was a junior manager rather than a basic associate and indeed one who had been warned five years earlier about the use of inappropriate language in a text message to a manager and who been referred only some months before to the Equal Opportunities Policy, which included the principle of respect for others. Whilst that original warning in 2009 was long since spent and played no part in the respondent's decision-making, these matters both show that the claimant was not ignorant of the need to show respect towards colleagues. This respondent made very clear the inter-relationship between its Equal Opportunities/Diversity Policy and its disciplinary procedure and the claimant had acknowledged he had been told about inappropriate references to Goan associates being offensive (227) . However, the claimant had gone on to engage in what he described in evidence as "Facebook banter" which he conceded was "pretty poisonous" such as that to Blair Pollard on 1 May 2014. The Tribunal found on the balance of probabilities that he had also more recently sent a Facebook reply to Andrew Sloper, copied to others which was childish, rude and offensive towards both Andrew Sloper and two coordinators whom others would instantly have recognised (194). Moreover, the claimant accepted that he had told others he had driven at Glenn Fernandes, even though he had not done so, suggesting that this was something to make a joke about. In reality, this was boastful and intimidatory, implying to colleagues both that he was someone who might indeed have it in him to drive a car deliberately at a colleague but that he was so important within the respondent that he could get away with such outrageous and dangerous behaviour. In these circumstances, the tribunal finds that the claimant contributed towards his own dismissal to the extent of 75%. There is no basis for any different reductions as between basic and compensatory award. Consideration of remedy is adjourned to a date to be fixed. No remedy hearing will be listed until 28 days after this Judgment is sent to the parties. The parties are asked to notify the Tribunal at that stage whether a remedy hearing is then needed.

Regional Employment Judge Parkin

Dated 26 August 2016

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
26 AUGUST 2016 BY EMAIL ONLY
MR JA ONGARO FOR EMPLOYMENT TRIBUNALS