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EMPLOYMENT TRIBUNALS

Claimant: Mr N Asokkumar

Respondent: Canary Wharf Management Ltd

Heard at: East London Hearing Centre

On: 22-23 November 2016
& (in chambers) on 5
December 2016 and
22 March 2017

Before: Employment Judge C Hyde (sitting alone)

Representation

Claimant: Mr J Kendall (Counsel)

Respondent: Ms T Barsam (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

- (1) The unfair dismissal complaint was not well founded and was dismissed.
- (2) The breach of contract/wrongful dismissal complaint was not well founded and was dismissed.
- (3) The breach of contract and unlawful deduction from wages claims in respect of bonus payment were dismissed on withdrawal

REASONS

1 Reasons are provided in writing for the above judgment as the judgment was

reserved. Furthermore, the reasons are provided only to the extent that the Tribunal considers it necessary to do so in order for the parties to understand why they have won or lost; and further only to the extent that it is proportionate to do so.

Evidence Adduced and Documents Produced

2 The parties agreed on the contents of a bundle of documents [R1] consisting of two lever arch files of documents numbering approximately 600 pages.

3 In addition the Respondent prepared a chronology of events [R2]; a cast list [R3]; and a list of issues [R4].

4 The initial list of issues was revised in order to take into account the revision in the Claimant's claims. This was then submitted to the Tribunal on 22 November 2016 by way of a further document marked [R6].

5 On behalf of the Respondent the Tribunal heard evidence from David Fendley who was Group Personnel Manager for Canary Wharf Group; Mark Harris who was Director of Building Management for the Respondent and who dismissed the Claimant; and Thomas Bain Legal Counsel employed by Canary Wharf Contractors Ltd, who dealt with the appeal. Their evidence in chief was given by way of witness statements which were marked respectively [R5], [R7] and [R8].

6 At the commencement of the hearing the Claimant also produced for the Tribunal a chronology which was marked [C1]. Further Mr Asokkumar's evidence in chief was set out in a witness statement which was marked [C2].

7 In accordance with the Tribunal's direction at the end of the evidence, the parties then submitted written closing submissions and supplementary submissions which were sent to the Tribunal on 16 December 2016 by email. The submissions were dated 2 and 16 December 2016 respectively from the Claimant. The Respondent relied solely on their main closing submissions dated 2 December and did not present submissions in reply.

The Claims and Issues

8 At the hearing in November 2016, it was agreed that the Tribunal would determine liability in relation to the claims of breach of contract in respect of bonus payment, the wrongful dismissal and unfair dismissal claims; and in respect of the unfair dismissal complaint this would include determination of issues relating to *Polkey* and contributory fault if appropriate.

9 The Claimant withdrew the unlawful deduction of wages complaint relating to the bonus payment during the hearing. However, the complaint was still pursued under the breach of contract jurisdiction in respect of the bonus payment, until that was also withdrawn in closing submissions. Accordingly, the Tribunal dismissed those complaints on withdrawal.

10 The unfair dismissal complaint was an 'ordinary' unfair dismissal complaint under section 98(4) of the Employment Rights Act 1996 ("the 1996 Act"). The

Respondent sought to justify the dismissal on the basis that it was a fair dismissal which related to conduct on the part of the Claimant (section 98(2)(b)) and/or “some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held” (section 98(1)(b) of the 1996 Act).

11 The Claimant also complained that he had been wrongfully dismissed i.e. that the Respondent was not entitled to have dismissed him without due notice (summarily).

12 After omitting consideration of the withdrawn complaints, the agreed issues insofar as they related to the substantive claims and contributory fault and *Polkey* were as follows:-

Unfair dismissal

12.1 Did the Respondent have a potentially fair reason for the Claimant’s dismissal, as required under section 98(1) of the Employment Rights Act 1996? The Respondent relied on the following as the reason for dismissal:-

12.1.1 Conduct (section 98(2)(b) of the Employment Rights Act 1996); and/or

12.1.2 Some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held (section 98(1)(b) of the 1996 Act)?

12.2 Did the Respondent act reasonably in all the circumstances in treating the reason or reasons above as a sufficient reason for dismissal (in accordance with section 98(4) of the Employment Rights Act 1996)?

12.2.1 At the time of the dismissal, did the Respondent believe that the Claimant was guilty of gross misconduct and/or that there was a significant relationship breakdown that was sufficient to justify the dismissal?

12.2.2 At the time of the dismissal, did the Respondent have reasonable grounds for that belief?

12.2.3 At the time that the Respondent formed that belief on those grounds, had it carried out as much investigation as was reasonable in the circumstances?

12.2.4 Was the sanction of dismissal within the band of reasonable responses?

12.3 Was the dismissal procedurally fair as particularised in the following paragraphs for the grounds of claim: 5(b), (c), (d), (e), (f), (g), (h); 7(a)-(h), (j)-(m), (o), and (p) (as set out in detail below).

13 The procedural matters that the Claimant relied on, taken from the claim form,

were as follows:-

- 13.1 That the Respondent failed to separate its investigation into his grievance from the disciplinary and appeal hearings.
- 13.2 That the Respondent wrongly disregarded earlier contemporaneous evidence because a witness could no longer remember what had happened when questioned later or gave different evidence when questioned later.
- 13.3 That the Respondent accepted evidence which supported the disciplinary charges against the Claimant but disregarded evidence which did not support the disciplinary charges.
- 13.4 That the Respondent failed to carry out the same level of investigation into the behaviour of Mr Hajjaj and Mr Thomson as it did in relation to the Claimant.
- 13.5 That the Respondent refused to hear evidence about, failed to investigate and failed to take into account the background to the meeting of 3 November 2015 and, in particular, the earlier breakdown in trust and confidence between the Claimant and Mr Hajjaj and the subsequent behaviour of both Mr Hajjaj and Mr Thomson towards the Claimant leading up to the meeting on 3 November 2015.
- 13.6 That the Respondent failed to investigate the reasonableness of Mr Hajjaj's behaviour at the meeting on 3 November 2015; and
- 13.7 That the Respondent did not fairly investigate the grievances the Claimant had raised, including his allegations against Mr Hajjaj and Mr Thomson.

14 The above matters were relied on as relevant to the investigation into the disciplinary charges.

15 The Claimant further alleged that there were procedural errors which affected the fairness of the disciplinary hearing in that when considering whether to dismiss the Claimant the Respondent refused to consider or take into account relevant matters and evidence and disregarded matters and evidence which should have been taken into account. These were that the Respondent:-

- 15.1 Disregarded evidence which witnesses gave on or shortly after 3 November 2015 and unfairly preferred to accept evidence which witnesses provided later;
- 15.2 Wrongly discounted the evidence of witnesses who could no longer remember what had happened when asked to give evidence later;
- 15.3 Disregarded discrepancies between the accounts of events given by witnesses soon after the incident on 3 November 2015 and later;

- 15.4 Disregarded the evidence of witnesses whose evidence did not support the disciplinary charges;
 - 15.5 Disregarded evidence which challenged the account of events given by Mr Hajjaj and Mr Thomson;
 - 15.6 Disregarded discrepancies between the evidence of Mr Hajjaj and Mr Thomson;
 - 15.7 Disregarded the discrepancies between their evidence and that of other witnesses;
 - 15.8 Failed to consider or give due weight to the earlier breakdown in the relationship between the Claimant and Mr Hajjaj, Mr Hajjaj's subsequent behaviour towards the Claimant and Mr Thomson's behaviour towards the Claimant when evaluating their evidence;
 - 15.9 Failed to consider and test whether their evidence was biased against the Claimant;
 - 15.10 Failed to consider or give due weight to the grievances the Claimant had raised about the way he had been treated by Mr Hajjaj, Mr Thomson and the Respondent;
 - 15.11 Failed to consider whether the Claimant had behaved reasonably in relation to the matters which led to his meeting on 3 November 2015 with Mr Hajjaj during the meeting and subsequently;
 - 15.12 Failed to consider or give due weight to whether the evidence of impartial witnesses should be preferred to that of Mr Hajjaj and Mr Thomson;
 - 15.13 Failed to consider whether if the Claimant had criticised members of staff and made serious allegations about their behaviour, including that of Mr Hajjaj and Mr Thomson, that was justified by their behaviour and the way in which the Respondent had conducted the disciplinary investigation, disciplinary hearing and disciplinary appeal, his grievance hearings and the other disciplinary procedure he had been subjected to; and
 - 15.14 Generally failed to hold a fair and impartial dismissal hearing and appeal hearing.
- 16 In relation to remedy for any unfair dismissal,
- 1.1 Would the Claimant have been dismissed in any event?
 - 1.2 Did the Claimant contribute to his dismissal?

Wrongful dismissal

17 What was the Claimant's conduct such as to justify summary dismissal?

Relevant Law

18 The Claimant's Counsel stated that this case involved no particular issue of law. In the Respondent's Counsel's submissions, only trite law in this field was referred to. The Tribunal also considered that the law did not present any particular challenges in this case. Thus, although cases and statute law were incorporated into the written submissions, it is not necessary or proportionate to set out the relevant law in these Reasons.

Findings of Fact and Conclusions

19 The facts were found on the balance of probabilities.

20 In the findings of fact set out below, the Tribunal has referred to relevant page numbers from the bundle.

21 The Respondent is a subsidiary company of Canary Wharf Group plc. It undertakes management of the Canary Wharf estate. Its roles on the estate include security, traffic management, health and safety and facilities management.

22 The Claimant commenced employment with the Respondent as a Security Officer in May 1996 and was appointed Car Parks Supervisor in 2004. He reported to Mr Mo Hajjaj, Deputy Car Parks Operation Manager. The Claimant raised several grievances against numerous colleagues including Mr Hajjaj and Christine Wheeler, Car Parks Operations Manager. None of the grievances was upheld.

23 On 19 April 2010, the Claimant was appointed Car Parks Cleaning Supervisor in an attempt to resolve his concerns about his reporting structure (pp75 to 76).

24 In December 2013, following a restructure, the Claimant was advised that he should once more report to the Deputy Car Parks Operations Manager, who was at that time Mr Bryden Thomson. The Claimant was initially concerned about the change in line management as Mr Hajjaj had been promoted to Car Parks Operations Manager and Mr Thomson reported to Mr Hajjaj. It was agreed therefore that Andrew Shrimplin, Building Manager, would have a "dotted line" responsibility for the Claimant.

25 On completion of a three month trial period, the Claimant confirmed that he had no ongoing concerns regarding his line management by Mr Thomson (p435). In cross examination, the Claimant confirmed that he found Mr Thomson's approach to be open, fair and balanced at least until March 2015. The Claimant received broadly positive appraisals from Mr Thomson in October 2014 and March 2015, although his appraisal in October 2014 noted that the Claimant "needs to address issues in a more

constructive manner. He needs to be more open to feedback and remain professional, calm and not raise his voice when having challenging conversations” (p81C).

26 The Claimant also confirmed that following the restructure he had a reasonably good relationship with Mr Hajjaj until shortly before the incident on 3 November 2015. The Claimant confirmed in cross examination that he talked to Mr Hajjaj about family, holiday and his children. The Claimant suggested that he found discussions about work related matters with Mr Hajjaj difficult and that Mr Hajjaj had called him “rude”.

27 In August 2015, the Claimant was invited to a Disciplinary Investigation regarding allegations that he had been disrespectful, uncooperative and unhelpful (pp447-448). The disciplinary charges arose out of email correspondence from the Claimant and other communication by Mr Asokkumar with his line manager, Mr Thomson. The Claimant was ultimately given a verbal warning for that behaviour on 4 December 2015, confirmed in writing on 16 December 2015 (pp468 - 469).

28 Meanwhile, on 3 November 2015, at 8.20am the Claimant answered a telephone call in the Car Parks Office from a customer seeking an update on an incident regarding his car. Mr Asokkumar later called the customer back and told him that he had been given the wrong advice not to contact the police. There followed an email exchange during which the Claimant reported the matter to the “Car Parks” email group and staff and expressed his view that security should in some circumstances advise the customer to report the matter to the police (pp83B and 93C). The Claimant entered Mr Hajjaj’s office as Mr Hajjaj was in the process of responding to the Claimant’s email. An altercation ensued.

Incident on 3 November 2015

29 The Claimant called into Mr Hajjaj’s office at approximately 3.30pm to ask Mr Hajjaj where Bryden Thomson was. Mr Hajjaj took the opportunity to ask the Claimant about his finishing time. The Tribunal accepted the Claimant’s evidence that he explained that he had finished at 3.30pm for the last three years and said something like “Mo do you remember you said to me last week that your memory is not as sharp as it used to be”. In response, Mr Hajjaj asked the Claimant if he realised he was being rude (Claimant’s Witness Statement at Paragraph 43).

30 There then followed a discussion of the Car Parks Customer Complaints Procedure. Mr Hajjaj told the Claimant that he did not want the Claimant to answer the phone. The Claimant replied that he would answer the phone when there was no one in the office. Mr Hajjaj again insisted that the Claimant should not answer the phone. The Claimant accepts that he repeated that he would answer the phone when there was no one in the office and said words to the effect that if Mr Hajjaj did not want him to attend to the phone, he should make sure the office was manned during office hours (p92). Mr Hajjaj construed these comments as a criticism of his ability to manage the office. The Claimant accepted that Mr Hajjaj again accused him of being rude and asked the Claimant to leave his office.

31 The Claimant did not immediately leave Mr Hajjaj's office. What followed was the subject of some dispute. There was a dispute as to whether Mr Hajjaj advanced towards Mr Asokkumar or advanced towards the door at that stage. There was also a dispute as to whether Mr Hajjaj said "please" when asking the Claimant to leave, whether he asked the Claimant to leave on numerous occasions, and as to when he asked the Claimant to leave.

32 At some point during the altercation Mr Hajjaj and the Claimant were standing very close together. The Claimant contended that it was Mr Hajjaj who approached him, whereas the Respondent contended that the Claimant pushed his chest up towards Mr Hajjaj as Mr Hajjaj stood with one hand on the door. It was not disputed that the Claimant said "don't push me" loudly even though Mr Hajjaj had not pushed him. The Claimant then sat down in a chair. Either shortly before or after the Claimant sat down, Mr Thomson entered the room. Mr Thomson asked the Claimant to leave the room and he then did so, with Mr Thomson.

33 Later that afternoon, Mr Hajjaj called David Fendley, Group Personnel Manager, upset and reported that the Claimant had been difficult and argumentative (p312A). Mr Fendley asked Mr Hajjaj to send him an email about what had happened, which Mr Hajjaj did at 17.27 that day (p83B). Mr Fendley then asked Mr Hajjaj to provide a chronology and more detail. This was provided by Mr Hajjaj the next morning (p83A).

34 Mr Fendley spoke to Mr Duncan, Building Manager and Mr Hajjaj's line manager, who took charge of gathering evidence about what had happened. Mr Duncan contacted everyone in the area to ascertain what they had witnessed. Between 4 and 5 November, Mr Duncan received emails from Yasmin Saddique (p86B), Bryden Thomson (pp87 - 89), Mo Hajjaj (pp90 - 91), and Abdul Kadir (p96) setting out what they had seen. Thomas Kittoe and Raza Mirza confirmed that they had not witnessed the events.

35 Mr Fendley made the decision to recommend the suspension of the Claimant based primarily on the contents of the statements of Mr Hajjaj and Mr Thomson and his view that the Claimant's conduct was potentially gross misconduct. This decision was reinforced by the evidence provided by Mr Kadir and Ms Saddique.

36 On 6 November 2015, the Claimant was informed that he was being suspended while allegations of gross misconduct were investigated. It was made clear to the Claimant that suspension was not a form of disciplinary action (pp101 - 102).

37 Meanwhile on the morning on 4 November 2015, the Claimant sent an email to Andrew Shrimplin with his version of events (p92). It was headed "verbal abuse and threat". However, the Tribunal was satisfied that none of Mr Hajjaj's conduct as described in the Claimant's email could properly be considered either verbal abuse or a

threat. At least half of the email was taken up with the Claimant's contention that he should continue to answer the phone despite Mr Hajjaj's very clear instructions to the contrary. This clearly demonstrated that the Claimant was stating an intention not to comply with a specific instruction from his second line manager in relation to an activity (answering the telephone in that location) which fell outside the scope of Mr Asokkumar's duties. Whilst Mr Asokkumar described that Mr Hajjaj had come so close to him that his jacket touched the Claimant's blazer, the Tribunal considered that the Claimant's account, taken as a whole, portrayed him taking on his manager, for no good reason.

38 Mr Shrimplin forwarded this email to Mr Duncan who in turn forwarded it to Mr Fendley (p92). Mr Fendley asked the Claimant if he wanted the matter dealt with as a grievance. The Claimant did not immediately request this, but said he would get back to Mr Fendley. It was only after the Claimant was suspended on 6 November 2015 at 9.45am that he confirmed (at about 11.15am on the same day) that he wanted to formally invoke the grievance procedure (p97).

39 On 9 November 2015, the Claimant raised a formal grievance regarding his suspension. Danny Ring, Building Manager, was appointed to investigate both the Claimant's grievance and the disciplinary allegations simultaneously. The Claimant agreed to this approach (p127). The Respondent had initially appointed Jim Duncan to undertake the investigations but he was removed at the Claimant's request.

40 Mr Ring interviewed the Claimant (p152), Mr Hajjaj (p206), Ms Saddique (p199), Bryden Thomson (p210), Abdul Kadir (p201), Alexandria Allen (p197) and Sha Rahman (p204) as part of the disciplinary investigation.

41 A meeting took place to consider the grievance on 25 November 2015, and the Claimant submitted several letters, emails and further information, all of which were considered by Mr Ring. Mr Ring rejected the Claimant's grievance on 26 January 2016 (pp213 – 215). The Claimant appealed against this outcome. Mark Harris, Director of Building Management, was appointed to consider the Claimant's appeal against the outcome of his grievance and the disciplinary allegations against the Claimant.

42 On 22 February 2016, the Claimant raised a grievance against Mr Thomson "for deliberately fabricating false and untrue accounts" (pp225 - 227). Mr Harris was asked to consider these allegations also.

43 On 26 February 2016, Mr Harris conducted the Grievance Appeal Hearing (p247) and the Disciplinary Hearing (p253). Thereafter, he re-interviewed Mr Hajjaj (p283), Mr Thomson (p278), Ms Allen (p288) and Mr Kadir (p291). Mr Harris rejected the Claimant's grievance appeal on 7 April 2016 and thereafter reconvened the Disciplinary Hearing on 21 April 2016. The Claimant was notified of the decision to dismiss him by letter dated 22 April 2016 (p320).

44 In summary, Mr Harris concluded that all four of the allegations against the Claimant were made out, namely that the Claimant:

- (a) Repeatedly refused to comply with the Customer Complaints Procedure;
- (b) Attempted to intimidate Mr Hajjaj by physically squaring up to him;
- (c) Refused to leave Mr Hajjaj's office despite repeated requests to do so; instead sitting down in one of the chairs until escorted from the office by Mr Thomson; and
- (d) Was disrespectful to Mr Hajjaj by telling him that he was not managing the Car Park office in an appropriate manner.

Mr Harris concluded that the acts of insubordination and the threatening behaviour which formed the basis of the disciplinary allegations against the Claimant amounted to Gross Misconduct and that dismissal was the appropriate sanction. The disciplinary charges listed above were as set out in the letter dated 17 February 2016 inviting the Claimant to the Disciplinary Hearing (pp220 – 222).

45 The Claimant appealed against the decision to dismiss him. The Appeal was considered by Thomas Bain, Legal Counsel, and Adrian Madigan, Accounts Receivable Manager. Mr Fendley was present to advise on procedural aspects and to collate documentation. Following the Appeal Hearing which was attended by the Claimant, Mr Hajjaj (p382G), Mr Thomson (p382D) and Mr Kadir (p382A) were interviewed once again. Mr Bain and Mr Madigan were not satisfied that there was sufficient evidence to suggest that the Claimant had explicitly refused to comply with the customer complaints procedure (allegation (a)). However, the decision to dismiss the Claimant in relation to the remaining three allegations was upheld (Bundle at Page 383).

Unfair Dismissal

Reason for dismissal

46 It is settled law that the reason for dismissal is the set of facts known to the employer or of beliefs held by it, which causes the employer to dismiss the employee (*Abernethy v Mott, Hay and Anderson* [1974] ICR 323). It is clear from both the letter inviting the Claimant to a disciplinary hearing and the letter communicating the outcome of the disciplinary hearing that the factual matters relied upon as allegations of Gross Misconduct were that the Claimant:

- (a) Repeatedly refused to comply with the Customer Complaints Procedure;
- (b) Attempted to intimidate Mr Hajjaj by physically squaring up to him;
- (c) Refused to leave Mr Hajjaj's office despite repeated requests to do so; instead sitting down in one of the chairs until escorted from the office by Mr Thomson; and
- (d) Was disrespectful to Mr Hajjaj by telling him that he was not managing the Car Park office in an appropriate manner.

47 In so far as findings were made in relation to the Claimant's honesty, the

Tribunal was satisfied that these were not considered as separate allegations of misconduct, but were considered when assessing the appropriate sanction. Mr Harris' evidence on this issue, which the Tribunal accepted, was that the Claimant's dishonest conduct was not the basis of the decision to dismiss but confirmed to him that dismissal was the appropriate sanction (Witness Statement at Paragraph 48). This was consistent with the contents of the disciplinary outcome letter, which concluded by summing up the findings in relation to the four allegations of gross misconduct set out above without any mention of dishonesty (p327) and restated that "acts of insubordination and threatening behaviour" were the basis of the disciplinary process and finding of gross misconduct (p329).

48 In any event, it was clear that the allegations of dishonesty played no material part in Mr Bain's decision to uphold the decision to dismiss. Mr Bain gave clear and cogent evidence that he considered dismissal to be the appropriate outcome irrespective of any allegation of dishonesty (Thomas Bain's Witness Statement at Paragraph 37 and in response to cross examination).

49 The Tribunal accepted that the factual basis for dismissal was as set out above – these were the matters that the Respondent's decision to dismiss was based on. Such conduct constituted a potentially fair reason for dismissal under the 1996 Act, being either a reason relating to the Claimant's conduct or some other substantial reason of a kind such as to justify dismissal, namely a significant breakdown in the relationship.

Fairness in all the circumstances (s98(4))

50 Following British Home Stores v Burchell [1980] ICR 303 it is for the Tribunal to consider:

- (i) Whether the employer believed that an employee was guilty of misconduct.
- (ii) Whether the employer had in its mind reasonable grounds on which to sustain that belief.
- (iii) Whether the employer formed that belief after it had carried out as much investigation into the matter as was reasonable in all the circumstances.

In relation to (ii) and (iii), the burden of proof is neutral (Boys and Girls Welfare Society v McDonald [1977] ICR 693, EAT).

51 It is trite law that it is for the Tribunal to assess whether the actions of the Respondent in dismissing the Claimant were within the range of reasonable responses.

52 Where a reason for dismissal is a composite number of conclusions about a number of different events it is the whole of that reasoning that a Tribunal must examine.

Reasonable grounds for belief

53 Both Mr Harris and Mr Bain had reasonable grounds to sustain the belief that the Claimant had physically squared up to Mr Hajjaj in an intimidating way, refused to

leave Mr Hajjaj's office despite repeated requests to do so, and had been disrespectful to Mr Hajjaj by telling him that he was not managing the Car Park Office appropriately, given the following admissions by the Claimant, and other evidence which the Respondent was reasonably entitled to accept:

- (a) The Claimant admitted having told Mr Hajjaj "if he does not want me to attend the phone, he should make sure the office should be manned during office hours", strongly implying that Mr Hajjaj was not managing the Car Park Office appropriately (p92);
- (b) The Claimant admitted that Mr Hajjaj told him at least twice that he was being rude;
- (c) Alexandria Allen considered that the Claimant was agitating the situation and was trying to "wind Mr Hajjaj up" (p289);
- (d) The interviews and statements provided by Ms Saddique (pp86B and 199), Ms Allen (pp197 and 289) and Mr Kadir (pp96 and 292) confirmed that Mr Hajjaj asked the Claimant to leave on multiple occasions and, at least at first, had asked politely;
- (e) It was undisputed that the Claimant did not leave the office, despite being asked to do so by Mr Hajjaj on several occasions. On the accounts of Ms Saddique, Ms Allen and Mr Kadir, Mr Hajjaj asked the Claimant to leave multiple times before the Claimant shouted "don't push me";
- (f) The Claimant admitted that he did not leave the office until asked to do so by Mr Thomson.
- (g) The Claimant's explanation that he chose to sit down because he felt physically threatened by Mr Hajjaj was implausible, and the Respondent was reasonably entitled to reach that view. On the Claimant's own account, whilst asserting that he was fearful of being pushed out of the room (p92), he nonetheless decided to sit down rather than leave the room. The decision to take a seat strongly suggested that the Claimant moved back into the room away from the doorway in order to sit down. This finding was also corroborated by the Claimant's evidence during the Appeal (pp 365 and 370) about the location of the door and the available seating.
- (h) Moreover, the Claimant revealed his real reason for choosing to sit down when he stated in his letter of 22 February 2016 that he "sat on the chair wanting to continue to talk" (p226).
- (i) Mr Thomson gave an account that the Claimant was "aggressive in his manner" (p89) and that the Claimant was "standing squared up to Mr Hajjaj in his face and he was clearly agitated" (p211).
- (j) Mr Thomson, Mr Hajjaj and the Claimant's accounts were all consistent in suggesting that Mr Thomson entered the office very close to the time when the Claimant sat down.
- (k) The Claimant stated that he felt reassured when Mr Thomson came in the office;
- (l) The Claimant admitted to having shouted "don't push me", knowing that Mr Hajjaj had not pushed him. Moreover he expressly admitted that he had said it so that others could hear. The Claimant admitted that this was done with the intention of influencing Mr Hajjaj's behaviour (Bundle at Page 266). Mr Thomson provided a statement that the Claimant had told Mr Thomson immediately after the incident that he had been pushed and only admitted that there was no push on further questioning (Bundle at Page 89).

(m) Mr Hajjaj reported being “very upset” and shaken up by the incident. This was consistent with Mr Fendley’s impression of him on the afternoon of the 3 November 2015.

54 Moreover, it was within the range of reasonable responses for the Respondent to reject the contention that Mr Thomson and Mr Hajjaj had colluded. The Claimant presented no evidence in support of this contention save for identifying some inconsistencies in their accounts. The Claimant overstated the inconsistencies. The Respondent was reasonably entitled to conclude that the inconsistencies in their accounts in fact suggested that they had not colluded and was attributable to their different viewpoints.

55 Based on the evidence available, it was within the range of reasonable responses for the Respondent to conclude that it was more likely than not that the Claimant had acted in an insubordinate and intimidating manner, and that such conduct constituted gross misconduct or a serious breakdown in the relationship between the Claimant and the Respondent. The Respondent was further reasonably entitled to conclude that the fact that the Claimant and Mr Hajjaj felt able to exchange pleasantries the following day was of limited relevance when assessing the Claimant’s ability to discuss work matters and take orders from Mr Hajjaj going forward.

Reasonable investigation

56 It is for the Tribunal to determine whether the Respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. The investigation was full and involved interviews of several witnesses on multiple occasions. The Claimant failed, during the Tribunal Hearing and indeed during the disciplinary procedure), to clearly identify what further investigation he says should have been done.

57 The only further investigation that was suggested related to the allegation that the Claimant was dismissed by reason of dishonesty. In so far as the Respondent considered the Claimant’s dishonest account of the events of 3 November 2016 to be relevant, that matter was sufficiently investigated in the course of the investigation into the events of 3 November 2016. In particular, the Claimant was given the opportunity to comment on and present any evidence to explain why he had shouted “don’t push me” so others could hear. The Respondent’s failure to expressly put to the Claimant that a statement had been made dishonestly did not in all the circumstances of this case render the decision to dismiss unreasonable, particularly given the limited relevance of the concern about the Claimant’s honesty to that decision.

58 In so far as any criticism was made of the Respondent’s failure to investigate historic matters involving other managers, the Tribunal was satisfied that the decision that these matters were of insufficient relevance to merit further investigation was a conclusion which fell within the range of reasonable responses. This is particularly so given the Claimant’s “significant personnel file”.

Fair procedure

59 In considering the validity or otherwise of the points raised by the Claimant in relation to procedural failings the Tribunal had regard to the ACAS Code of Conduct on disciplinary procedures. The Tribunal was satisfied that the Respondent had met those standards.

60 It was suggested that the decision to suspend the Claimant prejudiced the disciplinary procedure that followed. There was no evidence presented either during the disciplinary procedure or to the Tribunal that there was any actual prejudice to the Claimant. Moreover the decision to suspend the Claimant and not Mr Hajjaj was within the range of reasonable responses. Mr Hajjaj's account was, on its face, supported by the account provided by Bryden Thomson and Ms Saddique. Moreover, while Mr Fendley under cross examination accepted that the Claimant's complaint against Mr Hajjaj was "possibly" an allegation of gross misconduct, there was in fact nothing in the substance of the Claimant's email complaint that could properly be considered gross misconduct, warranting the immediate suspension of Mr Hajjaj. It was Mr Fendley's evidence that he would have suspended Mr Hajjaj if anything emerged in the course of the investigation into the incident that warranted his suspension. The Tribunal had no good reason to reject that evidence.

61 The fairness of the procedure must be looked at as a whole. In so far as there were any procedural flaws, they were insufficient to render the dismissal unfair when considering the procedure as a whole and when taken against the totality of the reasons for the dismissal and the particular focus on the Claimant's insubordinate and intimidating conduct towards Mr Hajjaj.

62 The Appeal was entirely independent and not limited to a review of the decision of Mr Harris. Mr Bain, Legal Counsel, had not previously met the parties involved and Mr Madigan was from a different department. The Tribunal accepted the evidence of Mr Bain and Mr Fendley to the effect that Mr Fendley was not involved in the meetings between Mr Madigan and Mr Bain at which the decision on appeal was discussed, albeit that the contrary impression was given by the inclusion of his name as a panel member on the minutes, and the fact that he also signed the appeal outcome letter.

63 It was apparent that Mr Bain conducted further investigations and reached a fresh conclusion on the totality of the evidence before him. Under cross examination Mr Bain gave a cogent and persuasive analysis of the evidence before him. He too was unperturbed by the minor inconsistency in the accounts of Mr Hajjaj and Mr Thomson when taken against the totality of the evidence.

Dismissal a fair sanction

64 Dismissal was within the range of reasonable responses. The Claimant's conduct was rude, insubordinate and directed towards a senior manager. Moreover rather than admit to his conduct or acknowledge any wrongdoing he made serious and unsupported allegations against his colleagues. While the Claimant had long service, it was not good service. It was marked by a recent verbal warning and his most recent full appraisal suggested that he found it difficult to remain calm and address issues in a

constructive and professional manner without raising his voice (p81C). His record did not therefore provide much by way of mitigation.

65 The Claimant did not complain during the disciplinary proceedings that his dismissal was inconsistent with the Respondent's treatment of similar instances of misconduct. In accordance with the principles decided in the case law the Tribunal did not find that the comparators relied upon were "truly parallel" (*Hadjioannou v Coral Casinos* [1981] IRLR 352). The comparators' cases can be distinguished in that A was subjected to considerable provocation and B exhibited obvious contrition. Neither case involved insubordination or employees with a live warning on file.

66 In all the circumstances therefore, it was within the range of reasonable responses for the Respondent to treat these cases differently from that of the Claimant.

Polkey/ Contribution

67 It was unnecessary to consider these issues in the light of the Tribunal's conclusion that the dismissal was not unfair.

Wrongful Dismissal

68 The Claimant admitted making statements which were rude and disrespectful to Mr Hajjaj. Moreover, he admitted declining to leave Mr Hajjaj's office despite being asked to do so several times. The Claimant's evidence in cross examination that Mr Hajjaj only asked him to leave as he approached the Claimant and only repeated his requests after the Claimant sat down is inconsistent with the Claimant's own witness statement. It is also inconsistent with the accounts given by Mr Thomson, Ms Saddique, Mr Kadir and Ms Allen all of whom reported hearing Mr Hajjaj ask the Claimant to leave on numerous occasions prior to the Claimant shouting "don't push me" (i.e. prior to the Claimant sitting down). It was more likely than not that the Claimant was asked to leave numerous times before Mr Hajjaj came towards the door, but that Mr Asokkumar refused to do so.

69 Moreover, it was very likely that the Claimant chose to sit down in order to continue the conversation with Mr Hajjaj, as he admitted in his letter of 22 February 2016, and not because he felt intimidated. On the Claimant's own account which was written the day after the incident, he feared being pushed out of the office (p92). This strongly suggests that he was standing in or close to the doorway and so had plenty of opportunity to leave. Instead he chose to sit down. If the Claimant had felt intimidated, it was more likely that he would have tried to leave his manager's office. Given the Claimant's role in provoking and escalating the conflict it was more likely than not that the Claimant "squared up" to Mr Hajjaj in an aggressive manner as the Respondent alleged. The Claimant's conduct when taken as a whole, constituted a serious breach going to the very root of his contract of service.

70 The Tribunal found that in the circumstances the Respondent was entitled to dismiss the Claimant summarily.

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Employment Judge Hyde

24 March 2017