

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104422/16

5

Held in Glasgow on 21, 22 & 23 March 2017

Employment Judge: Robert Gall

10

Mr John Coulter

**Claimant
Represented by:
Mr G Bathgate -
Solicitor**

15

First Scotland East Limited

**Respondents
Represented by:
Ms L Byars -
Solicitor**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25

The Judgment of the Tribunal is that the dismissal of the claimant by the respondents was not unfair in terms of Section 98(4) of the Employment Rights Act 1996. The claim is accordingly unsuccessful.

30

REASONS

1. This case proceeded to a Hearing at Glasgow. The Hearing was conducted over 21, 22 and 23 March 2017. The claimant was represented by Mr Bathgate. The respondents were represented by Ms Byars. A joint bundle of productions was lodged.

40

2. Evidence was heard from the following parties:-

E.T. Z4 (WR)

- Noel Barrowman, Investigating Officer
- Jim Brennan, Dismissing Officer
- 5 • John Scott, First Appeal Hearer
- Kenny Dickson, Second Appeal Hearer
- The claimant

10

3. The following parties are relevantly mentioned at this point as reference was made to them during the course of relevant evidence:-

15

- Neil Boyd, Cleaner
- Paul Brannigan, Engineering Manager and Line Manager for the claimant
- Paul Collins, Electrician, fellow employee of the claimant
- 20 • Paul McCorry, fellow employee of the claimant
- Derek Ormston, Trade Union Representative who accompanied the claimant at the investigation, disciplinary and appeal meetings.
- 25 • Jason Hackett, formerly Operations Manager, Livingston and now Business Director.

30

Background

4. There had initially been four matters raised for investigation. They then became the subject of disciplinary proceedings. Three of those were upheld at time of the initial decision to dismiss. Each one was said in its own right to be an “*offence*” which warranted dismissal.

5

5. On the first appeal, the claimant achieved success in relation to one of the those “*charges*”. Two charges remained and were upheld as grounds of dismissal.

10

6. On the second appeal, the claimant was successful in relation to one of the then remaining two grounds of dismissal. There remained, however, one “*offence*” which was regarded by the respondents as constituting gross misconduct and in respect of which the decision the claimant be summarily dismissed was upheld.

15

7. At Tribunal the evidence and submissions related to the one “*offence*” which had become the basis for dismissal of the claimant. The claimant’s position was that the respondents did not have reasonable grounds on which to form a genuine belief that he was “*guilty*” of the misconduct. He took the further point that even if reasonable grounds existed for the belief, the sanction of dismissal was harsh and too severe in the circumstances, rendering the dismissal unfair. Dismissal was said to be substantively unfair. It was also said to be procedurally unfair given what was said to have been the lack of fair notice to the claimant as to the date and place of events which formed the basis of the grounds on which the claimant was dismissed.

20

25

8. The claimant sought compensation as remedy if he was successful. A Schedule of Loss was agreed. It appeared at page 207 of the bundle. From the Schedule which appeared there, the entries in respect of pension were adjusted such that the pension loss claimed became £600. This meant that the total sum claimed was £7,355.

30

Facts

9. The following were found to be the relevant and essential facts.

The Claimant`s Employment

5 10. The claimant commenced employment with the respondents on 27
September 2006. He was employed as a Chargehand in the Engineering
Department. His responsibilities comprised safety critical areas in relation
to buses which are operated by the respondents. He dealt with mechanical
10 faults, resolved those including, for example, issues with brakes on the
buses.

11. The claimant`s employment ended on 16 March 2016. He had therefore, at
time of his dismissal, 9 complete years of service.

15 12. The claimant`s gross wage exceeded the relevant statutory maximum in
respect of compensation, being £475 per week. After dismissal from the
respondents he obtained employment with a different bus operator, McGills.
He commenced employment with McGills on 21 March 2016. In that
employment he suffered a wage loss of £40 per week. There was also a
20 reduction in pension contributions made by his new employer as compared
to the pension contributions made by the respondents.

13. The respondents employed apprentices. The claimant had a role, as
Chargehand, in supervising apprentices.

25

14. A copy of the claimant`s written statement of terms and conditions of
employment appeared at pages 208 to 216 of the bundle.

30

15. A copy of the respondents disciplinary policy and procedure appeared at
pages 187 to 193 of the bundle. In that policy, Section 2.4 at page 191 of
the bundle set out examples of gross misconduct, stating that the list
provided was not exhaustive. The list included:-

- Serious acts of insubordination towards Company Directors, managers, employees, clients or members of the general public
- Bringing the Company into disrepute.

5

Initial awareness of Respondents

16. The claimant had lodged a grievance against Mr Brannigan in September 2015. That was being investigated. The respondents had confirmed in
10 December 2015 that it was still being investigated.
17. On 11 January 2016 the claimant said to the respondents that he was feeling bullied, harassed and was starting to feel depressed about the situation at work. His complaint related to a note put on the notice board by
15 Paul Collins. The claimant believed it related to him. He also believed that Mr Brannigan had instigated Mr Collins in the writing of the note.
18. Mr Barrowman, Staff Manager with the respondents at Livingston, was asked by Operations Manager, Scott Ferguson, to investigate this matter.
20
19. Mr Barrowman met with the claimant on 11 January 2016. A copy of the notes of that meeting appeared at page 42 of the bundle.
20. The note to which the claimant made reference in his meeting with Mr
25 Barrowman appeared at page 58 of the bundle. That note contained foul and abusive language. It did not identify the party who was being talked about by naming that party.
21. Mr Barrowman spoke with Mr Collins. Mr Collins accepted that he had
30 written the note. He explained to Mr Barrowman that the note was not directed to the claimant. Mr Collins explained that the note was written when he felt low and in retaliation for a picture which had been put up on the

notice board and was directed at him. He apologised for what he referred to as being an error of judgment.

5 22. Mr Barrowman, as part of this investigation, spoke with Mr Brannigan. Mr Brannigan had taken the notice which related to Mr Collins off the notice board. Mr Barrowman said that this matter should be dealt with by management.

10 23. In course of his investigations, Mr Barrowman was approached by Mr Boyd. Mr Boyd said he felt intimidated. Mr Barrowman said that he would listen to any allegations, however, wished them to be put in writing. Mr Boyd then put his comments at that point in writing. A copy of the note from Mr Boyd appeared in typewritten form at page 77 and in handwritten form at page 78 of the bundle. The note is not dated. It was received by Mr Barrowman on
15 19 January 2016.

20 24 Mr Barrowman met with Mr Boyd on 26 January 2016. A copy of a note of that meeting in typewritten form appears at page 86 of the bundle. The note in handwritten form appears at pages 87 and 88 of the bundle.

25 25. In course of that meeting with Mr Barrowman, Mr Boyd said:-

"I have also seen John Coulter write on a You First magazine with Jason`s face on it but could not tell you what had been written on it."

26. In light of Mr Boyd`s comments, Mr Barrowman spoke once more to Mr Brannigan. He asked Mr Brannigan if there had been any other material of which he was aware in addition to the notice written by Mr Collins. Mr Brannigan said to Mr Barrowman that he had found a magazine with writing
30 on it. Mr Barrowman asked that Mr Brannigan write a statement as to where he had found the magazine. Mr Barrowman said that he would investigate that. He took the magazine from Mr Brannigan.

27. Mr Brannigan wrote a statement and passed that to Mr Barrowman. A copy of that statement appeared at pages 67 and 68 of the bundle.

5 28. The respondents publish a quarterly magazine known as You First. It contains news of different goings on within the respondents` organisation. It also contains information as to events with which the respondents are linked and which involve the general public. The addition for Winter 2015 had been published in late 2015.

10 29. There are many copies of the magazine made available to employees.

30. In his statement, Mr Brannigan said that in course of one of his daily "walk around checks" he noticed an edition of the company magazine "*resting upon John Coulter`s toolbox*". He went on to say that this magazine appeared to him to be a new edition. He therefore picked it up for a quick read as usually there were members of the Livingston engineering section referred to in the magazine.

15

31. Mr Brannigan went on to say:-

20

"Straight away I noticed that the magazine had been drawn on every picture and that every picture was now containing abusive and offensive writing. I kept hold of the magazine as I didn`t want anyone to see the abuse that was being aimed at individuals."

25

32. He then expressed the view that the terms used were not such that they could be regarded as being banter. He said that in his opinion this was a form of harassment and bullying which was why he had removed the magazine and given it to Mr Barrowman as he was aware that a case was ongoing in connection with individuals who had claimed that they were being harassed or bullied.

30

33. Mr Brannigan gave the magazine to Mr Barrowman on the day when he first saw it. He did not immediately give it to Mr Barrowman, however, as he was preparing for a visit by way of inspection in connection with wrench awards which relate to cleanliness of work zone areas.

5

34. A copy of the magazine which Mr Brannigan passed to Mr Barrowman appeared at pages 69 to 75 of the bundle.

35. On the front page of the magazine Jason Hackett's photograph appears. He is pictured with a schoolgirl who has produced a poster in relation to vandalism. Speech bubbles are drawn emanating from the mouth of the schoolgirl and containing offensive remarks. An offensive word is printed on the forehead of Mr Hackett.

10

36. Within the magazine offensive words appear written on or near to photographs of different individuals. Some of those individuals work or did work at the respondents' depot where the claimant worked. The words written are offensive.

15

20 **Events following upon receipt of the magazine by Mr Barrowman**

37. On receiving the magazine and realising what was written upon it, Mr Barrowman found the comments written quite shocking. He regarded them as degrading of the people upon whom they were written or to whom they appeared to relate. He was concerned in particular about the comments attributed to the schoolgirl by virtue of the bubbles drawn coming from her mouth. Mr Barrowman regarded the words written in relation to the individuals as degrading. One of his concern was that if the comments written upon the magazine became a matter of public knowledge, there would be significant damage to the reputation of the respondents and upset to the individuals involved, including the family of the schoolgirl and the girl herself.

25

30

38. As Mr Brannigan had retained the copy of the magazine in question, as far as could be told, it was not seen by many, if anyone, beyond Mr Barrowman, Mr Brannigan and the person who wrote the words.

5 **Meeting between Mr Barrowman and the Claimant**

39. Mr Barrowman was conscious that he had the magazine with the comments written upon it and that Mr Brannigan had stated that he found the magazine resting upon the claimant`s toolbox.

10

40. The toolbox is within the workshop. The workshop is accessible by approximately 30 people.

15

41. Mr Barrowman also had the statement from Mr Boyd that Mr Boyd had seen the claimant writing on a You First magazine which had the photograph of Mr Hackett on the front cover.

20

42. The claimant had at this point been suspended as a precautionary measure. He received full pay during the time of suspension. The suspension did not relate to the allegation as to the magazine being written upon. It related to a different allegation made against the claimant.

25

43. By letter of 29 January 2016 Mr Barrowman wrote to the claimant inviting him to a meeting in connection with investigation into various allegations of misconduct. He detailed one of those allegations as being an allegation that the claimant had written offensive comments on a copy of the company magazine. He sent with that letter a copy of the magazine. There were four matters which Mr Barrowman said he wished to discuss with the claimant. Mr Barrowman also suggested that in addition to the four allegations of misconduct against the claimant, the meeting was also utilised to discuss the grievance which the claimant had lodged.

30

44. The investigatory meeting took place on 5 February 2016. Notes of that meeting appeared at pages 103 and 104 of the bundle.

45. At the meeting, Mr Barrowman said that he would like to start with the grievance. The claimant confirmed he was in agreement with this. Mr Ormston, however, said that it was not in the claimant's best interests so to proceed. The meeting did not therefore address the grievance.

46. In relation to the company magazine, Mr Barrowman asked the claimant, referring to the magazine which had been written upon, whether the writing on that magazine was that of the claimant. The claimant denied that it was his handwriting. He said he was willing to have his handwriting analysed by an expert. He was adamant that the handwriting was not his.

47. The claimant denied engaging in harassment of Mr Boyd. He said that he had not exerted pressure and had not written in the magazine. He said he had never belittled Mr Boyd or written on his locker.

48. Notes made by Mr Barrowman following upon the investigatory meeting appeared at page 105 of the bundle.

49. Mr Barrowman considered the claimant's comments in relation to the magazine. He decided not to refer the matter to a handwriting expert. Many of the comments were written in capital letters. Mr Barrowman was unclear as to what extent a handwriting expert would be able to determine from that who had written the comments. He said, in the note which appeared at pages 106 and 107 of the bundle as his report on the investigation, that he would have:-

"felt it appropriate to see what guidance I could get from a handwriting expert had I not reached what, in my view, was a reasonable conclusion that the comments had indeed been written by Mr Coulter. The magazine was found on his desk and Mr Boyd

had seen Mr Coulter writing on a picture of Mr Hackett. On this basis I think there are reasonable grounds to conclude that Mr Coulter did indeed write the comments which appear.”

5 50. Mr Barrowman passed the papers and note to a disciplining officer to consider whether initiating disciplinary proceedings was appropriate and, if so, what charges were to be. He said in a report, the conclusion of which appeared at page 109 of the bundle, that he had reasonable belief that there was a case for the allegations made against Mr Coulter.

10

51. Mr Barrowman was conscious, in reaching this view, that the magazine could have been placed at the claimant`s toolbox area. He was conscious that there was no date or time specified as to when Mr Boyd had seen the claimant write on the magazine and when the magazine had been found.
15 His view was that this was a fairly new edition of the magazine. Each employee kept their toolbox area pretty clear and with their own materials upon it. Although it might have seemed strange that the claimant had left the magazine there, in Mr Barrowman`s opinion the claimant may have thought that the remarks written constituted banter and that there was no
20 serious issue with the comments.

52. Although Mr Barrowman was conscious that the claimant had a grievance current in relation to Mr Brannigan, Mr Barrowman viewed that as a separate issue. Mr Brannigan had had a reason to be looking at the
25 workshop area. In Mr Barrowman`s opinion Mr Brannigan had no reason to lie regarding having found the magazine on the workbench.

30 **Conduct by Mr Collins**

53. Mr Barrowman also carried out an investigation in relation to the note left by Mr Collins. A copy of his report appeared at page 111 of the bundle. He

recommended that the matter be passed to a disciplining officer to consider possible disciplinary action. Such action was taken against Mr Collins. A first and final warning was issued to Mr Collins.

- 5 54. Mr Barrowman`s involvement finished at this point. The claimant did not ask Mr Barrowman to conduct any further investigations or to speak to any other parties in relation to the writing on the magazine.

Disciplinary Stage

10

55. Mr Brennan is the Depot Operations Manager with the respondents. In that role he conducts some disciplinary and appeal stage hearings. He was asked to become involved in the case of the claimant following upon submission by Mr Barrowman of the investigatory report.

15

56. Mr Brennan received all relevant papers from the respondents following upon the investigatory process. He was aware of the actions of Mr Collins in writing and leaving the note on the notice board. He did not, however, deal with the disciplinary hearing involving Mr Collins.

20

57. In preparing for the disciplinary meeting, Mr Brennan was aware that the claimant had raised with Mr Barrowman the possibility of a handwriting expert being instructed. Mr Brennan took advice from HR upon that point. He had concluded that as the writing was in block capitals it would be difficult to obtain a definitive answer as to the author.

25

58. The disciplinary meeting took place on 7 March 2016, having been rearranged from the initially proposed date of 26 February 2016. The claimant attended that with Mr Ormston. Notes of the disciplinary hearing appeared at pages 121 to 123 of the bundle.

30

59. The claimant said that he could categorically say that Mr Boyd did not see him write anything on the magazine. He was asked by Mr Brennan why Mr

Boyd would say that if he did not in fact see the claimant. The following exchange occurred, Mr Brennan being "JB" and the claimant being "JC":-

5

"JB Why would he say this if he didn't see you?"

JC I don't know why he would say this. If I was going to do this then why would I leave it lying beside my toolbox?"

10

JB Are you saying he is lying?"

JC I am not lying.

JB If it was not you then who was it?"

15

JC The writing on the magazine is not mine. Why would I do this? I do not even know who some of the people are in the magazine. It is not my character to do this. I am friendly with Scott Ferguson, why would I write something about him?"

20

JB What is your working relationship with N Boyd?"

JC He is a cleaner and I am a Chargehand. I have given him lifts home and shared food with him.

25

JB Reads statement from N Boyd (Appendix 1)

Why do you think he is saying the things he is saying in his statement.

30

JC I don't know why he is saying these things. I have never belittled people. I will help anyone, and we all have general workshop banter. Here is a statement from one of my colleagues, Paul Hughes (see attached).

JB *Has something happened between you and Neil Boyd?*

5 JC *I don't think so, I take all the banter in the workshop and it doesn't matter to me, I have done nothing to him."*

60. The following passage also appears in the note of the disciplinary meeting, "DO" being Mr Ormston:-

10 "DO *The magazine could have been put at JC workplace at any time by anyone, this has been vindictive; there is no CCTV to show him doing this. We are willing for the handwriting expert to analyse the writing. Why was this not reported at the time? PB saw it and did not report it at the time.*

15 JC *Think this is very neat that it was found at my toolbox, why did PB not pull me up about this. NB (Noel Barrowman) said he was a not a handwriting expert, the writing was in capital letters anyway, but in his opinion it was me that wrote the stuff."*

20

61. At one point in the disciplinary hearing Mr Brennan asked whether there was friction between the claimant and Mr Brannigan. The claimant said that he thought that Mr Brannigan was "*out to get him*". He gives an example of a situation where he was unhappy with the behaviour of Mr Brannigan. Mr Ormston asks why Mr Brannigan did not challenge the claimant about the magazine when he found it. He says on behalf of the claimant that the claimant has a formal grievance against Mr Brannigan and that it is very suspicious that the allegations have been made. He says "*it looks like a gathering of evidence to fit the crime.*" Mr Ormston says that the claimant is treated differently from other members of staff. There was a grievance against Mr Brannigan for bullying and harassment but Mr Brannigan was

25

30

not suspended. He says that there has been no problem in the previous 10 years when the claimant has worked with the respondents.

5 62. Following the disciplinary hearing, Mr Brennan arranged to meet Mr Boyd. He read to Mr Boyd the statement which Mr Boyd had given initially at the time when Mr Barrowman was involved. He asked Mr Boyd where he was standing and what he saw. Mr Boyd repeated that he saw the claimant writing on the You First magazine with Mr Hackett`s picture on the front of the magazine. He said that this had happened at break time in the canteen
10 but that he could not remember the date. Mr Brennan made no note of the specific questions he asked Mr Boyd or of the answers given. A brief note of the interview, summarising it, appeared at page 124 of the bundle. Mr Brennan did not disclose to the claimant that the meeting had occurred or what the claimant had said at it.

15

63. Mr Brennan then considered the position. He came to a view.

20 64. He believed Mr Boyd, accepting that Mr Boyd had seen the claimant writing on the magazine with the picture of Jason Hackett on the front of it. He was conscious that no magazine with writing upon it had come to light other than the magazine which Mr Brannigan had found. He was conscious that Mr Boyd had not seen what was written. He believed, however, that with the claimant having been seen by Mr Boyd, in his view, writing upon the magazine, and the magazine with writing being found by Mr Brannigan at
25 the claimant`s toolbox, it was the claimant who had written the comments upon the magazine which Mr Brannigan found. He kept in mind that Mr Brannigan had been subject of a grievance lodged by the claimant. He did not believe, however, that Mr Brannigan had lied about finding the magazine at the claimant`s toolbox. He thought that the claimant may have
30 been of the view that the remarks constituted banter and that there was no issue with leaving the magazine lying where it was found.

65. Mr Brennan therefore relied upon Mr Boyd's statement and that of Mr Brannigan. In his view there was too much of a coincidence between the claimant being seen by one person writing on that edition of the magazine and that edition of the magazine being found with writing upon it at the claimant's toolbox area.

66. As to sanction, Mr Brennan took the view that the comments made were shocking. He was conscious of the fact that the claimant had been employed for almost 10 years. He was also aware that there was very little on the file of the claimant in relation to any previous disciplinary matter with things having been "*fine*" up until then. Weighing service and the disciplinary record of the claimant against the behaviour which Mr Brennan believed the claimant had carried out in the writing of the comments, he concluded that the appropriate sanction was that of summary dismissal on the basis that the claimant's actions constituted gross misconduct. He regarded the matter as being one which was very serious. Although the magazine had not been in the public domain, the seriousness of the comments by reason their content was such that summary dismissal was warranted in the view of Mr Brennan.

67. Mr Brennan wrote to the claimant on 14 March 2016. In relation to the magazine, the following passage appeared in that letter, the letter being at pages 125 and 126 of the bundle:-

"1. That you wrote offensive comments on a copy of the company magazine."

"It is a matter of agreement that offensive comments were written on a copy of the company magazine and I think we are in agreement that the nature of the comments were wholly and completely unacceptable. Based on the statements provided by Mr Brannigan and Mr Boyd, in my view, there are reasonable grounds to believe that you wrote those

comments. I have reflected carefully on your denial but after careful consideration I have drawn (sic) the view that you wrote those comments.

5 *The writing of these comments amounts, in my view, to gross misconduct and in respect of this charge alone I consider that the appropriate sanction is summary dismissal on gross misconduct grounds.”*

10 68. Mr Brennan intimated in the letter that the claimant had a right of appeal.

Appeal to Mr Scott

15 69. The claimant appealed against his dismissal. A copy of his letter of appeal appeared at page 133 of the bundle.

70. Mr Scott, the Network Manager for the respondents, was asked to handle the appeal. He received all relevant pre-existing paperwork.

20 71. The view which Mr Scott had as to the role which he would carry out as Appeal Officer was that he would consider the appeal points made and investigate for himself where he regarded it as being appropriate to speak to others or to ask questions of people. He did not have any previous contact with the claimant.

25 72. The appeal before Mr Scott was set down for and proceeded on 7 April 2016. The claimant was present with Mr Ormston.

73. Notes of the appeal hearing are in the bundle at pages 142 to 146.

30 74. Whilst there was reference near the start of the meeting to the grievance which the claimant had raised and to the fact that that had not been heard,

when asked by Mr Scott as to whether the grievance hearing had been rescheduled, Mr Ormston said, in a passage at page 142 of the bundle:-

5 *“We will not be attending a grievance unless John is reinstated. The
remedy is not there for John. Just for your information – if John is
reinstated I expect the grievance to go ahead.”*

75. The grievance hearing had been initially scheduled to take place prior to the disciplinary hearing. It was, however, re-arranged for a date which was
10 after the disciplinary hearing. It was set down for 16 March 2016 whereas the disciplinary hearing took place on 7 March 2016. The grievance hearing had not therefore taken place at time of dismissal.

76. The claimant`s position at the appeal was that the location where the magazine was said to have been found by Mr Brannigan had altered. He
15 said that there had been a reference to the magazine found on the toolbox and a later reference to it being found beside his toolbox. He said that things kept moving or being added in. He also said that Mr Boyd did not take the same break at him and questioned how Mr Boyd could have seen
20 him. He raised a question as to why, if this was so serious, Mr Boyd did not report it straight away. He referred once more to the possibility of a handwriting expert being instructed. He asked why he would incriminate himself by leaving the defaced magazine on his own toolbox. He also said that he spoke to Mr Ferguson on a daily basis and was friendly with him.
25 On that footing why would he write about him, he asked. He said that he did not know Mr Hackett and queried why he would write about someone he did not know. He expressed the view that he was being made a scapegoat.

77. Mr Ormston raised in a passage in the appeal notes at page 144 of the
30 bundle, the length of service which the claimant had and that his record was blemish free. Mr Ormston raised the fact that there had been a grievance lodged against Mr Brannigan and also Mr Collins. Mr Collins had an involvement in one of the other charges with which the appeal was

concerned rather than with the charge in relation to the magazine. The claimant also raised the “offence” committed by Mr Collins by the writing of the note which appeared on the notice board and the penalty imposed upon Mr Collins, contrasting that with the penalty imposed upon the claimant himself.

5

78. There was also an allegation made that Mr Brennan had not made the decision to dismiss. The claimant said that he believed that Mr Brannigan had coerced witnesses and that it was vindictive on the part of Mr Brannigan.

10

79. Prior to the appeal hearing, the claimant had emailed on 18 March 2016 requesting that witnesses were interviewed. A copy of that email appeared at page 134 of the bundle.

15

80. Following upon the appeal Mr Scott interviewed Mr Boyd and Mr Brannigan in relation to the magazine article. He also interviewed other witnesses in relation to other allegations.

20

81. Mr Scott noted that Mr Boyd was unable to give specific times and dates as to when he saw the claimant writing on the magazine in the canteen. Mr Boyd said that he raised the fact that he had seen the claimant writing on a magazine as it came out in relation to other general questions about which he was asked. A copy of the notes of the interview between Mr Scott and Mr Boyd appeared at page 147 of the bundle.

25

82. Mr Scott was of the view that Mr Boyd was giving an honest statement as to what he had seen and recalling as best he could when he had seen that. He was conscious that there had been an allegation that Mr Brannigan had coerced Mr Boyd. He bore that in mind in speaking to Mr Boyd. He considered Mr Boyd’s evidence as being genuine. Mr Boyd was of the view that the claimant was a good mechanic, however, had an issue with his manner. Mr Scott took the view that there was no evidence to support the

30

conclusion that Mr Boyd had been coerced by Mr Brannigan. He further concluded that Mr Boyd was not giving evidence as he disliked the claimant.

- 5 83. Mr Scott also carried out a telephone interview with Mr Brannigan. Notes of that interview appeared at page 154 of the bundle.
- 10 84. In that interview Mr Brannigan repeated his position that he had moved what he referred to as “the offending magazine” from the toolbox. He said he had not spoken to the claimant at the time as the claimant was not at his toolbox at that point. He said that he was of the view that if he went looking for the claimant there was a possibility of it becoming confrontational so he decided to seek advice. As Mr Scott had concluded on meeting with Mr Boyd, which he did on 13 April 2016, that Mr Brannigan had not coerced Mr Boyd, he did not put that point to Mr Brannigan when he spoke with Mr Brannigan on 25 April 2016. Mr Brannigan denied having made any comment as to there being “*two down, one to go*” in relation to the engineering department.
- 15
- 20 85. Mr Scott assessed the position. He came to a view in relation to the appeal. A copy of the letter to the claimant communicating the outcome of his appeal appeared at page 155 to 158 of the bundle. It is a letter from Mr Scott to the claimant dated 28 April 2016.
- 25 86. In that letter Mr Scott noted that the grievance had not been dealt with as the claimant had, in conjunction with Mr Ormston, come to the view and intimated to the respondents that he did not wish to proceed with his grievance unless the outcome of the disciplinary appeal process was reinstatement.
- 30 87. The decision by Mr Scott confirmed that Mr Scott was satisfied that Mr Brennan’s view had been arrived at independently and by Mr Brennan himself.

88. In relation to the magazine, Mr Scott came to the view that the statements provided by Mr Boyd and Mr Brannigan were such that he could have a reasonable belief that they were true. He did not regard there as being any significant variation between the statements given by Mr Brannigan. He regarded it as significant that Mr Boyd was able to identify the magazine upon which he had seen the claimant write as being the one with Mr Hackett's face on the front of it and that Mr Brannigan had found a copy of the magazine with Mr Hackett's face on the front of it with writing upon it at the toolbox of the claimant.

89. Though there had been no note of dates and times in the statement of Mr Boyd, Mr Scott was of the view that the significant point was that Mr Boyd said that he saw the claimant writing on the magazine. He had concluded from meeting with Mr Boyd that Mr Boyd had not been coerced by Mr Brannigan. Mr Scott considered the claimant's point that he would not have left the magazine on his toolbox if he had written upon it. Mr Scott's view was that it might be the case that the claimant did not believe that the magazine would be found or might have been of the view that there would be no particular issue with doing what had been done, with it not being likely to lead to proceedings involving his dismissal. He regarded Mr Brannigan as having given an explanation as to why he had not challenged the claimant immediately upon finding the magazine. In Mr Scott's view, Mr Brannigan had acted in the correct manner in dealing with the finding of the magazine. Mr Scott was conscious of the claimant's view that Mr Brannigan had an issue with him. Mr Scott found, however, Mr Brannigan to be believable and regarded his statement as being truthful. Mr Scott did not regard it as particularly relevant that the claimant had no issue, he had said, with some of the people in the magazine upon whom he had written comments or in relation to whom he had made remarks. The important thing, in Mr Scott's view, was that the comments had been written and that he believed from the statements of Mr Brannigan and Mr Boyd, that it was the claimant who had written the remarks and comments.

90. In coming to the view which he did at the appeal stage, Mr Scott bore in mind the claimant's comments as to his having been a scapegoat. Mr Scott's view was that there was no alternative evidence of anyone else who might be said to have written upon the magazine or who might have said that the magazine was not present at a particular time at the claimant's toolbox. In relation to the possibility of a handwriting expert being instructed, Mr Scott decided that that was not something appropriate as he was concerned that the handwriting might be distorted and that the opinion of any handwriting expert might not be something which could be relied upon. He was of the view, on the other hand, that he could rely upon the statements of Mr Boyd and of Mr Brannigan as sufficient to enable him to come to the view that the claimant had, on the balance of probabilities, written the comments.

91. As to sanction, Mr Scott was of the view that this was an instance of gross misconduct. He took that view due to the nature of the remarks and also the fact that they involved a minor, who was not an employee of the company. He was concerned as to the impact on the company if the magazine with the comments upon it was seen by a wider audience. He regarded the potential risk to the respondents as being very serious. He was in no doubt that gross misconduct was the proper label for the actions and that dismissal was an appropriate sanction.

92. Mr Brennan had concluded, as set out above, that charge four had not been established. Mr Scott concluded that, in addition to that, charge three had not been established. He upheld therefore the claimant's appeal in relation to charge three. He did not uphold the appeal in relation to charges one and two. Specifically charge one was charge which related to the writing upon the magazine.

93. In relation to charge one alone, Mr Scott was of the view that dismissal was the appropriate sanction notwithstanding the claimant's length of service and good record. Mr Scott considered that there had been a full, proper, fair and impartial investigation. He was satisfied that he had investigated

5 matters in addition to the initial investigation carried out. He recognised that he had not been made aware by Mr Brennan of the questions which Mr Brennan had asked of Mr Boyd in the meeting subsequent to Mr Boyd presenting his written information. Mr Scott, however, had met with Mr Boyd himself and had come to the view that Mr Boyd had provided a credible statement which in Mr Scott's opinion was truthful.

10 94. Mr Scott was aware in coming to the view which he did as to sanction to be imposed upon the claimant, of the outcome of disciplinary proceedings in the case of Mr Collins.

15 95. A different sanction had been imposed upon Mr Collins. Mr Scott's view was that there was a greater risk to the respondents if the content in the magazine had been disseminated. He was also conscious that on the magazine there was a young girl to whom comments were attributed by way of a speech bubble and that finding out about those comments would have been potentially quite distressing for the girl herself and for her family. He was concerned that the writing in the magazine would bring the company into disrepute. Mr Scott was of the view that he could reasonably conclude
20 that, given the statement of Mr Boyd and that of Mr Brannigan, the claimant had been the person who had written on the magazine in question.

Second Appeal – Mr Dickson

25 96. A further appeal was lodged by the claimant. That appeal was heard by Kenny Dickson. Mr Dickson is Engineering Support Director based at a sister company of the respondents. He had no knowledge of the claimant prior to his involvement in the appeal hearing.

30 97. Mr Dickson received all the papers and materials relevant to consideration of the appeal made by the claimant. He considered the allegations which remained outstanding, points one and two of the initial "charges".

98. The claimant's letter of appeal appeared at page 167 in the bundle.

99. The position of the claimant in the appeal was that there was insufficient evidence against him as to his having written on the magazine, that there were no dates and times regarding the allegation of him having written on the magazine and that dismissal was too harsh a penalty given the circumstances, insufficient evidence and his length of service and clear record.

100. Mr Dickson spoke with the witnesses who the claimant had asked be interviewed. Those related to the charge which did not involve writing on the magazine, save for a brief exchange which appeared in a passage in the statement provided by Mr McCorry.

101. Mr McCorry said in the relevant passage of his statement which appeared at page 171 of the bundle that he had asked the claimant whether he was "trying to stick me in it". The following exchange then occurred between Mr Dickson ("KD") and Mr McCorry ("PMC"):-

KD Do you know who wrote in the magazine?

PMC I will not declare who wrote on the picture.

KD Are you sure you can't say

PMC We have a wee code in the workshop, I can't say.

KD Neil Boyd, did you hear in (sic) comments in the workshop?

PMC He sits by himself or goes out for parts. I can't remember him sitting beside anyone on breaks, keeps himself to himself."

102. An appeal meeting was held. It took place on 10 June 2016. The claimant was present with Mr Ormston. Notes of the meeting appeared at pages 175 to 178 of the bundle.

5 103. The claimant said close to the outset of the meeting in answer to a question as to what his ideal scenario was, that it was "*to clear my name*". The claimant went on to make points which he had made in the earlier hearings as to the date and time not being supplied. He said that no one could say exactly when the magazine was found. He alleged that Mr Brannigan covered for Mr Boyd with Mr Boyd going for parts but no one knowing where
10 he was. He said that Mr Boyd supplied Mr Brannigan with Viagra and other prescription drugs. He expressed the view once more that Mr Boyd had been influenced by Mr Brannigan.

15 104. Mr Ormston raised the fact that the respondents had been requested to obtain a handwriting expert but this hadn't happened. The claimant said that he had given the respondents ample opportunity to have a handwriting test. Mr Dickson asked whether the claimant was still willing to undergo a handwriting test. The claimant replied:-

20

"No. I am banging my head off a brick wall."

105. The claimant repeated his position, questioning why he would have written on a magazine and left it at his toolbox. He also mentioned Mr McCorry's
25 statement. Mr Dickson asked him whether he was aware of someone else writing on the magazine. The claimant replied:-

30

"There`s always been individuals who wrote on magazines & newspapers. I spoke to someone & they asked if I would stick them in."

106. In response to this comment Mr Dickson asked whether the claimant could name the person. The claimant refused to name the person saying that he

was not willing to name them and that the respondents should investigate properly.

5 107. The points made at earlier stages in the disciplinary process as to the grievance which the claimant had, Mr Brannigan's alleged influencing of others and as to the different sanction imposed upon Mr Collins were made once more by the claimant. He said that Mr Boyd did not take breaks with the claimant and so could not have seen the claimant write on the magazine.

10

108. The materials before Mr Dickson were considered by him together with the comments which the claimant had made at the appeal hearing. He considered the comments on the magazine. In his view the comments were disgusting, completely distasteful and deeply offensive. He regarded them as disrespectful of colleagues, superiors and management within the respondents. He noted that the statements from Mr Brannigan as to where the magazine had been found were consistent. He also noted that the statements made by Mr Boyd on different occasions were consistent. He was aware of the grievance which the claimant had lodged. He was conscious that the relationship between Mr Brannigan and the claimant was not good. He did not however regard that fact or the fact that there was a grievance lodged by the claimant against Mr Brannigan as forming a basis for disregarding the evidence of Mr Brannigan.

15

20 109. Mr Dickson did have a concern as to the absence of date and time in the statement of Mr Boyd in particular. He was conscious that the magazine in question was issued quarterly and that the magazine found written upon had the page with Mr Hackett's picture upon it. Mr Boyd had seen the claimant writing upon the front page of the magazine with Mr Hackett's photo on it. Mr Dickson believed the statements of Mr Boyd and Mr Brannigan. His view was that there was therefore the basis for the reasonable conclusion on his part that it was the claimant who had written upon the magazine which was found with comments upon it. He considered

25

30

the allegation that Mr Brannigan was being vindictive or had influenced Mr Boyd. He concluded that there was no material which he could find which would support either of those allegations. He did not accept that the fact that the magazine was found at the claimant's toolbox pointed away from the claimant having written on the magazine. He rejected the argument that the claimant would not have been so foolish as to leave the magazine at his own toolbox. He concluded that the claimant might have been of the view that there was nothing of concern in the comments or that they were humorous.

5

10

110. Mr Dickson concluded that the comments were such that gross misconduct was established. He concluded that there was no material to support the view that Mr Brannigan had coerced people into giving statements contrary to the interests of the claimant. His opinion was that if there had been evidence to point to that as being a possibility, he would have explored it further. Similarly, he concluded that if there was evidence as to some other party having written on the magazine, that would have warranted further investigation. Likewise, if the claimant had wished the handwriting expert to be instructed, Mr Dickson would have taken that step. It weighed in his mind to an extent in considering the outcome of the appeal process that the claimant had not named someone else as the person who had written on the magazine, although he gave the impression that he knew who had written upon the magazine. It also weighed to an extent upon Mr Dickson's mind in reaching his determination that the claimant had refused an opportunity for a handwriting expert to be instructed and to prepare any report. The refusal by the claimant of the offer to involve a handwriting expert and the refusal by the claimant to name the person who, he said, had written on the magazine were both in context of the claimant having said that he wished to clear his name. Without further information as to who it was that Mr McCorry or the claimant thought or knew had written in the magazine, Mr Dickson's opinion was that this was "*a dead end*" in terms of it being explored.

15

20

25

30

111. The comment in relation to Mr Boyd not taking breaks at the same time as the claimant was noted by Mr Dickson. He concluded that this did not mean that Mr Boyd could not have seen the claimant write on the magazine at some point.
- 5
112. The appeal meeting lasted one hour 50 minutes. Having heard the appeal Mr Dickson reviewed the materials. He was satisfied that the claimant had been given the opportunity to set out any comments which he might wish to make. Mr Dickson took the view, as mentioned, that on the balance of probabilities the claimant had written on the magazine.
- 10
113. The differing treatment of the offences of the claimant and Mr Collins was something which was in the mind of Mr Dickson in reaching his view on sanction. He viewed the matters as being distinct. Mr Collins had admitted the offence and had apologised for it. He had explained the circumstances in which the note was written. He had not identified anyone on the note. The note left by Mr Collins was not acceptable and warranted disciplinary proceedings and sanction. Mr Dickson concluded that there were reasons why Mr Collins had had a different sanction to dismissal as the outcome of the disciplinary proceedings in which he was involved. He was also of the view that dismissal on the basis of gross misconduct was the appropriate sanction in relation to the “*magazine charge*” which was the subject of the disciplinary proceedings involving the claimant.
- 15
- 20
- 25 114. Mr Dickson set out his decision in a letter to the claimant of 17 June 2016. A copy of that letter appeared at pages 179 and 180 of the bundle.
115. As stated above, the claimant’s appeal in relation to ground two was upheld. His appeal in relation to ground one, the “*magazine charge*” was not upheld. Mr Dickson said in his letter:-
- 30

“I have duly noted that you deny writing these comments. However, given the witness statements of Mr Brannigan relative to where the

offending item was found and that of Mr Boyd that he saw you writing on such a magazine, it is my reasonable conclusion these comments were indeed written by you.

5 *These comments are clearly deeply offensive and wholly inappropriate and would have caused significant offence to any reasonable minded person. As such the appeal lodged is duly rejected and the decision upheld.”*

10 116. In coming to this view, Mr Dickson bore in mind that Mr Boyd, although spoken to by different people, always maintained the same position. Mr Dickson thought it odd that the claimant was prepared in the meeting to make allegations against Mr Brannigan and Mr Boyd in relation to supply of drugs, for example, yet was not prepared to name the colleague who he
15 apparently knew had written on the magazine. This was in the context of the investigation of that matter potentially clearing the claimant’s name. The clearing of the claimant’s name would also, potentially, have occurred if a handwriting expert had been instructed and had prepared a report.

20 117. The fact that the claimant had lodged a grievance against Mr Brannigan was considered by Mr Dickson. In his view this did not strengthen the case against the claimant. However, it was not enough to discredit that case. He was of the view that the lodging of a grievance against a manager did not mean that the word of the manager could not be accepted and that the
25 claimant would have “*carte blanche*” in having anything he said accepted. Mr Dickson was of the view that there was a level of trust in a manager. That was not “*blind trust*”, however. The fact of putting in a grievance did not mean that the claimant had a defence in that anything said by Mr Brannigan was automatically discredited.

30

118. The conclusion to which Mr Dickson came was that taking everything into account and weighing up all the material before him, the balance of probabilities was in his view that the claimant had indeed written upon the

5 magazine. He then assessed penalty. Gross misconduct had been established in his view given what he regarded as severe insubordination towards the Managing Director, Fleet Engineers and Mr Hackett. In Mr Dickson`s view there were potentially serious implications for the business given the possibility of social media publicity. He was conscious of the young girl whose picture appeared in the magazine. This was in his view a really emotive area with there being a risk of high damage to the business. The claimant had a Chargehand role which involved him giving leadership to apprentices and others on the shift. Although therefore he had a clean disciplinary record and long service with the respondents, these did not weigh in the balance such that any outcome other than dismissal was appropriate.

The Claimant`s position since dismissal

15

119. The claimant obtained alternative employment with McGills as a Mechanic. He started with that company on 20 March 2016. He is paid at a slightly lesser rate with that company than he was with the respondents. He earns £40 per week less in net terms with McGills than he did with the respondents. There is a pension contribution by McGills as there was from the respondents. The pension contribution from McGills is £50 per month less than that made by the respondents.

25

The Issues

30 120. The issues for the Tribunal were:-

- (1) Was the dismissal of the claimant by the respondents unfair in terms of Section 98(4) of the Employment Rights Act 1996 (“ERA”)?

(2) If the dismissal was unfair, what level of compensation was to be paid to the claimant?

5 (3) If any compensation was to be ordered by the Tribunal as being payable to the claimant, was there to be a deduction from the compensatory award in terms of ***Polkey –v- A E Dayton Services Ltd [1988] ICR 142*** (“*Polkey*”)?

10 (4) Was there to be any deduction from the basic award or the compensatory award on the basis of conduct of the claimant or any contribution on his part? This was in terms of Sections 122 and 123 of ERA.

15 **Applicable Law**

121. Section 94 of ERA provides that an employee has the right not to be unfairly dismissed.

20 122. Section 98 of ERA provides that it is for the employer to show the reason or principal reason for dismissal and that it is a reason falling within subsection (2) of Section 98. Once such potentially fair reason is the conduct of the employee.

25

123. Whether a dismissal is fair or unfair is to be determined having regard to the reason shown by the employer and:-

30

“depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as sufficient

reason for dismissing the employee. Whether the dismissal is fair or unfair is to be determined in accordance with equity and the substantial merits of the case.”

5 124. Where the reason for dismissal is said to have been misconduct on the part of the employee, the Tribunal properly has regard to the well established case of **British Home Stores Ltd –v- Burchell [1980] ICR 303** (“**Burchell**”). That case provides that the employer must show:-

10 (a) It believed that the employee was guilty of the misconduct.

(b) That there were reasonable grounds upon which the belief which it had could be sustained, and

15 (c) At the stage when the belief was formed on those grounds as much investigation as was reasonable in the circumstances had been carried out by the employer.

125. The employer must then satisfy the Tribunal that dismissal lay within the
20 band of reasonable responses of a reasonable employer.

126. A Tribunal must take care not to substitute its own view for that of the employer. It does not matter that the Tribunal may regard dismissal as being a harsh sanction. It also does not matter whether the Tribunal regards
25 the behavior in question as distasteful, or worse. The employers decision to dismiss must be examined by the Tribunal on the basis that it will stand as a fair dismissal unless the Tribunal is satisfied that it lay outwith the band of reasonable responses of a reasonable employer.

30 127. In considering the investigation carried out by an employer, the Tribunal is required to judge any such investigation against the test of whether the investigation carried out was one which a reasonable employer, acting

reasonably, would carry out. This is confirmed in the case of ***J Sainsbury Plc –v- Hitt [2003] ICR 111 (“Hitt”)***.

5 128. In considering the fairness of the procedure adopted by the employer the Tribunal must look at the procedure as a whole, including any appeal stage. Any material which emerges by way of evidence at the appeal is properly considered. The cases of ***Taylor –v- OCS Group Ltd [2006] ICR 1602 (“Taylor”)*** and ***Arriva North West & Wales –v- Colebourn UK/EAT/0439/05*** confirm that.

10 129. ***Polkey*** makes it clear that if the Tribunal determines that a dismissal is unfair due to some procedural failing, it should consider whether in its view there was a percentage chance of there being a fair dismissal had a proper procedure been followed. It must then reduce compensation by the appropriate percentage applicable in its view. Any such reduction affects the
15 compensatory award alone.

20 130. In terms of Section 122 of ERA a reduction can be made to the basic award. Such a reduction is applicable if the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the basic award to any extent.

25 131. Section 122 of ERA provides that the compensatory award can be reduced if the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, the reduction being such as the Tribunal considers just and equitable having regard to that finding.

Submissions

30 **Submissions for the Respondents**

132 Ms Byars said that the reason for dismissal was conduct. She did not understand that to be disputed. The conduct was the alleged writing on a magazine of offensive content.

5 133. The test in terms of **Burchell** was outlined by Ms Byars. The respondents' witnesses were, she said, credible. Their views were consistent with the views which they took at the time.

134. The claimant's position as Chargehand with responsibilities for other
10 employees was drawn to the Tribunal's attention.

135. Ms Byars rehearsed the circumstances in which the issue had come to the attention of the respondents. When aware of the matter an investigation was carried out.

15
136. The respondents believed that the claimant was guilty of the misconduct, said Ms Byars. She referred to the evidence of Mr Brennan, Mr Scott and Mr Dickson as detailed in their outcome letters and as detailed to the Tribunal. They believed that the material had been written by the claimant in
20 the workplace and that he had left the magazine with the writing on it in his work bench area. The comments were extremely offensive. They were directed at individuals including management and the Managing Director. There were comments in relation to the young girl on the front cover of the magazine. There was a serious risk of reputational damage for the
25 respondents if the contents became known.

137. Mr Barrowman had conducted a reasonable investigation. He had approached the relevant parties and obtained information. He had come into possession of the magazine through approaching Mr Brannigan to ask
30 if Mr Brannigan knew of any offensive notes other than the one which Mr Collins had left. At that point a copy of the magazine was given to Mr Barrowman. Mr Brannigan detailed where he had found it. Mr Boyd had provided a statement that he saw the claimant writing on the same edition of

the magazine as had been found by Mr Brannigan with writing upon it. Mr Barrowman had concluded from his investigation that the case should be referred for possible disciplinary action.

5 138. During the discussion with the claimant upon this matter the claimant had suggested that a handwriting expert be instructed. Mr Barrowman concluded that that was not going to be of likely assistance. The conclusion reached by Mr Barrowman that disciplinary proceedings should follow was supportable and was as a result of a reasonable investigation. There was
10 no basis on which to think that any other individuals had relevant information to provide. There was no further investigation which could be carried out at that point, looking to the standard of *Hitt*.

139. Mr Brennan had carefully considered all the material before him. He spoke
15 with Mr Boyd. He met with the claimant and took full account of what the claimant said. He formed a reasonable conclusion which was that he believed on the balance of probabilities that the claimant had written the comments. There was a sound basis for him so to conclude. He had been aware of and had given consideration to the claimant's view that, had he
20 written on the magazine, he would not have left it at his toolbox area. He had had regard to the fact that there was no specific time or date provided by Mr Boyd as to when he saw the claimant write on the magazine. He had been aware of the claimant's grievance against Mr Brannigan. He had reached the reasonable conclusion on the key facts having regard to what
25 he believed had happened looking to the statements provided by Mr Brannigan and Mr Boyd and comparing those with the statement provided by the claimant. There had been no suggestion of any other magazine being found. Only one person had been identified as being seen to write on the magazine. Only one magazine with writing upon it had been found.

30 140. Taking account of the whole process including the appeals, the dismissal was fair, said Ms Byars. The dismissal itself was fair having regard to the offence involved.

141. Mr Scott had approached the appeal on the basis that it involved a re-assessment of the evidence. He had undertaken a full review and assessment of any new evidence. He had met with the claimant. He had spoken with Mr Boyd. He had taken a statement from Mr Brannigan. He had put the claimant's points to Mr Brannigan. He was aware that there was a poor relationship between the claimant and Mr Brannigan. He had concluded there was no basis for the claimant's view that Mr Brannigan was "out to get him". The claimant's comments and position on the various matters was appropriately considered by Mr Scott, said Ms Byars. Nothing had changed in the statements of Mr Boyd and Mr Brannigan, despite the claimant's view that there had been a change, particularly in the location in which the magazine was said to have been found. In fact that was not the position. Mr Brannigan had been consistent.

142. The conclusion reached by Mr Scott was a reasonable one on the evidence he had. He was clear that he had no reason to disbelieve Mr Brannigan or Mr Boyd. The investigation carried out, including the additional elements undertaken by Mr Scott, meant that a reasonable investigation had been carried out. There were reasonable grounds for the conclusion which Mr Scott reached.

143. Turning to the handling of the final appeal stage by Mr Dickson, Ms Byars said that the claimant had chosen to appeal although he had new employment. Mr Dickson was absolutely impartial. He reviewed all the material up to that point. He had considered all the points which the claimant put forward in the appeal. The appeal hearing had been held.

144. The claimant's position was that he wished to clear his name. He said that at the outset of the appeal hearing. Mr Dickson therefore found it strange that he declined the opportunity then given to him to have a handwriting expert look at the magazine.

145. There were, Ms Byars submitted, reasonable grounds on which Mr Dickson could conclude that the claimant had committed the misconduct of writing the comments on the magazine.

5 146. It was apparently said by the claimant that the respondents' belief in the claimant having committed this misconduct was questionable due to there being a grievance brought by the claimant against Mr Brannigan. That point had, however, been considered by the respondents. They had not accepted that Mr Brannigan had planted the magazine or that he might
10 have made up finding the magazine there. If the claimant was right then Mr Brannigan had gone on to coerce Mr Boyd to say that he saw the claimant writing on the magazine. That was not a position accepted by the respondents. Mr Boyd had adhered to the position in his statement when asked again.

15

147. It lacked credibility, Ms Byars said, for Mr Brannigan to have been involved in behaviour of this type.

148. The Tribunal should bear in mind that there was no further reasonable
20 investigation which could have been carried out by the respondents. They assessed the witness evidence. The points made by the claimant were assessed. It would have been better had there been a specific time and date alleged as the point where the offence had occurred or where Mr Boyd had seen the claimant writing on a magazine in his statement. The absence
25 of that did not, however, mean that the decision to accept the evidence they had as credible was unreasonable, Ms Byars submitted.

149. It also required to be borne in mind, Ms Byars submitted, that at the second
30 appeal the claimant did not provide the names of any others who he said could have written on the magazine or could have provided information. Without those names there was no route for the respondents to explore further.

150. Ms Byars referred to **Taylor** as confirming that the whole process required to be assessed in considering the fairness of a dismissal. When that was done here, and bearing in mind that Mr Scott and Mr Dickson had been involved a form of re-hearing at the appeal stage, the test of fairness was met.
- 5
151. As to the investigation, Ms Byars said that it was a reasonable one lying within the band. Again the process as a whole required to be considered. There was no requirement to investigate every avenue of enquiry. It was clear that the respondents had been careful in their investigation and had explored all relevant areas.
- 10
152. Dismissal was, Ms Byars submitted, an outcome which lay within the band of reasonable responses of a reasonable employer. She recognised that different employers would deal with situations differently. The Tribunal should not, however, substitute its own view for that of the respondents as employers.
- 15
153. All of the respondents' witnesses at decision making level had said that the conduct involved constituted gross misconduct warranting summary dismissal. It was entirely reasonable to categorise the conduct in this fashion. The conduct undermined the employment relationship. The comments made were abhorrent, offensive and disgusting according to witnesses. That was powerful testimony, Ms Byars said. Both Mr Scott and Mr Dickson had said that it was of particular significance that the comments involved a young girl. All three decision makers, Mr Brennan, Mr Scott and Mr Dickson, were clear that the conduct was gross misconduct.
- 20
- 25
- 30 154. Mr Dickson had referred to management, including the Managing Director, having comments made about them. There was a clear lack of respect and insubordination. There had also been a genuine concern on the part of the respondents as to the magazine with the comments upon it coming in the

public domain. There would be an impact of that to the respondents and also to the young girl and her family. Trust ran through this, Mr Dickson had said. The claimant had a leadership role, being responsible for training of apprentices. The conduct could not be condoned.

5

155. Further, a lesser sanction had been considered. The decision makers were aware of the claimant's length of service and of his clean disciplinary record. Those elements did not, however, persuade the decision makers that dismissal was not appropriate.

10

156. Although the claimant pointed to Mr Collins and what he said was a discrepancy in treatment, the respondents' witnesses had been clear, Ms Byars said, that there were distinctions. Mr Collins had not identified an individual in his note. It was generic. He had been remorseful.

15

157. Mr Scott had concluded that the dismissal was not influenced by Mr Brannigan.

20

158. Dismissal therefore lay within the band of reasonable responses, said Ms Byars. She urged that the Tribunal find that the dismissal was fair.

25

159. In relation to compensation if the Tribunal found the dismissal to be unfair, parties were agreed on the terms of the schedule of loss at page 207 of the bundle, as amended by the variation in the pension calculation detailed in this Judgment. Ms Byars said that if there was an issue with the procedural side, then 100% deduction in terms of **Polkey** applied as dismissal would have occurred if a proper procedure had been followed, on the basis that the Tribunal took the view that that was not so.

30

160. Ms Byars referred to the refusal on the part of the claimant to follow up and agree to the handwriting test. He had contributed to the dismissal and a reduction of 50% was appropriate. If the Tribunal took the view that the respondents had reasonably concluded that the claimant wrote on the

magazine but came to the view that the dismissal was unfair, it should be found that the claimant contributed to his dismissal which would result in a reduction of, in this case, 100%, said Ms Byars.

- 5 161. Ms Byars made a brief submission as to the claimant having failed to make appropriate attempts to find alternative employment. She withdrew this submission, however, on the claimant`s evidence in this regard being raised with her.

10 **Submissions for the Claimant**

162. In a succinct, focused and able submission, Mr Bathgate dealt with the areas critical for decision by the Tribunal.

- 15 163. He said that he agreed with the law in the case set out in ***Burchell***.

164. At the core of the claimant`s case was the proposition that there were no grounds upon which the respondents could properly have formed the reasonable belief that the claimant was guilty of the misconduct complained
20 of. The further proposition of the claimant was that dismissal as a sanction was in any event too harsh and outwith the band.

165. Looking to the reasonable belief, Mr Bathgate said that the evidence taken at its highest was that Mr Brannigan on an unspecified date found a
25 magazine containing offensive comments. The magazine was found on the claimant`s toolbox. This area was one to which some 30 people had access.

166. Upon an unspecified date, Mr Boyd had said that the claimant was seen to
30 be writing on a magazine with Mr Hackett`s face on the front cover. There was no detail from Mr Boyd as to what had been written.

167. It was critical that there was no date or time on which Mr Boyd was said to have seen the claimant write on a magazine. In the absence of that there could be no nexus between the claimant being seen to write on a magazine and the magazine with the offensive comments which was said to have been found at the claimant's toolbox area. It was speculation to say that the magazine found by Mr Brannigan was the one which Mr Boyd saw the claimant write upon. Throughout the disciplinary procedure, including the two appeals there had been no evidence of the dates when the magazine was said to have been written upon and when it was said to have been found. Without those, it could not be said that there was a reasonable basis for the belief on the part of the respondents that the claimant was guilty of misconduct by writing offensive comments on the magazine.

168. Looking at the evidence, Mr Brennan had assumed that the events had occurred on the same day. He had no evidence, however, to support that view. His view had been that the magazine was written on in the morning and found in the afternoon.

169. Mr Scott had said that a timeline was not necessary. The mere fact that the magazine had been found on the claimant's toolbox was sufficient for him to find that not only had the claimant written upon the magazine but that this was the same magazine that Mr Boyd had apparently witnessed the claimant writing upon.

170. Mr Dickson had said that he was not sure on reflection which event had occurred first. For there to be a nexus, the claimant would have had to write on the magazine before Mr Brannigan found it. Mr Dickson said in cross-examination that he was not sure what the timeline was. That suggested, said Mr Bathgate, that there were not grounds to sustain the reasonable belief that the claimant was "*guilty*" of writing on the magazine.

171. It was raised with Mr Bathgate that whilst Mr Dickson may have been unsure at Tribunal, he had concluded at the time that there were grounds

for a view on his part that the claimant had written on the magazine. Mr Bathgate acknowledged that, however said that there was no information before Mr Dickson which would allow him legitimately to make that connection. It was, he said, supposition and suspicion that led to the conclusion that the claimant had written on the magazine which was found by Mr Brannigan.

172. There had been no evidence of any search for magazines or of any other magazines being found with writing upon them. There was a large number of magazines of this edition in circulation. It was not for the claimant to produce other magazines with writing on them. That was an erroneous view of the responsibilities in the case.

173. In summary therefore there were insufficient grounds on which to support any reasonable belief on the part of the respondents.

174. All of this pointed to there having been an inadequate investigation, said Mr Bathgate.

175. There had been a failure during the investigation to determine when the events had occurred. This meant that the claimant did not have fair notice of the case against him which was to be answered. There was an unspecific allegation. He could not adduce evidence as to his whereabouts, for example, at either of the unspecified times when the claimant was said to have been seen writing on the magazine by Mr Boyd or when the magazine had appeared at the claimant's workstation.

176. Mr Bathgate accepted that this point was not raised at the time by the claimant. He said that the absence of dates and times meant that the claimant could not address the allegation, however, and the factual evidence which underpinned the allegation.

177. Mr Brennan had clearly undertaken an interview with Mr Boyd after the initial information gathering. That was referred to in the note at page 124 of the bundle. It was unclear, however, what had been discussed between Mr Brennan and Mr Boyd. The information as to that discussion was not given
5 to the claimant.
178. The claimant had raised allegations of coercion of Mr Boyd by Mr Brannigan. Whilst all witnesses for the respondents said that they were satisfied that this had not occurred, there had been no particular questioning
10 in this area put to Mr Brannigan or Mr Boyd. In fact the decision makers appeared to have accepted Mr Brannigan`s evidence, taking it as read. The claimant, however, had lodged a grievance against Mr Brannigan. None of the respondents` witnesses had suggested that that circumstance should affect the weight which they would attach to Mr Brannigan`s evidence. The
15 fact that there was a grievance lodged by the claimant against Mr Brannigan ought to have seen the decision makers exercising a degree of caution when considering Mr Brannigan`s evidence.
179. Mr Bathgate said that he did not argue that as there had been a grievance
20 lodged it was not open to Mr Brannigan to raise the issue of misconduct by the claimant. What he said, however, was that a degree of caution in considering Mr Brannigan`s evidence was required. On the evidence at the Tribunal, that had not occurred.
- 25 180. As to the referral by Mr Dickson to the refusal on the part of the claimant to have a handwriting expert involved, Mr Bathgate said that the claimant had told the Tribunal that he was frustrated by the time of the second appeal. A significant length of time had elapsed. Since his suspension it had been six months until the time of the second appeal. The second appeal took place
30 three months after his dismissal. He was in another job by then. Frustration on his part was therefore wholly understandable. He had invited the respondents at an earlier stage to go down the road of obtaining the view of a handwriting expert.

181. An important point was that the respondents now asserted that the claimant had refused to name the perpetrator. If that was said to have been important from Mr Dickson's point of view, it was significant that there was
5 no reference at all to that factor in the letter written by Mr Dickson setting out his decision in the case. There was no reference to the claimant's refusal to involve a handwriting expert in that letter and no reference to the claimant's refusal to name someone who he thought was the perpetrator. Mr Bathgate therefore said that his evidence that these factors were
10 involved in the decision making should be disregarded. His letter had been clear. He made the decision on the basis of the statements provided by Mr Brannigan and Mr Boyd.

182. The suggestion made to the Tribunal that the magazine might have been
15 left by the claimant in his toolbox area as he believed that the comments involved office banter was not something put to the claimant in the discipline process. If it had been put to the claimant during that time, there was no evidence of that.

20 183. There had been clear evidence of language being used in the workplace and exchanges between personnel in the workplace being such that you would not expect to hear such language in exchanges at the Tribunal. There had been no evidence, however, to support the proposition that the comments in the magazine would be viewed as banter. To say therefore
25 that the magazine had been left by the claimant at his workplace on some sort of view that it contained office banter was an unsubstantiated position.

184. The conclusion which the Tribunal ought to reach, said Mr Bathgate, was that there were no reasonable grounds to sustain the view that the claimant
30 was guilty of the conduct complained of.

185. There were deficiencies in the investigation process and in the discipline process.

186. The claimant's position was that if the Tribunal was against him on that basis, the decision to dismiss nevertheless did not lie within the band of reasonable responses. The claimant pointed to the treatment of Mr Collins.
5 It was also the case that the magazine contents had not been disseminated. There had been no evidence of damage to the respondents' reputation. The claimant had 10 years service. He had a clean disciplinary record. Dismissal therefore lay outwith the band of reasonable responses.

10 187. As far as any reductions in compensation were concerned, the reduction in terms of **Polkey**, if thought appropriate, involved a reduction to the compensatory award and not to the basic award.

15 188. Further, in relation to contributory conduct, this required to involve behaviour before dismissal, whether in relation to the potential reduction to the basic award or to the compensatory award. The appeal had been three months down the line. There had been no blameworthy conduct in any event on the part of the claimant.

20 189. Finally, Mr Bathgate submitted that the claimant had mitigated his loss.

Brief reply for the Respondents

25 190. Ms Byars said in response that Mr Dickson's evidence had been that the failure on the part of the claimant to agree to the appointment of handwriting expert and his failure to name the party he regarded as being responsible for the behaviour had played a part in his decision, albeit those elements had not appeared in his letter.

30 **Discussion & Decision**

The Reason for Dismissal

191. The respondents said that conduct was the reason for dismissal. There was no challenge to that as being the position in cross-examination. I am satisfied that the ground of dismissal was conduct.

5 **Fairness of Dismissal**

192. Conduct is a potentially fair reason for dismissal as confirmed in Section 98 of ERA.

10 193. Both Mr Bathgate and Ms Byars agreed that the well known and long established case of ***Burchell*** set out the principles to be applied by the Tribunal in assessing fairness.

15 194. The Tribunal therefore requires to be satisfied that the respondents genuinely believed that the claimant was guilty of the misconduct.

195. I accepted that this requirement was met in this case. There was no suggestion of any ulterior motive or that the respondents did not genuinely regard the claimant as having committed the misconduct in question.

20

196. The second requirement is that there must be reasonable grounds for the belief to exist on the part of the respondents at the time that they formed the view which they did.

25 197. This requirement is tied in with the third requirement that there must have been a reasonable investigation carried out by the respondents.

198. After some reflection, I was satisfied that there had been a reasonable investigation carried out by the respondents in this case. That is in the sense that it lay within the band of reasonable investigations which would be carried out by a reasonable employer (***Hitt***).

30

199. I recognised the criticism which Mr Bathgate made of the investigation. The respondents had attempted to obtain from Mr Boyd a note of the date and

time he saw the claimant write upon the magazine. He was unable to provide that specific information. It would have been helpful had the respondents looked to obtain information as to shifts worked by Mr Boyd and breaks taken, comparing those with shifts worked by the claimant and breaks taken. The claimant did not ask for this exercise to be carried out. There was no direct evidence before the Tribunal that this exercise could not have been carried out. There were comments made to the respondents during the investigation process, however, that the claimant and Mr Boyd were not in the canteen at the same time due to break times being different. This comment was made specifically at the second stage appeal held before Mr Dickson. Mr Dickson's view was that even if true this did not preclude Mr Boyd having seen the claimant write on the magazine. The fact that there was no request made by the claimant to take the step mentioned of checking breaks and shifts worked does not of course of itself mean that a reasonable investigation would not extend to that exercise being carried out. It is, however, one factor in considering what might have been involved in a reasonable investigation. If an employee suggests a course of action or presents information which warrants follow up then a failure to take that step is more readily identified as a failure to carry out a reasonable investigation, providing there is a relevance to the information or step highlighted.

200. It is true that the claimant did not have information as to the date and time when the claimant was said by Mr Boyd to have been seen writing on the magazine. That information was however sought from Mr Boyd. The lack of information in circumstances where it was asked for but was not available did not in my view properly found a claim of lack of fair notice. It did not mean, in my view, that it could successfully be argued that no reasonable investigation had been carried out.

201. It was not said by the claimant that it was simply impossible that Mr Boyd could have seen him writing on a magazine. The respondents met with Mr Boyd and assessed the credibility of his evidence. They assessed that both in relation to whether he had seen the claimant write anything and also in

relation to whether he had been coerced by Mr Brannigan, as the claimant suggested. Their view was that the fact that Mr Boyd had not said that he saw the claimant write particular comments or words supported the view that his evidence was genuinely given. Their opinion was that had he been coerced by Mr Brannigan that involved quite a degree of collusion and might have been something detected by them. It also would have been likely to result in a more definitive version being forthcoming from Mr Boyd, perhaps detailing some of the words which were said to have been written by the claimant, in the respondents' view.

10

202. In assessing the degree of investigation carried out in relation to Mr Brannigan's statement, I bore in mind that the respondents had considered various elements both in determining what investigation they carried out and in assessing the information available as a result of the investigation.

15

203. The respondents had weighed up Mr Brannigan's statement, being aware that he had not immediately challenged the claimant. Mr Brannigan said that the claimant was not present at the time when the magazine was found. He also said that he was somewhat wary of challenging the claimant as he was of the view that there might be a confrontation. That may or may not have been the way that matters would have taken shape. It was viewed by the respondents as being a legitimate answer to the question as to why no immediate reporting had occurred.

20

204. The respondents had been aware of the grievance lodged by the claimant. They had assessed both potential coercion by Mr Brannigan and also the potential for Mr Brannigan making the report by way of some form of "payback" for the grievance lodged by the claimant.

25

205. The respondents followed up any avenue of investigation suggested by the claimant. They spoke to the witnesses suggested by the claimant. They considered points made by him. They demonstrated a willingness to revisit decisions and to take views different to those initially taken. Four charges

30

initially made became three charges which formed the basis of initial dismissal, each one being viewed as sufficiently serious in its own right to warrant dismissal. A ground of appeal in relation to one of those charges was upheld at the first appeal, reducing the charges which formed the basis of appeal to two. An appeal on a further charge was upheld at the second appeal, leaving dismissal resting on the charge in relation to writing on the magazine.

206. Looking at the investigation carried out by the respondents, I considered carefully the points made by Mr Bathgate in cross-examination of the respondents' witnesses and indeed in submission based on the position revealed in cross-examination.

207. In cross-examination Mr Dickson in particular was prepared to concede that it might have been appropriate to put into the letter of dismissal the fact that he regarded the claimant's refusal to participate in an investigation by a handwriting expert and also his refusal to name the person who he either regarded as or knew to be the author of the comments as having an element of weight in his decision making. He also accepted, having been taken to the statements from Mr Boyd and from Mr Brannigan that he was unable to be definitive as to which event had occurred first in time, whether Mr Boyd had seen the claimant write on the magazine before the magazine had been found by Mr Brannigan.

208. I accepted that there were criticisms of the investigation validly made by Mr Bathgate on behalf of the claimant. It can often be the case that in the cold light of day in the Tribunal Hearing, when the process is closely examined by a skilled questioner, there are steps which could have been taken as part of the investigative process at the time which are later viewed as being of more significance than they were at the time of the investigation. It may be the case that taking those steps was something which just did not occur to the person investigating or conducting the disciplinary or appeal hearings. That of course does not mean automatically that the resultant investigation

absent those steps is a reasonable one. Equally, however, the ability to point to steps which might have been taken and were not taken by way of investigation does not render the investigation which did take place unreasonable. The test is whether the investigation carried out lay within the band of reasonable investigations which a reasonable employer would undertake. A detailed forensic investigation which might be undertaken by a skilled lawyer is not required of an employer in terms of **Burchell** and **Hitt**.

5
10 209. It seemed to me in this case that the investigation, whilst meriting many of the criticisms made of it by Mr Bathgate, did lie within that band. It was not ideal, for example, that Mr Brennan had spoken with Mr Boyd and had not provided any information to the claimant as to what Mr Boyd had been asked and what he had said. Nothing, however, outwith what was said in
15 the statement initially provided by Mr Boyd, was relied upon by the respondents in their decision making.

210. The respondents then had information available to them for assessment. Mr Barrowman had spoken to Mr Boyd. Mr Brennan had spoken to Mr
20 Boyd. Mr Scott had also spoken to Mr Boyd. Mr Barrowman had spoken to Mr Brannigan. Mr Scott spoke with Mr Brannigan.

211. The respondents were conscious of the fact that the claimant had lodged a grievance against Mr Brannigan. They considered the possibility that Mr
25 Brannigan had coerced Mr Boyd. They rejected those possibilities having spoken both with Mr Brannigan and Mr Boyd. This involved an assessment of the credibility of those witnesses. The claimant himself said to Mr Brennan that he did not know why Mr Boyd said what he said about seeing the claimant writing on the magazine

30

212. The respondents also considered the claimant's question as to why he would have left the magazine lying on his toolbox if he had written the comments on it. In a completely thorough investigation the respondents

would, in my view, have put to the claimant the thought which they apparently had at that point namely that the claimant may have left the magazine there thinking that there was nothing particularly wrong in the comments being made in that they were humorous or perhaps part of workplace banter. They did not put that proposition to the claimant. The fact that they did not does not in my view render either the investigation outwith the band or mean that the respondents did not have sufficient grounds on which to form the view that they did as to the claimant being guilty of misconduct.

10

213. Boiling it down, the respondents were left with the evidence of Mr Boyd that he saw the claimant writing on this particular edition of the magazine. They also had the evidence of Mr Brannigan that he found a copy of the same edition of the magazine with comments written on the front cover and inside pages. The claimant denied that he was responsible for the writing.

15

214. In my view the respondents did not take themselves outwith the band of a reasonable investigation by initially declining to take up the option of there being a handwriting expert. In any event, assessment of the fairness of the dismissal involves consideration of all that went on in the disciplinary process including appeals. At the second appeal Mr Dickson opened the door to there being a handwriting expert. At that point the claimant declined to take that step. That seemed somewhat odd to Mr Dickson given the claimant's earlier keenness on that course and also given his position at the second appeal that he wished to clear his name. Likewise, the refusal to name someone who he believed had written on the magazine was a choice made by the claimant but one which did not sit well, in Mr Dickson's view, with the opportunity being given to him to overturn potentially the decision to dismiss and to clear his name, as was his avowed intention.

20

25

30

215. I am conscious in my assessment of the position of two further key things. Firstly, the Tribunal must not substitute its view of matters for that of the respondents. The Tribunal, of course, is entitled to come to the view that the

respondents have not met the elements in the "**Burchell**" test. That, however, must be based on the Tribunal concluding (applying the test to the two areas in dispute in this case) either that the respondents did not have reasonable grounds for the belief which they formed or that a reasonable investigation was not carried out. The second point of which I am very conscious is that the respondents are not required to meet the high forensic standard which might be required in a police investigation, for instance. Equally they are not required to demonstrate to the Tribunal beyond reasonable doubt that the claimant was guilty of the misconduct.

10

216. In assessing therefore the investigation carried out and the events in the case with the view taken upon those by the respondents as to what had happened, I have concluded that, applying the two elements of the **Burchell** test just mentioned, the respondents did have reasonable grounds for concluding that the claimant was guilty of the misconduct involved and that the investigation which they carried out was a reasonable one in all the circumstances.

15

217. I appreciate that there is an element of assumption in making the link between the claimant being seen to have written on this edition of the magazine (the respondents having believed Mr Boyd's evidence) and the same edition of the magazine being found with writing upon it at the claimant's toolbox (the respondents having believed the evidence from Mr Brannigan).

25

218. The respondents' position that this was a reasonable conclusion to which they could come on the balance of probabilities, did not seem to me something which was open to successful attack in the Tribunal proceedings resulting in the dismissal being unfair.

30

219. I therefore concluded that the dismissal is appropriately viewed by the Tribunal as being fair, applying the ERA and the relevant case law..

Sanction – Dismissal

220. Given the comments made, it seemed to me that the decision to regard the comments as being gross misconduct and then to take the view that the applicable sanction was dismissal, was something which lay within the band of reasonable responses of a reasonable employer.
221. The respondents advanced cogent reasons why the comments were viewed as being entirely unacceptable. There was particular concern on their part both as to the fact that the comments were made about senior management and also especially as the comments involved a young girl. There was also evidence of concern on the respondents` part as to damage to reputation of the respondents if the comments written became public knowledge. I recognise that dissemination did not occur. Nevertheless the potential was there for possible reputational damage.
222. Whilst there were initially four charges, the charge in relation to the comments written on the magazine was at all times viewed as being sufficiently serious, if taken in isolation, as to constitute gross misconduct and to warrant dismissal. It was never the respondents` position that the accumulation of charges amounted to sufficient reason for dismissal. Had that been the position the reduction of the number of charges might have led to the view that on its own this charge was never viewed as being worthy of dismissal.
223. In my view the respondents gave valid reasons to explain the difference in treatment between the outcome in case involving Mr Collins and that involving the claimant.
224. The respondents did take account at the time of the claimant`s length of service and his clean disciplinary record.

225. In all the circumstances, I did not see that the decision to dismiss lay
outwith the band of reasonable responses of a reasonable employer.

5 226. In those circumstances the dismissal is not unfair, applying the statutory test
as interpreted by long standing and authoritative case law. The claim is
therefore unsuccessful.

10

15 Employment Judge: Robert Gall
Date of Judgment: 04 April 2017
Entered in register: 04 April 2017
and copied to parties

20

25

30