



EMPLOYMENT TRIBUNALS

Claimant: Mr. M Yasin

Respondent: Albert Farnell Limited

HELD AT: Leeds Employment Tribunal (by CVP) **ON:** 26, 27 November 2020

BEFORE: Employment Judge Buckley

REPRESENTATION:

Claimant: Miss Hand (Counsel)
Respondent: Miss Gould (Counsel)

This has been a remote hearing by CVP, which has not been objected to by the parties. The form of remote hearing was V: (Video). A face to face hearing was not held because it was not practicable, and no-one requested the same and all the issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The claim for unfair dismissal is dismissed.
2. The claim for breach of contract (notice pay) is dismissed.
3. The claim for unpaid holiday pay is dismissed.

REASONS

1. This is a primarily a claim for unfair dismissal. The issues which I have to determine were agreed at the start of the hearing to be:

- 1.1 What was the reason or principal reason for dismissal? The respondent says the reason was conduct or some other substantial reason. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct/in the other substantial reason.
 - 1.2 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular, whether:
 - 1.2.1 there were reasonable grounds for that belief;
 - 1.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
 - 1.2.3 the respondent otherwise acted in a procedurally fair manner;
 - 1.2.4 dismissal was within the range of reasonable responses.
 - 1.3 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - 1.4 If so, should the claimant's compensation be reduced? By how much?
 - 1.5 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
 - 1.6 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
 - 1.7 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
2. The claim form contains a claim for wrongful dismissal and for holiday pay. Neither party raised these claims in the hearing either when the list of issues was agreed, or at any other point. I was not addressed on them in submissions, but I am not aware that they had been withdrawn.
 3. No evidence was called on the holiday pay claim and I dismiss it on the basis that it is not proven on the balance of probabilities. The claimant was paid in lieu of notice and I dismiss the wrongful dismissal claim on that basis.

Witnesses

4. I heard evidence from the claimant. For the respondent I heard evidence from Neil Hall, General Manager, Mathew Timmons, Divisional Aftersales Director and Simon Horabin, Franchise Director.

Findings of fact

Introduction

5. The claimant worked as a smart repair technician at the respondent's Jaguar Landrover dealership in Bradford from 5 August 2017 until his dismissal on 2 October 2019. The respondent sells, maintains and repairs cars. The claimant was known as 'Sal' at work, and this name is used to refer to the claimant in some of the evidence.

Background – the previous disciplinary action and grievance

6. The claimant was given a first written warning in October 2018 for using foul and abusive language in a confrontation with James Wilson, Service Manager (the 2018 allegations). The investigation was carried out by Emma Moriarty. The disciplinary officer was Neil Hall, Group Bodyshop Manager. Amy Lightowler (human resources) attended the disciplinary hearing. The minutes show that Neil Hall asked most of the questions, but Amy Lightowler also asks some questions of the claimant. The written warning was overturned on appeal by Matthew Timmons, Divisional Aftersales Director on the basis that he felt that there was a lack of evidence, and that James Wilson may have had more of a role in instigating the altercation than the respondent had initially been lead to believe.
7. In June and July 2019, the claimant underwent a disciplinary investigation into a number of allegations ('the fraud allegations'). The allegations originally came to light because of concerns that Richard Sawyer had about the claimant's invoicing. Richard Sawyer (Technical Supervisor) carried out some initial fact finding and the disciplinary investigation was taken on by the claimant's line manager John Hughes, (Cosmetic Repair Regional Manager) with HR support from Amy Lightowler.
8. After the claimant had received notice of a disciplinary hearing but before the hearing took place, the claimant submitted a grievance against Amy Lightowler, Richard Sawyer and John Hughes. His allegations included that Amy Lightowler was one-sided during the investigation in September/October 2018. He states that in the disciplinary for the 2018 allegations he felt that she was 'wanting to sack me' and that 'if it wasn't for Neil smart report manager fighting my corner I would have been sacked...On appeal by Matthew Timmons it was clear that there was No evidence against me and he overturned the decision.'
9. On 29 July 2019 Jack Howden (Visual Merchandiser) called his line manager, Oliver Jackson (Sales Manager) with a number of allegations, including reporting that the claimant had encouraged him to accept cash in exchange for sending cars to a body shop and asked him to order parts for the claimant's personal car and allocate the cost to a sales car. The investigation report records that Jack Howden is a new employee and relatively shy. These new allegations were added to the existing fraud allegations. At some stage in the process the claimant was suspended, this appears to have taken place following the additional allegations raised by Jack Howden.

10. The grievance meeting took place on 6 August 2019. Most of the claimant's grievance including the part relating to Amy Lightowler was not upheld. The respondent upheld part of the grievance against Richard Sawyer, namely that he had taken away an extractor and failed to replace it.
11. The claimant appealed the grievance outcome by email dated 16 August 2019. The appeal was not upheld.
12. On 3 September 2019 the claimant attended a disciplinary hearing in relation to the fraud allegations, including those raised by Jack Howden. The disciplinary officer was Neil Hall. He determined that no action would be taken. The letter confirming the outcome was sent to the claimant on 6 September 2019.

Disciplinary action in relation to the incident on 10 September 2019

Investigatory stage

13. The claimant returned to work after his suspension on 10 September 2019. That evening Oliver Jackson reported to Neil Hall that he had been told that the claimant had behaved objectionably and used foul language towards Mark Barrett (new car sales manager) and Jack Howden in the presence of a number of other people in the sales team. It is apparent from the investigatory minutes of the interview with Martin Mollitt (one of the sales team who was present) that it was Martin Mollitt who brought it to Oliver Jackson's attention. He states 'I was uncomfortable about it all. Oliver came back in after about 5 minutes, I remember saying to Oliver to go see at the valet bay to keep an eye on them because I thought it was going to kick off'.
14. Neil Hall was responsible for conducting the investigation, although one of the investigatory interviews was carried out by Amy Lightowler. Gemma Reilly (sales executive) and Jack Howden provided written statements and the respondent carried out investigatory meetings with all five employees who had been present (Martin Mollitt, Mark Barrett, Jack Howden, Gemma Reilly and Abu Khayer) and with the claimant.
15. The investigatory meeting with the claimant took place on 17 September 2019. He was given the opportunity to give his version of events. There was no CCTV of the area where the incident occurred.
16. There is evidence either in the bundle or given by the claimant in the hearing that the claimant had a good working relationship with Martin Mollitt and Gemma Reilly. The claimant stated that he considered that he had a good working relationship with Jack Howden.
17. Although Neil Hall asks mainly open questions in the investigatory interviews, he asks a number of leading questions on some significant issues as follows. After Jack Howden has explained what he saw, Neil Hall asks 'When he was speaking to Mark and Mark said, "don't talk to him like that", did Sal [*the claimant*] then swear at Mark?'. Later in the same interview he states to Jack Howden 'You felt scared?'. To Mark Barrett he asks, 'Did you think it could escalate?', 'Did you ever feel you could be

assaulted?’ and states, ‘Someone also mentioned that he was being quite intimidating and threatening too’. To Gemma Reilly he states, ‘Did you hear him swear at Mark?’. To Martin Mollitt he asks, ‘Any swearing?’ and ‘You thought it would have escalated?’.

18. Some of these leading questions were put to Mr. Hall in cross-examination. He explained, for example, in relation to the questions to Martin Mollitt (‘Did you think it could escalate?’, ‘Did you ever feel you could be assaulted?’) that he was trying to understand how Martin Mollitt felt. I accept that this was an honest explanation and that was not attempting to escalate the charges against the claimant.
19. In the investigatory report’s summary of findings, it states that all the witnesses confirm that there was an altercation, mainly involving the claimant, Mark Barrett and Jack Howden. The majority of witnesses state that the claimant was the instigator and driver of the incident and that his behaviour was unacceptable. One of the witnesses could not recall any specifics and chose to leave the room when the matter became heated. The claimant denied the allegations, stating that he did not swear, and that Mark Barrett threw his phone on the desk.
20. The claimant initially denied stating that he said ‘innocent man walking through’ when walking into the sales office, but later called Neil Hall to say that he did say it in response to a comment that he was a dead man walking and a reference to OJ Simpson.
21. It came to light during the investigation that the claimant had approached Jack Howden at some point during the week, shook his hand and said, ‘thank you for the time off’. The claimant denied this and stated that he shook Jack Howden’s hand and said we need to work together, with the intent of rebuilding their relationship.
22. The summary states that there are two statements that the claimant swore at Mark Barrett and two statements stating that foul language was used by the claimant. Only the claimant’s statement says that he did not swear.
23. The report’s conclusions are set out over 2 pages. In essence Neil Hall concludes that, based on the witness statements, the claimant set the tone for his later behaviour when he entered the office by stating ‘innocent man walking through’. While Jack Howden was watching Mark Barrett signing off the claimant’s work, the claimant became objectionable to Jack Howden, leading Mark Barrett to ask the claimant not to speak to Jack Howden like that.
24. The report accepts that it is not completely clear what was said, but the statements support Mark Barrett behaving calmly towards the claimant, and the claimant behaving aggressively towards Mark Barrett. Two witnesses gave evidence that the claimant swore at Mark Barrett, but their versions of what was said differ. It is more likely than not that the claimant said something of an insulting nature involving the use of swear words. The claimant states that he left the room with Mark Barrett and Jack Howden,

but most witnesses state that Mark Barrett and Jack Howden left the room without the claimant and he continued to behave in a similar manner.

25. The report concludes that the theme of the statements is that the claimant was behaving in an intimidating and aggressive manner with the intent of causing disruption.
26. The report identified a number of breaches of company policy/procedure and a potential breach or breakdown in trust and confidence and recommends formal action for gross misconduct.

Disciplinary stage

27. The claimant was invited to a disciplinary hearing by letter dated 20 September 2019. The letter began by referring to the investigation meeting to discuss an allegation that the claimant behaved objectionably and used foul language on 10 September towards Mark Barrett and Jack Howden in the presence of a number of colleagues from the Sales Team.
28. The letter stated 'for clarity' that the allegations to be considered were:
 - Foul, abusive, objectionable or insulting language or behaviour
 - Disorderly conduct
 - Misrepresentation of fact – lying
 - Bullying or intimidation of another Colleague or customer
 - Serious breach of any of the Vertu Values of policies
29. In the respondent's disciplinary policy all these allegations are listed as examples of gross misconduct.
30. The respondent included copies of the minutes of all the investigation meetings and the two witness statements from Gemma Riley and Jack Howden. The letter set out all the possible outcomes, including the possibility of dismissal with or without notice.
31. The disciplinary hearing took place on 2 October 2019. It was chaired by Matthew Timmons. The claimant attended with a trade union representative. The claimant did not ask for the opportunity to question witnesses.
32. The claimant was given the opportunity to give his version of events again. The claimant asked Matthew Timmons to ask each witness to confirm that there are no lies in their statements and that if there are they will face a disciplinary. He stated that the four witnesses said he swore because they all wanted him out. Although he was pressed on this by Matthew Timmons he provided no further information about why he believed this.
33. The claimant stated in the meeting that he never swore. Matthew Timmons said that he was fully aware from previously working with the claimant that he did use language like that. The trade union representative asked Matthew Timmons if he was using knowledge from a previous investigation and he replied that it was from his previous relationship with the claimant.

34. As a result of the claimant's request Matthew Timmons adjourned the hearing and it was explained to Jack Howden, Gemma Reilly and Abu Khayer that false or misrepresented information could result in disciplinary action. They confirmed that their statements were true. Matthew Timmons did not put to any of the witnesses the allegation by the claimant that they wanted the claimant 'out'. The claimant had asked in the meeting for CCTV footage to be viewed. This was explored, but the CCTV had been disabled because of the proposed relocation of the business.
35. The claimant was given the outcome of the disciplinary meeting after an adjournment. The claimant states that the adjournment was about 10 minutes, Matthew Timmons could not remember, but thought it would be between 20 and 30 minutes. Matthew Timmons took the decision to terminate the claimant's employment with immediate effect. There is no note of the reasons given to the claimant in the meeting, but they are set out in a letter dated 9 October 2019. The letter states that the claimant's employment has been termination for gross misconduct for the following reasons:
- 35.1 Foul, abusive, objectionably or insulting language or behaviour
 - 35.2 Misrepresentation of fact – lying
 - 35.3 Bullying or intimidation of another Colleague or customer
 - 35.4 Serious breach of any of the Vertu values or policies.
36. The misrepresentation of fact/lying refers to the fact that the claimant rang up after the investigatory meeting and admitted that he had said 'innocent man walking.' However, it is clear from Matthew Timmons witness statement and his oral evidence that the principal reason for dismissal was the claimant's behaviour on 10 September rather than this specific incident of misrepresentation of fact or lying.
37. The letter states that Matthew Timmons considered alternative sanctions including a final written warning and alternative roles. The letter states that based on the evidence Matthew Timmons believes that the claimant created an intimidating and aggressive situation, including the use of abusive language. Further, the claimant had not taken responsibility for his actions which has resulted in a breakdown of trust and confidence in being able to continue in his role.

Appeal stage

38. The claimant appealed his dismissal. In his email he stated that the decision was too harsh, the witness statements questionable and that the meeting was not impartial because he was questioned on irrelevant issues. He also stated that he would like to present 'new evidence which has come to light'.
39. His appeal was heard on 6 November 2019 by Simon Horabin, Franchise Director.
40. It appears that at the beginning of the appeal meeting Simon Horabin indicated that the trade union representative would not be able to take part,

but this was resolved before the substantive part of the appeal meeting began.

41. Simon Horabin began the appeal meeting by stating that he wanted to understand the reason for the appeal. The claimant's trade union representative began by setting out that the claimant had had a lot of difficulties at work in 2019, including disciplinary action and that he had been treated for stress and anxiety. He had recently submitted a lengthy grievance. He stated that due to the claimant's anxiety he had made a covert recording in the office, which he accepted was in breach of the company disciplinary rules.
42. The meeting was adjourned to allow Simon Horabin to listen to the recording. Neither the recording nor a transcript was before me, but Simon Horabin gave evidence as to the content of the recording. He stated that it was quite difficult to understand, and that he and Amanda Smith (HR business partner) had to listen to it a number of times before they could piece together what was happening.
43. He stated that he felt that the claimant was being provocative with his initial comments and dismissive of his colleagues when asked for details of his work. Simon Horabin felt that he was goading Jack Howden with comments such as 'the boss is looking' and 'no need to get in his pocket'. The claimant also used a style of repeating himself to Jack Howden on a couple of occasions which felt to Simon Horabin to be rather intimidating and aggressive. At that point, Mark Barrett asked the claimant not to speak to Jack Howden in that way.
44. In cross-examination Simon Horabin stated that the recording did show that the claimant swore but did not show him swearing at anyone directly. For example, he stated that it did show the claimant said 'never fucking checked my work before' in the conversation with Gemma Reilly and Martin Mollitt. However, the recording did not show him swearing at colleagues by saying 'I'll speak to him how I fucking want pal' or 'don't you fucking talk to me like that'.
45. Simon Horabin got the sense from the recording that the claimant was a willing participant and that it seemed that the claimant was keen to encourage conflict and allow a confrontation to arise.
46. The recording raised some questions in Simon Horabin's mind, and he referred to the statements to ensure that he could correlate the recording with the recollection of the witnesses. His overall view of the recording was that the claimant's behaviour was as described by the witnesses, but there had been some differences in interpretation. He stated that he could 'absolutely understand why our witnesses felt intimidated and scared of the claimant, based on how he had spoken to them.'
47. Simon Horabin observed that the recording could not give an indication of the claimant's body language or position in the room.

48. After the adjournment he asked the claimant why he had not produced the recording earlier. The claimant stated that 'I didn't feel I would get justice. It's clear that there is lies in the statements and my anxiety kicked in and it did not trigger in my mind to go in with this stuff'.
49. This is different to the reason that the claimant gave in the tribunal proceedings. In his witness statement he says:
- 'The simple explanation for not presenting the recording on appeal was that my Union officer at the time essentially put the frighteners on me and said that the recording was illegal, and I could get in trouble and that it was potentially a criminal offence. Had I known that it was likely to clear my name at the beginning of the process. I would of course have disclosed it. I can assure the tribunal that this was the only reason... By the time of my appeal hearing, the Union advisor was then giving me further advice and said that he had checked the situation and to include the recording after all.'
50. In the appeal meeting, other than the discussion of the recording there was little discussion of the allegations against the claimant. Simon Horabin indicated that he would carry out further investigation as a result of receiving the recording, and that there might be a further meeting with the claimant.
51. Following the appeal meeting, Simon Horabin carried out some additional investigation, interviewing Jack Howden and Mark Barrett. They gave broadly the same evidence as they did in the previous investigatory interviews.
52. Simon Horabin did not call a further appeal meeting but proceeded to determine the appeal and sent the outcome of appeal to the claimant by letter dated 8 November 2019.
53. Taking account of the contents of the letter and the evidence given by Simon Horabin in the tribunal, I find that his decision was as follows. Overall, he preferred the version of events given by the witnesses in relation to the recording because:
- 53.1 He did not know if the recording was complete or if it had been edited. It did not include the 'innocent man walking' comment, which the claimant had admitted making at one stage.
- 53.2 An audio recording could not show the full picture – for example it would not reveal body language and positioning. The statements were therefore better evidence of the wider tone of the conversation and whether the claimant's behaviour was intimidating or in appropriate.
- 53.3 The statements were broadly consistent with each other.
54. In relation to the specific words used by the clamant, Simon Horabin accepted on the basis of the recording that the claimant had not sworn *at* anyone, although the recording did show that he had sworn.

55. It is clear from Simon Horabin's evidence that he took the view that the claimant's conduct, even without any swearing directed at colleagues, was wholly inappropriate and intimidating and that it amounted to a serious breach of Vertu values (i.e., 'Respect: We are friendly and courteous in our relationships with Colleagues..') A serious breach of Vertu values is listed as an act of gross misconduct in the respondent's disciplinary policy. Intimidation of another Colleague is also listed as an act of gross misconduct.
56. Simon Horabin also determined that the claimant's conduct in making a clandestine recording and presenting it late in the process was wholly inappropriate. The claimant was not aware until the appeal outcome letter that this was a separate disciplinary allegation against him, although it was addressed with him in some detail in the appeal meeting.
57. Taking into account the above, Simon Horabin decided that the claimant was not guilty of gross misconduct in relation to the foul, abusive and objectionable language allegation, because he had not sworn directly at someone.
58. Simon Horabin spoke to human resources about the options that were available to him. They advised him that one of the options was to reduce the penalty from dismissal without notice to dismissal with notice. This is the option he decided to take. The date of termination remained as 2 October 2019, but the claimant was paid in lieu of his contractual notice.
59. Simon Horabin was asked in evidence whether he would have reached the decision to dismiss even without the allegation of conduct related to the covert recording. He was clear that, in his view, the claimant's conduct on 10 September was so serious that it justified dismissal and that he would have dismissed him in any event. I accept this evidence.

The tribunal's findings on the incident on 10 September 2019

60. These are the tribunal's findings of fact as to what happened on the 10 September 2019 on the balance of probabilities. These findings are not relevant to liability for unfair dismissal. They are only relevant to any potential deductions for conduct or contributory fault.
61. In reaching these findings I have taken account of the information from the claimant and other colleagues recorded in the notes of the investigatory interviews. I have taken account of the claimant's version of events given in the disciplinary process. In the absence of the recording or a transcript have taken account of Simon Horabin's evidence as to its contents.
62. I did not hear detailed oral evidence in the tribunal hearing from the claimant explaining what happened on the 10 September. It is dealt with very briefly in the witness statement, which simply states that the claimant cannot recall if he said innocent man or dead man walking, and that he was not aggressive in any way. I am therefore faced with a conflict between the

claimant's evidence as given in the investigatory and the disciplinary meetings and the evidence of the other witnesses given in the investigatory meetings.

63. I find that the statements of the other witnesses are broadly consistent. There is no evidence before me of a motive for them to confer and agree a consistent fabricated version of events. Given that they are based on individuals' independent recollections it does not surprise me that there are differences when it comes to the exact wording used by the claimant, and if and when he either swore or swore at somebody. Simon Horabin concluded that the recording was broadly consistent with the evidence of the witnesses.
64. The claimant denied that he swore at all. This is not true – the recording shows that he swore, even though he did not swear at anyone. Further the claimant's evidence in tribunal as to the reason for withholding the recording until the appeal shows that he was not being truthful when he gave a different explanation in the appeal. The claimant could have produced the recording or a transcript of the recording if it supported the version he gave in the investigation and disciplinary process. He did not. I accept Simon Horabin's evidence that his overall view of the recording was that the claimant's behaviour was as described by the witnesses, but there had been some differences in interpretation.
65. Based on the above, on the balance of probabilities, I conclude that the evidence of the witnesses is more likely to be an accurate reflection of what happened on 10 September and I make the following findings on that basis.
66. The claimant returned to work from his suspension for the fraud and record keeping allegations on 10 September 2019. Near the end of the working day, he had to get some work signed off by Mark Barret and Jack Howden. As he entered the room he stated, 'innocent man walking through'. This was a reference to the fact that he had been cleared of the disciplinary charges against him. Martin Mollitt responded in a jokey fashion with a reference to OJ Simpson. At this stage the atmosphere felt awkward for some of those present but not confrontational.
67. During the conversation between Mark Barrett and Jack Howden the claimant became annoyed with the process of them having to check his work before signing it. As a result, he made a number of comments to Jack Howden including, 'You don't need to be looking at that Jack' and 'You won't get a promotion like that pal'. I find, on the basis of the evidence of the witnesses, that these comments were reasonably interpreted as aggressive and intimidating to Jack Howden because of the tone used by the claimant, and his body language. Although Mark Barrett asked the claimant not to speak to Jack Howden like that, he did so calmly. After the confrontation Gemma Reilly and Martin Mollitt tried to calm the claimant down, who was quite angry, swearing and saying things like 'they're trying to fucking shaft me.'

Application of the law to the facts

What was the reason or principal reason for dismissal and was it potentially fair?

68. I must assess the principal reason for dismissal on the basis of the reason for the original decision to dismiss (West Midlands Co-operative Society v Tipton [1986] ICR 192 and Monie v Coral Racing [1981] ICR 109). The finding that the clandestine recording was inappropriate and that the timing and manner of its disclosure were questionable cannot form part of the reason for dismissal.
69. The claimant submitted that there was, in effect, a desire within the respondent to get rid of him. I do not accept that there was any evidence that the individuals involved in the disciplinary process had a hidden agenda to get rid of the claimant.
70. The claimant's grievance specifically refers to Neil Hall 'fighting his corner' and highlights the fact that Matthew Timmons overturned the written warning on appeal. Neil Hall and Matthew Timmons's actions in previous disciplinary allegations against the claimant are not consistent with a hidden agenda to get rid of the claimant.
71. Simon Horabin was not involved in any of the previous disciplinary action and the claimant did no more than assert in evidence that he didn't think Simon Horabin was very nice to him in the appeal and that he thought he 'had an issue'. This was not put to Simon Horabin in cross-examination. This is insufficient to support a finding that Simon Horabin had any hidden agenda to get rid of the claimant. Although the claimant had raised a grievance against Amy Lightowler her involvement in the investigatory and disciplinary process that led to the claimant's dismissal was minimal.
72. The reasons for dismissal are set out in the letter dated 9 October 2019 and in Matthew Timmons' witness statement. The precise label used by the respondent is not relevant. I find that the principal reason for dismissal was the claimant's conduct on 10 September 2019, which the respondent determined amounted to foul, abusive, objectionable or insulting language or behaviour; bullying and intimidation and a serious breach of the Vertu values or policies. This is a potentially fair reason for dismissal (conduct), and I accept on the basis of Matthew Timmons' evidence that he had an honest belief in that reason.

Did the employer act reasonably in dismissing the claimant for this reason?

Did the respondent have reasonable grounds for the belief?

73. On the basis of the information before Matthew Timmons he had reasonable grounds for his belief. All the witnesses that were present for the entire incident stated that the claimant had used foul language. Two of them stated that the language was directed at colleagues. Even though the statements were not consistent as to the exact wording used, they are consistent in stating that the claimant was aggressive, and that Mark Barrett had remained calm. They are also broadly consistent as to what was said by

whom and in what order. Having read the statements it is clear to me that it was open to Matthew Timmons to prefer the evidence of the witnesses to that of the claimant. The claimant had given no reason for his assertion that the witnesses wanted him 'out'.

74. In considering whether or not an employer acted reasonably in dismissing the claimant I must take account of new information that comes to light during the appeal process such as the recording: West Midlands Co-operative Society Ltd v Tipton [1986] ICR 192.
75. Simon Horabin did take account of the recording, and for the reasons set out in my findings of fact, he determined that, overall, he preferred the evidence of the witnesses in relation to the overall tone and the intimidating behaviour of the claimant. He did accept, on the basis of the recording, that the claimant had not sworn directly at anyone. He concluded that the behaviour was inappropriate, intimidating and a serious breach of Vertu values.
76. I have not heard the recording, but on the basis of the evidence I have heard about it, and also simply from its nature as an audio recording, I accept that Simon Horabin's reasons for his conclusions are cogent and justifiable.
77. On this basis I conclude, even taking into account the new evidence which emerged at the appeal, that there remained reasonable grounds for concluding that the claimant's conduct was intimidating and a serious breach of the Vertu values. It would also have been reasonable to conclude that the claimant had used foul, abusive, objectionable or insulting language or behaviour, even though the claimant did not swear *at* anyone.

Was the investigation reasonable?

78. I accept that Neil Hall asked a number of leading questions in the investigatory meetings relating to some issues which were significant in his decision that he believed that there was a case to be heard for potential gross misconduct. I accept Mr. Hall's explanation of his motive for asking these questions. I do not accept the claimant's submissions that this is evidence of Mr. Hall attempting to escalate the issue or build a picture that things were significantly worse so that the charges against the claimant could be increased.
79. Despite my findings of a lack of nefarious motive, it is clear that an investigatory officer should try to avoid asking leading questions on significant issues. This is not an easy task. Even highly experienced barristers occasionally fail to avoid a leading question. An investigatory meeting is not a court hearing. There were only a limited number of leading questions. The information provided in response to other, more open questions, was along similar lines to that provided in response to the leading questions. I do not accept that this failing makes the investigation, looked at as a whole, unreasonable.

Did the respondent otherwise act in a procedurally fair manner?

80. Miss Hand put a number of points about procedure to the witnesses in cross-examination which I deal with here.
81. The invite to the disciplinary hearing makes clear reference to the incident on 10 September. It is clear that the potential disciplinary action relates to the claimant's conduct in that incident. The respondent sets out a list of the types of misconduct under their policy which cover this type of behaviour. The respondent included copies of the minutes of all the investigation meetings and the two witness statements from Gemma Reilly and Jack Howden. The letter sets out the possible outcomes of a disciplinary hearing and states that different outcomes reflect the distinction between minor disciplinary offences and more serious ones such as gross misconduct. It states that one of the potential outcomes in this case is dismissal with or without notice because of the severity of the issue.
82. I find that the claimant has sufficient information about the alleged misconduct and the potential outcomes to enable him to prepare to answer the case against him at the disciplinary hearing. The fact that the heading of the letter states 'misconduct and some other substantial reason' rather than 'gross misconduct' makes no difference. The letter makes abundantly clear that dismissal with or without notice is a potential outcome because of the severity of the alleged conduct. The list of allegations all appear in the respondent's policy as examples of gross misconduct.
83. The claimant made no request to cross-examine or question the witnesses and there is no procedural unfairness in failing to make them available to him to question. He made a request that a particular point was put to the witnesses and Matthew Timmons acted upon that request.
84. It was submitted on behalf of the claimant that the allegation that the witnesses were out to get him should have been put to the witnesses by Matthew Timmons once it had been raised. I do not accept this. Nothing was provided by the claimant to substantiate this allegation and it was reasonable not to put this bare assertion to the witnesses.
85. I do not think that it matters precisely how long an adjournment Matthew Timmons took to consider his decision. It is clear from his evidence that he gave the matter adequate consideration.
86. I accept that the appeal is quite short. It was not a full rehearing and therefore did not go through each of the allegations again with the claimant. Most of the discussion centred on the recording that had been produced by the claimant. Looked at in the context of the process overall, the claimant had been given a full opportunity at the disciplinary hearing to address each of the allegations. A failure to completely rehear all the evidence on appeal does not make the process unfair.
87. I find that it was reasonable of Simon Horabin to decide not to go back to the claimant after he had carried out some further investigatory meetings with the witnesses. Nothing new of significance had emerged during those

meetings and the claimant had had plenty of opportunity to give his version of events.

88. The claimant criticises the respondent for failing to raise with the witnesses that the claimant had made a recording and assess with them if it represented their recollection of what happened. I do not accept that the respondent had to take this course. Simon Horabin chose instead to form his own view as to whether or not the witnesses' recollections were accurate taking account of the recording and its limitations. This was a reasonable approach to take.
89. Rather than stick to the allegations that had been dealt with in the disciplinary, Simon Horabin in effect added another allegation of misconduct: the covert recording and the late production of the recording in the disciplinary process. I accept that it was unfair of the respondent to make a finding of inappropriate conduct against the claimant for making a covert recording and disclosing the recording late without having informed the claimant that he was facing potential disciplinary action for this charge.
90. The respondent had given the claimant the opportunity to give his reasons for doing so in the appeal hearing, but it had not told the claimant at any point in the hearing that he faced potential disciplinary action as a result of this conduct.
91. Under the ACAS code of practice, the employer should be notified in writing of the disciplinary case against them before the disciplinary hearing. It is a fundamental part of disciplinary procedures that employees should know the case against them.
92. This allegation did not form part of the reason for dismissal. In essence the claimant argues that this causes the dismissal to be unfair, and the respondent argues that it does not. In my view there are two alternative analyses of the effect of this failing:
 - 92.1 Because this allegation did not form part of the reason for dismissal it is not relevant to the statutory question: whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal.
 - 92.2 I have to look at the fairness of the whole process, including the appeal. The fact that the unfairness in procedure made no difference to the decision to dismiss is relevant to compensation not liability.
93. I conclude that the former is the correct approach. The focus of s 98(4) is on the reason for dismissal. Not only am I required to have regard to the reason shown by the employer, but also the question is not simply whether the employer acted reasonably or unreasonably. The question is whether the employer acted reasonably or unreasonably in treating that reason as sufficient reason for dismissal. Where the procedural unfairness relates to something which did not form part of the reason for dismissal it is not

relevant to the statutory question. For example, if the procedural unfairness related to an allegation against the employee which was not upheld, it would not be relevant to s 98(4).

94. Looking at the procedure as a whole, but with a focus on the reason for dismissal and the words of s 98(4), I find that the respondent acted in a procedurally fair manner.

Was dismissal within the range of reasonable responses?

95. Simon Horabin upheld the decision to dismiss. In doing so, he took account of the new information provided by the claimant and decided that the appropriate penalty was dismissal with notice because the penalty of dismissal without notice was too harsh. This is a conclusion open to the employer – the respondent’s disciplinary procedure entitles the respondent to impose whichever level of penalty it considers to be appropriate.
96. This employer makes very clear in its policy that intimidating behaviour is gross misconduct, and the Vertu values explicitly include being friendly and courteous in relationships with colleagues. I find that dismissal, whether with or without notice, was within the band of reasonable responses.

Conclusion on unfair dismissal

97. Based on my findings above, the dismissal was fair. The unfair dismissal claim is dismissed.

Alternative findings

98. Accordingly, it is not necessary to consider the question of a Polkey deduction or a reduction for conduct or contributory fault. However, I have considered what my alternative findings would have been if I had determined that the dismissal was unfair either (a) because I was wrong to conclude that the reason for dismissal should not include the reason given at the appeal stage and therefore part of the reason for dismissal was the allegation related to the covert recording which had not been dealt with fairly or (b) although I was right to conclude that it did not form part of the reason for dismissal it should, in any event, have rendered the dismissal unfair.
99. In either of those circumstances, I would have concluded that the claimant would have been dismissed at the same time in any event based on Simon Horabin’s evidence. Any compensatory award would therefore have been reduced by 100%.
100. In relation to reductions for conduct and contributory fault, I have found that the claimant behaved in a way which was reasonably seen as intimidating and aggressive by his colleagues. The procedural unfairness made no difference to the decision to dismiss. In those circumstances I would have concluded that the claimant’s blameworthy conduct was the sole cause of the dismissal. I would have found that the claimant’s conduct before the dismissal was such that it would be just and equitable to reduce the basic and any remaining compensatory award to nil.

Employment Judge Buckley

Date: 11 December 2020