EMPLOYMENT TRIBUNALS

Claimant: Mr Shuquan Sun

Respondent: Miki Travel Limited

Heard at: London Central (by CVP) **On:** 24 & 25 November 2020

Before: Employment Judge Isaacson

Representation
Claimant: In person
Respondent: Mr J Crozier, Counsel

Covid -19 Statement
This was a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because of the Coronavirus pandemic.

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant's complaint of unfair dismissal is not made out and is dismissed.

REASONS

Evidence before the Tribunal

1. The Tribunal was presented with a bundle form the respondent and a short bundle from the claimant. Many of the documents in the claimant's bundle were duplicated in the respondent's bundle. Page references are to the respondent's bundle. The claimant did not accept the respondent's bundle and on day 2 of the hearing said he did not have a copy of it but then accepted that he had received the bundle and printed it out but was not using the very latest version. He confirmed he was able to read every document referred to.

2. The claimant had written to the Tribunal on 17 November 2020 requesting a mandarin interpreter. Unfortunately, his request had not been actioned. The claimant confirmed that his English was good enough for him to proceed without an interpreter as long as legal jargon wasn't used. The claimant appeared to understand all the evidence and questions put to him and any legal jargon was avoided or explained. His spoken English was very good.

3. The Tribunal heard evidence from the claimant and from four respondent witnesses. The witnesses' initials are used to identify them for their privacy as this judgment will go on the public register. The Tribunal heard evidence from Mr Y, a department manager and the investigating officer; Ms K, head of the respondent's HR; Mr M, head of IT and the dismissing officer and Mr MDR, head of operations and a board of director who was the appeal officer.

4. Both parties had an opportunity to question witnesses and give oral submissions (a summary of their case). A draft list of issues was carefully considered at the start of the hearing and amended and agreed.

Claims and issues

5. Preliminaries

1) The Claimant was dismissed with effect from 12 February 2020 with a payment in lieu of notice.
2) The Claimant brings a claim for unfair dismissal.
3) The Respondent avers that the Claimant was dismissed for misconduct. The Claimant appears to dispute this.

Liability Issues

4) What was the reason (or principal reason) for the Claimant's dismissal? The Respondent relies on conduct.
5) If the Claimant was dismissed for misconduct, did the Respondent act reasonably or unreasonably in treating the reason for dismissal as sufficient reason to dismiss him?
6) Issue (5) shall include consideration of whether:
    a. the Respondent carried out a reasonable investigation into the circumstances of the alleged misconduct;
    b. the Respondent believed that the Claimant had committed the alleged misconduct; and
    c. if so, whether the Respondent had in mind reasonable grounds to sustain that belief?
7) Was the Claimant's dismissal otherwise substantively or procedurally unfair for the reasons set out by the Claimant in his claim, namely:

a. Did the Respondent take into account prior warnings given to the Claimant on 23 August 2019 (1st written warning) and 20 November 2019 (final written warning) in considering whether to dismiss the Claimant (§3-4);
b. Did the Respondent fail to investigate the Claimant's 22 November 2019 grievance as a separate matter (§4);
c. Did the respondent fail to investigate the claimant's grievance dated 22 July 2019;
d. Did Mr Lu involvement in the third disciplinary taint the respondent's decision?
e. Did the Respondent invent reasons to blame the Claimant for errors at the Respondent's business (§6);
f. Was there an orchestrated plan to dismiss the Claimant (§7)?

8) Did the decision to dismiss the Claimant fall within the range of reasonable responses open to the Respondent in light of the Claimant's conduct?
9) Was any unfairness in the decision to dismiss rectified or remedied at the appeal stage?
10) If the Acas code of practice is relevant was there any breach and should an uplift be applied?

Remedy Issues

11) If the Claimant was unfairly dismissed:
    a. What basic and/or compensatory award is he entitled to;
    b. What is the likelihood that the Claimant would have been dismissed in any event, notwithstanding any unfairness in the decision to dismiss;
    c. What reduction, if any, should be made to the basic and/or compensatory award for the Claimant's contributory fault?

Submissions

6. In brief, and not including all that was said, the respondent argued that the respondent did and was entitled to take account of the claimant's previous warnings when dismissing, in accordance with their disciplinary policy. The respondent was right to not investigate the claimant's 22 November grievance as a separate matter as it overlapped with their disciplinary process. The respondent did not deal with the claimant's grievance dated 22 July 2019 as he was merely complaining about being notified that he was being disciplined. There is no evidence that Mr Lu's involvement tainted the

respondent's decision. Any input from Mr Lu was carefully checked by both the disciplinary and appeal officers. The data provided by Mr Lu was not disputed by the claimant at the time of his disciplinary or appeal. There is no evidence that the respondent invented reasons to dismiss the claimant or orchestrated the claimant's dismissal. The reason for the claimant's dismissal was misconduct backed by clear evidence, following a careful investigation. The respondent followed a fair procedure and their decision to dismiss fell within a band of reasonable responses. They had a genuine belief in the claimant's guilt, based on reasonable grounds following a though investigation. Alternative sanctions to dismissal were considered but rejected in the circumstances.

7. The claimant's submissions are taken from his claim form, witness statement, the questions he asked in cross examination and his summary of the case. In brief, and not including all that was said, the claimant argued that he had withdrawn a previous race discrimination claim to the Tribunal due to a threat from HR. The respondent prejudged the claimant and there was no evidence in support of their decision to dismiss him. The claimant had only signed a contract to be a coordinator and not to do operations work so they couldn't require him to do operations work without negotiating. He wasn't given sufficient training to do the operations work. The respondent blamed the claimant for any mistake after forcing him to do operations work. There was an orchestrated plan from the very beginning to blame the claimant for mistakes after his job description changed. There were false allegations made, for example he did more then 10 invoices. His dismissal was substantively and procedurally unfair because the respondent relied on evidence from Mr L who was highly prejudiced as Mr L had bullied and threatened the claimant. The respondent had double standards as Mr L was not formally disciplined. He didn't accept that he had ben rude. The claimant wasn't allowed to raise an appeal to his first written warning after 3 months but Ms M was allowed to raise a grievance after 3-5 years. HR didn't investigate his grievances. HR had encouraged Ms M to raise her grievance. HR should have investigated Ms M, not the claimant. The respondent should have got someone within the department to assess his performance and using someone from outside the department showed it was an orchestrated plan to dismiss him. The claimant was suspended without an investigation. He was denied access to his work emails, which were blocked and so he could not verify whether the emails in the bundles had been fabricated. The decision to dismiss was unfair because the respondent did not take into account the claimant's mental health which affected his work performance. The claimant should not be blamed for invoices which he couldn't do while on holiday. That he was told he was going to a performance assessment meeting and not an investigating meeting. The members of staff who he had asked what they had said to HR were not junior to him but on the same level. The claimant was often notified of the disciplinary hearings on a Friday so had to prepare in his own time. The respondent failed to provide 1 million examples which Ms M accused the claimant of being blunt. Key points were missed out of the minutes of the disciplinary and appeal hearings. The respondent violated his privacy by sending letters to his old address. The investigation didn't look at the whole picture. He struggled to do his work because he was distracted by so many different disciplinary meetings.

The law

8. Section 94 Employment Rights Act 1996 (ERA) provides the right not to be unfairly dismissed. Section 98 provides that misconduct can be one of the potentially fair reasons to dismiss. Whether a claimant has been unfairly dismissed depends on whether in all the circumstances, including the size and administrative resources of the employer, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and should be determined in accordance with equity and the substantial merits of the case (s98(4) ERA).

9. Case law has established that the Tribunal should not put itself in the shoes of the employer and decide what it would have done in the circumstances. The test to apply is whether the respondent's decision to dismiss fell within the range of reasonable responses open to the respondent.

10. In considering whether the respondent acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason to dismiss the Tribunal should consider, in misconduct cases, the following three principles:

    a) whether the respondent carried out a reasonable investigation into the circumstances of the alleged misconduct;

    b) whether the respondent believed that the claimant had committed the alleged misconduct; and

    c) if so, whether the respondent had in mind reasonable grounds to sustain that belief?

Findings of fact

11. The respondent is a private travel company which provides travel products including tours to clients in the UK and internationally.

12. The claimant was initially employed by the respondent on 3 February 2014 as a Tour Coordinator in the respondent's Asia Coordination and Operations Department. In January 2018, following a restructure when the Asia Operations were moved to Budapest, the claimant moved to the respondent's UK and Eire Operations Department.

13. The claimant had a difficult relationship with his new line manager in the department resulting in the claimant issuing a race discrimination claim in the Employment Tribunal on 28 November 2018. The manager went off sick and the claimant refused to proceed with workplace mediation on the basis he thought the manager was falsely claiming that he was off sick with stress.

14. The respondent, in an email dated 28 February 2019, (p52a) pointed out their concern that the conflict was having a significant impact on the business and asked the claimant for any suggestions or proposals as to how the situation could be improved. The email went on to say "*We do need Tim back in the business, he is a proven manager and we need our*

most experienced people in the business for peak season, if there is no way forward between you and Tim we will need to consider all our options, including your dismissal. Please consider and come back to me if you have any proposals as to how this matter can be resolved".

15. The claimant read this email as a threat of dismissal if he did not withdraw his Tribunal claim. Consequently, he withdrew his claim, and a judgment was issued on 19 March 2019. The Tribunal understands why the claimant viewed the email as threatening as it mentions the possibility of his dismissal, but it also did invite the claimant to suggest methods to resolve the situation. The claimant was not told to withdraw his Tribunal claim by the respondent. The situation was resolved by moving the claimant's reporting line manager to Mr E, who was the Department Manager.

16. When the Claimant's line manager was moved to Mr E, part of his duties changed. Responsibility for coach operations was removed from his role and instead he was asked to carry out validating (approving) invoices for payment. It was a basic entry level function and the claimant's Section Manager, Mr L had a number of training sessions to get the clamant up to speed with the process, commencing in March 2019. However, by June 2019, it was felt that the claimant's performance was not up to standard.

17. The Tribunal accepts the evidence given by Ms K and Mr Y that the claimant was not completing the invoice validations within the required timescale (achieving 10 validations a month against an expected average turnaround of 25-30 invoices a month), and it was noted by colleagues that he was frequently absent from his desk.

18. The claimant alleges that he should never have been required to carry out the new operational tasks as his original contract only stated his job as coordinator. The Tribunal finds that it is normal for job roles to change over time due to the demands of a business and restructuring. It would have been preferable that each time the claimant's role was changed he was sent a letter or email detailing the new changes. However, the failure of a written notification of changes to terms and conditions doesn't mean that the changes haven't been implemented. It is not reasonable for an employee to carry out a role for a number of months after a restructuring but then say he isn't going to carry out the role because his contract hadn't been formally amended.

19. The claimant told the Tribunal that there should have been a negotiation and an increase in his salary if he was required to take on the new operational tasks. The Tribunal accepts the evidence of Ms K and Mr Y that the claimant's role changed as a result of the restructuring and that the claimant was given support and training to carry out his new tasks. The change in role was not a promotion requiring a pay increase. The claimant did not provide any evidence that he had in fact asked for a pay rise on the basis he was required to carry out new tasks.

20. In May there was an incident where Mr L told members of the department that they had to finish a task before leaving. Mr L raised his voice at the claimant in frustration. The claimant found Mr L's shouting as bullying and threatening and raised his concerns with HR. A meeting was arranged on 12 June 2019 between the claimant and Mr L with Ms K from HR present.

Mr L apologised to the claimant for shouting and said his behaviour was inappropriate. The Tribunal accepts the evidence of Ms K that the claimant's grievance was dealt with informally through this meeting and that she believed that the apology resolved the grievance and that the claimant seemed, at the time, to be satisfied with the outome.

First investigation

21. On 26 June 2019, Mr E had a meeting with the claimant to give him feedback regarding his performance. They were joined in the meeting by Ms N from the HR team. The meeting was part of ongoing feedback sessions as the claimant was undergoing training and coaching to try and familiarise him with the new processes and bring his work up to scratch.

22. When being confronted with his performance shortcomings the claimant lost his temper and began shouting loudly at Mr E and Ms N. They adjourned the meeting and reported the incident to Ms K and the General Counsel. The claimant confirmed to the Tribunal that after the meeting he did apologise to Ms N but was vague about what he apologised for.

23. Ms K asked Mr E and Ms N to email their recollection of the meeting and they described his behaviour as rude and aggressive and threatening and uneasy (p54-58).

24. On 27 June 2020, Ms K had a further email from Mr E [**53**], in it he said that while the claimant had promised to try harder at the invoice validation, he'd left a backlog of 120 invoices and expected the claimant was hoping the managers would give up trying to train him and simply do it themselves. Mr E pointed out that if the invoices were not validated by the following day they ran the risk of losing valued suppliers.

25. In addition, Mr E had become aware of an incident where the claimant had refused to co-ordinate changes to a coach pick up and this had been reported to the Asia co-ordination staff by the Tour Operator.

26. On 8 July 2019, Ms K arranged to meet with the claimant, Mr E and Ms N. She explained to the claimant that his behaviour at the feedback meeting on 26 June had been unprofessional; it was not acceptable conduct and if it happened again then they would consider formal disciplinary action. The claimant advised that he had apologised afterwards to Ms N. The Tribunal accepted the evidence of Ms K that the purpose of the meeting was to take the heat out of the situation by treating it informally, and try to get the claimant to focus on improving his performance.

27. Ms K followed this up with an email on 9 July 2019, summarising the meeting [**64**]. She received a response from the claimant at 5pm stating that "*As per discussion yesterday... we had mutual agreement that the reason I raised voice at the meeting on 26 June was that Mr E blamed me based on FAKE facts*" [**63**].

28. Ms K was surprised by this response, and it bore no resemblance to what they had discussed at the meeting. Ten minutes later she had a further email from the claimant claiming Mr E had threatened to downgrade his appraisal in the feedback meeting and asking her to "*raise the concern about Mr E's behaviour to top management as well."*

29. Ms K thought this was a deliberately provocative response and wrote to the claimant on 19 July 2019 to invite him to a formal investigation meeting to discuss the content and tone of his emails accusing Mr E of falsifying evidence and making threats [**67-68**]. The claimant alleged that he wasn't told before the investigation meeting that it was an investigation meeting but the Tribunal noted that this letter confirmed he was notified of the nature of the meeting in advance.

30. The claimant reacted by emailing Ms N on 23 July 2019, to raise a grievance against Ms K "*because of intimidation threat for disciplinary action"* due to her email of 9 July 2019 [**69-70**] sent in response to the two emails he had sent her. Ms N responded later that same day, sending copies of our Grievance and Disciplinary procedures. She advised him that the Grievance Procedure was not to be used to complain about any disciplinary action, and there was an appeal's process available under the Disciplinary procedure if he was unhappy about any disciplinary action taken against him.

31. The claimant argued before the Tribunal that this was evidence of the respondent's double standards: that they wouldn't allow his grievance to be investigated but did allow Ms N and Mr E's to be dealt with under the disciplinary process. The Tribunal finds that it was reasonable of Ms K to find the claimant's email responses to the meeting with Mr E and Ms N to try and resolve the situation as provocative and to view his emails accusing Mr E of using fake facts as behaviour that warranted disciplinary action.

32. The Tribunal also finds that Ms N's response to the claimant's email dated 23 July 2019 as appropriate and reasonable. The grievance procedures were not to be used to complain about disciplinary action taken against him.

33. Around this time the claimant approached Ms M, the claimant's former manager in the Asia Coordination department, that he wanted to return to her department. The claimant confirmed to the Tribunal that there had been some disagreements between him and Ms M but that was nothing unusual and he believed he was on good terms with her as he had once been to a football match with her and her husband.

34. However, Ms M clearly viewed their working relationship differently, as evidenced by Ms K. Ms M had spoken to Ms K in tears about her concern about the claimant returning to her department. She felt she had suffered bullying and harassment by the claimant.

35. On 25 July 2019 the claimant applied for an internal transfer to Ms M's department and Ms M raised a formal grievance against the claimant for bullying behaviour (73).

36. On 1 August 2019 Ms K held an investigation meeting with the claimant regarding his emails accusing Mr E of using fake facts. Ms K found his demeanour as surly and uncooperative and at first he spoke very quietly because he had a sore throat and didn't want to be accused of shouting again. She thought he was being childish. The claimant told the Tribunal that he merely had a sore throat but was able to talk normally after 5 minutes.

37. At the meeting the claimant had an opportunity to give his side of the story. He explained that he was concerned about being downgraded in his appraisal as he felt it unfair to be given new tasks whilst still training and he had been given too much work to do. He indicated that he didn't want to take on full responsibility for invoice validation. He suggested the tone of his emails was due to not being a native English speaker.

38. Following the investigation meeting Ms K decided that the claimant's behaviour did warrant disciplinary action and notified the claimant that he was required to attend a disciplinary hearing chaired by Mr T with Ms N from HR. The letter dated 8 August 2019 (85) sets out the allegations against the claimant of rude and inappropriate emails, unjustifiably accusing a manager of falsifying evidence against him, behaving uncooperatively and insubordinate, unjustly stating that he couldn't trust his manager to give him a fair appraisal, and considering whether trust and confidence had irretrievably broken down. The letter confirmed his right to be accompanied. The Tribunal finds this was a reasonable decision in the circumstances, based on a reasonable investigation.

First disciplinary

39. The first disciplinary meeting took place on 15 August 2019 and notes of the minutes and amended minutes are in the bundles. The notes demonstrate that each of the allegations were put to the claimant and he had an opportunity to respond to them. The claimant had been notified of his right to be accompanied.

40. Mr T wrote to the claimant on 23 August 2019 (96) giving him a first written warning to be placed on his file for 6 months. The letter set out the findings that the claimant had committed the four allegations set out above but did not find the relationship had irretrievably broken down. The letter set out the requirements for the claimant's conduct to improve and warned the claimant that any further misconduct within the 6 months period could result in a final warning or dismissal. The claimant was notified of his right to appeal within 7 days. The Tribunal finds this was a reasonable decision based on a reasonable investigation. The decision was reached having seen documentary evidence and having heard what the claimant said in response. The penalty was reasonable.

First grievance investigation

41. Following on from Ms M's grievance an investigation was carried out by Mr TT (94) who didn't speak to the claimant but concluded that it was a very serious case and they needed to provide a healthy working environment free of bullying and harassment so recommended disciplinary action. The claimant alleges this was unfair as he was not given the chance to give his side of the story at this stage of the process. Ms K explained in her evidence that the decision was made not to interview the claimant at this stage as they were concerned he might target Ms M who was very fragile. The Tribunal finds that although it is preferable that the claimant was given an opportunity to put his case at the investigation stage, the decision by the respondent not to was reasonable in the circumstances as they were concerned for Ms M. The claimant got an opportunity to put his case at the disciplinary hearing.

Second disciplinary hearing

42. On 20 September 2019 the claimant was invited to a disciplinary hearing regarding the complaints raised by Ms M (98). His manager Mr E was appointed to chair the disciplinary hearing. The letter set out the allegations clearly, notified him of his right to appeal and warned him that if upheld, may result in his dismissal. The allegations included being hostile and intimidating, intentionally embarrassing her, undermining, verbally aggressive and ignoring her.

43. The disciplinary hearing took place on 7 October 2019 (101). In response to the allegations, the claimant said, there was no hostile or abusive relationship or he would not have wanted to re-join the team; he could not remember refusing to follow procedures-intentionally embarrassing Ms M as it was more than two years' previously; he didn't speak behind her back because he was 'honest'; he would not have called her a 'snake' because his mother was born in the year of the snake and it would be an insult to his mother to say this. He then said he would sue Ms M and Ms L for injury to feelings and asked for their details. He denied shouting at Ms M and denied isolating her. He said it was a long time ago and both Ms M and Mr Y seemed happy for him to join the department again.

44. Mr E agreed to speak to Ms M and Mr Y again. At follow up meetings Ms M said that there were "*millions of examples where the claimant was too blunt and aggressive on the phone*". The disciplinary hearing was to reconvene on 9 November 2019. The claimant refused to attend until he was given 1 million examples from Ms M and suggested his trade union rep had said he couldn't attend until the examples were given. Ms k responded to the claimant explaining that Ms M had just used a figure of speech and he had been given further examples by email on 16 October 2019 (112a-h). The claimant wrote repeating his request and threatening to sue Ms M and Ms L.

45. Mr E wrote to the claimant on 30 October 2019, again clarifying that there were not 'one million examples' and giving him a final opportunity to attend the hearing which was rescheduled to 1 November 2019. He was warned that if he did not turn up it would go ahead in his absence and his absence may be treated as misconduct [**138-139**].

46. The claimant continued to correspond with Ms K, Ms C and Mr E asking for '1 million examples' [**164-160**] and was again warned that the meeting would go ahead in his absence.

47. The claimant did not attend the reconvened hearing with Mr E. Ms K met with Mr E on 1 November 2019 and went through all the evidence that they had collected. A copy of the minutes appears at [**140-153**]. The areas in light typeface are the explanations given by the claimant in the earlier meeting with him. (The minute incorrectly gives the date as 9 November 2019). Mr E considered there was sufficient corroborative evidence to uphold the allegations against the claimant and that he had breached the Anti- Bullying and Anti-Harassment Policy (82). Whilst in normal circumstances he felt dismissal would be an appropriate sanction, he took account of the fact that the acts complained of happened more than a year

previously and there had been no recurrence. In the circumstances, he felt that a final written warning was appropriate, given the claimant already had a live written warning [**152**]. The General Counsel was asked to review the decision to ensure it was fair and balanced.

48. The decision was notified to the claimant on 20 November 2019 [**154-155**]. The claimant was given a final written warning. He was warned that the likely consequence of any further misconduct in the next 12 months and of his right to appeal.

Third disciplinary investigation meeting

49. The Tribunal accepts the evidence of Ms k that issues with the claimant's performance were still causing problems and the perception was that the claimant simply did not want to carry out the work, rather than that he was not capable of performing the work. It was therefore decided to carry out an investigatory meeting with the claimant. This was to be chaired by Mr Y and Ms K would take notes as the HR representative.

50. Mr Y had worked in coordination and was familiar with the claimant's role. He met with the claimant on 10 October 2019 to notify him that he would be inviting him to an investigation meeting and followed this up with a formal invite letter [**113**]. The concerns about his performance centred on four main areas, namely that:

    (a) he was not completing courtesy calls to tour leaders in accordance with their agreed processes;

    (b) he failed in many instances to obtain coach driver details;

    (c) he was not completing his invoice validation work, leaving a large number of unpaid invoices at the end of the month and not dealing with queries in a timely manner; and

    (d) there had been complaints from colleagues and clients that he was not taking calls or dealing with them properly.

51. To prepare for the investigation meeting Mr Y looked at the claimant's latest performance appraisal [**51-52**]. The 'Weight' column showed him that the bulk of his work was Coordination (60%), 30% of his work was invoice validation and the remaining weightings covered teamwork and behaviour. The first issue was about a lack of courtesy calls. A courtesy call is made by the Coordinator to the tour leader at the start of every tour to check the tour leader is happy with the arrangements and to brief them on any details or changes, special needs or requests. As the tour leader may not always be available when the Coordinator rings, some calls are missed; in his own team Mr Y set a target of 100% of courtesy calls to be made by the Coordinators within the first couple of days of any tour.

52. After reading the appraisal Mr Y looked for some supporting evidence to ascertain how many calls had been made - or missed - by requesting a copy of the courtesy call list. The Coordinator had a list of all tours booked for the month and would log any calls to the tour leader [221-243]

53. At [**220**] is a copy of the service level agreement, agreed by all of the network offices. It sets out what the respondent expected from the Coordinator regarding courtesy calls. For example, it specified that the

Coordinator must make a phone call to the tour leader on the 1st or 2nd day of arrival. The little cartoon figure highlights that WhatsApp or other 'chat' or text was not acceptable. Where the Respondent is only looking after the hotel and coach transfer, then usually only one call is needed. If the Respondent is also responsible for organising tickets, visits, meals etc., then more calls are required to check in with the tour leader and the Coordinator will then update the spreadsheet.

54. The tour details are 'logged into an excel spreadsheet so they can be updated with real time information and the manager can see at a glance if the courtesy call is showing as having been made. [**207**] is an example of information that has been logged in and forms the working record for the claimant. He would enter the UK Operations department's tours and list them.

55. The Tribunal accepts the evidence of Mr Y, which wasn't really challenged by the claimant, that from April 2019, the amount of missed calls increased significantly [**226-230**]. By June 2019, this appeared to improve as there were an increasing number of 'Logged' tour numbers in the yellow column [**231-240**], however, when this was later audited, it transpired that the claimant had just logged in the number without actually making the courtesy call. This became known because the claimant's Department Manager, Mr E, had received complaints from other colleagues that the claimant was being difficult about accepting Coordination work passed to him; and refusing to take calls from tour leaders that they were attempting to transfer to him.

56. From there, his line managers carried out an investigation on his performance and they suspected that he had been entering false information into the system to make it appear that he had made courtesy calls, when in fact these were not being done. The managers dug into details - tour by tour - and found only a small percentage of the courtesy call records were genuine. Their investigation only covered the call logs back to April 2019, when the high season started. In September 2019, his line manager Mr L emailed Mr E to summarise their findings [**97a**]. He concluded that 75% of the claimant's curtesy calls had not been done and almost 60% of his role had not been performed.

57. The claimant, when cross examining Mr Y didn't really challenge these figures but raised questions about Mr L's involvement as being prejudicial because Mr L had bullied and harassed him. However, Mr Y explained to the Tribunal that he verified the figures himself by looking at the data from the spreadsheets.

58. The Tribunal finds that Mr Y's investigation was not in anyway tainted by any prejudice from Mr L. Mr L's input seemed to have been backed by documentary evidence and in any event Mr Y verified the facts for himself. There is no evidence before the Tribunal that Mr L was prejudiced towards the claimant. The fact that he raised his voice at the claimant and then apologised does not raise any suspicion that he would taint any evidence.

59. Regarding the failure to get coach driver details Mr Y had examples of tours where the claimant failed to reconfirm the coach orders (244). He was also provided with a record of unprocessed invoices and a summary

of delays in chasing up and validating invoices which had been prepared by one of his managers [**245-251**].

60. On 18 October 2019 Mr Y met with the claimant. Mr Y had prepared some questions and wrote down the claimant's responses. The claimant said in relation to curtesy calls that he didn't always have time to make them and he would log a call if he had just sent a text, which he said his previous manager had told him he could do. He said Mr L had told him that curtesy calls were not a priority when busy. He said he logged a call even when he had not made one because he was professional but admitted not telling his manager. The claimant thought his manager should pick up his work when he was busy. Mr Y concluded that the claimant was being obstructive because he didn't want to do the new operation work.

61. Mr Y told the Tribunal when Mr Y asked the claimant why work wasn't completed, the claimant tried to change the subject by mentioning being bullied by Mr L to stay late and finish his invoice validation work; and that he had mental health issues. However, when Ms K asked for more information, or permission to contact his GP, he refused and told them it was private. The claimant confirmed to the Tribunal that he only agreed to show the respondent a letter from NHS confirming he was being assessed for anxiety and depression during disclosure and not during the internal procedure.

62. The claimant blamed his slow turnaround of invoices on being inexperienced. The claimant, when asked if he understood the task needed to be completed by the end of the month said his view was it was a shared task and it was not fully his responsibility.

63. After the meeting Mr Y spoke to colleagues and managers about the claimant and looked through the evidence again. He verified that the claimant had received training in March and on 3 further occasions. He concluded that the claimant's conduct, particularly with regards to the curtesy calls amounted to misconduct and recommended disciplinary action. His report was submitted on 12 December 2019 (204). He felt the claimant's behaviour was not because of lack of ability but that he chose to be difficult and obstructive.

64. Mr Y wrote to the claimant on 13 December 2019, enclosing the evidence and notified him that he was invited to a disciplinary hearing, being chaired by Mr M, General manager ITS (257).

<u>Appeals against first warning and final written warning</u>

65. The claimant appealed against Mr T's final written warning on 22 November 2019 (159-173). He also wrote separately to Mr T on the same day, raising a grievance against Ms M for making false allegations against him [**156-158**]. HR was copied into the grievance, and Ms K wrote to the claimant on 25 November 2019, asking if this was a grievance or just part of an appeal as it covered the same ground. The clamant confirmed he had sent a separate appeal to Mr T [**175-174**].

66. On 29 November 2019, the claimant decided to appeal against the original written warning issued to him on 23 August 2019, despite the appeal deadline being 30 August 2019 and wrote to Richard McAvoy, Head of IT

who had been named as the person to hear an appeal back in August [**178-179**].

67. Ms K met with the claimant on 29 November 2019 to give him the letter from Mr T confirming that he would chair the appeal against the final written warning, with Ms K as note taker. [**180**]. He asked if they would hear the appeal or grievance first and she confirmed that as they already had Mr T confirmed for the appeal, this would happen first. They would also write separately about his appeal to Mr M in relation to the first written warning. He also mentioned the grievance he had raised with Ms N about Ms K (when she had invited him to a disciplinary investigation meeting in July 2019) and said it had not been dealt with appropriately.

68. Ms K reminded the claimant that he had been told his complaint against her was not suitable to be dealt with under the grievance procedure. The claimant then wrote to Mr T stating he would not continue with the appeal unless Ms K was removed as a note taker and it was agreed that the first written warning was not valid.

69. Ms K notified the claimant that as his appeal was more than 3 months out of time it would not be considered. The Tribunal finds this was a reasonable decision as the claimant had been notified of the 7 days' time limit for appealing and he didn't provide any practical reasons why he couldn't appeal in time. Ms K agreed not to be the note taker in the appeal hearing.

70. The claimant wrote to a number of people asking to have his appeal heard out of time in relation to the first written warning. In particular he wrote a number of times to Mr M. The claimant continued to write to Mr M and on 6 December 2019, Ms C wrote to warn him that if he continued to contact any members of staff about this matter it would be a disciplinary matter [**193-195**].

71. The claimant was notified on 13 December 2019 that his grievance against Ms M would be heard by Mr MM. The claimant then sent several emails to Mr MM (193-198).

Claimant's suspension

72. On 13 December 2019, Mr E came to Ms K to say that two of his female staff members had been approached by the claimant who was questioning them about what they said to management about him. They felt threatened and upset. Ms K emailed the claimant to tell him not to do this and advised him that he would have the right to ask questions as part of the disciplinary process [**259**].

73. Having been notified by Mr M of the inappropriate emails he had received from the claimant and being made aware he had made a further comment to a junior staff member on 16 December, the decision was taken to suspend him. Ms K wrote to him on 16 December to confirm his suspension because the complaints they received indicated that he failed to follow management instructions, was seeking to intimidate witnesses and present a risk to the interests of the business and other employees. Ms K advised him that they were carrying out a full investigation into this and, if there was a case to answer this would be considered as part of the disciplinary hearing to be chaired by Mr M [**260- 261**].

Claimant's appeal against second written warning

74. The claimant's appeal against his second written warning was heard by Mr T who upheld the decision. The Tribunal did not hear evidence from Mr T but read the minutes of the appeal hearing. The Tribunal finds that the claimant was given a fair opportunity to express all his reasons for appealing the second written warning and that Mr T made a reasonable decision, having considered all the claimant's points. His decision to uphold the original decision is at p 267.

75. The claimant's grievance against Ms M was rescheduled to 8 January 2020 with Ms N as notetaker.

76. The claimant's grievance hearing took place in his absence on 14 January 2020 and his grievance was dismissed (290). The claimant confirmed he had nothing to add to the points raised in his appeal hearing and Mr MM concluded that Mr T had already considered all those points and made a decision. The claimant was notified of his right to appeal. The claimant appealed and his appeal was heard on 4 February and was not upheld. The notes of the hearings and the letters confirming the decisions show the matters were independently and carefully considered and a fair procedure was followed.

Mr E's investigation and third disciplinary hearing

77. Mr E was asked to investigate the claimant's alleged harassment of staff (270). Disciplinary action was recommended, and it was added to the allegations to be dealt with in the claimant's third disciplinary hearing. The claimant was notified of the third disciplinary hearing by letter dated 8 January 2020 (288). The letter sets out all the allegations and enclosing the investigation reports and supporting documents. It advises the claimant of the right to be accompanied and warns him that the outcome may include his dismissal. The allegations were 1) that he had not properly carried out his coordination work by either not completing a large number of curtesy calls in accordance with their written requirements or entering wrong information on the schedule; 2)failing to obtain coach driver details; 3) not completing invoice validation work by leaving large numbers of unpaid invoices at the end of each month and not raising queries directly with managers to sort out queries; 4) not taking or dealing with calls properly and 5) ignoring senior managers' instructions.

78. Mr M spoke to the claimant before the disciplinary hearing about access to his email. The claimant was very upset that he wasn't given access to his emails through his original password. The respondent was offering the claimant access to his emails through a new password, but he didn't agree to that. The claimant told the Tribunal he believed the emails could be tampered with and the only way he could be sure the emails were genuine was by using his original password.

79. There is no evidence before the Tribunal that any emails have been tampered with. The emails and letters appear genuine and those received by the claimant could be verified. The claimant couldn't explain what advantage the respondent would have got in any event from tampering with the emails.

80. Minutes of the meeting are at p291-301. Ms N took notes and the claimant was accompanied by a trade union representative Mr Mc. The Tribunal finds that at the meeting the claimant was given an opportunity to go through each of the allegations and put his case. He could question the investigation report and the supporting documents. However, the claimant hardly challenged the evidence produced.

81. After the hearing Mr M followed up with witnesses to clarify outstanding points.

82. He felt the claimant's decision to mark the calls as completed and not to tell his manager what he had done was a deliberate falsification and felt his explanations were not credible.

83. With regard to the claimant's failures to log the driver details he did not find his explanations credible.

84. He also upheld the allegation that the claimant had wilfully or negligently not been completing his invoice validation work. He noted that the claimant had put others under pressure who had to pick up his work for him. He'd been trained in March, May, June and August on a task everyone else was trained on once. He'd left 106 invoices not completed in July and went on holiday on 29-31 July without telling anyone about this. He'd also passed up invoices without any details of what he was querying. He took other holiday leave at the end of May and June.

85. He felt the entire problem was with the claimant's attitude, not capability. he believed he was being deliberately obstructive.

86. He did not feel the allegation about him refusing to take calls or not dealing with them properly had been made out so dismissed this allegation. Although he noted that a number of people considered him unhelpful and obstructive.

87. On the allegation that he had intimidated junior staff and pestered senior staff, he gave him the benefit of the doubt regarding his contact with Mr MM. He had followed up after the meeting with two members of staff and they were both very clear that they had found the conversations with him to be intimidating – as much his demeanour and tone as the actual words used. He upheld this part of the allegation and noted that their version of events were, in part, corroborated by their managers and supporting emails.

88. The claimant emphasised during the Tribunal hearing that the two members of staff he spoke to were not his junior but the same level as him. Mr M believed that the members of staff found his conversations intimidating, and the Tribunal finds it is irrelevant whether or not they were junior to the claimant.

89. In all, Mr M felt that the behaviour and attitude the claimant had displayed toward managers and colleagues alike was disruptive and impactful on the team. It was also clear to him there was no effective working relationship between the claimant and his colleagues. He thought dismissal was the appropriate course.

90. He met with Ms K and Ms C. He told them that in his view the claimant was too disruptive, and his actions undermined his managers and impacted his colleagues. He did not see that they could have any confidence that the claimant would change, and they should let him go. He asked what the options were and concluded that he should be dismissed with notice.

91. He then wrote to the claimant on 12 February 2020 (302) advising him that he was being dismissed with immediate effect and was being paid in lieu of notice. The letter sets out each of the allegations and the reasons for the decision in relation to each of them. The letter confirms the claimant has a right to appeal.

92. The Tribunal finds that Mr M carefully considered each of the allegations and the evidence regarding them. He verified the evidence himself and considered the points made by the claimant. He considered whether a lesser sanction was appropriate but decided it wasn't in the circumstances. The claimant had a fair opportunity to put his case and all his points had been considered carefully. The claimant was sent notes of the meeting and had an opportunity to amend the minutes and did so before the respondent made its decision.

Appeal against dismissal

93. On 13 February the claimant appealed against his dismissal (307). In summary his grounds of appeal were that he had explained 6 key points for false allegations against him that were not carefully considered. He once again asked for access to his emails.

94. Mr MDR was asked to chair the appeal. The Tribunal finds that Mr MDR had an operational background, managerial experience, and had conducted disciplinary, grievance and appeal processes before. Mr MDR considered the evidence produced in support of Mr Y's investigation report, the disciplinary hearing notes and the claimant's appeal.

95. The appeal hearing took place on 2 March 2020 (309). The claimant was accompanied by his trade union representative. They went through each of Mr M's findings. The claimant raised the issue of potential email tampering. In mitigation the union representative asked if they would consider demoting the claimant.

96. Mr MDR went through the evidence from Mr L after the hearing and looked at the call logs. He concluded on a good day the claimant made 9 calls whereas 25-30 calls were manageable. He noted that the claimant had been doing the job for 5 years.

97. Mr MDR concluded the evidence showed a person who deliberately avoided work and was not pleasant to deal with. He was not performing his job, was clearly disruptive with the team and systematically cheating the system and manipulating data to say he'd completed his tasks when he had not. He had had the opportunity to improve his workload situation but the less work he was given the less he did. The evidence supported Mr M's findings. He considered whether the decision to dismiss was too harsh but as there was a misconduct issue he felt there had been a breach of trust as the claimant had deliberately manipulated call records and therefore dismissal was the appropriate penalty.

98. Mr MDR wrote to the claimant on 16 April 2020 upholding the decision to dismiss him.

Conclusion

99. The Tribunal finds that the respondent carried out a reasonable investigation at each of the investigation and disciplinary stages. The respondent genuinely believed the claimant was guilty of the misconduct set out in the dismissal letter and had reasonable grounds to sustain that belief. Mr Y had looked at all the documentary and witness evidence and verified the data himself. He carefully considered all the points raised by the claimant and concluded that the claimant was guilty of 4 out of 5 of the alleged acts of misconduct. The data confirmed the figures for performance and the claimant did not give an adequate explanation for not carrying out his roles properly.

100. The Tribunal has considered all the points raised by the claimant in reaching its decision. Mr Y did consider if a lesser sanction was appropriate but decided that, taking in to account the previous warnings and the loss of trust in the claimant, he concluded that dismissal was necessary.

101. The Tribunal concludes that the claimant was not forced to withdraw his previous race discrimination claim and that it had no influence on the decision to dismiss the claimant.

102. There is no evidence that the respondent was prejudiced against the claimant. It is understandable that the claimant may have felt that they were out to get him as he was faced with so many investigations and disciplinary hearings. However, every single one of those stages have been justified by the respondent witnesses having followed a fair procedure at each stage.

103. The fact that the claimant's original contract only described his role as coordinator does not mean that the claimant is then entitled to not carry out properly any non - coordination work given to him. Roles develop and vary over the years. The respondent witnesses confirmed that the work the claimant was asked to do at the time of his dismissal was entry level work and the claimant had been given sufficient training to be able to perform all the tasks asked of him properly. The respondent had concluded, based on a reasonable investigation, that the claimant was able but deliberately chose not to perform his roles properly.

104. There is no evidence of an orchestrated plan to get rid of the claimant. The evidence before the Tribunal is that the respondent followed a fair procedure. The claimant was first spoken to informally about his performance. He then was given a first warning, followed by and final warning and then dismissal. At each stage he was given an opportunity to improve his performance.

105. There is no evidence that the respondent falsely made allegations against the claimant. Each allegation found against the claimant has been backed up by data and witness evidence.

106. There is no evidence that Mr L was prejudiced towards the claimant and that his evidence tainted Mr Y's investigation. In any event Mr Y carried

out his own investigation to verify the facts produced by Mr L and so did Mr MDR at the appeal stage.

107. There is no evidence before the Tribunal that the respondent used double standards. Mr L was not formally disciplined because the respondent chose to deal with the incident informally and believed the matter had been resolved. The claimant was not allowed to appeal his first written warning 3 months out of time as this was not in accordance with their disciplinary policy. There is no time limit within their grievance policy for when a person can raise a grievance.

108. It was a reasonable decision of the respondent to not agree to investigate the claimant's 22 November 2019 grievance as a separate matter. The sole ground of the grievance was that he had been notified of disciplinary action being taken against him. The appropriate remedy is to appeal the disciplinary action. There is no evidence to suggest that had the respondent investigated his grievance separately that it would have changed the outcome of the disciplinary process.

109. There is no evidence that Ms M was encouraged by the respondent to raise a grievance against the claimant. Ms M spoke to Ms K in HR about the claimant. It was appropriate in her capacity as HR for Ms K to tell Ms M of her option to raise a formal grievance.

110. The respondent started assessing the claimant's performance with someone within his department. At each stage of the disciplinary process it was appropriate for the respondent to appoint someone who was more senior and independent but who understood the claimant's role. The respondent followed their own procedure and acted reasonably.

111. It was reasonable of the respondent to hold an investigation into Ms M's allegations without notifying the claimant because they were concerned about how fragile Ms M was.

112. It was reasonable for the respondent to block the claimant's access to his work emails once he was suspended. There is no evidence that this in any way prejudiced the claimant from having a fair disciplinary process. The claimant was given an opportunity to access his emails. He couldn't give any explanation to the Tribunal for his allegation that the respondent may have fabricated emails. Many of the emails in the bundle were addressed to the claimant or had been sent to him as part of the various investigation reports and therefore could be verified.

113. The respondent was notified by the claimant that he had been suffering from anxiety and depression. The respondent asked for proof and this was not provided by the claimant before his dismissal or appeal. Mr M and Mr MDR did consider this in mitigation but still concluded that the claimant was guilty of the misconduct.

114. The evidence before the Tribunal shows that the claimant was not blamed for invoices not done while he was away on holiday. He was blamed for invoices he didn't do before he went on holiday.

115. The claimant was notified that he was attending an investigation meeting in a letter/email sent to him. It was clear from his own evidence that he received that letter.

116. It is irrelevant whether or not the two staff members who complained about the claimant intimidating them when he asked them what they had said about him to management, were junior or the same level as him. The important point was that the respondent believed he had intimidated them.

117. The claimant may have felt bombarded by disciplinary and investigatory hearings as there were a number over a short period of time but the Tribunal finds that each one was justified and was carried out reasonably. He may have struggled to do his work because he was distracted by so many different meetings and hearings. However, the reason for the hearings was his conduct and each meeting was justified. The claimant's performance had been found to be poor before any disciplinary hearing was held.

118. The respondent could not have provided the claimant with a million examples of when he was blunt with Ms M because she had merely used a term of expression. It is understandable that it is frustrating to be accused of such things, but it is not reasonable to continue to demand the examples when it has been explained that it is just a term of phrase.

119. There are often gaps in and disputes about minutes of meetings as people recall what is said in different ways. The claimant was able to send to the respondent his amended minutes and these were considered by the respondent when reaching their decision.

120. It was unfortunate that the respondent sent some letters to his former address. Mistakes do happen and this does not affect the fairness of the dismissal.

121. In conclusion, the Tribunal finds that the respondent carried out a fair process, they genuinely believed the claimant was guilty of the misconduct and had reasonable grounds to sustain that belief. They did look at the whole picture at each stage of their disciplinary process. The respondent did take account of the claimant's previous warnings and that was reasonable and appropriate. There is no evidence of any orchestrated plan to dismiss the claimant or any tainted evidence. The decision to dismiss was based on a thorough and fair investigation backed by documentary evidence.

122. The reason for the claimant's dismissal was misconduct backed by clear evidence, following a careful investigation. The respondent followed a fair procedure and their decision to dismiss fell within a band of reasonable responses. They had a genuine belief in the claimant's guilt, based on reasonable grounds following a thorough investigation. Alternative sanctions to dismissal were considered but rejected in the circumstances. There were no procedural failings and the respondent complied with the ACAS code of conduct.

123. Therefore, the Tribunal finds that the claimant's dismissal was fair in all the circumstances and his claim for unfair dismissal fails and is dismissed.

EJ A Isaacson

Employment Judge **A Isaacson**

2nd December 2020

Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

02/12/2020

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FOR EMPLOYMENT TRIBUNALS