EMPLOYMENT TRIBUNALS

Claimant: **Mr A Brown**

Respondent: **Grove F & B Limited**

Heard at: **East London Hearing Centre**

On: **29th October 2020**

Before: **Employment Judge Reid**

Representation
Claimant: Mr K Brown (the Claimant's brother)
Respondent: Mr A Ross, Counsel (instructed by Leyton UK partners LLP)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

The Claimant was not unfairly dismissed by the Respondent and his claim for unfair dismissal is dismissed.

REASONS

Background

1. The Claimant was employed by the Respondent as a maintenance assistant from 11th September 2017 to 13th September 2019 when he was dismissed without notice for an incident on the evening of 27th August 2019 when he used racist and sexist language, recorded by a colleague, Magda Ascinte. He lived in staff accommodation at the Novotel Stansted Airport and that is where the incident occurred. The Claimant accepted he had used the language and that the recording was him, though he took issue with what he saw as the selective nature of the recordings which he said did not show the complete picture and said he had not agreed to be recorded. He also said he had been provoked and that there were mitigating factors.

The claim

2. The Claimant presented his claim on 24th February 2020 claiming his dismissal was unfair for the following reasons:

- The Respondent had not taken into account his mental health issues, of which it was aware.
- There had been no complaint by any member of staff about the incident to the Respondent.
- He was not given witness statements to look at.
- He was suspended and escorted out of the accommodation so had to go and live in a caravan.
- He had not given permission for the recordings of him to be made.
- The disciplinary policy had not been followed.
- His pension provider NEST had told him on 11th September 2019 before he was dismissed on 13th September 2019 that he was showing on their system as having had his employment terminated, showing that the outcome was predetermined.
- At the appeal stage it was agreed that the policy had not been followed but he was still dismissed.

3. The Respondent resisted the claim on the basis that it was a justified dismissal for gross misconduct taking into account the Respondent's policy about abusive language and harassment; the recordings were not the only evidence used but were relied on in part and he had been aware of being recorded; it had followed a fair procedure, there was an explanation of the comments made by NEST, the dismissal was not pre-determined and the Respondent had a reasonable belief that the Claimant had committed an act of gross misconduct.

The hearing

4. The Claimant attended the hearing and gave evidence. He was represented by his brother. The Respondent called three witnesses Mr Saito (who did the investigation interviews), Ms Wells (HR), Mr Muscroft (who took the decision to dismiss) and Mr Al-Wagga (who dealt with the appeal). There was a bundle paginated to page 190, all those giving evidence had provided witness statements and the Respondent produced a chronology and cast list. Due to lack of time I did not hear oral submissions but the parties provided written submissions after the hearing which I have taken into account.

5. The Respondent requested that I listen to the three recordings, even though there was a transcript on pages 188-190, because it was said that the tone used by the Claimant was significant. That transcript was agreed

by the Claimant as to what he is transcribed as saying though he took issue the recording as being (a) a partial recording of an event (ie it excluded what was happening beforehand and was said outside of the recordings) and (b) there is a section in recording 3 (the middle section on page 190, where the Claimant is talking to someone called David) which the Claimant said was in fact a conversation at another point in time and which did not take place in the middle of the rest of recording 3. The Claimant asked that I did not listen to the recordings because they had been made without his agreement. On the issue of the admissibility of the recordings, I decided, taking into account Rule 41 and Rule of the Tribunal Rules 2013, to listen to them because they formed part of the evidence used to dismiss the Claimant (ie they were highly relevant) and the Claimant had been aware he was being recorded in some way because in recording 2 (page 189) he says he is glad a video is being taken; he was therefore aware he was being recorded in some way including by audio format as it was unlikely, even if he misunderstood that it was a video rather than just an audio recording, that he did not understand his voice was being recorded. I also explained to the Claimant that this had not been a situation where the Respondent had secretly 'bugged' his room and made a covert recording of him – this was a recording taken by a colleague which the Respondent had not asked for or been part of obtaining. I listened to the three recordings before the evidence started.

Findings of fact

Events prior to the incident

6. I find that earlier in the day on 27th August 2019 there had been an altercation in the staff accommodation between the Claimant and Magda, arising out of what the Claimant said was water damage to his laptop from Magda's hanging basket (she was in the room above the Claimant). The Claimant was very upset and angry about this and spoke to Ms Wells about it. Ms Wells did not agree to immediately go and look at the laptop but said that she would talk to them both when Magda was back at work to resolve matters. Ms Wells recognised that the Claimant was upset and worked up and suggested he took a couple of hours off; Ms Wells was aware that the Claimant had had some mental health issues, had had time off sick for it in early 2019 and was having counselling. I find it unlikely that she suggested a beer garden to the Claimant as the place to go and relax for a couple of hours as he was due back at work after this break. I find that the Claimant duly took a couple of hours off and went to a local forest after which he reported to Ms Wells he felt better and was visibly calmer. He then returned to his work for the rest of the day. There was therefore nothing to suggest that the Respondent needed to do any sort of risk assessment for the Claimant.

7. Whilst I therefore find that this previous problem with Madga that day had significantly upset the Claimant, Ms Wells had not ignored it and had taken into account his mental health problem when suggesting some time out. On his return the Claimant accepted he was calmer and that he went back to work. I therefore find that the Respondent reasonably subsequently concluded that the Claimant's assertion that the reason he made the

comments on the recording were justified or explained partly by the previous laptop/ hanging basket incident that day did not explain or justify the extent and nature of the abuse on the recordings and as set out in the witness statements.

8. The Claimant said that prior to the recordings there had been a second incident which was also the context for the abuse. This was an incident with a chef (Jan Zelman) who the Claimant said had rudely and with foul language asked the Claimant to turn his music down and then pushed at the Claimant's window causing his wardrobe to topple. On the Claimant's own account (witness statement page 1) he then tried to calm down and went out for a cigarette, so again had calmed down to a degree and some time had elapsed before the abuse on the recording. He accepted in his oral evidence that the right way to deal with an incident like that was to make a complaint via formal channels.

9. I therefore find that the Respondent later reasonably concluded that neither of these two incidents justified or explained the abuse on the recordings - see findings of fact as to the nature of the abuse set out below which the Respondent reasonably concluded was very serious. The absence of recordings of other conversations that evening (the Jan incident) which the Claimant said provided important context, did not mean that the Respondent acted unreasonably in dismissing the Claimant as it reasonably concluded that whatever had happened earlier that day/that evening did not justify the subsequent abuse.

<u>The Claimant's abusive comments on the evening of 27th August 2019</u>

10. The Claimant accepted that it was him on the recordings and that he had made the comments as transcribed in the transcripts. I find that the Respondent acted reasonably in listening to the recordings in the context of the very serious nature of what was claimed to have been said. Whilst the recordings were not made with his consent they were not initiated or set up by the Respondent in breach of his privacy rights as set out above. They were not recordings made illegally by the Respondent. They were not in any event the only evidence relied on and, ultimately, the Claimant accepted he made the comments. I therefore find no unfairness to the Claimant arose from the Respondent taking the recordings into account along with the other evidence it considered.

11. The Claimant said that another colleague Jonathan had also made a recording (witness statement page 2). The Respondent did not take any recordings into account except the three Magda handed over which she had made.

12. I find that what the Claimant says in the recordings and transcribed in the transcript was an angry, aggressive and vituperative tirade of racist, sexist and other abuse. He accepted he was drunk at the time (page 92). I do not accept his assertion in his oral evidence that he did not know what a 'sket' was when shouting at a female colleague or that he did not know what 'manky' meant.

13. The Claimant made the following racist comments:

- Comparing himself as a polite English person to those who were noisy and who complained (page 188)
- Mocking someone about understanding English (page 189)
- Saying 'fuck off back to your own fucking country' (page 190).

14. The Claimant made the following sexist comments:

- Calling a female colleague a fucking sket (page 189)
- Repeatedly using the word cunt (pages 188-190).

15. The Claimant made other abusive comments and repeatedly swore aggressively including

- Calling his colleague manky
- 'Fuck off shouting out of your window'
- 'Sleep with fucking music you piss taking cunt'
- 'Stay up all fucking night'
- 'If you want some, fucking come and get it' (this was particularly aggressive)
- 'You're all cunts all of you'.

16. Ms Leu reported the incident the next day (page 70A) couched in terms of worry about the Claimant's wellbeing. That issue was thereby flagged up to Ms Wells and Mr Saito at this stage and from the outset as partly a concern about his welfare, even though of the two of them only Ms Wells knew at this stage about the Claimant's weekly time off for counselling. Mr Saito went to check on the Claimant who said he was unhappy about the lack of promotion opportunities. Mr Saito reported back to Ms Wells (page 70C), recording that the Claimant was ok but that he had suggested that the Claimant speak again to Ms Wells the next day. The Claimant was not therefore unsupported or his wellbeing or work issues ignored.

17. Mr Saito was subsequently provided with the recordings by Magda. I find that no-one had made an official complaint but that having been provided with the recordings, the Respondent reasonably had to investigate and take the matter further given the content of the recordings. To do otherwise would mean ignoring evidence of significant misconduct, ignoring its own disciplinary policy designating such behaviour towards colleagues as an example of gross misconduct (page 47) and potentially failing to comply with its equality duties to other employees and protect them from harassment. I also found that the Respondent reasonably decided to consider the recordings as part of the overall evidence it had to consider; while the Claimant had not agreed to the recording he had been aware of it (see above) and the recordings would show clearly what he exactly said (and the tone used), rather than relying entirely on witness evidence summarising what he said and which would not show the tone it was delivered in (for example muttering abuse at someone under the breath is different from shouting or screaming it). Additionally the

Respondent was mindful of its duties to other employees and to not listen to the recordings would not give the Respondent the full flavor of the incident, a serious one.

18. The Claimant was suspended in line with the disciplinary policy (page 41). The suspension had the effect of the Claimant having to leave the staff accommodation but this was necessary in any event due to the nature of the allegations and the fact the incident had occurred in the staff accommodation.

The disciplinary process

The investigation

19. The disciplinary policy provided that the procedure could be varied if appropriate (page 40) and it was not a contractual procedure. The Respondent therefore could vary the procedure provided that did not impact on the fairness of treatment overall.

20. The grievance procedure (page 50) provided that if a grievance was raised that would usually be heard before the disciplinary process is completed. The grievance procedure was not contractual.

21. The Claimant's criticism of the investigation process was firstly that the way the investigation interview on 29th August 2019 was conducted with him was intimidating (page 114). I find based on Mr Saito's evidence that the reason for blocking off some of the doors into the meeting room was to stop other staff interrupting by mistake. In any event the Claimant went out during the meeting via another exit to get his friend (who was not an employee so was not permitted to accompany the Claimant) so was not locked in or intentionally intimidated but able to leave and take the action he thought appropriate (even if it was not appropriate, because he was not entitled to have a friend attend with him). The fire exit remained open so there was no health and safety issue as claimed. The Claimant also moved the furniture to bring his friend in via the main blocked door consistent with not feeling intimidated, though feeling annoyed. I therefore find that the Claimant was not in fact intimidated by the main doors being blocked off and that the Respondent had a good reason to do so, namely to preserve confidentiality and avoid interruptions of a kind Mr Saito had experienced before in that room. The Claimant did not in any event raise any concerns about feeling intimidated during the meeting and so even if he felt uncomfortable he did not tell Mr Saito or Ms Wells and they were not therefore aware of it.

22. Secondly, the Claimant said that Ms Wells should have limited herself in that meeting to note taker and that by asking or answering questions she was not acting in line with the disciplinary policy (witness statement, page 2). Whilst Ms Wells was there as notetaker she is an HR manager and so it was not unreasonable for her to ask some questions; the notes (pages 86-97) show that any questions from Ms Wells were very limited and that it was clearly Mr Saito who was leading the investigation. Even if Ms Wells did assist Mr Saito in that interview beyond being a notetaker. Mr Saito

was clearly responsible overall for the investigation and in any event the Respondent was entitled to vary the policy and any such variation did not make the process unfair on the Claimant. In fact in his grievance (page 114) the Claimant did not say that Ms Wells had overstepped the mark by asking questions even though referring to her role that day (page 115) from which I find he did not in fact have that concern at the meeting or feel that her asking any questions was inappropriate.

23. Thirdly the Claimant said that mitigating circumstances (namely the context of the abuse as regards what had happened earlier that day with Madga and the previous issue that evening with Jan) were ignored in the investigation (witness statement page 2). The Claimant claimed that Mr Saito had not listened to what the Claimant was putting forward as mitigating circumstances in the investigation interview, in breach of the policy (page 114-115). The policy provides for the employee to be given the opportunity to put forward mitigating circumstances (page 42). The meeting started with Mr Saito asking the Claimant to explain what had happened which gave the opportunity to the Claimant to explain the context of the incident, which he then did. Mr Saito listened to the laptop/ hanging basket incident with Madga as background to the later incident and asked some follow-up questions (page 86). He also listened to the Claimant's account of the wardrobe/window incident with Jan that evening, prior to the incident and asked some follow up questions (page 87-88), bringing the Claimant back to the Jan incident (page 89) to finish his account of the pre-incident events. Mr Saito again listened later to the Claimant's account of having been provoked (page 91-92) and after a break came back to the claimed provocation by Jan (page 93) and again, even though the Claimant had by now become aggressive, listened to further details about the laptop incident (page 95). It was not the case as later claimed in his grievance hearing (page 123) that no notes were being taken of what he was raising as mitigating factors. Taking these findings of fact into account I find that Mr Saito did listen during a meeting lasting at least an hour and a half. He then interviewed Jan on 2nd September 2019 (page 109) and re-interviewed Magda on 2nd September 2019 who gave her account of the window incident with Jan (page 103). Mr Saito also obtained information about what had happened that evening between the Claimant and Jan from Mateusz Morawski (who he interviewed after the Claimant on 29th August 2019 (page 98)). Mr Saito was therefore following up on what the Claimant was referring to as mitigating circumstances being what had happened earlier that day and in the evening which he said lead to/ explained his outburst.

24. Another issue the Claimant raised which he thought was a mitigating circumstance was about another colleague Irena who the Claimant claimed had also been abusive but being treated differently to him (page 96). The Respondent did later investigate the complaint about Irena but any issue about Irena's behavior reasonably did not require further investigation by Mr Saito before a decision could be made as to whether the Claimant's conduct should proceed to a disciplinary hearing, in the context of the admitted serious misconduct by the Claimant, albeit he said he was provoked. The fact that another employee else may also have behaved badly in an unrelated incident was reasonably not relevant to

whether or not the disciplinary action against the Claimant could continue. The issue with Irina was in any event subsequently investigated (even though the Claimant had not made a formal complaint, in the same way as the matter with him was investigated without there being a formal complaint) although then dealt with informally after the Claimant had left. I find that even if the Respondent had specifically investigated Irina before the Claimant's dismissal it would not have changed the outcome because of the difference in magnitude and context of the Claimant's behaviour compared to what Irina was claimed to have said.

25. The Claimant also said a mitigating circumstance was his mental health (witness statement page 2) because he said Mr Saito was aware of it. Taking into account the above concern Mr Saito had shown in checking in on the Claimant I find that generally speaking Mr Saito did not ignore the Claimant's wellbeing in the process. Mr Saito was aware of a past problem earlier in 2019 to the extent that he had had a chat with the Claimant who had said he was feeling low about his private life (TS para 49) but this is not the same thing as Mr Saito being aware that some months later the Claimant was being treated for a mental health problem and was having counselling. Mr Saito was not aware that the Claimant was having counselling but I find even if he had been aware of it (as Ms Wells was) I find it likely that that would not have changed the decision to proceed with the disciplinary process given the nature of the misconduct which the Claimant largely admitted.

26. The Claimant may disagree with the weight Mr Saito put on his mitigating explanations but he was given plenty of time to tell Mr Saito and Mr Saito listened and investigated further. Mr Saito reasonably concluded however that what had happened earlier in the day with Madga or that evening with Jan did not explain or justify the outburst of the kind of language the Claimant used in the incident. His decision therefore to refer the matter on for disciplinary action was reasonable and not in breach of the policy.

27. Fourthly, the Claimant said that the investigation by Mr Saito should have been re-done by someone else on the basis of alleged bias by Mr Saito and that he was told this would happen. At various stages he gave different reasons for claiming bias by Mr Saito. He raised at the end of the investigation interview that it was because Mr Saito managed other staff who the Claimant lived with in the accommodation (page 97). He next claimed that the bias also arose from a past animosity (page 115) in the previous 6 months though he did not explain why the unidentified past issue with the Operations Manager meant that Mr Saito was biased. He then said (witness statement page 2) that the bias arose from Mr Saito apparently laughing at the Claimant and not being understanding about his mental health condition (this was a reference to a discussion earlier in 2019). In his claim form (page 12) the Claimant said the bias arose from the way the investigation meeting had been conducted (a different basis to what he in fact said at the end of the investigation meeting). I find this was a scattergun approach by the Claimant to try to get the investigation re-done. I find none of these matters were a reasonable basis on which to claim bias by Mr Saito taking into account my other findings about the way he conducted the investigation and the account taken of what the Claimant

put forward as mitigating circumstances (taking into account Mr Saito had been the one to check on the Claimant the day after the incident as concerns had been raised so even if not aware specifically of his mental health problems was sufficiently aware to know to check on an employee who had been very upset).

28. The Claimant also gave a varying account of the claimed assurance he was given that there would be a second investigation by someone else. In his grievance (page 115) he said that Mr Saito had said it would be discussed. In his witness statement he said that Ms Wells had said she would sort something out (page 2). In his claim form he said that Mr Muscroft had agreed Mr Saito should be taken off the investigation (page 12) and in his witness statement (page 3) that another investigating officer would be appointed to commence the investigation ie re-do it. I find that it is very unlikely that that any of the three managers would have given the Claimant the assurance of a new second investigation in the context of admitted allegations of drunken racist and sexist abuse captured on recordings and supplemented by witness statements from other staff. The Respondent investigated the Claimant's grievance separately so did not in any event ignore what he was saying about the investigation process being unfair and reasonably rolled its decision on that issue that into the decision on dismissal (page 162). Mr Muscroft in the grievance hearing on 6th September 2019 (page 129) told the Claimant that Mr Saito would no longer be the investigator going forward but that is because Mr Saito's investigations were by then in practice complete; he had completed his second batch of interviews on 2nd September 2019 and the behaviour admitted by the Claimant from the outset (and recorded) reasonably spoke for itself as to it being a matter to progress to the disciplinary stage, given its seriousness. I therefore find that the Claimant was not told that the investigation would be re-done but was told by Mr Muscroft that Mr Saito would no longer be involved in the process (page 129), Mr Muscroft reasonably concluding that Mr Saito's investigations were in practice complete and that the matter could proceed to the disciplinary stage.

29. I also find that the Respondent reasonably did not hold a formal investigation meeting with the Claimant after Mr Saito had completed his further interviews. Mr Saito had completed his further interviews on 2nd September 2019 and already had the witness statements obtained on 29th August 2019 and the recordings. The only purpose of a formal meeting would be to tell the Claimant that the matter was proceeding to the disciplinary stage and that could reasonably be done without a formal meeting as there was nothing further that needed saying in person; this was reasonable given the seriousness of the admitted behaviour. Additionally, as the Claimant had complained about Mr Saito in his grievance dated 3rd September 2019 and that was to be investigated by Mr Musgrove, it was reasonably not appropriate for the Claimant to meet with Mr Saito again on 5th September 2019 (the planned date, page 113B) given his interviews were already complete and both the grievance and disciplinary matters were being handed over to Mr Musgrove because the investigation had to be 'paused' as per the policy (page 50). I therefore find that whilst the Respondent may have departed from the policy in not holding a formal investigation meeting after the interviews, it was entitled

to do so also taking into account the policy itself (page 42) specifically provides for the bypassing of the investigatory stage straight to a disciplinary hearing; likewise the Respondent could reasonably bypass the investigation meeting having done the interviews. This therefore caused no unfairness to the Claimant and was also within the general flexibility allowed by the policy.

30. Fifthly the Claimant said in his claim form that he had not been given witness statements prior to the investigation interview with him on 29th August 2019. That is because it was an investigatory interview, the purpose of which was to obtain the Claimant's account of what had happened and then decide if disciplinary action should follow. The notes of the interviews with the witnesses were provided to the Claimant before the disciplinary hearing (page 137) in any event so no unfairness resulted.

31. The Claimant also claimed that there was a relevant other witness Weronika who had not been interviewed. She had been referred to by Janus Sveliga in Mr Saito's interview with Janus after he had interviewed the Claimant (page 112). I find that Weronika was known by Mr Saito and Ms Wells to be in her notice period at this time but neither had realised that she had in fact already left. The decision not to interview her was therefore reasonable taking into account the admitted conduct, the existing number of other witnesses and the existence of the recordings.

Disciplinary meeting and appeal

32. The Claimant claimed that the Respondent had breached the policy (page 43) by not having the investigating officer attend the disciplinary hearing. Any departure from the policy was generally permitted by the policy itself taking into account the policy also specifically allowed for dispensing with the investigation stage entirely (page 42) if the evidence so allowed.

33. By the time of the disciplinary hearing Mr Muscroft had held the Claimant's grievance hearing, covering his grievance about three aspects of the investigation (page 114, 118). That grievance meeting lasted with breaks from 11.30 am to 4.30pm (pages 118-136). By raising his grievance when he did the Claimant therefore did not only have to rely on what he could get across in his disciplinary and appeal hearings but also had this protracted meeting to raise issues. He was thereby being accorded significantly more time to make his case generally than an employee who waited for their disciplinary hearing and appeal to make their points.

34. The Claimant said that the notice given for his disciplinary hearing was short (witness statement page 3) which affected his ability to address the points. Whilst relatively short notice the issue was admitted conduct (save as to context) some two weeks previously and the Claimant was already aware of what he wanted to say in mitigation because he had raised issues with Mr Saito during the interview and told Mr Muscroft about this in the very long grievance hearing. He accepted it was him on the recordings and there was no factual dispute as to what had happened, save to the context which the Claimant said explained his behaviour. In that context I do not find that the length of notice affected his ability to take part and

make his points – borne out by the length of the disciplinary meeting with Mr Muscroft for which the notes are 20 pages and there is plenty of input from the Claimant including the issues he wanted to raise about mitigation which Mr Muscoft specifically addressed in the outcome letter (page 166), including a new point about an alleged racist comment by Jan (page 145) and rude gestures (page 148). The Claimant had not mentioned these specific points previously despite the opportunity to do so with Mr Saito, but they were in any event listened to and taken into account by Mr Muscoft (even if the Claimant disagrees that they do not outweigh the seriousness of the conduct).

35. The Claimant claimed that Mr Muscroft had morphed into being the investigating officer (witness statement page 4) because Mr Saito was no longer involved. Taking into account the above findings as to the extent and depth of the investigation interviews conducted by Mr Saito I find that Mr Saito was the investigating officer and that Mr Muscroft did not in any way take over from him in that role; the matter only went to Mr Muscroft once Mr Saito had concluded the interviews and decided that disciplinary action should follow.

36. Taking into account the above findings Mr Muscroft reasonably concluded that, despite taking into account the Claimant's mental health and that he had apologised (page 166) and the provocations he had claimed, this did not explain or justify his behaviour and that he would be dismissed, taking into account the racist, sexist and aggressive conduct (page 167) and the fact that the Respondent has duties to other employees. He had not failed to address what the Claimant had raised in mitigation, was himself aware of the Claimant's counselling and took it into account (page 167) and just because he did not accept that what had been raised were sufficiently mitigating circumstances, does not make his decision unreasonable given the nature of the misconduct. The Claimant accepted in his oral evidence that Mr Muscroft had been thorough, explained his decision to dismiss and given it his careful attention (including the mitigation matters raised by the Claimant); he said however that Mr Muscroft's conclusion was unreasonable because it did not take into account the way the incident had started although also simultaneously accepting that there was a proper way to raise complaints about other staff in the accommodation and that Mr Muscroft had to balance what had happened as against duties to the other employees. The Claimant may disagree with Mr Muscroft not being influenced in his favour by what he had raised, but Mr Muscroft had considered the points he had raised and reasonably rejected them as explaining or justifying such extreme behaviour.

37. The Claimant says that the appeal procedure should have been paused when he raised his second grievance like the disciplinary procedure had been when he raised his first grievance (witness statement page 4). The policy says that this is what will 'usually' happen (page 50) but that does not oblige the Respondent on its own terms to always do that. Further the first 4 items were all matters which related to the dismissal process (the second was a new one about the NEST information which Mr Al-Wagga went on to look into) which would be looked at in any event on appeal (in line with the end of para 1 on page 50). The final point was about his

wages and this was also a matter the appeals officer could reasonably deal with. To not pause the appeal was therefore within the flexibility of the policy and resulted in no substantive unfairness. It was also reasonable for the Respondent to deal with both the second grievance letter and the appeal letter as combined appeal issues.

38. The new matter which had been raised was two conversations the Claimant said he had had with NEST the pensions provider on 12th September 2019 (page 160, 161), the day before the dismissal outcome letter was sent. The Claimant said this showed that a decision to dismiss had already been made at the point of the disciplinary hearing on 11th September because he said that call showed that the Respondent had already told NEST that his employment had terminated. I find that what the first transcript (page 160) shows is that the operator is initially saying that their information shows that NEST were told on 11th September 2019 (not on 9th-10th September as claimed by the Claimant, page 159) that the Claimant was no longer contributing. NEST did not tell the Claimant that their records showed his employment had terminated but that he was no longer contributing, entirely in line with what had in fact happened in May 2019 when the Claimant notified the Respondent (not NEST, though later communicated to NEST by the Respondent – see below) that he wanted to stop contributions. I therefore find that what NEST was saying in this first call was that its records showed he had stopped contributing, which was correct and triggered by the Claimant in May; the operator did not tell the Claimant he was noted as his employment having terminated. The way the Claimant had had to communicate this (via his note to HR) inevitably meant there would be a gap between him telling HR and NEST being notified. The anomaly from the first call was therefore the date NEST was telling him they were notified (11th September 2019). The second call (page 161) confused matters because the Claimant predicated the call on the assertion that his employer had stopped contributions whereas the information from the first call was that it was he who was recorded by NEST as no longer contributing (ie from May 2019). The operator picked up on this assertion that it was something done by the Respondent (5th box) but had not logged in at that point so was merely reflecting back the premise of the Claimant's question. In box 11 the operator says what he/she thinks has 'probably' happened and in box 19 gives a garbled explanation, again on the premise the change is due to being a leaver (because that is what the Claimant has asserted) but not saying that the system shows that the Claimant's record shows that the Claimant's employment has been terminated as the reason for contributions stopping; the operator's responses at boxes 20-26 do not say that and although use the term 'leaver' do not link that to the specific event said to trigger that. In particular the operator advises the Claimant (box 21) that if he wants to contribute he can ask his employer to enroll him again from which it is clear that the operator was not seeing a termination of employment on the NEST system but an opt out because they would not be suggesting an opt back in 'again' if the system showed his employment had been terminated by the Respondent and in the context of the Claimant not saying he had a new job which that could apply to. The Claimant jumped to the conclusion that he was being told he was already recorded by NEST as having had

his employment terminated but that was the wrong and unreasonable conclusion to jump to.

39. Mr Al-Wagga looked into this issue as raised in the appeal (though he did not have the two call logs till later – see below) and checked himself (Y A-W para 10,30) that the Respondent's records showed that the Claimant had been processed as a leaver on 13th September 2019, the date he was dismissed. I find that this was all he was reasonably required to do to investigate what the Claimant was alleging at this point. He explained this explanation to the Claimant in the appeal outcome (page 182).

40. In any event subsequent investigations (YA-W para 31) showed that (pages 184A-E) that the reason the date of 11th September 2019 was referred to in the first call was because that was the date the notification was issued to the Claimant showing that his contributions had stopped; this was based on a quarterly payroll report which explained the delay between May 2019 when the Claimant said he wanted to stop contributing and that being logged by NEST on 1st September 2019 (page 184C). The Claimant had jumped to the wrong conclusion about his dismissal having already been decided upon and actioned on 11th September 2019. Even if the Respondent had had this specific extra information at the time of the dismissal, it would not have changed the outcome.

41. The other issue referred to in the second grievance letter was an issue over the pausing of Wagestream. Mr Al-Wagga had looked into this prior to the appeal meeting and reasonably concluded that the withdrawal system had been capped for all employees and that if the Claimant had tried to use it and it was not available, it was for this reason and not because the Claimant had been suspended. He explained this to the Claimant in the appeal hearing (page 173) and in the outcome letter (page 183).

42. Another new issue raised at the appeal hearing was the Claimant reporting that there had been an incident of racial discrimination directed at a member of the public, which he said he had reported to Ms Wells (page 177). Mr Al-Wagga looked into this with Ms Wells, Mr Saito and Mr Muscroft (A-W para 26) who all said they had not received such a complaint or been aware of such a complaint. The Respondent reasonably concluded that it had not happened as not reported.

43. Mr Al-Wagga also considered the Claimant's assertion that a risk assessment should have been done due to his mental health and followed up with Ms Wells (A-W para 25). He reasonably concluded from the evidence before him that there had not been anything to alert the Respondent to any need for a risk assessment.

44. Mr Al-Wagga confirmed the decision to dismiss, going through each of the issues raised by the Claimant in the second grievance letter and in the appeal letter in turn (page 182). He was aware the Claimant had been having counselling. Again the Claimant may disagree with the outcome but that does not mean Mr Al-Wagga was acting unreasonably in all the

circumstances or had not listened to or taken into account what the Claimant had said.

45. A general complaint raised by the Claimant at the hearing was that the notes of the meetings did not record exactly everything that was said. I find that looking at the procedure followed by the Respondent including the opportunities it gave the Claimant to confirm or correct the notes, that he had a clear opportunity to say at the time if something important was missing. He was repeatedly challenging every decision along the way and raised two written grievances and a formal appeal and so could have done so at multiple stages by saying clearly what was missing and, crucially, why that mattered. The Respondent in any event specifically addressed at each stage the issues he raised and if the notes were not a verbatim account then in practice it gave rise to no unfairness because he had multiple opportunities to make his case and refer to issues right up to and including the appeal.

Relevant law – unfair dismissal

46. The relevant law for unfair dismissal is s98 Employment Rights Act 1996 (fair reason and fairness of dismissal) and the test in *BHS v Burchell [1978] IRLR 379* for conduct dismissals, namely that the employer must have a genuine belief that the misconduct has occurred, on reasonable grounds and following a reasonable investigation.

47. The range of reasonable responses test in *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 applied to the dismissal and as that test applies to the reasonableness of the extent of an investigation, *Sainsburys v Hitt [2003] IRLR 23*.

48. It is not for the Tribunal to decide whether it would have dismissed the Claimant or to substitute its own view as to what should have happened but to assess the fairness of the dismissal within the band or range of reasonable responses test taking into account what was in the Respondent's mind at the time of the dismissal and the material before the it at that time.

49. It is for the Respondent to adduce evidence that the Claimant would have been dismissed in any event if a fair procedure had been followed or to support an argument that the employee would not have been employed indefinitely (a *Polkey* deduction) (*Compass Group v Ayodele [2011] IRLR 802*). *Software 200 Limited v Andrews* [200] ICR 82 identified the need to consider whether it is not possible to reconstruct what might have happened such that no sensible prediction can be made.

50. The basic award for unfair dismissal can be reduced under s122(2) Employment Rights Act 1996. This is where any conduct of the employee before dismissal was such (whether or not the employer knew about it) that it would be just and equitable to reduce the amount of the basic award in which case the Tribunal shall make that reduction. The conduct must be blameworthy (*Nelson v BBC (No 2) 1979 IRLR 346*.

51. The compensatory award for unfair dismissal can be reduced under

s123(6) Employment Rights Act 1996. This is where the Tribunal finds that the dismissal was caused or contributed to by any action of the employee before the dismissal in which case the Tribunal shall reduce the compensatory award by such proportion as it considers just and equitable. The conduct must be blameworthy (*Nelson v BBC (No 2) 1979 IRLR 346*).

Reasons

52. Taking into account the above findings of fact the Respondent acted reasonably in treating the Claimant's conduct on 27th August 2019 as a sufficient reason for dismissal. It had a genuine belief that the Claimant had committed the acts of misconduct, on reasonable grounds having conducted a reasonable investigation which interviewed relevant witnesses, involved the making of further enquiries where appropriate and relied partly on the recordings which were not made illegally by the Respondent and which it was reasonable for the Respondent to take into account.

53. Any departures from the Respondent's non-contractual policy were permitted by the policy and in any event did not result in substantive unfairness to the Claimant. The Respondent did not breach the Claimant's contract as claimed.

54. The Respondent took into account what the Claimant raised as mitigation throughout the process but ultimately what he raised did not reasonably excuse or explain the misconduct, given its nature and the Respondent's duties to other employees (including the risk of repetition). That was a reasonable conclusion by the Respondent even though the Claimant says it should have gone the other way.

55. The decision to dismiss the Claimant fell within the band or range or reasonable responses and was therefore fair.

56. Taking into account the above findings of fact, even if the dismissal was unfair (and I have found that it was fair) I assess the chance that the Respondent would have dismissed the Claimant in any event as 100%. This is not a case where no sensible prediction can be made.

57. Taking into account the above findings of fact I find that, even if the dismissal was unfair (and I have found that it was fair) I would reduce both the basic and compensatory awards (if any were made) by 100% under s122(2) and s123(6) Employment Rights Act 1996 by reason of the Claimant's conduct.

Employment Judge Reid
Date: 11 November 2020