



## EMPLOYMENT TRIBUNALS

Claimant

Respondent

**Mr T Smith**

**v FCC Environment (UK) Ltd**

### RESERVED JUDGMENT

**Heard at: Leeds by Teams**

**On: 15,16,17 June 2021 and 16 July 2021**

**Before: Employment Judge O'Neill**

**Sitting with Ms S Norburn and Mr M Weller**

**Appearance:**

**For the Claimant: Mr S Tettey of Counsel,**

**For the Respondent: Ms Barry of Counsel**

### Judgment

1. The claim of Unfair dismissal for an impermissible reason under section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 fails
2. The claim for Unfair dismissal under sections 94 and 98 of the Employment Rights Act 1996 succeeds
3. The claim for wrongful dismissal / Notice succeeds
4. The claim of detrimental treatment contrary to section 146 of the 1992 Act fails

### Reasons

#### 1. Claims

The claimant brings the following claims:

- 1.1. Unfair dismissal for an impermissible reason under section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992. (This is a dismissal of a kind commonly referred to as "*automatic unfair dismissal*").

- 1.2. Unfair dismissal under sections 94 and 98 of the Employment Rights Act 1996. (This is a dismissal of a kind commonly referred to as "*ordinary unfair dismissal*").
- 1.3. Wrongful dismissal.
- 1.4. That he suffered detrimental treatment contrary to section 146 of the 1992 Act.
2. The claimant says that the sole or principal reason for his dismissal was because:
  - 2.1. He was a member of an independent trade union.
  - 2.2. He was taking part or had taken part in the activities of an independent trade union.
  - 2.3. He had made use or proposed to make use of trade union services at an appropriate time.

3. **Background**

- 3.1 It is agreed that the claimant was employed between 21 May 2007 and 29 July 2020 when he was summarily dismissed. The claimant was employed by the respondent to work as an HGV driver. He was also a trade union representative and health and safety representative.
- 3.2 The respondent charges the claimant with the following conduct which occurred on 17 January 2020:
  - 3.2.1 He breached the visitor and contract site induction by entering the "*member of public*" area whilst a member of public was on site.
  - 3.2.2 He breached the safe working procedure on the operation of roll on off vehicles by not carrying out a security inspection of the skip/load and by not sheeting off the skip/load prior to leaving site (netting up).
  - 3.2.3 That he was verbally abusive to site staff.
- 3.3 Although it was alleged that each of the three allegations in and of themselves may be regarded as gross misconduct, the Respondent asserts that claimant was summarily dismissed only upon the allegation of verbal abuse and was given a final written warning for the two health and safety breaches. It is the claimant's case that the respondent had no reasonable grounds to believe that he had committed the acts of misconduct alleged, or that they constitute gross misconduct and there are procedural issues affecting the fairness of the dismissal.
- 3.4 The claimant's position is that he sought assistance from site operatives at the location at which he was working on 17 January 2020 and was subjected to verbal abuse himself. He maintains that he committed no health and safety breaches.
- 3.5 The claimant was suspended from his role that day but the disciplinary hearing did not take place until 20 July 2020. He raised a grievance about his treatment which was not upheld. He also appealed against his dismissal. His appeal was refused.

3.6 The claimant says that the sole or principal reason for his dismissal was because:

- He was a member of an independent trade union.
- He was taking part or had taken part in the activities of an independent trade union.
- He had made use or proposed to make use of trade union services at an appropriate time.

#### 4 Law and Issues

4.1 The relevant statutory sections are

- S152 of the Trade Union and Labour Relations (Consolidation) Act 1992 and 94 and 98 and S122 and 123 of the Employment Rights Act 1996.
- S 146 of the Trade Union and Labour Relations (Consolidation) Act 1992.

4.2 **Authorities** The most important case is that of *British Home Stores Ltd v Burchell [1978] IRLR 379* the principles of which are well established and enshrined in the issues set out in the Issues section below. *Iceland Frozen Foods v Jones [1982] IRLR 439* is also a long-standing and well-established case which sets out the guidance to employment tribunals on how to approach the decision-making, including a warning against substitution

#### 4.3 Burden of Proof – as set out in the CMO

- 4.3.1 As the claimant has sufficient qualifying service to pursue an ordinary unfair dismissal claim, the burden of proving the reason for dismissal is upon the respondent.
- 4.3.2 The claimant acquires an evidential burden to show – without having to prove – that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason that he is advancing under the 1992 Act. However, once the employee satisfies the Tribunal that there is such an issue, the burden reverts to the employer, who must prove, on the balance of probabilities, which of the competing reasons was the principal reason for dismissal.
- 4.3.3 The claimant says that he was subjected to **detriment** on the grounds of his trade union membership and/or activities by the unreasonable period of suspension, the failure to uphold his grievance and the failure to uphold his appeal against his dismissal.
- 4.3.4 It is for the claimant to show that there were acts or failures to act upon the part of the respondent which caused a detriment to him and must establish a prima facie case that the detriments were because of trade union membership, services or activity. Then, the respondent will acquire the burden of proving the purpose behind the acts or omissions.
- 4.3.5 The respondent relies upon the claimant's conduct. It will be for the respondent to satisfy the Tribunal that they had a genuine belief that the claimant committed the acts of misconduct alleged. Then, it will

be for the Tribunal to decide whether the respondent had reasonable grounds upon which to sustain that belief after carrying out as much investigation into the matter as was reasonable and after following a fair and reasonable procedure and to decide whether the respondent acted fairly and reasonably (and within the range of reasonable management responses) in treating the reason as sufficient to justify the dismissal of the employee.

**4.4 Remedy:** As the claimant no longer seeks re-employment the unfair dismissal remedy will be for monetary compensation taking into account contribution, mitigation, Polkey and the Acas Code. This will be for a basic award and a compensatory award.

**4.5** Will any procedural unfairness make no difference to the outcome. Is it just and equitable that there be a reduction of the basic and compensatory awards.

**4.6 Wrongful dismissal:** The question is whether the claimant was in repudiatory breach of contract such that the respondent had an entitlement to summarily dismiss him.

## 5 Evidence

The Tribunal had before it

- (a) An agreed bundle of documents paginated and indexed
- (b) The Tribunal was shown CCTV footage as explained by Ms Hart with the consent of the Claimant and on which the Claimant also commented.
- (c) The claimant provided a written statement which was taken as read and gave oral testimony and was cross examined, as did Mr P Swarbrick the Claimant's Unison Official.
- (d) A signed statement from a colleague Mr A Cousins was submitted and read by the Tribunal but Mr Cousins did not appear to be cross examined and therefore the Tribunal gave little weight to his statement.
- (e) The Respondent witnesses who provided written statements which were taken as read and gave oral testimony and were cross examined were as follows
  - Ms C Hart – Investigating Officer
  - Ms S Aitkinson – HR Advisor
  - Mr M Kirk – Dismissing Officer
  - Mr D Conway – Appeals Officer

## Findings of Fact

- 6 Having considered all of the evidence both oral and documentary we make the following findings of fact on the balance of probabilities which are relevant to the issues to be determined. Where we heard or read evidence on matters on which we make no finding or do not make a finding to the same level of detail as the evidence presented to us that reflects the extent to which we considered that the particular matter assists us in determining the issues. Some of the findings are also set out in the conclusions below in an attempt to avoid unnecessary

repetition and some of the conclusions are set out in the findings of fact adjacent to those findings.

- 7 For nearly 13 years the claimant had been employed as a lorry driver for the respondent and its predecessor. It was accepted he was a good driver and had no live warnings on his record. He was also an active member of Unison and was elected Unison shop steward and health and safety representative. He had been active in the industrial action which had taken place in or about 2018 over a number of months and during the course of his employment had raised health and safety issues. His union activity is likely to have been known to the local management team.
- 8 On 17 January 2020 the claimant was involved in an altercation with the acting team leader Bobby Joe Lane at the respondent's household waste recycling centre at Weel. The tribunal has seen CCTV footage of the circumstances leading to the altercation.
- 9 On the day in question it was raining very hard and the claimant arrived at the site at about 12.47 while Mr Lane was in the 'lobby' (the site office) at lunch. The claimant was driving a lorry with an empty container and it was his intention to drop the empty container and collect a container of discarded household appliances. In order to do this, he had to drop the empty container, remove the full container from its position on some tyres and reposition it temporarily in order to place the empty container on the tyres before loading up the full container and taking it away.
- 10 The container is placed at an angle on tyres in order to prevent water collecting in it. It is not a straightforward manoeuvre to position the container on the tyres. The tribunal accepts the claimant's evidence that site personnel would usually assist in guiding the driver onto the tyres. On the day in question, the acting team leader was the only experienced person on the site and was working with two less experienced workers. The claimant went to the lobby and asked for assistance to position the container on the tyres, one of the workers called Jed came to help, but did not know what to do. Mr Lane is seen leaving the lobby and walking towards Jed and the claimant. According to all parties Mr Lane instructed Jed not to assist the claimant on the grounds of health and safety. Mr Lane also declined to assist.
- 11 Ms Hart, who investigated this matter suggested to us that as this was not Mr Lane's regular site, he may not have been familiar or experienced in guiding the lorry driver onto the tyres. The Tribunal find Ms Hart disingenuous about that. Although Mr Lane was not based at this site, he regularly worked there, and the tribunal finds it likely that he knew how to act as banksman and guide the claimant on to the tyres but chose not to. Mr Kirk also accepted that provided the banksman kept his distance there was no health and safety risk in this practice.
- 12 This led to the altercation between the claimant and Mr Lane. The claimant alleges that Mr Lane swore at him and told him to 'fuck off' when he asked for help and again when he came up into the yard and called Jed back. The Tribunal finds it likely that these men working in a rubbish recycling centre would use such industrial language and that that Mr lane swore at the claimant in that stage of the altercation.
- 13 After initially arranging the tyres himself and positioning the container on them, the claimant then reversed the lorry onto the empty container, dislodging it from

the tyres. The claimant asserted at the tribunal that he did so because he was not satisfied that the container was safely placed there. The Tribunal do not believe the claimant about this, particularly as he had gone to the trouble to position the tyres himself. Mr Kirk interpreted this action as indicating that the claimant had lost his temper and the Tribunal find that to be a reasonable view.

- 14 The claimant then loaded the full container and drove forward to the lobby and went in. Mr Lane and his assistants in their statements to Ms Hart say in terms that the Claimant entered the lobby and swore at Mr Lane in an aggressive manner. They say at that point Mr Lane did not retaliate. In addition to complaining about the lack of assistance that day, they say that the claimant also complained about the staff parking arrangements, Mr Lane sleeping on the job, that placing the container on the tyres was for the site's benefit not his and that as a health and safety rep he would in terms make life difficult by lodging 'near miss' reports about everything. This is largely accepted by the claimant who says there was a heated conversation, but he denies acting in an aggressive or threatening manner towards Mr Lane or that he would lodge near miss reports about everything.
- 15 The claimant then returned to his lorry and drove off. It is clear from the CCTV that the Claimant did so without netting the load inside the site nor immediately outside it, which was in breach of the Respondent's Health and Safety policy. The tribunal accept that there was a quite common practice of netting loads nearby but off site (which has since been prohibited) but if this happened it took place in the entrance mouth and not on the public road as Mr Smith must have done if he had netted his load at all that day.
- 16 Similarly, the CCTV that the claimant does not indicate that the claimant checked the container doors before driving off and this was a breach of the respondent's health and safety standards The tribunal accept the respondent's evidence that this is a matter that cannot be checked by a visual inspection from inside the cab of the lorry. The Claimant can also be seen to have entered further into the site prematurely, before the last member of the public had left. The health and safety policy for this site was to exclude members of the public from the site while the containers are being manoeuvred and that container lorries must remain in a safe area near the entrance until all the public have left.
- 17 Before leaving the lobby, the Claimant told Mr Lane that he intended to report him to a more senior manager, Mr Peter Woods. The tribunal accepts the evidence of the claimant that on 17 January 2020 he complained to a manager called Lee Davies. The Claimant described the altercation as 'handbags' by which the Tribunal understands that he did not regard it as particularly serious. Mr Davies appears to have taken no steps following the claimant's oral report and no forms were completed by him or the claimant.
- 18 Despite telling the Ms Hart and Mr Kirk that he had reported the incident to Mr Davies on 17 January 2020, no one asked Mr Davies to corroborate the fact of the report made by the Claimant to him or ascertain what had been said by the claimant. Had they done so they might have secured a more rounded picture of what had been said by the claimant and Mr Lane.
- 19 The Claimant asserted that his only mistake was to warn Mr Lane that he intended to report him and suggested that this warning provoked Mr Lane to get his complaint in first, presenting himself as the victim whereas the Claimant felt Mr Lane was the one in the wrong. Whether or not there is any basis for this

suggestion the fact of the matter was that Mr Lane and his two colleagues completed forms reporting the incident, which were all completed at about the same time and faxed together to Ms Hart on the day of the incident and this prompted an investigation by Ms Hart which the Tribunal finds to be a reasonable course of action and not an indicator that Ms Hart seized on the complaints to be rid of the Claimant. There is no evidence that Mr Lane and his assistants were put up to lodge their complaints by any member of management.

- 20 On receipt of the complaints from Mr Lane and his assistants the contract manager Cassie Hart immediately undertook an investigation in which she interviewed Mr Lane and his assistants on 21 January 2020, viewed the CCTV footage, interviewed the claimant on 22 January and viewed the CCTV footage with him, considered the tachograph information and the navigation reports and the health and safety policy and training materials.

Having seen the CCTV footage she concluded that the claimant had breached a number of health and safety standards which warranted referral under the disciplinary procedure. The tribunal finds that this was a reasonable conclusion to draw from the footage, it was reasonable to inspect the footage and Ms Hart did not trawl through the CCTV footage to bolster a case against the claimant. The breaches were glaringly obvious to her.

The primary reason for her investigation had been the complaints from Mr Lane and his assistants that the claimant had been aggressive. The disciplinary procedure describes 'Fighting, physical assault, dangerous horseplay or aggressive behaviour' as gross misconduct. Ms Hart concluded that the matter should be referred to the disciplinary procedure. The Tribunal find that this was not an unreasonable course of action.

- 21 In conducting her investigation Ms Hart did not speak to Mr Davies, did not reinterview Mr Lane and his colleagues after hearing from the claimant. During the CCTV presentation at the Tribunal we found that Ms Hart drew attention to any apparent failure of the claimant even if it had not been previously raised and was not the subject of the disciplinary action. The Tribunal find that she approached the investigation in an unbalanced way by focussing on whether the complaints of Mr Lane could be established rather than looking at the events in the round taking into account the claimant's version of events and may have been guilty of unconscious confirmatory bias.

- 22 The disciplinary hearing took place on 20 July 2020 and in the meantime, the claimant remained on suspension on full pay. It is the claimant's case that this prolonged period of suspension amounted to a detriment because of his trade union membership and activity. On the face of it, this is an exceptional delay between the date of the incident (17 January 2021) and the date of the hearing (20 July 2021). The tribunal has seen the email trail in the bundle and accepts the evidence of Ms Hart that this delay was unfortunate but unavoidable and due to a series of factors unrelated to the claimant's union membership or activity. The claimant asked to be accompanied by his full-time official during the course of the investigation, this request was granted but it took some time to arrange a date convenient to the official to view the CCTV and before the meetings could be completed the Covid lockdown had begun, which further delayed the meetings. The claimant has suggested that the delay could have been avoided had a copy of the CCTV footage simply being given to him and his representatives. The tribunal accept the evidence of Ms Hart that she was advised by her legal team

that this could not be done because car registration numbers and faces of members of the public could not be pixelated and in the circumstances, she made the best arrangement she could by affording the claimant and his representatives access to the CCTV and a private room to discuss what they had seen.

- 23 The disciplinary hearing was chaired by Mr Mark Kirk, who was the contract manager for the North West. He had encountered the claimant previously as he had heard the claimant's appeal against the warning given in 2018. Neither the claimant nor his union representative raised any objection to Mr Kirk conducting the disciplinary.
- 24 The allegations were set out in the letter inviting the Claimant to the Hearing which also put him on notice that dismissal was a possible outcome. The allegations were

*'Breach of safety rules and/or any action, which seriously endangers the health or safety of a colleague, yourself or any other person whilst at work.*

*You must act in accordance with the Group '5 Policies and Procedures.*

*Namely; it is alleged that whilst at work on 17<sup>th</sup> January 2020 you breached the Visitor and Contract site induction, in particular it is alleged that you entered the Member of Public (MOP) area whilst there was a MoP on site.*

*In addition, it is also alleged that you breached Safe Working Procedure on the Operation of Roll-on-Off Vehicles by not carrying out a security inspection of the skip/load and also by not sheeting off the skip/load prior to leaving site.*

*Fighting, physical assault, dangerous horseplay or aggressive behaviour.*

*Namely; it is alleged that whilst on site on 17<sup>th</sup> January 2020 you were verbally abusive to members of the HWRC staff whilst at Weel HWRC'.*

- 25 The disciplinary hearing took place on 20 July 2020, in attendance were the disciplinary officer Mr Mark Kirk, the area manager for the North West (the claimant was employed in the north-east), Ms Sarah Atkinson, who was a senior HR adviser, Ms Cassie Hart contract manager for the North East, who had investigated the matter and was presenting the disciplinary case, the claimant and his full-time union representative Mr Paul Swarbrick. The claimant and his union representative were provided with a breakout room and the CCTV footage was examined. The claimant and his representative made no complaints about the personnel present, the process or the fact of the delay. The party is also agreed to encompass the claimant's grievances at the same time as the disciplinary hearing.
- 26 During the course of the disciplinary hearing, the claimant tried to introduce the proposition that the disciplinary action had nothing to do with health and safety, but was an act of bullying against him because of his union membership and activity and mentioned another employee RB who he suggested had been similarly treated.



Ms Atkinson intervened (without being invited to do so by Mr Kirk) to say '*that is a strong allegation and we are not here to talk about other people*'. The claimant went on to say 'it was the same when RB got banned of all FCC sites when were (sic) Hargreaves'. Ms Atkinson responded by saying '*Tony, this has nothing to do with today's hearing. We are here to hear the allegations as outlined in the disciplinary invite letter.*' The tribunal note that this intervention was not strictly correct as Mr Kirk had agreed to discuss the claimant's grievances and this element was clearly a matter of grievance. In effect, Ms Atkinson closed down the claimant's opportunity to raise his concerns about the real reason for disciplinary action having been taken. The claimant's final words are '*I feel strongly that this has nothing to do with anything other than me being a health and safety rep*'.

27 During the course of the hearing, Mr Kirk accepted and considered the questionnaires completed by other drivers concerning driving practices.

28 By email of 24 July 2020 Mr Kirk notified Ms Atkinson of his decision to impose final written warnings in respect of the health and safety matters and summary dismissal for the aggressive behaviour towards Mr Lane. He set out his reasons in the form of a draft letter and asked Ms Atkinson to put it into a formal company, letter of dismissal. Ms Atkinson passed it to a member of her staff, who prepared the formal letter which was issued in the name of Mr Kirk, who was by then on leave.

The letter of dismissal was dated 29 July 2020. The letter that was issued, refers to totting, '*in summary you have been issued with two final written warnings and a summary dismissal outcome and under the companies totting up procedure this amounts to a final outcome of summary dismissal.*'

29 Ms Atkinson told the tribunal that she had not drafted the letter herself, but had delegated it to a more junior member of staff who had mistakenly adopted the text of the wrong model word processed letter which included the reference to totting. Given the importance of this letter to the claimant and to the respondent the tribunal is somewhat surprised that such a letter should have been produced in this way and sent out without scrutiny. The Tribunal also note that a similar form of words is contained in the appeal outcome letter which casts doubt on Ms Atkinson's explanation. However, the respondent relies only on the charge of aggressive conduct to justify summary dismissal.

30 The claimant appealed his dismissal and an appeal hearing took place on 15 September 2020. Mr David Conway conducted the appeal, Ms Atkinson was in attendance taking the note as she had done at the dismissal hearing, the claimant was present with his full-time official Mr Swarbrick. Mr Conway heard from the claimant, his representative and a selection of witnesses produced by the claimant who were other drivers. The claimant appealed on the grounds of trade union victimisation, severity of the sanction, failure to follow a fair procedure, the decision was made against the weight of the evidence.

31 The thrust of the appeal was that

- the claimant had been victimised for his union activities whereas other drivers had not been disciplined in similar circumstances
- the disciplinary procedure had been misapplied in respect of totting

- penalty was too severe given that the health and safety breaches were custom and practice and the so-called aggression only a mild altercation

32 The claimant had issued questionnaires to the other drivers as to what they considered to be custom and practice. According to the claimant's response to Mr Conway the questionnaires were issued to both union and non-union members. The questionnaires do not distinguish between union and non-union members. These were considered by Mr Conway, who also questioned a number of drivers directly.

The drivers' evidence may be summarised as follows, at some sites the layout is such that it is possible to safely enter while a member of the public is present on site but no driver indicated that it was custom and practice to enter the Weel site while members of the public were present; it is not uncommon for drivers to net the load outside the gate, but not after driving down the public highway but this has now been tightened up; site attendants would normally act as banksmen.

33 In 2018 the claimant had been issued with a warning for having failed to report causing damage to the vehicle and a pier. At the appeal in 2020 he complained that other drivers had done similar things, but had not been disciplined as he had been in 2018. He attributed this difference in treatment to his trade union activities.

34 A statement was produced by another driver, J.D., who was questioned by Mr Conway, who said that on two occasions he had failed to report damage he had caused to a handrail and a gantry, he said he had been interviewed about the damage by his manager at the time and his explanations that he was unaware of the incidents had been accepted and no action taken. Neither the tribunal nor Mr Conway have been told whether or not JD is a union member, activist, or participated in the strike. The claimant's explanation that he was unaware of having caused any damage had not been accepted in 2018.

35 Mr Conway also questioned another driver, RB who was a union activist. No statement was produced to the Tribunal from RB and we are unable to find a questionnaire or statement from him in the Bundle. He complains of being picked on over the years which he attributes to his union activities. However we cannot discern from the appeal notes that he has been disciplined for anything.

36 The claimant asked to question Mr Kirk at the appeal which was refused by Mr Conway. The Tribunal agrees that it would be unusual to question the dismissing officer at the appeal stage and we do not consider the appeal to be flawed because of that. Had the claimant produced a prima facie case of Trade Union victimisation at the appeal then it might have been appropriate for Mr Conway to interview Mr Kirk. However we find that the claimant did not provide a well founded case of such victimisation at the appeal.

37 Mr Conway gave his decision on the appeal by letter dated 16 October 2020 and dismissed the allegations of trade union victimisation and upheld the dismissal.

## **Conclusions**

### **Unfair dismissal for an impermissible reason**

38 The reason given by the respondent for the dismissal is gross misconduct (namely the act of aggression). The claimant says this is not the real reason and the real reason for his dismissal is his trade union membership, activity or use of union services. As set out above, the claimant has to show some basis for his

assertion that the real reason is his trade union membership, activity or use of union services.

- 39 The Tribunal finds that the claimant has not shown any basis for his assertion that he has been victimised on trade union grounds, save for the reference in the dismissal letter to leading by example as a health and safety representative. Although at this hearing the claimant confirmed the issues set out by Judge Brain at the CMO he has given no indication at all as to how his trade union victimisation might be linked to his membership or use of services. The respondent has a trade union agreement with the claimant's union and another union and the claimant has produced no statistical or other evidence of discrimination employees because of their membership or any attempts to deter union membership. The claimant has produced no evidence to suggest victimisation of himself or anyone else because they have taken up union services, nor in his particular case, what those services might have been. Indeed, the correspondence between the respondent and the claimant's union officials appears to be perfectly cordial and the claimant was afforded representation by his full-time official without any apparent difficulty.
- 40 During the course of the hearing, the proposition that the claimant put forward was that he was dismissed because he was a union activist and in respect of his union activism he relied on having been involved in a strike in 2018 and his health and safety duties. The claimant has not explained his role in the strike, or why that had attracted any particular adverse attention and whether that set him apart from other drivers or union members. Nor do we know whether other people who had a similar role in the strike have been victimised in any way, and if so, whether that appears to be a trend which should be investigated. There is a reference to a fellow activist, RB, which comes up in the disciplinary hearing but from the intervention of Ms Atkinson, which was not disputed, that appears to relate to matters arising before the respondent took over or at least a long time ago. Mr Swarbrick makes a brief reference to a fellow union representative involved in a near miss at Wilmington, but we have been given no details as to when that occurred, what was involved, why there might be a link to trade union activity and note that Mr Swarbrick concedes fault on the part of that person. In the circumstances we find that the claimant has failed to show any prospect of his dismissal being linked to his trade union activity in the strike or any other activity.
- 41 Similarly, apart from his assertion that he has raised health and safety issues, as one would expect of a health and safety representative, the claimant has produced no explanation of what health and safety activity might have been linked to his alleged victimisation in January 2020 and his dismissal and how.
- 42 There is a submission that he was treated more harshly because he was a health and safety rep. This stems from a passage in the dismissal letter which says '*as a health and safety representative for the Hull and East Riding contract, I would expect you to lead by example and not ignore health and safety procedures in place*'. This reference might on the face of it, suggest that as a health and safety representative the claimant was judged by higher standards and penalised more severely than an employee who was not a health and safety representative. However, this does not evidence that Mr Kirk had a greater expectation of the claimant as a health and safety representative elected by the union than he would have had of a health and safety representative elected or appointed from the non-unionised sections of staff. The tribunal is satisfied that the respondent has shown that the real reason for dismissal was aggressive conduct as set out in the

letter of dismissal and finds that the above reference to be an unfortunate and unnecessary paragraph in the dismissal letter.

- 43 In all the circumstances the Tribunal finds that the Claimant has shown no link between his union membership, activities and services take up and his dismissal or any other detriment. The Tribunal finds that Mr Kirk the dismissing Officer genuinely believed that the claimant should be dismissed for misconduct and that the reason for dismissal had no connection with the claimant's trade union activities, membership or service take up.
- 44 The claim for Unfair dismissal for an impermissible reason under section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 fails.

#### **Unfair dismissal S94 and S98**

- 45 The respondent relies upon the claimant's conduct and the tribunal is satisfied that Ms Hart, having received a complaint form from Mr Lane and others was justified in investigating that complaint and in so doing, acted reasonably in inspecting the CCTV footage as a result of which she added the specific health and safety charges and given the respondent's health and safety policy, the Tribunal finds that she acted reasonably by so doing. Nevertheless, the primary reason for the investigation and thereafter the referral to disciplinary action was the allegation of aggressive conduct.
- 46 The Tribunal finds that the respondent's investigation was flawed. No one spoke to Mr Davies and had this been done there would have been a more rounded view of what had been said from the claimant's perspective. Ms Hart gave the Tribunal the impression that she approached the investigation in an unbalanced way; she did not speak to Mr Davies, did not re-interview Mr Lane and his colleagues after hearing from the claimant. She did not pin down with any specificity what had been said to Mr Lane and the language adopted at the second stage of the altercation. She did not pin- down what Mr Lane had said to the claimant at the first stage of the altercation. In this respect the Tribunal finds that the investigation fell outside the bounds of a reasonable investigation.
- 47 Of the charges put to the claimant, the respondent relies only on the alleged act of aggressive conduct as the reason for the summary dismissal. The tribunal, accepts the evidence of Mr Kirk that this conduct was the genuine reason for dismissal.
- 48 The disciplinary hearing was chaired by Mr Mark Kirk, who was the contract manager for the North West. He had encountered the claimant previously as he had conducted the claimant's appeal against the warning given in 2018. Neither the claimant nor his union representative raised any objection to Mr Kirk conducting the disciplinary and we found no evidence of a predisposition against the claimant. The allegations were clearly set out in the letter inviting the claimant and his representative to the hearing. The claimant was represented by his full-time union representative, all relevant documents were provided, the CCTV the footage was examined, the claimant and his representative were provided with a breakout room. The parties agreed that Mr Kirk should look into the claimant's grievances and mitigation as part of the disciplinary process. The delay between the suspension and the hearing was not raised at the time as matters of complaint. In all those respects the respondents conducted a fair and reasonable hearing and, save for the intervention of Ms Atkinson, the claimant was given every opportunity to state his case.

49 During the course of the disciplinary hearing, the claimant tried to introduce the proposition that the disciplinary action had nothing to do with health and safety, but was an act of bullying against him because of his union activity and mentioned another employee RB who he suggested had been similarly treated.

Ms Atkinson intervened (without being invited to do so by Mr Kirk) to say '*that is a strong allegation and we are not here to talk about other people*'. Ms Atkinson also stated in relation to RB '*Tony, this has nothing to do with today's hearing. We are here to hear the allegations as outlined in the disciplinary invite letter.*' The tribunal note that this intervention was not strictly correct as Mr Kirk had agreed to discuss the claimant's grievances and this element was clearly a matter of grievance. In effect, Ms Atkinson closed down the claimant's opportunity to raise his concerns about the real reason he asserted for disciplinary action having been taken which the Tribunal consider to be procedurally unfair.

The tribunal infer from the absence of evidence provided at this Tribunal hearing in support of the claimant's claim that he was victimised on trade union grounds, that had Ms Atkinson not intervened and had Mr Kirk allowed the claimant to make such a case, that it would have made no difference and the claimant would have failed to show Mr Kirk that he was being victimised because of his trade union membership and activity as he has failed to show us. He expressed his feelings that he had been victimised but brought nothing of substance to the disciplinary hearing to support such a contention.

50 Further, if Ms Atkinson's intervention might have rendered the procedure unfair, then it has been corrected by the appeal to Mr Conway at which the claimant produced further witnesses, including a witness JD brought forward to support the alleged disparity in treatment and RB who was said to be an activist similarly treated. Although he complained about not having the opportunity to question Mr Kirk, the tribunal find that at the appeal hearing no barrier was put in the claimant's way to making the case that trade union victimisation was the real reason for his dismissal.

51 The Tribunal finds it likely that these men working in a rubbish recycling centre would use industrial language and that each swore at the other at various stages of the incident. We also find on the balance of probability that Mr Lane provoked the claimant by swearing at him and by failing to act as banks man when the claimant had a reasonable expectation that he should assist.

52 However, the matter did not stop there. Instead of leaving the site, the claimant drove up to the lobby, left his cab and went into the building and continued the altercation. The claimant describes the altercation as handbags and asks the tribunal in terms to regard it as not an act of aggression but a petty quarrel between colleagues. The tribunal is not inclined to accept this and notes the claimant's own evidence that it is not in his nature to tell-tales on his colleagues and yet on this occasion he reported the dispute to Mr Davies. The tribunal infers from this that the claimant himself regarded it as more than a matter of handbags, but something that had crossed a line and required reporting.

Mr Kirk took the claimant's behaviour in knocking the container off the tyres as indicating that he had lost his temper and we find that was a reasonable view to take. Mr Kirk was also of the view that the fact that Mr Lane and assistants felt compelled to make a formal statement confirms that they felt they had good grounds to complain and that the exchange had gone beyond 'handbags' and an abusive conversation is likely to have taken place. The claimant accepts it was

heated and the Tribunal find it likely that even the claimant believed it went beyond 'handbags'. The tribunal finds that the three men may well have conferred as to the contents of the complaint forms faxed to Ms Hart on the day of the event. However, given the claimant accepts that there was in fact a heated conversation, this does not undermine their core content.

In any event on 21 January 2020 Ms Hart interviewed them individually and took statements. Mr Lane told Ms Hart in terms that the claimant's behaviour had the effect of making Mr Lane not wish to go to work. Mr Hannan describes the claimant as shouting and swearing at Mr Lane. Mr Megson describes the claimant coming into the lobby shouting and swearing at Mr Lane which caused Mr Megson to feel intimidated although he knew it was not directed at him. Notwithstanding the fact that the investigation interviews with Mr Lane and his assistants do not pin down precisely what was alleged to have been said by the claimant during the second stage of the altercation, the fact that the claimant chose to leave his cab enter the lobby and continue the altercation instead of leaving the site led Mr Kirk to conclude that the claimant was in fact the aggressor at that second stage of the altercation. The Tribunal find that this conclusion was well founded.

53 Mr Kirk did not go back to the witnesses to pin them down on the words actually used in the second stage of the altercation or what had precisely had been said at the first and whether it amounted to provocation of the claimant. As set out above Ms Hart's investigation is flawed in that respect. This detail should have been important to Mr Kirk in judging the severity of the sanction and the extent of any mitigation. The Tribunal does not accept that the Respondent has a zero tolerance of verbal aggression because of the failure to examine and deal with the claimant's allegations about Mr Lane.

54 The key question for the Tribunal is whether dismissal falls inside the band of reasonable responses of a reasonable employer. In answering this question, the tribunal reminds itself against substituting its view for that of the respondent.

55 In all the circumstances, the Tribunal find that the dismissal falls outside the band of reasonable responses of a reasonable employer. The claimant was a long serving employee with almost 13 years service and a good disciplinary record. He had no live warnings and had no history of having behaved aggressively to others. The Tribunal finds it to be an exaggeration to say that the Respondent had a zero-tolerance policy, especially as no steps were taken to examine the claimant's complaints about Mr Lane. Little if any regard was taken of the degree to which the claimant had been provoked. There is no evidence of the specific words used by the claimant. The claimant made a raft of complaints about Mr Lane (summarised at paragraph 14 above) but there is no record of the vocabulary he used when he allegedly swore at Mr Lane. There was no fighting or physical threats and the behaviour was only a verbal exchange between peers who would have been familiar with industrial language. The Tribunal accepts that acts of verbal aggression might in some circumstances justify the sanction of dismissal but the Respondent should have discovered with greater particularity what had been said or done in order to gauge the seriousness of the misconduct and the severity of the sanction. The Tribunal find that the claimant's conduct fell short of conduct for which dismissal was an appropriate sanction.

**56 The claim for unfair dismissal succeeds.**

## **Detriment**

57 The disciplinary hearing took place on 20 July 2020 and in the meantime, the claimant remained on suspension on full pay. It is the claimant's case that this prolonged period of suspension amounted to a detriment because of his trade union membership and activity. On the face of it, this is an exceptional delay between the date of the incident (17 January 2021) and the date of the hearing (20 July 2021). The tribunal has seen the email trail in the bundle and accepts the evidence of Ms Hart that this delay was unfortunate but unavoidable and due to a series of factors unrelated to the claimant's union membership or activity.

**58 The detriment claim on this ground fails.**

59 The claimant also claims to have been subjected to a detriment because of his trade union membership /activities/take up of services in that his grievance and his appeal were not upheld. The Tribunal find no link at all between those matters and his trade union membership, activities or uptake of services.

**60 The detriment claim on this ground fails.**

## **Wrongful Dismissal**

61 The Tribunal finds that the claimant's conduct towards Mr Lane on 17 January 2020 fell short of repudiatory conduct and his claim for wrongful dismissal succeeds and he is entitled to notice pay of 12 weeks.

**62 The claim for wrongful dismissal succeeds.**

## **Contribution and Uplift**

63 The Tribunal find that the Claimant contributed to his dismissal to the extent that the Compensatory Award shall be reduced by 75% and that it would not be just and equitable to award more than 25% of the basic award and the compensatory award..

64 The Claimant's conduct towards Mr Lane constituted misconduct and warranted a disciplinary sanction. In addition to the misconduct charge of aggressive conduct for which the claimant was dismissed, there were also significant breaches of health and safety which were not aggregated and on which the Respondent does not rely to justify dismissal but in the circumstances the Tribunal considers it would not be just and equitable to award more than 25% of the basic award and the compensatory award given that background.

65 Notwithstanding the procedural flaws we make no uplift in relation to the Acas Code which we find was broadly complied with.

## **Remedy**

66 The Tribunal have made no orders as to remedy as we indicated at the beginning of the Hearing that we would defer the matter of remedy as the parties recognised that given the number of witnesses we would struggle to deal with evidence and submissions within the allotted time table. We have scrutinised the Schedule of Loss which appears to be correctly calculated and we have made a finding of contribution. In the circumstances we urge the parties to settle the matter of

**Case Number: 1806928/2020(A)**

remedy and inform the Tribunal on or before 16 August 2021. If the parties fail to reach an agreement the Tribunal will list the matter for a Remedy hearing on the first available date thereafter.

**Employment Judge O'Neill**

Date: 16 July 2021

Date: 19 July 2021