EMPLOYMENT TRIBUNALS

Claimant: **Mr A Dedushi**

Respondent: **Renewi UK Services Ltd**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **4 March 2021**

Before: **Employment Judge Jones**

Representation

Claimant: In person
Respondent: Mr Mitchell (Solicitor)

JUDGMENT

1. **The claimant was fairly dismissed. The claim is dismissed.**

2. **The Respondent did not fail to pay the Claimant in lieu of entitlement to annual leave.**

3. **That claim is dismissed.**

REASONS

1. This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was V: CVP (Cloud Video Platform). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents considered by the Tribunal are referred to below.

Claims and issues

2. This was a complaint of unfair dismissal which the respondent defended. There was also a claim for 4 days holiday pay. The respondent denied that it owed the claimant holiday pay.

3. As the claimant was not represented, we spent some time at the start of the hearing discussing the issues in the case. I informed the claimant that in determining a complaint of unfair dismissal the Tribunal's purpose is to decide the reason for dismissal and if it is for gross misconduct as the Respondent alleges, then to decide whether it was reasonable to dismiss him on that basis. We went through the elements of the test in the case of *BHS V Burchell* [1980] ICR 303; which is set out below. The Tribunal advised the Claimant that it would not be making a decision as to whether he did assault Mr Blackholly as alleged, but whether it was reasonable for the Respondent to believe that he did, based on their investigation and the evidence considered by the person who made the decision to dismiss him.

4. The Claimant was given opportunities during the hearing to ask questions on tribunal procedure. During the hearing the Claimant stated, as he did in his ET1, that the fact that he came from Montenegro may have had something to do with the Respondent's decision to prefer Mr Blackholly's version of what occurred in the locker room as opposed to his but he did not raise this in the internal proceedings and there was no complaint of race discrimination before this Tribunal.

Evidence

5. The claimant gave evidence on his own behalf. For the Respondent, the Tribunal heard from Andrew Freeman, senior multi-skilled operative; Lee Goodfellow, Operations Manager at Frog Island; and Simon Lee, general manager for the HWRC sites and the person who dismissed the Claimant. The Tribunal had written witness statements from all of those witnesses and also from Mr Blackholly, who was too ill to attend the hearing.

6. The tribunal made the following findings of fact from the evidence in the hearing. The tribunal has only made findings of fact on those matters in dispute, which related to issues in the case.

Findings of fact

7. On 3 November 2014 the claimant starting full time employment with the respondent's predecessor, Shanks Waste Management Ltd as a nightshift mobile plant operator, based in Barking. He had previously worked as an agency worker from October 2013. From 6 March 2017, the claimant was promoted to senior multiskilled machine operator and began working at Frog Island in Rainham, Essex. From 1 March 2017, the claimant's employer became Renewi UK Services Ltd.

8. The respondent carries out waste and recycling operations throughout the UK for various local authorities. The respondent has approximately 600 employees. In the project with the claimant worked, the respondent undertakes waste management services for the East London Waste Authority in order to treat and dispose of all waste for the London boroughs of Barking and Dagenham, Newham, Redbridge and Havering.

9. The respondent had a written bullying and harassment policy which set out definitions of bullying and harassment, including physical harassment which was defined as threatened or actual unnecessary body contact, menacing gestures, threats or verbal or physical abuse. The policy stated that bullying or harassment may take many forms and range from mild banter to actual physical violence which would be unacceptable within the working environment. Bullying or harassment can take place face-to-face, behind your back, by telephone, email, text and social media or any other form of communication and may consist of a single incident or series of incidents. Behaviour that may appear trivial as a single incident can constitute harassment or bullying were repeated. Harassment and bullying behaviour may not always be intentional, but was always unacceptable to the respondent, whether intentional or not. Lastly, that section of the policy stated that everyone's interpretation of bullying or harassment may be different and what may be acceptable to one person may not be acceptable to another. Bullying and harassment would be defined by how the person feels and not what the bully/harasser intended.

10. The respondent's policy was clear that bullying and harassment would be taken seriously and would be addressed speedily. The respondent recognised its duty to protect its employees. The policy set out an informal policy and also a commitment to conduct a fair and independent investigation of any complaint brought formally to the attention of management and to take prompt and appropriate action accordingly.

11. The hearing bundle also included the respondent's disciplinary policy which stated that it was a respondent's policy to follow best practice guidelines issued by ACAS which would be observed at all times to ensure that all actions carried out in the context of disciplinary procedures or grievance resolutions are done objectively and fairly. It stated that many disciplinary issues could be resolved informally but where an issue cannot be resolved in this way for example, where such an approach is considered likely to be ineffective or inappropriate, where the misconduct or unsatisfactory performance is more serious, the respondent reserved the right to pursue the formal procedure contained in the policy document.

12. The policy stated that disciplinary action would be taken in the event of misconduct or poor performance. If disciplinary action became necessary, such action will be taken subject to the charges been reasonably established and extenuating circumstances being taken into account. It stated that managers will use their best efforts to ensure that all cases are investigated thoroughly, that they avoid any discrimination or bias, that they prepare carefully and are consistent in applying the procedures and that that they adhere to them. The policy set out steps that the respondent's managers would take, including investigation, suspension, preparing a written statement to invite someone to a disciplinary hearing, conducting the hearing and deciding on the appropriate sanction if the misconduct is confirmed. The sanctions outlined in the procedure that could be imposed by the employer were a written warning at stage I, a final written warning at stage II and dismissal at stage III. Where an employee is found guilty of gross misconduct, stages I and II may be omitted and the employee may be dismissed. The policy stated that any decision to dismiss would only be taken by a manager who had the authority to do so. In that case, the employee would be informed as soon as possible of the reasons for dismissal, the day on which the contract would end, the appropriate period of notice and the right of appeal.

13. The policy stated that a fair disciplinary process would be followed before an employee is dismissed for gross misconduct. Examples of gross misconduct contained in the policy included *'serious assault or physical violence, actual or threatening to any company employee or third party either on or off company property'.*

14. The policy stated that the employee would be given the right to appeal against a decision made under it. Any appeal must be received by the respondent within five working days. The respondent would endeavour to ensure that the manager who hears the appeal is more senior than the manager who held the disciplinary hearing. The employee would be advised of the appeal decision in writing which would make clear that the decision is final.

15. The respondent confirmed that the claimant was good at his job and that there were no complaints about his performance. The claimant had no previous disciplinary matters and a clean record.

16. At some time prior to 30 June claimant had undergone a hair transplant medical procedure in Harley Street. It is likely that this changed his appearance and the claimant may have been conscious of this on his return to work on 30 June 2020. It was the claimant's evidence that he had previously exchanged words with Dave Blackholly before 30 June in which Mr Blackholly had made what he considered to be racially discriminatory comments. However, the claimant had not raised any of those issues with the respondent's management. The claimant had formed an opinion that Mr Blackholly was ignorant in his views and insensitive. He described Mr Blackholly as '*being full of himself*'.

17. On the morning of 30 June, the claimant was in the works canteen at the same time as other colleagues. In his witness statement, the claimant stated that while in the canteen he heard Mr Blackholly make comments in which he was deliberately derogatory about the claimant's transplant. However, in the hearing, the claimant's evidence was different. He stated that while in the canteen someone called Neil made a comment about the claimant's hair or asked him whether he had had a haircut and Mr Blackholly pulled a face or made a gesture indicating his agreement with Neil's comment. He recalled that Mr Blackholly looked down on the floor and made a face.

18. Both the claimant and Mr Blackholly's statements agree that the claimant spoke first. The claimant's version is that he asked Mr Blackholly why he was pulling faces. In the statement that was taken from Mr Blackholly at the time of the incident, he stated that as he was leaving the canteen, the claimant said to him '*don't laugh behind my back'*. Mr Blackholly responded by saying that if he had to say anything he would say it directly to the claimant. The claimant's recollection is that Mr Blackholly swore at him in response by saying '*Fuck off'* after which he walked towards the door to leave the canteen.

19. The claimant was upset that he had been sworn at by Mr Blackholly. He approached Mr Blackholly at the door and continued the conversation with him. He told Mr Blackholly that he should watch his swearing and that as an older man he should set a better example for the younger workers. The claimant denied using the highly offensive word '*cunt'* towards Mr Blackholly, blowing in his face or

saying that he would '*knock him out'* as Mr Blackholly reported in the statement given to the Mr Keane.

20. The heated discussion between the claimant and Mr Blackholly in the canteen was escalated to their line manager, Tim Keane. Mr Keane met and took statements from the claimant, Dave Blackholly, Neal Shirley and Matt Taylor. Mr Taylor produced a statement recalling his conversation with the claimant but the claimant does not agree that it is accurate. It was the claimant's case that he did not say that if he got Mr Blackholly off camera, he would *'slap him'*. He agreed that Mr Taylor told him that he should take half-day to cool off. In an email to Mr Goodfellow after speaking to both the claimant and Mr Blackholly that morning, Mr Keane advised that he had spoken to both men and asked them to be professional, focus on their work for the balance of the day and stay out of each other's way. Mr Keane decided not to take the matter any further.

21. There were no CCTV cameras in the locker room. This was known among staff. The claimant confirmed that he was aware of this. Later that morning, Mr Blackholly was in the locker room. The claimant went into the locker room to retrieve his protective equipment. It was agreed that there was a small window in the locker room, which was located high above head height. This meant that people in the locker room could not be seen from outside.

22. The claimant confirmed that he when he entered the locker room and saw Mr Blackholly, he spoke to him. They were alone in the locker room. He told Mr Blackholly that he had been '*out of order'* earlier in the day. His evidence was that Mr Blackholly then walked towards him and he put his hand out and told him not to come any closer. In a statement given to Mr Goodfellow at about 3:30 PM, Mr Blackholly stated that the claimant had walked over to him in the locker room and slapped him in the face. Mr Freeman stated that when he was approaching the locker room to start his break, he saw Mr Blackholly and noticed that Mr Blackholly's right cheek was swollen and had a red mark on it. Mr Blackholly was upset. He told Mr Freeman that he was going to report what had happened with the claimant and that he would go home. Mr Freeman got his lunch out of his locker and went to the canteen.

23. Mr Blackholly went into Mr Keane's office and informed him that the claimant had '*slapped him in the face'*. Mr Keane telephoned his line manager, Lee Goodfellow who was at another site at Jenkins Lane and asked him to attend at Frog Island to take notes of the investigation meeting he was about to conduct with the claimant. Mr Goodfellow was surprised as it was unusual for the claimant to have any conduct issues at work.

24. Mr Goodfellow and Mr Keane met with the claimant to conduct an investigation meeting into Mr Blackholly's allegation that he had slapped him in the face. Mr Goodfellow agreed in the hearing that it was unusual to have two managers conduct the investigation meeting but that as Mr Keane asked him for assistance, he agreed to do so. Mr Goodfellow confirmed that he understood that Mr Keane had asked him because he was worried claimant might *'fly off the handle'*. Mr Goodfellow also spoke to Mr Blackholly over the telephone as part of the investigation.

25. In the investigation meeting, the claimant had an opportunity to explain what

happened in the locker/changing room. He denied that he had touched Mr Blackholly in the locker room and stated that he had put his hand up to *'move him away'*. He stated that he went into the locker room to get his hard hat. At the end of the meeting, there was a short break during which the two managers discussed what was the appropriate action in a situation where there had been an allegation of physical assault by one employee on another employee.

26. When the meeting resumed, Mr Keane informed the claimant that he was being suspended on full pay pending further investigation of the allegation that he had physically assaulted Mr Blackholly. Mr Keane stated that he had personally witnessed a mark on Mr Blackholly's face. He informed the claimant that the nature of the allegation was potentially gross misconduct and that the respondent wanted to ensure that it had all possible facts. The claimant was advised that he should not contact any colleagues while on suspension and that his suspension would be confirmed in writing to his home address. The claimant was given permission to leave the site immediately.

27. Later, on 3 July, Mr Goodfellow took notes at a meeting between Mr Keane and Matt Taylor. He confirmed in the hearing that the minutes were accurate. A note of that conversation was in the bundle documents. Mr Blackholly recounted the exchange between himself and the claimant in the canteen that morning and confirmed that the claimant had slapped him in the face while they were in the locker room. He stated that it was a total shock to him.

28. On 1 July 2020, Mr Keane wrote to the claimant to confirm his suspension from duty, pending an investigation into his alleged behaviour and conduct. In the letter, the claimant was informed that suspension was not a disciplinary measure but one that was necessary due to the serious nature of the allegation. The claimant was informed that he would be on full pay during his suspension. A copy of the disciplinary policy and the notes from the investigation meeting were enclosed with the letter. The claimant was given the opportunity to comment on the notes. The letter told him that he would be informed as soon as possible of the next course of action. The respondent acknowledged that being suspended and investigated was likely to be a difficult time for him and attached details of a 24-hour helpline that he could access.

29. Mr Keane conducted more investigation meetings. He met with Andrew Freeman on 1 July and took a statement from him. In his statement Mr Freeman confirmed that he went into the locker room shortly after the claimant left and saw Mr Blackholly there. He noticed a red mark on Mr Blackholly's face. On 3 July he took a statement from Matt Taylor in which he gave details of the discussion in the canteen that morning and a conversation with the claimant afterwards in which Mr Taylor stated that the claimant told him that if he got Mr Blackholly off camera, he would *'slap him'*.

30. The respondent appointed Simon Lee, who did consultancy work for the respondent as an independent chair for the disciplinary hearing. Mr Lee was asked to do so by Lisa Bailey, the respondent's HR advisor and Kevin Bell, contracts director. Mr Lee was considered suitable as he did not work with either the claimant or Albert Blackholly, although he knew the claimant from seeing him around the site.

31. On 3 July Mr Keane sent Mr Lee a copy of the statements that he had collated so far – from Neal Shirley, Matt Taylor, Andy Freeman, Dave Blackholly and the claimant; along with the notes of his investigation meetings with the claimant and second statements from Mr Freeman and Mr Taylor. Later, he sent Mr Blackholly's second statement.

32. Mr Lee wrote to the claimant on 9 July to invite him to a disciplinary hearing. The letter outlined that the allegation that would be considered at the meeting was that the about 10.15am on 30 June, the claimant physically assaulted a colleague in the locker room at Frog Island. The letter enclosed copies of all the statements that Mr Keane had taken, the investigation notes and the respondent's disciplinary and bullying and harassment policies. The claimant was advised of his right to be accompanied by a colleague or a trade union representative. The letter informed him that the allegations against him were regarded as potentially gross misconduct which may result in summary dismissal if his explanations were found to be unsatisfactory. The hearing was scheduled to take place on 17 July.

33. The claimant attended the disciplinary hearing on 17 July. Mr Lee was supported by Lisa Bailey, the respondent's HR advisor who was also notetaker. The meeting took place in the boardroom at the Rainham branch. The tribunal had notes of the hearing in the bundle of documents.

34. During the disciplinary hearing the claimant denied hitting Mr Blackholly. He denied touching him. He alleged that he had spoken with Matt Taylor immediately after the incident in the canteen and that Mr Taylor had effectively sympathised with him and told him that he '*took his hat off'* to the claimant for not reacting to Mr Blackholly's conduct in the canteen. He expressed surprise that the statement that the respondent had from Mr Taylor recounted a different exchange between them. The claimant explained that he felt that Mr Taylor was not a reliable witness as he smoked marijuana at work. The claimant also felt that Mr Blackholly had been aggressive towards him.

35. He referred to a conversation that he had witnessed between Ms Bailey and Mr Blackholly on 30 June outside as she drove into work. He thought that Mr Blackholly had told her about the incident that occurred in the canteen earlier that day.

36. At the end of the meeting, Mr Lee informed the claimant that he wanted to investigate further before he came to a decision. He expected that any further enquiries would not take too long and he advised the claimant that he was likely to come back to him with a decision within the following week. Ms Bailey reminded the claimant that he was still on suspension.

37. The respondent took the allegations of drug abuse against Mr Taylor seriously and this was investigated separately from the claimant's process.

38. Because there were no witnesses to the incident and because there were contrasting witness statements before him, Mr Lee decided to personally speak to Mr Blackholly and Mr Taylor to personally hear their description of the events of the day. He considered that this was also appropriate because the consequences of a finding of gross misconduct for the claimant could be quite serious and he was conscious of his responsibilities in that regard. At the end of the disciplinary

hearing, Mr Lee believe that it was more likely than not that the claimant had slapped Mr Blackholly due to the evidence from Andy Freeman and Tim Keane that they had seen a red mark on Mr Blackholly's face and he chose to personally speak to and Mr Blackholly and Mr Taylor to confirm those conclusions.

39. On 17 July, Ms Bailey produced a statement outlining the details of her conversation with Mr Blackholly as she drove in to work on 30 June. She confirmed that he did not tell her about the incident that had occurred in the canteen that morning. Mr Lee had not asked her to produce a statement. She produced statement because she wanted to clarify the issue that came up in the disciplinary hearing. Mr Lee did not take that statement into account when making his decision on the claimant's disciplinary.

40. Mr Lee spoke to Mr Taylor on the 17 July. Mr Taylor's statement confirmed what he had previously said to Mr Keane. He gave more details about what happened in the canteen between the claimant and Mr Blackholly and confirmed that he had spoken to the claimant outside after the incident in the canteen. He confirmed that he stated to the claimant *'do yourself a favour take half a day off and calm down'*. He also reported that the claimant had told him that when he saw Mr Blackholly off camera he would *'have him'*. That is the same as the information that he gave Mr Keane.

41. Mr Lee spoke to Mr Blackholly on 22 July. Mr Blackholly stated that after the incident in the canteen the claimant had threatened him when was clearing up outside. The claimant stated that he would run him over when there is no one watching and no cameras. He confirmed that the claimant had hit him while they were alone in the locker room. Mr Blackholly denied that he swore at the claimant during the earlier incident in the canteen and described their exchange there as factory banter. These statements did not provide any new information but simply reinforced what Mr Blackholly and Mr Taylor had previously stated in the statements taken by Mr Keane.

42. When he considered all the information he had, Mr Lee considered that it was likely that the claimant had slapped Mr Blackholly when they were alone in the locker room. He was persuaded by Mr Freeman and Mr Keane's statements that they saw a red mark on Mr Blackholly's face shortly after the claimant left the locker room. Also, that Mr Blackholly had reported the incident soon after it happened and that Mr Keane took statements soon after it was reported to him so there had not been any real opportunity for staff to collude together to produce agreed statements.

43. Mr Lee concluded that the claimant had assaulted Mr Blackholly and that this was a serious matter and in contravention of the respondent's bullying and harassment policy. He concluded that this was a physical assault which came under the heading of gross misconduct in the respondent's disciplinary policy. Having come to that conclusion, he went on to consider what would be the most appropriate sanction to impose on the claimant.

44. Mr Lee considered whether a sanction other than dismissal would be appropriate. He considered that the respondent needed staff to work together in a professional and safe manner, particularly given the potentially dangerous work environment at Frog Island. The claimant had displayed violence and threatening

conduct at work and he considered that this was unacceptable. He decided that it would be extremely difficult for the claimant to return to work after this. Notwithstanding that the claimant had a clean disciplinary record up until this point, Mr Lee's decision was that the claimant should be dismissed for gross misconduct.

45. Mr Lee wrote to the claimant on 27 July 202o to advise him that having considered the evidence gleaned from the internal investigation carried out by Mr Keane, which was confirmed by the statements he obtained and having considered the claimant's representations at the disciplinary hearing; he had come to the conclusion that the claimant had physically assaulted Mr Blackholly on 30 June. He cited two issues: firstly, the physical red mark on Mr Blackholly's cheek which had been witnessed by colleagues and the incident that occurred earlier that day, which made it more likely than not that the incident took place as described. Secondly, he had not been able to find any mitigating factors from the claimant's account.

46. The claimant was summarily dismissed on 27 July 2020. He was advised of his right to appeal by writing to Kevin Bell, ELWA contract director within 5 working days, clearly stating his grounds of appeal. The claimant did not appeal against his dismissal.

47. On 23 July, the claimant was paid for the whole month of July. However, as he was summarily dismissed on 27 July, this means that he was actually overpaid for 4 days (i.e. 28 – 31 July). The respondent produced annual leave records in the hearing which showed that the claimant had accrued 17 days leave and took 14. He was owed 3 days holiday pay.

Law

<u>Unfair dismissal</u>

48. In this case, the Tribunal is concerned with the question of determining the reason for the Claimant's dismissal and whether it is one of the reasons set out in section 98(2) of the Employment Rights Act 1996 (ERA). The burden is on the Respondent to show the reason for the dismissal and that it is a potentially fair reason i.e. that it relates to the Claimant's conduct or capability.

49. A dismissal that falls within that category can be fair. In order to decide whether it is fair or unfair, the Tribunal needs to look at the processes employed by the Respondent leading up to and including the decision to dismiss. In cases concerning the employee's conduct, a three-stage test must be applied by the Respondent in reaching a decision that the employee has committed the alleged act/s of misconduct. This was most clearly stated in the case of *British Homes Stores Ltd v Burchell [1980] ICR 303*, as follows. The employer must show that:-

(a) he believed the employee was guilty of misconduct;

(b) he had in his mind reasonable grounds which could sustain that belief, and

(c) at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in

the circumstances.

50. The means that the employer does not need to have conclusive direct proof of the employee's misconduct but only a genuine and reasonable belief of it which has been reasonably tested through an investigation.

51. If the Tribunal concludes from all the evidence that this is the case; then the next step for the Tribunal is to decide whether, taking into account all the relevant circumstances, including the size of the employer's undertaking and the substantial merits of the case, the employer has acted reasonably in treating it as a sufficient reason to dismiss the employee. In determining this, the Tribunal has to be mindful not to substitute its own views for that of the employer. Whereas the onus is on the employer to establish that there is a fair reason, the burden in this second stage is a neutral one. The *Burchell* test applies here again and the Tribunal must ask itself whether what occurred fell within *"the range of reasonable responses"* of a reasonable employer. The law was set out in the case of *Iceland Frozen Foods v Jones [1982] IRLR 439* where Mr Justice Browne-Wilkinson summarised the law concisely as follows:

> "*We consider that the authorities establish that in law the correct approach for the … tribunal to adopt in answering the question posed by [section 98(4)] is as follows:*
>
> *(1) the starting point should always be the words of section 98(4) themselves;*
>
> *(2) in apply the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether they (members of the tribunal) consider the dismissal to be fair;*
>
> *(3) in judging the reasonableness of the employer's conduct, the tribunal must not substitute its decision as to what was the right course to adopt for that of employer;*
>
> *(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another might quite reasonably take another;*
>
> *(5) the function of the …. Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable response which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.*

<u>The Tribunal's decision</u>

Unfair Dismissal

52. The first issue for the Tribunal was to decide the reason for the claimant's dismissal. The burden of proving the reason for dismissal is on the respondent.

53. The respondent proved that the reason for the claimant's dismissal was the claimant's misconduct. Prior to the allegations regarding the incident in the locker room on 30 June, there were no issues with the claimant's performance and he had a clean disciplinary record. The respondent had no issues with the claimant and had no intention to discipline him or terminate his employment.

54. It is this Tribunal's judgment that these disciplinary proceedings arose from the incident that occurred on 30 June. It was because of the allegation made by Mr Blackholly and his investigation that Mr Keane suspended the claimant and it was based on the investigation and the statements that Mr Lee terminated the claimant's employment.

55. There was no evidence that this was all done to protect the company, as the claimant alleged in the hearing.

56. It is this Tribunal's judgment that the reason for dismissal was the claimant's misconduct.

57. The next question for the Tribunal is whether at the time that Mr Lee made the decision to dismiss the claimant, he believed that the claimant had committed gross misconduct and that belief was based on a reasonable investigation.

58. The claimant submitted that as there was no CCTV and no witness to the assault, the respondent had no evidence and therefore could not say that he had assaulted Mr Blackholly. At the time that Mr Lee made the decision to dismiss, he had Mr Keane's investigation and had heard from the claimant in the disciplinary hearing. On the one hand, the claimant denied hitting Mr Blackholly. On the other hand, Mr Keane and Mr Freeman stated that they had seen Mr Blackholly soon after he came from the locker room and that he had a red mark on his cheek and reported to them that the claimant had struck him. Mr Keane had taken statements quite quickly after Mr Blackholly reported the incident to him so that it was reasonable for Mr Lee to conclude that there had been no time for members of staff to collude together to make statements to support Mr Blackholly, as the claimant alleged in the hearing. There was no evidence to support the claimant's contention that they were supporting Mr Blackholly because he was English as opposed to the Claimant who is from Montenegro.

59. There were statements which confirmed that there had been an incident earlier in the morning of 30 June which supported a conclusion that it formed the background to the incident in the locker room. In the canteen, it was the claimant who approached Mr Blackholly and spoke to him. It was also he who spoke to Mr Blackholly as he was leaving the canteen. Even though it was not usual behavior for the claimant, there was evidence from the statements collected by Mr Keane that meant that it was reasonable for Mr Lee to conclude that it was more likely than not that the claimant had threatened Mr Blackholly earlier in the day and had carried out the threat to slap him when he got him alone and in a place without any CCTV cameras. The claimant complained in the hearing that there had been one other person in the canteen that day who the respondent had not spoken to. However, the claimant was not disciplined or dismissed for the incident in the canteen. It was open to him to ask that person to attend the disciplinary hearing if they had evidence to give. Also, it was not his case that the individual had evidence to give that would be different to that given by Neil, Mr Blackholly and Matt Taylor.

There was no evidence that the respondent had deliberately chosen not to speak to a witness who had been in the canteen when the first incident occurred. At the disciplinary hearing, the claimant did not refer to anyone else that the respondent should speak to about the canteen incident.

60. Mr Keane did speak to members of staff who witnessed the incident in the morning in the canteen and those to whom the claimant and Mr Blackholly spoke, immediately after the incident in the locker room. There was no CCTV and it was Mr Blackholly's account that the claimant decided to hit him in the locker room precisely because there was no CCTV there. The absence of CCTV does not mean that the respondent could not take action in relation to this incident.

61. The Tribunal considered whether Mr Lee's action in speaking to Mr Blackholly and Mr Taylor after the disciplinary hearing and not showing those additional statements to the claimant affected the fairness of the dismissal. He also did not show the claimant the statement provided by Ms Bailey about her conversation with Mr Blackholly in the car park. Those statements did not add anything to the respondent's case. It was right that Mr Lee should have taken the opportunity to assess Mr Blackholly's and Matt Taylor's evidence and to check whether what they said to him was consistent with the statements they gave to Mr Keane. He had already come to the conclusion that it was more likely than not that the claimant had committed the assault as alleged.

62. The statement from Ms Bailey did not add anything to the investigation and the Tribunal accepted Mr Lee's evidence that he did not take it into account when deciding this matter.

63. The respondent does not have to carry out a police type investigation. The duty on the respondent is to conduct a reasonable investigation. It was appropriate, given the seriousness of the allegations against the claimant for Mr Lee as the decision maker to meet Mr Blackholly and hear his account of the incident first-hand so that he could decide whether he found him credible. If Mr Blackholly or Mr Taylor had said anything different to their earlier statements, it is likely that Mr Lee would have given the claimant an opportunity to comment on them but as they repeated the information which they had given in their earlier statements, it was not necessary for him to do so.

64. It is this Tribunal's judgment that at the end of the disciplinary process, Mr Lee believed that the claimant had slapped Mr Blackholly in the locker room and that he came to that conclusion from the investigation conducted by Mr Keane and from the disciplinary hearing. The respondent had conducted a reasonable investigation.

65. It was reasonable for the respondent to conclude that slapping a colleague out of sight of CCTV cameras was a deliberate act of violence and therefore an act of gross misconduct. Although this was out of character for the claimant, a serious one-off act can still be gross misconduct. As this was physical violence, physical harassment, accompanied by threats, it was appropriate and reasonable to describe it as gross misconduct and for the respondent to take it seriously and treat it as such.

66. The respondent did not automatically terminate the claimant's contract. It

is this Tribunal's judgment that before deciding on the appropriate sanction to impose on the claimant, Mr Lee considered whether there was any other sanction that was appropriate but did not mean the termination of the claimant's employment. As this was an act of violence and unprofessional conduct, the respondent could not be certain that it would not happen again if the claimant returned to work and considered that he was being provoked by a colleague. It was reasonable for the respondent to come to that conclusion. Even by the claimant's own account Mr Blackholly had not actually spoken to him in the canteen. He had made a face when someone else commented on the claimant's hair. That was sufficient to provoke strong reactions from the claimant which led to the assault. In those circumstances, it was reasonable for the respondent to be concerned about whether, if the claimant remained in employment, they could be assured that the claimant would be able to work in a safe and professional manner in the future.

67. The respondent's policy gives summary dismissal as a sanction for gross misconduct.

68. In the circumstances, it is this Tribunal's judgment that it was reasonable for the respondent to conclude that the claimant had committed gross misconduct. It was also fair and within the band of reasonable responses open to the respondent to summarily dismiss him for gross misconduct.

Holiday pay claim

69. The respondent confirmed that it at the end of the claimant's employment he was owed 3 days holiday pay.

70. However, as the claimant had been dismissed summarily on 27 July 2020 he was only entitled to be paid to that day. He had already been paid up to 31 July. The salary was paid on 23 July 2020. The claimant was overpaid his salary by 4 days' pay. The claimant has, in effect, been paid his holiday pay together with his salary for July 2020.

71. There is no outstanding holiday pay owed to the claimant.

Judgment

72. It is this Tribunal's judgment that the claimant was fairly dismissed and the complaint of unfair dismissal is dismissed.

73. There is no outstanding holiday pay owed to the claimant. That claim fails and is dismissed.

Employment Judge Jones
Date: 26 May 2021