



EMPLOYMENT TRIBUNALS

Claimant: Mr Gary Ferguson

Respondent: Royal Mail Group Limited

Heard at: Cardiff Employment Tribunal and remotely

On: 14 April 2022

Before: Employment Judge S Moore

Representation

Claimant: Mr T Cooper, CWU Representative – in person

Respondent: Ms Cairney, Solicitor - remotely

RESERVED JUDGMENT

The claimant was unfairly dismissed contrary to s94 Employment Rights Act 1996.

REASONS

Background and Introduction

1. The ET1 was presented on 6 September 2021. The claimant brought claims of unfair dismissal. There was an agreed bundle of documents running to 254 pages.
2. The Tribunal heard evidence from the respondent's witnesses Mr Gareth Stuckey, dismissing manager, and Ms S Knight-Smith, appeal officer by video, and the claimant in person.
3. The decision had to be reserved as the Tribunal did not finish hearing the evidence until 4.30pm. A direction was made for written submissions to be sent to the Tribunal by 10.00am on 25 April 2022.

4. In addition to the bundle and the witness evidence the Tribunal had sight of two CCTV videos which were played during the hybrid hearing.
5. The issues were agreed with the parties as follows.
 - a. What was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct. The respondent must prove it had a genuine belief in misconduct and this was the reason for dismissal.
 - b. Did the respondent hold that belief in misconduct on reasonable grounds, following a reasonable investigation? The burden of proof is neutral.
 - c. Was the dismissal fair or unfair in accordance with Section 98(4) ERA? Was the decision to dismiss a sanction within the "band of reasonable responses" for a reasonable employer?
 - d. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed? (Polkey v AE Dayton Services Ltd [1987] UKHL 8);
 - e. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to Section 122(2) ERA; and if so to what extent?
 - f. Did the claimant, by blameworthy or culpable actions, cause or contribute to the dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to Section 123(6) ERA?

Findings of Fact

6. I make the following findings of fact on the balance of probabilities.
7. The claimant was employed as a Delivery Officer placed at the Mumbles Delivery Office in Swansea. The claimant commenced his employment on 18 January 2010 until his summary dismissal on 8 July 2021.
8. The Tribunal had sight of the respondent's Code of Business Standards which set out their expectations for the personal behaviour of their employees. This provided that whilst representing the Royal Mail Group employees must not act in an intimidating, threatening, derogatory or discriminatory way or behave

violently or abusively to others. Under the section “What does this mean for managers?” it stated that they expected managers to set a good example at all times and demonstrate how to live by business standards and company values. They were expected in particular as managers to lead by example.

9. The Royal Mail Group conduct policy sets out an approach to take when dealing with conduct cases. In a formal conduct process there would be a factfinding investigation. A cautionary suspension could take place where there had been a serious incident and in circumstances where there had been alleged inappropriate behaviour, for example refusal to carry out reasonable instruction, violent or threatening behaviour. The policy provided that where the employee had refused to carry out a reasonable instruction, they should be given ten minutes cooling off time to reconsider their actions. Employees should be encouraged to see their union representative during this period where possible. Under the types of behaviour deemed to be gross misconduct, although they were non-exhaustive, they included the type of behaviour such as theft, violence and abusive behaviour to customers or colleagues.

10. Up until the incident leading to his dismissal, the claimant had an clear disciplinary record.

11. There had been a history of issues between the claimant and his line manager. In 2018 the claimant raised a formal grievance against this individual regarding an incident that took place in December 2018 where he had told the claimant to *“fuck off home if you don’t like it”* when he had approached to ask him about future plans for the Christmas period. These words were documented on the front page of the grievance form. The claimant also complained he was being treated differently to other staff members with regard to sickness, workload and daily duties.

12. The respondent accepted that the line manager was subsequently disciplined in respect of this grievance. Although Mr Stuckey was the investigating officer for that investigation, he was unable to recall the disciplinary sanction applied but agreed that one had been applied. He also agreed that the allegations regarding the line manager swearing at the claimant as described above were found to have been proven.

13. During 2020 the claimant had further time off due to mental health issues and was referred on four occasions to the respondent’s Occupational Health advisers. The Occupational Health reports in the bundle reported that the claimant was experiencing difficulties with symptoms of stress, anxiety and depression which he attributed to personal and work-related issues. He was referred for counselling in which coping strategies were explored with the claimant. The Occupational Health adviser recommended that the respondent complete a stress risk assessment with an action plan documented and reviewed and regular intervals. A further report documented that the claimant had raised concerns about conflicts he had in the past with regards to additional work he felt under pressure to complete. It reiterated the need for a stress risk assessment. None was ever undertaken.

14. On 8 May 2021 there was an incident between the claimant and his line manager at approximately 6.45am. The claimant had approached the line manager to raise concerns about going over his delivery three times the previous week which was affecting his ability to pick up his children from school. There was a dispute about what happened next.

15. Before dealing with the incident it should be noted at that time Wales was at alert level 3 in respect of Covid restrictions. Indoor hospitality remained closed and it was a legal requirement (not guidance) that employers should take all reasonable measures to ensure 2 metres distance between all people at all times.

Claimant's version of events

16. Accordingly to the claimant, he had had to work himself up to speak to his line manager as he generally became aggressive, sarcastic and intimidating and the claimant did not want it to "turn into a slanging match", which is what it normally turned into. The claimant accepted that voices quickly became raised as they were calling across to each other. The claimant says that the line manager then instructed him to go to the canteen but did not explain why. The claimant did not want to go to the canteen as he wanted to go on delivery. At this point the claimant was in his fitting (which is the name for the area where employees undertook their sorting duties being a small compact area) and the line manager made physical contact with the claimant by placing his hand on the claimant's chest area. The fact of contact is common ground but the manner and meaning of the contact is disputed. (The line manager later accepted that he approached the claimant and placed his hand "*lightly at the top of his shoulder*").

17. The claimant says that the line manager pushed him sideways as the claimant was trying to move towards his fitting area, whereas the line manager wanted him to go to the canteen. The claimant at this point shouted, "*don't push me*". The claimant's witness evidence is that he was also concerned about this physical contact in the context of his line manager being within his personal space in breach of COVID social distancing regulations at that time. The claimant then left the area but was pursued by the line manager who had placed both arms behind his back and still insisting that he went to the canteen. The claimant then went to get his trade union representative, Mr Ewing.

18. At the factfinding interview with Mr John on 14 May 2021 (which I will return to below), the claimant is recorded as saying that he had called across to the line manager, he accepted voices were raised but said that the line manager became aggressive/sarcastic/intimidating. The line manager shouted at him to go to the canteen, he did not want to go. He then says that the line manager walked over to his fitting and said, "*go to the canteen*" and "*he put his hand on my shoulder to push me. I shouted don't push me. I don't come to work for managers to put hands on me, he should not touch me, he shouldn't be in my two metre space. I have been to the police for advice, it's low level assault*". He was asked to describe where the line manager put his hand, and the claimant replied that the line manager walked over to him asking him to go to the canteen, put his hand onto his right shoulder and "*pushed me in a sideways direction*". A Mr Griffiths had come over and said, "*calm down there are people watching*" and he called Mr Ewing, who was the union representative.

Line manager' version of events

19. The line manager' account was as follows. This was set out in a written note. It was not disclosed to the claimant until just before the disciplinary hearing. The line manager accepted that during the initial conversation the claimant was speaking to him in a *"tidy and respectful manner"* about being over his delivery times three times that week. The line manager was sitting down and as the conversation continued he alleges that the claimant's mood suddenly changed and his voice level rose to shouting very close to him where he was sitting. He said that the claimant started to walk away, shouting back "verbals" and pointing. He quickly assessed the situation, took into account his behaviours and how it was affecting other staff, and asked him in a calm tone and pointing in the direction of the canteen to go to the canteen to calm down, which he requested at least three times. The claimant refused and proceeded to walk to his prep frame (fitting) from around the right-hand side he approached the left-hand side. He said *"we arrived at the prep frame at the same time. Mr Ferguson was more focussed on shouting and pointing at me in an aggressive manner."* He then admits that he *"placed his left hand lightly on the top of Mr Ferguson's right shoulder as we were both side-on."* At this point the claimant started very loudly shouting *"I'd pushed him and caused more of a scene by asking loudly if anyone had seen it."* He put his hands behind his back while the claimant moved away and kept coming back towards him shouting loudly. He continued to ask the claimant to go to the canteen. The line manager does not say that the claimant swore at him during this encounter.

CCTV footage

20. I make the following findings having observed the CCTV footage. There were two videos. The first, which was the shorter one, starts with the claimant pushing a trolley, looking backwards and walking and pointing at someone. He steps forward several times but the person that he is speaking to remains out of the frame. This is the line manager. The claimant then pushes a trolley into his frame area and the line manager can be seen walking from the right-hand side towards the frame area and then directly into an area in front of the claimant. The line manager is also pointing and waving his arms. It is at this point that the line manager accepts he placed his hand on the claimant, and the claimant can be seen then walking away with the line manager pursuing him. The line manager at this point has his arms behind his back in a self restrained type manner. The claimant turns back and talks to the line manager again, and the line manager continues to follow the claimant very closely with his hands behind his back while the claimant is walking away backwards. At this point another person approaches both of the individuals (who I have presumed is Mr Griffiths where he tells them to "wrap it in" – see below). The claimant continues to walk away towards the canteen and the line manager continues to follow closely behind him with his hands behind his back.

21. In the second video, which is four minutes and 25 seconds long, nothing happens until the last 20 or so seconds of the film. It is the same film but from a different camera angle. The fitting area where the alleged push takes place can be more clearly seen. Towards the end the claimant can be seen talking to the line manager, who is sitting at a desk. He then starts to walk away, pushing the trolley as previously described. The claimant is moving away but turning and

gesturing and pointing at the line manager, moving a short step forward as he does so. He then continues to walk away. The line manager then raises both arms, stands up and can be seen to be pointing repeatedly and moving quite quickly towards the claimant who is retreating.

22. In both videos other members of staff can be seen working in the area, with no-one appearing to stop or intervene.

23. Both the claimant and the line manager are displaying confrontational body language. The claimant raises his arms and is pointing but does so from a distance. The line manager raises both arms upwards, stands and then quickly pursues the claimant across the floor whilst he is walking away and is repeatedly jabbing his arm in a pointing fashion. This is probably where he was instructing the claimant to go to the canteen.

24. Whilst the claimant is also turning back to the line manager and pointing in a confrontational way he is some way away from line manager at this point, moving briefly forward before walking backwards again. The line manager quickly crosses the floor towards the claimant whilst raising his hand and pointing a number of times.

Investigation

25. After the incident a number of witness statements were taken from individuals that had been named by the line manager as witnesses, and these witness statements were not signed or dated. It is unclear when the statements were taken. According to Mr Stuckey, Mr John who was appointed as the investigating officer took these witness statements. These stated as follows.

26. A statement from Ms Storey stated that at 6:45 she could hear the claimant's voice raised and thought "here we go". When she looked over the line manager was sitting down and the claimant was shouting and waving his hands, gesturing, and this went on for minutes. She was told by a colleague to do something and go and get somebody. She went to find a Mr Griffiths and asked him to go and do something before it escalated. Ms Storey went on to say that Mr Griffiths went towards them and told them to "wrap it in" and that the line manager was telling the claimant to go to the canteen.

27. A statement from a Mr Grant stated that he was by the IPS frames (the fittings where the line manager was sitting) and they were having a conversation, at which point the claimant started to move his frame, shouting at the line manager, who remained calm and pointing towards the canteen. He said the atmosphere was not nice. He did not see any push but heard the claimant shouting. Mr Grant commented that the claimant was always vocal and loud in the office and has had a go at a few people in work.

28. Mr Newton stated as follows. He described the claimant's voice being loud and caught his attention. He said that the line manager was sitting on the IPS frame and that the claimant was in his face aggressively waving his hands. He said he could not hear what was being said but that the claimant was moving back to his frame, still shouting and swearing at the line manager. He went on to say

that both the line manager and the claimant were by the claimant's frame and he could hear the line manager saying, "go to the canteen" and what looked like the line manager "shepherding" the claimant towards the canteen direction. The claimant started shouting, "*don't touch me, you are touching me*" in a very drama-like theatrical way, and he could not believe what he was seeing with his eyes as the line manager had not touched the claimant.

29. Mr Griffiths' statement stated that he could hear shouting but did not take much notice and then Ms Storey approached him and asked him to go and have a word. He said he approached them and said them, "*wrap it in and calm down boys*". He said the line manager was asking the claimant to go to the canteen and the claimant was waving his hands. He had not heard or seen anything prior to that.

30. Mr Ewing gave a statement. He explained that the claimant had come to get him and asked him to speak to the line manager to see what was going on and that he had pushed the claimant. He said that he went to the claimant's fitting and the line manager was still there, turning off the fitting light and insisting the claimant go to the canteen, questioning whether he was fit for delivery. Mr Ewing asked the claimant to go to the canteen while he spoke to the line manager. He told Mr Ewing that he had had a heated exchange with the claimant and admitted he had put his hand on the claimant, at which point Mr Ewing said, "*you shouldn't put your hands on people*" to which he admitted that that was wrong, insisting he was guiding the claimant to the canteen. A surprising aspect of what happened next was that the line manager then insisted that Mr Ewing fetched the claimant from the canteen, where they went into the office and a further heated discussion took place. The claimant was then permitted to go out on delivery.

31. There were two other handwritten statements: one was from someone called "the Mumbles postman". This witness stated that the claimant had become louder and more aggressive in his manner and verbal abuse at the line manager which involved a torrent of swearing and verbal abuse. This witness said that at no time did they see line manager physically touch the claimant. This witness stated it was not the first time the claimant had attacked the line manager with a torrent of verbal swearing and abuse, and that the line manager had always been professional and calm.

32. There was another handwritten statement from an unidentified person. They did not see any touching, tapping or pushing as their view was restricted. The witness described that he heard the claimant's voice and the tone caused them to step back from the fitting to see what was happening. He claimed that the claimant said to the line manager "*you fucking do it then*". This witness said it was not first time they had witnessed the claimant shouting and swearing at the line manager. The witness said that she was upset at the accusation made (presumably against line manager).

Incident on 10 May 2021

33. On 10 May 2021 there was a further incident between the line manager and the claimant in the locker room. The claimant told Mr John at the investigation factfinding meeting that as he walked into the locker room the line manager was in

there and said someone would want to speak to him about Saturday, to which he replied, *"the police will be speaking to you for putting your hands on me"* and walked out. The claimant was asked if he called the line manager a *"prick"*. The claimant denied saying this but that he had said to himself *"stick to what you're told, walk away"*, which was a coping mechanism he had been taught from counselling. The line manager's account was that when he was in the locker area the claimant entered the room and he explained to him he wanted him to have a meeting with Mr Stuckey regarding his behaviour on Saturday, to which the claimant replied *"what about your behaviour pushing me? I think that's called assault"*. The line manager said he replied, *"I did not push you"* as he was leaving the office, and said louder than what he intended and in earshot the word *"prick"*. The line manager said he challenged the claimant on *"what he called me"*, repeating the word back, which the claimant denied and claimed that the line manager was picking on him.

34. Also on 10 May 2021 Mr Stuckey, who is the Delivery Office Manager, had been told about the incident between the line manager and the claimant and spoke to both of them about it. He described this as an *"informal discussion"*. He did not keep any notes of that discussion. His witness evidence stated that during that informal discussion the claimant had informed him that he had been pushed by the line manager and he had been aggressive towards him. The line manager advised Mr Stuckey that he had had a conversation about the claimant's performance when the discussion started to escalate, he then instructed the claimant to go to the canteen, which he had refused to do, following which the line manager put his hand on the claimant's shoulder to guide him away from the situation. At this point the claimant became aggressive and started to shout he was being pushed.

35. Following this informal discussion Mr Stuckey spoke to the advice and support team and decided the case needed to be investigated further because at that time the way the case was presented by the claimant alluded to the line manager being the aggressor, but this was disputed by line manager. Mr Stuckey asked Mr John to investigate.

36. The line manager was not suspended pending an investigation however he was temporarily transferred somewhere else.

Fact finding investigation

37. On 10 May 2021 Mr John had an initial discussion with the claimant about the incident. I find that this must have been after the incident in the locker room with line manager as this took place at 6am.

38. On 12 May 2021 the claimant was sent a letter inviting him to a fact-finding meeting on 14 May 2021. The claimant attended this meeting accompanied by his union rep Mr Ewing. The meeting was conducted by Mr John. Mr John explained that the purpose of the interview was to understand the facts of the allegation the claimant had made against his line manager. The claimant had not made a formal complaint at that stage so this must have been in reference to the conversation with Mr Stuckey described as an informal discussion on 10 May 2021. There were typed notes of the meeting which the claimant had annotated by hand. The

claimant referenced several times that the line manager pushed him. In the notes where Mr John suggested it was not a direct push backwards more a sideways motion, the claimant had written in handwriting on the note "he pushed me away from my fitting." The claimant also complained to Mr John that he did not come to work "for managers to put their hands on him and that [the line manager] should not have touched him and was in his 2 metre space" (referencing the social distancing regulations in place at that time). This was reiterated by the union representative. The claimant informed Mr John he had been to the police and for advice and it was "low level" assault. The claimant also told Mr John that he had told the line manager on the Saturday in the locker room that "the police will be speaking to him for putting his hands on me". Therefore as of 14 May 2021, Mr John must have been aware that the claimant already intended to speak to the police by the time he arrived at work on 10 May 2021 and had already done so by 14 May 2021. The union representative also made the point that they were in the middle of Covid and should be 2 metres apart.

39. The claimant told Mr John that he had put in a grievance against the line manager for foul and abusive language and nothing had been done. This was in reference to the 2018 grievance referenced above. This was noted in the notes but there is no evidence that Mr John followed that up as part of his investigation or drew it to the attention of Mr Stuckey.

Suspension

40. The precautionary suspension report was erroneously dated 12 May 2021. It later transpired that Mr John had used a template file as the letter and forgotten to change the date in fact the letter was edited on 21 May 2021. It set out that the main circumstances were alleged inappropriate behaviour, alleged serious breach of contract where there is a reasonable belief that the serious breach might be repeated, and/or there is a risk to people, property or the good image of Royal Mail Group, and that the investigation may be hampered when the employee remains at work. Mr John sets out that he took the decision to precautionarily suspend the claimant. He said there was a "clear potential conduct issue which relates to aggressive and abusive behaviour and potential issue regarding dishonesty which needs to be investigated", and the claimant would remain suspended during further investigations into the matter.

Police involvement

41. I now turn to the findings I make in respect of when the claimant informed the police of the incident between him and the line manager. The claimant's evidence was that he initially called 101 on the evening of Monday 10 May 2021 after taking advice from a neighbour/friend about what had happened, and he had been told that the line manager placing his hand on the claimant in the way that he did could have been assault as well as breaching social distancing. The claimant made the call to 101 and was told that he would be contacted back. This was corroborated by what the claimant subsequently told Mr John at the investigation meeting on 14 May 2021 (that he had already been to the police) and also what he had said to the line manager on 10 May 2021 in the locker room incident that he (the line manager) would be hearing from the police. For these reasons I

accepted the claimant's evidence that he contacted the police via the 101 service on the evening of Monday 10 May 2021.

42. Mr John subsequently passed the matter to Mr Stuckey as he considered the potential penalty to be outside of his authority. There was no investigation report setting out a summary of the evidence gathered. In an undated letter Mr Stuckey subsequently wrote to the claimant inviting him to a formal conduct meeting. There were five allegations which I set out as follows: –

1. **Misconduct-acting in an aggressive and abusive manner to your line manager**
2. **Misconduct-failing to follow reasonable instruction when being asked to go to the canteen by your line manager**
3. **Misconduct-swearing at your line manager on 10 May 2021;**
4. **Gross misconduct-dishonesty-due to the detail provided in the initial investigation there is doubt about the version of events that you have provided;**
5. **Gross misconduct-deliberately trying to mislead a formal investigation for the sole purpose of trade to get your line manager disciplined.**

Disciplinary hearing 7 June 2021

43. The hearing was conducted by Mr Stuckey. The claimant was accompanied by his union representative.

44. Mr Stuckey told the Tribunal that had allegations 4 and 5 not been upheld, the claimant would not have been dismissed. He also confirmed that allegation 3 was in respect of the incident on 10 May 2021 when the claimant allegedly called the line manager a "prick".

45. The claimant denied swearing at the line manager and brought up that the line manager had been disciplined for swearing at him previously. He also raised his sick record for stress and anxiety. He also questioned why only the witnesses named by the line manager had been interviewed where he maintained others directly near the incident had not been. The claimant accepted he had been shouting and asserted the line manager had also. He raised the "cooling off" period referenced above in response to the question as to why he did not go to the canteen as instructed by the line manager and also he had not understood the instruction to be a literal one as line manager had previously told him to "fuck off home" and he had not understood he meant the instruction on this basis. The claimant stated he accepted responsibility for some of the incident and that both he and the line manager should have stopped and were both wrong.

46. The claimant told Mr Stuckey a number of times that the line manager had pushed him and he told the line manager he could not put his hands on a person and that he had come "so close" and should not have, and it was unwanted. He asked where it says a manager can put a hand on him (in Royal Mail procedures). This was repeated numerous times during the hearing.

47. The claimant's hand written annotation on the notes state that he informed Mr Stuckey that on 10 May 2021, he told the line manager "*wait until the police*

knock on your door". He later stated the alleged push was not strong and had told this to the police. Mr Stuckey put to the claimant there was no evidence the line manager had pushed him other than what the claimant had said. The claimant stated it was not a force or a shove but that he had not wanted the line manager to touch him. The CCTV footage was viewed. The union representative asserted that the line manager had "guided" the claimant to where he wanted him to go. The claimant started to resile from the word "push" stating he had put his hand on his shoulder to move him away but it was the touching that was the issue. However further on, the claimant stated that "*a person putting a hand on you during a heated argument was a level of assault*". He quoted the Royal Mail procedure regarding precautionary suspension and stated that "*It's violence as he's put his hands on me*".

48. In relation to the police incident. Mr Stuckey asked the claimant why he had called the police. The claimant told Mr Stuckey this was because "*if he hit him there would be no record of what happened.*" The claimant explained this comment in his cross examination that he was referring to a potential future incident between him and the line manager. He clarified he went to the police as he had taken advice about the situation over the weekend after the incident and not for any other reason. Mr Stuckey asked the claimant when he contacted the police and he replied, "*he could not remember, sometime in that week or the week after.*" He repeated he could not remember and was feeling sick, not sleeping and he had become very low. He informed Mr Stuckey he told the police he did not want the line manager prosecuted it was about traceability, he wanted a history of events.

49. The union representative raised the gross misconduct charges on a number of occasions trying to clarify what they meant.

Dismissal

50. Mr Stuckey adjourned the disciplinary hearing to reach his decision. He upheld all five charges against the claimant and advised that because two of the charges were gross misconduct (allegations 4 and 5) he would be dismissed without notice. The claimant was notified in a letter and report dated 8 July 2021.

51. In relation to the first charge, Mr Stuckey noted that five of the witnesses statements said the line manager remained calm and sat on the frame whilst the claimant was acting in an aggressive manner and was shouting. He concluded from the CCTV footage that the claimant was aggressive and the line manager's body language was "normal for someone explaining things".

52. In relation to the second charge, Mr Stuckey upheld this on basis the claimant admitted being asked to go to the canteen but did not and it was not an unreasonable instruction or out of process.

53. In relation to the third charge of swearing, Mr Stuckey upheld this charge against the claimant relying on several witness statements from the Saturday 8 May incident that stated that the claimant had been swearing at the line manager (Mr Newton, paragraph 28, and the two anonymous witnesses, see paragraphs 31 and 32). Mr Stuckey also based his belief on a conclusion that the claimant replied to the line manager in the locker room in a clearly more threatening and aggressive

way by saying he would be hearing from the police. Mr Stuckey did not mention in his outcome report whether he had taken the fact that the line manager had previously been disciplined for swearing at the claimant into account, which had been noted in the minutes of the investigation meeting with Mr John.

54. In relation to charge number four which was dishonesty due to the detail provided in the initial investigation. The claimant's union had continuously requested clarification of this allegation to understand on what basis the claimant was said to have been dishonest.

55. The report stated as follows:

"In determining this chain of events it is my reasonable belief that the version of events Mr Ferguson describes at this incident didn't happen that way and I have based this decision on the fact the CCTV footage demonstrates Mr Ferguson being the aggressor and also the witness statements provided back that up."

And

"It is my reasonable belief that this version of what happened is not what actually happened based on the evidence provided and as such it is my belief that Mr Ferguson has been dishonest in providing his evidence and therefore this charge is upheld."

56. Mr Stuckey's witness statement set out the following in respect of the dishonesty allegation.

"Having considered the evidence, I noted that the incident did not appear to have occurred in the manner that Mr Ferguson had suggested within my informal discussion with him.

.....

Throughout the conduct investigations, Mr Ferguson had portrayed [the line manager] as the aggressor in the incident and that [the line manager] had pushed Mr Ferguson in an abusive manner. However, upon review of the evidence before me, including the CCTV footage and other witness testimony, it was clear that this was not the case. Whilst [the line manager] should not have put his hand on Mr Ferguson's shoulder, this was in no way an act of aggression. Rather, it was a gentle attempt to guide Mr Ferguson away from the scene of the incident after repeatedly refusing to go to the canteen after being instructed to do so. It was therefore evident that Mr Ferguson had been dishonest during the investigations, including my initial discussion with him, and I had to consider whether this was deliberate or just a different perception of events.

Whilst his union representative at the formal conduct case attempted to imply that the situation was not violent and that Mr Ferguson's words were being taken out of context, I noted that further along during the interview Mr Ferguson used the term 'violence' when he described the event. Mr Ferguson's description of the events were so different to those of the other witnesses that that I believed it went beyond a mere difference in interpretation of what had happened, rather it was a deliberate and callous attempt to make out that [the line manager] had acted in a manner that was far more serious than he had actually behaved."

57. Mr Stuckey acknowledged that the claimant suffered from mental health issues and that stress would be a factor in his behaviour. He also accepted the fact that the claimant may have reacted in the way he did so due to this reason and found himself unable to cope in a stressful situation of that moment in time.

However as the claimant maintained his position at the fact finding interview and the formal charge interview (disciplinary hearing), this discounted this mitigation.

58. Mr Stuckey was asked to clarify what was meant by the “initial investigation” under this charge. Mr Stuckey told the Tribunal that the initial investigation was the discussion with himself on 10 May 2021 and the fact finding meeting with Mr John on 14 May 2021.

59. In relation to the fifth charge, which was that the claimant had deliberately tried to mislead formal investigation for the sole purpose of trying to get his line manager disciplined.

60. Mr Stuckey concluded that the claimant had claimed he was physically pushed, assaulted and that the line manager had acted in a violent manner towards him. He took into account that the union representative had changed the words from push to nudge or “guided shuffle”. He acknowledged that the line manager was wrong to breach Covid 19 guidelines and make any contact with the claimant and stated that that was being investigated separately. (Ms Knight-Smith told the Tribunal the line manager subsequently received a “low level sanction”).

61. In his outcome report Mr Stuckey picked up on the claimant’s use of the word “violence” used for the first time at the disciplinary hearing. He quoted the dictionary definition of violence “behaviour involving physical force intended to hurt damage or kill someone.” He also quoted the claimant’s use of the expression “low-level assault” and defined common law assault as making any degree of physical contact with another person against their will when a person intentionally or and or recklessly applies unlawful force to another. Mr Stuckey acknowledged the fact that contact was against the claimant’s will but said there was no evidence to show there was any unlawful force and concluded that the touch was of a “guiding hand” rather than forceful push.

62. Mr Stuckey goes on to say that the claimant had reported the incident to the police “almost 7 days after it happened”. He concluded that this happened after Mr John had started the formal fact-finding investigation. Mr Stuckey raised the question as to why the claimant would need to contact the police to put it on record or wait a week to contact the police if he was seriously concerned about something happening outside of work. He concluded that the claimant informing the line manager on 10 May that he was going to report him to the police for assault in the locker room left “*serious doubt around the motive of this action*”. Mr Stuckey stated that the claimant had repeatedly accused the line manager of assault and of being violent. He reached a belief that the claimant contacted the police to try and get the line manager into trouble and used language to lead the investigation to that conclusion.

“If Mr Ferguson has stated that [the line manager] has put his hand on me and was unwarranted contact and that [the line manager] breached COVID 19 rules, then this charge would have been not upheld. However it is my reasonable belief that Mr Ferguson on every occasion throughout this process had tried to imply the contact was an assault and physical threat which in my view has been done in a dishonest manner to ensure [the line manage]r got into further trouble and as such has misled a Royal Mail formal investigation. As a result of this I uphold this charge.”

63. In reaching a conclusion that the claimant had delayed reporting the matter to the police for “almost 7 days”, this must have meant Mr Stuckey concluded the claimant had reported it on or around 14 or 15 May 2021 (given the incident occurred on 8 May 2021). Mr Stuckey was asked to explain why the claimant reporting the matter to the police could have been concluded as malicious given that at the very least the line manager had admitted breaching the law in respect of social distancing even if the assault allegation was put to one side. It was clear to the Tribunal that Mr Stuckey had not taken into account the social distancing breach at all in this context even though he acknowledged it was wrong. He told the Tribunal he concluded the claimant’s motive was malicious because he formed a belief that the claimant had only decided to go to the police once he knew he was going to be subject to a formal investigation. The claimant was told there would be a fact finding investigation in a letter from Mr John dated 12 May 2021. Mr Stuckey was asked how he had reached this conclusion and how he knew when the claimant had reported the matter to the police. Mr Stuckey told the Tribunal that the line manager had informed Mr Stuckey that he had been contacted by the police and believed this to have been “on the Friday”. When Mr Stuckey was asked how the line manager would know the exact date the claimant had contacted the police he said he didn’t know. On this basis, despite not knowing when the claimant had contacted the police, Mr Stuckey formed the view that the claimant had only contacted the police in retaliation having been advised there would be a fact finding meeting and that this was malicious. This is despite the claimant having told Mr John at the fact finding meeting on 14 May 2021 he had already contacted the police at that stage and further, that he intended to inform the police as early as 10 May 2021.

64. Mr Stuckey says he took into account the claimant’s 11 years service and clear record. Mr Stuckey expressed concern that the claimant had not factored in how the allegations would impact on the line manager / and his family’s health and well-being by reporting him to the police. Mr Stuckey concluded that as the claimant was someone who had mental health issues himself, that he should have considered this. Mr Stuckey concluded that the reporting of the matter to the police was “intent to cause harm” to the line manager and therefore an act of malice.

Appeal

65. The claimant subsequently appealed his dismissal and arrangements were made to hear the appeal on 22 July 2021. The appeal was to be heard by Ms Knight Smith, independent casework manager. The interview took place over Teams due to covid 19 restrictions. The claimant was again represented by a trade union representative. In summary the appeal raised the following issues;

- they accepted there was an incident but the decision to dismiss was too severe;
- there were procedural irregularities in particular Mr Stuckey had conducted the “seek an explanation” interview and then the disciplinary hearing.

- the claimant had experienced mental health issues and these were in part driven by a previous incident with the line manager three years earlier;
- the claimant had raised a grievance about this but no action was taken. This was raised under three separate headings. An email from the claimant to Ms Knight Smith also referred specifically to the 2018 grievance which had been ignored. It was also referenced as part of the explanation as to why he had contacted the police;
- the line manager approached the claimant and put his hand on his shoulder to steer him away from the frame and that it was not suggested the line manager been forceful but he did put his hand on the claimant and pushed him. The line manager is bigger than the claimant and the claimant found it intimidating;
- the claimant had been advised to contact the police so that there would be a record of the case of further issues and when the claimant spoke to the police he told them he did not want a prosecution just someone to speak to the line manager. The claimant was advised by the police the incident was low-level assault as there had been physical contact without consent;
- the claimant had never been provided with the line manager interview notes;
- there was nothing from the police to suggest they had concluded there was no case to answer;
- Mr Stuckey had been selective in what he had taken from the witness statements;
- the claimant is in the habit of using exaggerated hand gestures as wife is hard of hearing;
- the claimant accepted there had been an incident but the claimant had tried to remove himself only to be pursued and have his personal space invaded;
- Wales had stricter Covid 19 restrictions and these were breached by the line manager;
- The claimant denied swearing. The claimants version of events have been largely consistent but have seen as dishonest. He had never used the word violence but the line manager had placed his hands on him.

66. Ms Knight-Smith is recorded in the notes as observing that the initial incident “seemed like a storm in a teacup” but that going to the police seemed provocative. It was explained to her at the appeal hearing that the reason he had gone to the police is that nothing had been done three years earlier when he had brought a grievance against the line manager.

67. There were two statements in the bundle from a Mr Watts and a Mr Wards dated 22 July 2021. It was unclear if these were passed to Ms Knight Smith. I did not find these statements to have added anything significant as neither saw the contact between the claimant and the line manager.

68. Following the appeal hearing Ms Knight Smith approached Mr Stuckey for a copy of the line manager' statement and the CCTV footage. They had a discussion but this was not documented. She accepted under cross examination that she had had a conversation with the line manager but again this was not documented. The line manager told Ms Knight Smith he had been contacted by the police but did not tell her when he had been contacted only that it was after the fact finding interview with the claimant.

69. In a letter and enclosed report dated 23 August 2021 Ms Knight Smith upheld the decision to dismiss the claimant. She concluded that although it had been inappropriate for the line manager to have touched the claimant, it was "highly unlikely" that a prosecution was ever a realistic option. Whilst acknowledging going to the police was the claimant's prerogative, it appeared the complaint had been made following the formal fact finding meeting and it seemed reasonable to suppose the claimant's decision to make a police report was prompted by the formal investigation rather than the incident.

70. In relation to the breach of Covid 19 restrictions by the line manager, Ms Knight Smith concluded "it was not in question" that he had placed his hand on the claimant's shoulder. However she did not go on to draw any conclusions about the impact of this accepted breach of social distancing in the workplace or whether this explained why the claimant may have acted the way he did.

71. Ms Knight Smith agreed the wording of the fourth allegation was not especially helpful. It was nonetheless upheld on the basis that the claimant exacerbated the situation by involving the police and exaggerated the line manager's actions. She also found that allegation 5 could be seen as a duplicate but that the claimant's actions were an attempt to cause problems for the line manager. She concluded that the penalty was appropriate as the claimant's actions had damaged the bond of trust between him and the employer.

72. Ms Knight Smith was asked if she had viewed the claimant's grievance against the line manager prior to reaching her decision. She told the Tribunal she thought she had viewed it on a national portal. This is corroborated in her conclusions where she quoted from the grievance. Therefore Ms Knight Smith must have had sight of the complaint that the line manager had sworn at the claimant previously as this was written on the front page of the form. There is no evidence that she made any enquiry as to the outcome of this grievance.

73. Ms Knight Smith was asked to explain how she reached the view that the claimant had only gone to the police after the fact finding interview. She told the Tribunal this was based on what Mr Stuckey and the line manager had told her that it was "well after the incident" which "suggested the timings tied up".

74. Ms Knight Smith was asked whether she was aware that the 2 metre social distancing was a legal requirement in the workplace in Wales at the time. She told

the Tribunal she was aware and that Wales had more stringent rules. She was asked therefore why reporting a breach of this to the police could be malicious. She told the Tribunal it was about the timing of the report and not about social distancing.

Police report

75. The police report of the incident was in the bundle but had not been before the respondent when they reached the decision. Ms Knight Smith had asked for the crime reference number at the appeal hearing but had been unable to obtain a copy of the report at the time. For the sake of completeness, the report stated the date of occurrence and reporting was at the same time, 14 May 2021 at 20.26 however this was the time at which the PC actually spoke to the claimant following his initial call to 101 on the Monday.

The Law

76. The relevant law in relation to the unfair dismissal claim is set out in Section 98 of the Employment Rights Act 1996. In this case, the respondent relies on the potentially fair reason of conduct as the reason for dismissal.

77. In a conduct dismissal case **British Home Stores v Burchell [1980] ICR 303**, the Court of Appeal set out the criteria to be applied by Tribunals in cases of dismissal by reason of misconduct. Firstly the Tribunal should decide whether the employer had an honest and genuine belief that the employee was guilty of the dishonesty in question. Secondly the Tribunal has to consider whether the employer had reasonable grounds upon which to sustain that belief. Thirdly at the stage at which the employer formed its belief, whether it has carried out as much as an investigation of the matter as was reasonable in all of the circumstances.

78. In **J Sainsbury's v Hitt [2003] ICR 111**, the Court of Appeal held that the range of reasonable responses test applied as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it did to the reasonableness of the decision to dismiss for the conduct reason.

79. The relevant authorities in relation to reasonableness under Section 98 (4) were considered by the EAT (Browne-Wilkinson J presiding) in **Iceland Frozen Foods v Jones [1982] IRLR 439**. The test was formulated in the following terms:

- *"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by [ERA 1996 s 98(4)] is as follows.*
- *the starting point should always be the words of [s 98(4)] themselves;*
- *in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;*

- *in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;*
- *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 quite reasonably take another;*
- *the function of the Industrial 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 responses 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'.*

80. In assessing whether the Claimant's conduct amounted to gross misconduct that conduct must be deliberate wrongdoing or gross negligence. In the case of deliberate wrong doing it must amount for wilful repudiation of the express or implied term of the contract (**Sandwell and West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09**).

81. If the dismissal is procedurally unfair the Tribunal must assess the percentage chance of the Claimant being fairly dismissed (**Polkey v AE Dayton Services Ltd [1987] IRLR 503, [1987]**).

82. The Tribunal must also consider whether, under S207 (2) TULRCA 1992 there is any provision of the ACAS Code of Practice on disciplinary procedure which appears to be relevant.

83. Lastly whether the Claimant's basic and or compensatory award should be reduced under S122 (2) and S123 (6) ERA 1996. The wording of the two provisions are not identical and differing reductions can be made in principle. S122 (2) provides that where the tribunal considers any conduct of the Claimant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly. S123 (6) provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

84. In **Steen v ASP Packaging Ltd [2014] ICR 56** (Langstaff P presiding) the EAT stated that the application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy—the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Tribunal to establish and which, once established, it is for the Tribunal to evaluate; (3) the Tribunal must ask for the

purposes of ERA 1996 s 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did cause or contribute to the dismissal to any extent then the Tribunal moves on to the next question; (4) this is to what extent the award should be reduced and to what extent it is just and equitable to reduce it.

Conclusions

85. I firstly deal with whether the respondent has established a potentially fair reason for dismissal namely conduct. That was not a matter in dispute. This is a potentially fair reason and I therefore go on to consider whether the dismissal is fair or unfair under S98 (4) ERA 1996. This depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant.

86. Both of the respondent's witnesses were clear that the decision to dismiss was not taken on a cumulative or "totting up" basis. The first three allegations were not put as acts of gross misconduct rather misconduct. They were also clear that had allegations four and five not been upheld the claimant would not have been dismissed. Nonetheless I consider it is appropriate to reach conclusions on all of the allegations as this impacts on the overall reasonableness of the dismissal.

87. I deal with firstly whether Mr Stuckey and Ms Knight Smith had an honest and genuine belief that the employee was guilty of the misconduct in question. I find this to be the case. This is not a case where it has been said there were ulterior or dishonest beliefs on the part of the managers charged with the decision making. I accepted their evidence that they had genuine beliefs in what they concluded albeit Ms Knight Smith evidently had some initial misgivings (calling the incident a storm in a tea cup). I address the change of mind after speaking with Mr Stuckey and the line manager below.

88. Secondly the Tribunal has to consider whether the employer had reasonable grounds upon which to sustain that belief. It is on this basis that I consider that no reasonable employer could have reasonably sustained the belief in respect of the 4th and 5th allegations. For the sake of completeness I also set out my conclusions in respect of the first three allegations.

89. In relation to the first allegation, having viewed the CCTV footage and reviewed the statements gathered by the respondent, in my judgment it was reasonable to sustain a belief that the claimant that had acted in an aggressive and abusive manner towards his line manager. There was ample evidence from the witness statements of a heated argument between the claimant and the line manager involving shouting and the CCTV footage shows that the claimant was waving his arms around and pointing at the line manager. What I find to have been an unsustainable and unreasonable belief to have formed was that it was only the claimant who was the "aggressor" and the line manager was wholly blameless.

90. In respect of the CCTV footage considered by the respondent witnesses, even without sound, the claimant can be seen to be consistently retreating yet was pursued by the line manager. Furthermore, instead of de-escalating the situation

after the claimant had gone to the canteen, the line manager insisted he came to the office where the argument again became heated according to Mr Ewing.

91. In relation to the second allegation, the claimant accepted that he had refused to go to the canteen as instructed by the line manager. His reason provided for not doing so were not considered by the respondent's witnesses. He explained that the line manager had previously instructed him to "fuck off home" and he did not consider that to be a valid management instruction and so neither was this. I find this was a reasonable instruction from the line manager to have issued and the claimant unreasonably disobeyed the instruction. I find that 2018 incident was not on his mind at that time. The claimant did not go to the canteen as he did not want to. The respondent had a reasonable belief the claimant was guilty of this misconduct.

92. In relation to the third allegation I find that it was reasonable to have formed a belief the claimant was guilty of the misconduct in question. This was an allegation where it was one word against the other. It was reasonable to form a belief that the claimant did not use the word "stick" but used the word "prick" in light of the animosity between the two at that time. However I set out below under the "third Burchell limb" that I conclude the respondent did not conduct a reasonable investigation into this allegation.

93. In relation to the fourth allegation. This in my judgment took some unravelling to understand exactly what the claimant was alleged to have been dishonest about. This was a point repeatedly raised by the trade union at the time. The allegation was "dishonesty due to the detail provided in the initial investigation" and Mr Stuckey confirmed that this was in respect of his initial discussion on (10 May 2021) and the fact finding interview with Mr John (on 14 May 2021). Mr Stuckey confirmed the dishonesty was, in summary that the claimant had deliberately and callously been dishonest about the events on 8 May 2021 as he sought to portray the line manager as the aggressor, see my findings of fact above at paragraphs 55-56.

94. In my judgment this was not a reasonable belief that could have been formed by a reasonable employer. It was common ground that at the point at which the line manager's hand made contact with the claimant's chest / shoulder, the pair were in the middle of a heated argument. The claimant was retreating away yet the line manager pursued the claimant across the floor into his fitting area which was a small space. He had repeatedly told the claimant to go to the canteen and the claimant was not complying. The line manager then makes physical contact which Mr Stuckey concluded was not a push but to "gently guide him to the canteen". This is so implausible that in my judgment it undermines the credibility of Mr Stuckey's belief. I am not seeking to substitute my own view for Mr Stuckey's as to what actually happened. I make no finding as to whether there was a push or not. The issue is that it cannot have been a reasonable belief that the claimant was dishonest about what had happened in these circumstances. The indisputable facts were that the line manager touched the claimant in the middle of a heated argument and that was unwanted. The claimant immediately told him as such. He should not have been close enough to have touched him at all due to the social distancing regulations. The line manager did not then leave it there. He continues to pursue the claimant as the claimant walks quickly away (backwards) with his

(the line manager) hands restrained behind his back, standing over and very close to the claimant.

95. To then find that the claimant was actively dishonest in his account was not a reasonable belief that could have been formed on any level. The claimant was consistent in his account through the initial discussion with Mr Stuckey and Mr John. I did not consider it to be reasonable to rely on statements made by the union representative or the claimant's comments after viewing the CCTV at the conduct hearing that sought to "row back" the allegations as evidence of dishonesty. The allegation was that the claimant had been dishonest during the initial investigation and it was not fair to then rely on statements made at the disciplinary hearing. Further, given by this stage the claimant is actively being disciplined for alleging he had been pushed it is unsurprising albeit perhaps misguided that he and his union sought to downplay the incident.

96. I also do not consider it reasonable to rely on the claimant's use of the word violence at the disciplinary hearing (paragraphs 47, 56, 60-62). This was taken out of context and also, again, it cannot have formed part of the allegation as it was not stated until after the allegations had been put. I find that Mr Stuckey unreasonably seized on, exaggerated and focussed on the use of this word to the derogation of the other evidence before him (in particular where he concludes the claimant had repeatedly alleged the line manager had been violent).

97. I reach the same conclusion regarding the fifth allegation that there were not reasonable grounds to sustain the belief. The allegation was "deliberately trying to mislead a formal investigation for the sole purpose of trying to get the line manager disciplined". In my judgment this belief was unreasonable for three reasons. Firstly, the admissions of both Mr Stuckey and Ms Knight Smith that they did not know when the claimant had first contacted the police. They had both concluded that the timing of the report was malicious, yet admitted they did not know when the claimant had made the report. They concluded that the claimant had only made the report once he knew he was being investigated. Had they undertaken a reasonable investigation and applied their minds to the facts before them they cannot have reached such a belief. The claimant had told Mr John at the fact finding meeting on 14 May 2021 that he had already been to the police. He told his line manager of his intention to do so on 10 May 2021. At no stage at the fact finding meeting was the claimant asked when he had contacted the police and therefore I am unable to understand on what basis the witnesses could have concluded it was seven days after the incident.

98. Secondly, a reasonable investigation should have concluded far from being dishonest about such allegations, that the claimant had reasonable grounds to complain that he believed he had been pushed or assaulted by his line manager. In a situation where the line manager had admitted touching the claimant in the middle of a heated argument, the claimant in my judgment had reasonable grounds to complain about that conduct. There was no evaluation of why the claimant had gone to the police – namely that a previous grievance was not actioned and he believed the respondent were not doing anything to protect him from the line manager. There was at the very least a basis on which the claimant could have reasonably believed he had been subject to a "low level assault". Instead, both Mr Stuckey and Ms Knight Smith made findings about the legal definitions of assault

not being met with Ms Knight Smith going as far to conclude that it was “highly unlikely” that a prosecution was ever a realistic option.

99. In my judgment, the belief that the claimant only contacted the police to mislead an investigation was unreasonable and unsustainable. In essence, the respondent sought to punish the claimant and label him as dishonest for having a different version of events to his manager in the circumstances of a heated argument and unwanted touching by that manager. I found this to be a particularly troubling aspect of this case. Employees should feel they have the ability to complain about a manager’s behaviour / conduct without being subjected to retaliatory actions by their employer particularly where the employer is one the size of the respondent.

100. Thirdly, the line manager had admitted breaching Covid 19 social distancing regulations. The claimant had every right to report this aspect of the matter to the police. The respondent accepted this throughout the investigation yet never addressed it in their reasoning. It was not even evaluated when considering the claimant’s motives. The respondent’s submissions sought to underplay this aspect of the claimant’s case by asserting that this was not something raised as an issue at the time with the respondent’s witnesses. This plainly was not the case. It was consistently raised by the claimant and his union representatives throughout the procedure and at the hearing. Mr Ewing’s immediately remonstrated the line manager for this aspect of his behaviour directly after the incident (see paragraph 30). It was raised by the claimant at the fact finding investigation (see paragraphs 17 and 38), at the disciplinary hearing (see paragraph 46) and at the appeal (see paragraphs 65 and 70). Mr Stuckey even addresses it in his findings (see paragraph 60) where he acknowledges the line manager was wrong to breach the restrictions. I therefore am unable to accept the submission that it was not raised at the time.

101. I lastly consider the third element of the Burchell test, whether at the stage at which the employer formed its beliefs, whether it has carried out as much as an investigation of the matter as was reasonable in all of the circumstances.

102. There was certainly an investigation, a disciplinary hearing and an appeal. The claimant was accompanied throughout by his union representative and notes were taken with the claimant having an opportunity to comment on the notes. However, I balanced these factors with my findings in respect of the shortcomings to the investigation.

103. The respondent only sought witness statements from the people suggested by the line manager. Two of the statements were anonymous and there was no evidence as to why this was necessary, as such the claimant did not have the opportunity to challenge them. They contained allegations of previous misconduct by the claimant (swearing and shouting at the line manager previously) that was relied upon by Mr Stuckey yet there was no previous disciplinary record to verify this. This is in stark contrast with proven disciplinary charges against the line manager that were ignored. The statements were not subject to any degree of scrutiny by the investigating officer where they contained inconsistencies. For example, Mr Newton stated that he could not hear what was being said but went onto to allege the claimant had sworn at the line manager. He also stated line

manager had “shepherded” the claimant but not touched him and this was not explored. All of the witness statements were inaccurate in that they disputed the line manager had touched the claimant whereas the line manager admitted he had done so. Mr Griffiths said he had told both the claimant and the line manager to “wrap it in”, which could have suggested that they were both behaving inappropriately. No consideration was given to the fact that a member of staff and a union representative had to be called to clam the situation down.

104. There was no investigation report summarising the findings of the investigation assessing all of the circumstances. It was unclear who had drafted the disciplinary allegations and allegation four was not explained properly. Mr Stuckey relied upon information he gathered from the first initial meeting but failed to record these and later acted in the capacity of hearing the disciplinary and making the decision. The ACAS Code of Practice specifies that ideally the investigation and the disciplinary should be conducted by different managers and this did not happen in this case. There were no notes of the discussions between the line manager, Mr Stuckey and Ms Knight Smith meaning the claimant did not have the opportunity to challenge them or raise points of dispute. This was particularly important as the respondent witnesses relied on what the line manager said about the timing of the police contact. Both Mr Stuckey and Ms Knight Smith failed to properly investigate the previous incident between the claimant and the line manager where the line manager had sworn at the claimant. There was a failure to assess and consider the admitted breach of social distancing regulations by the line manager when looking at the claimant’s motives for alleged dishonesty and trying to get the line manager disciplined.

105. Both Mr Stuckey and Ms Knight Smith wholly failed to consider or take into account the fact that it was the line manager who had previously been found to have sworn at the claimant when assessing whether they had a reasonable belief that the claimant had called the line manager a “prick” on 10 May 2021. This was highly relevant to the issue of assessing credibility yet it was ignored. The respondent submitted that this had not been raised to either of the respondent’s witnesses as evidenced by the meeting notes. This is not correct. The claimant raised it at the investigation hearing with Mr John (see paragraph 39). Mr Stuckey was actually the investigating officer for that incident so must have been aware of it. Further, he raised it on appeal (see paragraphs 65, 66 and 72).

106. For these reasons I find that the respondent did not conduct a reasonable investigation.

107. Having determined that the respondent has not acted reasonably in accordance with S98 (4) ERA 1996 I find the dismissal was unfair. I have not embarked on an evaluation of whether the dismissal was within the range of reasonable responses as the respondent’s witnesses conceded that the claimant would not have been dismissed but for allegations 4 and 5.

108. I now deal with whether, having found the dismissal procedurally unfair the percentage chance of the claimant being fairly dismissed (Polkey) and the issue of contributory fault.

Polkey

109. In my judgment, if the respondent had followed a fair procedure then there would be no chance the claimant would have been fairly dismissed. I base this in the main on the concession by the respondent's witnesses that the claimant would not have been dismissed had he just faced the first three misconduct allegations. Even if we put aside the procedural defects outlined at paragraphs 102 to 105, the conclusion that no reasonable employer could have formed the belief the claimant was guilty of the gross misconduct charges remains. Without allegations 4 and 5, the respondent accepted that allegations 1 – 3 did not amount to gross misconduct and as such could not have led to summary dismissal on their own.

Contributory fault

110. I consider that the issue of contributory fault needs to be decided at the remedy hearing as neither party has properly addressed this in submissions and as such I do not consider it appropriate to make a reserved judgment without hearing further from the parties.

Employment Judge S Moore

Date 16 May 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 19 May 2022

FOR THE TRIBUNAL OFFICE Mr N Roche

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