



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Jones

**Respondent:** Govia Thameslink Railway Ltd

**Heard at:** London South, by video

**On:** 11<sup>th</sup> & 12<sup>th</sup> April 2022

**Before:** Employment Judge Reed

## **Representation**

Claimant: Abigail Lenart, Counsel

Respondent: David Gray-Jones, Counsel

# RESERVED JUDGMENT

1. The Claimant's claim of unfair dismissal is not well founded and is dismissed. The dismissal of the Claimant by the Respondent was fair.
2. The Claimant's claim of breach of contract (wrongful dismissal) is not well founded and is dismissed. The Respondent was entitled to dismiss the Claimant without notice.

# REASONS

## **Claims and issues**

1. The Claimant has brought claims for unfair dismissal and breach of contract (wrongful dismissal).
2. There was no dispute between the parties that the Claimant was qualified to bring a claim for unfair dismissal, being an employee with sufficient qualifying service. It was agreed that he was dismissed on 18<sup>th</sup> September 2020.
3. The reason for dismissal was disputed. The Respondent argued that the Claimant had been dismissed because of his conduct, specifically bullying of a vulnerable member of staff. The Claimant argued that he had been dismissed

because of previous disciplinary proceedings arising out of sick leave that he had taken.

4. If I concluded that the Claimant was dismissed for the potentially fair reason of conduct, it was agreed that I should approach the question of the fairness of the dismissal by reference to the Burchill test (arising from the case of *British Home Stores v Burchell* [1980] ICR 303). That requires that I consider:
  - a. Did the Respondent have an honest belief in the allegations?
  - b. Did the Respondent have reasonable grounds to support that belief?
  - c. Did the Respondent carry out a reasonable investigation into the allegations?
  - d. Given all the circumstances, were the allegations sufficiently serious that dismissal fell within the range of reasonable responses open to a reasonable employer?
5. In addition, it was agreed that I should consider whether the procedure used by the Respondent to dismiss was fair.
6. In relation to the wrongful dismissal, the sole issue between the parties was whether the Respondent was entitled to dismiss summarily. This turns on whether the Claimant had committed an act of gross misconduct.
7. It was agreed at the start of the hearing that I should address issues of liability in both claims, together with assessment of any reduction to the award arising from the possibility that the Claimant would have been dismissed had the Respondent carried out a fair process and any reduction arising from contributory fault on the part of the Claimant. Any further determination of matters relating to remedy would then follow.

### **Procedure, documents and evidence**

8. I heard evidence from the Claimant and the following witnesses from the Respondent: Kevin Ripley, John McCuaig and Scott Last.
9. There was an agreed bundle of documents of 104 pages. References to page numbers, unless otherwise indicated, are references to this bundle.

### **Findings of fact**

10. On the basis of the above evidence, I make the following findings of fact. These are made on the balance of probabilities, that is that they are more likely to be the case than not. I have not sought to resolve every factual dispute between the parties, only those that are relevant to the determination of these claims.
11. The Respondent is a train operating company which runs a number of rail services. The Claimant had worked for them since 9<sup>th</sup> May 2005. At that time of dismissal he was working as an Assistant Service Engineer at the Brighton Engineering Depot.

*Prior disciplinary action against the Claimant*

12. It is accepted between the parties that the Claimant had been disciplined on a previous occasion in 2017 for taking excessive sick leave and emergency annual leave. These events are relevant to this claim in that the Claimant says that his dismissal was motivated by these events, rather than by the more recent allegations of misconduct.

*Reporting of colleague*

13. It is accepted between the parties that, a few months prior to the events of this claim the Claimant had reported an incident of inadequate work and that this had ultimately led to a colleague being dismissed. The Claimant describes this as causing 'a bit of a rift' between him and other members of staff.

**Background to allegations of bullying**

14. In April 2018 Sam Rumaner was seconded to the Respondent's engineering team. The Claimant was assigned as his mentor. This had the dual purpose that the Claimant would support Mr Rumaner in his training and adjustment to engineering work, while the Claimant would have the opportunity to develop his leadership skills, assisting him in his desire to progress in seniority.
15. In May 2018 Mr Rumaner successfully completed his secondment and became a full time engineer. He continued to work within the same team as the Claimant.
16. The Claimant was promoted in January 2019. In part this was because of his work in mentoring Mr Rumaner.
17. In order to put later events in context, it is necessary to say a little about Mr Rumaner. Both the Claimant and the witnesses for the Respondent agreed that he was, to some degree, a vulnerable individual. It is sufficient, for the purposes of these proceedings, to say that he had been faced with some difficult events within his personal / family life. As a result he sometimes lacked confidence and found it difficult to deal with confrontation.
18. Although the Claimant would not have known about this background at the start of his association with Mr Rumaner, he accepted that he was aware from July 2020 when they had been on a track call together. Mr Rumaner had then discussed his family background with the Claimant. In any event, he had known Mr Rumaner as a colleague for some time and been involved in his training as his mentor. The Claimant would therefore have a good sense of Mr Rumaner's personality.

**Complaint of bullying**

19. On the 12<sup>th</sup> August 2020 Mr Rumaner had a one-to-one meeting with Kevin Ripley (Production Manager at the Brighton Engineering Depot). At that meeting Mr Rumaner said that he was being mistreated by the Claimant. Mr

Ripley suggested the possibility of an informal discussion with the Claimant or mediation. Mr Rumaner was reluctant to pursue either of these options. He said that he felt that an informal chat would not result in change. He said that he did not feel he would be able to talk to the Claimant in a mediation and that even the idea of doing so made him feel distressed. Mr Ripley's evidence, which I accept, is that Mr Rumaner was visibly upset during this meeting and that he said he felt like quitting because of the situation.

20. Since he was going to go on annual leave the following day Mr Ripley told Mr Rumaner that he should consider what he wanted to do and inform Mr Hoffman, the Deputy Depot Manager the next day.
21. On the 13<sup>th</sup> August 2020 Mr Rumaner made a written complaint of bullying against the Claimant to Mr Hoffman (page 42). He wrote that, on more than one occasion, he had felt belittled, to the point where he had wanted to give up.
22. In the written complaint, Mr Rumaner refers to the complaint following from his one to one with Mr Ripley and refers to 'Reports from other members of staff concerning bullying having been raised. Although it is somewhat ambiguous, the most obvious reading of the written complaint is that Mr Ripley had brought up the possibility of bullying with Mr Rumaner because he had received reports from other employees.
23. In his evidence, Mr Ripley denied this. He said he had received no other allegations and that the issue of bullying had been raised by Mr Rumaner. I accept this evidence. The only witness with direct knowledge of these events was Mr Ripley. In my view it is implausible that he would fabricate his account of this meeting, because he would have no motive to do so. There would obviously be nothing wrong with asking an employee about possible bullying if that was reported by their colleagues. I also bore in mind that Mr Rumaner's letter of complaint was not a professionally drafted document or written with the expectation that it would bear rigorous analysis within the context of legal proceedings.

## **Investigation**

24. On 17<sup>th</sup> August 2020 Mr Ripley was assigned to investigate the allegations.

### *Interview with Mr Rumaner*

25. Mr Ripley interviewed Mr Rumaner on 24<sup>th</sup> August 2020. Mr Rumaner repeated his allegations of bullying and provided further information. He gave an example of working with the Claimant during a cab examination. Mr Rumaner had asked the Claimant to release the doors and the Claimant had told him to 'fuck off'.
26. Mr Rumaner also said that, after his promotion, the Claimant had stopped assisting him at work and respondent to queries by saying 'I don't do Cat 3 work anymore'. He described the Claimant as unpredictable, sometimes being okay to work with, but other times unpleasant. He described the Claimant's general

approach as a refusal to help him, while finding fault with his work and swearing at him.

27. Mr Rumaner said that he had not tried to speak to the Claimant, because he tended to avoid conflict and was worried about being further belittled.

*Interviews with other engineers*

28. Mr Ripley also interviewed John Cosstick, an Assistant Service Engineer who worked with the Claimant and Mr Rumaner. Mr Cosstick said that the Claimant had belittled Mr Rumaner since he had been promoted. This took the form of looking for Mr Rumaner's mistakes and bringing them to general attention. He said that, in his opinion, the Claimant did this to 'look big' and that he showed off at Mr Rumaner's expense. He said that, in general, the Claimant would try to lord it over new staff, but would stop if they stood up to him. He said that Mr Rumaner was too nice and too insecure to fight back, so he continued to be persecuted by the Claimant. He said that the Claimant had tried similar behaviour with him, but had stopped when Mr Cosstick resisted.
29. Mr Ripley also asked Mr Cosstick about the specific allegation of swearing at Mr Rumaner during the cab examination. He said that he had not overheard the Claimant's words, but had seen that the incident had an impact on Mr Rumaner. Mr Cosstick also expressed his view that there was no reason not to release the doors as Mr Rumaner had requested. He said that, in his view, if he had made the same request the Claimant complied without fuss.
30. Mr Ripley also interviewed Andrew Smallbridge, another Assistant Service Engineer. He told Mr Ripley that, in his view, the Claimant had good days and bad days, but that Mr Rumaner tended to take things too seriously. He described the Claimant's behaviour towards Mr Rumaner as 'more than boisterous'.
31. In reference to the specific allegation of swearing at Mr Rumaner during the cab examination Mr Smallbridge confirmed that the Claimant had said 'fuck off' in response to Mr Rumaner's request, but said that, in his view, it was a general expression of annoyance, rather than directed specifically at Mr Rumaner.
32. Mr Smallbridge did not recall observing any overt bullying towards Mr Rumaner by the Claimant. He said that the Claimant did pick up on errors Mr Rumaner made, but addressed them directly with him, not with the group.
33. Mr Smallbridge also said that he, along with the other engineers in the team were aware that Mr Rumaner had personal issues that led to low confidence. He said that while he and others on the team were empathetic about this the Claimant was not.
34. Mr Ripley also interviewed Rory Dewey, Service Engineer. Mr Dewey described the Claimant as acting superior to others and assuming that he was in charge in every situation. He described this behaviour as having grown worse since the Claimant was promoted.

35. Mr Dewey described the Claimant as seeking dominance over everyone, but backing off if they confronted that behaviour. He said that Mr Rumaner was not able to defend himself, so the Claimant's behaviour continued.
36. Mr Dewey said that the Claimant did not draw attention to Mr Rumaner's errors to any greater extent than anyone else's.

*Interview with the Claimant*

37. Mr Ripley met with the Claimant on 25<sup>th</sup> August 2020. He explained that there had been an allegation of bullying a colleague and that Mr Ripley had been assigned to investigate this. He said that, while the investigation continued the Claimant would be suspended. A letter confirming this was sent on the same day (page 44).
38. On the 25<sup>th</sup> August 2020 Mr Ripley wrote to the Claimant inviting him to an investigatory interview (page 44).
39. The investigatory interview took place between Mr Ripley and the Claimant on the 3<sup>rd</sup> September 2020. The Claimant was accompanied by Kevin Poole. A note of that meeting has been produced (page 73-75). The Claimant agrees that it is a broadly accurate record of the meeting and I accept it as such.
40. The Claimant expressed surprise at the allegations and said that he felt he had a good relationship with Mr Rumaner. He said that Mr Rumaner tended to go overboard on his work and need approval, which caused unnecessary delays. He said that Mr Rumaner tended to question and create work where he didn't need to. The Claimant said that this might have caused him to be short with Mr Rumaner.
41. In relation to the more specific allegations, the Claimant said that he did not recall swearing at Mr Rumaner during a cab inspection. In relation to suggestions that he had refused to assist Mr Rumaner the Claimant said that he didn't have the same time to mentor Mr Rumaner that he had had before his promotion. He said that he might have been 'off' with Mr Rumaner while he was still understanding his new job.
42. The Claimant agreed, that on occasion, he 'does a Jonesy', which meant becoming short, volatile, arrogant, and critical. Most of his colleagues would then tell him to behave or get lost. But, he said, Mr Rumaner would not do this and so he had been unaware he was causing distress.

*Investigation outcome*

43. Following his investigation, Mr Ripley concluded that the complaint of bullying by Mr Rumaner was valid. He concluded that the Claimant had been dismissive of and belittled Mr Rumaner.
44. Mr Ripley recommended that the matter proceed to a disciplinary hearing.

45. Written confirmation of this was sent to the Claimant on the 8<sup>th</sup> September 2020, page 87. It invited the Claimant to a disciplinary hearing on 18<sup>th</sup> September 2020. It also included an Investigation Pack, assembled by Mr Ripley, which included written summaries of the interviews he had conducted.
46. The Claimant has sought to persuade me that the outcome of this investigatory process was pre-determined. I do not accept this. Essentially, the evidence relied upon by the Claimant to support this position is the manner in which the investigatory meetings were conducted and, in particular, criticism of Mr Ripley's questioning. It is suggested that the allegations against the Claimant were presented to him as though they were facts and that this indicated a pre-conceived view. Similarly, it was suggested that Mr Rigby had led the other witnesses in their accounts.
47. I do not accept that this is an accurate characterisation of the investigation meeting or that such an inference should be drawn. It is clear, both from the notes of the meeting and from the evidence of the Claimant and Mr Ripley that Mr Ripley presented the allegations to the Claimant and invited him to respond. That is a normal and proper approach to an investigatory meeting. It was important for Mr Ripley to inform the Claimant of the allegations against him and hear what he had to say about them. Doing so does not imply that, at that stage, he accepted the allegations or that he had any pre-conceived view of the matter. Similarly, it was appropriate to put the allegations that had been made to other witnesses who might have something relevant to say about them. Reading the statements as a whole, they do not suggest that Mr Ripley was leading the accounts to a predetermined conclusion. They differ in significant respects and include significant elements in support of the Claimant.

#### *Disciplinary hearing*

48. The disciplinary hearing was conducted by Mr McCuaig. It was attended by Mr McCuaig, the Claimant, Mr Ian Dainty who acted as the Claimant's representative and Mr Ken MacKriell who took notes.
49. The notes of the meeting have been produced (page 88-93). The Claimant did not challenge them and I accept them as a broadly accurate account of the meeting.
50. At the meeting the Claimant denied the allegations. He said that his promotion had meant that he had a greater workload, but denied that he had refused to assist Mr Rumaner. He said that when he had described 'Cat 3' jobs as below his grade he had been joking. In reference to the allegation of swearing at Mr Rumaner he said that he did not remember the incident, but that swearing was commonplace and he would not have meant it maliciously.
51. The Claimant agreed that some of his behaviour could be interpreted as suggesting he thought of himself as the boss and was seeking to take control of the work. He said, however, that he was motivated by trying to get the work done efficiently, not by self-aggrandisement.
52. On the Claimant's behalf Mr Dainty said that sometimes teams need someone to push them on and that this was what the Claimant did. He said that different

people responded in different ways, but they were motivated to get the job done. He also said that the Claimant recognised that he could go too far, but was apologetic and willing to apologise to Mr Rumaner.

53. After a break of approximately 15 minutes Mr McCuaig indicated that he accepted the allegation of bullying was true and, on that basis, would dismiss the Claimant.
54. A letter confirming the dismissal was sent to the Claimant on 21<sup>st</sup> September 2020 (page 94-95).
55. The Claimant has sought to persuade me that, during this process, Mr McCuaig was not, as he suggested motivated by the allegations of bullying. Rather the Claimant says that he was motivated by the Claimant's previous disciplinary proceedings or the report he had made about a colleague.
56. I reject the Claimant's argument on this point and accept Mr McCuaig's evidence that his concern was with the allegations of bullying. The allegations of bullying and the evidence considered by Mr McCuaig during the disciplinary meeting are a credible explanation for his actions. The Claimant's argument, that he was instead motivated by disciplinary matters that occurred years prior or by him reporting another employee is, in my view, implausible. Similarly, the Claimant's suggestion that he was dismissed for reporting another colleague is, in my view, implausible. No explanation has been provided as to why the Respondent might dismiss the colleague but retain a grudge against the Claimant leading to his dismissal.

### *Appeal*

57. The Claimant did appeal on 22<sup>nd</sup> September 2020 (page 96). In his appeal he said that there had been a misinterpretation of the facts and the punishment of dismissal was too severe.
58. The Respondent wrote to the Claimant on the 6<sup>th</sup> November 2020 inviting him to an appeal hearing on the 11<sup>th</sup> November.
59. The appeal hearing was chaired by Mr Scott Last, the Depot Manager at Hornsey Depot. This is a separate depot. Mr Last had no involvement with the disciplinary procedure before dealing with the appeal and did not know the Claimant. The Claimant attended the appeal alone and notes were taken by Ailsha Banton, an administrator. The notes have been produced and their accuracy is not disputed by the Claimant. I accept them as a broadly accurate account of the meeting (page 98-100).
60. At the beginning of the appeal hearing the Claimant said that he had asked a colleague to attend with him, but they had refused because of possible damage to his job.
61. In his witness statement the Claimant elaborates on this. He said that he had asked a colleague to accompany him. That colleague, however, had said that it looked like people had it in for the Claimant and that he had been told that his job was on the line if he acted as his representative. The Claimant's evidence



was that this conversation had occurred by text message. No messages, however, had been disclosed as evidence in these proceedings.

62. I do not accept this account. As detailed above, I have concluded that there was no hidden motive in the Respondent's actions during the investigation or the disciplinary proceeding. The outcome had not been predetermined. While I accept that, on occasion, employers act vindictively towards individuals who represent their colleagues in disciplinary proceedings, I do not consider it plausible in this case. The Respondent is a large organisation where a certain number of disciplinary investigations and proceedings are a fact of life. No plausible motive is suggested as to any manager involved would be so personally emotionally engaged as to wish to punish anyone associating themselves with the Claimant.
63. Mr Last asked the Claimant to explain his arguments on appeal. He replied that there had not been sufficient investigation into the suggestion raised by witnesses during the investigation that he had bullied people in the past. He described this as being based on Mr Dewy and Mr Cosstick's opinion rather than evidence. He did not, however, suggest any specific further step that the Respondent should take to investigate. Rather his criticism was that Mr McCuaig had relied on Mr Dewy and Mr Cosstick's evidence when it was unreasonable to do so. He also pointed to his long service with the Respondent and expressed unhappiness that the situation had been dealt with formally, rather than an informal process. He suggested that, had matters been dealt with informally, it would not have resulted in dismissal.
64. Mr Last then adjourned the hearing to consider what the Claimant had said and to review the documents. When the meeting reconvened there was discussion of the witness statements and the Claimant's position. He said that his behaviour had been taken the wrong way and that he was trying to be productive to get work done.
65. The meeting was then adjourned again. When it reconvened Mr Last said that he had reviewed the evidence and concluded that it was clear that the Claimant had bullied Mr Rumaner. He said that he was therefore upholding the decision to dismiss.
66. Written confirmation of Mr Last's decision was sent to the Claimant on 13<sup>th</sup> November 2020.

*Findings of fact relevant to wrongful dismissal*

67. For the purposes of unfair dismissal, I must focus on the actions and beliefs of the Respondent, rather than the underlying events, in order to avoid substituting my own view. This is not the case in relation to wrongful dismissal. There I must consider whether or not the Claimant did, in fact, commit an act of gross misconduct. The belief of the employer is irrelevant in this context.
68. I therefore reach the following findings of fact for the purposes of determining the wrongful dismissal claim.

69. I accept that the Claimant acted inappropriately in relation to Mr Rumaner. I find that he did swear at him during the cab inspection incident. More generally, I find that, although he could often be a supportive colleague, there were occasions on which he was demanding, sarcastic and belittled Mr Rumaner for perceived failings in his work. This was a consistent pattern of behaviour and caused Mr Rumaner a great deal of distress. It amounted to serious bullying of a vulnerable colleague.
70. This conclusion is based on two categories of evidence. First, the material gathered by the Respondent from Mr Rumaner and other employees during the investigation. I have born in mind that I have not heard live evidence from these witnesses. They have therefore not given evidence on oath or been subjected to cross-examination. I therefore give their evidence less weight. Nonetheless, there is significant body of broadly consistent evidence that records the Claimant acting inappropriately towards Mr Rumaner and other employees.
71. Although the Claimant has suggested that the evidence of his colleagues was influenced by his reporting another employee's sub-standard work, I do not find this plausible. The Claimant has not produced supporting evidence of how attitudes towards him changed. The argument amounts, essentially, to the assertion that he made such a report, that it led to a colleague's dismissal, and an invitation to draw an inference that the evidence given by his colleagues was influenced by that.
72. Further, the statements made to Mr Ripley do not have the appearance of either prejudice against the Claimant or any form of conspiracy against him. A number of the witnesses include elements in support of the Claimant. For example, Mr Rumaner states that he believes the Claimant was unaware of his behaviour. Similarly Mr Smallridge suggests that Mr Rumaner could take matters too seriously and that he thought the Claimant's swearing was a general expression of annoyance rather than being directed at anyone. Mr Dewey suggests that that the Claimant did not intend to be malicious. Both Mr Smallridge and Mr Dewey said that the Claimant raised issues directly with Mr Rumaner rather than publicly as others had suggested.
73. The Claimant also accepted in his evidence that his behaviour towards Mr Rumaner was inappropriate. He accepted that he had breached the Respondent's anti-harassment policy and that his attitude to colleagues could be seen as hostile. The Claimant did not concede that he had bullied Mr Rumaner, but in my view his account goes a long way to confirm the accounts given by Mr Rumaner and others during the Respondent's investigatory process.
74. I accept that, at the time, the Claimant did not recognise the full impact of his actions. I accept his evidence that he was surprised that Mr Rumaner was sufficiently distressed to raise a complaint or that his behaviour was regarded as bullying.
75. Nonetheless, I find that the Claimant was aware that he was sometimes acting poorly. In his evidence he accepted that his attitude towards colleagues was sometimes perceived as hostile or difficult.

## The law

### *Unfair dismissal*

76. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. This lays down a two stage test. First, under section 98(1) the employer is required to show that the reason (or principal reason) for the dismissal is a potentially fair one, i.e. in this case either misconduct or capability. The reasons for dismissal in this context is the factor or factors operating on the mind of the decision-maker which caused them to decide to dismiss.
77. If the dismissal was for a potentially fair reason I must consider whether, in all the circumstances, the employer acted reasonably in treating it as a sufficient reason for dismissing the employee (see section 98(4) ERA 1996).
78. As noted, above, the parties agreed that, in the circumstances of this case, it was appropriate to apply what is commonly referred to as the Burchell test (which arises from the case of *BHS Ltd v Burchell* [1980] ICR 303, although it has been further developed by subsequent case-law). This requires me to consider:
- e. Did the Respondent have an honest belief in the allegations?
  - f. Did the Respondent have reasonable grounds to support that belief?
  - g. Did the Respondent carry out a reasonable investigation into the allegations?
  - h. Given all the circumstances, were the allegations sufficiently serious that dismissal fell within the range of reasonable responses open to a reasonable employer?
79. In considering the Burchell test I have also borne in mind the guidance given in *Iceland Frozen Food v Jones* [1983] ICR 17 by the Employment Appeal Tribunal, in particular that I must guard against substituting my own views in relation to an employee's actions or the appropriate response by an employer, and focus on considering whether, in the particular circumstances of each case, whether the decision to dismiss the employee fell within the band of reasonable response which a reasonable employer might have adopted.
80. I must also, however, remember that the range of reasonable responses is not infinitely wide and that a finding that dismissal fell outside the range should not inevitably suggest that a Tribunal has substituted its own view for that of the employer, see *Newbound v Thames Water Utilities Ltd* [2015] IRLR 734.

### *Breach of contract / Wrongful dismissal*

81. An Employment Tribunal has jurisdiction to consider a common law breach of contract claim pursuant to the Employment Tribunals Act 1996 and the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.
82. In the context of this claim, the breach of contract claimed is that the Claimant was not provided with the contractual notice that he was entitled to. It was

agreed between the parties that the Claimant had been dismissed summarily and this would only be lawful if he had committed gross misconduct.

83. Gross misconduct, in this context is 'conduct which so undermines the relationship of trust and confidence that the employer should no longer be required to retain the employee in his employment, see *Neary v Dean of Westminster* [1999] IRLR 288. Such behaviour must be a deliberate breach of the employee's duty, *West London Mental Health NHS Trust v Chhabra* [2014] IRLR 227.

### **Submissions**

84. Both parties were ably represented and made full submissions. I will not seek to set these out in full, but address the points made in my conclusions below.

### **Conclusions**

*What was the reason for dismissal? Was it potentially fair?*

85. I accept Mr McCuaig's evidence in relation to his reasons for dismissing the claimant. I find that he dismissed the Claimant for misconduct, specifically his bullying of Mr Rumaner.

86. It follows that I accept that the Claimant was dismissed for a potentially fair reason.

*Did the Respondent have an honest belief in the allegations?*

87. On the basis of the same evidence and for the same reasons I accept that the Respondent honestly believed that the Claimant had committed the alleged misconduct.

*Did the Respondent have reasonable grounds to support that belief?*

88. There was sufficient evidence to give the Respondent reasonable grounds to support their belief that the Claimant had committed the alleged misconduct.

89. The evidence gathered from Mr Rumaner and the other witnesses during the investigatory process was, in and of itself, sufficient to give a reasonable employer grounds to believe that bullying had occurred. There were specific allegations from Mr Rumaner who had no apparent motive to deceive the Respondent or to harm the Claimant. These were largely supported by the other witnesses.

90. Further, the Respondent was entitled to view the Claimant's evidence during both the investigation and the disciplinary hearing as, to a significant extent, confirming the allegations. Although he denied deliberate bullying, he accepted that he could, on occasion, be difficult and critical.

91. A different employer might well have reached different conclusions. They might have accepted that Claimant's account that he acted without malice and, although on occasion difficult to work with, he was not a deliberate bully. But the fact that another conclusion was possible does not mean that the Respondent lacked reasonable grounds.

*Did the Respondent carry out a reasonable investigation into the allegations?*

92. I conclude that the Respondent did carry out a reasonable investigation into the allegations against the Claimant. They interviewed Mr Rumaner, who was the principal accuser and other employees who were likely to have relevant evidence to contribute.

93. The Claimant did not, either in these proceedings or during the disciplinary process, suggest any other witness that should be interviewed or other evidence that should have been considered.

94. The Claimant has argued that the investigation was unfair because the Respondent had a pre-conceived view at the investigatory stage. As set out above, I have found that it did not.

*Given all the circumstances, were the allegations sufficiently serious that dismissal fell within the range of reasonable responses open to a reasonable employer?*

95. I find that the allegations were sufficiently serious that dismissal was within the range of reasonable responses open to a reasonable employer.

96. The Claimant was accused of deliberately bullying and belittling a vulnerable colleague, including swearing at him in response to a reasonable request and a prolonged period of negative conduct towards him. I appreciate that the Claimant denies these allegations, but in considering the severity of the sanction for the purposes of unfair dismissal, I must consider the allegations that were accepted by the Respondent.

97. I accept the Respondent's submission that it would be inappropriate to focus only on individual incidents. Instead I must consider the totality of the allegations that the Respondent had in mind at the point of dismissal. This means that I am not considering whether, for example, the incident of the Claimant swearing at Mr Rumaner during a cab inspection is alone sufficient to justify dismissal. Rather I must assess whether the much wider allegations of bullying and inappropriate behaviour were sufficient to do so.

98. I accept that behaviour must be judged by the prevailing standards in a workplace. Different workplaces have different cultures and the same behaviour may mean very different things in different places. I accept that, at the Respondent, swearing was not uncommon and relations between employees often included joking mockery. There is a difference, however, between swearing in general and swearing at someone in a hostile manner. And there is a difference between joking mockery with someone who is happy to participate and bullying a vulnerable colleague who is uncomfortable with

what is being said. It is important to recognise that the Respondent had concluded that it was the latter of these things that was occurring, not the former.

99. In my view it is not appropriate to seek to decide this question by considering whether Mr Rumaner believed that the Claimant's behaviour was deliberate or whether he would have wished the Claimant to be dismissed. What matters, for these purposes, is the misconduct as believed in by the Respondent. An employer is entitled (provided the requirements of reasonable grounds and a reasonable investigation are satisfied) to conclude that behaviour that is initially described as inadvertent or accidental is, in fact, deliberate. If that is the case the seriousness of the behaviour must be judged by what is in the mind of the employer, not what is in mind of the individual who makes the initial report.
100. I am satisfied that the Respondent's anti-harassment policy makes clear that such behaviour was unacceptable. Although, at the bottom of page 77, it refers to harassment as related only to behaviour connected to the Equality Act 2010 protected characteristics, elsewhere a much wider definition is employed. For example, on page 78 it describes harassment as 'any unwanted conduct affecting the dignity of employees' and explains that an essential characteristic of harassment is that it is action, behaviour or comment that is unwanted by the recipient. Examples of harassment are given and include 'ridiculing or demeaning them', 'Overbearing supervision' and 'Deliberately undermining a competent worker by overloading and constant criticism'.
101. The policy goes on to describe bullying as 'any behaviour that leaves an individual feeling threatened, intimidated, humiliated, vulnerable or otherwise upset' (page 78).
102. The code is clear that bullying or harassment is unacceptable; that it will generally be considered gross misconduct and lead to summary dismissal.
103. In any event, even if the anti-harassment policy had been less clear, I would have found that it was self-evident that the sort of behaviour the Claimant was accused of was serious misconduct that might lead to dismissal. An employer does not need to explain through an official policy that serious bullying of colleagues is unacceptable, because that is (or should be) obvious to any employee.
104. The Claimant has argued that relevant factors, in particular his length of service and the lack of previous allegations of this nature were not taken into account. I disagree. I accept Mr McCuaig's evidence that he considered the Claimant's length of service, but concluded that it was not sufficient mitigation given the seriousness of the allegations. Mr Last accepted in his evidence that he did not consider the Claimant's length of service. In the context of the decision as a whole, however, I do not find that this made the dismissal unfair.

*Was the procedure used by the Respondent to dismiss the Claimant fair?*

105. The Claimant argues that, in not dealing with the matter informally or using a mediation process, the Respondent has acted unfairly. I do not agree. The Respondent acted reasonably in discussing the possibility of informal

discussions or mediation with Mr Rumaner, but not pursuing it further given both the seriousness of the allegations and Mr Rumaner's resistance to those possibilities. Ultimately, the decision as to how to deal with an allegation of bullying is a matter for the employer, provided their decision remains within the range of reasonable responses. The fact that another employer might have gone further down the informal route or attempted mediation does not mean that the Respondent acted unfairly by taking a different approach.

106. Similarly, the Claimant argues that Mr Rumaner did not intend or expect that his complaint would lead to the Claimant's dismissal. It was therefore unfair of the Respondent not to consider this factor as part of their decision to dismiss. I do not accept this. The argument is based on the Claimant's evidence of a conversation that he had with Mr Rumaner outside the depot, but it is not suggested that this information was communicated to anyone at the Respondent at any relevant time. In the circumstances, fairness did not require the Respondent to consult with Mr Rumaner about the progress of the disciplinary process. They were entitled to proceed on the basis that he had made a serious complaint and to deal with it as such.

107. The Claimant has argued that the fact that one of his colleagues did not represent him at the appeal hearing means that the dismissal was unfair. As detailed above, I did not accept this evidence and so do not agree that there was any unfairness in that respect.

108. The Claimant also argues that fairness required Mr Rumaner to be interviewed by Mr McCuaig or Mr Last, rather than them relying on the account given during the investigation. I do not accept this. Mr Rumaner had given his account to Mr Ripley as part of the investigatory process. It was acceptable for Mr McCuaig and Mr Last to rely on that.

109. Stepping back from these points of detail to look at the procedure overall, I find that the process used by the Respondent was a fair one. The Claimant was invited to an investigatory meeting, a disciplinary hearing and given the opportunity to appeal. At each stage he was informed of the allegations against him and the material that the decision maker would be considering. He had an opportunity to respond to the allegations and to be heard.

### *Wrongful dismissal*

110. The Claimant was dismissed without notice, which was only lawful if he had committed gross misconduct, since that would entitle the Respondent to dismiss summarily. I have concluded that the Claimant's behaviour did amount to gross misconduct. The Respondent was therefore entitled to dismiss him summarily.

111. As set out above I have found that the Claimant did behave inappropriately towards Mr Rumaner in a way that amounted to bullying. Mr Rumaner was a vulnerable individual and this made the Claimant's conduct more serious

112. Although I have found that, to a significant degree, the Claimant did not appreciate the impact that his behaviour was having, he was able to recognise

that it was inappropriate. That is sufficient in these circumstances to satisfy the requirement that an employee must act deliberately. Actions can amount to gross misconduct, provided they are deliberate, without an employee either a) appreciating the full impact of their behaviour or b) recognising the extent to which they are acting wrongly.

113. Overall, I have concluded that the Claimant's behaviour was sufficiently serious to amount to gross misconduct. Bullying of a fellow employee is always likely to be serious. In this case it had occurred over a significant period of time and the victim was a relatively vulnerable individual. Both of these factors make the conduct more serious.

*Conclusion overall*

114. As set out above I have concluded that both claims are not well founded and are therefore dismissed.

Employment Judge Reed  
Date: 28 November 2022