EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110086/2021

Held in Edinburgh (by CVP) on 25-26 October 2021

Employment Judge B Beyzade

Mr. A Little	**Claimant** **In person**
Lagwell Insulation Company Limited	**Respondent** **Represented by:** **Ms M McGrady,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgment of the Tribunal is that:

1.1. the complaint of unfair dismissal is well-founded and succeeds.

1.2. A 100% '*Polkey*' reduction of the compensatory award is made.

1.3. The claimant caused or contributed to his dismissal, and it is just and equitable to apply a reduction of 100% which will be applied to the compensatory award in accordance with section 123(6) of the *Employment Rights Act 1996*.

1.4. In light of the conduct of the claimant before dismissal, it is just and equitable to reduce the amount of the basic award by 100% in accordance with section 122(2) of the *Employment Rights Act 1996*.

1.5. If both the basic and compensatory awards were not reduced by 100%, the Tribunal would have reduced any award made to the claimant by 25% pursuant to section *s 207A(3) of the Trade Union and Labour Relations (Consolidation) Act 1992*.

REASONS

Introduction

2. The Claimant presented a complaint of unfair dismissal which the respondent denied.

3. A final hearing was held on 25-26 October 2021. This was a hearing held by CVP video hearing pursuant to Rule 46. I was satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in the hearing were able to see and hear the proceedings.

4. The parties prepared and filed a Joint Inventory of Productions in advance of the hearing consisting of 92 pages.

5. The respondent's representative advised that they had applied for a postponement on the basis that Ms G Irvine, Managing Director (who the Tribunal was told was the disciplinary officer) was unwell. Prior to the hearing the application was withdrawn by the respondent, the respondent was unsure when she will be fit to attend the hearing, and they had decided to proceed without calling her as a witness. Employment Judge D'Inverno had indicated to parties on 22 October 2021 that in view of the withdrawal of the application and the claimant's objection, the hearing will proceed on the listed dates. The respondent's representative confirmed that the application was not pursued.

6. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:

(i) What was the reason or principal reason for dismissal? The respondent says the primary reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

(ii) If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will decide, in particular, whether:

(iii) the respondent formed a reasonable belief that the claimant was guilty of gross misconduct at that time;

(iv) there were reasonable grounds on which to sustain that belief;

(v) at the time the belief was formed on those grounds whether the respondent arrived at that decision after carrying out as much investigation into the matter as was reasonable in all the circumstances of the case;

(vi) the respondent otherwise acted in a procedurally fair manner;

(vii) dismissal was within the range of reasonable responses.

(viii) Alternatively, whether the claimant was dismissed due to (a) capability or (b) for some other substantial reason i.e.: an irretrievable breakdown of his employment relationship with the respondent company and whether the dismissal was fair and reasonable in all the circumstances.

(ix) Was the reason for any dismissal potentially fair within the meaning of Section 98 (1) or (2) of the Employment Rights Act 1996?

(x) Was the dismissal fair having regard to Section 98(4) of the Employment Rights Act 1996 including whether in the circumstances the respondent acted reasonably in treating it as a sufficient reason for dismissing the claimant? Did any decision to dismiss (and the procedure adopted) fall within the ‘range of reasonable responses’ open to a reasonable employer? Iceland Frozen Foods Ltd v Jones 1983 ICR 17

(xi) If the claimant was dismissed, did the respondent adopt a reasonable procedure? Was there any unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures? Did any procedural irregularities affect the overall fairness of the process having regard to the reason for dismissal?

Remedy

(xii) If the respondent did not adopt a reasonable procedure, was there a chance the claimant would have been dismissed in any event (Polkey v AE Dayton Services Ltd 1987 3 All ER 974)?

(xiii) To what basic award is the claimant entitled? Did the claimant engage in conduct which would justify a reduction to the basic award?

(xiv) What loss has the claimant suffered in consequence of the dismissal? What compensatory award would be just and equitable in all the circumstances? Did the claimant contribute to his dismissal? Has the claimant taken reasonable steps to mitigate his losses?

7. The Claimant gave evidence at the hearing on his own behalf and Miss P Palmer, Health and Safety Director gave evidence on behalf of the respondent.

8. The respondent was represented by solicitors and the claimant represented himself. Both parties made closing submissions.

Findings of Fact

1. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues -

2. The claimant was employed by the respondent between 18 January 1999 and 19 March 2021. The claimant was employed as a Thermal Insulation Engineer prior to his dismissal.

3. The claimant's role involved coordinating works on site, distributing work to individuals, ordering materials, ordering work at height material, advising on the best way to progress a project, and reporting back to Miss Palmer and to the client on projects.

4. The respondent is Lagwell Insulation Company Limited, a limited company with its registered offices located at Unit 5, Wallyford Industrial Estate, Wallyford, East Lothian, EH21 8QJ. The respondent supplies thermal insulation and fits insulation around metal. They have been trading since 1994 and at the time of the claimant's dismissal they employed 28 people.

5. The respondent had three Directors including Ms G Irvine (Managing Director), Miss P Palmer (Health and Safety Director), and Mr W Little (Finance Director).

6. The claimant worked 38 hours per week. His regular start time was said to be from 07.30am to 4.00pm Monday to Thursday, and 7.30am to 2.00pm on Fridays. The claimant was entitled to a morning break of 15 minutes and a lunch break of 30 minutes each day.

7. The claimant was paid £573.80 per week gross pay and £439.71 per week net pay. His wages were paid weekly every Thursday into his bank account.

8. The claimant's contract of employment dated 02 December 2019 included a section titled 'Alcohol & Drugs – right of testing' stating that "*Lagwell is committed to providing a safe, healthy and secure environment for all its employees and for those affected by its operations and activities. Anyone suspected of being impaired due to alcohol or substance abuse or taking drugs illegally will be immediately removed from site. Testing for alcohol or drugs may be carried out on reasonable suspicion or following an accident or incident. Lagwell reserve the right to introduce random testing where it was considered appropriate. The disciplinary process will be invoked should*

anyone refuse to take an alcohol or drugs test and may lead to summary dismissal. Please see employee handbook for details."

9. The Employee Handbook contained details relating to the respondent's disciplinary procedure. This states that minor offences included time wasting, lateness, minor cases of bad workmanship or absence without permission, or using a mobile telephone for personal reasons during working hours. Serious offences included '*uncertified absence without leave*.' Gross misconduct '*covers any action done by you deliberately or recklessly which injures, damages or recklessly which injures, damages or interferes with the running of the company business, the company's property or employees*.' Examples of gross misconduct included '*clocking offences or the deliberate falsification of timesheets or other work records. Drunkenness, drug abuse or fighting during work hours*.' The procedure states that cases of minor or serious offences will first result in a written warning (followed by a final warning), whereas in the case of gross misconduct an employee may be summarily dismissed.

10. On Monday 22 February 2021 the claimant was sent to work at a site in North Shields on his own. Leading up to this he had a number of personal problems. Although he was working during the week, he was drinking alcohol in the evenings. That day he attended work late due to issues with transport and he took some time to sign into his accommodation.

11. In relation to this project, it was agreed that the claimant was due to continue working each day between 08.00am and 06.00pm until Saturday 27 February 2021 (the claimant had indicated that the project will be finished that Saturday albeit on 25 February 2021 prior to leaving the site the claimant advised the respondent that this would not be achievable). The project sign-out sheet recorded that the claimant was on the site between 08.00am and 06.00pm Monday to Thursday during that week.

12. The claimant left work on Thursday 25 February 2021 at 2.30pm following an argument that he had with his wife on the telephone. He wanted to go home to try to resolve the situation. However, prior to doing so, the claimant consumed 2 cans of strong lager and he began to drive home. At approximately 5.00pm, the claimant crashed his car on the A1 in Northumberland. He damaged a road sign and his car had been written off. The claimant attended hospital, he was given medical treatment and medication (morphine), and he discharged himself at 1.30am.

13. The claimant's wife telephoned Mr W Little to advise him of this incident and that his son was in hospital. Mr W Little advised Ms Irvine what had happened. The claimant went back to his house, and he was picked up in the morning on Friday 26 February 2021 by Ms Irvine who drove him to his friend's home in Leith.

14. That morning the claimant had also spoken to Miss Palmer who he informed that he had personal issues, he had been drinking during the week in question each evening since 21 February 2021, he had been an alcoholic for years, and he failed to take his addiction medication for 3 days. He told Miss Palmer that he had been drinking from 3pm on 25 February 2021 and that the incident with his car took place at around 5pm that day. He said that the police arrived at the scene and that an ambulance was called, the airbags did not deploy, and his car was placed into storage.

15. Miss Palmer sent the claimant a text message at 1.50pm asking for confirmation of his doctor's appointment. The claimant replied at 1.55pm advising that he was almost home and that he would telephone her back.

16. The claimant continued to drink heavily, and he had health issues. He attended Edinburgh Royal Infirmary hospital on 1 March 2021 where he was provided with anti-depressant medication and advised to attend alcoholics anonymous meetings by a counsellor.

17. On the same day Miss Palmer visited the claimant at his aunt's house and required that he signed a timesheet. The claimant signed a timesheet confirming that he worked between 22 February 2021 and 24 February 2021 for 8 hours plus 2 hours' overtime and 6 hours on 25 February 2021.

18. That day, on 1 March 2021, the claimant was provided with a letter from Ms Irvine confirming that an investigation was being conducted by Miss Palmer in relation to his work attendance in North Shields, drinking alcohol in work time, leaving site without permission, lying to Lagwell MD regarding work progress, lying to client re reasons to leave site, and road traffic collision during work hours while under the influence of alcohol. He was told that he was currently suspended on full pay while the investigation took place.

19. The claimant attended an investigation meeting on 08 March 2021.

20. The claimant was sent a letter from Ms Irvine dated 12 March 2021 advising him of the details of six allegations against him and inviting him to attend a disciplinary hearing on 17 March 2021.

21. Following the disciplinary hearing on 17 March 2021, the claimant was sent a letter dated 19 March 2021 from Ms Irvine advising him that he was being summarily dismissed without notice due to gross misconduct. The letter stated that the claimant admitted during the disciplinary meeting that he breached his contract and company policies in relation to all allegations mentioned in the letter of 12 March 2021. He also mentioned that the claimant's performance was not satisfactory. He advised the claimant that he was dismissed due to "*gross misconduct related to breach of health and safety rules as well behaving in an untrustworthy manner in relation to carrying out your contractual duties and bring under the influence of alcohol during work hours, to the extent of driving under the influence of alcohol during work hours and being involved in a road traffic accident*." Ms Irvine stated that she considered the mitigating circumstances in relation to the claimant's personal situation, and she was satisfied that the claimant's

actions irreparably damaged the employment relationship between him and the company.

22. The claimant was dismissed with effect from 19 March 2021. Although he was given the opportunity to send an appeal to Miss Palmer, the claimant did not appeal. The claimant said this was because he was looking for new work and he had to support his family and children.

23. The claimant had not received any written warnings or had prior disciplinary proceedings brought against him by the respondent prior to his dismissal.

24. Following the claimant's dismissal the claimant started working for a new employer on 23 March 2021 earning £567.00 per week.

Observations

25. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

26. The Tribunal observed that in terms of the witness evidence it heard, different witnesses were able to assist with or comment on specific aspects of this case. Where there was a conflict of evidence, the Tribunal made findings of fact on the balance probabilities based on the documents, having considered the totality of the witness evidence, and accepted the evidence that set out the position most clearly and consistently.

27. The Tribunal considered the claimant's evidence about his employment history, the background, and the responses he presented to Miss Palmer in terms of the allegations made against him.

28. The respondent did not provide an investigation report. However, there were notes made by Miss Palmer of her conversation with the claimant on 26

February 2021, her attendance to the claimant's aunt's house on 1 March 2021, and brief notes in relation to the investigation meeting on 8 March 2021 and disciplinary hearing on 17 March 2021. There was, no reference in the 12 March 2021 letter to the claimant having been provided with a copy of Miss Palmer's investigation meeting notes or any other investigation material.

29. The allegations against the claimant were set out in the letter dated 12 March 2021. These were read out to the claimant during the disciplinary hearing and the claimant accepted that these were true and accurate. This included the fact that he left work at approximately 2.30pm on 25 February 2021, that he was consuming alcohol at 3pm that day, that he left site without permission, he lied to the client and there was a discrepancy in relation to the hours he claimed, and he crashed his car at approximately 5pm. The last of the six allegations stated that his workday was scheduled to finish at 6pm.

30. The letter from Ms Irvine dated 19 March 2021 setting out the outcome of her decision was brief. It summarised that the claimant admitted the allegations, and that the claimant being under the influence of alcohol during work hours was a breach of health and safety, led to a lack of trust, and amounted to gross misconduct. In the first sentence of the third paragraph she states she considered the mitigating circumstances relating to the claimant's personal situation, but no further reference or detail is provided in respect of this.

31. The claimant was provided with an opportunity to appeal to Miss Palmer. She was the Director who conducted the investigation. He did not appeal.

Relevant law

32. To those facts, the Tribunal applied the law –

33. Section 94 of the *Employment Rights Act 1996* ('ERA 1996') provides that an employee has the right not to be unfairly dismissed. It is for the respondent to show the reason (or principal reason if more than one) for the dismissal

(s98(1)(a) ERA 1996). That the employee committed misconduct is one of the permissible reasons for a fair dismissal (section 98(1)(b) and (2)(c) ERA 1996). Where dismissal is asserted to be for misconduct the employer must show that what is being asserted is true i.e. that the employee has in fact committed misconduct.

34. In *British Home Stores v Burchell [1978] ICR 303* the Employment Appeal Tribunal ("EAT") indicated a 3-stage test for considering whether an employee is dismissed by reason of conduct. A Tribunal must decide whether:
    a. The employer genuinely believed the employee to be guilty of misconduct.
    b. The employer had in its mind reasonable grounds for believing that the employee was guilty of that misconduct.
    c. At the time it held that belief, it had carried out as much investigation as was reasonable in all the circumstances of the case.

35. If satisfied of the reason for dismissal, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA 1996).

36. In applying s98(4) ERA 1996 the Tribunal must not substitute its own view for the matter for that of the employer but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

37. A Tribunal must always keep at the front of its mind that it should not stray into what is called a 'substitution mindset.' Rather it should assess the actions of an employer in the context of a band of reasonable responses of a reasonable employer: *Iceland Frozen Foods Ltd v Jones 1983 ICR 17*. The range of reasonable responses test applies equally to the investigation

undertaken, as to the decision to dismiss (*Sainsbury's Supermarkets Limited v Hitt (2003) IRLR 23*).

38. The Tribunal is not to question whether some lesser penalty would have been applied or the level of injustice to an employee: *Chubb Fire Security Limited v Harper 1983 IRLR 311*. In *Havjioannou v Coral Casinos Limited 1991 IRLR 325* it was held that the disparity argument was only available in very limited circumstances and Tribunal was to scrutinise these arguments with care.

39. In terms of mitigation, there may be cases where it will be necessary for the employer to go further than merely allow the employee to explain his mitigation and investigate the circumstances relating to the mitigation. In *Chamberlain Vinyl Products Ltd v Patel [1996] ICR 113*, the EAT held that a Tribunal was entitled to conclude that an employer had acted unreasonably in failing to explore more fully the employee's claim that his misconduct had been caused by a psychiatric illness (that case pre-dated *Sainsbury's* and so the question now is in what circumstances a failure to make such investigations may lie outside the range of reasonable responses). This point also arose in *Tesco Stores Ltd v S UKEATS/0040/19 (1 April 2021, unreported)*. At [42] the judgment states:

''In considering whether a particular line of inquiry into mitigation was so important that failure to undertake it would take the investigation outside the Sainsbury's *band, Tribunals require to consider* inter alia *the degree of relevance of the inquiry to the issue of sanction, whether or not the employee advanced any evidential basis which merited further inquiry, and the extent to which resultant further investigation could have revealed information favourable to the employee.''*

40. In *Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677*, *[2015] IRLR 734* the claimant was dismissed for a serious breach of procedures in going into an enclosed space without breathing apparatus. His senior who had permitted it was given a lesser penalty. The claimant had over 30 years' service with the employer, but the latter considered that in these

circumstances this functioned as an aggravation of the misconduct, not mitigation. The Tribunal found that the dismissal was unfair generally, partly in the light of the long service, and also specifically because of the disparity in treatment in comparison with his senior; this was subject to 40% contributory fault. The EAT allowed the employer's appeal, considering that the Tribunal had substituted its own view for that of the employer. Allowing the employee's further appeal, Bean LJ said the EAT overstepped the mark and that the Tribunal had applied the law properly and reached conclusions open to it; the EAT had been wrong to intervene. On the health and safety point, the Court of Appeal held that the normal rules on fairness applied.

41. The band of reasonable responses test is applicable to both the procedural and substantive elements to the decision taken by the employer (*Whitbread –v- Hall [2001] IRLR 275*). Procedural issues do not sit "*in a vacuum to be assessed separately*" (*Sharkey v Lloyds Bank plc [2015] UKEAT/0005/15*) and should be considered together with the reason for dismissal, in assessing whether, in all the circumstances, the employer acted reasonably in treating the reason as a sufficient reason for dismissal (*Taylor v OCS Group Limited [2006] IRLR 613 (CA)*). It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together.

42. R*oyal Society for the Protection of Birds v Croucher* [1984] IRLR 425, is authority for the proposition that there may be cases of admitted dishonesty in which it is not incumbent upon the employer to give the employee a warning or carry out a detailed investigation before deciding that the employee should be dismissed. However, in the case of *John Lewis plc v Coyne [2001] IRLR 139* the EAT held that in a case where an employee admitted she made personal calls using company property, the duty to act reasonably required that they should investigate the seriousness of the offence, including not only the number of calls made but also the purpose of the calls, whether there was any element of personal crisis and whether or not the conduct was persistent. The Court of Session held in *Scottish Daily Record and Sunday Mail (1986) Ltd v Laird [1996] IRLR 665*) the application of the threefold test

from *Burchell* was not a mere formality in a case where there was an admission in relation to the nature of a contractual obligation is respect of which there was an alleged breach and it went to the root of the question whether Mr Cassidy had a sound basis for the allegations which he was making in order to justify his decision to dismiss the employee.

43. In *Polkey v AE Dayton Services [1987] IRLR 503* Lord Bridge sets out procedural steps which should include a full and fair investigation of the conduct and a fair hearing in terms of an employee's explanation, mitigation, and defence. If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Tribunal is not permitted to ask in applying the test of reasonableness is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. He further states:

"It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section 57(3) may be satisfied."

44. In *BBC –v- Nelson [1979] IRLR 346*, the CA stated that if the dismissal were unfair, the claimant could still be responsible for his dismissal if the conduct on his part relied upon as contributory was culpable or blameworthy. This included conduct that was a breach of contract, a tort, perverse or foolish, bloody-minded, and "…*action which, though not meriting any if those more perjorative epithets, is nevertheless unreasonable in all the circumstances*. *But all unreasonable conduct is not necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved*." There is a requirement to identify the relevant act or omission and to determine that it is just and equitable to reduce the claimant's loss to a specified extent.

45. The respondent's representative referred to the following cases in respect of contributory fault:

a) *W Devis & Sons Ltd v Atkins [1977] IRLR 314*: it was held that a reduction for contributory conduct can be anything up to 100% and that there was nothing inconsistent with finding of unfair dismissal and making a reduction of 100%.

b) *Sinclair v Wordsworth Council UKEAT/0145/07 (unreported)*: An employee who had a dependency on alcohol was dismissed twice for turning up intoxicated for work. Although the Tribunal said the dismissal was procedurally unfair, it was held that they should not have ignored the employee's drunkenness when assessing contributory fault.

c) *Steyn v ASP Packaging Limited UKEAT/23/11 (unreported)*: A Tribunal must consider the following 4 questions in relation to the alleged misconduct: i) what was the conduct which was said to give rise to possible contributory fault? ii) Was the conduct blameworthy irrespective of the employer's view of matter? iii) For purposes of section 123(6) did the blameworthy conduct cause or contribute to the claimant's dismissal? iv) If so, to what extent should the award be reduced and to what extent would it be just and equitable to reduce it?

d) *Robert Whitting Designs Limited v Lamb [1978] ICR 89*: Any conduct on part of the claimant can be considered in determining the extent of contributory fault providing it is blameworthy and contributes in some way to the claimant's dismissal. It does not have to be principal reason for dismissal – it must be one of the reasons for dismissal.

46. The Tribunal also considered the *ACAS Code of Practice*. In relation to this the respondent relied on the Tribunal decision of *Baker v Birmingham Metropolitan College ET/130135511*. This was a case where a dismissal was found to be unfair, and the Tribunal decided to reduce the award by 25% due to the claimant's unreasonable failure to appeal and comply with the ACAS Code of practice. The employee thought an appeal was futile. This case is not binding authority, but the respondent's representative said it was persuasive and well-reasoned.

Discussion and decision

47. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

(i) What was the reason or principal reason for dismissal?

48. The respondent relied on misconduct as the reason for dismissal. There was no evidence given by Ms Irvine and the claimant did not appeal. The Tribunal heard evidence that Miss Palmer investigated the claimant's misconduct. The Tribunal was also referred to the letter from Ms Irvine dated 19 March 2021 which although it referred to the claimant's conduct and performance being unsatisfactory, there were no particulars provided in relation to the performance issues which led to this conclusion. However the fifth paragraph of the letter began "the reasons for your dismissal are:" and gross misconduct was given as the reason for dismissal. The claimant was dismissed summarily due to gross misconduct. There was no evidence of any other reason for dismissal before the Tribunal. The Tribunal accepted that Ms. Irvine formed a genuine belief as to the claimant having committed misconduct.

49. This is a potentially fair reason for dismissal in accordance with section 98(2) of the ERA 1996.

(ii)If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant
(iii)the respondent formed a reasonable belief that the claimant was guilty of gross misconduct at that time;
(iv)there were reasonable grounds on which to sustain that belief;
(v)at the time the belief was formed on those grounds whether the respondent arrived at that decision after carrying out as much investigation into the matter as was reasonable in all the circumstances of the case

50. The respondent relied on the admission by the claimant of the six allegations that were put to him at the disciplinary hearing from the letter dated 12 Mach 2021. The notes of the 17 March 2021 meeting recorded that the claimant

agreed that all of the issues listed were true and accurate. Notwithstanding this, the claimant advised the Tribunal that he did not accept he was drinking during working hours and that he was unwell at the time and unable to concentrate properly. A reasonable employer would have followed the 3-stage *Burchell* test as the claimant did not accept all aspects of the allegations put to him and he was clearly distressed and suffering from health issues at the time. Miss Palmer indicated in cross examination that the admissions were a factor taken into account and the respondent in its submissions did not seek to argue that the *Burchell* test did not apply. As in the case of *John Lewis plc v Coyne,* it was important that a reasonable employer should investigate the seriousness of the offence, including not only the specific details of the misconduct (such as when, where, how, and how much alcohol was consumed by the claimant and a proper analysis of the timesheets and the information in the email received from the client at North Shields), whether there was any element of personal crisis and whether or not the conduct was persistent and its nature and extent.

51. Although no investigation report was produced, Miss Palmer made notes of her correspondences with the claimant and of the investigation meeting and disciplinary hearing. Miss Palmer also obtained an email from the client at the relevant project site in relation to the allegations.

52. The claimant was not given a copy of the telephone conversation notes or the investigation meeting notes, or indeed, the email from the client at North Shields in advance of the disciplinary hearing, so he had not had the chance to comment on this at the disciplinary hearing. However, he was notified of the allegations against him on 12 March 2021, these were repeated to him during the meeting on 19 March 2021, and the claimant did not seek to dispute these or adduce any evidence in rebuttal.

53. He was also given the opportunity to explain his personal circumstances with regards to alcohol dependency and support he had been seeking during the investigation and the disciplinary hearing. The claimant did not provide any

medical evidence to the respondent and the respondent did not request any such evidence from the claimant. However the claimant had given detailed information including the treatment he was receiving and the names and dosages of medication he was taking.

54. However it is necessary to consider the six allegations found proven by the respondent as listed in the letter from Ms Irvine dated 12 March 2021 and whether the respondent's investigation was within the band of reasonable responses open to a reasonable employer. In relation to the first of these, discrepancy as to the hours worked and claimed by the claimant and the client, the Tribunal did not accept that the relevant information and the timesheets were put to the claimant during the disciplinary hearing or investigation meeting or that a reasonable employer would have found that there was sufficient evidence of a discrepancy based on the investigation conducted. The claimant claimed to have worked 6 hours on Thursday 25 February 2021, which was consistent with what he told the respondent during the investigation meeting and disciplinary hearing. The Tribunal accepted that the claimant was at work by 08.00am and he had left work at around 2.30pm on that day which amounts to 6.5 hours' work. On 23 and 24 February 2021 the client and the claimant broadly agree that the claimant was at work all day. In relation to 22 February 2021, the client's email was not clear, and this did not show that the claimant did not work the hours that he said he worked. Although the information on the sign in sheets differed, the hours claimed were those that were included on the timesheet (prepared by the respondent's Finance Director who was aware of the claimant leaving work early on 25 February 2021 and they were signed by the claimant).

55. In the second allegation the respondent states that the claimant lied to its client in relation to the reason he left the site on 22 February 2021. This referred to the claimant leaving the site because of car tyre issues and needing to make arrangements relating to his accommodation. In the email from the client, the client stated that the claimant was late due to issues with his transport and that he left the site to sign into his accommodation. There

was no reasonable basis upon which the respondent could properly conclude that the claimant lied to the respondent's client, based on the claimant's evidence and the email received from the respondent's client.

56. In relation to the third allegation, no evidence was provided to the claimant or to the Tribunal to demonstrate that the claimant lied in relation to his work progress. There were text messages in the evidence presented to the Tribunal which showed the claimant initially indicated that he would complete the work by Saturday 27 February 2021, and he later informed the respondent that this would not be possible.

57. In relation to the first three allegations, no reasonable employer would have concluded that these allegations were proven in all the circumstances. This was compounded by the fact that there was no evidence before the Tribunal that the respondent put the key evidence before the claimant, such as the relevant timesheet and the signing in sheet prior to the disciplinary hearing so that he could provide his comments in relation to these. If this had taken place, the allegations may well have been discontinued.

58. The fourth allegation stated that the claimant was 'consuming alcohol in work hours.' This refers to the fact that the claimant admitted drinking alcohol from 3pm on 25 February 2021. This matter was not disputed. The respondent did not investigate this allegation in any detail and did not question the claimant about the nature of, place and the extent of the alcohol he consumed. The Tribunal noted that the Employee Handbook did not simply refer to 'consuming alcohol during work hours,' but it stated that "*drunkenness … during work hours" was an offence of gross misconduct*. It was not put to the claimant by the respondent that he was accused of drunkenness during work hours in the fourth allegation and this specific allegation was not explored with the claimant in any detail during the call on 26 February 2021, meeting on 8 March 2021, or during the disciplinary hearing on 17 March 2021. Disciplinary allegations have to be clearly framed and must be put to employees in

advance to afford them with a reasonable opportunity to prepare their defence.

59. The claimant admitted the fifth allegation which related to leaving his work site without permission on 25 February 2021. He did not sign out on the signing sheets or notify the client. In the Employee Handbook an employee's absence without permission is classified as a minor offence, and that it will result in a warning. The claimant was not charged with an allegation that could amount to a 'serious offence' or 'gross misconduct' as defined in the Employee Handbook in respect of this allegation.

60. The final allegation, the sixth allegation, was that the claimant had a road traffic collision whilst under the influence of alcohol during work hours. The respondent did not make clear which aspect of the rules set out in the Employee Handbook this related to and why they felt it necessary to include this as a separate allegation rather than combining it with the fourth allegation. However, this was essentially an extension of the fourth allegation, which was not properly framed as set out above.

61. Furthermore, at the time the belief was formed in relation to the fourth, fifth and sixth allegations, save that any investigation material was not provided to the claimant for comment, and for the reasons set out above, the respondent had arrived at its decision after carrying out as much investigation into the matter as was reasonable in all the circumstances of the case. For the reasons set out above the investigation conducted in relation to the first, second and third allegations did not meet the obligation to conduct as much investigation into the matter as was reasonable in all the circumstances.

62. However, although the respondent genuinely believed that the claimant was guilty of misconduct in respect of each allegation, for the reasons stated in relation to each allegation above the respondent did not act reasonably in all the circumstances in treating any of the proven allegations as a sufficient reason to dismiss the claimant and the Tribunal is unable to conclude based

on the allegations and the evidence that the respondent formed a reasonable belief on reasonable grounds that the claimant was guilty of gross misconduct.

(vi)whether the respondent otherwise acted in a procedurally fair manner

63. The Tribunal found that the process followed as a whole was not fair and reasonable in all the circumstances. Ms Irvine upheld all six allegations. There was no evidence that the evidence in relation to each allegation was considered separately.

64. There was no evidence to indicate that the claimant was provided with an opportunity to comment on the investigation meeting notes or any other material that was collated by Miss Palmer either before or during the disciplinary hearing.

65. As no appeal took place, there was no opportunity for these matters to be addressed or explored further by the respondent. The claimant said he did not appeal as he was looking for other work and this was due to his personal and family circumstances. A right of appeal was offered to the claimant to Miss Palmer, who conducted the investigation and was already involved in the disciplinary process. It was not clear why an impartial manager could not be appointed to hear the appeal, but neither party addressed this in their evidence or submissions. In any event this was not a point raised by the claimant in his letter sent to Miss Palmer following the decision to dismiss him.

(vii)Whether dismissal was within the range of reasonable responses

66. The allegations that the respondent put to the claimant were of a serious nature.

67. The Tribunal is required to look at the band of reasonable responses and what a reasonable employer would do in all the circumstances. The Tribunal must not substitute its own view for that of the employer and therefore it is not for the Tribunal to decide whether it would have dismissed the claimant. The Tribunal must ask whether the respondent's decision to dismiss fell within the

band of reasonable responses which a reasonable employer might have adopted.

68. The Tribunal, in considering this matter, had regard to the fact the claimant sought to mitigate what he had done by (i) saying he had personal problems and he was on anti-depressant medication (ii) he had been consuming excessive alcohol over a long period of time. The claimant told the Tribunal that he had been seeking assistance from alcoholics anonymous and he had not had alcohol for quite some time. He stated that the respondent was aware of this as he provided a copy of his prescription to the respondent relating to this on 15 November 2019 (but he did not advise the respondent what this medication was for in his text message of that date). Miss Palmer stated she became aware of these personal issues on 26 February 2021.

69. The Tribunal set out above that it accepted Ms Irvine's reason that the reason for the claimant's dismissal was gross misconduct and this was the genuine reason for the claimant's dismissal. The claimant admitted the six allegations against him during the disciplinary hearing were true.

70. The respondent recorded that the claimant admitted the allegations that were put to him. The claimant told the Tribunal that he disputed some of the key facts including whether he was drinking alcohol during working hours. Miss Palmer said that the claimant accepted that he left his work site at 2.30pm on 25 February 2021 and he had previously agreed to work until 6.00pm. This was supported by the signing in and out sheets.

71. Given that the letter of dismissal was fairly brief, it did not make detailed separate findings in relation to each allegation. It did not detail Ms Irvine's thought processes in terms of the claimant's mitigation and his personal circumstances and his health, and the Tribunal would have been assisted if Ms Irvine were able to give evidence about these matters. Ms Irvine was not present as she was unwell. The Tribunal referred to relevant correspondences and records kept by the respondent to show her thought processes. It was not

explicitly stated whether Ms Irvine took account of the claimant's length of service of 21 years and the fact that he had no previous warnings on his personnel file in respect of any disciplinary matters. There were no documentation available in relation to any performance concerns relating to the claimant.

72. Although Miss Palmer said that there was consideration of a demotion, but this was not considered practical, there were no details provided about this during oral evidence or in the letter dated 19 March 2021.

73. The dismissal had been unfair in relation to the application of the respondent's alcohol policy. The respondent had not given the claimant details of its alcohol policy and had failed to spell out precisely what aspect of this policy he had breached, and anything he could do in order to provide mitigation or why a warning was not appropriate as this was the first time that consuming alcohol at work and leaving work before his contractual finishing time was being addressed. The claimant pointed to disparate treatment with a colleague who had stolen from the company and obtained a written warning, but on the face of it the circumstances of the claimant's colleague were different.

74. The respondent needed to be careful when framing disciplinary charges and ensuring that the facts support a decision to dismiss. In relation to the fourth allegation the claimant was accused of consuming alcohol in work hours. The disciplinary policy in the Employee Handbook said that drunkenness during work hours was an example of gross misconduct. The sixth allegation did not explicitly refer to the provisions in the Employee Handbook relating to gross misconduct and drunkenness during working hours. The totality of the policy was not put to the claimant or analysed in any or any sufficient detail.

75. In view of those circumstances and my findings, I find that the respondent's decision to dismiss the claimant was not within the band of reasonable responses open to a reasonable employer.

(viii)Alternatively, whether the claimant was dismissed due to (a) capability or (b) for some other substantial reason

76. As indicated above, the Tribunal has found that the reason for dismissal was conduct and the respondent genuinely believed this. There was no evidence before the Tribunal that the claimant's performance at work led to the termination of his employment or that his dismissal was for some other substantial reason. No performance related documentation was adduced by the respondent in evidence that was before the employer prior to the claimant's dismissal and in any event no allegations were put to the claimant in relation to his unsatisfactory performance. There was a bare assertion in the letter of dismissal that the claimant's performance was not satisfactory but no particulars of any findings relating to this were provided.

77. The respondent's representative said in submissions that the some other substantial reason relied on as an alternative reason for dismissal was reputational damage and loss of trust and confidence. This was not a matter that was explored in any detail during the respondent's evidence and in any event there was no evidence before the Tribunal that Ms Irvine relied on some other substantial reason as an alternative reason for the claimant's dismissal.

(ix)Was the reason for any dismissal potentially fair within the meaning of Section 98 (1) or (2) of the Employment Rights Act 1996?

(x)Was the dismissal fair having regard to Section 98(4) of the Employment Rights Act 1996 including whether in the circumstances the respondent acted reasonably in treating it as a sufficient reason for dismissing the claimant? Did any decision to dismiss (and the procedure adopted) fall within the 'range of reasonable responses' open to a reasonable employer?

(xi) If the claimant was dismissed, did the respondent adopt a reasonable procedure?

78. If the Tribunal is wrong and the claimant's dismissal was due to capability or some other substantial reason, the Tribunal would have found that these were both potential fair within the meaning of section 98(1) or (2) of the ERA 1996, but that having regard to section 98(4) of the ERA 1996 the respondent did

not act reasonably in treating capability or some other substantial reason as a sufficient reason for dismissing the claimant. It was not within the range of reasonable responses for the respondent to dismiss the claimant due to capability or some other substantial reason. The respondent did not put these allegations to the claimant in advance of the disciplinary hearing, and the facts found, and the conclusions reached by Ms. Irvine do not show that dismissal on either of those grounds were within the band of reasonable responses. The Tribunal would be unable to conclude that the respondent adopted a fair procedure in all the circumstances.

(xii) Reduction pursuant to the Polkey case

79. The Tribunal is required to enquire what would have happened if a fair procedure been followed. That is often called the "Polkey" principle (after *Polkey v A E Dayton Services Limited [1988] ICR 142*) and it arises because section 123(1) of the ERA 1996 requires the Tribunal to make such compensatory award as is just and equitable, and that includes assessing what might have happened if a fair procedure had been followed, even though that is inherently speculative.

80. It seemed to me that if Ms Irvine had framed the allegations against the claimant correctly and called the claimant in to discuss the investigation materials with him before taking a decision it is inevitable that Ms Irvine would have taken the same decision. In my judgment Ms Irvine would and could reasonably have rejected any other explanation or mitigation from the claimant. Holding a meeting with the claimant would only have taken a day or two but it could still have resulted in a fair dismissal for gross misconduct which would have deprived the claimant of any notice pay.

81. Therefore, I was satisfied that a 100% Polkey reduction was appropriate to the compensatory award as had a fair procedure been followed the claimant would have been dismissed without notice in any event. I declined to make any compensatory award in favour of the claimant.

82. The Tribunal is absolutely certain that had a fair procedure been followed, the claimant would have been dismissed in any event. In particular, if Ms Irvine had kept an open mind and deliberated with an open mind on any reframed disciplinary allegations, there is no doubt whatsoever that she would have concluded that the claimant was guilty of gross misconduct and that she would have dismissed him. She would have accepted that on 25 February 2021 the claimant left work early at 02.30pm, that he consumed alcohol at around 3.00pm, that he was drunk, and he had an accident at around 5.00pm. It would have been entirely reasonable for her to do so. Much of these facts were admitted anyway. She would have considered summary dismissal to be the only appropriate sanction. If she had considered such mitigation as there was, albeit any employer would have a degree of sympathy for the claimant's personal and health circumstances, and if she had considered whether a sanction short of dismissal was enough, she would have concluded that only summary dismissal would do. There is also no reason to think that the dismissal would have been delayed had a fair procedure been followed. The timescales were short, but the respondent were dealing with allegations of a serious nature. The matters were not overly complicated and all that was needed was a chance to respond to the reframed allegations, explicit reference to the respondent's policy and the investigation documents, and Ms Irvine would need to clearly set out that the claimant's mitigation had been considered. That could be done in the timeframe that there in fact was. Given the circumstances a 100% Polkey reduction should be made.

(xiii) *Contributory conduct*

83. I have then considered the claimant's conduct. I have found that the claimant was unfairly dismissed but that does not mean that he was blameless. He consumed alcohol during working hours, he told the Tribunal he had two strong cans of lager and he knew that was not allowed. He said in his ET1 Form that after he left work on 25 February 2021 "*I stupidly downed 2 cans of strong lager and drove*." I accept that he had been told in the Employee Handbook that being drunk during working hours was an example of gross misconduct. He sought to rely on the fact that he believed that the respondent

should have given him a second chance. The respondent clearly did not feel that that was appropriate given the circumstances. It is implausible that any employee is unaware of the strict workplace rules which apply to being drunk during work hours even if they work outside much of the time, and it is clear that those rules had been brought to his attention. These are health and safety rules, and it is of vital importance that health and safety rules are taken seriously by all employees. In the circumstances it is just and equitable to reduce the claimant's compensatory and basic awards by a very significant amount to take account of his significant and serious contributory fault.

84. The respondent's representative suggested that if I found the dismissal was unfair I should reduce compensation by 100%. I reflected carefully on whether I should do that in light of the seriousness of the claimant's fault in this case. I did apply a 100% reduction because I am entirely satisfied that if the respondent had applied the approach of a reasonable employer by looking at all of the circumstances of the case, including the claimant's mitigation and listened to what the claimant wished to raise about consistency and his personal circumstances, it was absolutely inevitable that he would have been dismissed. For that reason, I have applied a 100% reduction to compensation of both the basic and compensatory award.

85. I say that because of the seriousness nature of the misconduct and having regard to the nature of the respondent's business.

(xiv)*Losses suffered, compensation award, and mitigation*

86. If I were wrong and the claimant was entitled to a basic award, the amount of the basic award would have been £9,684.00. This is based on an award of 18 weeks' pay. The statutory cap of £538.00 applies to the claimant's weekly pay.

87. The claimant started new employment just 3 days after his dismissal. The claimant indicated at the start of the hearing that he was only unemployed for one day and his daily wages were £96.00. He had also received £4.00 gross

pay per week less (£2.40 net). On the basis that he had been in his role for 28 weeks he claimed £67.20 being the difference in his pay. His compensatory award would therefore have been £163.20 in the event that I were wrong to reduce his compensatory award by 100%.

88. The claimant clearly took reasonable steps to mitigate his losses. He found employment with a similar level of income within a matter of days. The respondent did not seek the argue in their submissions that the claimant failed to mitigate his losses and did not challenge the losses he claimed.

89. The respondent stated that the claimant failed to comply with ACAS Code of Practice which states that an employee should appeal against the decision to dismiss him. The respondent submitted that a 25% reduction in compensation should be made pursuant to s 207A (3) of the *Trade Union and Labour Relations (Consolidation) Act 1992*, inserted by the *Employment Act 2008*, by reason of the claimant's unreasonable failure to appeal. The claimant was able to write to Miss Palmer after he was dismissed. The claimant could have sent an appeal and looked for a new job at the same time. I was satisfied that the ACAS Code of Practice applied in this case, that the claimant failed to comply with this by not sending an appeal to the respondent and that the claimant's failure in this regard was unreasonable. I therefore concluded that it is just and equitable in all the circumstances to exercise my discretion to reduce any award that would have been made to the claimant by twenty-five percent (if I had not determined that the basic and compensatory award should be reduced by 100%). I consider that an appeal may have provided an opportunity to the parties the address all or some of the procedural matters identified above.

Conclusion

90. The Tribunal were satisfied that there was a fair reason for the claimant's dismissal, namely misconduct.

91. The Tribunal considered whether the dismissal was fair and reasonable in accordance with section 98(4) of the ERA including the size and administrative resources of the employer and found that the dismissal was not fair and reasonable in all the circumstances.

92. The claimant's claim for unfair dismissal succeeds.

93. The Tribunal reduced the claimant's basic and compensatory award by 100% by reason of the claimant's contributory conduct. Furthermore the Tribunal reduced the claimant's compensatory award by 100% pursuant to the *Polkey* case. In any event the Tribunal would have reduced any award made to the claimant by 25% by reason of his failure to comply with the ACAS Code of Practice as set out above.

94. For the avoidance of doubt, the respondent is not required to pay any sum of money to the claimant pursuant to this judgment.

Employment Judge: B Beyzade
Date of Judgment: 10 January 2022
Entered in register: 12 January 2022
and copied to parties

I confirm that this is my judgment in the case of 4110086/2021 *Mr A Little v* Lagwell Insulation Company Limited *and that I have signed the order by electronic signature.*