EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106410/2024

Hearing held at Dundee on 4 and 5 November 2024

Employment Judge McFatridge

Mr R Pawlicki	**Claimant** **In Person** **[Assisted by Interpreter]**
2 Sisters Food Group Limited	**Respondent** **Represented by:** **Mr G Dunlop - Counsel** **[Instructed by Messrs Squire Patton Boggs (UK) LLP]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant was not unfairly dismissed by the respondent. The respondent did not unlawfully withhold notice pay, holiday pay or arrears of pay from the claimant. All claims are dismissed.

REASONS

1. The claimant submitted a claim to the tribunal in which he claimed that he had been unfairly dismissed by the respondent. He also ticked the box on the claim form to indicate that he was claiming for notice pay, holiday pay and arrears of pay although he did not provide any details of these claims in his ET1. The respondent submitted a response in which they denied the claim. It was their position that the claimant had been summarily dismissed for gross misconduct and that the dismissal was procedurally and substantively fair. No additional sums were due to him. He was not entitled to notice pay because he had been in repudiatory breach of contract. A final hearing was fixed to take place over three days on 4, 5, 6 November 2024. In the event only two days were required. At the hearing

evidence was led on behalf of the respondent from John Nicholson the respondent's Head of Technical who conducted the disciplinary hearing and made the decision to dismiss the claimant. Evidence was also led on behalf of the respondent from Craig Williamson who heard the claimant's appeal against dismissal. The claimant gave evidence on his own behalf. On the first day of the hearing the claimant lodged a document which he indicated was a signed statement by Oskar Wojciechowski a former colleague of the claimant. He indicated that he had intended to lead evidence from Mr Wojciechowski but that he had started a new job that day and required to attend induction and was unavailable. When it was pointed out that it would be possible for Mr Wojciechowski to give evidence the following day the claimant requested a witness order for Mr Wojciechowski to give to his employer and the witness order was granted on the basis that the claimant would personally deliver it to Mr Wojciechowski. In the event having heard the evidence of the respondent's witnesses and the respondent's submission that none of the matters mentioned in Mr Wojciechowski's statement appeared to be relevant to the claim the claimant decided not to call Mr Wojciechowski on the second day of the hearing and the witness order was therefore cancelled. The respondent had prepared a bundle of documents for the hearing. They complained that the claimant had not co-operated in the process of producing a joint bundle. They indicated that at a late stage the claimant had indicated that he had recordings of the disciplinary and grievance hearings and sought to lodge these. The respondent had in light of the overriding objective prepared a transcript of these recordings at their expense and these had been incorporated in the bundle. The documents in the bundle are referred to by page number in the judgment below. On the basis of the evidence and the productions I found the following essential facts relevant to the claim to be proved or agreed.

Findings in fact

2. The respondent is a substantial organisation which slaughters and packs raw poultry for retail own brands. The group has around 30,000 employees within the UK. The poultry division has around 7000 employees over eight sites within the UK. The respondent operates a site at Coupar Angus which employs around 900 people. The claimant

commenced employment there on or about 9 September 2009. The claimant's contract of employment was lodged (pages 42-45). Although this describes the claimant as a Process Worker, by the time of his dismissal in 2024 the claimant had worked for some time as a Nightshift Hygiene Operative. A Hygiene Operative does physical cleaning of the factory after a shift. This work can be technical and involves specialised cleaning of machines as well as general cleaning of the factory. As a factory processing raw chicken, hygiene is of paramount importance. There are around 66 night shift cleaners who are spread over two shifts. One shift works Monday to Thursday and the other works Friday, Saturday, Sunday. The claimant would usually start work at around 9.00pm. The factory continues slaughtering chickens until around midnight and once the final processing is complete at around 12.30 the claimant and the other cleaners would have access to the machinery to clean it. Generally speaking they would clean these until around 5.30am. They would then have a break before finishing work between 5.30 and 6.00. Each shift had three shift supervisors. These supervisors in turn reported to a Shift Manager. The claimant is of Polish origin and does not have a good grasp of English. There are many people of different nationalities amongst the 900 odd people working in the factory and there is a substantial Polish contingent. It was not unusual for communication between employees to take place in Polish. The claimant's manager Grzegorz Sroczyk also spoke Polish.

3. In or about August 2023 the claimant unfortunately suffered a minor accident outside of work when he fell over whilst walking his dog. This resulted in the claimant injuring his left foot. The claimant had unfortunately suffered a previous injury to his right foot around six years' previously and the additional stresses to his walking pattern caused a resurgence of symptoms in respect of his right foot also. As a result of this injury the claimant commenced a substantial period of absence in or about August 2023. The claimant's SSP form dated 21 August 2023 was lodged (page 55). In addition to this the claimant's fit notes for the period from 28 August 2023 until 15 February 2024 were lodged (pages 57-68). The claimant was absent from work from around 21 August 2023 onwards.

4. The claimant met with his employers as part of the normal absence management process on 18 December 2023. At that point there was a discussion about the claimant obtaining orthopedic boots to wear at work.

5. At the time the claimant had suffered his previous injury to his right foot he had had a meeting with an Occupational Health Nurse employed by the respondent. At that time he had been told that the company would provide him with special orthopedic boots. These were supplied to the claimant and he found them helpful. Over the next few years however the boots were either lost or wore out and the claimant reverted to using the standard wellingtons which were issued to the rest of the night cleaning staff. The claimant said that his doctor had told him that it would be helpful if he could revert to wearing such boots. The person within the company who had dealt with the issue previously had left and the claimant was told that as part of their hygiene procedures the respondent usually required employees to wear the standard wellington boots. The claimant was however told that if he could provide a letter from his GP then the matter would be looked at again with a view to the company supplying him with special orthopedic boots. There was then a discussion when it transpired that the claimant's GP wished to make a charge of £30 for such a certificate. The claimant wanted the employer to pay for this.

6. The matter was raised again when the claimant met with the respondent's HR department on or about 9 February 2024. By this time a return to work was imminent as the claimant's sick note was due to run out on 15 February. There was a further discussion about the boots. The claimant agreed that he would like to wear the special wellington boots which had been prescribed for him previously. The issue of the £30 appears to have resolved itself and the respondent agreed that these would be provided. It was agreed that the claimant would take his accrued annual leave before he returned to work. This meant that although the claimant's fit note expired on 15 February he would be on holiday thereafter and return to work on 20 March 2024. It was agreed that he would work half shifts for the first two weeks so as to give him a phased return to work.

7. An email exchange from the claimant's shift manager Grzegorz Sroczyk to HR was lodged (page 71). Within this HR were asked to obtain the claimant's foot size so that the boots could be ordered. On 29 February 2024 Beverley Watt of the respondent's HR department emailed the claimant asking him to confirm his shoe size. This email was lodged (page 72). The claimant did not respond to this email in any way.

8. A further email was sent on 29 February advising the claimant that his phased return for two weeks meant that when he returned to work his shift would start at midnight rather than 9pm.(page 73). One of the reasons the respondent did this was because the shift manager was always extremely busy at 9pm and it was thought beneficial to have a later start so that the manager could deal with the claimant's return and any issues that arose. Once again the claimant did not respond to this email.

9. At some point one of the claimant's colleagues Marta Wojcik telephoned the claimant and asked him his shoe size. The claimant provided this information. The claimant was on friendly terms with Ms Wojcik who worked with him on night shift. They often travelled to work together.

10. On 20 March when the claimant was due to return to work he turned up at 9.00pm which had been his previous start time. He was not supposed to start until midnight. Nothing had been organised at that point regarding his boots although it appears that they had arrived in the respondent's factory. The claimant found that his feet were sore working in ordinary wellingtons and he left the site around 2.30am.

11. On the next evening the claimant once again started work at 9.00pm. Shortly afterwards an incident took place which led to the claimant's dismissal. The claimant was asked to go into the management office by the shift manager Grzegorz Sroczyk. Marta Wojciz and another individual named Przemek Jedraszek were also present but did not take any part in the incident. There is a very thin partition wall between the office where the claimant met Mr Sroczyk and the adjoining office. Mark Wilson the respondent's Health and Safety Manager and Claire Rodger were both in the adjoining office.

12. During the meeting the claimant sought to raise the issue of his boots whilst Mr Sroczyk sought to raise the issue that the claimant had turned up two days running at 9.00pm rather than twelve midnight as he had been told. As noted above, the reason the claimant had been asked to attend at midnight rather than 9.00pm was firstly because it was part of his phased return to work but also more importantly because the managers had a great deal of work to do at the beginning of a shift and it had been thought there would be more time to deal with the claimant's return to work issues if he came at midnight rather than at the start of the shift. As a result of the incident Mr Sroczyk considered that the claimant had acted aggressively towards him. Mark Wilson came in to the room at the end of the altercation having heard raised voices. Mr Sroczyk told the claimant that he was suspended pending an investigation into his abusive behaviour. The claimant was told to leave the site which he did.

13. Very shortly after the incident Mr Sroczyk sent an email to Beverley Watt of the respondent's HR department together with various others within the respondent's management structure including Craig Williamson the Head of Technical. It is probably as well to set out the terms of this email in full (page 80). He stated:-

"Good morning

Unfortunately, I had to suspend Robert last night due to his aggressive and verbal abuse toward my person.

Robert was called to the office to be questioned why again he start his shift at 9 pm and instead as advised by HR team at midnight.

Its start as normal discussion he was ask, why you start your shift at 9 pm not as informed by business. His respond that because yesterday he had to find his bits (not sure to what he refers to) and he make decision he will start at 9 pm again. Although he was informed today by Bev his shift start midnight. At this point I told him it's not up to him to decide what shift his working, his reply 'my health is more important' and start to lean against me with high vice – which I took as aggressive. At this moment I call him by his name with higher tone to stop him coming closer, this where he starts to swear to me in polish. This don't stop him, so I got up from my

chair standing replying to Rober he is suspended for investigation for abusive behaviour and walk to next office where Mark Wilson was sitting.

Did ask Mark for help informing Robert was abusing and being suspended, he escort him to the main gate for me.

Could you please be so kind to arrange disciplinary investigation with Rober asap, as I would normally not suspend people. But I didn't feel insecure this why I've made that call as he clanged his fist.

Other people in H&S cabin who could witness were:

- *Mark Wilson*
- *Marta Wojcik*
- *Przemek Jedraszek*
- *Jane Burns"*

14. Following the incident the claimant had left the respondent's premises and gone home where he slept until around 1.00 pm. When he got up he sent an email himself to Beverley Watt of the respondent's HR department. Again, it is probably as well to set out the terms of this email in full (page 81):-

"Hi Beverley

I'm unsure whether the situation that happened last night constitutes a formal complaint against my manager Grzegorz, but I want to make you aware of it.

I arrived at work for 9.30 pm last night as I suspected that nothing will be ready for my return and I knew there will be no chance organising anything later at night. Day before I had to work in normal shoes (not orthopedic as instructed by doctor) and my feet are already sore. I did not even have a locker because mine was taken by somebody.

Grzegorz asked me what I was doing in the factory at this time

I said that I came to work.

He said that I was informed by e-mail of start at midnight.

I said yes, I got the e-mail, but because absolutely nothing was ready for my return on Wednesday and my feet were sore due to lack of appropriate footwear I thought …

At this moment Grzegorz shouted at me and asked 'did you think'??

This situation was already stressful for me without manager trying to intimidate and belittle me.

With a raised voice I responded to him 'yes, I did think'

G got up, went to another room and asked H&S officer if he heard me shouting at Grzegorz. After that Grzegorz instructed me to leave the factory.

I think this situation is unacceptable and could have been prevented by manager taking responsibility for member of staff returning to work, organising it and perhaps communicating with me.

As this matter is serious please only communicate with me regarding this in writing.

As for my return to work I am meant to start at 18.00, please can you confirm this is still the case either by phone or by e-mail."

15. Subsequently on 22 March 2024 the claimant received a letter which was attached to an email. The letter confirmed his suspension. It was written in English with a copy in Polish. The English copy is at page 76-77 and the Polish copy at page 78-79. The letter confirmed to the claimant that he was suspended to allow an investigation into allegations of aggressive behaviour and verbal abuse towards his line manager. He was told that the allegations constituted gross misconduct and potentially a breach of trust and confidence. He was advised that he may not enter the site or discuss the matter with his colleagues and that he must co-operate with the investigation. He was advised that if he had any documents, witnesses or information that he thought would be relevant to the matter under investigation he should advise the respondent as soon as possible. A copy of the disciplinary procedure was attached to the email.

16. On the morning of 22 March Mr Sroczyk sent a further email to Beverley Watt and the other recipients of his earlier email stating:-

"In last sentence I mean that I really felt insecure with him being so close with closed fist, that's why I have suspend him.

Just for all to be aware this is not first time when he is doing this to other people. Jane report him and he has been issued with file note by Viktorija. This stops us moving this to the disciplinary process." (page 80)

17. One of the recipients of Mr Sroczyk's two emails was Mr Williamson who is the respondent's Head of Technical. He saw the emails the following day but did not become involved any further at that stage. A few days later Mr Williamson was asked to conduct a disciplinary hearing by Beverley Watt. He was approached verbally by her. He then received a calendar invite and was sent various documents. These included copies of the two emails he had already seen together with the claimant's email and statements which Beverley Watt had taken from two of the witnesses named by Mr Sroczyk. A witness statement was given to him from Mark Wilson. This was lodged (page 82). Mr Williamson's understanding was that Mr Wilson had been asked to provide such a statement in an email from HR. The statement contains a statement of truth and states that Mr Wilson was HS&E Manager having been employed by the company for 14 years. It goes on to state:

"On the evening of Thursday, March 21, 2024 at approx. 21:00 PM, I saw Mr Robert Pawlicki enter the hygiene office and start speaking with his manager Mr Grzegorz Sroczyk. As the hygiene office door was wide open, I could clearly hear the conversation in polish as I worked at my desk 2 meters away.

Although I tried to blank out the conversation, this became difficult as Mr Pawlicki was raising his voice at Mr Sroczyk in what I'd describe as angry tone. Mr Grzegorz Sroczyk was speaking but in a calm tone.

Although I do not understand the polish language, I did hear Mr Pawlicki use the word, Kurwa at least once possibly twice. I have myself during my time as H&S manager been called this word and know it. There was also a scuffle sound from the office, so I stopped what I was doing and turned

to look towards the open office door. Mr Grzegorz Sroczyk then appeared at the door visibly shaken and moving away from Robert, saying to Mr Pawlicki you swear at your manager, Mark did you hear him swear at me? Robert your suspended for abuse, please leave the site. Mr Sroczyk again asked if I had heard what Robert had called him and I nodded yes, Mr Pawlicki then walked out of the hygiene office.

Mr Sroczyk looked visibly shaken and was backing away from the taller Mr Pawlicki, as he asked if I would escort Mr Pawlicki off site. This I did with Mr Pawlicki walking with me, Mr Pawlicki tried to start conversation with me, but I told him to calm himself and that he should discuss the matter the following day, when he was in a calmer mood. He then left site and I informed security that he was not to be allowed back on site until the morning."

There was also a short email from Jane Burns dated 26 March sent to Claire Rodger of HR which stated

"Morning Claire,

Regarding the incident with Robert Pawlicki in the office on Thursday 21st March 2024. I was in the health and safety office doing a back to work with Przemek Jedraszak and Grzegorz was having a conversation with Robert about phase return hours about what time to come in. During this conversation all I heard was Robert getting angry and raising his voice very loudly, I don't know what was said as it was all in Polish. Grzegorz was then asking Robert to leave the building numerous times. He also asked Mark Wilson if he heard Robert, and he said yes. Grzegorz and Mark, both escorted him off the premises." (page 84)

Mr Williamson understood from Beverley Watt that four witnesses had been mentioned by Mr Sroczyk but that the two other witnesses who were both Polish had declined to give statements. Mr Williamson understood that as part of the Polish community they didn't want to get involved.

18. On 1 April Nicola Barrie an HR Administrator with the respondent sent a letter to the claimant inviting him to a disciplinary hearing which was to take place on 3 April before Mr Williamson. A copy of this letter was lodged (page 85-86). The claimant was advised that he had allegedly acted in an

aggressive and verbally abusive manner towards his line manager and that the allegation was a potential breach of trust and confidence and that the allegations constitute gross misconduct. The claimant was advised of his right to be accompanied. The claimant contacted HR to advise that he had a medical appointment at the time and the meeting was thereafter rearranged. A fresh letter was sent on 9 April confirming that the meeting would now take place on 11 April 2024 (pages 93-94).

19. A disciplinary meeting took place on 11 April. The claimant attended. He brought a Klaudia Sosnowska with him to help with translating. Nicola Barrie attended along with Mr Williamson to take notes. Ms Barrie's note of the meeting was lodged (pages 95-96). I considered that on the balance of probabilities this was a reasonably accurate record of what took place at the meeting. Although the claimant did not mention this at the time the claimant in fact took a clandestine recording of the meeting. The respondent was not advised of this until shortly before the tribunal hearing. They were then provided with a copy of the recording and produced a transcript. The transcript was made by the respondent's solicitors with a view to seeing what had taken place at the meeting. During the hearing the claimant was not prepared to either confirm or dispute that the transcript was an accurate transcript of the recording. In the circumstances given that I did not hear any evidence from the person who had made the transcript I was not in a position to make any findings about this.

20. During the course of the meeting the claimant set out the background to the incident. He then went on to say that he had a verbal argument with Grzegorz. He said that

"he went to Mark and said did you hear him screaming at me, then mark asked me to leave the site"

He said he had asked Marta. When the statements of the two witnesses were read he said

"I admit I swore on one occasion, when I was asked to leave. I said to Marta, 'Fuck, I didn't do anything wrong' there was 4 people in the room, why only 2 statements? Marta should have statement, she was there."

The claimant said his position was that swear words could be used in different ways. He said you can swear at someone directly or you are just saying it out loud but not directed at anyone. He denied swearing at Mr Sroczyk. He also said that his voice was perhaps different due to dental surgery. He said that he was not aggressive. At the end of the hearing Mr Williamson told the claimant that he would remain on full suspension meantime and would be told the outcome in due course.

21. Following the meeting, Mr Williamson felt that he should try again to obtain statements from the other two witnesses. He was very keen to come to the right conclusion. He was aware that the conversation had taken place in Polish. It was clear on the evidence that the claimant had been shouting and that the claimant had used a swear word. Although Mr Sroczyk understood Polish neither of the other two witnesses who had given statements did. The two witnesses who were in the same room who would have understood what was being said by the parties had declined to give statements. Mr Williamson went to speak to both of these individuals directly. He spoke with Marta and asked her if she would like to make a statement. She told him that she was not prepared to give a statement. She said that she did not want harm to come to her family or herself. He also attempted to obtain a statement from Mr Jedraszek with similar results.

22. Mr Williamson decided that he would speak to the two witnesses who had given statements as well. These both worked on night shift so that had to be done early the next morning. He asked Mark Wilson if he was clear that the claimant had sworn at Grzegorz Sroczyk. Mr Wilson said that he was clear that the swear word Kurwa had been used but given that he did not speak Polish he was unable to say how it had been used. Mr Williamson asked Mr Wilson if the claimant had been aggressive. Mr Wilson stated that the claimant definitely had been aggressive. He said that the claimant's fists were clenched and that Grzegorz Sroczyk was visibly shaking. His evidence in this regard was considered by Mr Williamson to be fairly graphic and was definitely to the effect that the claimant was very aggressive. Mr Williamson also spoke to Jane Burns and she confirmed that the claimant had sounded very aggressive to her.

23. Mr Williamson decided he would approach Marta again and said that he was just wanting to check things. He said that she would not require to produce a statement and that whatever she told him would be considered as off the record. She said that she still did not want to say anything. Mr Williamson explained the context that he was trying to determine whether the claimant had acted aggressively since the claimant denied this. He wanted to get things right. Marta again refused. Mr Jedraszek was not available at the time to be re-interviewed by Mr Williamson. Mr Williamson discussed matters with Valerie Calder and asked if there was anything in the claimant's file that might be relevant. Ms Calder advised him that there was a file note in the claimant's records. The file note was lodged (page 54). This referred to an incident on 27 August 2022. It was stated in the form that the claimant had *"Screamed on the senior team leader (right on the face) inappropriate manner after was asked to complete reasonable management request."* It was stated to be *"Completely unacceptable attitude toward management team member and must stop immediately."* It was signed by the manager but had not been signed by the claimant.

24. Mr Williamson's understanding of the disciplinary policy was that previous warnings expired after six months and that accordingly he was not in a position to take this matter into account. In actual fact whilst the respondent's policy confirmed that formal warnings would expire after a period of time that was not the case with file notes such as the one which had been issued to the claimant. In any event Mr Williamson decided to ignore the file note when making his decision.

25. Having considered matters Mr Williamson decided that he was satisfied that the claimant had behaved aggressively towards his line manager. He noted that Mr Sroczyk had been shaking. He felt this was entirely unacceptable. Employees ought to be able to attend work and do their job without being treated in such an aggressive way. He decided that in the circumstances the appropriate sanction was dismissal. He did not believe that a final warning would be sufficient given the fact that the claimant had behaved aggressively towards his line manager. He did not believe that the claimant could be trusted not to behave in this way again. The claimant had not shown any remorse.

26. On 16 April the respondent wrote to the claimant confirming the outcome of the hearing. The letter was lodged (pages 97-98). Along with this letter the claimant was sent a copy of the meeting note lodged at pages 95-96. The claimant was told that if there were any factual inaccuracies in the document he should advise Nicola Barrie by Thursday 18 April 2024. The claimant did not. The claimant was advised that his last day of employment would be 17 April 2024. He was advised of his right of appeal.

27. On 18 April 2024 the claimant submitted a letter of appeal. The letter was lodged (pages 99-100). In the appeal letter the claimant referred to four numbered paragraphs. In the first paragraphs he sets out the background to his return to work and sets out his view that the company failed to manage his phased return in an acceptable manner. In paragraph 2 he stated:

"I dispute your statement that my manager had reasons to feel threatened. At no point did I swore at him. As I described during the meeting on 11/04 I may have used the word 'kurwa' however this was in a way of a comma (sentence break) and not directed to Grzegorz. Similarly Scottish colleagues throw an 'f' word into the sentences.

After being asked to leave the premises I left in a calm manner and did not require escorting out."

In paragraph 3 he stated:

"The fact that out of 4 people who witnessed the conversation only 2 were asked to testify proves that the investigation was not an objective one. Especially when taking into account that 2 persons who actually had a chance to understand both content and the tone of this conversation because Polish is their native tongue were not asked to testify. I have pointed this out during the disciplinary meeting but Craig Williamson chose to disregard those comments and did not ask for their statements. …."

In the fourth paragraph the claimant mentioned the expired file note and stated that he had not been provided with a copy of this. He then stated that the disciplinary process stated that employees would not normally be dismissed for a first act of misconduct. He disputed that the act constituted gross misconduct.

28. The appeal was dealt with by John Nicholson who was the Site Director. He has been Site Director since January 2021 and as such was the most senior person at the Coupar Angus site with responsibility for around 900 staff. He had had no contact with the claimant prior to hearing the appeal. Mr Nicholson has had considerable experience of conducting disciplinary and appeal hearings during his 40 years in management. Since joining the respondent in 2021 he had dealt with nine or 10 appeals. He has had training. Out of the nine or 10 done he has not upheld the disciplinary sanction in one or two cases.

29. Mr Nicholson was initially told verbally by HR that an appeal would be coming in and that he would be dealing with it. He was then passed the letter of appeal and instructed HR to set up an appeal meeting. The Head of HR then produced a bundle for him which comprised all communications and all notes. This was put in a pack. It contained the initial statement from Mr Sroczyk, the claimant's email of 22 March, the two statements and the notes of the disciplinary hearing. Mr Nicholson immediately noted that there were only statements from two of the four witnesses named by Mr Sroczyk. He was advised by HR that the other two had refused to give statements. He then spoke to Mr Williamson who confirmed to him that the other two were not prepared to give statements. Mr Williamson confirmed to him what he had done to try to persuade Marta to give a statement. Mr Nicholson asked Mr Williamson to go back and speak to her again and on this occasion offer her complete anonymity. Mr Williamson reported back to him that this had been done and that her position was unchanged. Mr Nicholson also obtained various emails from Beverley Watt regarding the contact between the claimant and HR prior to his return relating to the attempts to get new sizes for his boots. He noted that the claimant had been asked to provide a shoe size but had not responded and that eventually this information had been verbally obtained via Marta Wojciz.

30. The respondent wrote to the claimant on 25 April inviting him to an appeal hearing which was to take place on 1 May. The letter was lodged (page 101). The appeal meeting duly took place on 1 May. The claimant attended and was accompanied by John Nicholl a Senior Shop Steward with the respondent. Mr Nicholson was accompanied by Valerie Calder

the HR Manager and a Klaudia Sosnowska who acted as translator. Ms Calder took notes of the meeting which were lodged (pages 102-103). I considered these to be an accurate although not verbatim record of what took place on 1 May. During the course of the discussion the claimant asked for an adjournment and at the end of that he said that he would need a further adjournment since he had to leave for a hospital appointment in Perth and the traffic might be busy. Mr Nicholson agreed to the adjournment but said that as there were still further points to cover the hearing would continue on a rescheduled date next week. The claimant was invited to the reconvened meeting which was to take place on 8 May in a letter dated 2 May 2024. The letter was lodged (page 105). Those present at the meeting were the same as at the meeting the previous week. A note of this meeting was also lodged (pages 106-107). During the two meetings the claimant raised the point that he believed he had been discriminated against because of his ill health. He referred to what he considered to be the respondent's mismanagement of this. He said that he had previously spoken to Mr Sroczyk about going on lighter jobs but had been just told to go home. He believed that the respondent had a preconceived outcome in mind. During the course of the second meeting he was passed a copy of the file note. He stated that his position was that *"this was 2 years ago, I remember the situation in the locker room, Jane shouted at me and I shouted back. Later Victorija called me in and said file note for aggressive behaviour but I refused to sign."* Mr Nicholson confirmed that the claimant had been wrongly advised that this file note had expired since the company's policy was that such file notes did not in fact expire in the same way as more formal warnings. Mr Nicholson stated that he would consider matters and would convey his decision in writing by the following Friday.

31. As with the disciplinary meeting the reconvened appeal meeting was also recorded by the claimant clandestinely. A transcript of this was lodged (pages 107A-107G). This had been compiled by the respondent's agent. The claimant was not in a position to confirm that this was an accurate transcript.

32. Mr Nicholson sought to approach the matter with an open mind. He noted the claimant's position regarding the lead up but also noted the claimant

had been clearly told to start at 12. He was concerned about the fact that two of the witnesses were not prepared to give evidence. In his experience it would probably have been counterproductive for him to try to reinterview the witnesses himself. He was the most senior person on site and he felt that it would simply put the witnesses under stress without advancing matters. He noted that the witnesses had been asked by HR to provide statements and that they had subsequently been asked by Mr Williamson and that they were adamant they were not going to produce further statements. He found no evidence to support the suggestion that Marta was intimidated by the company. He noted that the correct position was that the file note had not expired but did not feel that the file note really affected the decision one way or the other. His decision would be the same whether there was a file note or not. He was open to lesser sanctions than dismissal however he considered that irrespective of the claimant's length of service it was simply unacceptable for him to behave in an aggressive way towards his manager. He could see no evidence that the respondent had failed to deal with the claimant's absence properly. His understanding was that the boots were actually on site, there was no reason to suppose that if the claimant had turned up at midnight as he was supposed to the boots would have been available for him. He decided to uphold the decision. This was communicated to the claimant in a letter dated 10 May 2024 (pages 108-109).

33. Following his dismissal the claimant has not sought other employment as he considers himself too sick to work. He has been attending medical appointments for issues with his leg and also heart issues. The claimant is in receipt of Universal Credit. He had applied for sickness related benefits but these had been refused on two occasions. Mr Williamson had heard rumours around the factory that the claimant was working as a gardener but the claimant stated these rumours were untrue and I did not consider it necessary for me to make any factual findings regarding this point.

Matters arising from the evidence

34. Whilst the witnesses were at odds as to whether the respondent's actions had been correct or not, there was remarkably little difference between the

evidence of the parties as to the sequence of events in relation to the respondent's investigation of the issue and the course of the disciplinary process. During his evidence the claimant sought to criticise the evidence contained in Mr Sroczyk's email and the two statements from Mr Wilson and Ms Burns which had formed part of the disciplinary case against him. The claimant's position was that he had not acted aggressively towards Mr Sroczyk. He was critical that Mr Sroczyk did not refer to him having clenched his fists in the first email but only in the second email sent at 7.20 on 22 March 2024. I noted that in the first email Mr Sroczyk does in fact refer to his statement as having *"clanged his fist"*. It is clear that Mr Sroczyk's first language is not English and I did not consider that there was anything to the point made by the claimant. I advised the claimant on numerous occasions that what the tribunal was looking at were the actions of the respondent and whether it had been reasonable for them to reach the conclusions they did. At the end of the day I felt that all of the witnesses were trying to give honest evidence to the tribunal to the best of their ability. There was a slight conflict between the evidence of Mr Nicholson and Mr Williamson as to the number of times Mr Williamson had gone back to the other two witnesses. Mr Williamson's own evidence was that he had had limited contact with Mr Nicholson but that he had gone back to the witnesses twice albeit Mr Jedraszek was not available on the second occasion. Mr Nicholson's evidence suggested that he had gone back again after the appeal had been instituted since Mr Nicholson had asked him to do this and had been told that this had been done together with the offer of anonymity. I considered that it was most likely on the balance of probabilities that there had been a further approach to these witnesses and that the most likely explanation for the discrepancy in the evidence was that Mr Williamson had simply forgotten the final time. What was not in doubt however was the claimant's own evidence that he was on friendly terms with Marta Wojciz and yet she did not give any statement to the respondent. This was despite the clear evidence from Mr Williamson which I accepted which was that he had clearly told her there would be absolutely no comeback and that all she needed to do was give her view as to whether the claimant had been aggressive or not. I also note that the claimant did not seek to have Ms Wojciz attend as a witness to explain why she refused to give a statement.

35. On the first day of the hearing the claimant stated that he had intended to call a witness namely Mr Oskar Wojciechowski but that this gentleman could not attend as he was undergoing induction for a new job. He sought to lodge a signed statement from this individual. It was pointed out to him that the tribunal would be happy to hear the evidence of this witness the following day. The claimant said that he would like a witness order for Mr Wojciechowski which he could show to his employer. This was granted on the basis that the claimant would hand deliver it to Mr Wojciechowski later that day. In the event the claimant decided not to call Mr Wojciechowski. Mr Wojciechowski's statement was lodged. This related solely to the claimant's position that he was not escorted from the premises but in fact left the factory alone. During their evidence both Mr Williamson and Mr Nicholson had indicated that the issue of whether the claimant left the premises on his own or was formally escorted by Mr Wilson was not something that was at all relevant to their decision.

Discussion and decision

36. Both parties made full submissions. The respondent's submissions were made in writing and were expanded upon orally. I considered that the respondent's submissions accurately set out the law on the subject of unfair dismissal for gross misconduct which is not controversial. Rather than repeat both sides' submissions below I will deal with them where appropriate in the discussion.

37. Section 98 of the Employment Rights Act 1996 provides that

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."*

In this case it was the respondent's position that the claimant was dismissed for a reason relating to conduct which is a potentially fair reason falling within section 98(2)(b) of the said Act.

38. I had little hesitation in accepting that this was in fact the reason for the claimant's dismissal. Although the claimant stated that Mr Williamson had already determined the outcome in advance of the hearing there was absolutely no evidence before me to suggest that this was the case. The evidence from the documentation showed that the claimant had unfortunately been absent as a result of health issues. The respondent's correspondence showed that they had dealt appropriately with this in a fairly standard manner. There had been a couple of communications issues in relation to the shoes however it appeared to me that this was as much the result of the claimant failing to act appropriately in response to messages sent to him than anything else. There was no evidence whatsoever to suggest that the respondent would have dismissed him if they had not come to the view that he had acted aggressively towards his manager. Having established a potentially fair reason for dismissal the tribunal then requires to consider the terms of section 98(4) which states:

> *"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

39. As pointed out by the respondent in their submission the issue for consideration is whether the employer acted reasonably and the employment tribunal is not entitled to substitute its own views for those of the employer (***Foley v Post Office*** [2000] ICR 1283). The case of ***Burchell v British Home Stores*** [1980] ICR 303 has provided guidance to tribunals over many years as to the approach which should be taken to

the question posed by section 98(4) in a case where dismissal is alleged to be by reason of conduct. The tribunal is not entitled to carry out its own investigation and decide whether or not the claimant was guilty of the misconduct in question. The tribunal's focus is on the action of the employer. The tribunal requires to look at whether there was a genuine belief by the employer on reasonable grounds after reasonable investigation that the employee was guilty of misconduct. If so then the tribunal requires to go on to consider whether or not dismissal was within the range of reasonable responses to that conduct.

40. The famous ***Burchell*** test divides this up into various separate questions. The first is whether or not the respondent at the time of dismissal did in fact hold such a genuine belief in the claimant's guilt. In this case I was in no doubt that the employer in the person of Mr Williamson and Mr Nicholson did hold the view that the claimant was guilty of acting aggressively towards his manager. The second question is whether the respondent had reasonable grounds for holding that belief. In my view there is little question but that the respondent did have reasonable grounds for holding that belief. They had the clear statement from Mr Wojciz the claimant's line manager who stated that the claimant was behaving aggressively. They had the statement from Mr Wilson who spoke graphically of the claimant shouting in Polish and using what Mr Wilson knew to be a Polish swear word. He spoke of the claimant looming over Mr Sroczyk and Mr Sroczyk shaking. Ms Burns confirmed that the claimant had been shouting. In addition the claimant's own evidence was that he was shouting and accepted using a Polish swear word but stated that he had been using this by way of punctuation and emphasis rather than swearing at his line manager. In my view, it would simply not be possible to say that the respondent did not have reasonable grounds for coming to the conclusion they did. With regard to the investigation the incident was a self-contained one. The people who could give relevant evidence were the claimant, Mr Sroczyk and the four witnesses. I was entirely satisfied that the respondent took reasonable steps to interview all four witnesses. It is very unfortunate that two of the witnesses simply refused to give statements. The claimant's position is that this was because they felt intimidated by the company and would not want to give statements which

contradicted their manager. There was no evidence to suggest that this was the case. The respondent's representative quite reasonably set out that the alternative explanation was that as members of the Polish community they did not want to give evidence which if truthful, would implicate and cause problems for the claimant, another member of that Polish community. In any event, I was entirely satisfied that they had taken reasonable steps to obtain evidence from the other two witnesses.

41. It would clearly have been better if Mr Williamson had documented his attempts to speak to the other two witnesses and that their actual response had been recorded in writing. I accepted his evidence however as truthful. I was struck by the fact that he himself had said to them that he was very keen to get matters right. He had offered to Marta Wojciz that she should simply tell him what happened and would not require to give a formal statement as a way of breaking the impasse. I was also satisfied that he had passed on Mr Nicholson's offer that the witnesses could give their evidence anonymously although in reality given that the claimant knew who was there at the time, this would not assist much. At the end of the day there is not much an employer can do if an employee who is a witness simply refuses to say anything about what they have seen. In my view the employer in this case, had no option but to proceed on the basis of the evidence which they did have. In my view it was perfectly reasonable for them to come to the view based on this evidence that the claimant had been guilty of acting aggressively towards his line manager.

42. So far as penalty is concerned the law recognises that there is no "one size fits all" response which an employer is required to make to a specific piece of misconduct. The law recognises that one employer may decide to take one action in response to a matter which another employee may treat differently. The tribunal was only entitled to interfere if the response, in this case dismissal, was outwith the range of responses available to a reasonable employer.

43. I have to say that given the claimant's length of service it was undoubtedly a harsh decision to dismiss him for one act of misconduct. I am however forced to agree with the respondent that this was a particularly serious act of misconduct, given that he acted aggressively towards his own line

manager. I considered that Mr Williamson's comment that this was simply something which the respondent could not accept to be entirely reasonable. The respondent is employing an extremely large number of people on one site, managers require to be able to do their job without being treated aggressively in response.

44. I am mindful of the many strictures from the superior courts that it is not for the tribunal to substitute its own view for that of the respondent. The tribunal can only interfere if the decision is outwith the range of reasonable responses. In this case I do not believe it is possible for me to make a finding that it was outwith the band of reasonable responses for the respondent to dismiss the claimant. It was clearly a decision which they considered carefully and at the end of the day their decision that the severity of the offence and the need to ensure that managers are not subject to this behaviour outweighed any considerations of length of service. The claimant's claim of unfair dismissal is therefore dismissed. Given that the claimant was dismissed summarily for gross misconduct he is not entitled to notice pay. Unlike the claim for unfair dismissal this is a matter where the tribunal's decision as to whether or not he was in fact guilty of gross misconduct is relevant. In this case, having considered the evidence before me which was essentially the same written evidence as that before the respondent my conclusion is that it is more likely than not that the claimant was in fact guilty of gross misconduct and therefore his claim for notice pay falls. Although the claimant had ticked the box claiming holiday pay and arrears of pay he did not give any evidence in relation to this. His pay slips were lodged (page 110-113) and I am not in a position to make any finding that he was due any further sums following the termination of his employment.

I McFatridge

Employment Judge

3 December 2024

Date

Date sent to parties **6 December 2024**