EMPLOYMENT TRIBUNALS

Claimant: Mr R Ogden

Respondent: Booker Limited

Heard at: Manchester (via CVP) **On:** 1 October 2024
(deliberation on 8 October 2024)

Before: Employment Judge Shergill
(sitting alone)

Representation

Claimant: in person
Respondent: Mr R Mitchell, Solicitor

RESERVED JUDGMENT

1. The claim for unfair dismissal on grounds of conduct brought under the Employment Rights Act 1996 is well-founded.

REASONS

Introduction

1. Mr Ogden ('the claimant') worked for the respondent as a driver/trainer at its Royton site. He had worked for the respondent since 29/02/16 and it is not in dispute that he was dismissed on 26/10/23. The respondent says the claimant was dismissed for gross misconduct due to breaching the dignity at work policy. The breach related to saying certain inappropriate things to a co-worker. The claimant says he was unfairly dismissed because proper process was not followed and/or the outcome was too severe.

The Hearing

2. The hearing was conducted remotely. It is unclear why the respondent's representatives (from a large national firm) had not notified the tribunal as

to there being a bundle of 313 pages (a substantial number of which were meeting notes relevant to the case); and 30 pages of fairly dense witness statements. The bundle may have been sent in good time but was not available to me until 9am. I took a short time to read into the case, but that was spent navigating the witness statements and a limited number of other documents. There was fairly detailed oral evidence, which required my prompting to keep matters to a very tight timescale. The hearing managed to conclude having heard all the evidence and submissions on liability only. The decision was reserved and has taken some time to read more extensively into the bundle, consider applicable law and draft. The case should have been listed for a minimum of two days in light of this, and perhaps should be noted for future cases.

3. The Tribunal heard evidence from the claimant on his own behalf; and two witnesses for the respondent. They were Paul Vile ('PV') who was the disciplinary manager and Jon Lomas ('JL') who was the appeal officer. I had regard to an agreed bundle of documents, and the witness statements of all three witnesses. There were additional documents uploaded at my direction to assist navigation of the case and to assist with some legal principles. There is a case list of many other people involved in the background to this case, none of whom provided witness statements. That was somewhat surprising as some of them were witnesses of fact to the events in question. The claimant thought they would be called by the respondent. Of course, parties can choose who they wish to call. The problem with not having called a witness, and where witnesses before me do speak to the same matter, the tribunal will have to decide what to make of a particular point of contention. I am of course entitled to fill evidential gaps navigating from what evidence is before me, giving appropriate weight to it, and if required I can make reasonable inferences to draw factual conclusions. However, I have to avoid speculating about matters. My judicial style is not to name people who have not provided signed witness statements, so I will refer to other characters by their initials/title.

The Issues

4. There were no issues as regards employment status, date of dismissal or time limits. There was an agreed list of issues. However, in an effort to move the case on, insufficient time was spent considering this. I have re-ordered and/or added to the list as I consider it will facilitate proper assessment of the live issues before me. The issues are better encapsulated below:

    a) Has the respondent shown the reason or principal reason for dismissal was the claimant's misconduct?

    b) Was it a potentially fair reason under s.98(2)(b) of the Employment Rights Act ("ERA") 1996?

    c) 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 usually decide, in particular, whether:

i) the respondent genuinely believed the claimant had committed misconduct;
ii) there were reasonable grounds for that belief;
iii) at the time the belief was formed the respondent had carried out a reasonable investigation;
iv) the respondent followed a reasonably fair procedure;
v) dismissal was within the band of reasonable responses.

Relevant Legal Principles

5. I have to apply section 98 of the Employment Rights Act 1996 in deciding the case. A synthesis of the key issues is: a) it is for the respondent to show on balance that the claimant was dismissed for a potentially fair reason; and b) the question of whether the dismissal was fair or unfair depends on whether in the circumstances the employer acted reasonably.

6. In considering the question of reasonableness, I have had regard to the decisions in **British Home Stores v. Burchell** [1980] ICR 303; **Iceland Frozen Foods Limited v. Jones** [1993] ICR 17; **Foley v. Post Office and Midland Bank plc v. Madden** [2000] IRLR 82. I must apply the test outlined in the '**Burchell**' case. The three elements of the test are:

   6.1 Did the employer have a genuine belief that the employee was guilty of misconduct?
   6.2 Did the employer have reasonable grounds for that belief?
   6.3 Did the employer carry out a reasonable investigation in all the circumstances?

7. An employer is not obliged to believe one employee over another in forming an honest/ genuine belief on reasonable grounds that the misconduct occurred (**Salford Royal NHS Trust v Roldan** [2010] EWCA Civ 522).

8. A tribunal is not allowed to substitute its own decision as to what it may have decided in the same situation. The tribunal's role is to decide if the respondent's decision to dismiss the claimant fell within the band of reasonable responses open to an employer. I must be mindful of not taking a '*substitution mindset*' (**London Ambulance Service NHS Trust v. Small** [2009] EWCA Civ 220). That approach applies to both the investigation and the decision to dismiss itself (**Sainsbury's Supermarket Ltd v. Hitt** [2002] EWCA Civ 1588.

9. I am grateful to Mr. Mitchell in assisting the tribunal with case law on 'corporate knowledge' (as I referred to in the hearing). I am satisfied **Orr v Milton Keynes Council** 2011 ICR 704, CA applies to this case. This is not a case which would fall under the limited exception (relating to deceit at an earlier state in the disciplinary process) set out in **Royal Mail Ltd v Jhuti** [2019] UKSC 55. In applying **Orr**, I can only consider the relevant state of mind of the disciplinary officer concluding that dismissal should take place. I cannot impute 'corporate knowledge' to the respondent as that would be tantamount to imputing the officer as having acquired all the relevant information in the organisation's possession. That would be contrary to section 98 and the authorities.

10. On a similar theme, I can only take account of facts or beliefs that were known to the respondent at the time of the dismissal (**Devis v. Atkins** 1977 ICR 622, HL). In particular, the tribunal is furnished with significant additional evidence, so my assessment of reasonableness of what the respondent did is only based on what facts were available at the time (**CRO Ports London Ltd v. Wiltshire** EAT 0344/14).

11. I need to be satisfied as to the identity of who took the decision to dismiss; and I should look at the disciplinary process and any appeals process by the respondent as part of the overall process of dismissal. Applying **West Midlands Co-Op Ltd v. Tipton** 1986 ICR 192, separating the dismissal process from the appeal was artificial; and facts coming to light during the appeals process are relevant in considering whether the respondent's decision to dismiss was reasonable. An appeals process plays a part in the overall determination of fairness, though unfairness in the appeal will not always or inevitably lead to a finding that the dismissal was unfair (**Mirab v. Mentor Graphics Ltd** EAT 0172/17).

12. Dismissal does not have to be the last resort for it to fall within the band of reasonable responses (**Quadrant Catering Ltd v. Smith** EAT 0362/2010). However, there may be instances when mitigating factors were identified by the respondent (not the tribunal of its own volition) which would allow a tribunal in 'a small number of cases' to conclude that no reasonable employer would have dismissed. (**East of England Ambulance Service NHS Trust v Sanders** EAT 0319/15). It was also observed that as part of the investigation, an employer may be required to investigate mitigatory factors bearing upon sanction for proven or admitted misconduct (**Tesco Stores Ltd v. S** EATS 00040/19).

13. I should to take into account the respondent's' size and administrative resources and have regard to equity and the substantial merits of the case. The consideration of equity is part of the reasonableness assessment and not standalone (**Devis).** Minor procedural defects may not be material to an assessment of reasonableness (**D'Silva v MMU** EAT 0328/16); and it is important to consider 'substance and procedure' and looking at 'the whole procedure, including the decision to dismiss, in the round' (Langstaff P, in **Sharkey v. Lloyds Bank Plc** EATS 0005/15).

14. I should also consider if the respondent has complied with internal policies and procedures, and done so correctly (**Sinclair v Wandsworth Council** EAT 0145/07 and **Welsh National Opera v Johnston** [2012] EWCA Civ 1046).

15. In assessing whether the respondent followed a fair procedure, I should take account the ACAS Code of Practice on Discipline and Grievances.

16. The claimant suggests he has been singled out and/or there has been inconsistency in disciplinary punishment. That may be relevant where there is true parity between cases of similar misconduct; and an employer has some flexibility (**Post Office v Fennell** 1981 IRLR 221; and **Paul v East Surrey District Health Authority,** CA, [1995] IRLR 305).

17. The claimant also suggests that the respondent failed to enforce its disciplinary policies amongst the workforce which as I understood it, created a 'false sense of security'. This may or may not be relevant for my consideration. (see for example, **JJ Food Service Ltd, Kefil** 2013 IRLR 850).

Submissions

18. Mr Mitchell submitted that the claimant was not unfairly dismissed on 26/10/23 and that the reason for the dismissal was his misconduct. As such this is a potentially fair reason under section 98. He said the respondent had a genuine belief about the misconduct arising from the incident on 26/07/23. That incident had a severe impact on the other employee. The only reasons for dismissal advanced by the claimant were in relation to procedural points and consistency arguments. The claimant was suspended from work and the disciplinary hearing was adjourned for other matters to be further investigated. PV advised the claimant that he was being summarily dismissed for gross misconduct. The matter falls within the reasonableness test set out in Birchall. It was submitted that the procedure has been compliant. The respondent accepted that there was a GDPR breach and that notes should have been signed promptly. It was submitted that this along with the suspension had no bearing on the fairness of the hearing. The respondent submits that the outcome to dismiss was consistent with previous decisions and complied with the ACAS Code, as such it was reasonable. He also made submissions on relevant law.

19. The claimant said that his case was about the reasonableness of the process and that his main issue had been that he had not been given a fair hearing by his former employer and that the investigation had been unreasonable. He said that his whole argument was summed up page 68 and said that there was a wider pattern within the organisation and he was the unlucky one to have been sanctioned. He said there had been previous altercations between employees, including managers and that the business had been aware of this. He said that his incident was an isolated one, it was an outburst, a one-off compared to an otherwise exemplary record. He said that he had been singled out and that there were cultural issues in the team including with the management. He said that he had not intended malice when he said what he said and that no training on dignity at work had taken place and as such how was the process fair. He said that the ACAS code had been breached because there were weeks and months between signing of the meeting notes and that there was a toxic environment.

Findings of fact

20. This case has a cast list of 15 people, some of whom were directly involved or witnessed the incident, some of whom were part of the investigation, grievance or disciplinary process. Some of these people have appeared at various points during the internal processes. It was unclear why other witnesses were not relied on by the respondent and why further time was not built into the hearing. It is a confusing factual matrix and as such I have limited myself to the key issues that have arisen in my reading, almost entirely on the hoof and post-hearing. I have filled in the gaps navigating

from the documents before me, any oral evidence I heard and made reasonable inferences to fill gaps.

21. I have decided the case only taking the relevant evidence into account, on the balance of probabilities.

22. As I have set out above, I have to restrict myself to what was known by the decision makers at the time, I have therefore not re-read items 15 to 23 in deliberations. These documents relate to a 'protector line' complaint carried out at head office. All parties seemed to agree it would not have been disclosed as part of the disciplinary process. To the extent I now have limited recall of their contents I have put it out of my mind.

23. I have concentrated on what I consider to be the most probative and relevant evidence in the bundle. That is PV's two interviews with the claimant in October 2023, what PV did in the intervening period, and what evidence he had from other witnesses of fact leading up to him issuing his dismissal letter. I have then considered what is said in the witness statement and from oral evidence. I have used initials and marked bundle page numbers in brackets. A similar approach is taken regards the appeal, and I have taken account of the claimant's various accounts in the permitted part of the bundle.

24. There are several themes that have arisen from the evidence I have looked at, which I consider are material to my consideration. I will approach the findings of fact under those broad themes.

<u>The incident on 26/07/23</u>

25. On 04/08/23, a female employee raised a formal grievance claiming bullying comments had been made against her. I refer to her as the victim. She said that on 26/07/23 the claimant was in the office with others. There was some discussion about donuts, weight loss and attending a weight loss club. The victim alleged that the claimant had been 'very aggressive' in saying derogatory words to her. The common theme that has run through the disciplinary process is that the claimant uses the terms 'fucking' and 'mong' either together or in the same sentence. This was directed at the victim. Victim says that the comments made her feel humiliated in front of the managers and staff that were in the office of the time she said she felt violated and shocked.

26. She goes on to say *'… If [PF] and [MF] would [have] stepped in, I feel the situation could [have] escalated with how aggressive [the claimant] was being.*' I return to PF and MF under the 'workplace culture' heading. They are both managers in the office.

27. The victim took some time off work (I note elsewhere before and after the formal grievance was lodged) and she says in her grievance letter that it had been a difficult decision to make a formal complaint that she did so because she felt humiliated and anxious. She wanted some action to be taken so that it did not happen again to herself or other members of staff.

28. GS is an important witness to the immediate aftermath of events. The victim rang him later on, in tears. She was ‘sick of it’ and said ‘I have had enough’. His account refers to her telling him about issues when she first started working in the office that she thought the two female managers were being a bit awkward with her [105]. GS also suggests that others were ‘having a go’ at the victim, as she had hinted the time. One manager was ‘funny with her’ seemingly because the victim was seen as not liked or capable from my understanding of GS’s account [106]. MN in his interview questions suggested that the claimant’s actions were the ‘straw that broke the camel’s back’. That seems to be the case in my view, not only in relation to the claimant but the victim’s perception of her working relationships with others.

29. The claimant accepts he said the following:

> '"Becky you can't do that, are you a fucking mong? no wonder it takes you 19 weeks to lose a stone, it hasn't taken me 19 weeks" I said it has because I have been dieting as well.’ [93]

30. I am satisfied the use of expletives by the claimant was clear from his interview responses with the MN in the grievance interview. He uses the ‘F’ word a number of times at [97]. I am satisfied that swearing should not be acceptable in a workplace, although common everyday experience, particularly in the North is that the F word is used quite often spoken in the public sphere. It is interesting that the manager conducting the interview did not intervene to stop the claimant from using expletives. It tends to support a culture within the workplace that stood apart from what might be considered acceptable workplace norms. I return to this common theme about a culture in the workplace below.

31. Various witnesses heard something or the other. Some heard the word ‘fucking’ others say they heard ‘licking’ and or ‘windows’. PV preferred the extended version that the victim had complained of (i.e. licking windows) at para 39.1WS; though that seems to contradict what was cited in the dismissal letter [190] which is more in keeping with the claimant’s account. The claimant denies ‘mong’ was used as a reference to people with Downs Syndrome and says that it is a common Northern term referring to stupid. The ‘windows’ aspect was not put to him and it is unclear what that adds to the case. I have decided the account at para 29 above accords with dismissal letter and was more likely to be operative on PV than his witness statement account.

32. The tribunal is entitled to give words their ordinary dictionary definition meaning. The OED entry for the term ‘mong’ states:

> ‘British colloquial. offensive.
> 1980–
> A person with Down's syndrome (cf. Mongol n. A.2); (more usually as a vague term of abuse) a person considered to be stupid or foolish.’

33. I am satisfied that the claimant was not using ‘mong’, as Mr Mitchell asserted, as a ‘protected characteristic’. The dismissal letter and interview notes do not support that contention. It is clearly an offensive term more usually as a vague term of abuse, which supports what the claimant was saying in his evidence.

34. As the term of abuse is not one relating to a protected characteristic, the case should be viewed in that light in my assessment.

35. Furthermore, as the dictionary definition confirms, it is colloquial. That of course does not detract from the offensive nature of it. What it does clarify in my mind that this term is not on a par with use of such offensive terms as the racist words 'N-word' and 'P-word' or the homophobic terminology 'P-word' or 'F-word' etc. These are offensive par excellence, not commonplace in society generally since the early 2000s; and are not colloquially used. These sorts of terms are likely to be ones which if said in context of a criminal offence would lead to aggravating circumstances for sentence. This conclusion is relevant in my view for the surrounding circumstances and comparative sanctions to other disciplinary case.

36. Overall, I am satisfied on balance that even on the admitted interaction with the phrase 'fucking mong' is an offensive term to use in the workplace. On the face of it, use of an offensive term is likely to be a prima facie breach of workplace discipline in most workplaces.

37. I am satisfied there was a duty of care to the victim who had made a formal complaint about an offensive term being used.

38. The respondent was therefore entitled to undertake an investigation and decide whether to rely on its disciplinary processes.

Issues relating to the apology

39. I remain unclear as to when the respondent considers the claimant could have apologised. There are various references to dates in the evidence of when the claimant was present at work and/or away from work. Similarly, there are different dates when the victim was present or absent. PV was told at the first disciplinary hearing by the claimant that he did not see the victim the day after, on 27 July. He said that 17 August was the first time he had seen her as they were both on site [169] (and that account was not sufficiently undermined in my view). This of course is the day before the claimant is interviewed by MN as part of the grievance investigation. That fact appears to have been viewed negatively by the victim, MN and PV – my takeaway was that there was a view it was 'too little too late'.

40. PV then speaks to the victim on 24/10/23. She says she was back at work the day after the incident on 27/07/23 and 'nothing was said to me then'. She had an emergency holiday (presumably because she was upset) between 28/07/23 until (Wednesday) 02/08/23. She then says she finished work on 05/08/23 for two weeks. That would actually take the date to Saturday, 19 August (so that cannot be correct as we know that they spoke in person on 17th of August). The only dates she was in the office between the incident and the apology was 27th of July, and 2nd, 3rd, 4th and possibly 5th August depending on when the holiday started. That is four days possibly five, further reduced by the unchallenged account that the claimant was not in the same office on the 27th.

41. I am satisfied there were a limited number of days that the two parties were in the office together. That tends to support the claimant's account at 17 August was the first day he had seen her. The chronology I have been provided with is silent as to the two-week vacation she had. There is reference to it in the hearing notes but it is unclear how much notice was taken by PV of this period of absence in any of the evidence before me, despite the apology issue being a material consideration.

42. GS stated that he spoke to the claimant a week later and 'he was really sorry' [105], the claimant did not say he was going to apologise. GS said to him to go and say you are sorry and be done with it. GS goes on to say that he himself was surprised as to how 'out of hand' the incident has become. He also told the victim 'you do not want Rob to lose his job do you?' She indicated he wanted him to apologise. GS said that when he had spoken to the claimant 'he was nothing but mortified'.

43. The relevance of all this is that PV was invited to pursue disciplinary processes by MN and the fourth bullet at [68] refers to the significantly disputed assertion that the claimant had told MF he had no intention of apologising as he did not like the victim. That is a material part of the referral relating to a comment MF says [75], which the claimant emphatically denied. Reference to that disputed comment of 27/07/23 appears in the dismissal letter, and in my assessment, it was operative in PV's mind when dismissing as set out at paragraphs 38.2WS, 46WS and 62WS. As such, it was incumbent on PV to have attempted to resolve this factual dispute beyond the investigation notes that were before him relating to MF. It was unreasonable for him to have done so given there had been an adjournment, and it was a material failing in the investigation, and decision-making process. I am not satisfied that any reasonable employer would have failed to resolve these issues as part of the investigation and/or disciplinary process.

<u>Claimant's general attitude</u>

44. It is common ground between all of the interviewees that no one intervened during the incident. I am satisfied that this was a short interaction of 10 to 30 seconds taking different accounts. Different witnesses have a different take as to whether the claimant had an aggressive attitude, though there was no assertion of any physical aggression by anyone. Some people seemed to have taken notice of the incident where as others had not. The claimant was someone who had become somewhat excitable in interview, and to some degree in the hearing. In my assessment all the evidence points to him being the opposite of 'softly spoken'.

45. GS stated he had not known the claimant to be nasty like that before [105]. He goes on to say 'I have never seen him have a cross word with anyone and Becky has never said anything about Rob before'. There is a mixed picture in the other accounts from people who were there.

46. The investigation conclusions allegation states at bullet two [68] that the claimant 'has been witnessed to be verbally aggressive'. This issue is not a peripheral matter because it ramps up the seriousness of the claimant's

behaviour. It is also relevant to the concerns over potential contamination of evidence. In particular LC's handwritten note that MN had mentioned 'that Rob was the angry man' of the company. There was a delay producing those notes for LC to sign; and there is no date when it was signed. MN has endorsed LC's note that he disagrees. That is irregular and calls into question why this happened. It is also not the only irregularity.

47. It is unclear whether PV took account of accounts and that the claimant had an exemplary record, in terms of resolving the 'aggressive' issue sufficiently. PV's letter refers to having to concentrate on the allegation *'inappropriate and verbally aggressive behaviour'* [189]. I am satisfied that the addition of 'verbally aggressive behaviour' amplifies the significance of what the claimant is alleged to have done. There is no real insight given in the dismissal letter as to whether PV engaged with the issues in the evidence before him about verbal aggression. The only reference I can find to any consideration of the issue of aggression is paragraph 32WS. At first blush, PV noted this as mitigation at para 36.4WS. However, at paragraph 44 he states he considered there was no substantive or relevant mitigation. The dismissal letter, being silent on the issue of aggression, concludes 'the allegations of Gross Misconduct are founded'. That raises a question whether the mitigation was considered properly; or whether the issue of aggression was resolved in PV's mind before he reached his dismissal decision. This was another irregularity in terms of rationalising a key aspect of the allegation against the claimant.

48. One inference is that PV decided that the words alone rather than the delivery of them were the breach of the dignity policy i.e. it was not verbally aggressive. However, that is not what the letter implies if the 'allegations' are founded. An alternative view is that the mitigation has been referenced post decision and did not actually form part of the dismissal consideration. Either of those outcomes potentially has a material impact on the case, and raises concerns about irregularity. I am not satisfied that any reasonable employer would have proceeded with a disciplinary process or outcome in this manner.

Workplace culture at the time

49. Part of the claimant's case relates to the context of how his misconduct arose, in terms of a wider problem with the culture in the workplace. He told PV [171] about many incidents at the office. He talked about it being 'toxic' and 'lawless'. The shift manager pouring sweets over the victim's head. Mutual horseplay between staff and PF including inappropriate comments such as 'chubs' and other references. When PV asked if the culture had changed and if there had been any corrective sanctions, the claimant says 'absolutely not' and that PF is still calling the victim derogatory names. He says that other people are still calling the victim names, and nothing had changed. Despite raising specific concerns about MF and the accuracy of his statement, I note that PV did not reinterview either PF or MF. That was a material failure in the investigation process.

50. The claimant speaks at lengths about various troubling incidents in the workplace in the interview on 18/08/23 with MN who was the investigating officer. This was a somewhat unusual case, inasmuch as MN was a senior

manager in the organisation, who has provided a somewhat troubling insight into the culture in the office. I have set out some extracts from two such interviews, though there was a consistent theme in other evidence.

51. In relation to an interview with LC, I note MN's comments [102]:

> '…there a whole host of accusations comments about swirled around about transport that points along the lines of culturally the department has some issues as if the line of decency in the office and what is the right and wrong thing to say? It is a difficult thing to assess what is you view of the cultural goings on within the team? …The comments we have been giving is there is a lot of people discussing a lot of things, there is a lot of banter…the times they are a changing there has to be a realisation, that what once might have been accepted has since now become not so…It's what the person on the receiving end thinks, there is the wrong side 99.99% of the time it is friendly, its jovial, people are more sensitive nowadays… the expectations are that we move with the times without being too hypercritical, everyone has to raise the bar of what is acceptable in the office. That is the message to get through to everyone to drive a little bit of cultural change which is the journey they are on, it's not all doom and gloom that's about it…'

52. It is also worth reproducing lengthy excerpts between MN and PF (a manager in the same office) to put the situation into context, as set out below:

> MN You stated that [MF] has had the conversation with Rob one of the other things that we have really, I want to ask there was a fake certificate made up with a of gainer of the week left on [victim's] desk
> PF Plus, loser certificate
> MN What can you teel me about that?
> PF This is before, she came to me and said have you seen this gainer of the week? she laughed about it, was banter between presuming [GS] they are very good friends, its either LC or GS they won't lie to you because its banter
> MN What would you say if I told you, it was still in the department?
> PF It's not its gone, it wasn't lying round the office no driver could see it or anybody
> MN There also has been a picture of a fat child eating a cheeseburger
> PF I've not seen that one
> MN In terms of the picture, how do you think she has taken it?
> PF She laughed about it, she said "cheeky bastards"
> MN That incident didn't cause any offence
> PF No, no way, she laughed about it, I could get one tonight we have a WhatsApp group where we would talk about it.
> MN, Can I suggest you don't have a WhatsApp group there are company standards that in terms of our policy, I would advise you don't participate. Broadly speaking do you think there is a relationship issues with [C, and victim or J]?

53. That points to significant amount of 'banter' in the office with the victim being part and parcel of it. This lends credence to the claims made in evidence and the investigation process by the claimant. Both in terms of widespread nature of banter/pranks/inappropriate conduct, but also the victim partaking in that she 'gives as good as she gets' as I understood it had been characterised. It is unclear how much consideration PV had given to this background information, in assessing the claimant's misconduct.

54. Aside from PF talking about 'fat club' a number of times (further insight into slack standards in my view), he continues with the interaction with MN:

> MN I understand the complexity of running the office, I was there for 15 years, they may be getting too slack with people, what worries me is that you have gone too far the other way, and it is a fast moving and tense environment it's something we need to think about being too friendly
> PF Now I'm being questioned my ability to do the job?

MN It the context of this yes, we are a business that is modifying our standards Your Contributions are going to play a big part of that, we have a PLC that is techy and their policies are tighter than ours, without becoming fully corporate, we have to look at tightening up our standards across the board, it isn't the point of this investigation, otherwise I think it is going to go downhill very quickly

PF I have a plan, I'm not firm enough, I need to be firmer, myself and another HR colleague are going to be meeting with the transport department, I have another ASM sending emails when he should be speaking with the individuals he has been file noted. We are changing how we do things in there We are going through an evolutionary process, we need a plan where the standard across the department are raised, F needs to raise the bar and the drivers as well

MN We want them to have a laugh but we have an opportunity to drive these changes through, that will be a far more route

PF I'm on board

MN I want this to be taken forward, you're not the only one being challenged this is wider than you

PF I need to step away a bit more I'm involved with everything

55. I am satisfied that the claims of a lack of enforcements of standards in the business by the claimant are true. This interaction exposes the slackness of what has gone on before and the imperative to change that. I am satisfied there was a 'toxic culture' in the office, it was 'lawless' with no real enforcement of expected workplace norms by managers. Indeed, managers were part of the problem by most accounts. Such was the complicity that PF felt he was in trouble when he was speaking with MN. All of that appears to have been brushed aside by PV. It is unclear why he considered these culture issues were not relevant to the disciplinary process, to be 'picked up outside of this process' [189]. A reasonable employer would have weighed it up to have considered how it impacted on the fairness of pursuing the claimant, and what sanction to impose.

56. PF then appears to have taken umbrage with what had been said the day before, feeling as though he was now under scrutiny:

PF I felt belittled yesterday a bit bullied as if I was being investigated

MN Ok to continue

PF I felt like my job was on the line yesterday

MN There is no threat to you, there is no grand conspiracy going on, I haven't spoken to anyone about this, we haven't spoken to anyone outside of the people we have spoken to. You are not being investigated, however, two things to say you aren't going to end up in a disciplinary, through the course of speaking to people there are broader complaints, the one that has been put down is the incident that the scope of the issue is gradually widening up, it points to a broader issue within the department

PF At the end of the day, I am in charge of those people

MN It speaks to a broader level of dissatisfaction within the department, there may be personal issues, there may be wider context contextual issues between the protagonists, we have lifted a lid and there is a broader issue it wasn't just about that one incident. I don't think there is an endemic bullying and harassment culture within the team, ultimately what it may end up with, is some people spoken to and people need to understand that if their behaviour keeps the way it is it won't be accepted. It has centred around a small bunch of people, we are duty bound to follow these processes, the posters and the little things, it all points to a broader picture when an individual is responsible for a team and we had some problems in planning we become culpable for the team, as this washes through you may had dealt with it in a way is because I want the message to land, we have been as tough with them as have the other people we need to get across to people that it is serious, the other thing is as you the manager of the team it's better for you to lead the drive from within and that will reflect on you. That you recognise that we have missed the ball with this, and we need to jump on this type of behaviour. If you have another incident like this, people above me will ask some questions but take it seriously and start thinking about the action plan and how you roll this out that's why I'm being harsh otherwise something else will have to do it.

57. The problem with that admission by MN that there was 'no threat' to PF, is that he has been given effective amnesty despite disclosing a rampant history of poor compliance and enforcement of proper workplace behaviour. It was a tacit admission of failing to enforce the respondent's own disciplinary and dignity at work standards, enough for him to be upset by what he was being questioned about. The claimant says he was singled out, that the rules were not applied to others, that managers including PF were part of the problem in the office, and he questioned why the business was ignoring other infractions of the dignity at work policy. This interaction (as a snippet of PF's lengthy interview with MN) lends weight to those claims by the claimant. It is unclear why PV failed to consider it, and implies in his statement that it was in effect blame shifting by the claimant. The relevance appears to have been lost, that this was an office where standards were not enforced, leading to a false sense of security.

58. The claimant refers to a toxic culture in the office. The other interviewees paint a similar picture of disfunction, joviality and pranks. JL confirmed in oral evidence that there was banter on the floor. JL was also asked about PF calling the victim 'chubs' in the office (his claim being this occurred regularly as part of the culture in the office), when asked if this was appropriate, JL said that it depended on the relationship they had. I found that surprising given PF was a manager and this was a busy office, clearly with a cultural issue. I am satisfied this was a dysfunctional and seemingly toxic office, with many participants in this unprofessional behaviour including the claimant and victim in my assessment.

59. These concerns do not appear to have been given sufficient weight in assessing the case against the claimant. Indeed, PV and JL both considered the office culture matter should be dealt with outside the disciplinary process. There has been a material failing which undermines the fairness of the process. I am not satisfied that any reasonable employer would have proceeded in this manner.

Training issues

60. With all this dysfunction in the office, the irresistible conclusion is that training was not effective. The various references by MN and some interviewees in the notes support that contention. JL said from 2019 that there had been two refresher sessions on discipline at his site, but he was unaware of the Royton site. Whatever training there was it was possible for the claimant to click through the online training given there were multiple '0 minutes' entries. That suggests an ineffective safeguard in the training process. Although, the real evidence of an ineffective training process is the concerns elicited in the interviewee accounts, and my findings about a dysfunctional office. Training and implementation of dignity in the workplace standards was woeful in my view, across the board. Yet it appears to have been another material factor held against the claimant by PV. I am not satisfied that any reasonable employer would have concluded that.

Procedural concerns raised

61. There was an acceptance by PV in the dismissal letter that:

'I fully agree there have been some failings by the business surrounding your suspension and the investigation. As stated in our meeting, these will be picked up outside of this process. That said, I do not believe that these failings would have resulted in a different outcome.'

62. I am satisfied that indicates that failings were accepted by PV on behalf of the respondent, but were not weighed up as part and parcel of the disciplinary process.

63. That suggests a lack of engagement with the various live issues by PV, notwithstanding his claims that he is an experienced individual in disciplinary matters. This lack of engagement can be seen in the further paragraph where he states: '*Although there have been some failings, I need to concentrate on the allegation against you which is alleged gross misconduct*…' I am satisfied the recognition of accepted failings by the respondent should have been at the forefront of PV's assessment of what impact it had on fairness to the claimant. I am not satisfied that any reasonable employer would have concluded that it was an external issue.

64. Another part of the appellant's claim relates to delays in finalising the hearing notes from those who were interviewed as part of the grievance and disciplinary process. I did not understand why there was such a delay given there is evidence to suggest the HR adviser was taking the notes on a laptop. This delay led to the concerns relating to LC's notes and the handwritten comments he made, which was further endorsed by MN. When I was reading through the notes in detail after the hearing, it became apparent to me that there were other instances where things seem to be out of sync or missing. For example, at page 91 the notes end abruptly, and there is no signature block, indicating that these notes are incomplete. Indeed, JA's interview appears to have been reproduced in partial format. At the bottom of page 90, MN asks 'what are your normal working hours'; in response at the top of page 91 it is clearly not a response to that question. Unfortunately, the fact that the paragraphs or questions were not numbered, it is unclear to see which or how many questions are missing. The same issue arises with the endorsement on the first page of all of the hearing notes 'Page 1 of 'where none of the interview records seen have been completed as to how many pages they contain. That is a fairly fundamental omission of the respondent's part in terms of preparing this bundle, but also, I have questions as to whether the disciplinary officers had been aware of incomplete notes. What else is missing or incorrect? No one else has picked up on this issue, but there are other minor examples of things not flowing properly which may suggest poor accuracy. These issues were potentially material to a fair process.

65. The claimant states in his first disciplinary hearing that he had been failed by MF [169] following the conversation they had the day after the incident. The claimant had asked that conversation to be documented but it was not, stating that MF had told him it was informal and he had refused to documented. The claimant says that MF did not tell him that the victim was upset or that he should apologise. That issue is relevant to the claimant's outburst in the investigation interviews calling MF a 'lying bastard' [97]. That followed the assertion that when MF had asked him if he was going to apologise to the victim, MF states that the claimant said 'I do not care, I do

not like her'. There was clearly a significant factual dispute as between what the claimant says happened when he spoke with MF on 27/07/23, and what MF reported to the investigating officer. I am satisfied that this was a live issue for PV to deal with when the claimant had denied he was asked to apologise. I am satisfied that it was incumbent on PV to have made those enquiries with MF in order to take a rounded view as to what had happened on 27/07/23. I accept PV need not have resolved who was telling the truth but denying the claimant an opportunity for that issue to be resolved, by MF being reinterviewed, was a material flaw. I am not satisfied that any reasonable employer would have simply ignored such a serious matter.

66. Indeed, at paragraph 27 WS, PV says that before the first hearing he was happy with the investigation had been carried out and did not feel he required further investigation to be conducted. He did however state at paragraph 37 WS that he adjourned the hearing to investigate additional points been raised. Those points do not relate to this issue of the claimant being asked to apologise by MF. PV failed to resolve the issue of whether the apology was suggested as early as 27/07/23 and what the claimant's alleged response was. After all, he had concluded the claimant had trivialised the incident. Paragraph 41 gives an insight into PV's thought processes that the claimant had blamed the culture and had not taken accountability for the matter. This suggests he had taken a dim view of the claimant's accounts, one of which was significantly disputed in relation to the informal undocumented chat with MF.

67. PV noted the points of mitigation relied on by the claimant: namely that he did not know the victim was upset at the outset and had apologised at the first chance; that he was not aggressive; and that there were other matters to investigate amongst other things. The first point I note is at paragraph 36.6, this is an incorrect reference. The claimant does not say at page 170 'family friendly banter'. The actual reference is in response to the relationship with the victim in terms of everyday conversations: 'yes, we were like one big family, friendly banter. That is what this was. Other evidence, would tend to support an environment where banter was the norm. I do not know how material this issue would have been, but it perhaps indicates some degree of lack of focus on the detail of what had been said.

68. PV makes it clear in paragraph 44 WS that it was his view that the claimant 'did not provide any substantive or relevant mitigation in respect of the allegations'. That means, that the issue relating to the first opportunity for the claimant to apologise had not been properly grappled with in my view. Nor had the issue of no prior disciplinary matter. Furthermore, paragraph 44 is at odds with what PV said in cross-examination that he had taken account of the exemplary record. I am not satisfied this matter is obvious in the contemporaneous evidence before me that mitigation including an exemplary record was weighed up by PV.

69. What MF had claimed had been said on 27/07/23 appears at the end of the investigation summary produced for the disciplinary process at the fourth bullet point. It must have been in the forefront of PV's mind in looking at the case at the outset. PV does not deal with it expressly but he does dismiss the apology as a mitigating as can be seen in paragraph 46WS in justifying dismissal:

> *'This is because I felt that Mr Ogden did not show any remorse at the time or in the immediate aftermath of the incident and only when there was an investigation did, he apologise. I also did not believe that Mr Ogden, if he was to return to the Respondent, would not repeat the language and manner in which it was used again, and have carried out his duties in accordance with the Dignity at Work policy.'*

70. MF fails to record or make a contemporary note of an informal meeting where he later alleges the claimant was dismissive of the victim. MF and PF are managers who are complicit in the poor standards of behaviour in the office. The investigating officer reassures PF, despite PF's own concerns that he is in the frame for disciplinary action, that he is not going to get into trouble. That is despite other employees talking about a general freefall in the office. MF and PF were only interviewed once. It is unclear why PV did not think it was necessary to speak to either of them again. It adds to a concern of the two managers being protected (as MN indicated to PF after he had been upset in his interview). Particularly when PV decided that there was poor mitigation of the claimant's behalf, yet at the same time accepting failings in the process. I am satisfied that PV was on notice to have ensured greater thoroughness in this case given the various concerns that were obvious to him given his comments in the dismissal process, in the way things had been handled. That was particularly so as it was a large employer. I am satisfied that any reasonable employer would have proceeded with greater thoroughness; or indeed, decided whether the process was so infected with irregularities that it could not continue. I am not satisfied that any reasonable employer would have simply carried on regardless which is what appears to have happened.

71. In terms of the appeal process, JL was limited in what he was looking at given the terms of reference are only as a review. That was further limited by the somewhat cursory way in which key aspects of the claimant's concerns were brushed aside in the short letter, either because they were outside that process, or no fault had been found in PV's decision. It was in effect, a rubber-stamping process without any substantive engagement with the live issues of concern in terms of a reasonable investigation and reasonable procedure.

<u>Consistency</u>

72. I was not persuaded by the respondent's evidence relating to a consistency of treatment. MN clearly signalled that PF was not under scrutiny which suggested special treatment despite concerns about his behaviour and a requirement under the Disciplinary Standards Policy that *'Supervisors and managers are responsible for specifying standards of behaviour, enforcing rules and ensuring that any breaches are tackled promptly. Managers are responsible for clarifying standards of behaviour…*' This office was dysfunctional and the managers were part of the problem. There was clearly a lack of consistency in enforcement of expected standards.

73. In terms of the examples relied on, JL's witness statement is misleading in my view (perhaps unintentionally but misleading nonetheless). It reads as though the examples from [242] onwards were part of the consideration of

consistency in the appeal process. I heard that in fact he had discussed the matter with HR but no note was kept of that. Indeed, a number of examples in the bundle post-dated the appeal and after I pressed the matter, it transpired these documents had not been before JL at the time of dismissing the appeal. I have similar concerns regards PV and both of them despite their experience have ignored fairly significant concerns in the process as external to the consideration of the claimant's case. As such, I do not accept relevant previous cases were considered, satisfactorily or at all, by the respondent to gauge the claimant's behaviour at the point of dismissal and/or appeal. That is a material failing, particularly when the claimant had said he was being singled out. It is not cured by the claimed experience of the dismissing officers given the generalised concerns I have set out above about their approaches to matters. It did not lead me to resolve the matter in the respondent's favour. The process was unreasonable and no reasonable employer would have allowed the process to conclude in this way given the litany of issues set out above.

Discussion and conclusions

Has the respondent shown the reason or principal reason for dismissal was the claimant's misconduct?

74. Yes – the words used were an offensive term and the respondent was therefore entitled to undertake an investigation and decide whether to rely on its disciplinary processes to dismiss. There have been no ulterior motives otherwise pleaded by the claimant in terms of why he was dismissed.

Was it a potentially fair reason under s.98(2)(b) of the Employment Rights Act ("ERA") 1996?

75. Yes – conduct of the employee under s.98(2)(b) and being a prima facie breach of the dignity at work and disciplinary procedure.

Did the respondent genuinely believe the claimant had committed misconduct; and were there reasonable grounds for that belief?

76. Yes – a formal grievance was made, witnesses confirmed various accounts of the claimed incident and the claimant accepted a version of events and words used which would have constituted a breach of the employer's policies. A lengthy process had been undertaken (albeit flawed as set out below). It was reasonable for the respondent to conclude the misconduct had been committed by the claimant.

At the time the belief was formed the respondent had carried out a reasonable investigation?

77. No – despite the admitted misconduct the respondent failed to properly investigate the matters that arose in the process as set out above; and the respondent admitted failings in the investigation process. The various negative features have been detailed above.

Did the respondent follow a reasonably fair procedure?

78. No – this is a multi-million-pound organisation with significant local and head office HR resources. It should have been more compliant with proper processes given the findings set out above. Instead, there were rudimentary failings in the process as I have detailed above. Some of those were perhaps minor when looked at in isolation, but cumulatively, particular with the more serious themes, they amounted to an unreasonable process. The wholesale exclusion of the culture of workplace as being outside the process was the most significant; as was the corollary of using that against the claimant as part of his lack of taking responsibility; closely followed by a lack of clear explanation as to how seven years previous exemplary conduct was weighed up in the round in terms of the claimed isolated nature.

79. I am satisfied no reasonable employer would have proceeded to the end of their internal processes without at least having addressed the more substantive failings and weighing up the unusual features of the 'lawless' nature of the workplace, and apparent singling out of the claimant.

Dismissal was within the band of reasonable responses?

80. No – aside from process failings generally, there was a failure to show how various matters of mitigation known to the respondent had been weighed into the assessment of sanction.

81. There was a failure to assess the claimant's behaviour in context to a toxic, dysfunctional office where the managers in the office were complicit in that dysfunction. That was made worse by a failure to enforce standards generally thereby leading to a culture of 'banter'. The claimant had not been pulled up before over comments, and this likely led to a false sense of security in terms of it not being a disciplinary issue. The certificate incidents were seen by the victim as part of the office banter, yet the respondent took this as being part of bullying behaviour. It might have been able to view it that way, had it not been for the toxic environment, managers involvement with the 'banter' and lack of enforcement generally.

82. There was a failure to reconcile the impact on the victim of expecting an apology with the practicality of when that could have been made due to her not being in the office for a significant period of time. There was a substitution of the victim's assertion of the apology, effectively being 'too little too late', for an objective assessment of contrition, remorse and whether the events would re-occur. That was particularly relevant given the claimant was otherwise an exemplary employee with seven years' service.

83. What the claimant said was offensive and may have crossed a line. However, having not been informed previously that this conduct was causing offence, the decision to dismiss the claimant when assessing all of the defects and concerns holistically with the process failings, is harsh. I am not satisfied that other employers would have acted in this way. A large, well-resourced employer in particular, should have ensured the various defects did not happen in the first place. In particular, the disciplinary outcomes should not have reflected just the impact on the victim, as seemed to be the subtext, but looking holistically at the breach in its proper context including taking account of mitigation. I am not satisfied that the matters set

out above are simply minor procedural matters, the appeal cemented the earlier failings rather than curing them. The decision to dismiss was framed as if the procedural defects were an outside element to the consideration of case. The free-for-all in the office suggested the claimant was the one who was without a chair when the music stopped. There was a real sense of him being made an example of, which in the context of the free-for-all office, and significant failings in process was unreasonable.

84. I am not satisfied that the various failings and concerns in this case would have led to any other employer to dismiss. A finding of misconduct and a written warning to set proper future standards is likely to have been what at least some other employers would have done. That would have been consistent with paragraph 20 of the ACAS Code. Other employers may have pursued an informal remedy or abandoned the process. I am satisfied that the respondent has failed to show their procedures and the decision to dismiss fell within the band of reasonable responses open to an employer.

85. For all of the reasons set out above, the appellant was unfairly dismissed.

Conclusion

86. The claimant has shown on balance that he was unfairly dismissed.

87. The case will proceed to an assessment of quantum. The respondent's representatives should liaise with the tribunal for a hearing date which given the potential arguments under **Polkey**, will require two days before me.

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Employment Judge Shergill

Date: 14/10/24

WRITTEN REASONS SENT TO THE PARTIES ON

18 October 2024

FOR EMPLOYMENT TRIBUNALS