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EMPLOYMENT TRIBUNALS

Claimant: Mr Kenny Olatunji

Respondent: TC Facilities Management Limited

Heard at: East London Hearing Centre

On: 8 & 9 December 2020

Before: Employment Judge Barrett

Representation

Claimant: Mr Chike Ezike, Universe Solicitors Ltd

Respondent: Ms Naomi Gyane, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. The Claimant's dismissal was fair.
2. The Respondent did not breach the Claimant's employment contract by dismissing him without notice.
3. The Claimant's claims are dismissed.

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was by videoconference (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Introduction

1. The Claimant, Mr Kenny Olatunji, worked for the Respondent, TC Facilities Management Limited, until he was dismissed without notice on 1 April 2020. On 11 June 2020 he presented an ET1 form bringing claims for unfair dismissal and wrongful dismissal.
2. The Respondent says it dismissed the Claimant because of his conduct and that his dismissal was fair. Further, it argues that the Claimant committed an act of gross misconduct which entitled the Respondent to terminate his employment without notice.

The hearing

3. The hearing was conducted over two days, 8 and 9 December 2020. The Claimant was represented by his solicitor Mr Chike Ezike and the Respondent by Ms Naomi Gyane of Counsel.
4. The Tribunal was provided with an agreed bundle of evidence numbering 131 pages.
5. During the hearing, the Respondent added a further document showing a screenshot of the Claimant's dates of employment on the Respondent's internal HR management system. No objection was made by the Claimant.
6. On the first day of the hearing the Claimant asked that recordings he had made of his disciplinary and appeal hearings to be admitted into evidence. Although the Claimant had disclosed the existence of these recordings in accordance with the Tribunal's case management directions, unfortunately the Respondent had not received them in an accessible format in advance of the hearing. Mr Ezike provided the recordings in audio file format on the afternoon of the first day of the hearing. Having had the opportunity to listen to them overnight, the Respondent did not object to their admission into evidence the next day. Both parties helpfully provided a list of the parts of the recordings relied upon, which comprised the entirety of the disciplinary hearing and excerpts from the appeal hearing.
7. The following witnesses gave evidence on behalf of the Respondent:
 - 7.1. Mr Patrick Mendonca, Area Manager, who was the Claimant's line manager.
 - 7.2. Miss Melanie Acott, HR Business Partner, who was the note-taker at the Claimant's disciplinary hearing.
 - 7.3. Mr Ian Stevens, Regional Manager, who was the decision-maker at the appeal stage.
8. Miss Acott and Mr Stevens, having given the main part of their evidence on the first day, were recalled on the second day to address a limited number of further questions arising out of the recordings of the disciplinary and appeal hearings, which they had by then had the opportunity to listen to.
9. The disciplinary manager who made the decision to dismiss was Mr Marcelo Piotto, Regional Manager. He had since left the Respondent and did not give

evidence. Miss Acott, who was present at the disciplinary hearing and provided HR support to Mr Piotto throughout the process, gave evidence about his decision-making process insofar as it was within her knowledge.

10. The Claimant gave evidence on his own behalf.
11. After the evidence had been completed, Mr Ezike provided a written skeleton argument and both Mr Ezike and Ms Gyane made helpful oral closing submissions.

Findings of fact

The Claimant's employment history

12. The Claimant commenced employment with a company called Cleanbrite on 1 October 1998, as a manager working on a contract providing outsourced cleaning services in Tesco stores. His employment transferred under the applicable TUPE legislation several times as different companies took over the Tesco cleaning contract. From Cleanbrite, he transferred to Exclusive Contract Services, then GS Associates, then Echoclean, then Servest.
13. On 1 August 2017, the Claimant's employment transferred from Servest to the Respondent. The Respondent is a company that provides cleaning and facilities management services, specialising in the cleaning of supermarkets and other retail sites. It has approximately 6,000 employees. The Respondent's records showed that the date the Claimant's continuous service commenced was 3 October 2004. However, that did not reflect the Claimant's total length of continuous service.
14. The Claimant's job title was In-Store Cleaning Manager ('ISM'). He managed the cleaning operation at the Tesco Lakeside Extra store. His role included managing staff, rotas, and budgets as well as liaising with the Tesco store management and undertaking joint weekly and monthly audits. He worked from 5am to 12pm on Mondays to Fridays. He also had a second job at which he worked a further 7-hour shift each weekday afternoon to evening.
15. Under the Respondent's structure, the Lakeside Extra store is part of the Essex area 'Cluster'. The Claimant reported to the Cluster Facilities Manager for that area, also referred to as the Area Manager. Mr Mendonca became the Area Manager for the Essex Cluster in December 2019. The Claimant met him for the first time in January 2020.
16. Area Managers in turn report to a Regional Manager. Mr Piotto was the Regional Manager covering the Essex Cluster. Prior to the events giving rise to this claim, the Claimant had worked with a number of Area and Regional Managers, including Mr Piotto, and had enjoyed good working relationships with them.

HR training session on 28 February 2020

17. On 28 February 2020, the Claimant and Mr Mendonca attended an HR training session led by Miss Acott. During the meeting, the Claimant answered a call on his work mobile. He saw his Duty Manager had tried to call him several times and thought it could be urgent. However, Mr Mendonca thought it was rude of

him to answer the phone during the meeting and reprimanded him. The Claimant was offended by what he perceived to be Mr Mendonca's patronising and officious approach and told Mr Mendonca to speak to him like a child. Miss Acott intervened and asked the Claimant if he would like a 5-minute break. The Claimant declined, and the meeting continued.

Disciplinary proceedings instigated by Mr Mendonca

18. At some point after this, Mr Mendonca telephoned the Claimant to speak about the standard of cleaning of the car park at the Lakeside Extra store. Mr Mendonca perceived the Claimant's reaction to the request to be rude and angry.
19. Mr Mendonca informed Mr Piotto that he wished to conduct a disciplinary hearing with the Claimant for having a poor attitude towards him. Mr Mendonca did not address the issue informally with the Claimant before deciding to instigate disciplinary proceedings.
20. On 24 March 2020, the Claimant was sent an invitation letter to a disciplinary hearing to be conducted that Friday 27 March 2020. The letter was signed by Mr Mendonca and said that he would conduct the hearing. It stated "*This hearing is concerning allegations made against you of poor attitude and unacceptable behaviour towards your Area Manager*"; i.e. towards Mr Mendonca himself. It warned that the hearing could result in a formal warning being issued.
21. The letter was sent as an attachment to an email sent by the Respondent's People Team to the Claimant's personal email address at 14:26 on 24 March 2020. It arrived in his junk mail folder and he did not see it at the time.

Incident on 27 March 2020

22. On Friday 27 March 2020 at approximately 11am, Mr Mendonca attended the Lakeland store with Vanessa Caenetto, an ISM from a different store who had agreed to act as note-taker. They approached the Claimant on the shop floor. Mr Mendonca asked the Claimant to attend his disciplinary hearing. The Claimant, who had not seen the invitation letter, was shocked and taken aback. Mr Mendonca suggested they move away from the shop floor, and the three of them went upstairs to the café, which was closed and therefore relatively private.
23. In the café, the Claimant explained that he had not received a disciplinary invitation letter. Mr Mendonca read the text of the invitation letter aloud to the Claimant from his tablet. The Claimant immediately objected to the suggestion that Mr Mendonca should be the disciplinary decision-maker with regard to an allegation of poor attitude and behaviour towards Mr Mendonca himself – effectively, acting as judge in his own cause.
24. For the purposes of the Claimant's wrongful dismissal claim, the Respondent's case is that the Claimant's conduct during this meeting amounted to gross misconduct entitling the Respondent to terminate his employment contract without notice. It is therefore necessary to make findings about what the Claimant said and did during the meeting. Those findings are:

- 24.1. The Claimant was agitated, upset and angry at being taken by surprise and subject to what he felt was an unfair allegation of misconduct.
 - 24.2. The Claimant refused to participate in the meeting on grounds that he had not been given prior notice and that Mr Mendonca was not the appropriate person to conduct the meeting.
 - 24.3. The Claimant said that the disciplinary allegation was untrue and said to Mr Mendonca "*you are lying to my face*". He spoke quickly and at a raised volume, although he was not shouting. The Claimant has a stammer which causes him to speak loudly and quickly when trying to communicate under stress.
 - 24.4. Mr Mendonca told the Claimant to stop being aggressive and asked Ms Caenetto to minute that the Claimant was shouting and being aggressive. This had the effect of inflaming the situation, as the Claimant had not intended to be aggressive and perceived this as a further injustice.
 - 24.5. The Claimant lost his temper and told Mr Mendonca to "*fuck off*".
 - 24.6. The Claimant made a further comment which Mr Mendonca and Ms Caenetto heard or remembered differently (see their accounts below) but which they both understood to be threatening. This was not the Claimant's intention and there was some misunderstanding about the words the Claimant had used.
 - 24.7. Mr Mendonca told the Claimant he was suspended. The Claimant, who had at this point been starting to walk away, turned back, called Mr Mendonca "*an idiot*" and left.
25. The meeting ended at approximately 11.20am. Following the meeting, Mr Mendonca and Ms Caenetto felt shaken by the confrontation. They perceived the Claimant's attitude towards them to have been aggressive and threatening. This had not been the Claimant's intention.
 26. During the meeting Ms Caenetto had taken brief notes. The notes recorded Mr Mendonca saying, "*I can't talk, he's aggressive and don't let me talk*", and that the Claimant had called Mr Mendonca a liar, told him to "*fuck off*", shouted and screamed, and called Mr Mendonca "*an idiot*".

Events following incident on 27 March 2020

27. Immediately following the meeting, Mr Mendonca called Mr Piotta to tell him what had happened. Mr Piotta formed the impression that Mr Mendonca was shaken up by the experience. He asked Mr Mendonca to submit a written account of the meeting. After speaking to Mr Piotta, Mr Mendonca called the HR department to request that a suspension letter be sent to the Claimant.
28. At 3.02pm that afternoon, Mr Mendonca sent an email to Mr Piotta and Miss Acott containing his account of the meeting. He noted that the Claimant had started speaking loudly on the shop floor, and after they moved to the café he "*start[ed] with verbal insolence*", was aggressive, called Mr Mendonca a liar, screamed at him, told him to "*fuck off*", threatened to "*give him a lesson*", called

him an idiot and left. The “*give him a lesson*” comment was not corroborated in Ms Caenetto’s notes of the meeting or her subsequent written account.

29. Ms Caenetto also submitted a written account on the same day. She stated that the Claimant had got very angry with Mr Mendonca, screamed at him, called him a liar, told him to “*fuck off*”, called him an idiot, and threatened “*I will fuck you up if anything happens, I will show you the way*”. This last allegation was not included in Ms Caenetto’s meeting notes, Mr Mendonca’s account at the time, or his evidence to the Tribunal.
30. Mr Piotto was the manager with responsibility for investigating the incident as a potential disciplinary matter. He had HR support from Miss Acott. He inquired whether there was CCTV footage of the incident but was told that the camera in the café did not cover the area where the meeting took place. Mr Piotto formed the view, based on Ms Caenetto’s notes of the meeting and Mr Mendonca and Ms Caenetto’s statements, that it was unnecessary to conduct any further investigation. He directed that the Claimant should be invited to attend a disciplinary hearing.

Disciplinary hearing on 1 April 2020

31. The Claimant was sent a disciplinary letter on 30 March 2020, inviting him to a hearing on 1 April 2020. It stated, “*This hearing is concerning allegations made against you of verbal and threatening behaviour towards management*” and warned that summary dismissal was a possible outcome. Ms Caenetto’s notes and the written accounts of Ms Caenetto and Mr Mendonca were enclosed as attachments to the same cover email.
32. Mr Piotto also conducted the disciplinary hearing. Miss Acott provided HR support and took notes. The Claimant chose his colleague Kerry Barnett to act as companion. The hearing took place at 10am on 1 April 2020 by telephone conference call, due to the coronavirus pandemic. The Claimant recorded the call.
33. Throughout the disciplinary hearing the Claimant spoke fast and loudly – as noted above, compensating for his stammer causes him to do this when under emotional stress. Mr Piotto found him difficult to interrupt and therefore found it hard to control the flow of the conversation. The Claimant did not shout or speak aggressively.
34. The Claimant was indignant and sought to explain that he felt the situation had been caused by the unfair way Mr Mendonca had treated him. He referred to the HR training session on 28 February 2020. At this point, Miss Acott pointed out that she had run the session. Her view was that the Claimant had been “*irate*” and she had considered asking him, not Mr Mendonca, to leave.
35. Mr Piotto asked the Claimant whether he had shouted at Mr Mendonca, said any bad words to him, or called him anything. The Claimant replied “*no*” to each of these questions and stated he was “*just angry*”. He asked that Mr Piotto to speak with his managers he had worked with over the past 23 years who would say he was “*not unmanageable*” and his staff who would say he treated them with respect.

36. The hearing lasted for approximately 15 minutes and Mr Piotto took a 30-minute adjournment to consider his decision. During the adjournment, he asked Miss Acott whether, if he found the incident occurred as alleged, it could result in dismissal despite considerable service. She replied that it could. He also asked her about the HR training session. Miss Acott told him her impression from that occasion was that the Claimant could be intimidating.

Dismissal

37. The hearing reconvened and Mr Piotto informed the Claimant he was dismissed with immediate effect. A letter confirming the dismissal was sent on 3 April 2020, which stated *“You have been summarily dismissed for gross misconduct for verbal and threatening behaviour towards management”*.

Appeal submitted on 3 April 2020

38. The Claimant exercised his right of appeal under the Respondent’s disciplinary policy. His grounds of appeal submitted on 3 April 2020 set out his account of the breakdown of his working relationship with Mr Mendonca. He stated that Mr Mendonca had been rude to him at the HR training session. He further alleged that Mr Mendonca had once asked him to forge a signature on a housekeeping sheet and thought the Claimant was *“disrespectful”* because he had refused. He contended that Mr Mendonca had told Ms Caenetto what to write in the notes of the 27 March 2020 meeting. In relation to the disciplinary hearing, he stated that Mr Piotto had only asked him one or two questions, and Miss Acott had taken Mr Mendonca’s side.

Appeal hearing on 21 April 2020

39. The Claimant’s appeal hearing was conducted by Mr Stevens. Mr Stevens had previously line-managed the Claimant for a short period in 2017 and they had a good relationship. The appeal hearing took place on 21 April 2020. Nicola Meikle provided HR support and took notes. The Claimant’s companion was his colleague Lateef Fatia. The hearing was conducted by telephone conference. The Claimant stated at the outset he would record it and no objection was taken.
40. Mr Stevens, like Mr Piotto, found it difficult to control the flow of the conversation during the appeal hearing as the Claimant at times spoke loudly and quickly, displaying some agitation. On occasions, Ms Meikle had to interrupt him to say she was having difficulty taking notes. However, the Claimant did not shout or speak aggressively. He was frustrated when Ms Meikle asked him to calm down and suggested he was shouting. He replied, *“I’m not shouting this is how I speak”*.
41. Mr Stevens went through the statements of Mr Mendonca and Ms Caenetto and the Claimant again denied having shouted, screamed, or sworn at Mr Mendonca. He reiterated that he thought Mr Mendonca was singling him out because he had refused to sign housekeeping sheets, and that Ms Caenetto and Mr Mendonca had conspired to make allegations against him. Mr Stevens asked whether there were any witnesses to the incident and the Claimant stated there were two Tesco colleagues present in the café, but he did not know

their names. The Claimant referred to the HR training session and asked Mr Stevens to verify with other colleagues he named who were present that he had not been angry.

Further investigation by appeal manager

42. Following the hearing, Mr Stevens conducted further investigation. On 22 April 2020 he interviewed Ms Caenetto, Mr Mendonca and Miss Acott by telephone. Both Miss Caenetto and Mr Mendonca denied any conspiracy. Mr Mendonca denied having made any improper request in relation to housekeeping sheets. Like the Claimant, he remembered there being two Tesco colleagues in the café but did not think he would recognise them again as they had been facing away from him. Ms Caenetto said they had been *“far away on the other side of the café to us”*. Miss Caenetto stated that she feared the Claimant and would not go back to his store if he was there. Mr Mendonca also said did not feel safe going to the Claimant’s store. Miss Acott stated that the Claimant had shouted in the HR training session and she had thought he was frightening.

Appeal outcome on 29 April 2020

43. On 29 April 2020 Mr Stevens wrote to the Claimant to communicate that his appeal against dismissal had not been upheld. The letter set out the factors he relied upon in coming to this conclusion. He relied upon the statements of Mr Mendonca and Ms Caenetto, and noted they were afraid to come to the store because of the incident. He stated that, *“Throughout the appeal hearing you also raised your voice on numerous occasions towards myself”*. He did not accept the allegation that Mr Mendonca had asked the Claimant to forge housekeeping sheets. He considered that the Claimant’s actions had resulted in a loss of trust and confidence in him as a Store Manager.

The law

Unfair dismissal

44. Section 94 Employment Rights Act 1996 (‘ERA’) provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by her employer.

45. Section 98 ERA provides so far as relevant:

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.

A reason falls within this subsection if it—

...

(b) relates to the conduct of the employee

(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.

46. The starting-point in misconduct cases is the well-known guidance in *Burchell v British Home Stores* [1980] ICR 303 at 304:

'What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case'.

47. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at paras 16–17) held:

'... the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see *J Sainsbury plc v Hitt* [2003] ICR 111.'

48. It is not for the Tribunal to make its own assessment of the credibility of witnesses on the basis of evidence given before it (*Linfood Cash and Carry Ltd v Thomson* [1989] ICR 518). The relevant question is whether an employer, acting reasonably and fairly in the circumstances, could properly have accepted the facts and opinions which they did. The Tribunal must have logical and substantial grounds for concluding that no reasonable employer could have assessed the credibility of the witnesses in the way in which the employer did.
49. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the Tribunal's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses. The fact that other employers might reasonably have been more lenient is irrelevant (*British Leyland (UK) Ltd v Swift* [1981] IRLR 91).
50. In cases where there is a procedural defect, the question that remains to be answered is whether the employer's procedure constituted a fair process. A dismissal will be held unfair either where there was a defect of such seriousness that the procedure itself was unfair or where the results of the defect taken overall were unfair (*Fuller v Lloyds Bank plc* [1991] IRLR 336; see also *Slater v Leicestershire Health Authority* [1989] IRLR 16).

51. Procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness, according to the decision of the Court of Appeal in *Taylor v OCS Group Ltd* [2006] IRLR 613.

Breach of contract

52. For an employer to be entitled to summarily dismiss an employee, that is dismiss him without notice, the employee's conduct must amount to gross misconduct. A definition of gross misconduct is found in paragraph 22 of *Neary v Dean of Westminster* [1999] IRLR 288:

'...conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.'

53. Unlike in a claim for unfair dismissal, where the Tribunal will not substitute its own view for the employer's, the question for the Tribunal here is whether the Claimant is guilty on the facts of the gross misconduct alleged.

Submissions

Claimant's submissions

54. For the Claimant, it was submitted that the dismissal was unfair because the Respondent had failed to conduct a reasonable investigation. This included: a failure to obtain CCTV footage from Tesco; a failure to identify and seek evidence from the Tesco colleagues in the café; a failure to seek further witness accounts of the HR training session; and a failure to further investigate the issue of the housekeeping sheets. It was further submitted that Miss Acott had taken Mr Mendonca's side and not carried out her role objectively.
55. In relation to wrongful dismissal, Mr Ezike submitted that the Tribunal should prefer the Claimant's account of the 27 March 2020 incident because he had a lengthy clean disciplinary record, and had he screamed and shouted as alleged this would have drawn attention and further witnesses at the time. The Claimant relied on the recordings of the disciplinary and appeal hearings to show he was not aggressive in the way the Respondent sought to portray him.

Respondent's submissions

56. For the Respondent, Ms Gyane submitted that the Respondent's witnesses had formed a genuine belief the Claimant was guilty of misconduct on reasonable grounds. The statements of Mr Mendonca and Ms Caenetto were contemporaneous and corroborated each other. The Claimant himself had agreed when giving evidence that he said to Mr Mendonca "*you are lying to my face*". Miss Acott's evidence was that Mr Piotto had told her that Mr Mendonca sounded shaken up by the incident when he called immediately afterwards. The Respondent also relied on the recordings, for the purpose of showing the Claimant was not able to moderate his manner and tone.
57. In relation to the investigation, Ms Gyane submitted that the Respondent did not have to conduct a perfect or exhaustive investigation, but as much investigation as was reasonable in the circumstances of the particular case.

CCTV of the relevant area had not been available and in any event would not have included an audio recording of what was said. The Claimant had only raised the conspiracy and housekeeping sheets allegations at the appeal stage and Mr Stevens had investigated them. Any lack at the original investigation stage was said to have been remedied at the appeal stage.

58. In relation to wrongful dismissal, the Tribunal was invited to prefer Mr Mendonca's evidence regarding the 27 March 2020.

Conclusions

Unfair dismissal

59. The first question to address is whether the Respondent dismissed the Claimant for a fair reason for the purposes of s.98(1) ERA. The Respondent relies on conduct, which is a potentially fair reason (s.98(2)(b) ERA).

59.1. Did the Respondent have a genuine belief that the Claimant was guilty of misconduct? The letter of dismissal and Miss Acott's evidence regarding Mr Piotto's thinking at the time show that Mr Piotto the dismissing manager genuinely believed the Claimant to be guilty of misconduct, namely verbal aggression and threatening behaviour towards Mr Mendonca on 27 March 2020. Mr Stevens' evidence demonstrated that he also genuinely believed the Claimant to be guilty of that misconduct.

59.2. Did the Respondent carry out as much investigation into the matter as was reasonable in the circumstances? The Respondent's investigation fell within the reasonable range of responses. The three people involved were the Claimant, Mr Mendonca and Miss Caenetto and they were each asked about what happened during the 27 March 2020 meeting. Addressing the Claimant's specific criticisms of the investigation:

59.2.1. An initial inquiry was made about CCTV and it was reasonable that no further steps were taken to follow this up given that the CCTV camera was understood not to have covered the relevant area, and CCTV evidence would not have included audio recording of what was said.

59.2.2. None of the people at the 27 March 2020 meeting were able to identify the two Tesco colleagues present in the café so it was not practicable for further statements to be sought from them.

59.2.3. It would have gone beyond what was reasonably required to seek further witness evidence about the HR training session on 28 February 2020 given that the disciplinary allegations under investigation related only to the meeting on 27 March 2020.

59.2.4. The Claimant's allegations about a conspiracy between Mr Mendonca and Ms Caenetto and the housekeeping sheets issue were raised for the first time at the appeal stage. Mr Stevens put the allegations to the relevant witnesses in his follow up interviews.

- 59.3. Were there reasonable grounds for the Respondent to conclude that the Claimant had committed misconduct? There were. Mr Piotto relied on the notes taken by Ms Caenetto and the contemporaneous written accounts of Ms Caenetto and Mr Mendonca, which suggested the Claimant had shouted, screamed, sworn, and behaved in an aggressive and threatening manner. The Claimant denied the disciplinary allegations and gave a different account of the interaction which occurred on 27 March 2020. Nonetheless, it was reasonably open to Mr Piotto to prefer Mr Mendonca's account, as broadly corroborated by Ms Caenetto. Mr Stevens had the benefit of the further witness interviews described above in drawing the same conclusion. It was reasonably open to Mr Stevens to accept the answers he was given by Ms Caenetto and Mr Mendonca regarding the conspiracy and housekeeping sheets issues.
60. The next issue is whether the Respondent followed a fair procedure. Overall, the Respondent's procedure was fair.
- 60.1. The procedure followed at the initial investigative and disciplinary stages was not as robust as might be expected from a company of the size and with the HR resources available to the Respondent. Mr Piotto acted as both investigation and disciplinary manager, whereas the Respondent's policy provides that "*In misconduct cases, where practicable, different people will carry out the investigation and disciplinary hearings*". The Claimant was not asked for his account of events until the disciplinary hearing, which was an inevitably stressful environment and not conducive to the Claimant being able to give his side of the story fully and calmly. However, the question is not whether the procedure followed was perfect but whether it was reasonably open to the Respondent to adopt such a procedure. The allegations against the Claimant related to a single incident and were not complex. The evidence against him was succinctly set out in the accounts of Mr Mendonca and Ms Caenetto. In the circumstances, it was within the band of reasonable procedural options for Mr Piotto to decide that a formal investigation stage conducted by a separate manager could be dispensed with.
- 60.2. The Claimant was correct to submit that Miss Acott intervened in the disciplinary hearing in a way that was supportive of Mr Mendonca. However, this occurred because the Claimant himself referred to the training session that Miss Acott had facilitated as an example of Mr Mendonca's unfair approach. It would be artificial and unrealistic to expect Miss Acott not to have mentioned her factual impressions of that occasion. The Claimant did not suggest that Miss Acott had any biased or ulterior motive for the account which she gave.
- 60.3. In any event, any unfairness to the Claimant caused by the way Mr Piotto and Miss Acott handled the disciplinary stage was cured at the appeal stage. Mr Stevens was an independent manager who the Claimant had a good relationship with. The Claimant had the

opportunity to give his side of the story in his written grounds of appeal and during the course of the appeal hearing. Mr Stevens conducted a further investigation following up the points the Claimant had raised and interviewed relevant witnesses.

- 60.4. At the outset of the hearing, it was suggested on the Claimant's behalf that there had been a failure to provide him with relevant documents and sufficient time to prepare for hearings. However, the Claimant confirmed in evidence that he had received the disciplinary evidence, namely, Ms Caenetto's notes and the written accounts of Ms Caenetto and Mr Mendonca, with the disciplinary letter on 30 March 2020. The Claimant also confirmed that he had had sufficient time to prepare for the disciplinary and appeal hearings.
61. The final question in relation to the unfair dismissal claim is whether the Respondent acted reasonably in all the circumstances in treating the alleged misconduct as a sufficient reason for dismissal (s.98(4) ERA).
62. The decision to dismiss was reasonably open to the Respondent in the circumstances of this case. The misconduct in question, verbal aggression and threatening behaviour towards a line manager, was serious. The Respondent's disciplinary policy provides that "*Any act... of aggression... threats of violence, threatening behaviour, verbal abuse... intimidation...*" will amount to gross misconduct and would normally result in summary dismissal.
63. Another employer might reasonably have considered the Claimant's long record of good service and the provoking circumstances which caused him to lose his temper as sufficient mitigation to dismiss with notice or impose a final written warning. However, summary dismissal was within the band of reasonable responses open to the Respondent in the circumstances. Therefore, the Claimant's dismissal was fair.

Wrongful dismissal

64. Did the Claimant commit a repudiatory breach of contract such that the Respondent was entitled to dismiss him without notice?
65. The findings of fact at paragraph 24 above relating to the Claimant's conduct on 27 March 2020 amount to misconduct which is less grave than the allegations the Respondent's disciplinary and appeal managers had in mind. On the balance of probabilities, I do not find that the Claimant shouted and screamed at Mr Mendonca. I accept that had he done so, this would have been likely to draw attention including from the two Tesco staff present in the café. I do not find that the Claimant made a threatening comment; this is not recorded in the meeting minutes and Mr Mendonca's and Ms Caenetto's descriptions of the alleged threat do not corroborate each other. I accept the Claimant's evidence that he had not intended to act aggressively.
66. However, the result of his conduct was that Mr Mendonca and Ms Caenetto were genuinely shaken. I have found that the Claimant lost his temper, raised his voice, accused Mr Mendonca of lying, called him "*an idiot*" and told him to "*fuck off*".

67. The Claimant's loss of temper was the result of a provoking set of circumstances. He was startled to be told he faced an immediate disciplinary hearing conducted by the same line manager who was the complainant against him. However, his reaction was disproportionate. It was sufficiently grave to undermine the trust and confidence which is inherent in the employment relationship. It amounted to gross misconduct and the Respondent was entitled to summarily dismiss him.

Employment Judge Barrett

8 January 2021