EMPLOYMENT TRIBUNALS

Claimant: Mr J Vallucci

Respondent: Edge Hill University

HELD AT: Liverpool **ON:** 14 March 2017 & 20 March 2017 (in chambers)

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: In person
Respondent: Ms R Wedderspoon, counsel

JUDGMENT

The judgment of the Tribunal is that the claimant was not unfairly dismissed and his claim for unfair dismissal is not well founded and is dismissed.

REASONS

Preamble

1. By a claim form received 16 November 2016 (early conciliation certificate dated 21 October 2016) the claimant claimed unfair dismissal maintaining a final written warning given following a verbal and physical altercation with Mike Harvey on 27 May 2015 he had with another member of staff was unfair in that he had not been provided with the relevant procedures and the person accompanying him to disciplinary hearing was denied the right to speak. He further alleged witnesses (Mike Harvey and Mr Evans) had colluded against him, key witnesses (Ian Macadam, Paul Chandley & Mike Jones) had not been spoken to, the evidence of independent witnesses was overlooked by the investigator, witnesses (Neil Dixon and Kevin Rowan) gave irrelevant character evidence, and reference was made to the claimant's military background. Mike Harvey was given a written warning, there was a disparity of treatment, and mediation was not offered.

2. Following a second incident involving Mike Harvey on 23/24 February 2016 the claimant was dismissed for misconduct, he had a live final written warning on file, and it was not reasonable for the disciplinary panel to dismiss with notice.

3. The respondent disputed the claimant's claims maintaining the claimant was dismissed for misconduct, a reasonable investigation had been conducted, a fair and reasonable procedure had been followed, there was sufficient evidence for it to reasonably form a view that the claimant had committed the alleged act of misconduct, and the decision to dismiss fell within the band of reasonable responses, which was fair pursuant to section 98 of the Employment Rights Act 1996.

Evidence

4. On behalf of the claimant the Tribunal heard evidence from the claimant on his own behalf who gave oral evidence and produced a written statement taken into account.

5. On behalf of the respondent the Tribunal heard from Mark Arthur Allanson, Pro Vice-chancellor (External Relations) appeal chair, Liam Christopher Owens, Director of Student Recruitment and Administration, investigator, and Lynda Brady, Pro-vice chancellor, Student Experience, chair of disciplinary hearing, and it took into account their witness statements.

6. Turning to credibility issues, the Tribunal found all of the witnesses to be credible with the exception of the claimant in part, who on one occasion gave less than satisfactory replies on cross-examination concerning whether or not he had made aware the allegations he was facing involved those for which he was dismissed, or were theft and dishonesty. The claimant gave evidence that he took the disciplinary invite letter that set out a reference to theft and dishonesty at face value, and did not make connection with the investigation into the alleged physical altercation, which the claimant maintained was an assault upon him despite the fact the investigation report was attached to the invite letter and this clearly referred to the correct allegations.

Agreed issues

7. The agreed issues in this case are as follows –

(1) Was the claimant dismissed for a potentially fair reason? Was the reason or principal reason misconduct?

(2) Did the respondent hold a genuine belief in misconduct on reasonable grounds following a reasonable investigation?

(3) Was the first warning issued for an oblique motive or was it manifestly in appropriate i.e. not issued in good faith or for prima facie grounds? Was the earlier final written warning valid?

(4) Was the sanction too harsh? In particular, was it reasonable for the respondent to treat the conduct reason, taken together with the final written warning imposed on 20 July 2015, as sufficient to dismiss?

(5) If the Tribunal were to find in the claimant's favour the "no difference rule" under the well known case of Polkey v AE Dayton Services Limited [1988] ICR 142, HL, in contribution were issues to be decided upon and on which the Tribunal heard oral submissions.

8. The Tribunal was referred to an agreed bundle of documents together with additional documents, the claimant's skeleton argument (the relevant points have been covered in the finding of facts and conclusion), chronology, oral submissions and written submissions presented by the parties which the Tribunal does not intend to repeat, but has attempted to incorporate the points made within the body of this Judgment with Reasons, I have made the following findings of the relevant facts.

The Facts

9. The respondent is a campus university based in Ormskirk, Lancashire. It has the welfare of its students at heart, and it was well known to staff, including the claimant and another employee, mike Harvey, that Wednesday nights, known as "fight night" necessitated the protection of students on campus that had a 24 hour security and emergency response. "Fight night" occurred when the students drank at the Students Union and in the aftermath.

10. The claimant was employed by the respondent between 6 September 2013 and 26 June 2016, the effective date of termination, as a facilities management supervisor line managing five employees providing campus support daytime and at night. The claimant was accountable to head of accommodation services.

11. The claimant was provided with a Disciplinary and Grievance Procedure, Bullying and Harassment Policy and procedure in addition to a number of other policies and procedures. The Bullying and Harassment Procedure defined bullying as "offensive, intimating, malicious or insulting behaviour, the abuse or misuse of power which violates the dignity of, or creates a hostile environment which undermines, humiliates, denigrates or otherwise injures the recipient." The Disciplinary and Grievance Procedure included "physical/violent behaviour" as gross misconduct, and complied with the ACAS Code.

12. The claimant was provided with a contract of employment dated 22 August 2013, job description and person specification. The claimant was on grade 5 points 19-22. The job description ran to some 4 pages and included a reference to team leadership, and the requirement that the claimant "develop and maintain a true team working culture within FM Campus support, promoting staff inclusion, empowerment and ownership." He was expected to "maintain a safe and secure residential environment for students…liaise with the Head of Accommodation Services and accommodation operations manager." The claimant carried out patrols at night as part of his duties.

The 27 May 2015 incident

13. In the early hours of Thursday 27 May 2015 an incident took place between the claimant and Mike Harvey, a night support officer, Student Services, who was on a Grade 3 and over whom the claimant, whilst not his line manager, had authority. The claimant had trained Mike Harvey in the use of body cameras.

14. A complaint was raised initially by the claimant into the alleged incident, and this was followed up by a counter-complaint by Mike Harvey. At this liability hearing the claimant maintained no action was taken by the respondent until Mike Harvey's complaint and the fact he had complained first should have been taken into account, and was not. The Tribunal was of the view that who had complained first was not relevant; the issue was whether Francis Scattergood had carried out a reasonable investigation that fell within the band of reasonable responses and if not, did this point to the final written warning being manifestly inappropriate or not issued in good faith on the basis that there were no prima facie grounds, i.e. the investigation, for making it. . What is reasonable does not equate to perfection. The Tribunal found no such grounds for the reasons set out below.

15. The claimant's incident interview log dated 28 May 2015 accused Mike Harvey of "rugby tackling" him when the claimant prevented him from walking the street past the students union bar. Reference was made to head door person, door staff and student's attending the claimant at the time, and Mike Jones, Ian Macadam and Paul Bradley being in the "immediate area." The claimant has criticised Francis Scattergood for failing to interview students. The Tribunal did not agree; the students were not named by the claimant and it was sufficient for statements to have been taken from those witnesses who had attended the claimant at the time, Chris Mattison, and Tyler Hornby door supervisors from FHG Security confirmed by the claimant to have witnessed the alleged assault.

16. Mike Harvey in an email also dated 28 May 2015 accused the claimant of grabbing his jacket and pushing him backwards and threatening to "take it to the front." He described telling the claimant he was activating the body camera "something I hadn't done earlier as I never imagined he would actually strike me. He immediately stood still; stopped talking and looked straight ahead avoiding eye contact…"

17. Both employees were suspended on full pay pending the outcome of the investigation.

18. Chris Mattison provided a witness statement on 25 May 2015 describing how the incident between campus support and general support had been "brewing for months" and how the male "with the bald head" pushed into the claimant, they were split up and the claimant was then filmed. Tyler Hornby provided a witness statement on the same date as he had witnessed the aftermath, describing the claimant as professional and calm, "…the NCO's [Mike Harvey and colleague] increasingly frustrated and vocal." Darren Evans in witness statements dated 28 May and 2 June 2015 accused the claimant, supporting the evidence of Mike Harvey.

19. It is apparent to the Tribunal Mike Harvey and Darren Evans may well have colluded prior to the later producing his witness statement which were almost

identical in a small part but not in whole to Mike Harvey's email dated 18 May 2015. For example, the phrase "He continued in an intimidating manner by trying to encroach on both of our personal space and then suddenly and aggressively asked me 'what have you got to say" was included in the statement of Darren Evans dated 28 May 2015. "He maintained an intimidating manner by trying to encroach on our personal space and then suddenly and quite aggressively asked Darren "what have you got to say" was set out in Mike Harvey's email of 18 May 2015. The similarities are striking but there is also a considerable amount of difference which points to the possibility that whilst information may have been shared, i.e. Darren Evans may have been provided with a copy of the 18 May email, much that was said was not duplicated. It is notable Mike Harvey's investigation statement is not a duplication of Darren Evans' witness statement.

20. The claimant in his lengthy statement proffered and referred to his military background. It is notable he confirmed he would not have approached the incident in a different way, alleging Mike Harvey had sworn and rushed at him violently and "using necessary and proportionate force" towards Mike Harvey confirming he had been trained on "all stages of conflict management and [physical] disengagement," and this evidence of the claimant's attitude to the allegation was taken into account at the disciplinary hearing.

Investigation report

21. An Investigation Report dated 6 July 2015 was produced, together with appendixes. The Tribunal has only dealt with the complaint relating to the alleged physical confrontation and not the radio communications as the latter was not found against the claimant.

22. Kevin Rowan confirmed to the investigating officer there were "no formal rules in relation to out of bounds area for particular members of staff, a fact also confirmed by Kate McAdam and the note records examples being given of the claimant's "military mindset." Cleve Rushton, Ian Blease and Neil Dixon gave evidence concerning security, the later referring to the claimant's rigid approach and "past military experience…not entirely in keeping with supporting students on campus."

23. In a letter dated 4 June 2015 that complied with the ACAS Code the claimant was invited to an investigation meeting with Frances Scattergood. He was informed he had the right to be accompanied. The seriousness of the allegation was set out.

24. As part of his investigation Francis Scattergood took witness statements from 10 witnesses in total, including two night support officers one of whom was a key witness, Kevin Rowan the claimant's line manger, and Kate McAdam, Head of Accommodation Services to provide context. The report referred to CCTV footage being viewed and footage from a body camera worn by Mike Harvey. Francis Scattergood's findings were that there was a dispute about whether Mike Harvey had authority to patrol or pass through the street outside the student union bar on the night in question. It was found the claimant's allegation that Mike Harvey had no authority was unsubstantiated. There was evidence the claimant had made denied Mike Harvey access and "contrary evidence that MH became irate and violently aggressive towards JV."

25. Francis Scattergood found there was evidence of a "slight" physical altercation, "however it was unclear who the instigator was. There is no corroborating evidence MH rugby tackled JV... there is evidence that the incident was witnessed in person however there is no CCTV evidence depicting the actual assault." There is a reference to the body camera footage capturing words and showing the claimant disengaging as soon as the body camera was switched on after the alleged incident.

26. The report referred to a history of unresolved issues and "clash of personality" between the claimant and Mike Harvey. Francis Scattergood's opinion was "JV brings a military tone to the role and this includes a perception that he has overall ownership of the campus during night shift. This appears to bring with it an overzealous interpretation of the role of campus support supervisor, rigidly applying rules and regulations and showing a lack of situational sensitivity to his work." He concluded, "The information I have gathered does not indicate whether JV or MH actually instigated the incident or what proportion of force was used…there is however, evidence to indicate that JV…engaged in what could be construed as 'physical or violent behaviour.' That evidence does not point to one individual being more culpable than the other."

27. The respondent invited the claimant to a disciplinary hearing in a letter dated 13 July 2015 that incorrectly referred to allegations of theft and dishonesty enclosing the investigation report that "provides specific details of your alleged misconduct." The investigation report is very clear on the allegations facing the claimant, and he would have known after reading that report they were not theft and dishonesty.

28. In a letter dated 19 July 2015 the claimant raised a grievance against Francis Scattergood referring to Ian Macadam and Mike Jones as witnesses who were in close vicinity and had not been spoken to, raising complaints about Jan Harvey who had been when she was not present and Mike Harvey's wife. The claimant's witnesses were not spoken to, the reason for this was not apparent on the evidence before the Tribunal.

<u>The disciplinary hearing 28 July 2015</u>

29. The claimant attended a disciplinary hearing on 28 July 2015. He was aware from the invite letter that he could have requested the attendance of any witness, submit witness statements and be accompanied. The claimant was accompanied by Proper Mwedzi, a work colleague, and he produced witness statements taken from Paul Chandley and Mike Jones. The minutes record the witness statements as having been read and it was accepted by the disciplinary committee they provided context. The claimant did not produce a statement from Ian Macadam and nor was he questioned by the respondent .

30. The minutes record the disciplinary chair stating Proper Mwedzi was there to support the claimant, and they wished to hear from the claimant directly. There was no reference to Proper Mwedzi not being allowed to present the claimant's case or ask questions. It is recorded the claimant had no questions to ask Francis Scattergood and alleged Mike Harvey and Darren Evans had colluded over their witness statements. The claimant produced a 3-page document titled "Representation before the Panel" setting out his arguments.

The outcome – final written warning

31. In a letter dated 30 July 2015 the disciplinary hearing panel of 3 confirmed the outcome; it found the claimant and Mike Harvey were both culpable having accepted an altercation had taken place, it accepted the statements of Mike Jones and Ian Macadam and concluded the claimant's behaviour fell short of the standard expected of a supervisor. The letter recorded "…You accept that an altercation took place, however you assert that you did not instigate any physical/violent action…When asked to reflect upon your behaviour and the impact of that behaviour you believed that your actions followed protocol and were appropriate to the situation you faced. **I am not, therefore, confident that faced with a similar situation you would react any differently and this causes me concern** [my emphasis]." A final written warning was issued that "will remain on your file for a period of 12-months…please be aware that any live warnings may be taken into account and may lead to dismissal."

32. In a letter dated 30 July 2015 to Mike Harvey following his disciplinary hearing it was confirmed he and the claimant were both culpable, and like the claimant he accepted an altercation had taken place, but not at his instigation. In direct contrast to the claimant the letter recorded "**When asked to reflect upon your behaviour you recognised the impact of that behaviour and accepted your continued questioning of the other party was not helpful, and as such, if it happened again you would walk away to avoid further confrontation"** [my emphasis]**.** A written warning was issue issued to stay on Mike Harvey's file for 12-months.

33. Mike Harvey refused to mediate with the claimant who was open to mediation, and thus mediation could not take place.

34. As the Acas Guide points out, fairness does not mean that similar offences will always call for the same disciplinary action. Each case must be looked at in the context of its particular circumstances. The respondent's decision to differentiate between the claimant and Mike Harvey on the level of punishment given the claimant's seniority and the respondent's concerns about his reaction to the allegation, could not be said to be manifestly inappropriate and the Tribunal finds the final written warning was issued in good faith and for prima facie grounds.

35. The claimant appealed in 3-page letter dated 10 August 2015 and in an appeal outcome letter dated 10 September 2015 the Pro-Vice Chancellor Mark Allanson dismissed the appeal. The claimant chose not accompanied. The Tribunal heard oral evidence from Mark Allanson as to his involvement.. Despite the claimant's observations, he found the investigating officer to have been impartial and did not question the "genuineness" of any of the statements from the witnesses noting they "had been given freely and had been obtained shortly after the incident." Despite the similarities of some of the phrasing as set out above, it is the Tribunal view on the balance of probabilities that Mark Allanson was entitled to reach this conclusion, especially given his references to the investigating officer's interview of several witnesses and the witness statements produced by the claimant had been accepted in evidence by the disciplinary committee. He confirmed the claimant's military background did not inform the decision making process and "having regard

to the nature of Mr Vallucci's position, including the seniority of his role, I considered his behaviour to be highly inappropriate and that a final written warning was a proportional outcome. Indeed, I considered that some disciplinary panels may have determined that involvement in an incident of this nature should attract a dismissal decision." He emphasised the claimant should have "been setting an exemplary example to students of the university and colleagues… [He] occupied a senior position with important leadership and management responsibilities", referring too the claimant's job description.

36. The Tribunal was satisfied, the claimant having admitted that an incident took place, albeit not at his instigation, the disciplinary and appeal committee were entitled to conclude the claimant's failure fell far below the standard for an employee in a senior position and it cannot be said, on the balance of probabilities, the first warning had been issued for an oblique motive or was manifestly in appropriate i.e. not issued in good faith or for prima facie grounds. In short, the earlier final written warning was valid and live on the claimant's record.

37. The respondent be criticised for not providing the claimant with footage from Mike Harvey's body camera, but as it appears the only reference to this footage is a brief one within the investigating report (the actual incident itself was not recorded), and as the disciplinary and appeal committee did not view the footage, it cannot be said the decision to award a final written warning amounted to an unfairness given the entirety of the evidence submitted in the investigation report and considered by the disciplinary panel. The disciplinary and appeal committee was entitled to take into account the different circumstances between the two employees, in particularly, the claimant's seniority and to do so would not point to the first warning being issued for an oblique motive or manifestly inappropriate. There was no satisfactory evidence before the Tribunal the claimant was punished for his military background, as now alleged by the claimant who had referred to this background himself during the investigation. Had the respondent's intention been to dismiss the claimant because of this, then it could have done so given the seriousness of the first offence and the claimant's reaction to it.

<u>The second allegation</u>

38. The claimant had put forward a business case for body cameras as a health and safety measure, produced a Standard Operating Procedure and trained staff including Mike Harvey. Under the respondent's processes the Standard Operating Procedure would have been authorised by management and placed on the respondent's intranet; there was no evidence of either step having been taken and it appears custom and practice was for the body camera to be signed out without the claimant's consent or knowledge.

39. The Standard Operating Procedure produced by the claimant at the disciplinary hearing set out the following; "officer wishing to patrol using BWCCTV must do so only with the approval of a supervising officer." It was the claimant's view at the liability hearing as he was the supervisor approval was within his gift only. The Procedure did not specify what would happen in the event of the claimant not working i.e. if he was on holiday or sick.

40. As a result of the final written warning being issued the respondent had taken the view the claimant should work the day shift in order to better understand how the university was run and his pay was reduced accordingly. The claimant was not pleased but accepted the situation. With effect from 7 January 2016 the claimant reverted to his original night shift. Mike Harvey had been off work with a serious head injury and had returned.

The 24 February 2016 incident

41. On the 24 February 2016 at 13.03 hours the claimant emailed Kevin Rowland complaining about Mike Harvey's refusal to return a body camera whilst he was on duty. The claimant wrote; "The reason I bring this up with you is that given the misuse of this equipment by the said person in the past and the point that I believe he has taken it to provoke a confrontation and or use it inappropriately this evening, worried me as I will have enough to deal with it being our busiest night on campus." The claimant was referring to Mike Harvey's use of the body camera during the first incident in 2015. Kevin Roland responded; "some of the NSO's have signed the body cams out at some point. We cannot change that process now. The current status of NSO/CS means that there is no formal management or supervision…"

42. A formal written complaint of bullying was made by Mike Harvey in an email dated 7 March 2016 in which he described how the claimant was not his line manager, that he was the only night support officer who attended the 2014 body camera training sessions and how on 24 February 2016 he had requested a body camera from student support services "as I had done many times before. Mike Jones…issued me with a camera." The claimant demanded its return approximately some 2-hours after it had been issued maintaining it was policy. Mike Harvey complained "I am the only person such an order would affect as I am the only non-Campus support staff member who carries a Body cam through the night. I find his [the claimant's] actions a direct attack on me and his radio demands a further attempt to humiliate me over the airways…I believe his actions are a misuse of his position…and clearly bullying of me in the workplace leaving me particularly vulnerable at night."

43. In a letter dated 9 March 2016 that complied with the ACAS code, the claimant was invited to an investigation into inappropriate radio conversation and allocation and usage of body cameras.

The investigation

44. Liam Owens undertook the investigation and Mike Jones was interviewed on 10 March 2016. He was accompanied by Paul Chandley. The claimant was interviewed on the same day maintaining he had been on shift and cameras had to be signed out by him. Mike Harvey had "mistakenly" been signed out a camera by Mike Jones who had not followed the correct procedure, one which the claimant was unable to find. …Mike Harvey did not want to use the camera appropriately and that he wanted to record JV himself rather than have a camera for protective/safety reasons." The previous incident was referred to by the claimant.

45. Kevin Rowan attended an investigation meeting on 14 March 2016 and confirmed the procedure for issuing body cameras that did not require staff to report

to anyone (including the claimant) and it was not necessary for a supervisor to sign them out and "anyone on duty" can have/sign out a camera if requested. Kevin Rowan after the incident had confirmed "cameras should be made available to anyone…especially on Wednesdays when there was a higher probability of problems on campus

46. Mike Harvey was interviewed on 14 March 2016. He referred to Wednesday nights as "fight nights" and explained how he had recently had a head injury, recently returned to work, did not want any confrontation and felt "discriminated against" by the claimant.

47. Iona Horsurgh provided evidence that Mike Harvey had requested the body camera due to his head injury and nervousness on his return from sick leave and cameras should be issued to anyone on request "as had been the case for a number of months previously."

48. Kate McAdam confirmed Mike Harvey had "routinely used a body camera," was the only NSO to do so, and she had not received any communication with regards to a policy that only supervisors could sign out body cameras. Her view was that they should be available, particularly on Wednesdays.

49. On the 23 March 2016 the claimant went off work sick.

50. An investigation report was provided to him dated 22 March 2016 that referred to there being a sufficient number of body cameras, 6 in all, and Mike Harvey routinely issued with a body camera particularly on Wednesdays for his own safety. The body camera was signed out by Michael Jones on the night in question "in keeping with the usual patterns of behaviour...MH has recently returned from sick leave during which he was recuperating from a serious injury and therefore feels particularly vulnerable…there is no reason to believe that MH would seek to wear this equipment other than for its intended use. JV's demand that the camera be returned…because an 'order' was in place due to a change in the policy appears to be false and…misjudged…JV's demand…was made on the basis of wishing to single out and humiliate MH. There is no justifiable reason why MH should have been required to return the equipment and I can therefore only find JV was at fault in this incident."

51. The claimant was invited to a disciplinary hearing in a letter that complied with the ACAS Code dated 6 April 2016. There was numerous adjournments and in an occupational health report dated 24 May 2016 the claimant was deemed well enough to attend a disciplinary hearing. Party to party correspondence was exchange concerning witnesses and the names of those the claimant wished to have present. In an email dated 8 June 2016 he was advised by human resources "it is your prerogative to suggest them as witnesses and explain the rationale for that…alternatively, at the hearing you may make a case for them to be re-interviewed and suggest particular questions not already asked of them…if they were to attend in person you would have the opportunity to ask them questions..."

52. The disciplinary outcome letter dated 30 July 2015 relating to the first allegation, together with witnesses statements relating to the second incident and the investigation report was with the claimant and before the disciplinary panel.

The 13 June 2016 disciplinary hearing

53. The disciplinary hearing relating to the second allegation took place on 13 June 2016. The claimant chose not to be accompanied. The claimant repeated his concern that Mike Harvey wanted the camera to film the claimant, and it could not just be signed out according to the Standard Operating Procedure which could be found on the respondent's FMY drive. He referred to being attacked by Mike Harvey in 2015 and there were references to a number of differences between the claimant, Mike Harvey and their poor working relationship. The claimant denied possessing knowledge of Mike Harvey's head injury and it was notable at the liability hearing he was unable to explain why, once Mike Harvey had returned the "missing" body camera, it had not been returned for him to continue using on a night known as "fight night" when the students poured out of the students union after drinking in the bar.

54. Liam Owens expressed his concern surrounding the claimant's "continuing poor judgment" referring to the final written warning relating to unacceptable behaviour concluding this "indicates a lack of responsibility for his actions and attitude towards other members of the university community."

55. It is clear from the minutes of the disciplinary hearing the claimant's concern was not that 2 cameras were missing; it cannot be said the camera held by Mike Harvey was so. The claimant was preoccupied with Mike Harvey's "unethical use" of the camera, an "invasion of privacy issue" as he felt "MH would goad him…this was harassment by MH."

56. The disciplinary hearing was adjourned for the panel to have a follow up meeting with the claimant's line manager, Kevin Rowan, who confirmed it was "custom and practice that cameras were signed out by staff from both teams on request." The claimant has at the liability hearing sought to undermine the knowledge of Kevin Rowan on the basis that he had not been his line manager for very long and was unaware of the Procedure to which the claimant referred to. It was the Tribunal's view the disciplinary committee were entitled to take into account the evidence of Kevin Rowan and prefer that to the claimant's, given the corroborating evidence of other managers. Reference was made to the proposed merger of NSO and campus support.

57. The disciplinary hearing outcome was set out in a letter dated 11 August 2016. The panel of 3 were unanimous that the allegation was proven and amounted to a serious breach of procedures. They found it was not clear, despite the claimant giving various reasons for the return of the body camera having indicated at the disciplinary hearing "for the first time" 2 body cameras were missing, why he had requested its return. In relation to this finding the claimant at the liability hearing correctly pointed out that this was not the first time he had raised the issue of 2 missing cameras; this had been raised previously in the 24 February 2016 and the disciplinary committee were wrong on this point. Nevertheless, the Tribunal found it fell within the band of reasonable responses for disciplinary committee to reach a

view it was undisputed the claimant had asked for the body camera return and had not then returned it for Mike Harvey, who was unhappy, to use.

58. The disciplinary committee understandably questioned why the claimant had demanded the return of the body camera given his argument that 2 were missing and only 1 had been signed out, when clearly the only that had been signed out to Mike Harvey was not missing. This raised a weakness in the claimant's case the disciplinary committee were entitled to take into account and form a view of the claimant's credibility.

59. Reference was made to the Standard Operating Procedure provided by the claimant at the disciplinary hearing, and it was found that this was not "routinely" followed. The disciplinary committee were entitled to accept the evidence of Kevin Rowan and Liam Owens that operationally custom and practice of body cameras being issued by colleagues was in place and the Operating Procedures were not "routinely followed."

60. The disciplinary panel was entitled to conclude, based on the evidence before them, the claimant "unnecessarily" asked for the return of the body camera on more than one occasion, "notwithstanding the fact you knew the camera had been issued to MH by a colleague so its whereabouts was not in question…your request to MH…was not a decision relating to process, but…heavily influenced by the previous incident which resulted in the final written warning. Your actions resulted in the 'singling out' of MH…was an inflammatory act designed to provoke and humiliate MH…you made this decision whilst working in a supervisory capacity, with a higher level of responsibility that comes with such a role and the decision s such that it could have endangered a colleagues health and safety…it calls into question your judgment…and demonstrates a failure to reflect from and learn from the previous incident involving the same individual.

61. The Tribunal accepted the evidence of Lynda Brady, who chaired the disciplinary committee, as credible that the committee was concerned the claimant had singled out Mike Harvey, and his request was heavily influenced by the previous incident that resulted in the final written warning. The claimant has suggested it was unfairness for the final written warning to have been referred to. Given the particular circumstances of this case and the inter-relationship between the two incidents, the Tribunal did not agree. The claimant made repeated references to the intention of Mike Harvey to use the body camera to taunt the claimant and film his response; this is analogous to what the claimant alleged took place in the aftermath of the second incident. The Tribunal accepts on balance, the disciplinary committee considered the alleged conduct on 24 February 2016 in the knowledge that the claimant was subject to a final written warning, but did not take into account that warning until it came to consider whether the claimant should be dismissed after a decision had been reached on whether the alleged 24 February 2016 incident had taken place.

62. The Tribunal is satisfied the disciplinary committee treated the warning as no more than background and dismissed for the misconduct alleged in the new proceedings when it came to consider what sanction should be applied. It did not attached significant weight to the warning when considering whether or not the claimant was guilty of the misconduct alleged in respect of the body camera, and its starting position was not that because the claimant had already been found guilty of

misconduct involving Mike Harvey previously and the subject of a written warning as a result, he was automatically guilty of the second offence and should be dismissed.

63. It is evident from the hearing notes the claimant was given a full opportunity to present his case and ask questions. It is clear from questions asked the disciplinary committee sought an explanation from the claimant, which it considered objectively, adjourning to double-check the custom and practice point with the claimant's line manager. There is no evidence the claimant has questioned these notes, although he now does so, and the Tribunal has taken them into account as contemporaneous evidence that largely supports the basis for respondent's decision to dismiss. Had the disciplinary committee not approached the allegations with an open mind and objectivity, it would not have checked one of the key evidential conflicts in the case, namely, whether the body cameras were issued under the procedure relied upon by the claimant or custom and practise. As the evidence was overwhelmingly in favour of custom and practice, and the procedure relied upon by the claimant could not be located on the respondent's intranet, the disciplinary panel's decision to accept the evidence of managers and other staff in contrast with the claimant's, did not fall outside the band of reasonable responses.

64. It was unanimously decided the claimant's actions amount to serious misconduct , and he was dismissed on the basis that the final written warning was live having considered mitigation, with notice.

Appeal

65. The claimant appealed in a letter dated 1 July 2016. The hearing took place on 2 August 2016 before an appeal panel chaired by Robert Seth Crofts, Pro vice chancellor. At the appeal hearing the claimant stated Mike Harvey had not made known his head injury and had he disclosed this fact "maybe I would have approached things differently." There was no such admission at the disciplinary hearing. The appeal was dismissed in an appeal outcome letter dated 11 August 2016, the appeal committee having concluded a significant amount of support had been given to the claimant to familiarise himself with "general campus support operations and university culture…the incident called into question your judgment particularly given your role as supervisor.

66. Having reviewed the notes taken at the appeal hearing and considered the oral evidence of Robert Crofts, the Tribunal was satisfied there was a full and fair consideration of the points raised by the claimant in his appeal. With reference to the proportionality of the outcome, it did not fall outside the band of reasonable responses for the appeal committee to conclude the claimant's explanations were flawed; lacked substance and the claimant had acted vindictively when singling out Mike Harvey. The appeal committee relied on the undisputed fact that Wednesday evenings were the "liveliest" and when staff were more likely to need protective equipment. It found the existence of the final written warning was evidence the claimant had been made aware that any further lapses were likely to attract disciplinary action and possibly dismissal.

The law

67. Section 94(1) of the Employment Rights Act 1996 ("the 1996 Act") provides that an employee has the right not to be unfairly dismissed by her employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) includes conduct of the employee as being a potentially fair reason for dismissal.

68. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

69. Where the reason for dismissal is based upon the employee's conduct, the employer must show that this conduct was the reason for dismissal. For a dismissal to be procedurally fair in a case where the alleged reason for dismissal is misconduct, Lord Bridge in Polkey –v- A E Dayton Services Limited [1981] ICR (142) HL said that the procedural steps necessary in the great majority of cases of misconduct is a full investigation of the conduct and a fair hearing to hear what the employee has to say in explanation or mitigation. It is the employer who must show that misconduct was the reason for the dismissal, and must establish a genuine belief based upon reasonable grounds after a reasonable investigation that the employee was guilty of misconduct – British Home Stores Ltd v Birchell [1980] CA affirmed in Post Office v Foley [2000] ICR 1283 and J Sainsbury v Hitt [2003] C111. In short, the Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation, without substituting itself for the employer.

70. The Court of Appeal in British Leyland (UK) Ltd v Swift [1981] IRLR 91 set out the correct approach: "If no reasonable employer would have dismissed him then the dismissal was fair. But is a reasonable employer might reasonably have dismissed him, then the dismissal was fair…in all these cases there is a band of reasonableness, within which one employer might reasonably take one view and another reasonably take a different view.

71. In between extreme cases of misconduct there will be cases where there is room for reasonable disagreement amongst reasonable employers as to whether dismissal for the particular misconduct is a reasonable or unreasonable response: LJ Mummery in HSBC Bank Plc v Madden [2000] ICT 1283.

72. The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed,

including whether the dismissal of an employee was reasonable in all the circumstances of the case.

73. The test remains whether the dismissal was within the range of reasonable responses and whether a fair procedure was followed. Section 98 (4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

74. On behalf of the respondent the Tribunal was referred to the EAT decision in C Simmonds v Milford Club UKEAT/03223/12/KN in which reference was made to a "manifestly inappropriate previous disciplinary sanction" and the Court of Appeal decision in Davies v Sandwell Metropolitan Borough [2013] EWCA Civ 135. The Tribunal considered this judgment, in particular, paragraphs 14, 20, 21, 37 and 38.

75. In Simmonds and the Judgment of Lord Justice Mummery it was held the starting point should always be Section 98 of the Employment Rights Act 1996, the question being whether it was reasonable for the employer to treat the conduct reason, taken together with the circumstances of the final written warning, as sufficient to dismiss the claimant. Secondly, it was not for the tribunal to reopen the final warning and consider whether it was legally valid or a nullity. And thirdly, the questions of whether the warning was issued in good faith, whether there were *prima facie* grounds for imposing it and whether it was 'manifestly inappropriate' are all relevant to the question of whether dismissal was reasonable, having regard, among other things, to the circumstances of the warning. Lord Justice Beatson confirmed that only rarely would it be legitimate for a tribunal to 'go behind' a final written warning given before dismissal. Where there has been no appeal against a final warning, or where an appeal has been launched but not pursued, there would need to be exceptional circumstances for a tribunal to, in effect, reopen the earlier disciplinary process.

76. Finally, the Tribunal was referred on behalf of the respondent to the court of Appeal decision in Way v spectrum Property Care Limited [2015] EWCA Civ 381 particularly paragraphs 1, 21, 37, 38, 50 – 58 of the Judgment by LJ Christopher Clarke.

Conclusion, applying the law to the facts

77. During the liability hearing the claimant attempted to show that his dismissal had serious consequences for his qualifications in security; there was no evidence whatsoever before the Tribunal to this effect and no reference made by the claimant either at his disciplinary or appeal hearing. In short, the Tribunal is not satisfied the may never work again in his chosen career of security as a result of the findings of serious (not gross) misconduct. Nevertheless, the Tribunal has taken some time over this matter, and scrutinised the respondent's processes, both at investigating stage and during the disciplinary and appeal hearing, mindful of the requirement that it should not substitute its own view for that of the respondent.

78. With reference to the first issue, namely, was the claimant dismissed for a potentially fair reason, the Tribunal found he was having been dismissed for misconduct, and he would not have been so dismissed had the live final written warning not been taken into account.

79. With reference to the second issue, namely, did the respondent hold a genuine belief in misconduct on reasonable grounds following a reasonable investigation the Tribunal found it did. A fair and proportionate procedure was followed, it complied with the ACAS Code of Practice on Disciplinary and Grievance Procedure, and on the balance of probabilities fell well within the range of reasonable responses open to a reasonable employer. Paragraph 23 of the ACAS Code states that, "a fair disciplinary process should always be followed before dismissing for gross misconduct." The ACAS guide emphasises that the more serious the allegations against the employee the more thorough the investigation conducted by the employer ought to be.

80. The Tribunal was referred to numerous cases by the claimant, who on one occasion did not provide a citation and in relation to all did not provide copies of the cases, nevertheless, given the fact the claimant is a litigant in person the Tribunal has searched for them.

81. On behalf of the claimant the Tribunal were referred to Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94 in which the Court of Appeal held to require an employer to investigate each separate line of defence put forward by an employee in response to allegations of misconduct unless it is manifestly false or unarguable would be to adopt too narrow an approach and add an unwarranted gloss to the test for reasonableness of dismissal formulated by the EAT in British Home Stores Ltd v Burchell. An employer must consider the defences put forward by the employee, but the extent to which the employer is required to investigate them will depend on the circumstances as a whole. What is important is the reasonableness of the overall investigation into the issue. In the present case, the Tribunal found the investigation – including into the employee's responses to the allegations of misconduct – were reasonable in the circumstances. The claimant had provided witness statements at the disciplinary hearing and these were taken into account by the disciplinary committee before it made its decision.

82. The claimant referred the Tribunal to the Court of Appeal decision in Turner v East Midlands Trains Ltd [2013] IRLR 107 and A v B [2003] IRLR with no citation. The Tribunal assumes the claimant is referring to [2002] UKEAT 1167_01_1411, [2003] IRLR 405 and if so, the claimant's case can be differentiated. As indicated above, there was no evidence before the Tribunal that final written warning and/or dismissal affected the claimant's professional reputation or ability to work in security. He was not facing serious allegations of criminal misbehaviour. AvB made reference to the fact the investigation is usually being conducted by laymen and not lawyers and it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary. The Tribunal found on the face of the evidence, this is what transpired in the claimant's case.

83. On behalf of the claimant the Tribunal was referred to Henderson v Granville Tours Ltd [1982] IRLR 494 in which it was held it was unreasonable for an employer

to dismiss on the basis of customer complaints alone, no matter how truthful and reliable the employer thought the complainants to be. Further investigation is needed, even by small firms, before reasonable belief in the misconduct is established. It is notable reference was made to the issue concerning whether the employer's belief in H's misconduct was reasonable, the Tribunal should have asked whether any reasonable employer, faced with complaints from a customer denied by an employee, would believe the customer against the employee without further enquiry into the fact of misconduct and the gravity of any misconduct found, after investigation, to have occurred. The claimant's argument that the respondent should have interviewed students and Henderson set a high bar for a respondent was not accepted by the Tribunal. Unlike the respondent in Henderson the investigating officers in both allegations relating to the claimant, interviewed a number of relevant witnesses and there was not requirement for it to go on a hunt for unnamed students pouring out of a bar on "fight night" with regard to the first allegation, bearing in mind there were witnesses of the event who held positions of responsibility i.e. the security doormen. The respondent's belief in the claimant's misconduct was genuine in relation to both allegations, and it was reasonable for that belief to be held given the extent of the investigations that fell well within the band of reasonable responses.

84. The investigating officer, the disciplinary committee and appeal committee were required to keep an open mind, which they did. Their task was to objectively look for evidence that supports and/ or weakens the claimant's case. A reasonable investigation had been conducted into the claimant's conduct and a fair and reasonable procedure was followed before the decision taken to dismiss and not to uphold the appeal against dismissal. The ACAS Code of Practice was complied with throughout. In relation to the second allegation, the claimant was aware of his right to be accompanied and chose not to be, which was a matter was for him. The claimant's explanation that he chose not to on the basis his colleague who had accompanied him to the hearing of the first allegation was not allowed to talk, was not found to be credible by the Tribunal. The claimant had been advised of his right, and if he intended questions to be asked on his behalf, or for his case to be put forward, this is a matter he could have raised at the disciplinary hearing with his colleague in tow. Having not done so, the claimant is not now in a position to complain about his right to be accompanied. The Tribunal has dealt with the first allegation and the claimant being accompanied at the disciplinary hearing above; in short, it accepted the claimant had been told the disciplinary committee wished to hear from the claimant directly. The notes do not record the claimant was informed his colleague could not say anything, and the Tribunal found this was not the case. It is notable the claimant did not seek to amend the notes during the disciplinary process.

85. The claimant was given the opportunity to ask questions and to state his case, procedure witness statements (which he did at the disciplinary hearing dealing with the first allegations) call witnesses, raised questions and put forward an explanation as to why he had not committed the misconduct. It was open to the disciplinary and appeal committee to prefer the evidence of other witnesses, including line managers, to that of the claimant, who gave a number of reason as to why he had re-called the body camera.

86. With reference to the third issue, namely, was the first warning issued for an oblique motive or was it manifestly in appropriate i.e. not issued in good faith or for

prima facie grounds, the Tribunal found it was not and that it was a matter of which the claimant could have been dismissed, fighting in the workplace being a particular serious allegation. The Tribunal, who does not intend to repeat its findings above, found the earlier final written warning was on the face of the documentation valid, and followed a fair, but not perfect, disciplinary process for the reasons already given. On the balance of probabilities the Tribunal accepts there was sufficient evidence before the disciplinary committee who were able to reasonably form a view that claimant had been involved in a physical confrontational. It held a genuine belief based upon a reasonable investigation, and given the seriousness of the allegation, the decision to issue the claimant with a final written warning and his colleague with a written warning given the claimant's seniority and responsibility, fell within the band of reasonable responses which a reasonable employer would be entitled to take in the circumstances.

87. In Wincanton Group plc v Stone [2013] ICR D6, EAT (above) Mr Justice Langstaff, President of the EAT, summarised the general principles to be applied as to the relevance of earlier warnings when determining the fairness of a dismissal:

83.1 The tribunal should take into account earlier warnings issued in good faith.
83.2 If the tribunal considers that a warning was issued in bad faith, it will not be valid and cannot be relied upon by the employer to justify any subsequent dismissal.
83.3 where a warning was issued in good faith, the tribunal should take account of any relevant proceedings, such as internal appeals, that may affect the validity of the warning, and give them such weight as it considers appropriate
83.4 the tribunal may not 'go behind' a valid warning to hold that it should not have been issued or that a 'lesser category' of warning should have been issued
83.5 The tribunal will not be going behind the warning where it takes into account the factual circumstances giving rise to it. There may be a considerable difference between the circumstances giving rise to the first warning and those considered later. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way
83.6 The tribunal may also take account of the employer's treatment of other employees since the warning was issued. This may show that an employer has subsequently been more or less lenient in similar circumstances
83.7 The tribunal must remember that a final written warning always implies, subject only to any contractual terms to the contrary, and that any subsequent misconduct of whatever nature will usually be met with dismissal.

88. The Tribunal examined the disciplinary committee's reasoning - including the extent to which it relied on the final written warning - to see whether or not the decision to dismiss was reasonable having regard to equity and the substantial merits of the case as recorded above. There is no satisfactory evidence before the Tribunal to the effect that the final written warning was issued in bad faith, and the Tribunal accepted the evidence of the appeal officer, Mark Allanson, as to the processes carried out and the reasons for the issuing of a final written warning. There exists prima facie grounds for imposing the final written warning, which was not on the face of it, 'manifestly inappropriate' having regard, among other things, to the circumstances of the warning.

89. With reference to the fourth issue, namely, was the sanction too harsh, the Tribunal found it was not and it was reasonable for the respondent to treat the conduct reason, taken together with the final written warning imposed on 30 July 2015, as sufficient to dismiss given the particular circumstances of this case. The Tribunal determined, on the facts of this particular case and having regard to the nature of the allegations made, the manner of the investigation, the size and capacity of the respondent's undertaking (which was considerable with access to HR and legal), and all relevant circumstances including the seriousness of the offences, the seniority of the claimant's position and his responsibilities, and the existence of a live final written warning, the decision to dismiss the claimant was both substantively and procedurally fair and fell within the band of reasonable responses.

90. With reference to the fifth issue, namely, if the Tribunal were to find in the claimant's favour the "no difference rule" under the well known case of Polkey v AE Dayton Services Limited [1988] ICR 142, HL, having found the claimant was not unfairly dismissed it was not require to deal with these issues..

91. In conclusion, on the facts of the case and taking into account the nature of the allegations made, the manner of the investigation throughout the entire disciplinary process, the size and capacity of the first respondent's undertaking and all relevant circumstances, the claimant was not unfairly dismissed and his claim for unfair dismissal is not well-founded and is dismissed.

Employment Judge Shotter

21 March 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

27 March 2017

FOR THE TRIBUNAL OFFICE