



EMPLOYMENT TRIBUNALS

Claimant: Mr A Lee

Respondent: Bestway Panacea Holdings Limited

HELD AT: Manchester

ON: 24 September 2020

BEFORE: Employment Judge Phil Allen
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Ms R Kight, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant was not unfairly dismissed. His unfair dismissal claim is not well-founded and -does not succeed.

REASONS

Introduction

1. The claimant was employed by the respondent as a store manager from January 2013 until a disciplinary hearing on 6th November 2019, with an effective date of termination of 15th November 2019.

2. The claimant was given a final written warning on 12th June 2019 for displaying unprofessional and inappropriate behaviour. The claimant complains about the process which led to that sanction. The claimant was dismissed following a disciplinary hearing on 6th November 2019 for unprofessional conduct, that is he was alleged to have behaved in an unprofessional manner arising from the language which he was alleged to have used. This was held to constitute gross misconduct. The claimant appealed and his appeal was heard on 17th January 2020 and not upheld.

3. The claimant alleges that the dismissal was unfair, particularly as a result of the investigation and process followed, which the claimant contends was not conducted in a fair way. The claim was only for unfair dismissal.

Issues

4. The issues were identified at a preliminary hearing on 6 July 2020. At the start of the hearing it was confirmed with the parties that the issues to be determined remained unchanged. The issues were as confirmed at paragraphs 5-9 below.

Unfair dismissal

5. What was the principal reason for the dismissal and was it a potentially fair reason in accordance with section 98 of the Employment Rights Act 1996? The respondent asserts that it was a reason relating to the claimant's conduct.

6. Was the dismissal fair in all the circumstances in accordance with equity and the substantial merits of the case (and section 94 of the Employment Rights Act 1996)?

- (a) Was the final written warning given to the claimant in June 2019, manifestly inappropriate? The claimant says that interviews with him were not appropriately recorded and an interview with Shakeela Akhtar and Andrew Lees was also not included in the notes.
- (b) Did the respondent have a genuine belief in the misconduct which was the reason for dismissal?
- (c) Did the respondent hold that belief in the claimant's misconduct on reasonable grounds?
- (d) Did the respondent carry out a reasonable investigation in all the circumstances?
- (e) It is also contended by the claimant that an unfair procedure was followed, including that Mr Evans spoke to people the claimant did not know.
- (f) Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

7. If the dismissal was unfair, did the claimant cause or contribute to the dismissal by any blameworthy or culpable conduct and, if so, to what extent?

8. If the dismissal was procedurally unfair, what adjustment (if any) should be made to any award to reflect the possibility that the claimant would still have been dismissed in any event had a fair and reasonable procedure been followed? (*Polkey*)

Remedy

9. If the claimant is successful in his claim, what, if any, remedy is he entitled to?

Procedure and evidence heard

10. The claimant represented himself at the hearing. The respondent was represented by Ms R Kight, counsel.

11. The code V in the heading records that the hearing took place by CVP remote video technology. Both parties and all witnesses attended and gave evidence remotely. Members of the public were able to, and did, attend the hearing remotely.

12. The parties had exchanged witness statements prior to the hearing. The Tribunal read the statements prepared by each of the witnesses.

13. The respondent had prepared statements for: Mr V Evans, Regional Development Manager; and Ms E Hand-Griffiths, Patient Safety and Professional Standards Manager. Each witness confirmed the truth of their statement under oath and was cross examined, as well as being asked questions by the Tribunal.

14. The claimant had prepared a witness statement. As with the respondent's witnesses, he confirmed the truth of his statement under oath and was cross examined, as well as being asked questions by the Tribunal.

15. The Tribunal was also provided an agreed bundle which was in excess of 184 pages. The Tribunal read only the documents to which it was referred, either in witness statements or in the course of the hearing. In the course of the claimant's cross examination he made reference to a document which was not contained in the hearing bundle and which he did not have electronically. The Tribunal confirmed with both the claimant and the respondent whether he/it was of the view that the Tribunal needed to see the document in order to reach a decision. Both parties stated that that was not necessary. As a result, the document was not provided to the Tribunal and was not considered as part of the decision.

16. The parties each made oral submissions. At the end of submissions, the Tribunal reserved judgment and accordingly provides the judgment and reasons outlined below.

Facts

17. The claimant was employed by the respondent as a Store Manager. His continuity of employment commenced in January 2013 and he transferred to the respondent in or around August 2013. Throughout his time with the respondent the claimant's role was that of Store Manager. The respondent operates a number of pharmacies. The pharmacies in which the claimant worked changed over time, but by the time of his dismissal he was the manager of the respondent's Marton store in Blackpool.

18. In her statement to the Tribunal Ms Hand-Griffiths confirmed that the claimant had previously been given awards for good performance.

Final written warning

19. The claimant was subject to a disciplinary process which culminated in a disciplinary hearing held on 31st May 2019 conducted by Mr D Rowntree, Regional Development Manager. A letter recording the outcome of that meeting was sent to the claimant dated 12th June 2019 (67-69). The claimant was given a final written warning.

20. The letter imposing that warning addressed a number of matters and is not entirely clear in all respects. It acknowledged that there were some things within the disciplinary process that could have been dealt with differently and the letter records that recommendations were made to people as a result. One of the findings related to the claimant using inappropriate language relating to a customer on 30th March 2019. The decision letter records the claimant as acknowledging that he did use the inappropriate language. Mr Rowntree said that:

“The language used is completely unacceptable within the workplace, whether directed at a customer or used in the dispensary. It is entirely unprofessional conduct and use of this language is not in line with the Well behaviours or those expected of a Branch Manager.”

21. The letter concluded by informing the claimant in clear terms that he was being issued with a final written warning. That was described as being *“due to your failure to exhibit the Well Values and Behaviours and displaying unprofessional and inappropriate behaviour”*. The letter went on to warn the claimant that any similar incidents of the same kind could lead to dismissal.

22. The claimant appealed against the final written warning and also raised a grievance which related to similar issues. A hearing was conducted on 21st June 2019 by Ms L Ritchie, Professional Resourcing Manager. An outcome letter dated 15th July 2019 was sent to the claimant and provided to the Tribunal (81-83). That letter partially upheld elements of the grievance, but did not uphold the appeal against the final written warning.

23. Following this decision and prior to the issues which led to the claimant's dismissal, the claimant changed stores and became responsible for the Marton store. As part of his evidence to the Tribunal, the claimant emphasised that he was not in fact present in the Marton store for very long prior to his suspension, as a result of both holiday and a period of ill health.

Investigation

24. On 11th October 2019 the claimant was suspended on full pay. Two employees had raised concerns about the claimant's conduct, and in particular things that he was alleged to have said. The letter sent to the claimant confirming his suspension refers to the issues to be investigated as:

“An allegation of unprofessional conduct, namely that you have behaved in an unprofessional manner.”

25. Ms M O'Hara (from whom the Tribunal did not hear) undertook an internal investigation and reported on 18th October 2019 (131-134). As part of the investigation, seven employees who worked in the same store as the claimant were interviewed, as well as three managers and the claimant himself. Ms O'Hara's report recorded that she had interviewed all the staff, taking seven statements from store colleagues, and six of those colleagues had confirmed that the claimant had used inappropriate language, swearing, or other comments. In the Tribunal hearing the claimant contested the statement as he believed that one of the colleagues had not in fact ever worked at the store with the claimant and alleged that she had lied to the investigator. The investigator's conclusion was that there was clear evidence to substantiate the allegations and therefore they should be dealt with as part of a disciplinary hearing.

26. The claimant was sent a letter by recorded delivery dated 28th October 2019 which confirmed the allegations and invited him to a disciplinary hearing to be held on 6 November 2019 (135-137). That letter listed the investigation notes and reports included with the letter, which the claimant acknowledged he received at least prior to the date of the hearing. The allegation which the claimant faced as recorded in this letter differed from that which had been contained in the letter regarding the investigation. The issue to be considered was stated to be the following:

“Allegations of unprofessional conduct, namely that you have been behaving in an inappropriate manner: allegations that you have used inappropriate language on a number of occasions towards and in front of your colleagues. This does not fall in line with Well's behaviours and the role of a Store Manager; allegations that you have made inappropriate hand gestures in front of your colleagues whilst receiving a call from a patient.”

27. The letter informed the claimant that his behaviour could be concluded to be gross misconduct and that his employment could be terminated as a result. The letter also confirmed his right to be accompanied.

28. The Tribunal was provided with the records of the various investigation meetings undertaken. The claimant's investigation meeting had taken place on 17th October 2019 at 10.30am, when Ms O'Hara had asked the claimant a number of questions (114-127). The claimant admitted that he had said some of the things alleged, and in relation to one of the allegations contended that he would have said it to himself but accepted that possibly or probably he said it loud enough for a colleague to hear him. For one of the allegations he was 100% certain that he had not said it.

29. In his answers to questions in cross examination, the claimant was critical of the interview by Ms O'Hara, arguing that she had not given him the opportunity to provide his account in full, contending that she had asked very directed questions. In questioning the respondent's representative identified three points in the meeting when open questions were asked by Ms O'Hara. In particular, towards the end of the meeting, Ms O'Hara said *“is there anything else I need to know from today?”*

The claimant's evidence was he was still answering those questions in the light of previous questions asked. He was also critical of Ms O'Hara for not asking him specifically about the culture in the workplace.

Unsubstantiated allegations

30. As part of the investigation, Ms O'Hara spoke to Ms S Akhtar, a Regional Development Manager. As part of that interview (126) Ms Akhtar made reference to the claimant's behaviour in a particular meeting and made some very serious suggestions about something which she had seen on the claimant's arms. The claimant was understandably concerned about this allegation. He informed the Tribunal that he took legal advice about taking this further and that he was in fact advised not to raise it during his own internal disciplinary process as he was taking that advice. The Tribunal heard no evidence whatsoever to support the allegation made by Ms Akhtar. That allegation was not pursued by the respondent, was not referred to in the investigation report, and was not addressed at all in the disciplinary hearing.

31. When the claimant was asked by the Tribunal what he thought the respondent should have done as a result of this allegation being made in the interview, his answer was that it should have been investigated. The fact is that it was not. The Tribunal finds it difficult to see how not investigating an allegation made about the claimant was to the claimant's detriment, or rendered the process followed in relation to other allegations to be unfair.

32. There was no evidence before the Tribunal that Mr Evans took the statement into account in reaching his disciplinary decision. Part of the claimant's criticism of the respondent's process was that as the statement was included in the materials provided, it could have had an adverse effect upon Mr Evans' decision making. There was no evidence from Mr Evans that it did so and the Tribunal finds that it was not an issue which Mr Evans took into account in reaching his decision.

Disciplinary hearing

33. The disciplinary hearing took place on 6th November 2019. The Tribunal was provided with notes of the meeting (138-144), each page having been signed by the attendees. The notes record that the meeting lasted from 10.44am until 12.09pm. The meeting was conducted by Mr Evans, a Regional Development Manager. Mr K Hutson, Unite, attended with the claimant as his trade union representative. A Ms Sousa attended and took notes.

34. Mr Evans' evidence was that he did not know the claimant prior to the hearing nor did he know the other people who had made statements. He had no involvement in the investigation and had no prior awareness of, or familiarity with, the claimant. Mr Evans' evidence was that he approached the hearing independently and with an open mind. The Tribunal found Mr Evans to be a credible witness who had conscientiously applied his mind to the decision which he reached. The Tribunal had no reason to doubt Mr Evans' evidence. There were, in his witness statement, a small number of errors which he corrected at the start of his evidence. Mr Lee

challenged his credibility based upon these errors, but the Tribunal does not find that his credibility was undermined by the errors that he made.

35. The claimant highlighted in his own evidence that his trade union representative did most of the talking for him in the course of the disciplinary hearing. Mr Evans identified two things in particular from the issues raised in the disciplinary hearing: that part of the defence upon which the trade union representative relied was that other colleagues swore as well, it was not just the claimant; and the claimant himself put forward that one colleague had coerced the others to make the complaints against him.

36. In the light of the claimant's contention that there was a culture of inappropriate language in the store, further investigations were undertaken following the hearing. Mr Evans asked Ms Sousa to contact the branch colleagues to ascertain if the use of inappropriate language and gestures was commonplace amongst the group. A set of questions was sent by email to four other employees, and the Tribunal was provided with their responses (145-154). Three of those colleagues made reference to the claimant using inappropriate language. One of those colleagues, Ms Nicholson (a friend of the claimant's), said that there were occasions when swear words were said amongst staff and there was the odd swear word that had slipped out, but she did not paint the same picture as the others who replied to the question. Mr Evans' conclusion, as explained in his evidence, was that:

"I was satisfied that the claimant's assertions regarding colleagues and their use of language similar to his was not substantiated."

Disciplinary decision

37. Mr Evans' evidence stated that he formed a genuine belief that some of the allegations against the claimant were well-founded and that the claimant had used inappropriate language in front of and towards colleagues and that this amounted to gross misconduct. He recorded that he could not see any evidence that colleagues had been coerced into giving evidence. He did not find, based on the subsequent investigation, that the use of inappropriate language was commonplace.

38. A decision letter was sent to the claimant dated 15th November 2019 (155-156). That letter cited each of the alleged allegations and identified whether or not they were or were not upheld. In terms of the comments and/or actions alleged, the letter found that two were not upheld. However four allegations were upheld. The four allegations were as follows:

- (1) That the claimant had said, *"for f*** sake, it's just a plastic box"* which had been heard by two colleagues. The claimant admitted the use of this language;
- (2) That the claimant had said, *"I don't give a rat's ass"* to a colleague witnessed by another, which the claimant acknowledged. The decision letter refers to the word used as being "a*se". The claimant was keen to emphasise in his evidence to the Tribunal that in fact what he admitted to saying was "ass";

- (3) That in relation to patients which had irritated him the claimant had used inappropriate language such as saying “*for God’s sake they’re doing my f***ing head in*”. The claimant admitted it is possible that he had used this language and that was upheld, and in the Tribunal hearing he did not argue that he did not say that; and
- (4) That the claimant had responded to a comment from another employee by saying, “*I can tell you where to shove it – down there*”, indicating what is described as the female employee’s private area. That is the one allegation (of those found) which the claimant denied, but nonetheless Mr Evans found on balance was a comment that the claimant had said. This was the comment that the claimant utterly denied in the investigatory meeting.

39. The decision letter concluded by stating that Mr Evans had no alternative but to terminate the claimant’s contract and summarily dismiss him without notice. He concluded that it did not appear to be the case that a culture existed in the branch where everyone used inappropriate language. He highlighted that the claimant had received a final written warning in the past for similar behaviours. He also referred to the fact that the claimant was “empowered” as a Branch Manager to eradicate such behaviour. Mr Evans confirmed that he found no evidence to support the argument that there had been coercion.

40. In the Tribunal hearing Mr Evans was asked about his decision and whether he had thought about each of the alleged matters independently and what the appropriate sanction would have been for each. Mr Evans confirmed that the decision was taken in the light of all of his findings collectively. However, he would have dismissed the claimant for each of the findings individually (as numbered at paragraph 38 above): (1); (3); and (4). He would not have dismissed him for simply making the comment found at number (2). Mr Evans’ evidence was also that he did not dismiss the claimant relying upon the final written warning, the misconduct was dismissible on its own. He felt that the fact that the claimant had received a final written warning for something similar showed that he had not learned from his previous sanction for similar conduct. Mr Evans’ evidence was also that any employee would have been dismissed for saying what he had identified the claimant had said, whether or not they were a manager.

Appeal

41. The claimant appealed against his dismissal. In his appeal letter (157-158) he particularly emphasised two things: the comment made in the investigation meeting by the senior manager; and his view that one of the other complainants had also made slanderous comments. In the Tribunal hearing he alleged that the second complainant was a serial grievance raiser. What was highlighted to the claimant in cross examination, and appears to be the case, is that neither of the individuals referred to in the claimant’s appeal were those who had witnessed or complained of the comments which the claimant was found to have made. The person the claimant alleged to be a serial raiser of grievances had made a complaint about the claimant, but that complaint had not been upheld.

42. In his appeal letter, regarding the comment which he had denied but which Mr Evans had found he had said (that is comment number (4) above), the claimant said:

“I find absolutely offensive. Although she says we have banter etc. I would never and have never said anything like that.”

43. The claimant's appeal was heard on 17th January 2020. The Tribunal was provided with notes of the appeal (159-161). The claimant was again accompanied by his trade union representative. The hearing was conducted by Ms Hand-Griffiths. Mr L Funnell attended and took notes.

44. The claimant's trade union representative repeated in the appeal his contention that there was a culture of swearing in the workplace and it was common for swearing to happen. He stated that the process was flawed. The claimant alleged that Mr Evans *“had a clouded judgment of me”*. The claimant stated that he did not tell people in the branch that language was unacceptable because he was *“not the word police”*. The claimant's trade union representative made reference to a specific legal case which he said showed that industrial language used by one party cannot then be used to take disciplinary action against another. Following the hearing Ms Hand-Griffiths asked for the details of the case to be confirmed, and this was not provided. The Tribunal is unaware of the case referred, to but the respondent's representative in the Tribunal hearing accepted the point being made was one which was supported by authority.

45. In the appeal the claimant stated that Ms Nicholson would support him in his argument about the culture, so Ms Hand-Griffiths spoke with Ms Nicholson on 31st January and 3rd February 2020. That is, she did speak to the person the claimant thought needed to be spoken to. Ms Hand-Griffiths records that Ms Nicholson informed her that some colleagues did swear. She took that statement into account in considering the claimant's appeal.

46. In fact, Ms Nicholson was asked for her views on three occasions as part of the disciplinary process, that is: during the investigation; in the exchange of emails following the disciplinary hearing; and following the appeal hearing. As was highlighted by the respondent's representative in the Tribunal hearing, there is a notable inconsistency in the statements made by Ms Nicholson. It is clear from Ms Hand-Griffiths' statement and evidence, that what Ms Nicholson had to say was taken into account.

47. Ms Hand-Griffiths did not uphold the claimant's appeal. A letter confirming the outcome was sent to the claimant on 10th February 2020 (165-167). She summarised her decision as being that the claimant's behaviour was found to be not meeting Well's values. Ms Hand-Griffiths did not uphold any of the claimant's grounds of appeal. She thought that the reasons for the dismissal were clear, particularly in the light of the claimant having a live final written warning. The appeal letter concludes:

“In summary, I find that it is more likely than not that you contributed to and did not stop a culture of unprofessional language and behaviour within the pharmacy. As the manager, it was your responsibility to act on such

behaviour. You have stated that this did not happen, offering the defence that it was acceptable because others joined in with it. I do not find that this excuses your inaction in promoting and regulating a professional place of work. With full consideration of all of the above, the original sanction of dismissal will be upheld."

48. In her evidence to the Tribunal Ms Hand-Griffiths ran through each of the claimant's grounds of appeal and identified the reasons why she rejected those grounds. In terms of the allegation of swearing being common practice, she concluded that employees at the store had agreed that swearing was used occasionally, but that colleagues other than the claimant knew where to draw the line. Ms Hand-Griffiths in evidence confirmed that she agreed with Mr Evans' view that the misconduct identified was gross misconduct in itself, irrespective of the previous final written warning.

49. The respondent does have a disciplinary procedure (169-172). That disciplinary procedure accords entirely with the ACAS Code, albeit the procedure is not overly detailed and contains considerably less procedural guidance than that of many other policies of other employers. In his submissions and in his arguments, the claimant criticised the respondent's limited procedures. In particular he felt that clearer procedures should have been in place with regard to the questions to be asked and (implicit from his questioning) how the respondent should have addressed serious allegations being made by an interviewee in the course of a disciplinary investigation. The Tribunal does not find that there were any deficiencies in the respondent's procedure and does not find that there was any breach of the ACAS Code by the respondent in the process that it followed.

50. The claimant's witness statement for the Tribunal hearing was relatively brief. In cross examination the claimant was taken through all of the points that he raised within it, and it was highlighted to him that the vast majority addressed issues relating to the final written warning rather than the dismissal itself. In his answers to questions, the claimant highlighted that he was not really complaining about the decision itself, nor was he denying that he had made inappropriate comments. What he was questioning was the procedure followed - which he did not think was fair. In his submissions the claimant emphasised the length of time that the process took and the fact that when he was suspended he was asked not to speak to colleagues, which was something that he found particularly difficult.

The Law

Unfair dismissal

51. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

52. The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for a fair reason. Here the respondent relies upon conduct as being the fair reason. If the respondent fails to persuade the tribunal that it had a genuine belief in the claimant's misconduct and that it dismissed him for that reason, the dismissal will be unfair.

53. If the respondent does persuade the tribunal that it held the genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. The Tribunal must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the reason relied upon as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

54. In conduct cases, when considering the question of reasonableness, the tribunal is required to have regard to the test outlined in **British Home Stores v Burchell [1980] ICR 303**. The three elements of the test are:

- (1) Did the employer have a genuine belief that the employee was guilty of misconduct?
- (2) Did the employer have reasonable grounds for that belief?
- (3) Did the employer carry out a reasonable investigation in all the circumstances?

55. The additional question is to determine whether the decision to dismiss was one which was within the range of reasonable responses that a reasonable employer could reach.

56. It is important that the tribunal does not substitute its own view for that of the respondent, **London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220** at paragraph 43 says:

"It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question- whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal"

57. The appropriate standard of proof for the respondent's decision-maker, is whether on the balance of probabilities they believed that the misconduct was committed by the claimant. They do not need to determine or establish that the misconduct was committed beyond all reasonable doubt (nor do they need to do so on any other more onerous basis than the balance of probabilities).

58. In considering the investigation undertaken, the relevant question for the Tribunal is whether it was an investigation that fell within the range of reasonable responses that a reasonable employer might have adopted. Where the Tribunal is

considering fairness, it is important that it looks at the process followed as a whole, including the appeal.

59. With regard to a case where there is a final written warning upon which the decision is based, the guidance on the issues which the Tribunal needs to determine was outlined in **Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374** which says:

“The correct starting point for this appeal is Part X of the Employment Rights Act 1996. It enacts the law of unfair dismissal...As for the authorities cited on final warnings, Elias LJ observed, when granting permission to appeal, that the essential principle laid down in them is that it is legitimate for an employer to rely on a final warning, provided that it was issued in good faith, that there were at least prima facie grounds for imposing it and that it must not have been manifestly inappropriate to issue it. I agree with that statement and add some comments. First, the guiding principle in determining whether a dismissal is fair or unfair in cases where there has been a prior final warning does not originate in the cases, which are but instances of the application of s.98(4) to particular sets of facts. The broad test laid down in s.98(4) is whether, in the particular case, it was reasonable for the employer to treat the conduct reason, taken together with the circumstance of the final written warning, as sufficient to dismiss the claimant. Secondly, in answering that question, it is not the function of the ET to reopen the final warning and rule on an issue raised by the claimant as to whether the final warning should, or should not, have been issued and whether it was a legally valid warning or a ‘nullity’. The function of the ET is to apply the objective statutory test of reasonableness to determine whether the final warning was a circumstance, which a reasonable employer could reasonably take into account in the decision to dismiss the claimant for subsequent misconduct. Thirdly, it is relevant for the ET to consider whether the final warning was issued in good faith, whether there were prima facie grounds for following the final warning procedure and whether it was manifestly inappropriate to issue the warning. They are material factors in assessing the reasonableness of the decision to dismiss by reference to, inter alia, the circumstance of the final warning.”

60. More recently, and with reference to that case, what was said in **Bandara v BBC [EAT/0335/15]** was:

“Generally speaking, earlier decisions by an employer should be regarded by an Employment Tribunal as established background that should not be reopened. It should be exceptional to do so ... An earlier disciplinary sanction can of course only be open to criticism if it was unreasonable by the objective standard of the reasonable employer, but that is not enough, otherwise the Employment Tribunal would have to reopen and reinvestigate previous disciplinary sanctions whenever an employee was aggrieved by them. A threshold has to be set. An allegation of bad faith that has some real substance to it, as in Way, will be one example. So will the absence of any prima facie grounds for the sanction. So will something that makes the sanction manifestly inappropriate. I think a sanction will only be manifestly

inappropriate if there is something about its imposition that once pointed out shows that it plainly ought not to have been imposed.”

61. Accordingly these authorities establish that the correct starting point is the terms of section 94 itself, but in relation to the final written warning the Tribunal needs to determine whether that final written warning was: in bad faith; made in the absence of any prima facie grounds for the sanction; and/or manifestly inappropriate. If the Tribunal were to determine that any of those categories were satisfied, the Tribunal would then need to go on and consider whether the dismissal was unfair more broadly in the light of those issues. However, if the Tribunal were to establish that the final written warning imposed did not fall into those three categories, the question for the Tribunal is whether the final written warning was a circumstance which a reasonable employer could reasonably take into account in deciding to dismiss.

62. The Tribunal referred to the ACAS code of practice on disciplinary and grievance procedures, to which it is required to have regard.

63. In her submissions the respondent's representative referred to **Burchell** and **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**, but did not refer to any other authority. The Tribunal has considered the well know guidance in the latter case and will not reproduce it in this Judgment. The respondent's representative also made submissions with regard to contributory fault and **Polkey** when prompted to do so by the Tribunal, but for reasons explained below it is not necessary for the Tribunal to explain the law as it applies to those issues.

Discussion and conclusions

Reason for dismissal

64. The Tribunal finds that the principal reason for the dismissal of the claimant was conduct. The Tribunal accepts the evidence of Mr Evans who was the decision maker. Mr Evans dismissed the claimant on the grounds of conduct.

The final written warning

65. The final written warning given to the claimant in June 2019 was not manifestly inappropriate. It was not the case that it was clear that it plainly ought not to have been imposed. The Tribunal found no genuine evidence of bad faith, nor was there an absence of grounds for the sanction. The claimant had made an inappropriate comment and a final written warning was imposed.

66. The claimant's issues in relation to the final written warning process were procedural in nature and did not mean that the imposition of a sanction was manifestly inappropriate. The authorities explain that the Tribunal should not, without finding one of the limited exceptions, reopen and reinvestigate previous disciplinary sanctions. As a result it is neither appropriate nor necessary for the Tribunal to reach conclusions about the alleged absence of any interview records or notes in that process. To consider those issues would be the Tribunal re-opening and re-investigating previous disciplinary sanctions in the way advised against in the

Bandara decision. The sanction was not unreasonable by the objective standard of the reasonable employer, and in any event it was neither manifestly inappropriate nor made in bad faith.

67. As highlighted above in relation to the evidence of Mr Evans and Ms Hand-Griffiths, whilst the final written warning was relevant in a broad sense to the findings made, it was not used as a building block for the decision reached and the sanction imposed. Mr Evans' evidence was clear that the claimant was dismissed for the matters addressed in his disciplinary hearing and not as a result of the fact that he had a pre-existing final written warning.

68. It is noted that the claimant did not raise issues about the final written warning in the disciplinary hearing which led to his dismissal, and did not allege in that hearing that it should not be taken into account. The Tribunal therefore cannot see that any flaws in the earlier process could result in the dismissal for subsequent action being unfair. Even had the claimant done so, for the reasons explained, it would still have been inappropriate for this Tribunal to delve further into the final written warning process.

Grounds for belief and investigation

69. The Tribunal does find that Mr Evans had a genuine belief in the claimant's misconduct. Mr Evans held that belief on reasonable grounds. Whilst the claimant contended that Mr Evans should have given greater weight to the statement of Ms Nicholson and indeed should not have given any weight to the statements of others identified in the investigation, that was a decision for Mr Evans which he was able to reach on the evidence before him. Mr Evans was provided with sufficient evidence to reach the findings that he did.

70. The respondent did carry out a reasonable investigation in all the circumstances. Statements were collated, an investigation undertaken and a report written, and the information was provided to the claimant in advance of the disciplinary hearing. The question of whether there was a reasonable investigation is to be determined by the Tribunal at the point that the decision was made. Accordingly, the subsequent investigation undertaken after the disciplinary hearing to identify whether or not there was evidence of a culture of inappropriate language in the branch, is taken into account when determining that the investigation was reasonable. It is notable that Mr Evans did ensure that this issue was further investigated before he reached his decision. There can be no genuine criticism of the respondent for not having investigated the question of the culture earlier, as it was raised for the first time at that hearing.

71. The fact that one of the witnesses interviewed as part of the investigation made comments which appeared to be unsubstantiated and which were not taken further, does not undermine the reasonableness of the investigation. The Tribunal understands the claimant's sense of grievance about those unsubstantiated allegations being referred to in the interview and the documents collated as part of the process, but that does not make the investigation unreasonable and there is no evidence that Mr Evans was inappropriately persuaded to reach a decision in the light of the statement made.

Alleged unfair process

72. Issue 3(e) (that is the claimant contended that an unfair procedure was followed, including that Mr Evans spoke to people the claimant did not know) was clarified with the claimant in the course of the hearing. During the collation of information following the disciplinary hearing, an email was sent to and received from the email address of a Mr Harrison (150). The content of the email was in fact the statement of a Ms Harrison, who was the employee being asked the questions. The Tribunal does not find that, as alleged, Mr Evans spoke to people the claimant did not know. It is clear that the statement is that of Ms Harrison. Ms Hand-Griffiths acknowledged in her answers to questions that this may not have been the best approach in the circumstances. The Tribunal agrees that there may be valid questions about the use of such an email address, confidentiality, and adherence to GDPR. Nonetheless the Tribunal does not have jurisdiction to determine GDPR complaints and therefore does not do so. The Tribunal finds that the respondent exchanging emails with such an email address does not render the dismissal unfair.

Sanction and range of reasonable responses

73. In terms of sanction, this is something which the Tribunal has considered very carefully. It is not the Tribunal's role to reach its own decision about whether it would have dismissed the claimant as a result of what was found (and the Tribunal is mindful that it must not slip into the substitution mindset as warned about in the decision of **Small**).

74. With regard to inappropriate language in the workplace, the language used must be judged in the context of the specific working environment and the norms in that workplace. There was no dispute that the Well pharmacy managed by the claimant was a professional workplace with some customer facing parts. The point made by the claimant's trade union representative in the internal appeal hearing is correct, inasmuch as if someone is to be fairly dismissed for using certain language, it must not be language which is commonplace and tolerated from others in that workplace. Both Mr Evans and Ms Hand-Griffiths gave evidence about their experiences of the language used in pharmacies and, in particular, Well pharmacies, based on regular visits (in Mr Evans's case) and many years' experience of working in other roles (in the case of Ms Hand-Griffiths). They each reached their decision based upon their own view of the normal working environment and culture. As confirmed above, Mr Evans also arranged for further investigation to be undertaken to establish the position at the specific pharmacy managed by the claimant. The disciplinary and appeal decisions were made with specific reference to the Well values, and the claimant himself placed emphasis on such values in his own witness statement. The Tribunal does not find that there was a culture of inappropriate language in the workplace or of language comparable to that which the claimant was found to have used. In any event, the respondent's decision-makers appropriately took into account what they believed to be the norms regarding language in the claimant's place of work (and in the respondent's pharmacies generally), when they reached their decisions.

75. In the light of the four allegations which Mr Evans found (see paragraph 38 above), the Tribunal does find that the decision to dismiss was within the range of

reasonable responses of a reasonable employer. The Tribunal agrees with Mr Evans that comment (2), would not of it itself have been one for which dismissal would have been within the range of reasonable responses. Indeed, for any or all of comments (1), (2) and/or (3) the Tribunal may have been unlikely to determine that a dismissal decision fell within the range of reasonable responses (but that is not a matter upon which the Tribunal needs to reach a decision). However, Mr Evans also found that the claimant made comment (4) (as numbered in paragraph 38). In his letter of appeal, whilst denying that he said it, the claimant acknowledged that the comment was more serious (see paragraph 42 above). The Tribunal finds that this comment was one for which dismissal was within the range of reasonable responses for the one comment alone, and taken together with the other three comments finds it certainly does fall within such a range. Whilst the claimant does not agree with his finding on this comment, Mr Evans did find that the comment was made and, as a result, his decision to dismiss was one which the respondent could reasonably reach.

76. As a result of the above the Tribunal finds that the dismissal was not unfair. The claimant was dismissed for reasons relating to his conduct and that dismissal was fair in all the circumstances and in accordance with equity and the substantial merits of the case. As a result of this finding, the Tribunal does not need to consider the issues of contributory fault and/or **Polkey** (that is whether the claimant would have been dismissed in any event had a fair procedure been followed).

Conclusions

77. As outlined above and for the reasons given, the claimant was not unfairly dismissed.

Employment Judge Phil Allen
2 October 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
8 October 2020

FOR THE TRIBUNAL OFFICE