EMPLOYMENT TRIBUNALS

Claimant: Mr P Blythe

Respondent: Network Rail Infrastructure Limited

Heard at: Manchester **On:** 12-13 January 2021

Before: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Claimant: Ms Owusu-Agyei, counsel
Respondent: Mr J Braier, counsel

JUDGMENT

The judgment of the Employment Tribunal is that:

1. The claimant was not unfairly dismissed. His claim for unfair dismissal does not succeed;

2. The respondent did fundamentally breach the claimant's contract of employment by terminating it on 14 October 2019 without notice. The claimant did not fundamentally breach his contract of employment with the respondent. The claim for breach of contract does succeed.

REASONS

Introduction

1. The claimant was employed by the respondent from 3 November 2008 until his dismissal on 14 October 2019, latterly as an S&T Technician and Acting Team Leader.

2. The claimant brought claims of unfair dismissal and wrongful dismissal following his dismissal.

3. The respondent contended that the dismissal was fair by reason of misconduct and denied that it breached the claimant's contract of employment by not paying notice or employing the claimant for a period of notice, because it says the claimant fundamentally breached the contract of employment and it accepted that breach, meaning that the claimant was not entitled to notice.

The Issues

4. An agreed list of issues had been prepared in advance and it was confirmed at the start of the hearing these were the issues to be determined.

5. The agreed list of issues was as follows:

Unfair Dismissal

1. **Reason for dismissal**

1.1 Did the Respondent genuinely believe that the Claimant had made a racist comment towards his colleague?

1.2 Was this the reason for the Claimant's dismissal?

1.3 Was this a reason relating to the conduct of the Claimant?

2. **Reasonableness**

2.1 In the circumstances, did the Respondent act reasonably in treating this reason as a sufficient reason for dismissing the Claimant, taking into account its size and administrative resources and having regard to equity and the substantial merits of the case? This gives rise to the following sub-issues:

2.1.1 Did the Respondent carry out a reasonable investigation into the alleged misconduct?

2.1.2 Did the Respondent have reasonable grounds for believing the Claimant had committed the alleged misconduct?

2.1.3 Did the Respondent follow a fair procedure, taking into account the ACAS Code of Practice on Discipline and Grievances?

2.1.4 Was the decision to dismiss within the band of reasonable responses which a reasonable employer might have adopted?

Wrongful dismissal/notice pay

Failure to give due notice to terminate employment

The Claimant alleges that the Respondent breached his contract of employment on 14 October 2019 by terminating it without giving the notice to which he alleges he was entitled.

3. **Whether Claimant dismissed**

3.1 It is accepted that the Claimant was dismissed without notice with effect from 14 October 2019.

4. **Whether dismissal in breach of contract**

4.1 Was the Respondent entitled to terminate the Claimant's employment without notice? This gives rise to the following sub-issues:

4.1.1 Did the Claimant make a racist comment to his colleague on 10 August 2019?

4.1.2 Was this a breach of the implied term of trust and confidence?

4.1.3 Was the breach repudiatory in nature?

4.1.4 Alternatively, was the Respondent entitled to dismiss the Claimant without notice pursuant to an express term in his employment contract?

4.1.5 Did the Respondent terminate the Claimant's employment in response to the breach?

Remedy

5. **Unfair Dismissal**

5.1 Would the Claimant have been fairly dismissed in any event had a different procedure been followed? If so, to what extent should any compensatory award be reduced?

5.2 Did the Claimant cause or contribute to the dismissal by his conduct? If so:

5.2.1 should any compensatory award be reduced pursuant to section 123(6) of the Employment Rights Act 1996; and

5.2.2 should an equivalent reduction be made to the basic award under section 122(2) of the Employment Rights Act 1996?

5.3 Has the Claimant taken reasonable steps to mitigate his loss?

5.4 Did the Respondent fail to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures such that a 25% uplift should be applied to the Claimant's compensatory award?

6. **Wrongful Dismissal/Notice Pay**

6.1 How much notice was the Claimant entitled to under the terms of his contract of employment?

6.2 What amount of compensation would put the Claimant in the position he would have been in but for the breach?

6. The Tribunal suggested, and the parties agreed, that the issues of **Polkey**, contributory fault and the alleged failure to follow the ACAS code on discipline and grievance procedures, would be determined as part of the liability Judgment. Other issues in relation to remedy would be left to be determined only should that be required after liability had been established.

The Hearing

7. The claimant was represented at the hearing by Ms Owusu-Agyei, counsel. The respondent was represented by Mr Braier, counsel.

8. The hearing was conducted by CVP remote video technology, with both parties, and all witnesses attending the hearing remotely. The public were able to observe the hearing, if they wished to do so.

9. The Tribunal considered a bundle of documents. This ran to 273 pages.

10. On the first morning of the hearing the tribunal read the witness statements together with the relevant pages from the bundle. All of the witness statements were read by the Tribunal, but only pages referred to in the witness statements, or expressly referred to by the parties during the hearing, were read by the Tribunal.

11. The Tribunal heard evidence on behalf of the respondent from: Mr Phillip Gilmour, senior project engineer (being the person who made the decision to dismiss the claimant); and Mr Alec Christie, Programme Manager (being the person who heard the appeal).

12. The Tribunal heard evidence from the claimant and from Mr Craig Johnson, S&T Technician with the respondent, who gave evidence on his behalf.

13. Each witness confirmed the evidence in their witness statement and was cross examined, before being asked questions by the Tribunal and being re-examined. The respondent's evidence was heard on the first day, the claimant's on the second.

14. The Tribunal heard oral submissions from each party. The claimant's representative also relied upon written submissions. Both representatives provided a bundle of authorities.

15. As the submissions concluded at the end of the two days allocated, judgment was reserved.

16. Based on the evidence heard, and insofar as relevant to the issues that must be determined, the Tribunal makes the findings explained below.

Findings of Facts

Background

17. The claimant was employed by the respondent from 3 September 2008.

Contracts and policies

18. The Tribunal was provided with a copy of the claimant's contract of employment. The provision regarding notice from the respondent, provided for the claimant to be given one week for each complete year of continuous employment.

19. The respondent has an equality diversity and inclusion policy and procedure (55) and a harassment policy and procedure (62).

20. The respondent also has a disciplinary policy and procedure (67). The policy is relatively detailed and includes mainly standard provisions. Included in the list of examples of gross misconduct (73) is: bullying, harassment or discrimination. It includes the following provisions (with the Tribunal's emphasis added):

> at provision 2.4.2 in relation to notification following the investigation, it says: *"the employee will be advised of the alleged offence, their right to be represented, and will be provided with a copy of* ***all relevant evidence***."
>
> at 2.7.1.1 under the heading disciplinary hearing it says: "*at each stage of the formal disciplinary procedure Network Rail will inform the employee of the complaints against them and provide them with copies of the* ***supporting evidence*** *(including witness statements) prior to the disciplinary hearing"****.***
>
> at 2.7.2.1 under the heading witnesses it says: *"the employee and their representative can call other people as other witnesses during the formal disciplinary hearing. Where Network Rail or the employee intends to call*

> *relevant witnesses, they should give advance notice that they intend to do this"*.
>
> at 2.7.2.2 under the same heading it says: "*the employee and their representative will be given an opportunity to raise points about any information provided by witnesses and ask them questions*".
>
> in respect of the appeal at 2.11.4 it says: *"following the appeal, the manager will respond in writing with their ruling, normally within 8 calendar days".*

The alleged comment

21. The claimant worked a shift which started on Saturday 10 August 2019 and ran into Sunday 11 August. On that shift, the claimant was the controller of site safety. Mr Munginga was in charge of the shift. A conversation took place between the claimant, Mr Munginga, and another employee, Mr Mitchell. Also, present and able to hear the conversation was Mr Lean. The claimant's evidence was that all four were standing about a metre apart from each other, with Mr Mitchell on one side of him and Mr Munginga on the other. The work site was loud.

22. What is not in dispute is that, after Mr Mitchell had answered questions on two occasions that the claimant had directed to Mr Munginga, the claimant turned to Mr Mitchell and said, "*I am trying to speak to the organ grinder, not the monkey*". It is also not in dispute that the claimant then turned to Mr Munginga (who was stood in the opposite direction to Mr Mitchell) and said "*what do you want me to do?*". The claimant's evidence was that he prefaced this statement with *"You are the boss".*

23. What was in dispute is whether anything else was said by the claimant immediately following his question to Mr Munginga. The evidence was as follows:

a. In an email of 12 August 2019 Mr Munginga recorded that the claimant had said the words *"you monkey"* when addressing Mr Munginga (that is he said *"what do you want me to do, you monkey*?");

b. In his subsequent statement, given on 10 September 2019, Mr Munginga recorded that the claimant added the word "*monkey*" to the question when speaking directly to Mr Munginga (that is he said *"what do you want me to do, monkey*?"). Mr Mitchell stated that the same thing was said in an email of 14 August 2019 and a statement made on 16 September 2019*;* and

c. The claimant vehemently denied that he had said the word "*monkey*" at all to Mr Munginga. Mr Lean when interviewed on 10 September 2019 also denied that the word had been said.

24. It was common ground that Mr Munginga did not raise any issue or react during the shift. However, first thing on the Monday morning, 12 August, he sent an email to Mr Thompson (75) at 8:25, in which he recounted the version of events stated above. He also said *"I did not want to cause a scene about the issue. I just carried on letting them know how the job was going to go and proceeded with the*

work to the end". He went on to say "*I have not been able to sleep since I came back from work thinking about these issues. I will not come into work today as I gather my thoughts and try to rest. I am very angry and need time to reflect. I will let you know when I am in the right frame of mind to do anything".* Mr Munginga's email also contained reference to other instances that he said had occurred of racial prejudice including an allegation that the claimant made a comment in reference to him with regard to black ballast in Stoke a few weeks prior to the incident.

25. On 14 August 2019 Mr Mitchell sent an email to Ms Dacre providing the statement about the events which (broadly) corroborated what Mr Munginga had said.

Suspension

26. The claimant was suspended at a meeting on 15 August 2019 by Mr Thompson and provided with a suspension letter (88 – 89). In his own evidence the claimant made clear that Mr Thompson informed him that what he had allegedly said to Mr Munginga during the shift on 10 August 2019 was *"what do you want me to do you monkey".* The claimant's response was that Mr Munginga had misheard what he had said and he recounted to Mr Thompson the comment regarding the organ grinder (which it is not in dispute he had said). The suspension letter includes standard content. It explains the allegation as being *"on 10/8/19 you used racist and unacceptable language towards a fellow colleague, specifically you said, what do you want me to do you monkey?".* Accordingly, it is clear that the claimant was fully aware of the allegation that had been made which had led to his suspension, as his witness statement records it as being said to him and it is also recorded in the suspension letter.

Investigation

27. An investigation was undertaken by Mr Smith, a Scheme Project Manager. That investigation included a meeting with the claimant, who was accompanied by his supervisor, on 27 August 2019. The Tribunal was provided with a copy of the notes of that meeting which were signed by all attendees (95). Amongst other things, the claimant: strongly denied that he had called Mr Munginga a monkey; provided his account regarding the organ grinder comment; and identified Mr Lean as being someone to whom Mr Smith should speak.

28. Mr Smith subsequently spoke to Mr Munginga (97). Mr Munginga provided his account of what he alleged had been said to him by the claimant, explaining that the claimant had been speaking directly to him when the word "*monkey*" was said. The statement also records how Mr Munginga said the events had really affected him.

29. The statement (97) records that Mr Munginga alleged that the comment had been made "*numerous times*". There is no other evidence at all that suggests that the word was used more than once towards Mr Munginga by the claimant.

30. Mr Smith also spoke to Mr Lean, who gave an account which supported the claimant's version of events (99). He had a telephone call with Mr Mitchell, in which his account was provided which supported what Mr Munginga had said (101).

31. Mr Smith then prepared an investigatory report which identified the contentious issue and concluded that, in his opinion, the claimant had allegedly made racist comments towards his supervisor on a Saturday night shift and should face a disciplinary hearing.

Disciplinary hearing

32. Mr Gilmour, a Senior Project Engineer, was asked to conduct the disciplinary hearing. He had no previous involvement in the matter and worked at a different location, so considered himself impartial. He asked for some further investigation to be undertaken and, accordingly, Mr Smith interviewed Mr Thompson by telephone on 24 September (105) and Mr Johnson on 26 September (106). An updated investigation report was prepared by Mr Smith (108), which reached the same conclusion as the previous version.

33. On 30 September 2019 the claimant was sent a letter inviting him to a disciplinary hearing. The letter stated that it enclosed the investigation report as well as the evidence gathered. The letter enclosed the witness statements taken as part of the investigation, but not the email from Mr Mitchell or the original email from Mr Munginga. The claimant's evidence was that he had been shown the email from Mr Mitchell on a screen at his investigatory meeting with Mr Smith, but he was not provided with a copy of Mr Munginga's original complaint nor was he shown it at any time.

34. The letter also stated that the company did not intend to call any witnesses at the hearing. It made clear "*you have the right to ask relevant witnesses to attend the hearing who you believe are able to provide evidence relating to the allegation outlined above. If you intend to do this please let me have their names as soon as possible*".

35. The allegations, as recorded in this letter, were: "*breach of the equality, diversity and inclusion policy and procedure. Making racist comments causing offence and upset; and breach of harassment policy and procedure (point 1.3, 3.2 and 3.3). Specifically, on the Saturday night shift of 10 August you made a racist comment towards a colleague causing offence and upset*".

36. Mr Gilmour was cross examined about the use of the word comments in this letter (and subsequent letters), that is comments in plural. Mr Gilmour's evidence was that he believed the wording had been taken from a policy. The Tribunal was not shown the wording used in any policy. However, his evidence to the Tribunal was very clear that, in reaching his decision, he had reached it only considering the one alleged comment of "*monkey*" on 10 August and not in relation to any other matter. The Tribunal finds that evidence to be true. The claimant was clearly aware that the focus of the hearing would be the 10 August comment, as that is referred to in the allegations in the letter (and is what he had been told at the time of his suspension).

37. In advance of the disciplinary hearing, the claimant made arrangements for two witnesses to attend on his behalf: Mr Lean; and Mr Johnson. The claimant did not explicitly request that Mr Munginga or Mr Mitchell attend, nor did he make arrangements for them to do so. Mr Lean's account supported the claimant (as

recorded above). Mr Johnson's evidence related to a secondary matter, as he was not present during the shift on the night of 10 August.

38. The disciplinary hearing took place on 14 October 2019. The claimant attended and was accompanied by Mr Sheedy, a Trade Union Representative. Ms Roberts attended to take notes. Her notes were provided to the Tribunal (116). The claimant was critical of the fact that he was not given the opportunity to check the notes on the day. The respondent's reason for not doing so, was that they were written on the day but were only typed subsequently. Nonetheless, the claimant did not contend that there were any material errors contained in the notes. It was the process for approval to which he objected, not the content.

39. The notes record that the meeting lasted from 11 am until 12.15 pm. The meeting adjourned for a break including lunch. At 1:30 pm the meeting reconvened and Mr Gilmour informed the claimant of his decision. There is no dispute that it was a lengthy meeting, and there was no dispute that the claimant was given the opportunity to raise anything he wished to in the meeting and to give his account. He chose to leave the meeting while Mr Lean and Mr Johnson attended, but his trade union representative remained throughout. At the end of the meeting, the claimant was asked whether there was anything he felt had not been discussed and he provided an answer referring to his length of service with the company and the fact that nobody else had said he had made any harassing or bullying comments in all that time, but he did not refer to any other matters that needed to be considered.

40. Mr Gilmour's decision was that the claimant had committed the misconduct alleged, that is that he had used the word "*monkey*" addressed to Mr Munginga. He took a little time to reach that decision. He informed the claimant of that decision at the end of the meeting and informed him that he would be dismissed for gross misconduct.

41. Mr Gilmour's decision was confirmed in writing (114). In the course of the Tribunal hearing it transpired that the version of the letter that the claimant received differed from the version provided to the Tribunal in the bundle. The claimant's letter was dated 17 October and contained one slight amendment in relation to the date upon which equipment was to be returned. In all other respects it was the same as the document provided to the Tribunal (which was dated 16 October). The reason for the dismissal was recorded as being that the claimant had been found guilty of the charges, with the allegations themselves being those stated in the invite letter.

42. In his evidence to the Tribunal, Mr Gilmour provided a detailed account of why he had reached the decision that he did, in particular (at paragraph 18) he explained the basis for his decision. He stated that he concluded on the balance of probabilities that Mr Munginga's account of what was said on 10 August 2019 was more likely than the claimant's, particularly as Mr Mitchell had corroborated what had been said. Mr Gilmour's primary reason for reaching that decision was that he considered it unrealistic that Mr Munginga (and Mr Mitchell) would fabricate the allegation against the claimant.

43. In his evidence to the Tribunal, Mr Gilmour was very clear in explaining that he found that, on the balance of probabilities, the claimant had directed the word at

Mr Munginga. He also explained that he had concluded that the claimant had intended to do so and had meant to cause upset.

44. A second allegation was referred to throughout the disciplinary process and was addressed as part of the investigation. That was that the claimant had made a comment to Mr Munginga when working in Stoke which referred to "*black ballast*" (or in the claimant's evidence to the Tribunal, made reference to "*soot*" or "*sooty*"). That allegation was the reason for the additional investigation undertaken by Mr Smith at Mr Gilmour's request. The second allegation was also addressed in the evidence at the disciplinary hearing. Mr Gilmour's conclusion, as recorded in his statement, was that the evidence in relation to that matter was "*inconclusive*" and it did not form part of or affect his decision in respect of the "monkey" comment. Mr Gilmour was very clear in his answers to questioning, that his decision was reached based on the "*monkey*" comment only. The Tribunal accepts Mr Gilmour's evidence that only the "*monkey*" comment was taken into account when he reached his decision. The Tribunal finds that there was no supporting evidence whatsoever of the allegation that the claimant had made any comment relating to "*black ballast*" or "*soot/sooty*".

The appeal

45. The claimant appealed against his dismissal in two emails of 22 October 2019 (131 and 133). In summary, he contended that: the comment had been taken out of context; he had not made the comment; he had not directed the word "*monkey*" at Mr Munginga; and the punishment was too severe.

46. In his first appeal email the claimant alleged that the allegations against him were "*malicious*". In the course of the Tribunal hearing, in his answers to questions, the claimant made clear that he was <u>not</u> alleging that Mr Munginga had made up the allegation against him or pursued it in a malicious way. Rather, in his reference to "*malicious*", the claimant meant that the finding that he had made the comment was malicious because he believed it was incorrect. The claimant did not allege Mr Munginga had made the allegations maliciously, rather he alleged that Mr Munginga must have misheard what was said or misunderstood the comment he had made about the organ grinder.

47. In his first appeal email the claimant also stated that the statements of Mr Lean and Mr Johnson had "*clearly exonerated me*". This argument lay at the heart of the claimant's case, which is that because there was someone else who supported his version of events, he believed that meant that the respondent could not, or at least should not, have found that the events had occurred.

48. In his second appeal email the claimant referred to there being a direct conflict of evidence on the matter, and complained that the respondent had preferred the evidence of Mr Munginga and Mr Mitchell over his own.

49. The claimant included in his letter an argument that he felt showed a "*fatal flaw in the allegation*", which is that in the organ grinder comment he was referring to Mr Mitchell as the monkey and Mr Munginga as the organ grinder, therefore it made no sense for him to thereafter refer to Mr Munginga as the monkey. He contended that it was more likely there had been a misunderstanding.

50. In relation to this alleged "*fatal flaw*" the Tribunal understands why the claimant puts the argument that he does, but does not find that the lack of logic for the word said undermines the allegation or means that the respondent's decision was not one it was able to reach. What was alleged was that a racist comment had been made and had been directed at Mr Munginga. The statements of Mr Munginga and Mr Mitchell make clear that they both perceived that the word "*monkey*" had been clearly directed at Mr Munginga. By the very nature of what was alleged, there is highly unlikely to be any logic to a comment which is directed at someone because of their race. Irrespective of whether the claimant contended that a comment in the course of such a conversation was logical, the fact that such a comment was made and directed at Mr Mungingwa was a decision which the respondent was still fairly and reasonably able to reach on the balance of probabilities.

The appeal hearing

51. The claimant was invited to an appeal hearing by letter of 6 November (136). The appeal hearing took place on 14 November 2019. It was conducted by Mr Christie, the respondent's Programme Manager for Works Delivery, who had no knowledge of the claimant prior to the appeal hearing. The claimant was accompanied at the appeal hearing by a trade union official, Mr Brown. Sullinder Kalar also attended as a note taker and notes were provided (138).

52. It is clear from the notes, and from the evidence the Tribunal heard, that the claimant and Mr Brown were given the full opportunity to raise anything that they wished to in the course of the appeal hearing and they were not limited in the facts and matters they were able to raise. At the end of the hearing Mr Christie summarised his understanding of the points that had been raised and made a proposal for steps he would undertake going forward.

53. At the end of the hearing it was adjourned to enable some further investigation to be undertaken. In particular, the claimant and his trade union representative had suggested that all of those present on site on 10 August should be interviewed to establish whether anyone had overheard the relevant conversation. Mr Christie arranged for some of those people to be spoken to, albeit none of those spoken to had heard anything relevant. Ultimately, in the time available, he was unable to obtain statements from six other people present during the shift. The claimant's position was not that he believed that anyone would be able to shed any light on whether the word "*monkey*" had been said, but rather he hoped someone might be able to. In the light of the claimant's own evidence about the noise on site at the time and the fact that the four people who were party to the conversation had been spoken to as part of the investigation, the Tribunal does not find that it was a necessary part of a reasonable investigation undertaken by a reasonable employer to interview everyone on site on the day, even though Mr Christie chose to endeavour to check with everyone on the shift whether they had heard what was said (even though they were not believed to have been part of the relevant conversation).

54. It was clear from Mr Christie's evidence that he considered the appeal very narrowly. He certainly did not re-hear the matter or re-consider the evidence. Indeed, Mr Christie did not reconsider the sanction. It was clear from his answers to cross-examination, that Mr Christie had limited his appeal decision and consideration

to the matters raised in the course of the appeal hearing. He did not carefully consider the fatal flaw argument contained in the appeal document, because it was not highlighted during the hearing itself.

55. The appeal outcome was sent on 23 December 2019. That is there was some delay in this decision being provided and it was provided considerably later than the eight calendar days stated as being the normal time within the disciplinary procedure. The Tribunal finds that the delay resulted from: the fact that an investigation was being undertaken; the difficulty of obtaining statements; and the fact that (as Mr Christie evidenced) it was a busy period for the respondent (and for him personally) prior to Christmas. The Tribunal does not find the fact that the appeal outcome took longer than the eight days suggested in the procedure to have had any material impact upon the fairness of the procedure, and indeed does not find it to have taken a particularly long time in the light of the further investigation which was undertaken.

56. Mr Christie outlined his decision by reference to various bullet points dealing with the issues raised (147). In summary, primarily his decision was that, whilst there was clearly an element of judgment involved in this kind of case, he did not find the disciplinary manager's deductions were unreasonable, given the information available to him at the time of the disciplinary hearing.

57. The Tribunal also heard evidence from Mr Johnson about a conversation which he had with Mr Mitchell some time after the decision to dismiss had been made. This was not evidence which had been before Mr Gilmour or Mr Christie and therefore it cannot be relevant to the unfair dismissal claim. The Tribunal accepts that Mr Johnson's evidence was genuine. He records that Mr Mitchell subsequently said that if he had to do it again he would not give a statement, something which even if true is not inconsistent with the facts alleged. The Tribunal does not find that has any material impact on the decision it is asked to reach. Mr Johnson's statement also records that Mr Mitchell: told him that Mr Thompson said that the claimant would not be coming back, during the disciplinary process; and suggested that there had been a meeting between Mr Mitchell, Mr Munginga and Mr Thompson which was not recorded in any of the investigation materials.

The Law

Unfair dismissal

58. The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for misconduct. 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.

59. 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 misconduct 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.

60. 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?

61. 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.

62. 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*"

63. 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.

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

65. The Tribunal has considered the ACAS code of practice on disciplinary and grievance procedures, as it is required to do. It has noted that the wording of the respondent's procedure about witnesses cited above reflects the terminology used in the code. The respondent's representative particularly relied upon: the last line of paragraph 9 (which says it will normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification of disciplinary hearing); paragraph 11 (meetings should be held without unreasonable delay); and paragraph 20 (that is that first occurrences of misconduct should usually lead to a warning).

66. Both representatives made detailed and well-argued submissions, with reference to authorities which were provided to the Tribunal. The claimant's representative provided written submissions, which were supplemented by verbal submissions. The respondent's representative relied on verbal submissions only. The Tribunal has considered all of the points made and the legal issues raised, and will not endeavour to summarise in this Judgment all the well-made submissions.

67. The claimant relied upon: **W Weddel & Co Ltd v Tepper [1980] IRLR 96**; and **Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721**. Reference was also made to **Post Office v Foley [2000] ICR 1283**.

68. In **W Weddel & Co Ltd v Tepper** at the end of paragraph 20 Stephenson LJ says the following:

> *"Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And, it seems to me, they do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, in the words of the Industrial Tribunal in this case, 'gathered further evidence' or, in the words of Mr Justice Arnold in the Burchell case, 'carried out as much investigation into the matter as was reasonable in all the circumstances of the case.' That means that they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably."*

69. In **Salford Royal NHS Foundation Trust v Roldan** Elias LJ said the following (at paragraph 73):

> "*The second point raised by this appeal concerns the approach of employers to allegations of misconduct where, as in this case, the evidence consists of diametrically conflicting accounts of an alleged incident with no, or very little, other evidence to provide corroboration one way or the other. Employers should remember that they must form a genuine belief on reasonable grounds that the misconduct has occurred. But they are not obliged to believe one employee and to disbelieve another. Sometimes the apparent conflict may not be as fundamental as it seems; it may be that each party is genuinely seeking to tell the truth but is perceiving events from his or her own vantage point. Even where that does not appear to be so, there will be cases where it is perfectly proper for the employers to say that they are not satisfied that they can resolve the conflict of evidence and accordingly do not find the case proved. That is not the same as saying that they disbelieve the Complainant. For example, they may tend to believe that a Complainant is giving an accurate account of an incident but at the same time it may be wholly out of character for an employee who has given years of good service to have acted*

> *in the way alleged. In my view, it would be perfectly proper in such a case for the employer to give the alleged wrongdoer the benefit of the doubt without feeling compelled to have to come down in favour of on one side or the other*"

70. The claimant's representative contended that this was a case to which an argument which arises from the **Roldan** judgment should apply. She summarised that position as "*Where an employee's reputation or ability to work in their chosen field of employment is potentially at risk, it is particularly important that employers take seriously their responsibilities to conduct a fair investigation*". What the **Roldan** Judgment actually says is this (at paragraph 60), when addressing the particular facts of that case:

> "*In my judgment, therefore, the Employment Tribunal were entitled to find…that that the dismissal was unfair for the reasons they gave. This is particularly so given that here was a woman who had given service to the employers over four years, apparently without complaint, and there was a real risk that her career would be blighted by this dismissal. It would certainly lead to her deportation and destroy her opportunity for building a career in this country. In my judgment, the case of* A v B, *not specifically referred to in the EAT's judgment, reinforces the justification for the tribunal's conclusion*."

71. The Tribunal accepts the broad principle from **Roldan** that the severity of the consequences to the employee of a finding of guilt is a factor to be assessed in determining whether the **Burchell** factors have been followed by a respondent, and has applied that principle when reaching the judgment explained below.

72. The respondent relied upon: **Hussain v Elonex Plc [1999] IRLR 420** (and in particular paragraphs 24 and 25 of that Judgment); **Strouthos v London Underground Ltd [2004] IRLR 636**; **Taylor v OCS Group Ltd [2006] IRLR 613** (and in particular paragraph 48 of that Judgment, see below); **Steen v ASP Packaging Ltd [2014] ICR 56** (and in particular paragraphs 11-15 of that Judgment); **NHS 24 v Pillar UKEATS/5/16** (and in particular paragraph 29 of that Judgment); and **Sattar v Citibank NA [2020] IRLR 104** (and in particular paragraph 56 of that Judgment). The Tribunal will not reproduce what is said in all those authorities, but has reviewed them all prior to reaching this decision.

73. In **Taylor v OCS Group Ltd** at paragraph 48 Smith LJ said the following:

> "*it may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that section 98(4) of the* Employment Rights Act 1996 *requires the employment tribunal to approach its task broadly as an industrial jury. That means that it should consider the procedural issues together with the reason for the dismissal, as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss. So, for example, where the misconduct which founds the reason for the dismissal is serious, an employment tribunal might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a*

sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the employment tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee."

74. **Hussain v Elonex Plc** was a case in which the employer had failed to provide four witness statements to the claimant, but the dismissal was still found to be fair. As the claimant's representative highlighted, the conclusion of the Court of Appeal was that only one of the statements was possibly relevant to the allegations in that case. However, what is said by Mummery LJ is nonetheless important:

"There is no universal requirement of natural justice or general principle of law that an employee must be shown in all cases copies of witness statements obtained by an employer about the employee's conduct. It is a matter of what is fair and reasonable in each case. What emerges from the two authorities cited by Mr Cook is not that there is a failure of natural justice where witness statements are obtained but not disclosed, but there is a failure of natural justice if the essence of the case on the employee's conduct is contained in statements which have not been disclosed to him, and where he has not otherwise been informed at the hearing, or orally or in other manner, of the nature of the case against him. I would emphasise the passage in Wood J's judgment in Louies v Coventry Hood and Seating Co Ltd where he referred to the substance of the case being contained in statements which the employee had asked to see and which had not been shown to him, with no good reason being shown, and on which substantial reliance had been placed in reaching the decision to dismiss him. That is not the case here. The Industrial Tribunal was entitled to reach the conclusion that the investigation was fair and reasonable in all the circumstances. Mr Hussain knew that he was being accused of having headbutted Mr Gurden. He was given a full opportunity to respond to that allegation at the hearing in the disciplinary tribunal".

Wrongful dismissal

75. The respondent's representative also made reference to **British Heart Foundation v Roy UKEAT/49/15** in which the Employment Appeal Tribunal sets out the difference between the test in an unfair dismissal claim and the test for wrongful dismissal (or when considering contributory fault). That Judgment helpfully summarises what the Tribunal needs to decide when considering the wrongful dismissal claim and identifies why the questions to be asked are so different in respect of the two claims. It says (from paragraph 4):

"The law as to wrongful dismissal (in respect of which the appeal arises) needs to be set out. A member of the public might express some surprise if the law were to the effect that an employee whom the employer, on reasonable grounds, suspected of having been guilty of theft and in respect of whom a Judge concluded that indeed she probably was, had to be kept on at work until the expiry of her full notice period and could not be dismissed immediately. Whereas the focus in unfair dismissal is on the employer's reasons for that dismissal and it does not matter what the Employment

Tribunal thinks objectively probably occurred, or whether, in fact, the misconduct actually happened, it is different when one turns to the question either of contributory fault for the purposes of compensation for unfair dismissal or for wrongful dismissal. There the question is, indeed, whether the misconduct actually occurred. In a claim for wrongful dismissal the legal question is whether the employer dismissed the Claimant in breach of contract. Dismissal without notice will be such a breach unless the employer is entitled to dismiss summarily. An employer will only be in that position if the employee is herself in breach of contract and that breach is repudiatory"

76. In the light of its decision below the Tribunal does not need to expand upon or recount the law on **Polkey** or contributory fault in this Judgment.

Discussion and Analysis

Unfair dismissal – reason for dismissal

77. The first issue is what was the reason for the dismissal, with the agreed issues identifying three questions that should be asked (see 1.1-1.3 in the list of issues as recorded above). Did the Respondent genuinely believe that the claimant had made the comment alleged towards his colleague (described in the list of issues as a racist comment)? Was that the reason for the claimant's dismissal? Was this a reason relating to the conduct of the claimant – as the respondent says the reason was misconduct?

78. Mr Gilmour made the decision to dismiss the claimant. As recorded and found at paragraphs 36 and 44 above, the Tribunal finds that Mr Gilmour's decision to dismiss was based solely upon the allegation that the claimant had turned to Mr Munginga on the 10 August 2019 and referred to him as a "*monkey*". The Tribunal finds that the reason for his decision was that he believed that the claimant had said what was alleged on 10 August 2019 and that the claimant had committed the misconduct alleged. The Tribunal has no doubt that Mr Gilmour genuinely believed that the claimant had made the comment alleged.

79. In her submissions, the claimant's representative argued strongly that the respondent had not shown that genuine belief in misconduct was the reason for the dismissal. In particular, she emphasised the use of the plural when referring to racist comments used in both the invite and the decision letter and contended that the reason for dismissal was unclear or was both allegations (not just the one). The Tribunal has not found that Mr Gilmour did dismiss as a result of more than one event, he made the decision to dismiss for the one alleged comment only. The Tribunal would observe that the fact that the respondent used generic terminology in the allegations and findings, did not assist in ensuring that the paperwork was clear. However, the Tribunal also finds that the claimant was aware from the time of his suspension that it was the alleged comment on 10 August which was the main issue being considered. The Tribunal finds that the reason for dismissing the claimant was Mr Gilmour's genuine belief that the claimant had committed misconduct, that is Mr Gilmour dismissed the claimant because he believed a racist comment had been made to Mr Munginga on 10 August 2019.

80. Was this a reason relating to the conduct of the claimant? The answer to this question is clearly that it was (albeit conduct the claimant denied).

Unfair dismissal - reasonableness

81. Issue 2.1.1 is - did the respondent carry out a reasonable investigation into the alleged misconduct? Mr Smith carried out an investigation. He met with the claimant and discussed the allegations with him. He spoke to the other witnesses who were part of the conversation, including the person who the claimant identified he should speak to during the interview with the claimant. He prepared a management statement of case, and collated and appended the documents which had been obtained during the investigation. In response to some issues raised by Mr Gilmour, further investigation was undertaken and the report amended. Following the investigation, a hearing was conducted, to which the claimant was appropriately invited and had materials provided in advance.

82. Further investigation was undertaken following the appeal hearing, in the light of requests made by the claimant and his representative. The claimant's representative submitted that because Mr Christie had identified that further investigation should be undertaken at the appeal hearing, this was clear evidence that a reasonable investigation had not been undertaken in the first place. The Tribunal does not agree that this was the case. Where a conversation took place, which was a conversation between three people (identifiably witnessed by a fourth), a reasonable investigation requires that those four people are spoken to. The person who the claimant correctly identified had heard what was said, was spoken to. It was a noisy site and nobody involved identified anyone else who would have heard what was said. For an investigation to fall within the range of reasonable responses that a reasonable employer might adopt, does not require an employer to speak to every other person on site at the time. The fact that Mr Christie chose to investigate further and endeavour to do so, does not undermine the reasonableness of the original investigation. The fact that the outcome of Mr Christie's further investigation was that he found no further witnesses who had heard what was said, does in fact demonstrate that the original investigation had identified all the relevant evidence about the allegation.

83. In cross-examination of Mr Gilmour the claimant's representative highlighted a number of matters which Mr Smith and/or Mr Gilmour could have considered in greater detail and which they could have considered if either of them had undertaken a more detailed and forensic analysis of the different accounts. In her submissions and relying upon these issues, she contends that there was a catalogue of errors in the investigation. It is certainly true that either Mr Smith or Mr Gilmour could have undertaken a more forensic analysis of the allegations and the statements made and could have identified discrepancies. However, the Tribunal does not find that any of the issues highlighted mean that the investigation was not one which fell within the range of what was reasonable. Whilst the claimant's representative skilfully demonstrated how such an analysis could have been undertaken, such an analysis goes beyond that which a reasonable employer must undertake. They were matters which could have been considered or included in an investigation report, they were not a requirement for a fair investigation.

84. The point in time at which the Tribunal must assess whether a reasonable investigation had been undertaken, was when the decision was reached, and by that stage the claimant (and his trade union representative) had had the opportunity to challenge the case against him and explain why he believed there were flaws in the accounts given. The claimant had the opportunity to do so, and there was no material investigation outstanding which a reasonable employer should have undertaken.

85. The Tribunal finds that a reasonable investigation was undertaken.

86. Issue 2.1.2 is - did the respondent have reasonable grounds for believing the claimant had committed the alleged misconduct? As the claimant's representative ably demonstrated in the course of her cross-examination of Mr Gilmour, in reaching his decision he certainly could have undertaken a more forensic analysis of the material and statements before him to analyse potential inconsistencies and discrepancies between what was said on different occasions. Nonetheless the Tribunal finds that Mr Gilmour did apply his mind to the decision he needed to make and, based upon the statements of Mr Munginga and Mr Mitchell, there were reasonable grounds for him to reach the decision that he did. The Tribunal finds that Mr Gilmour formed his belief that the claimant had committed the misconduct alleged on reasonable grounds.

87. The claimant's representative argued that Mr Gilmour had closed his mind to any alternative outcomes and that meant that he had jumped to conclusions in the way warned about in **W Weddel & Co Ltd v Tepper**. She relied upon his answers to her questions in cross-examination addressed in paragraphs 83 and 86 above. She emphasised that he stated in one answer that he considered whether or not the "*monkey*" comment made logical sense "*in no way shines light on whether it did or didn't happen*".

88. The Tribunal did not find that Mr Gilmour's evidence meant that he had not given the claimant a fair opportunity to explain things before dismissing him or that he had jumped to conclusions. It was certainly clear that no one had challenged Mr Gilmour's thought-processes in the way that the claimant's representative did in the Tribunal hearing. However, that falls short of demonstrating that he had closed his mind, formed his belief hastily, or not acted reasonably. In practice, this was a case where Mr Gilmour was required to decide which account of events he preferred, between two competing accounts. There were two witnesses providing one account, and two providing a contrary one. He considered the evidence that he heard and reached a conclusion based upon it. The Tribunal accept his evidence that he reached this conclusion based on the balance of probabilities, placing particular emphasis on the lack of any reason why Mr Munginga and Mr Mitchell would maliciously raise the complaint. At the Tribunal hearing, the claimant's representative focussed particularly on the argument that the comment had been misunderstood or misinterpreted. However, the statements of Mr Munginga and Mr Mitchell both clearly record what they believe was said.

89. Issue 2.1.3 is - did the respondent follow a fair procedure, taking into account the ACAS Code of Practice on Discipline and grievances? For the reasons already given, the Tribunal finds that a fair procedure was followed, which was compliant

with the ACAS code of practice. There are two particular issues which the Tribunal has carefully considered when reaching this decision, which are addressed below: the emails not provided; and that the decision was made without Mr Gilmour hearing from two of the witnesses himself.

90. The claimant was not provided with a copy of Mr Munginga's original complaint or the email from Mr Mitchell in which he first recorded what occurred (although he was shown the latter during his investigation meeting). It would have made the process followed more transparent had they been provided. The respondent relied upon the reference to supporting evidence in 2.7.1.1 of the disciplinary policy and procedure (see above) as meaning that there was no requirement for them to be provided – the claimant was given the statements made by both Mr Munginga and Mr Mitchell in the course of the investigation. Mr Gilmour was clear in his evidence, which the Tribunal accepts, that his decision was based upon the statements which the claimant had, and was able to challenge. However, paragraph 2.4.2 of the policy (see above) does refer to the provision of all relevant evidence and the original complaint and first statement of Mr Mitchell were certainly relevant. The non-provision of those two documents means that the respondent did not entirely adhere to its own procedure, and did not give the claimant all the documents it might have, meaning he was not afforded the opportunity to highlight any discrepancies if he wished to.

91. The Tribunal has particularly taken into account what is said in **Taylor v OCS Group Ltd** and **Hussain v Elonex Plc** (see above). This was a procedural imperfection. The misconduct alleged in this case was of a very serious nature. There is no universal requirement that an employee must be shown in all cases copies of witness statements obtained. The claimant was fully aware of the essence of the case, which was detailed in the statements disclosed to him. He was disclosed a statement from each relevant witness. He was given the full opportunity to respond to the allegation. The Tribunal finds that: the respondent was acting reasonably in treating the reason found as a sufficient reason for dismissing the employee; and the investigation was fair and reasonable in all the circumstances.

92. The claimant did arrange for witnesses to attend the disciplinary hearing. As is clear from the policy and from the invite letter, the claimant could have asked Mr Munginga and Mr Mitchell to attend the hearing so that they could be questioned, if he wished. He was (using the wording in the ACAS code) given the opportunity to raise any points about the statements that had been made by Mr Munginga and Mr Mitchell. The respondent followed its own procedure in relation to witness attendance and complied with what is said in the ACAS code. It was open to Mr Gilmour to arrange for Mr Munginga and Mr Mitchell to attend the disciplinary hearing, so that he could decide whose account he preferred having heard all the witnesses in person. However, the Tribunal notes that nothing in the ACAS code or the respondent's procedure requires such an approach to challenging witness evidence. Mr Gilmour reached a balanced view on the balance of probabilities based upon the statements that were provided, and having heard personally from the claimant and Mr Lean. That approach was fair.

93. Issue 2.1.4 is - was the decision to dismiss within the band of reasonable responses which a reasonable employer might have adopted? The Tribunal has no

hesitation whatsoever in finding that it was. It is, of course, correct that a decision-maker must always consider the appropriate sanction. However, in the view of this Tribunal considering what it is Mr Gilmour found that the claimant had said directly to Mr Munginga and that he found that he had intended to make the comment, the claimant's contention that the decision fell outside the range of reasonable responses of a reasonable employer was absolutely lacking any merit whatsoever. Not only was the decision to dismiss within this range, but the Tribunal finds that most reasonable employers would have made the decision to dismiss and it would have been reasonable for them to do so.

94. The claimant's representative did highlight that the word "*monkey*" said to someone who was black does not, of itself and without more, amount to race discrimination/harassment: context is all important. The Tribunal entirely agrees with that submission. However, that does not detract from the fact that the sanction of dismissal was within the band of reasonable responses to a finding that the claimant had directed the word at Mr Munginga, and indeed on Mr Gilmour's verbal evidence of his finding that he found he had intended to do so in a way meant to cause upset.

95. As explained, in reaching its decision the Tribunal has considered **Roldan** and taken account of the severity of the consequences of a finding of guilt with an allegation such as this, when considering the **Burchell** factors and general fairness under section 98(4). The Tribunal finds that the respondent took seriously its responsibility to conduct a fair investigation, for the reasons already explained. The Tribunal was not presented with any genuine evidence to support the contention that dismissal in these circumstances would have a particular impact on the claimant's reputation or ability to work in his chosen field of employment, over and above that which would apply in any circumstances where someone was dismissed for comparable misconduct from a reputable employer. In the absence of any such evidence, the Tribunal does not accept that the claimant was someone whose ability to work in their chosen field of employment was particularly at risk in the way identified in the **Roldan** judgment (in that judgment it addressed a nurse who was facing deportation and the complete loss of her opportunity to build her career in the UK). There was insufficient evidence available to the Tribunal about the claimant's skills and experience and inability to find work with other employers, for such a finding to be made. However, as explained, the Tribunal has in any event considered the claimant's representative's submission and assessed the fairness of the respondent's approach on that basis.

96. In relation to the appeal, the Tribunal does find that the approach taken by the respondent was somewhat restricted and limited. The appeal certainly would not have rectified any flaws in the earlier process, had any such flaws been identified which would otherwise have rendered the dismissal unfair. The Tribunal does not find that Mr Christie's restrictive approach to the matters considered in the appeal rendered the dismissal otherwise unfair. The delay in the appeal outcome also did not mean that the dismissal was unfair, even though it was not provided promptly.

97. The Tribunal took account of the size of the respondent and its resources when reaching this decision. The Tribunal finds that the respondent acted reasonably in treating the reason as sufficient to dismiss, having regard to equity and the substantial merits of the case.

98. As a result of this finding, the Tribunal does not need to go on and consider the questions of **Polkey** or contributory fault.

Wrongful Dismissal

99. The question which the Tribunal needs to ask itself to determine the breach of contract claim, is - did the claimant commit a fundamental breach of contract entitling the respondent to dismiss without notice? As explained, what the Tribunal needs to determine differs substantially from what was required for the unfair dismissal claim. The Tribunal has carefully considered what is said in **British Heart Foundation v Roy**. In the unfair dismissal decision, the Tribunal has been keen to ensure that it did not substitute its own view for that of the respondent and focussed upon Mr Gilmour and his reasons for the dismissal. However, for the wrongful dismissal test, the question is what the Tribunal thinks objectively probably occurred and whether, in fact, the misconduct actually happened?

100. Did the claimant, on the balance of probabilities, direct the alleged comment to Mr Munginga on 10 August 2019? The Tribunal must reach this decision based upon the evidence it has heard. It has not heard from the complainant, that is the person who made the allegation, or Mr Mitchell. It has heard from the claimant himself and has heard his evidence under oath in which he denies that is what occurred.

101. This is a difficult decision, based as it is upon: two statements that allege the word was said and was directed at Mr Munginga; and two accounts that it was not – one of whom has given evidence to the Tribunal. There are discrepancies in what is said in the statements, as was identified by the claimant's representative in the Tribunal. Of particular importance, in the view of the Tribunal, is that Mr Munginga's statement (from his interview) records the allegation that the word was said on numerous occasions, when there is no other evidence to support that (including what was said by Mr Mitchell who only records it being said once). The claimant does not contend that Mr Munginga made the allegation maliciously, his only explanation is that Mr Munginga was mistaken or misunderstood what was said. That does not sit easily with what the statements record. However, on balance, particularly based upon the Tribunal's own view of the claimant's evidence which it found to be genuine and credible, and the discrepancy identified in the written statements containing the contrary account, the Tribunal prefers the claimant's evidence and finds that the claimant did not make the comment "*monkey*" directed to Mr Munginga on the 10 August 2019. As a result, the claimant did not fundamentally breach his contract of employment with the respondent.

102. Had the Tribunal found that the comment had been made as alleged, it would have found that it was a fundamental breach of contract entitling the respondent to treat the contract as terminated. On the basis of what the Tribunal has found occurred, the respondent breached the claimant's contract of employment when it terminated his employment without notice and accordingly the claimant's claim for breach of contract succeeds (in respect of notice). This decision has been made without taking into account Mr Johnson's evidence, as that evidence was given limited weight being third-hand and not really shedding any light on what occurred in a case where the claimant's contention was that the person raising the allegation

had been mistaken (rather than there being any suggestion of a malicious complaint).

Conclusion

103. For the reasons given above, the conclusion of the Tribunal is that the claimant was not unfairly dismissed, but he does succeed in his claim for breach of contract.

104. As a result of the finding in favour of the claimant, he will be entitled to a remedy for breach of contract. To enable that to be determined, the Tribunal makes the following orders:

a. Within 14 days of the date upon which this Judgment is sent to the parties, the respondent must write to the claimant and confirm whether it agrees that the remedy due to the claimant is the sum claimed (which is believed to be £5,442). If it does, it should also confirm this to the Tribunal (confirming the agreed amount). If it does not, it must explain to the claimant why not;

b. Thereafter the parties should liaise with each other about any issues in dispute, to see if the issue can be agreed;

c. By no later than 28 days after the date that this decision is sent to the parties, the parties must either: confirm to the Tribunal in writing what has been agreed; or inform the Tribunal that agreement cannot be reached, identifying what remains in dispute;

d. If remedy remains in dispute, the Tribunal will list the case for a remedy hearing time estimate two hours, to be conducted by CVP remote video technology. When informing the Tribunal that agreement cannot be reached, the parties must also explain whether alternative listing arrangements are required (and why), and provide any dates to avoid in the subsequent six-month period.

Employment Judge Phil Allen
Date: 22 January 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
1 February 2021

FOR THE TRIBUNAL OFFICE