



EMPLOYMENT TRIBUNALS

Claimant: Mr N Roud

Respondent: Llexeter Ltd

Heard at: Exeter

On: Monday 17 January
2022

Before: Employment Judge Matthews

Representation:

Claimant: Mr J Swain – Lay Representative

Respondent: Ms M Sharp of Counsel

RESERVED JUDGMENT

1. Mr Roud was unfairly dismissed.
2. Had the Respondent followed a fair procedure in dismissing Mr Roud, there is a 75% chance that the dismissal would have been fair.
3. It is just and equitable to reduce any basic award and any compensatory award made to Mr Roud by 50% by reference to sections 122(2) and 123(6) of the Employment Rights Act 1996.
4. The Respondent is ordered to pay to Mr Roud unfair dismissal compensation totalling £2,668.33, comprising a basic award of £2,017.50 and a compensatory award of £650.83.
5. The recoupment regulations apply and the particulars required by regulation 4(3) are:

Total (unfair dismissal) monetary award: £2,668.33

The Prescribed Element: £588.33

Period to which the Prescribed Element is attributable: 9 November 2020 to 22 February 2021

Amount by which the monetary award exceeds the Prescribed Element: £2,080.00

6. Mr Roud was wrongfully dismissed.

7. The Respondent is ordered to pay Mr Roud pay in lieu of notice of £4,303.20. No deduction is to be made for tax.

8. Mr Roud's claim for a redundancy payment is dismissed.

9. The total sum ordered to be paid by the Respondent to Mr Roud is £6,971.53.

REASONS

INTRODUCTION

1. Mr Nick Roud claims that he was unfairly dismissed and wrongfully dismissed (a claim for notice pay), by the Respondent Company. Mr Roud also makes a claim for a redundancy payment. The Company says that Mr Roud was fairly and lawfully dismissed for gross misconduct.
2. On the Company's side I heard evidence from Mr Matthew Squire (Customer Relations Manager) and Mr Leon Xu (Managing Director). Each produced a written statement. I heard from Mr Roud who also produced a written statement. There was a 160 page bundle of documentation. All references in this Judgment are to pages in the bundle unless otherwise specified.
3. The hearing was in person. However, Ms Sharp attended by video link because she was recovering from a bout of Coronavirus.
4. The case had been set down for two days. In the event, it was possible to hear the evidence and argument in a day with Judgment reserved to allow the Tribunal to better consider the evidence and its conclusions.

FACTS

5. The Company employs some 36 people. The Tribunal understands that it is a specialist supplier of Chinese motorcycles, scooters, spares and accessories. It operates from

premises at Greendale Business Park, Woodbury Salterton, not far from Exeter in Devonshire.

6. Mr Roud started work for the Company on 7 October 2015 and was summarily dismissed with effect from 9 November 2020. Mr Roud had just over five years' service. That service appears to have been without disciplinary incident until March 2019. What happened then is dealt with below. Mr Roud was the Warehouse Manager at the time of his dismissal, having been promoted on 1 October 2016 from the job of Warehouse Operative.
7. At the time of Mr Roud's dismissal, Mr Squire was Mr Roud's line manager, although Mr Paul Wakely (Operations Manager) dealt with the operation of the warehouse.
8. The warehouse is a working environment in which banter is exchanged regularly, including the full array of profanities.
9. On 11 March 2019 Mr Squire required Mr Roud to attend a disciplinary hearing. The email is at 58-63. The reason for the hearing was given as:

"Poor attitude

The above point of "poor attitude" refers to how you talk to, and your general demeanour towards, other staff members. This is based on multiple complaints we have received, which references how you talk to them using inappropriate language, an aggressive nature and general mannerisms which are deemed unnecessary."

10. Mr Roud responded in an e-mail on 12 March 2019 (64). Expressing himself somewhat shocked by the allegations, Mr Roud denied being aggressive but admitted to using colourful adjectives. Mr Roud offered to make an effort to moderate this, so as not to offend people. Mr Roud ended: *"I can't help being a big, ugly brute and I feel it would be helpful if people cast aside their preconceptions and/or prejudices."* (At the time of his dismissal Mr Roud reports himself as being six foot six inches high and weighing nineteen stone.)
11. The disciplinary hearing took place on 14 March 2019. Mr Squire's notes are at 66-67. Mr Squire raised some specific complaints that had been made about Mr Roud including from an individual who reported that he had left because of the way he had been spoken to and treated by Mr Roud.

12. On this occasion Mr Squire chose to take no further action and wrote to Mr Roud confirming this on 15 March 2019 (69). Mr Squire explained that he had taken this decision because Mr Roud had agreed to improve how he spoke to staff. The position was to be monitored for three months. In short, Mr Squire had given Mr Roud another chance. In his evidence, Mr Squire confirms that this played no part in his later decision to dismiss Mr Roud (WS6). Mr Squire told the Tribunal that he had taken no steps to monitor Mr Roud after the hearing.
13. Around eighteen months later, on 19 October 2020, Mr Squire received e-mails from Ms Catherine Lovell (Purchasing Officer) and Mr Paul Hutchings (Sales Account Manager). These can be seen at 71-72. Ms Lovell wished to raise a formal grievance about Mr Roud being condescending, agitated and angry and swearing at her on 16 October 2020. *"Nick Roud's behaviour was hostility, rude and totally unacceptable, I do not expect to be intimidated or have to endure verbal abused while at work."* In another incident on the same day Mr Roud had apparently sworn at Mr Hutchings. Mr Roud had ended by saying *"Don't fucking check up on me, if I catch you checking up on me again I'll break your fucking legs."* and adding *"If that doesn't work I'll slash your tyres and you will crash on the way home and die."* Mr Hutchings commented that he did not expect to be spoken to like that in the work place, especially by a manager. Mr Hutchings wanted the matter dealt with but his name kept out of it as he feared a reprisal.
14. A few days before this, Mr Squire says that he had had a complaint from Mr Kein Dennis (Customer Service Agent) (WS9). Mr Dennis had refused to contact Mr Roud anymore because of Mr Roud's rudeness.
15. Mr Squire spoke to Mr Wakely, who reported another incident involving Mr Nathan Langley (Parts Coordinator). Mr Langley's view was sought and his email dated 20 October 2020 can be seen at 72. Mr Langley reported that Mr Roud had threatened to break his legs on one occasion and, on another, had sworn at him.
16. Having established that Mr Wakely had witnessed the incident with Ms Lovell on 16 October 2020, Mr Squire asked Mr Wakely for his account, Mr Wakely's email response of 20 October 2020 is at 72. Mr Wakely confirmed that Mr Roud had shouted and sworn at Ms Lovell.

17. Next, Mr Squire followed up Mr Kein's complaint, asking Ms Maddie Gheorghe (Customer Service Manager) for comment. Ms Gheorghe's email of 20 October 2020 is at 73. Ms Gheorghe wrote that the majority of her staff was complaining about Mr Roud's attitude. Ms Gheorghe added *"Is nothing in particular. Is just the entire attitude and the way he is treating the staff."*
18. Faced with this, Mr Squire approached other warehouse staff who worked with Mr Roud. Mr Phil Guest (unofficial warehouse supervisor) reported general dissatisfaction and one instance of Mr Roud referring to a warehouse staff member, Mr Charlie Vernon, as a *"cunt"* (73).
19. Having reviewed the allegations, Mr Squire, who freely confesses to having had little experience and no training in disciplinary matters, now moved to a disciplinary hearing to be chaired by himself.
20. On 22 October 2020 Mr Squire, with Mr Wakely in attendance, handed Mr Roud a letter requiring Mr Roud to attend a disciplinary hearing on 26 October 2020 (78-84). This appears to be the first time that Mr Roud had been alerted to what was going on. The hearing was *"to discuss the following points:*
 - *Bullying*
 - *Being aggressive & unapproachable*
 - *A serious breach of confidence"*
21. The letter reminded Mr Roud of his right to be accompanied. Through a reference to the Company's disciplinary policy, Mr Roud's attention was drawn to the possibility of dismissal for gross misconduct for bullying. Copies of the complaints that had been made were enclosed, although the names of the complainants were redacted.
22. Pending the outcome of the disciplinary hearing, Mr Roud was suspended on full pay (85). In the meantime, Mr Roud was not to contact anyone in the Company, except for Mr Squire.
23. By agreement the disciplinary hearing was put off until 28 October 2020.
24. On 27 October 2020 Mr Roud sent an email to Mr Squire responding to the allegations (96-98). Mr Roud had not had any difficulty in identifying those behind them. Mr Roud included a detailed account of what he said had taken place. Mr Roud

denied that Ms Lovell and/or Mr Hutchings had any grounds for their complaints about the first incident on 16 October 2020. Basically, Mr Roud thought they had been at fault in the conversation. Mr Roud admitted that he had commented to Mr Hutchings later on 16 October 2020 that he would break his legs but that this was a long running joke. Otherwise, he had not done what Mr Hutchings reported he had done. Mr Roud accepted that he had made the “break your legs” comment to Mr Langley, but as part of the same running joke. As far as the warehouse staff were concerned, Mr Roud didn’t see there were any particular problems although he volunteered that he had made a “*dick of the day*” comment.

25. The disciplinary hearing on 28 October 2020 was chaired by Mr Squire. Mr Wakely attended to take a note, the typed version of which is at 87-95. Mr Roud was accompanied by Mr Carle Oxland. Mr Roud was given an unredacted copy of the allegations, showing the names of those who had made them. Each of the allegations was put to Mr Roud who referred to his version of events as set out in the email he had sent to Mr Squire on 23 October 2020. In round terms, Mr Roud denied the allegations whilst admitting that he could be blunt on occasions. Mr Roud specifically denied bullying. Mr Squire adjourned the *“meeting to undertake further investigations in relation to the points you have raised.”*
26. Immediately after the disciplinary hearing on 28 October and later on 6 November 2020, Mr Squire approached those who had made the allegations against Mr Roud. It seems that the detailed account of events provided by Mr Roud was not put to them but they were asked some specific questions. Their responses can be seen at 99-100. These shed no new light on what had happened, save in two respects. First, there was a comment from Mr Guest concerning the relationship between Mr Roud and Ms Lovell: *“There’s always been a thing, they just seem to clash, I don’t think they like each other.”* Second, although Mr Hutchings denied that they were anything other than business issues, there had been tensions between him and Mr Roud over the late placing of orders. The results of these conversations were not shared with Mr Roud until the later appeal stage.
27. Mr Squire did not believe Mr Roud’s accounts of events and decided he should be dismissed. Mr Squire spoke to Mr Roud and sent him the outcome letter on 9 November 2020 (101-104). Mr Roud was summarily dismissed for gross misconduct. Mr Squires’ specific findings were, first, that Mr Roud’s behaviour towards Ms Lovell and Mr Hutchings on 16 October 2020 had

been offensive and intimidating. This substantiated the allegation of bullying. Second, the same behaviour together with the other complaints, led Mr Squire to find that the allegation that Mr Roud had been aggressive and unapproachable was well founded. Third, these findings undermined the relationship of trust and confidence. Mr Squire then added a new allegation, that of dishonesty. During the disciplinary hearing Mr Roud had said that he did not have rows with Mr Guest. When Mr Squire had made his further enquiries, Mr Guest had disputed this. Bearing this in mind, Mr Squire concluded that trust had been *“irreversibly broken”*. Further, Mr Roud had shown no indication that he would not continue to act in the same ways. Mr Squire then turned again to his further enquiries. Mr Squire had put Mr Roud’s suggestion, that staff wanted to paint him in a bad light, to Mr Hutchings. Mr Hutchings had, in effect, denied this.

28. On 11 November 2020 Mr Jack Anderson (previously Warehouse Supervisor with the Company) contacted Mr Squire about the now vacant Warehouse Manager’s job. The email exchange is at 106-109. Mr Roud suggests that this is evidence that the Company had been intending to replace him. There is no evidence the Tribunal can see to support this. An employment agency had been in touch coincidentally and Mr Roud’s dismissal was, no doubt, the subject of the Company’s and other grapevines. When Mr Anderson heard of the opportunity, he took it. Mr Anderson was later appointed Warehouse Supervisor.
29. As he had been invited to do, Mr Roud appealed against his dismissal to Mr Xu (110). In the email the one ground of appeal was that there had been an unfair investigation.
30. Mr Xu invited Mr Roud to an appeal hearing in a letter dated 19 November 2020 (111-112). The letter included copies of the supplementary investigations on 28 October and 6 November 2020 that Mr Roud had not previously seen. Like Mr Squire, Mr Xu had had no training in disciplinary matters but, as Mr Squire had done at the outcome stage, Mr Xu took legal advice.
31. Mr Roud sent a long statement dated 23 November 2020 to Mr Xu explaining and expanding on his grounds for appealing against his dismissal (113-119). Amongst the points Mr Roud made were that no investigation meeting had been held with him, that the decision to dismiss had taken account of the supplementary investigations on 28 October and 6 November 2020 that Mr Roud had not seen at that stage, that some of those who had made allegations against him had ulterior motives, that none of the allegations had used the word “bullying” (which

allegation Mr Squire had found made out) and that the “I’ll break your legs” comments had been used for many years without complaint and were a long standing joke.

32. From this Mr Xu says that he picked up three points that he wanted to focus on (WS10). They were, would an investigatory meeting with Mr Roud have made any difference, was there evidence that the “I’ll break your legs” comments were known to be a joke and had the allegations been motivated by a desire to be rid of Mr Roud.
33. The appeal hearing was held using a video conferencing facility on 19 November 2020. There had been a mix up about Mr Oxland joining to accompany Mr Roud. Mr Roud agreed to continue without Mr Oxland. The minute, taken by Mr Sean Kelly (Purchasing Manager), is at 120-128.
34. The Tribunal notes that Mr Roud protested the severity of the sanction. As he saw it, the issue had not been brought up with him before. Mr Roud suggested that training for improvement would have helped. He had not understood how serious the situation was during the disciplinary process.
35. Following the appeal hearing Mr Xu asked Mr Squire how he had come by the allegations. Mr Squire’s note of 26 November 2020 on that subject is at 129-130. On 7 December 2020 Mr Xu wrote to Mr Roud to clarify some issues and to provide more information (132). Mr Roud replied on 9 December (133-134).
36. Mr Xu asked Mr Mark Mason (Media/Marketing Team) to respond to the suggestion that the “I’ll break your legs” comments were a well understood joke. The emails are at 135-140. It now came to light that, on 7 October 2020, Mr Mason had sent Mr Roud an email (copied to various people, including Mr Squire) apologising for something that was Mr Mason’s fault and, clearly in jest, asking “*What time do I get my legs broken?*” When pressed by Mr Xu, Mr Mason confirmed it was the sort of thing Mr Roud would say, but only in jest. Mr Mason expressed a wish not to get involved.
37. Mr Xu says this did make him think again about whether or not staff felt threatened by Mr Roud. Having reviewed the evidence, Mr Xu concluded that they did (WS20).
38. On 8 January 2021 Mr Xu wrote to Mr Roud dismissing the appeal (142-146). In summary, Mr Xu concluded that an investigation meeting would have made no difference to the

outcome; that, whilst “bullying” had not been mentioned in the allegations, intimidating and threatening behaviour amounted to the same thing; that Mr Mason’s view on the “I’ll break your legs” comments was not shared by everyone; and that Mr Roud’s behaviour amounted to gross misconduct under the Company’s Policy (54-55) which included (as paraphrased by Mr Xu):

“Verbal or physical abuse towards another member of staff;

Any act of discrimination harassment or bullying, which is a deliberate breach of the dignity for all policy; and

Any other action which on a “common sense” basis is considered to be a serious breach of acceptable behaviour.”

39. On 23 February 2021 Mr Roud got another job with the supermarket, Morrisons, but at a much lower rate of pay. The Tribunal understands that Mr Roud received Jobseekers Allowance.

APPLICABLE LAW

40. Section 94 of the Employment Rights Act 1996 (the “ERA”) provides an employee with a right not to be unfairly dismissed by his employer. Section 98 of the ERA sets out provisions for determining the fairness or otherwise of a dismissal. So far as it is relevant it provides:

“98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-....

“(b) relates to the conduct of the employee,”....

“(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer

acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

41. The test for a fair conduct dismissal is well established. In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is fair or unfair an employment tribunal has to decide whether the employer who dismissed the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, the fact of that belief must be established, that is that the employer did believe it. Second, the employer must have had in his mind reasonable grounds upon which to sustain that belief. Third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation as was reasonable in all the circumstances. The first of these elements goes to the reason for dismissal, which it is for the employer to show. Otherwise, the burden of proof is neutral.

42. Added to this test is the requirement that the sanction imposed by the employer is within the band of reasonable responses.

43. Implicit in all this is that it is not for the tribunal to substitute its view for that of an employer provided that the employer's view falls within the band of responses which a reasonable employer might adopt.

44. Sections 122(2) and 123(6) of the ERA respectively provide:

“122 Basic award: reductions” “(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.”

“123 Compensatory award” “(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”

45. Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 (the “TULRCA”), so far as it is relevant, provides:

“207A Effect of failure to comply with Code: adjustment of awards

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

If, in the case of proceedings to which this section applies, it appears to the employment tribunal that-

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

The employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%”

46. Schedule A2 of the TULRCA includes the jurisdiction of unfair dismissal and the Code is a relevant code for the purposes of section 207A (1)(a) of TULRCA.

47. The Tribunal was referred to Abernethy v Mott, Hay and Anderson [1974] ICR 323, BHS v Burchell [1980] ICR 303, Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, Polkey v A E Dayton Services Ltd [1997] IRLR 503, Neary v Dean of Westminster [1999] IRLR 288, Taylor v OCS Group Limited [2006] IRLR 613, London Borough of Brent v Fuller [2009] EAT/0453/09, Governing Body of Bearwood Humanities College v Ham [2013] UKEAT/0379/13 and Sharkey v Lloyds Bank plc [2015] UKEAT/0005/15.

CONCLUSIONS

48. Unfair Dismissal

49. It is for the Company to show a permissible reason for the dismissal and it puts forward “conduct” under subsection 98(2)(b) of the ERA. In short, the Company points to Mr Roud’s behaviours as identified in the allegations made against him. That is a reason related to conduct. Mr Roud maintains that the real reason for his dismissal was the Company’s wish to dismiss him and, rather than replace him as Warehouse Manager, recruit Mr Anderson as Warehouse Supervisor. In effect, Mr Roud says, he was made redundant. The only evidence the Tribunal sees on the point does not support that proposition. Mr Roud’s claim for a redundancy payment is dismissed.

50. There is no evidence on which the Tribunal could conclude that Mr Squire and/or, on appeal, Mr Xu, did not believe that Mr Roud was guilty of the misconduct in question.
51. The Tribunal now turns to whether or not Mr Squire and later Mr Xu had reasonable grounds for sustaining that belief. The question is, was it within the band of reasonableness for them to conclude, on the evidence before them, that Mr Roud had committed the misconduct alleged?
52. Looked at objectively, there were some problems in that respect. In round terms, there was one direct reference to intimidation (from Ms Lovell), three references to what could be classed as threatening behaviour (Ms Lovell, Mr Hutchings and Mr Langley) and many references to swearing. The most serious allegations were from Ms Lovell and Mr Hutchings. It is troubling that Mr Squire and Mr Xu appear to have paid scant regard to some obvious contra indications as far as the evidence was concerned. First, it is not uncommon in workplaces for these sorts of allegations to be factional. There was evidence that Ms Lovell and Mr Roud did not get on. There was also evidence that there had been tensions over the placing of late orders between Mr Hutchings and Mr Roud. Second, Mr Squire knew about the “I’ll break your legs” comments and the context in which they were made because he had been copied in on Mr Mason’s email on 7 October 2020 (see paragraph 36 above), only a month or so before he made the decision to dismiss Mr Roud. That does not seem to have figured in his deliberations at all. If Mr Squire had forgotten about it, presumably he had not seen it as a concern. Mr Xu uncovered this and disposed of it by deciding that, whilst it may not have offended Mr Mason, it would have offended others.
53. Notwithstanding these problems, there is insufficient for the Tribunal to decide that the conclusions reached by Mr Squire and by Mr Xu were outside the band of reasonableness. Both Mr Squire and Mr Xu reached their conclusions after giving reasonable consideration to the information they had and it is not open to the Tribunal to substitute a different conclusion.
54. The Tribunal turns to the investigation. The test is, had the employer, at the stage at which it formed its belief in the misconduct in question, carried out as much investigation as was reasonable in all the circumstances?
55. The ACAS Code of Practice 1 Code of Practice on Disciplinary and Grievance Procedures (2015) (the “Code”), as it says, provides basic practical guidance and sets out principles for

handling disciplinary situations in the workplace. Employment tribunals take the Code into account when considering relevant cases, of which this is one. (The Tribunal mentioned to Mr Xu at the hearing that some training in this area might help avoid difficulties in the future.)

56. The Code does not envisage that an investigatory meeting be held with an employee, whose conduct is being investigated, in all cases. What the Code stresses is that it is important to carry out necessary investigations. In appropriate cases this may be confined to the collation of evidence for use at any disciplinary hearing. This is what happened here. The question is, was this an appropriate case and was that as much investigation as was reasonable in the circumstances? The reasonable band test applies. In other words, there is a range of reasonable possibilities and provided the employer acts within that range, it is not for the Tribunal to intervene.
57. This was a relatively small business with commensurately sized resources. The managers charged with the process were self-confessedly inexperienced. Nevertheless, objectively viewed, it would have been obvious that the matter turned on conflicting evidence between Mr Roud and those complaining of his conduct. The key antagonists were Mr Roud on the one hand and Ms Lovell and Mr Hutchings on the other. Given that the relationship between Ms Lovell and Mr Roud was reported as not good, that Mr Hutchings and Mr Roud had differences over the late placing of orders and that Mr Squire had been copied in to the “leg breaking” comment in Mr Mason’s email a month earlier, the importance of weighing the evidence must have been clear to Mr Squire. If Mr Squire, having received the allegations, had held an investigatory meeting with Mr Roud, he would have received Mr Roud’s detailed account of the incidents at that earlier stage. That could have been put to Ms Lovell and Mr Hutchings as part of a continuing investigation. Handling the matter in this way would have created the space in which to form a considered view of the evidence before deciding whether or not to take it to a disciplinary hearing. What happened here is that the investigation process became conflated with the disciplinary process. In the end, it appears that Mr Roud’s detailed account of what had happened was never put to Ms Lovell or Mr Hutchings. Nor, indeed, does it appear that any of Mr Roud’s other detailed accounts were put to those who had made the other allegations.
58. This was not a case in which the facts were so clear or the wrongdoing so obvious that an investigation meeting was not necessary. To the contrary, it was a case in which the omission of

an investigatory meeting took the investigation outside the band of reasonable responses. This, in itself renders the dismissal unfair. The position was, however, compounded.

59. Whilst, again, there is no absolute requirement, the Code advises that, where practicable, different people should carry out the investigation and disciplinary hearing. This is a matter of fairness. It is generally understood that someone should not be the prosecutor and judge in the same case, if it can be avoided. In this instance there were some obvious options. Mr Wakely could have carried out the investigation and there were other managers in the Company who could have handled either the investigation or any resulting disciplinary hearing. The Tribunal understands, for example, that there was a Purchasing Manager. Mr Squire says that he felt he should handle the matter. In essence, however, the only explanation that has been provided for why the Company paid no heed to the Code in this respect, is ignorance. The consequences of that ignorance should not be visited on Mr Roud. There is no evidence that it was not practicable for the Company to use different people for the investigatory and disciplinary processes. This also renders the dismissal unfair.
60. It is arguable that the appeal process conducted by Mr Xu cured the defect that Mr Squire had handled both the investigatory and disciplinary processes. Mr Xu had the power to overturn Mr Squire's decision, although he ultimately decided not to do so. The Tribunal is not persuaded by this. First, once an employee has been dismissed there is momentum behind the decision. The chances that a dismissal will be overturned on appeal are less than the chances that a dismissal will not result, if the process is handled properly at the initial disciplinary stage. Second, although Mr Xu had the power to overturn the dismissal, it is by no means clear that he reheard the case. In particular, he did not revisit the entire investigatory process but focussed on three questions (see paragraph 32 above).
61. For the sake of completeness, the appeal process conducted by Mr Xu did not cure the defects in the substance of the investigatory process. The most obvious example is that Mr Xu did not put Mr Roud's accounts of events to those making the allegations.
62. The Tribunal is required to consider what would have happened had the Company carried out a reasonable investigation and/or appointed different people to handle the investigation and disciplinary processes. The Tribunal takes account of a number of factors in carrying out this exercise. First, although it had been

discounted, there had been an earlier occurrence in 2019. This and the nature of the new allegations appear to establish a pattern of behaviour. Whilst much of it had to do with profanity, some of it had to do with intimidatory behaviour. There is a good chance that a manager charged with the disciplinary process, but not involved in the investigation, would have seen it that way. The second factor goes the other way. That manager may well have given more weight to the possible ulterior motives behind the allegations. For example, the respective relationships between Ms Lovell and Mr Hutchings on the one hand and Mr Roud on the other were suspect. The third factor, again, goes in the other direction. That manager might have given more weight to Mr Mason's "*leg breaking*" email and given Mr Roud the benefit of the doubt.

63. The Tribunal's conclusion is that there is a 75% chance that a fair investigation followed by a disciplinary hearing conducted by different people would have resulted in a fair dismissal. Looked at the other way around, there is a 25% chance that, in those circumstances, the Company would have imposed a sanction short of dismissal on Mr Roud.

64. The Tribunal is also required to consider the issues of conduct and contribution as set out in sections 122(2) and 123(6) of the ERA. Before a Tribunal can make deductions for conduct and/or contribution, it must find that there was conduct having the characteristic of blameworthiness or culpability. On the evidence before it, the Tribunal finds there was an element of this. Doubt can be cast on the motivation behind Mr Roud's accusers. Mr Mason's email raises the question whether or not the "*leg breaking*" comments were anything more than banter. Nevertheless, there is enough background "*noise*" about Mr Roud's behaviour to conclude that his conduct had been culpable to some extent. The Tribunal finds that conduct contributed to Mr Roud's dismissal to the extent of 50%. That percentage will be used to reduce any compensatory award. Further, it is just and equitable to reduce the basic award by the same percentage.

65. The Code

66. These proceedings include a claim of unfair dismissal. Section 207A of the TULRCA applies. The failure to appoint two different officers to handle the investigatory and disciplinary processes, despite it being practicable to do so, was an unreasonable failure to comply with the Code. The Tribunal considers it just and equitable to increase any award it makes to Mr Roud by 25%.

67. Wrongful dismissal

68. The question for the Tribunal is, on the balance of probabilities, did Mr Roud's conduct amount to a repudiatory breach of contract such as to justify the Company in terminating it summarily. The fact that the dismissal has passed the "reasonable belief" test for unfair dismissal is not enough. On the evidence the Tribunal has seen, Mr Roud's behaviour did not amount to a repudiatory breach. On the balance of probabilities, the Tribunal's view is that the allegations, particularly the allegation of bullying, were not substantiated.

69. Remedy

70. *Wrongful dismissal*

71. Under his contract of employment (54) Mr Roud was entitled to 8 weeks' notice. Mr Roud is awarded £4,303.20 in this respect. The calculation is:

Annualising the 6 months net earnings shown on the payslips at 150-155 (after adding back company and employee contributions to pension totalling £1,115.93 to the total net salary of £12,869.58) gives net weekly pay of:
 $(£13,985.51 \times 2) \div 52 = £537.90$

$£537.90 \times 8 = £4,303.20.$

72. *Unfair dismissal*

73. Mr Roud has not asked that a reinstatement or re-engagement order be made.

74. Mr Roud is entitled to a basic award of £2,017.50 calculated as follows:

Mr Roud was aged over 41 throughout the 5 complete years of his employment

Week's gross pay capped at £538

$£538 \times 1.5 \times 5 = £4,035.00$

Reduction of 50% under section 122(2) ERA = £2,017.50

75. Relevant to the amount of any compensatory award is what Mr Roud did to mitigate his loss. Mr Roud's approach appears to have been to do little, if anything, in terms of applying for another

job until his appeal was dismissed on 8 January 2021. Thereafter Mr Roud found other work at a considerably lesser rate of pay. The Tribunal weighs Mr Roud's inaction pending the outcome of his appeal and the lack of any evidence that Mr Roud has tried to secure a better paid job, against the fact that he has been working in a lower paid position. Doing so, leads the Tribunal to the conclusion that it is just and equitable to award Mr Roud compensation for loss of earnings until the date he secured his new job, but not beyond that date.

76. The calculation is as follows:

Net average wages of £537.90 per week from 9 November 2020 to 23 February 2021 (15 weeks) = £8,068.50

Less Notice Pay of £4,303.20 = £3,765.30

Less "Polkey" reduction of 75% (£2,823.97) = £941.33

Add uplift of 25% (section 207A of the TULRCA) (£235.33) = £1,176.66

Less contributory fault at 50% (£588.33) = £588.33.

77. To this is added the sum of £400 awarded for loss of statutory rights. This is reduced by the "Polkey" reduction of 75% to £100, uplifted by 25 % (section 207A TULRCA) to £125 and reduced by 50% for contributory fault to £62.50.

78. The total compensatory award is £650.83.

Employment Judge Matthews
Date: 27 January 2022

Judgment sent to parties: 27 January 2022

FOR THE TRIBUNAL OFFICE