



THE EMPLOYMENT TRIBUNALS

Claimant: Mr K Allan

Respondent: Recyke y' Bike Ltd

Heard at: Newcastle Hearing Centre by Cloud Video Platform (CVP)
On: Tuesday 24th November 2020 **Deliberations:** 25th November 2020

Before: Employment Judge T R Smith

Representation:

Claimant: In Person
Respondent: Mr B Hoare

This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V-video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

JUDGMENT

1. The Claimant's complaint of unfair dismissal is well-founded.
2. The Claimant caused or contributed to his dismissal as to 50%.
3. The Claimant's complaint of wrongful dismissal – breach of contract is well-founded.

RESERVED REASONS

The Evidence

The Tribunal heard evidence from: –

- Mr Allan, the Claimant.
- Ms Savitri Holmstrom, finance administrator for the Claimant
- Mr Ben Hoare, the chair of the trustees of the Respondent
- Neil Mc Gowran, workshop manager for the Respondent
- Sara Newson manager for the Respondent

The Tribunal also had before it a bundle consisting of 116 pages.

The Tribunal considered all the evidence relevant to determining the agreed issues even if it is not made specific reference to a particular submission or dispute.

The Issues

What was the reason for the dismissal? The Respondent asserted that it was a reason relating to conduct which is a potentially fair reason under section 98 (2) of the Employment Rights Act 1996 (“ERA 96”).

Did the Respondent hold that belief in the Claimant’s misconduct on reasonable grounds? Did it act reasonably or unreasonably in treating that reason as a sufficient reason for dismissal having regard to the factors set out in section 98 (4) ERA96?

Was the decision to dismiss a fair sanction, that is, was it within a reasonable range of responses of a reasonable employer?

If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This required the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged?

It was agreed at the start of the hearing that the Tribunal would determine liability and contribution and only then, if necessary, proceed to remedy, if time allowed.

Findings of fact

Background

1.The Respondent is a small charity.

2.It operates from premises in Newcastle and Durham.

3.It employs six staff in Newcastle, four of whom are part-time and three in Durham, two of whom are part-time. Last year its turnover was in the region of £430,000. It is a small employer with no HR Department.

4.It recycles donated bikes, selling some of those bikes in its shops and donating others to worthy causes. It carries out outreach work with schools and youth groups, training young people in basic engineering skills.

5.The Respondents Newcastle premises were previously at a location known as “The Journey” where Mr Adam Laing (“Mr Laing”) rented a café on those premises from the Respondent. He had worked for the Respondent as a volunteer and also provided free coffee to the Respondent staff and their volunteers when they were based at The Journey. He had allowed his café to be used for meetings including annual general meetings of the Respondent. Since the Respondent had moved premises he had referred customers to the Respondent. The Tribunal concluded he was well known to management and staff of the Respondent.

6.The Respondents moved to their current premises in approximately July 2019.

7.The Respondent shares those premises with a company called Zmove which supplies the services of pedal cycle couriers to customers.

8.The structure at Newcastle was that the trustees managed the business but were not employees. Ms Newsom reported to the trustees .The Claimant worked in the workshop as a bicycle mechanic and he reported to the workshop manager, Mr Neil Mc Gowran. Mr Mc Gowran in turn reported to Ms Newsom.

9.The Claimant commenced employment with the Respondent on 02 January 2018 until he was dismissed for alleged gross misconduct on 02 May 2020.

10.The Claimant was issued with a statement of terms and conditions (93 to 96).

11.The Claimant had been placed on furlough leave on 01 April 2020 and returned to work on 22 April 2020.

12.Prior to returning from furlough the Claimant received an email from Ms Newsom dated 21 April 2020 (58) that stated customers were only allowed in by appointment unless it was for something such as an inner tube. This was linked to health and safety. The Claimant also received a letter which stressed that he had to wear gloves when serving customers (59).

13.The Tribunal was satisfied the Claimant was told that volunteers would not be allowed back to the project because of the possibility of the spread of Covid 19.

14.The Claimant's contractual hours were from 10 till 5pm whereas Mr McGowan's were 9 till 4pm. Normally another mechanic locked up when the Claimant left at 5pm, but he was still on furlough.

15.As only the Claimant and Mr Mc Gowran, were working in the workshop, and Mr Mc Gowran could leave earlier than the Claimant, the Claimant asked for, and was given, a set of keys, as he would be the last person to leave.

Policies and Covid 19

16.If staff worked late, they were entitled to claim time off in lieu.

17.The Respondent has a disciplinary procedure (85 to 88).

18.The Respondent does not have a lone worker policy. The Respondent however had carried out risk assessments under its health and safety obligations which included looking at the position of lone working. Such documentation was kept on the Respondents intranet. Staff had access to that system. Only those who were lone workers were specifically trained on lone working. There was no evidence the Claimant was ever so trained, as it was not appreciated that there might be occasions when the Claimant would operate as a lone worker. The Tribunal concluded that he therefore had no reason to refer to, and had not seen the specific risk assessment in respect of lone

working. It had never been given to the Claimant (in fairness to the Respondent probably because the Claimant had only recently become a key holder following his return from furlough).

19. In any event the risk assessment is somewhat ambiguous ((91). It provides “all staff and volunteers are not contracted and instructed to work alone. Should the requirement arise then a checking in system should be used with manager or colleague who hold keys”. The Tribunal emphasises the word “or”. If the Claimant held the keys, effectively he checked in with himself under the policy if working late.

20. The Tribunal should at this stage briefly deal with the issue of wearing of gloves and hand sanitisation. The Tribunal found that the Respondents generally operated an appointment system but as was made clear in its own documentation, members of the public could call in for parts if it was relatively quick. The nature of the doors at the Respondents premises in Newcastle was members of the public could enter in any event.

21. There were no notices requiring members of the public to wear gloves when visiting the Respondents premises, post the presence of Covid 19 in the United Kingdom although the Tribunal does accept the Respondents tried to encourage members of the public to wear gloves. After the incident referred to below, signs were erected.

22. The Tribunal found that there were occasions when both staff and members of the public did not wear gloves. The Claimant specifically raised in the course of disciplinary proceedings the case of Mr Dean Holmes not wearing gloves, which was accepted. Even following the Claimant’s disciplinary hearing, on occasions, in error, members of staff forgot to wear gloves, for example Ms Holmstrom when opening a sack of donations. Staff was simply counselled in respect of Covid 19. None was subject to any disciplinary action for not ensuring that customers wore gloves or they did not wear gloves.

Friday 24 April 2020

23. On Friday 24 April 2020 Mr Laing, wanted some parts and a tool for his bike. He was a friend of the Claimant and rang him on his mobile and was surprised to learn that the Respondents had opened for business. He made arrangements to visit the premises, albeit after working hours, arriving at about 5.30pm. He had forgotten his wallet and spent some time talking to the Claimant and then time was spent fixing parts on Mr Laing’s bike to the retail value of approximately £30. Mr Laing promised to make payment for the full retail value of the parts.

24. The Tribunal found that although the Claimant was working on a bike there was a social element to the meeting with Mr Laing.

25. The Claimant did not claim time off in lieu for working past his contractual leaving time of 5 pm. The Respondent incurred no direct or indirect cost by the Claimant working past his contractual hours.

26. At about 7 pm Mr McGowan telephoned the Claimant at work to say Zmove was having difficulties getting in to the premises and had the Claimant left his keys in the door? The Claimant agreed he had. He let the tenant in and then he left along with Mr Laing and the tenant, having locked up.

Subsequent events

27. On Saturday, 25 April 2020 Ms Newson spoke to the Claimant and wanted to know why he had been working so late as she was concerned that no one knew he was on site and the work he was doing should not have taken so long to complete. The Claimant did not volunteer that Mr Laing had been on the premises. He said he'd been working on a bike and had been working late. He did not hide that he'd been on the premises until 7 pm.

28. On Tuesday, 28 April 2020 Ms Newson told the Claimant she had reviewed the CCTV and seen Mr Laing on site.

29. The Claimant, accepted Mr Laing had been on site for a repair to his bike and Ms Newson expressed her concerns as regards a breach of the lone worker policy.

30. She also believed Mr Laing had been drinking, based on an image on the CCTV of him holding a can to his mouth. The Claimant accepted Mr Laing had a can of alcohol but he did not drink any alcohol.

31. The Claimant said he accepted what he done was unacceptable and would accept any consequences. Later that day Ms Newsom mentioned disciplinary proceedings. In the interim Mr Laing contacted the Claimant to arrange payment of the parts he had taken. This was before Ms Newson mentioned disciplinary proceedings.

32. On 28 April 2020 Ms Newson sent the Claimant an email inviting him to a disciplinary hearing (60). The allegations were, in summary: –

- the Claimant allowed Mr Laing on site outside working hours without prior permission at a time when the Respondent was limiting people on site due to health and safety concerns
- that alcohol was consumed on site
- that Respondent's business relationship with Zmove was negatively impacted
- that the Claimant wasn't honest about not been alone when spoken to by Ms Newson
- the use of the Respondent stock to repair Mr Laing's bike

33. The Claimant was told the meeting would be held the next day but was offered an adjournment if he needed time to prepare. The Claimant was not provided with any documentation other than the Respondents grievance and disciplinary procedure and Ms Newson statement until 17.33 on 29 April 2020 (62).

34. Later that evening, at 18.46pm Mr Hoare contacted the Claimant and stated he had viewed the CCTV and had concerned that Mr Laing had taken items without paying. He stated that the matters if proven was serious and could have serious consequences and

offered an adjournment. The Claimant was not expressly told that he could be dismissed.

35. On 29 April 2020 Ms Newson contacted Mr Laing and Mr Mason (the tenant Zmove) for statements. Mr Laing did not respond. Mr Mason explained how the difficulties in his employee gaining entry to the premises cost the business money and was upsetting to the individual who just wanted to finish work and get home. However as will be seen, the allegation that there was a negative impact on the Respondents relationship with Zmove, does not appear to feature in the subsequent disciplinary hearing.

The disciplinary hearing

36. A disciplinary hearing was held on 30 April 2020 lasting some two hours. Mr Hoare chaired the meeting supported by Ms Newson. The Claimant attended along with his witness, Ms Holmstrom.

37. Notes were taken of the meeting (27 to 29). The Tribunal regarded the notes as being a reasonable summary of the principal matters discussed. Indeed, the Claimant accepted in the internal proceedings that they were reasonably accurate (66).

38. Prior to the meeting the Claimant had pointed out to the investigating officer, Ms Newson that she should speak to the other mechanic, Mr James Gray, who would confirm that where customers were known to be reputable they were allowed short-term credit. No such enquiry was made by Ms Newson prior to the disciplinary hearing and nor was such an enquiry made by Mr Hoare.

39. Although Mr Hoare, after the meeting, received a statement from Mr Mc Gowran, prior to making a decision he disclosed it to the Claimant and offered to reconvene if the Claimant wish to ask questions of Mr Mc Gowran (67). The Claimant indicated he did not disagree with the statement (68).

40. Mr Hoare found that the Claimant had invited Mr Laing onto the Respondent premises without permission, gave him property belonging to the Respondent without seeking payment, had seriously breached health and safety procedures in that Mr Laing had not sanitised or worn gloves which could have led to the closure of the business, breached the lone worker policy and attempted to cover up his arrangement with Mr Laing. In evidence before the Tribunal, in isolation Mr Hoare stated that he would not regard dismissal as the appropriate penalty for any of the allegations other than giving property to Mr Laing without seeking payment. On the issue of breaching health and safety procedures he could not be sure whether that would or would not amount to gross misconduct.

41. Mr Hoare judged the Claimant had lied to the Respondent. He regarded the lies as being the Claimant stating he was working late on Friday. Just interjecting at this point the Claimant was doing work on Friday including working for a customer, Mr Laing. It may have been that the Claimant was not particularly productive and it is certainly true that the Claimant did not volunteer Mr Laing was on the premises, but the Tribunal did not find that the Claimant lied either to Ms Newson or Mr Hoare and no reasonable employer, on this evidence, could have found there were express lies by the Claimant.

42. Part of the concerns of the Respondent was that the CCTV apparently showed Mr Laing touching items and not wearing gloves. The Claimant specifically raised at the disciplinary hearing the case of Mr Dean Holmes, another trusted contact of the Respondent, who had touched items without wearing gloves and no action had been taken against the staff concerned. They were simply counselled. No explanation was given as to why this matter now merited a disciplinary hearing for the Claimant but did not merit a hearing in respect of the Dean Holmes incident.

43. One of the staff who had allowed a member of the public to touch a bike for her child without wearing gloves who was not disciplined was Ms Newsom.

44. Pausing at this juncture the findings differed from the matters that the Claimant was required to address in the disciplinary invite letter and some matters mentioned in that letter were not subject to any express findings, for example the consumption of alcohol. The allegation as regards harming the Respondents relationship with Zmove also appeared to have disappeared.

45. The Claimant was dismissed for gross misconduct.

46. The Claimant was advised of his right of appeal in writing.

The Appeal

47. The Claimant lodged an undated letter against his dismissal, headed as a statement (41 to 44).

48. He enclosed a statement from Mr Laing who stated he'd used hand sanitiser when he entered the premises and accepted he didn't pay for parts but, given he had been a volunteer for the Respondent and was a tenant had agreed with the Claimant to pay full price. The Claimant also enclosed two questionnaires, one from Mr Craw, former retail manager and one from Ms Bateman, former shop manager for the Respondent who both confirmed that in the past, on occasions, credit was given to trusted individuals.

49. Ms Newsom filed a statement (49) for the appeal dated 13 May 2020 in which she said the procedures had been updated since Mr Craw and Ms Bateman worked for the Respondent. She emphasised that lone working was discouraged.

50. Mr Hoare also filed a statement (50) dealing with the suggestion that he was biased.

51. An appeal took place on 19 May 2020 chaired by Mr Ian Bremner, a trustee and chair of the Respondents staffing and volunteer's subgroup.

52. Mr Bremner was not called by the Respondent to give evidence.

53. The Claimant attended the appeal, again supported by Ms Holmstrom. The appeal lasted about 2.5 hours

54. Notes of the appeal would be before the Tribunal which the Tribunal accepted as being broadly accurate (51 to 55).

55.The notes set out in some detail the contentions put forward by the Claimant. He had submitted evidence that credit had been given to valued customers in the past, Mr Laing had paid for the goods at full retail price prior to the commencement of any disciplinary proceedings; he explained the inconsistencies of the Respondent's approach to sanitisation/glove wearing. He denied he'd been given any specific training on lone working. He admitted, as he had done from prior to the commencement of the disciplinary proceedings, that he made an error in allowing Mr Laing onto the premises. He accepted he should have volunteered the information that Mr Laing was on the premises when asked on the Saturday by Ms Newson why he'd been doing working late but had never been asked if anyone else was on the premises with him.

56.Mr Bremner set out the position as it appeared to be from the Respondent's perspective. The Claimant put the relationship with Zmove at risk (an allegation he had no right to look at as it had not been proven at the disciplinary hearing), there had been socialising, Mr Laing should not have been on the premises, lone working wasn't permitted unless necessary, the meeting with Mr Laing looked like a pre-planned event and parts of been taken without payment.

57.The Claimant had been dismissed for five grounds namely: –

- inviting a friend onto the shop premises out of hours without permission
- giving the employer's property to a friend without payment
- seriously breaching health and safety procedures, a breach which could have led to the closure of the business
- breaching his contract by lone working
- seeking to cover up the Claimant's arrangement with Mr Laing

58.Mr Bremner upheld the original decision on 26 May 2020 in an appeal outcome letter (56 to 57) save to the extent that he did not find that the Claimant had given the Respondent's property to Mr Laing without seeking payment.

59.There is no explanation as to how Mr Bremner weighed up the various contentions of the Claimant. It is noticeable that in the statement submitted by Mr Laing he said he sanitised his hands before he entered the Respondent's premises. How this impacted upon Mr Bremner's judgement is not clear. Unfortunately, as Mr Bremner was not called to give evidence the Tribunal could not determine how he dealt with the various contentions and reached his judgement. Indeed, Mr Hoare contended that the outcome letter from Mr Bremner did not find that the Claimant's appeal, on the ground that employer's property was given to a friend without payment, was upheld

60.The relevant extract of the appeal outcome letter read "*With the exception of point 2, I am in full agreement with these findings. I have some doubts whether there was deliberate theft involved but the manner in which payment was eventually made was not convincing*" Point 2 was that the Claimant gave property of the Respondent to Mr Laing without payment. The fact that there was no consensus between the parties as to what grounds had actually been upheld, or not upheld in the Claimant's appeal fortified the Tribunal's judgement that it could have little confidence as to how, whatever decision had been reached, have been reached weighing up the various arguments.

Submissions

61. Both parties made submissions on matters of fact. The Tribunal means no disrespect to either of them by not repeating those submissions in this judgement as no matters of law were specifically referred to. The Tribunal has however dealt with any significant factual submissions in its judgement.

Discussion

62. The Tribunal applied section 98 (1), 98 (2) and 98 (4) of the ERA 96 which provides as follows: –

“98 (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 either it is 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.

98 (2) – a reason falls within this subsection if it.....

(b) relates to the conduct of the employee.

98 (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 the weather in the circumstances (including the size and the 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.”

63. The first issue the Tribunal had to address was whether the Respondent has established on the balance of probabilities that the reason or principal reason for dismissal was a potentially fair reason as set out in section 98(2) ERA 96 or for some other substantial reason.

64. The reason for dismissal is a set of facts known to the employer or beliefs held by him which would cause him to dismiss the employee, see **Abernethy – v – Mott, Hay and Anderson 1974 IRLR213**. The Respondent relies upon conduct which is a potentially fair reason for dismissal which led them to lose trust and confidence in the Claimant. The Tribunal noted that the Claimant suggested there may have been a grudge against him by the dismissing officer, Mr Hoare because of the way he raised concerns in respect of a previous redundancy situation. The Tribunal concluded that whilst the Respondent had been considering a redundancy situation and the Claimant wished to make representations as to the pool of employees, that process was being led by two other trustees. Although the Claimant asked to speak to Mr Hoare, and he

agreed to listen to what the Claimant had to say, the Tribunal was not satisfied that as a result of that meeting he held a grudge against the Claimant. In any event, as it transpired nobody was made redundant.

65.The Tribunal determined that looking at the disciplinary process in its entirety the principal reason for the Claimant's dismissal was conduct. The Claimant himself admitted throughout the internal proceedings that he had made errors. There was some CCTV evidence to support the Respondents concerns. It was the Respondent's belief as to the Claimant's conduct on and following 25 April that was the principal reason why he was dismissed.

66.It follows therefore that the Respondent has surmounted the first hurdle.

67.The next consideration is whether the dismissal was fair or unfair within the meaning of section 98 (4) ERA 96.

68.From the myriad of case law including **British Home Stores Ltd -v- Burchall 1978 IRLR 379**, **Sheffield Health and Social Care NHS Foundation Trust -v- Crabtree UKEAT 0331/09/ZT**, **Sainsbury's Supermarket-v- Hitt 2002 EWCA CIV 1588** and **London Waste Ltd -v-Scrivens UK EAT/0317/09** the Tribunal has deduced the following principles:

- Was there a genuine belief in the alleged misconduct?
- Were there reasonable grounds to sustain that belief?
- Was there a fair investigation and procedure (and this includes not only the material which was available to the Respondent but what would have been available had a proper investigation being conducted)?
- Was dismissal a reasonable sanction open to a reasonable employer? On this latter point the Tribunal must decide not whether it would have dismissed the Claimant but whether dismissal fell within the band of responses of a reasonable employer.

69.As there was an appeal process the Tribunal must examine the fairness of the disciplinary procedure as a whole, thus it is possible that if errors were made in an earlier part of the proceedings were corrected on appeal the dismissal may be fair, see **Taylor -v- OCS Group Ltd 2006 ICR 1602**.

70.The Tribunal determined that there were both procedural and substantive failings in the disciplinary procedure. Those failings included:-

- A failure to expressly warn the Claimant that his continued employment was in jeopardy if all, or any, of the allegations put to him prior to the disciplinary hearing were proven. The Tribunal did not accept Mr Hoare's submission that the fact that allegations were referred to as serious meant the Claimant must have known that he was at real risk of dismissal for gross misconduct.
- Linked to the first matter was the very late disclosure of the evidence from the investigation, after working hours on the night before the disciplinary hearing. Whilst it is true the Claimant was asked whether he wanted an adjournment, and

he declined, his view may be very different if he knew that there was a real risk his employment would be terminated for gross misconduct.

- The difference between the disciplinary invite letter setting out the allegations the Claimant had to answer and the subsequent findings of Mr Hoare.
- No significant attempt was made, prior to the decision being taken to dismiss the Claimant, to look at his assertion that credit had been given to reliable customers in the past. It was left to the Claimant to muster such evidence which he put forward at his appeal.
- It was unfair to find the allegation as regards lone working was substantiated on the evidence. The Respondent had no lone working policy and the health and safety assessments had never been drawn to his attention. Even if they had been, on the wording of the assessments, the Claimant did not breach the Respondents requirements as he was a keyholder.
- The Claimant at both the disciplinary and appeal hearing mentioned specific incidents where customers had not worn gloves and no action had been taken against staff. He did not dispute that Mr Laing did not wear gloves but the action taken against the Claimant was disproportionate to the way others were dealt with, without the Respondent explaining why it treated the Claimant more harshly
- It was clear from the evidence that Mr Hoare considered the Claimant had lied as regards the presence of Mr Laing. There was no cogent evidence that he positively lied, to support that conclusion. At best the Claimant was less than frank.
- There is no cogent evidence that consideration was given to the fact the Claimant accepted, even before the commencement of disciplinary proceedings, that he made an error of judgement in allowing Mr Laing entry onto the premises.
- It is not clear why each and every ground put forward by the Claimant at his appeal were either accepted or rejected and how the Claimant's evidence was weighed up by Mr Bremner. By way of illustration only, Mr Laing said in his statement before Mr Bremner that he sanitised hands before he entered the premises. If that was true then his failure to wear gloves (the purpose being to control infection) rather fell away. It may well be that there were good reasons why Mr Bremner rejected that evidence, but he did not explain why he did so in the appeal outcome letter and he was not present at the Tribunal to give evidence to explain his thinking.
- The raising at the appeal by Mr Bremner of an allegation that had not been found proven at the disciplinary hearing (possible damage to the relationship between the Respondent and Zmove)
- Both the disciplinary and appeal officers gave no consideration to the fact that even if gross misconduct was established that did not automatically result in

dismissal, see **Brito-Babapulle -v- Ealing Hospitals NHS Trust [2013] IRLR 854.**

71.The Tribunal has further concluded that dismissal was outside the band of responses of a reasonable employer. There was only one matter that Mr Hoare considered in isolation merited summary dismissal, namely allegedly not charging Mr Laing for the Respondent's property, (and for the reasons the Tribunal has already explained, a reasonable employer was not entitled to come to the conclusion that that allegation was made out as it was rejected at appeal). The Tribunal did not accept Mr Hoare's submission that if there are number of less serious matters, which do not constitute gross misconduct, when added together they can amount to gross misconduct. They may justify dismissal but gross misconduct requires a fundamental breach of the contract of employment.

72.The Tribunal has therefore concluded that the dismissal was unfair. That however is not the end of the matter as the Tribunal must consider the issue of contributory conduct.

73.Section 123 (6) ERA 96 states that *"[W] here the Tribunal finds that the dismissal was to any extent caused all contributed to by any action of the complainant, it shall reduce the..... compensatory award by such proportion as it considers just and equitable having regard to that finding."*

74.The wording in relation to any deduction from the basic award is set out in section 122(2) and differs from that in section 123 (6) ERA 96.

75.A reduction for contributory conduct is appropriate according to the Court of Appeal in **Nelson-v- BBC (2) 1980 ICR 110** when three factors are satisfied namely: –

- The relevant action must be culpable or blameworthy
- It must have caused or contributed to the dismissal, and
- It must be just and equitable to reduce the award by proportion specified

76.For a deduction to be made a causal link must exist between the employee's conduct and the dismissal. In other words, the conduct must have taken place before the dismissal; the employer must have been aware of the conduct; and the employer must then have dismissed the employee at least partly in consequence of conduct.

77.The Tribunal is satisfied that there was contributory conduct by the Claimant. He should not have allowed Mr Laing onto the premises.He did not personally check that Mr Laing had sanitised. He did not require Mr Laing to wear gloves. The Respondents were entitled to expect staff to seek to minimise the risk from Covid 19. Whilst the Tribunal has already observed that no action was taken against some staff when customers handled goods without wearing gloves this was potentially a more serious incident in that Mr Laing was present on the Respondents premises for a considerable period of time. He touched a number of items and was in close proximity to the Claimant and the Claimant never suggested that he himself knew that Mr Laing had sanitised his hands.

78.Further the Claimant was not immediately open when questioned by Ms Newsom as to what he was doing on Friday night. Whilst it was technically true that he was working

on a bike or bikes he did not volunteer the information that Mr Laing was present on the premises. He probably did so because he considered Ms Newsom would have been unhappy with that situation.

79.The Tribunal has concluded that the above behaviour by the Claimant was culpable or blameworthy. It was conduct that formed part of the reason the Respondent's instituted disciplinary proceedings against him. It would be just and equitable to make a reduction.

80.The level of reduction is very much a matter for the Tribunal. Mr Hoare referred to a 100% reduction but in the Tribunal's judgement that puts it far too high. The Tribunal considers that both parties were equally at fault and therefore a 50% reduction would be appropriate.

81.Turning to the question of breach of contract the Respondent has not established on the balance of probabilities that the Claimant committed a fundamental breach of his contract of employment. In the circumstances he is entitled to succeed in his claim, although compensation will be limited to his contractual notice.

82.The Tribunal has issued separate directions in respect of remedy. The Tribunal expresses the view that hopefully the parties can have meaningful discussions without the need for a remedy hearing.

EMPLOYMENT JUDGE SMITH

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 02 December 2020**

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.