EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000433/2024

Final Hearing Held at Glasgow on 12 – 13 August 2024

Employment Judge A Kemp

Mr A Rodger	**Claimant** **In person**
NewsTeam Group Limited	**Respondent** **Represented by:** **Mr F McCombie,** **Barrister** **Instructed by:** **Ms S Moore,** **HR Manager**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant was not unfairly dismissed and the Claim is dismissed.

REASONS

Introduction

1. This was a Final Hearing held in person in the Glasgow Tribunal of the sole claim made by the claimant of unfair dismissal. Dismissal was admitted by the respondent in its Response Form, which contended that the reason for the dismissal was conduct. The nature of that conduct was initially in issue between the parties, as the claimant alleged that his

dismissal was in relation to lack of insurance for driving a company van. The respondent alleged gross misconduct in other respects.

2. Case management orders had been issued on 22 May 2024, although the claimant had not complied fully with them as there was no Schedule of Loss and limited documents to show mitigation or losses being claimed. There was however a Bundle of Documents prepared by the parties, and some documents tendered by the claimant on the morning of the Final Hearing without objection.

3. The claimant is a party litigant, with the respondent represented by Mr McCombie a barrister, and I explained to the claimant the nature of the Final Hearing, the giving of evidence, cross-examination and re-examination, that documents were evidence only when spoken to by a witness, the need to provide all evidence during the hearing both for liability and remedy, and that after the evidence had been concluded each party could make a submission as to why it should succeed. I also explained that I could assist the claimant to an extent, including by asking questions of witnesses to elicit facts under Rule 41, and to seek to place parties on an equal footing so far as practicable under Rule 2, but could not act as if his solicitor. I did ask questions on such a basis during the evidence of all of the witnesses to the extent that I considered within the overriding objective.

Issues

4. I identified the issues for determination, and gave parties the opportunity to comment on them at the commencement of the hearing. Both were content. Those issues are:

   (i) What was the reason, or principal reason, for the claimant's dismissal?

   (ii) If potentially fair under section 98(2) of the Employment Rights Act 1996 was it fair or unfair under section 98(4) of the Act?

   (iii) If the claim is successful to what remedy is the claimant entitled? In that regard in particular:

      (a) what losses has the claimant or will the claimant suffer,

(b) might there have been a fair dismissal had there been a different procedure,
(c) did the claimant contribute to his dismissal, and
(d) did the claimant mitigate his loss.

Evidence

5. Evidence was given by the respondent first, commencing with that of Ms Elizabeth Bayley, then the dismissing officer Mr Ryan Michael and finally the appeal officer Mr Liam Hunter. The claimant gave evidence himself and did not call any witnesses. He was permitted to use an aide memoire to give his evidence.

6. The parties had prepared a Bundle of Documents, most but not all of which was spoken to in evidence.

Facts

7. I considered all of the evidence led before me, and found the following facts, material to the issues, to have been established:

Parties

8. The claimant is Mr Alastair Rodger.

9. The respondent is NewsTeam Group Ltd. It distributes newspapers and magazines across Great Britain. It has something of the order of 200 employees and works with drivers the majority of whom are contractors. It uses premises of other companies for warehousing and similar facilities. It has an HR Manager, Ms Sally Moore.

10. The respondent employed the claimant latterly as a Newspaper Distribution Supervisor with his employment continuous from 30 July 2021.

Terms of employment

11. There was no written contract or written particulars of employment for the claimant before the Tribunal.

12. The respondent operates a Disciplinary Policy and Procedure. It set out the procedure to follow where matters are alleged and included the following examples of gross misconduct justifying summary dismissal:

> "…..(b) actual or threatened violence, or behaviour which provokes violence……
>
> (f) repeated or serious failure to obey instructions, o any other serious act of insubordination…
>
> (m) serious neglect of duties, or a serious or deliberate breach of your contract or operating procedures."

Initial matters

13. The claimant was promoted to Supervisor late in 2023. Ms Elizabeth Bayley was shortly afterwards appointed Divisional Manager, in a role on line management above his own line manager, who was in the position of Branch Manager. She raised with the claimant and another manager Mr Scott McGuiness shortly after starting in her role new procedures she wished to introduce, which included that each van required to be signed out and in whenever used so that the respondent could track who was using it at any time. That was as the respondent had received a number of fines for speeding and breach of bus lanes which it had not been able to identify a driver for and which put at risk its operating licence.

14. On about 20 December 2023 the claimant passed his driving test and Ms Bayley added him to the respondent's insurance. Shortly thereafter he had an accident in it which he reported to her.

15. On at least two occasions the claimant did not sign out a van he then used and took home. He was aware when doing so that the van required to be signed out, and of the reason for that being required.

16. On 22 January 2024 the claimant spoke with the Branch Manager of the respondent to whom he reported, Mr JonPaul Moss-Carbert. Mr Moss-Carbert had been appointed about two weeks previously. The claimant was annoyed at messages posted by Mr Moss-Carbert on a managers WhatsApp group with regard to the claimant not signing out a van. He had

earlier been annoyed at how Mr Moss-Carbert had spoken to him with regard to the use of a particular van on a run to Kelso, when he had brought up a message from Ms Bayley about it. He felt as if he [the claimant] was being spoken to like a child.

17. After that call with Mr Moss-Carbert on 22 January 2024 the claimant telephoned Ms Bayley almost immediately. He said something to the effect that if Mr Moss-Carbert continued to talk to him like a "piece of shit" or as a child he "would take him away from the unit and cameras and kick fuck through him". Ms Bayley attempted to calm him down, and said that the comments were not appropriate but that policies were being changed. The claimant continued to vent anger towards Mr Moss-Carbert and said what he "will do" if he had to. She ended the call referring to holding a meeting with the two of them, but afterwards considered that that was not appropriate in view of the nature of the comments he had made.

18. The claimant was off work for about two days. He said that he would then return to work on 25 January 2024. Ms Bayley called him later on that date to state that she was suspending him. She did so as she considered that his comments about Mr Moss-Carbert and what he would do could amount to gross misconduct. Ms Moore sent him an undated letter to confirm his suspension.

19. Ms Bayley then prepared a written document summarising the issues that had arisen with the claimant, which included other matters she regarded as breaches of procedure as well as the failure to sign out the use of the van, and what she considered a threat of violence against his manager.

Dismissal

20. Ms Moore wrote a letter to the claimant dated 7 February 2024 calling him to a disciplinary hearing on 9 February 2024. The allegations were:

> "Unacceptable conduct, namely threatening behaviour, and language towards management team.
>
> Failure to comply with reasonable management requests and general duties. "

21. The claimant was informed of his right to be accompanied, and that if the allegations were upheld the sanction could include dismissal. At some point on or around that date Ms Moore emailed him with the statement Ms Bayley had made.

22. A disciplinary hearing took place on 9 February 2024 remotely by Teams. The claimant attended alone. It was conducted by Mr Ryan Michael, with a colleague attending for experience but not participating and Ms Moore present to take notes. The minute of that meeting is a reasonably accurate record of it.

23. During the meeting the claimant was asked about each matter raised in Ms Bayley's report. The claimant did not dispute that he had taken the van without signing it out but stated that others had also done that. He did not dispute the words he spoke in relation to Mr Moss-Carbert and said that it was "pure frustration". Mr Michael did not consider that he showed any remorse for his words, or that he apologised for them, and was concerned that he remained to an extent aggressive and was justified in what he had said.

24. The claimant also stated that other staff had told him that Mr Moss-Carbert on 25 January 2024 that he was going to "sack" the claimant. Mr Michael stated that he would look into that separately but that Mr Moss-Carbert did not make the decision, he would.

25. After the meeting Mr Michael spoke to Ms Bayley and asked her to investigate the issue of what Mr Moss-Carbert had allegedly said. She spoke to him and he denied having done so. She was not given the names of anyone who had been told that, although the claimant had given Mr Michael the names of two drivers. She reported that briefly to Mr Michael later.

26. On 12 February 2024 Ms Moore wrote to the claimant to inform him of his summary dismissal on the basis of Mr Michael's decision. It referred to his admission of taking vans without signing for them, the unacceptable language and threats towards Mr Moss-Carbert, his role as a supervisor and the lack of remorse. He was informed of the right of appeal.

Appeal

27. On the same day the claimant sent an email stating “I appeal the decision and wish to request another Teams meeting.” An appeal hearing was arranged before Mr Liam Hunter of the respondent on 20 February 2024, again by Teams.

28. The appeal hearing took place that day. The claimant was unaccompanied, and Ms Moore also attended. A note of the meeting is a reasonably accurate record of it, although at the start as Mr Hunter confused the case with another one he was to be handling that day he did not think that the claimant had been dismissed. During the appeal hearing the claimant raised the case of Mr Gary Bulloch. He played a recording of a conversation that he had had with Mr Bulloch which he later sent Mr Hunter. In that [not played to the Tribunal or with any transcript provided] Mr Bulloch spoke to Mr Moss-Carbert and invited him to a “square go”. He had been given a final written warning after being suspended for two days. In the disciplinary hearing into that issue Mr Bulloch had shown immediate remorse, apologised for his behaviour recognising that it was unacceptable, explained the stresses he was under at the time, and later apologised to Mr Moss-Carbert personally. He was not in a supervisory position.

29. The claimant also raised the issue of his accident and whether he was insured, and that there had been a fight between two drivers earlier which a previous Divisional Manager Ms Lian Parkes had had reported to her. Mr Hunter offered to consider anything that the claimant sent, but apart from the recording of the conversation with Mr Bulloch nothing further was provided by the claimant.

30. On 23 February 2023 Ms Moore wrote to the claimant to state that his actions had warranted the disciplinary action taken, and in effect the appeal was dismissed. The letter noted that the impact of his behaviours had not been acknowledged nor had he shown remorse for what was unacceptable behaviour.

Further matters

31. The claimant had made applications for employment on and around 2 February 2024 with other prospective employers. He made some four further applications and found employment with an agency in late May 2024. He did not receive Benefits.

32. When employed with the respondent he had net earnings in the last three months of his employment of £1,841, £1,758 and £1,725. He was in the respondent's pension scheme which involved employer contributions of about £56 per month, and employee contributions, under an auto-enrolment scheme. His earnings at the agency have been of the order of £1,900 per month, but without pension.

Early Conciliation

33. The claimant commenced early conciliation in relation to the respondent on 26 February 2024. The Certificate in relation to the same was issued on 8 April 2024. The present claim was presented to the Tribunal on 9 April 2024.

Submission for respondent

34. The following is a summary of the submission made. The reason for dismissal was conduct, and that was not now disputed. It was clear that there were two contributory reasons, firstly in relation to vans and secondly threats of violence, which was the major reason. Both contributed to the dismissal. The respondent clearly genuinely believed that the conduct had occurred and had been admitted by the claimant during the process. He accepted the language used as set out in Ms Bayley's statement in the two hearings. He had not raised any process issues that impinge on fairness.

35. The van issue was not controversial, given the admissions in evidence. The claimant understood what was required. There is no need for a disciplinary process to state that threats of violence are gross misconduct. There had been a sufficient investigation, with the claimant admitting the central facts. He raised separate and independent issues which did not

impinge on fairness. Reference was made to the statutory test and to not substituting my view for that of the respondent.

36. The claimant's argument was on consistency. If others had not signed out vans, that was wrong, but the respondent had to deal with the facts in front of them. There was nothing to compare. On Mr Bulloch there were two matters that distinguished the case, firstly the lack of management responsibility and secondly that he was remorseful and apologetic immediately without being invited to do so by the respondent. The claimant had been warned at the disciplinary meeting of concern over the lack of remorse. The claimant in evidence was not to express remorse or insight but to explain or justify his words. It was within the range of reasonableness to dismiss. There were then further submissions as to remedy.

Submission for claimant

37. The following is again a summary of the submission made. The claimant said that he knew what he said was not appropriate but he had not had a chance to apologise to Mr Moss-Carbert. Mr Bulloch was not management but managers should not be treated differently. He referred to the handbook (although that had not been addressed in evidence). He had been suspended after telephoning Ms Bayley and then being called back ten hours later. He had not been given the document about new procedures and he did not remember any meeting to discuss its terms.

38. He had not signed out the van but Mr Paul Scott had also not done so, and he had provided a photograph of his signature being typed in. He did not see how Mr Scott not signing it out and his own actions were any different. Nothing had been mentioned to him before it was raised in the disciplinary process.

39. At both hearings he was not asked if he was sorry or felt remorse. The respondent assumed that he was not, but assumptions should not be made by them. On Mr Bulloch Ms Bayley had said that he had been stressed about not picking up his children and messages from his wife, and Mr Michael had said that the stress was from his father passing away. That did not make sense.

Law

(i) The reason for dismissal

40. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act"). In ***Abernethy v Mott Hay and Anderson [1974] ICR 323***, the following guidance was given by Lord Justice Cairns:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

41. These words were approved by the House of Lords in ***W Devis & Sons Ltd v Atkins [1977] AC 931***. In ***Beatt v Croydon Health Services NHS Trust [2017] IRLR 748,*** Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision.

42. If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law. Fair reasons include conduct.

(ii) Fairness

43. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the Act which states that it

> "(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 that reason as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case."

44. Conduct is potentially a fair reason for dismissal, and whether or not it is fair is addressed under section 98(4). The terms of that section were examined by the Supreme Court in ***Reilly v Sandwell Metropolitan Borough Council [2018] UKSC 16***. In particular the Supreme Court considered whether the test laid down in ***BHS v Burchell [1978] IRLR 379*** remained applicable for conduct cases. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case, although it had not concerned that provision. He concluded that the test was consistent with the statutory provision. Lady Hale concluded that that case was not the one to review that line of authority, and that Tribunals remained bound by it.

45. The ***Burchell*** test remains authoritative guidance for cases of dismissal on the ground of conduct in circumstances such as the present. It has three elements

(i) Did the respondent have in fact a belief as to conduct?
(ii) Was that belief reasonable?
(iii) Was it based on a reasonable investigation?

46. It is supplemented by ***Iceland Frozen Foods Ltd v Jones [1982] ICR 432*** which included the following summary:

> "in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;
>
> in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
>
> the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

47. Lord Bridge in ***Polkey v AE Dayton Services [1988] ICR 142***, a House of Lords decision, said this after referring to the employer establishing potentially fair reasons for dismissal:

> "in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

48. Guidance on the extent of an investigation was given by the EAT in ***ILEA v Gravett 1988 IRLR 497,*** that "at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase." It was also held in ***A v B [2003] IRLR 403*** that the more serious the allegation the more it called for a careful, conscientious and evenly-balanced investigation.

49. The manner in which the Employment Tribunal should approach the determination of the fairness or otherwise of a dismissal under s 98(4) was considered and the law summarised by the Court of Appeal in ***Tayeh v Barchester Healthcare Ltd [2013] IRLR 387***. What is required is consideration of that which is reasonable in all the circumstances, as explained in ***Shrestha v Genesis Housing Association Ltd [2015] IRLR 399.*** In ***Sharkey v Lloyds Bank plc UKEATS/0005/15*** the EAT explained that not all flaws in the procedure render a dismissal unfair, only doing so if it is or they are significant, and further added that

> "…procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together."

50. The focus is on the evidence before the employer at the time of the decision to dismiss, rather than on the evidence before the Tribunal. In ***London Ambulance Service v Small [2009] IRLR 563*** Lord Justice Mummery in the Court of Appeal said this;

> "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."

51. The band of reasonable responses was held in ***Sainsburys plc v Hitt [2003] IRLR 223*** to apply to all aspects of the disciplinary procedure.

52. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness.

53. The employee should be given reasonable notice of the allegation, and what may be relevant is exactly what the employee was charged with at the hearing: ***Strouthos v London Underground Ltd [2004] IRLR 636.***

54. Where there is an argument as to lack of consistency the two cases must be sufficiently similar - ***Hadjioannou v Coral Casinos Ltd [1981] IRLR 352,*** such that if there is a material distinction between them the argument will not succeed.

55. Whether or not a matter might be regarded as one of gross misconduct has been the subject of authority. It must be an act which is repudiatory conduct ***Wilson v Racher [1974] ICR 428.*** The question is whether it was reasonable for the employer to have regarded the acts as amounting to gross misconduct – ***Eastman Homes Partnership Ltd v Cunningham EAT/0272/13.*** If the employer's view was that the conduct was serious enough to be regarded as gross misconduct, and if that was objectively justifiable, that was a circumstance to consider in assessing whether or not it was reasonable for the employer to have treated the conduct as a sufficient reason to dismiss. What is gross misconduct is a mixed question of fact and law: ***Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09***.

56. A finding that there was gross misconduct does not lead inevitably to a fair dismissal. In ***Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854*** the Tribunal suggested that where gross misconduct was found that is determinative, but the EAT held that that was in error, as it gave no scope for consideration of whether mitigating factors rendered the dismissal unfair, such as long service, the consequences of dismissal, and a previous unblemished record. The law in this area was reviewed in ***Hope v British Medical Association [2021] EA-2021-000187***.

57. Where there is an appeal that can, dependent on the circumstances, cure any defect in the procedures that led to dismissal, if the appeal hearing is sufficiently comprehensive. Whether or not the appeal process is sufficiently comprehensive depends on all the facts and circumstances ***Taylor v OCS Group Ltd [2006] IRLR 613.***

58. The Tribunal is required to take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures. It is not bound by it. It includes the following provisions:

> "4. …
>
> - Employers and employees should act consistently**.**
> - Employers should carry out any necessary investigations to establish the facts of the case…..
> - Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made…..
>
> 9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification…
>
> 12. ……. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been

> gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. ……
>
> 23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence…"

Observations on the evidence

59. I consider that each of the respondent's witnesses gave credible and reliable evidence.

60. I consider that generally the claimant was also seeking to give credible and reliable evidence, and he did accept both not signing out the vans on occasion, and using the words Ms Bayley indicated he had used. There were however some matters on which reliability was an issue. He said that he had not been given an opportunity to apologise for the comments, but in my view he had, both at the disciplinary hearing and appeal, and on each not only had he not done so, but at the former he gave Mr Michael the impression of continued aggression, and at the latter he brought up other cases which appeared to be an attempt either to justify his acts or to argue that others had been treated less strongly such that he should too. In neither did he appear to accept that his comments were entirely wrong. It was also striking that the Claim Form alleged that the dismissal was in relation to insurance for an accident while driving a van, a point he departed from in evidence and was entirely inconsistent with the letter of dismissal. Even making allowance for the fact that the claimant is a party litigant his position on that was surprising, and appeared to me to be an attempt to deflect attention from his comments, part of a pattern in both the disciplinary hearing and appeal hearing to do so. There was a lack of insight in my view into the seriousness of what he had said.

Discussion

61. I was satisfied that the Tribunal had jurisdiction for the claim. I address each of the issues that were identified above as follows:

(i) What was the reason, or principal reason, for the claimant's dismissal?

62. I was satisfied that the respondent had proved its case that the principal reason for dismissal was the respondent's belief in the claimant's conduct, firstly in relation to not signing out the van despite requirements to do so, and secondly in relation to the threats made in relation to his manager in a discussion with Ms Bayley.

(ii) If potentially fair under section 98(2) of the Employment Rights Act 1996 was it fair or unfair under section 98(4) of that Act?

63. I require to assess whether there was a fair dismissal or not under section 98(4). There is no onus on either party in this regard. I cannot substitute my view for that of the respondent, and must apply the band of reasonable responses. The band of reasonable responses applies to all aspects of the investigation and disciplinary process, as well as to the penalty of dismissal and as to the appeal.

64. I was satisfied that Mr Michael did genuinely believe that the claimant was guilty of gross misconduct by what had happened, as referred to above. That belief as to conduct is potentially a fair reason under section 98(2).

65. The questions are then whether it was a reasonable belief, and one based on a reasonable investigation, as well as whether the procedure followed was reasonable and whether the penalty was a reasonable one. When the word reasonable is used that is in the sense of being within the band of reasonable responses.

66. The respondent is I consider a medium sized employer, with a reasonable level of resources, including an in-house HR Manager. That is part of the background to take into account. I have also taken into account the ACAS Code.

67. The letter calling the claimant to the disciplinary meeting was not perfect. It did not specify exactly what the allegations were. But the claimant

accepted that he did receive the statement prepared by Ms Bayley which set those matters out fully at around the same time as that letter. He also acknowledged having done so at the start of the disciplinary hearing, at which he was asked about each of the allegations. The letter did not send the disciplinary procedure and policy document, and he said that he had not seen that, but I consider that that was not fatal to the issue of fairness. Perfection is not required, but what is reasonable, as explained above.

68. There was no real investigation needed on the basic facts of the allegations against the claimant as the claimant accepted the two allegations as to not signing out the van, the less serious matter, and the threat made in relation to Mr Moss-Carbert.

69. Mr Michael accepted that for two of the allegations the claimant's explanation was sufficient, but not for that in relation to the van being taken without signing for it, and that in relation to the threat towards his manager. The claimant did not dispute the latter at the disciplinary hearing. Nor did he say that he was sorry for what he had said, or that it was said in the heat of the moment or anything similar. In fact Mr Michael had the view that the claimant still felt justified in his comments, and remained aggressive in demeanour such that there was a risk of repetition of the comment, or risk of violence.

70. The issue then focusses on the penalty, and the question of consistency. Given the admission the claimant made, and that the comment had been in the terms that it was to Ms Bayley, I consider that Mr Michael was within the band of reasonable responses in deciding that that constituted gross misconduct and that dismissal was the penalty that should follow for it. The threat was made in terms that are clearly unacceptable in a workplace, whatever the sense of grievance that undelay it may have been. There was a direct threat of serious violence. That alone justifies summary dismissal. Although the issue with the vans was a small part of the decision, as Mr Michael stated in evidence which I accepted, it was not substantial. The real issue was the threat. Mr Michael stated that had the threat been the sole allegation he would have dismissed and I was satisfied that his evidence on that should be accepted.

71. On the issue of consistency it appears to me having considered this point that the cases the claimant sought to raise are very different. At a general level Mr Bulloch does appear to have spoken to his line manager in an entirely inappropriate manner, and to have offered to fight with him using the words a square go. Normally in such circumstances that would lead to a finding of gross misconduct, and dismissal. On that basis therefore the argument of inconsistency of treatment had a basis in fact to consider.

72. The overall circumstances applying to the case of Mr Bulloch were however materially different firstly, and most importantly, as Mr Bulloch apologised quickly and fully. The claimant not only did not, but acted as set out above during the disciplinary hearing in particular, at which Mr Michael stated that the lack of remorse was a concern. If a signal was needed that the claimant might wish to express that remorse or to apologise or similar those comments were such a signal. The claimant did not however act on it. In my view there was no obligation on the respondent to go further and ask the specific question of whether he wished to apologise or similar, as the claimant appeared to argue. He was a manager. He had been aware of what the allegations against him were, and he was aware from the letter that dismissal was a possibility. Mr Michael mentioned remorse as an issue. What was striking was that the claimant did not say anything to indicate remorse, but on the contrary appeared to be seeking to justify his actions. It was, therefore, not just an issue of lack of remorse, but the apparently complete lack of insight into the seriousness of making such a threat.

73. Such an issue can be relevant, and was addressed specifically in the case of ***Paul v East Surrey District Health Authority [1995] IRLR 305*** in which the Court of Appeal stated:

> "An employer is entitled to take into account not only the nature of the conduct and the surrounding facts but also any mitigating personal circumstances affecting the employee concerned. The attitude of the employee to his conduct may be a relevant factor in deciding whether a repetition is likely. Thus an employee who admits that conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one

> who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely."

74. Whilst the facts of the present case are different to an extent there is a material degree of similarity with the position taken by the claimant at the time. That the claimant did not show the remorse Mr Bulloch did, of which Mr Michael had personal knowledge, such that Mr Michael was concerned at the risk of repetition, is a factor that he was entitled to take into account and differentiates the present case from that of Mr Bulloch. Mr Hunter was entitled to do so on essentially the same basis.

75. Secondly although this was less significant the claimant was at a supervisory level, which Mr Bulloch was not. Mr Michael and Mr Hunter were in my view entitled to take that into account. Whilst Mr Bulloch was in my view very fortunate not to be dismissed that is not the point before me. I cannot substitute my view for that of the respondent. In my opinion the respondent was entitled, and within the band of reasonable responses, to consider the two cases differently given those matters.

76. There was therefore in my view no inconsistency in approach in respect of Mr Bulloch as that term is understood in this context.

77. Whilst before me the claimant was indicating that he would have apologised had that been asked of him, that is not what he said to the respondent. The test that must be applied is what the respondent did in the circumstances it knew about at the time. Having regard to the authorities above I consider that the dismissal was not unfair on the principle of inconsistency.

78. The claimant also raised consistency in relation to the signing out of vans, and argued that others including management had failed to do so. But that point was of very limited relevance to the decision to dismiss as addressed above, and I consider that any inconsistency in this particular respect does not impact on the fairness of the dismissal as a whole. The respondent was not it seems to me aware of the documents in relation to Mr Scott for example, which the claimant produced before me. He made allegations at the time, but in general terms. The issue of the vans was, as explained

above, of substantially less significance than the threat, and had the only issue been the threat, Mr Michael would have dismissed. It did not appear to me that such inconsistency as there was in relation to the van rendered the dismissal unfair.

79. I considered the procedures followed, and the terms of the ACAS Code of Practice in that regard. I did not consider that the respondent had breached those procedures, and none was suggested by the claimant. His only point was about the suspension being ten hours after he had called to say that he was returning to work after a period of absence, but in my view there was nothing in that point. In my view the procedures were within the band of reasonable responses.

80. The next matter does not arise because I consider that the original dismissal was fair, but had there been an issue with the disciplinary hearing I consider that it would have been rectified by the appeal. Mr Hunter gave the claimant every opportunity to put forward his arguments on why the appeal should be allowed. He listened to the recording provided. He sought to understand why the claimant was appealing, and concluded that the basis of his doing so was not sufficient to change the decision made.

81. The claimant argued that Mr Bulloch's behaviour was more serious as it was directed to Mr Moss-Carbert in person. The respondent did not agree, and I consider was at the least entitled to have that view. The comment by the claimant was made to Ms Bayley, and she noted that it was not only once but twice that the point arose. She tried to calm him down but apparently without success. By the time of the disciplinary hearing, at which the claimant knew that dismissal was a possibility, he did not offer any form of contrition or acknowledgement of wrong-doing. The words used by the claimant were in my view, and the view of the respondent, worse than those of a "square go" which were used by Mr Bulloch during a dispute with Mr Moss-Carbert. They threatened substantial violence and were made to Mr Moss-Carbert's line manager after the initial call with him. The circumstances were in my view materially different such that the principle of consistency does not operate in this context alone, quite apart

from the position on the apology Mr Bulloch quickly offered and acted upon which the claimant did not.

82. The reference to there being an earlier fight was in my view even more remote from the circumstances of the present case, and not a basis for an argument as to inconsistency. Whilst the claimant said that he had told Ms Parkes about it, and that a supervisor had intervened, the circumstances were not fully known to the claimant, and were such that the argument of inconsistency was not made out in relation to it. What the respondent knew, what the circumstances were, and what decision was made, were all not clear from the evidence.

83. The difficulty for the claimant is that he had telephoned Ms Bayley and told her of the threat of violence, repeated it to her in effect despite her attempt to calm him down, and then at the disciplinary and appeal hearings acted as described. Neither Mr Michael nor Mr Hunter thought that his behaviour could be acceptable and required to lead to dismissal, neither considered that consistency required to change that outcome and in my view were at the least entitled to do so. It was well within the band of reasonable responses.

84. It appeared to me that material parts of the argument on appeal was on issues not relevant to the decision to dismiss. That was also a matter that Mr Hunter had raised at the time, during the hearing. In my view he was entitled to dismiss the appeal and doing so was within the band of reasonable responses. That is a separate reason for holding the dismissal fair.

85. For completeness I will add that the claimant claimed that Mr Moss-Carbert had said that he would sack the claimant after his suspension, having told two employees whose names he gave Mr Michael. Mr Michael spoke to Ms Bayley about that, who then spoke to Mr Moss-Carbert who denied having done so. That issue was not investigated by the respondent fully, with Ms Bayley not being aware of the names although Mr Michael thought that he had given them to her. It seemed to me that Ms Bayley was more likely to be right on that.

86. This was however not a relevant matter in my view. As Mr Michael said at the time, the decision was his not that of Mr Moss-Carbert. Whilst Mr Michael had indicated that he would get back to the claimant about that and did not, that had no effect on the fairness of the dismissal in my view.

87. I considered that in all the circumstances the dismissal was not unfair under section 98(4).

(iii) If the claim is successful to what remedy is the claimant entitled?

88. This issue does not now arise. Had it, however, it appears to me that the claimant's admitted conduct would have been contributory both to the basic and compensatory awards to the extent of 100%, and had there been a procedural failure that the ***Polkey*** deduction, on the basis of the chance of a fair dismissal from a different procedure, would also have been 100%. The threat in the terms used and in the circumstances set out was so beyond what is acceptable in any workplace that such a deduction would have been merited, in my view, had the dismissal otherwise been held to be unfair.

Conclusion

89. In light of the finding made that the claimant was not unfairly dismissed, the Claim must be dismissed.

Employment Judge A Kemp

Employment Judge

15 August 2024

Date of Judgment

Date sent to parties **15 August 2024**