EMPLOYMENT TRIBUNALS

Claimant: **Mr Yaw Oppong**

Respondent: **Regular Cleaning Services Limited**

Heard at: London South Employment Tribunal

On: 12 – 13 April 2021

Before: Employment Judge A. Beale

Representation
Claimant: Mr S. Mensah (Paralegal)
Respondent: Ms S. Crawshay-Williams (Counsel)

RESERVED JUDGMENT

1. **The Respondent's name is amended to Regular Cleaning Services Limited.**

2. **The Claimant's claim for unfair dismissal succeeds.**

3. **The basic award and compensatory award payable to the Claimant shall be reduced by 100% by reason of contributory fault, under s. 122(2) and s. 123(6) Employment Rights Act 1996.**

4. **The compensatory award payable to the Claimant shall be reduced by 90% in accordance with the principles in *Polkey v AE Dayton Services Ltd*.**

5. **The Claimant's claim for wrongful dismissal fails and is dismissed.**

6. **The parties are referred to the separate Case Management Order setting directions for a hearing to deal with the Respondent's costs application and remedy if required.**

REASONS

Introduction

1. By an ET1 presented on 20 April 2020, the Claimant brought a claim for unfair and wrongful dismissal/notice pay.

2. The claim was heard by CVP, and a Twi interpreter, Mrs Gladys Mante, attended remotely to interpret for the Claimant.

3. During the course of the hearing, it was agreed that the correct name of the Respondent was Regular Cleaning Services Limited (rather than "Regular Cleaning" as stated on the claim form and response form), and that the Respondent's name should be amended accordingly. The Respondent's name is so amended in this Judgment.

The Issues

4. The claim had been listed for hearing on 3 March 2020. Unfortunately, on that occasion, the Claimant and his representative, Mr Mensah, attended late, and Mr Mensah then had significant difficulty with his internet connection, meaning that it did not prove possible to proceed. Mr Mensah also stated that the Claimant required a Twi interpreter, which had not previously been raised with the Tribunal. However, it was possible to set out the issues, which are contained in the case management order and reproduced below.

Unfair Dismissal

4.1 What was the reason or principal reason for dismissal?

4.1.1 The respondent contends that the reason was conduct, namely

(a) the claimant's changing account of a fight between him and another employee, K, during which K is said to have suffered significant injuries; and

(b) the claimant's alleged failure to recognise or acknowledge that his actions in raising his voice during an investigatory meeting were aggressive.

4.1.2 Alternatively, the respondent contends that the reason was "some other substantial reason", namely a breakdown in trust and confidence for the reasons given above.

4.1.3 The claimant does not contend that his dismissal was for a different reason.

4.2 Did the respondent genuinely believe the claimant had committed the misconduct alleged?

4.3 Did the respondent act reasonably in all the circumstances in treating the alleged misconduct as a sufficient reason to dismiss the claimant? In particular, the Tribunal will have to decide whether:

4.3.1 there were reasonable grounds for that belief;
4.3.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
4.3.3 the respondent otherwise acted in a procedurally fair manner;
4.3.4 dismissal was within the range of reasonable responses, in relation to which the claimant raises the following specific points:

(a) was the proven conduct sufficient to justify dismissal bearing in mind the decision made in relation to the other employee involved in the fight?
(b) did the conduct constitute gross misconduct?
(c) were mitigating factors considered?

Remedy for unfair dismissal

4.4 Does the claimant wish to be reinstated to his previous employment?

4.5 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

4.6 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

4.7 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

4.8 What should the terms of the re-engagement order be?

4.9 If there is a compensatory award, how much should it be? The Tribunal will decide:

4.9.1 What financial losses has the dismissal caused the claimant?
4.9.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
4.9.3 If not, for what period of loss should the claimant be compensated?
4.9.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
4.9.5 If so, should the claimant’s compensation be reduced? By how much?
4.9.6 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

4.9.7 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

4.9.8 Does the statutory cap of fifty-two weeks' pay apply?

4.10 What basic award is payable to the claimant, if any?

4.11 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Wrongful dismissal / Notice pay

4.12 What was the claimant's notice period?

4.13 Was the claimant paid for that notice period?

4.14 If not, was the claimant guilty of gross misconduct?

5. At the outset of the hearing, in view of the fact that the Claimant required interpretation of all the evidence (not simply translation of his own evidence), I informed the parties that this hearing would deal only with the liability issues set out at paragraphs 4.1 – 4.3 and 4.14 above, and (should the Claimant succeed in his claim for unfair dismissal) the issues of contributory fault and whether any *Polkey* reduction should be applied (issues 4.9.4 – 4.9.7 and 4.11). This decision was taken in order to ensure that the liability issues at least could be determined within the time available. Any remaining remedy issues would be dealt with at a further hearing.

Application to amend

6. At the start of the hearing, Mr Mensah indicated that he wished to make an application to amend the claim to include a claim of indirect discrimination. I expressed surprise at this given that the issues had been clarified on the last occasion, and no application to amend had been made at that stage.

7. I asked Mr Mensah to explain the amendment he wished to make, starting with the provision, criterion or practice he said had been applied. Mr Mensah said that the Claimant had not been permitted an interpreter at his investigation meeting, but his colleague, K, had been permitted to have an interpreter.

8. I explained that a provision, criterion or practice was something that was or would be applied generally and asked whether in fact Mr Mensah wished to amend to include a claim of direct discrimination. He agreed that he did, and after some discussion said that the protected characteristic relied upon was race. I asked on what basis it was said that the Claimant had been less favourably treated because of his race, and Mr Mensah referred again to the differential treatment of K, who he had already stated was also black African (albeit from a different country). I asked why this was said to constitute race discrimination, and whether the Claimant was relying on K's different nationality.

9. At this point Mr Mensah said that he did not wish to pursue his amendment application, as he felt that the point was covered by the existing claim for unfair dismissal. I agreed with this analysis, and the case proceeded on that basis.

Documents

10. I was provided with an electronic bundle numbering 131 pages, which both parties had before them. During the course of the hearing, the Respondent supplied a signed copy of the Claimant's statement of terms and conditions and a signed annual leave form, and the Claimant provided some internet pages relating to crush injuries, angioedema, black eyes and Prednisolone.

Witnesses

11. On behalf of the Respondent, I heard evidence from Mira Kubiec-Nowakowska (HR Manager), Mark Chalmers (Operations Director, who dismissed the Claimant) and Chris Goad (Operating Director, who heard the Claimant's appeal). The Claimant gave evidence on his own behalf and also supplied a statement from his former colleague, Ruth Abebrese, who did not attend to be cross-examined.

Submissions

12. Although the evidence was completed during the two days available for the hearing, the inevitably slower progress occasioned by the participation of an interpreter meant it was not possible to complete the submissions. I therefore set out a timetable for the exchange of submissions, and also for the Respondent to make, and the Claimant to reply to, an application for costs, which the Respondent indicated it wished to make in respect of the aborted previous hearing.

13. The Claimant initially failed to provide his submissions in accordance with the timetable and requested a short extension to 28 April 2021 on the grounds of Mr Mensah's illness. The submissions were in fact provided on 29 April 2021, and EJ Martin subsequently granted an extension of time for provision of the submissions to 21 May 2021. Although the Respondent initially objected to the late submissions, in view of EJ Martin's decision, the Respondent's solicitor indicated in an email dated 6 May 2021 that it took no further point on the late submissions. I have read the helpful submissions of each party and considered the authorities referred to therein in reaching my decision in this case.

14. There was also correspondence as to costs, with which I deal in the section of my Reasons headed "Costs" below.

Facts

15. The Claimant was employed by the Respondent between 7 April 2016 and 26 November 2019 as a cleaning operative.

16. Between either 4 or 5 and 6 October 2019, two incidents occurred between the Claimant and another employee of the Respondent, to whom I shall refer as K. These incidents are heavily disputed, and I make findings in relation to them below.

17. However, it is not in dispute that on Sunday 6 October there was a physical fight between the Claimant and K. I have seen photographs showing K with a swollen and apparently discoloured area under his eye (p. 104) and the Claimant with abrasions on his head (p. 105), which I am told, and I accept, were taken on 6 October. I have also seen K's "inpatient discharge summary" from University Hospital Lewisham, dated 7 October 2019 and timed at 15:19 (p. 65 – 66) which records:

    (a) that K was admitted on 7 October at 09:55;
    (b) that the speciality at discharge was ENT (Ear, Nose and Throat);
    (c) that the diagnosis at discharge was "crushing injury of neck";
    (d) in the clinical information/summary that "*Patient involved in fight on 6/10/19 resulting in suborbira*l [sic] *oedema + cricoid cartlidge* [sic] *injury. He was given steroids to reduce any swelling".*
    (e) that K had undergone endoscopy (FNE) in the ENT clinic which showed congestion and oedema of laryng and vocal folds, but no haematoma and normal mobility of vocal cords;
    (f) that the plan was for him to be discharged with Prednisolone, Lansoprazole and Gaviscon; that he should avoid hot, cold and spicy foods, and that he should be followed up in SOS on Wednesday 9 October.

18. On the day of the incident, 6 October 2019, the Claimant's brother produced a statement of what had occurred on the Claimant's behalf, in English (p. 63). This statement was supplied to the Respondent. The statement is reproduced in full below:

    "On Friday 4 October, whilst performing my duty upstairs, I was called by Angela to become team leader because of the absence of our supervisor, Everson. Upon arriving to the down floor, I saw [K] and Ruth exchanging words which brought misunderstanding. [K] was using sexual assault words in Italian language which was so disgusting.

    After separating them I went to wash my machine, but he followed me very furious. I did not want to exchange any words with him again because he was quite provoking me by raining insults. I decided to walk away but unexpected he hit me with a dustpan on my head and I started bleeding. I needed to also defend myself, so I also held him tightly and headed him because I was very angry at that time."

19. The Respondent's HR Manager, Ms Kubiec-Nowakowska, was informed of the fight between the two employees on 7 October 2019 and asked that they both be suspended immediately pending an investigation meeting. Ms Kubiec-

Nowakowska spoke to the Claimant on 8 October 2019 to discuss his suspension. At this point the Claimant was on the way to the airport for a holiday in Ghana. Ms Kubiec-Nowakowska told the Claimant that his suspension would continue on his return, and that he would be invited to an investigation meeting when he returned. It is common ground that Ms Kubiec-Nowakowska did not ask the Claimant when he would be returning.

20. The investigation into the incident was initially undertaken by Mary Saakian, the Respondent's temporary HR Advisor. Ms Saakian took a number of statements on 8 and 9 October 2019. There were no witnesses to the fight itself apart from the two participants.

21. Ms Saakian conducted an investigatory interview with K on 9 October 2019 (p. 68 – 9). He was accompanied by his wife who translated for him. He said that at 2 p.m. on Sunday 6 October 2019, the Claimant had called him to clean the floors. When he attended, he noted that the bins were not emptied, which was the Claimant's job. There was an altercation between them about the bins in the flower corridor. K closed the door to prevent others hearing the shouting. As he did so, the Claimant punched him in the face and then grabbed him from his neck for a few minutes. Then the Claimant "headed" him and ran away. K wanted to follow him to fight him back. He took a breath to rest, and called his supervisor, Huberson Abie, who said he would attend. The rest of the statement relates to the aftermath of the incident. The Claimant called the police, who attended, but did not take a statement. K denied hitting the Claimant with a dustpan and causing his head injuries.

22. K's statement was partly corroborated and partly contradicted by the statement of Huberson Abie, both men's supervisor (p. 71). Mr Abie related K's account of the incident as *"[K] tried to close the door and Yaw slapped him, grabbed his neck and then beheaded him. [K] at that time was holding a dustpan and hit Yaw's head on his defence".* He described K as *"a new guy"* and said of the Claimant *"we know he is aggressive, and he has a temper".* Another witness, a fellow cleaner, described K as attending the locker room with a *"swallowed eye"* and the Claimant has having a "*hit at his head"* (p. 70). A further witness, a security officer, said the Claimant's head injury *"looked more like a scratch than a hit"* (p. 73).

23. On 13 October 2019, the police wrote to the Claimant to state that the criminal case had been closed (p. 73 – 5).

24. On 15 October 2019, Ms Kubiec-Nowakowska conducted a disciplinary meeting with K. He was accompanied by his wife as his translator (p. 76). The note of the disciplinary meeting shows that there were two allegations against K, but discussion in relation to one of them has been redacted from the documents I have seen on the basis that it is "not relevant to the case", and I have not been provided with the wording of either allegation. On this occasion, K gave the following account of the fight:

    "I didn't offend Yaw. Yaw hit me first. Yaw headed me and hold me from my neck. I was holding a dust thing and I tried to defend myself, but Yaw protected

himself with his 2 hands. I didn't hit Yaw from the back because he was holding me from the neck. When the Police came, they said that Yaw didn't have any injury and they cancelled the ambulance."

25. At the end of the meeting, K was told that the investigation would continue, that he would receive his decision in writing and would have the right of appeal. I have not been provided with the outcome letter in K's case, but I am told by Ms Kubiec-Nowakowska that the outcome was delayed until the Claimant's process was completed in case further questioning was required. Mr Chalmers told me that he believed K had been given a final written warning. The Grounds of Resistance (p. 24) states that he was given a written warning on 3 December 2019.

26. Whilst these meetings were taking place, the Claimant was away in Ghana. He has supplied documents from the Ghana Health Service which state that he was admitted and managed for migraine and vertigo from 15 – 18 October 2019 (p. 77 – 78). The documents supplied do not connect these conditions to any particular event.

27. Due to a misunderstanding about when the Claimant was due to return from Ghana, he was invited to investigatory meetings to take place on 24 and then 28 October 2019 (p. 29 – 31). The Respondent then became aware that the Claimant was not due to return until 29 October 2019, and he was therefore invited to an investigatory meeting on 30 October at 11 a.m. by letter dated 28 October 2019 (p. 34). The alleged misconduct was recorded as a *"physical attack against your colleague, [K], which caused a serious injury on [K's] left side eye and neck"*.

28. It is the Claimant's case that he returned to the UK at 6 a.m. on 30 October 2019, arriving at home at 9:30 a.m. at which point he became aware of the investigatory meeting to take place at 11 a.m. the same day. During the course of the hearing, I was shown a holiday form which stated that the Claimant was requesting holiday from 9 – 28 October 2019 and would be returning to work on 30 October 2019. The Claimant confirmed that he was due to attend work at 12:30 p.m. on 30 October 2019.

29. The Claimant's evidence is that, on receiving the letter inviting him to an investigatory meeting, he called the office to explain he had just arrived home, and requested a postponement, a request he reiterated at the meeting, on the basis that he was tired and had been unable to prepare. He says that these requests were refused. The Claimant also said in oral evidence that he requested an interpreter for the investigatory meeting, and that this was also refused, although he did not mention this in his witness statement.

30. The investigatory meeting was conducted by Mary Saakian, who is no longer engaged by the Respondent, and who did not give evidence at this hearing. The notes of the meeting do not record any request for a postponement or for an interpreter. The Claimant was given the opportunity to correct the notes of the meeting, which were sent to him by email dated 31 October 2019 (p. 34). In the minutes of the disciplinary meeting on 20 November 2019 (p. 90), the

Claimant is recorded as saying that, having received the notes of the investigatory meeting, he told Ms Kubiec-Nowakoska by telephone on 14 November that he felt he had not been understood, and that he needed an interpreter. Ms Kubiec-Nowakowska gave evidence that the Claimant said Ms Saakian had not understood him during a phone call on 7 November, and that she asked him to provide any changes in writing, but he did not. Neither the disciplinary nor the appeal notes record the Claimant as complaining that he had asked for a postponement of, or the assistance of an interpreter at, the investigatory meeting, and the Claimant has provided no written corrections to any of the notes.

31. The investigatory meeting notes (p.79 - 80) record the Claimant's account of events as given to Ms Saakian. On this account, the fight began after the Claimant asked K why he had not answered a call and had failed to collect rubbish from the shop floor. The Claimant said that K had hit him with the dust pan and he had pushed K to the wall defending himself. When asked if he was responsible for K's injuries, the Claimant said *"I swear to God I haven't touched [K]. I just pushed him to the wall to defend myself."* The Claimant denied grabbing K's neck or punching his face. The Claimant also explained the previous events of 4 October 2019, involving Ms Abebrese, but did not link the two incidents.

32. Following the investigatory meeting, some further investigations were conducted by Ms Kubiec-Nowakowska. The cleaner previously interviewed at p. 70 was interviewed again (p. 81) and confirmed that K had not had any injuries to his face when he arrived at work on the day of the fight. Huberson Abie confirmed that he was not at work on the day of the fight (p. 82), and in a further interview gave some details about his discussion with K, the Claimant and the police (p. 86). He confirmed that K's injuries had been as shown in the photograph, and that both he and the Claimant had said K had had a dustpan. A second security guard was interviewed, who had not witnessed the fight, but was called to give first aid to the Claimant who had a "minor scratch". He said he had also seen K after the fight and did not see that he had a swollen eye (p. 85).

33. On 7 November 2019, Gemma Bowers, the Respondent's HR/L&D Director provided a statement to the effect that she had heard the Claimant shouting aggressively during his investigatory meeting with Mary Saakian on 30 October 2019 (p. 84).

34. On 8 November 2019, the Claimant was invited to a disciplinary meeting with Mark Chalmers, to take place on 20 November 2019 (p. 37 – 38). The charges laid against the Claimant were:

    (a) that on Sunday 6 October he had instigated a physical fight between himself and K;
    (b) that on Sunday 6 October he had provided an untrue statement about when the fight took place and how it started;
    (c) that on Sunday 6 October he was involved in a physical fight with K, which caused crushing injury to K's neck and injury to his left eye;

(d) that on Wednesday 30 October he had displayed an aggressive attitude during the investigation meeting with the temporary HR adviser, Mary Saakian.

35. The Claimant was provided with a number of documents set out in the letter, including the notes of the interviews referred to above and copies of the photographs of the injuries. He was informed of his right to be accompanied, and that Mr George Twum would be in attendance to translate.

36. The hearing went ahead as planned on 20 November 2019, conducted by Mr Chalmers, who was accompanied by a note-taker. The Claimant attended without a representative, and Mr Twum attended to translate. The main points covered in the hearing (the notes of which are at p. 87 - 94) are summarised below.

(a) In relation to the allegation about his behaviour during the investigatory meeting, the Claimant denied being aggressive, but accepted that he had raised his voice, although at the time he had thought it was normal. He said he had an issue controlling his voice.

(b) The Claimant denied giving different accounts of the fight and what led up to it. He said Ms Saakian had not understood him. The incident between Ms Abebrese and K had happened on a different day from the fight, and he or his brother had made a mistake with the dates, and also in stating that the Claimant had headbutted K. The Claimant confirmed that his brother was Ghanaian and that he had given his account to his brother in his own language.

(c) The Claimant gave a further account of the fight, in which he again stated that there had been a verbal altercation, following which K had hit him with a dustpan. He said that K had picked up a rope barrier and *"that's when I pushed then grabbed him and went to report him to security"*. He said K had tried to hit him again when he was with the security guard. He denied headbutting K.

(d) The Claimant denied instigating the fight.

(e) When asked how he could guarantee that there would be no recurrence of aggressive behaviour with K in future, the Claimant said *"If I was to repeat the incident, I wouldn't come back to work. I regret what happened."* When asked to clarify what he regretted, the Claimant said he wished the incident had not happened.

37. On 26 November 2019, Mr Chalmers wrote to the Claimant to inform him that he would be summarily dismissed (p. 39 – 44). Mr Chalmers found all the allegations, save the allegation that the Claimant had instigated the fight, to be proven. The letter provides detailed reasons for the decision.

(a) Mr Chalmers concluded that the Claimant did act aggressively in the meeting on 30 October 2019. He recorded that the Claimant had not

accepted that his raised voice could be perceived as aggressive behaviour, or that it was unacceptable behaviour.

(b) He did not accept that the differing accounts given by the Claimant of the fight could be attributed to misunderstanding by the Claimant's brother or Ms Saakian, given that, in particular, the Claimant had explained the incident to his brother in his own language, and the account in the statement prepared by his brother was consistent with K's injuries, whereas the later account was not. However, the initial statement was not accurate as to how the fight had started. He therefore upheld the allegation relating to untrue statements.

(c) He upheld the allegation that the Claimant had been involved in a physical fight with K and had caused the crushing injury to K's neck and the injury to his left eye. He relied on the consistency between the injuries and the Claimant's initial account of the fight.

(d) Mr Chalmers was unable to determine who had instigated the fight, and this allegation was not, therefore upheld.

38. In determining the penalty to be applied, Mr Chalmers took into account the Claimant's response to his questioning about how he could guarantee that a similar incident would be avoided in future. Mr Chalmers did not find these responses satisfactory. He concluded that the Claimant's behaviour amounted to a gross breach of trust and confidence and a breach of the Respondent's duty of care to provide a safe working environment to its employees and considered termination without notice to be an appropriate penalty.

39. In cross-examination, Mr Chalmers said that he would not have dismissed the Claimant for the aggressive behaviour on 30 October in itself. In response to questions from me during his oral evidence, Mr Chalmers said that the physical fight was gross misconduct, and because of the Claimant's constantly changing story, he could not trust that what he was saying was true. He needed reassurance that a similar incident would not occur, but in his behaviour towards Ms Saakian, the Claimant had demonstrated that in stressful or anxious environments, his reaction was to raise his voice and become aggressive.

40. I asked Mr Chalmers whether he was able to comment on why there had been a different outcome for the Claimant than for K, who was not dismissed. Mr Chalmers said he was not as he was only the decision maker in the Claimant's disciplinary hearing.

41. Through his solicitors, the Claimant appealed against his dismissal by letter dated 4 December 2019 (p. 46 – 48). He put forward a number of grounds of appeal. The substantive points made can be summarised as follows:

(a) the Claimant had been employed for three years and had a clean disciplinary record;
(b) the other employee involved in the fight had not been dismissed;

(c) the Respondent had not been able to substantiate who instigated the fight;
(d) the Claimant was said to have lied about the date and cause of the fight even though he admitted to the fight itself, which was the main issue;
(e) the Claimant was loud, but not aggressive at the meeting with Ms Saakian and in any event, this could not constitute gross misconduct;
(f) the decision to dismiss was unfair, wrong and discriminatory.

42. The Claimant was invited to an appeal meeting on 13 December 2019 (p. 49 – 50) which was subsequently rescheduled at the Claimant's request to 19 December 2019 (p. 51 – 2). The invitation letter informed him of his right to accompaniment.

43. The appeal hearing went ahead on 19 December 2019, conducted by Chris Goad, who was again accompanied by a note-taker. The Claimant attended without a representative, and Mr Twum again attended to translate. The notes appear at p. 95 – 102. Mr Goad went through each of the points made in the Claimant's solicitor's appeal letter, and the Claimant was given the opportunity to clarify those points if he wished. The Claimant added a number of points, including that he thought there should have been a statement taken from a second security guard; that he had suffered dizziness from his head injury and that there had been another incident between K and another employee called Yaw, although he was unable to explain why he had not raised this before.

44. When asked about the changes in his statements about the fight, the Claimant again said that if he had an interpreter, this would not have happened, and that during his investigatory interview, he was paying attention to Ms Saakian rather than what he was saying. He later said that the statement he had given via his brother was correct, and the interview with Ms Saakian was wrong. In his oral evidence, the Claimant denied that he had said this, but as noted above, he made no correction to the notes at the time. When asked about his allegedly aggressive conduct in the meeting with Ms Saakian, the Claimant said he had been trying to express himself, then he became frustrated and was raising his voice. The Claimant explained that he was saying his dismissal was discriminatory because he had been treated differently from K.

45. Mr Goad's evidence was that, after this hearing, he investigated some of the points raised by the Claimant with Ms Saakian, who confirmed that the Claimant did not request to have a translator at the investigatory meeting, and that although he had brought a friend, the friend was not permitted to attend as there was no entitlement to representation at that stage. I was not shown any notes of this interview. He also located the statement from the second security guard and confirmed that this had been sent to the Claimant prior to the disciplinary hearing.

46. Mr Goad wrote to the Claimant on 30 December 2019 dismissing his appeal (p. 52 – 55). He went through each of the Claimant's points of appeal as set out in the letter from his solicitors. He gave the following reasons relating to the substantive grounds of appeal noted above:

(a) He considered that the conduct in the Claimant's case was so serious that an alternative sanction could not be applied, despite his three years' service and clean disciplinary record.
(b) He could not comment on the sanction applied in K's case, but following investigation was able to say that he was subjected to a full disciplinary process, although Mr Goad had played no part in that process.
(c) Mr Chalmers had accepted that there was no clear evidence of who had instigated the fight and his decision had been made on that basis.
(d) The main issue was not whether or not the Claimant had admitted to the fight, as the appeal letter suggested, but the Claimant's changing account of the fight.
(e) The allegation of aggressive behaviour towards Mary Saakian was upheld as although being loud would not in itself necessarily constitute aggression, Mr Goad accepted the account of Gemma Bowers in which she explained that the volume and tone of what the Claimant was saying meant she had to go into the room to see whether everyone was OK.
(f) The Claimant had provided no basis, other than the different treatment of K, on which he said the decision was discriminatory.

47. In response to questions from Mr Mensah about the different treatment of K, Mr Goad said that he had checked to see that a full investigation had occurred and a full disciplinary had happened, and that he had done so by reading the investigation and disciplinary notes in relation to K. He said that Ms Kubiec-Nowakowska had made the decision in relation to K, so she should be asked about why he was not dismissed. He accepted that there were also discrepancies in K's account of events. In response to questions from me, Mr Goad said he had not read the outcome letter in K's case, although he was aware of the different outcome in that case. He was asked whether he had given any consideration to why the Claimant was dismissed and K was not, and said he wanted first to understand whether the investigation Mr Chalmers had undertaken was fair and appropriate and whether a fair process had been followed. He said he had looked at K's case, and when he compared the disciplinary and investigation notes to those in the Claimant's case, he felt there were more inaccuracies in the latter as he went through, and more changes of story, and this had played into his mind when making the decision.

The Law

48. Pursuant to section 98 Employment Rights Act ('ERA') 1996, it is for the employer to show the reason for dismissal, and that it is a potentially fair reason within the meaning of section 98. A reason relating to the conduct of an employee is a fair reason within section 98(2)(b) of the Act.

49. If a fair reason can be shown, section 98(4) ERA 1996 provides that the Tribunal must consider whether the dismissal was fair or unfair, which will depend on whether in the circumstances (including the size and administrative resources of the employer), the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

50. Where the reason for the dismissal is conduct, as is alleged in the present case, it is established law that the guidelines contained in *British Home Stores Ltd –v- Burchell* [1980] ICR 303 apply. An employer must (i) establish the fact of its belief in the employee's misconduct, that the employer did believe it. There must also (ii) be reasonable grounds to sustain that belief, (iii) having carried out such investigation into the matter as was reasonable in all the circumstances of the case. A conclusion reached by the employer on a balance of probabilities is enough. Point (i) goes to the employer's reason for dismissal (where the burden of proof is on the Respondent) and points (ii) and (iii) go to the general test of fairness at section 98(4) (where there is a neutral burden of proof).

51. The Tribunal must further determine whether the sanction imposed by the employer fell within the range of reasonable responses.

52. At the stages set out at points (ii) and (iii) in paragraph 50 above, as well as paragraph 51 above, the Tribunal must consider whether the employer's conduct fell within the range of reasonable responses open to it (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439; and see *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111, where it is confirmed that this principle also applies to the investigation carried out and procedure adopted by the employer). It is not open to the Tribunal to substitute its view for that of the employer.

53. There are numerous authorities (including *A v B* [2003] IRLR 405 and *Crawford and another v Suffolk Mental Health Partnership NHS Trust* [2012] IRLR 402, cited to me by the Claimant) to the effect that serious allegations of criminal misbehaviour must always be the subject of the most careful investigation, including a careful and conscientious investigations of the facts, and an equal focus on evidence that may exculpate the employee. This applies particularly strongly when the employee's reputation or ability to work in his or her chosen field is likely to be affected by a finding of misconduct.

54. I have considered all of the cases on the issue of disparity of treatment cited in the respective skeleton arguments, and I have found this summary of the authorities from *UK Coal Mining Limited v Raby*, EAT, 30 January 2003, particularly helpful:

    (1) An employer is required to consider the case of each employee on its own merits which includes taking into account any mitigating factors:
    "The requirement that employers must act consistently between all employees means that, before reaching a decision to dismiss, an employer should consider truly comparable cases of which it knows or ought reasonably to have known. The overriding principle must be, however, that each case must be considered on its own facts and with freedom to consider mitigating aspects. Not every case of leniency should be considered to be a deviation from a declared policy." (*Proctor v British Gypsum Ltd [1992] IRLR 7 EAT* , Wood P).

(2) *"Where two employees are involved in an act of gross misconduct it is not unfair to dismiss one employee and retain the other provided there are reasonable grounds for treating the employees differently."* (*Frames Snooker Centre v Boyce [1992] IRLR 472*).

(3) *"An employer is acting reasonably and within the band of reasonable responses if it acts on the conclusions and findings of investigating officers where two employees are involved in an incident and the officers decide to dismiss one employee and not the other, provided that the decision is not irrational."* (*Securicor Ltd v Smith [1989] IRLR 356 CA*)

(4) "Disparity of treatment can be unfair." See *Hadjioannou v Coral Casinos Limited [1981] IRLR 352* at paragraph 25, per Waterhouse J who said this:
"We accept that analysis by Counsel for the Respondents of the potential relevance of arguments based on disparity. We should add, however, as Counsel has urged upon us, that industrial tribunals would be well to scrutinise arguments based upon disparity with particular care. It is only in the limited circumstances that we have indicated that the argument is likely to be relevant, and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a Tribunal may be led away from a proper consideration of the issues raised by [section 98 (4)]. The emphasis in that section is upon the particular circumstances of the individual employee's case. It would be most regrettable if Tribunals or employers were to be encouraged to adopt rules of thumb, or codes, for dealing with industrial relations problems and, in particular, issues arising when dismissal is being considered. It is of the highest importance that flexibility should be retained, and we hope that nothing that we say in the course of our judgment will encourage employers or Tribunals to think that a tariff approach to industrial misconduct is appropriate. One has only to consider for a moment the dangers of the tariff approach in other spheres of the law to realise how inappropriate it would be to import it into this particular legislation."
This passage was endorsed with approval by Beldam LJ in *Paul v East Surrey District Health Authority [1995] IRLR 305* at paragraph 34.

(5) *"In cases where there is a disparity a Tribunal must consider whether the dismissal fell within the range of reasonable responses and ask itself whether the distinction made by the Respondent between two employees was irrational. It should not substitute its own view for that of the employers"* (*London Borough of Harrow v Cunningham [1996] IRLR 256 EAT* Judge Peter Clark)

(6) The guiding principle should be that laid down in *Securicor v Smith* and *Harrow v Cunningham* above. As Peter Gibson LJ said in *Walpole v Vauxhall Motors Ltd (Unreported, Court of Appeal, 24 April 1998)*; giving the judgment with which the other members agreed:
"All that those cases do is to state the common sense proposition that where two employees who have committed the same offence are treated differently by the employer, the industrial tribunal should ask whether the distinction made by the employer was within the band of reasonable responses open to the employer or so irrational that no reasonable employer could have made it. I

have no reason to think that the industrial tribunal did not apply that common sense rule which hardly needs any authority."

55. I also adopt the summary of *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352 set out in the Respondent's submissions: Tribunals should scrutinise arguments based on disparity with particular care, and it is only cases that are *"truly similar, or sufficiently similar"* that give rise to concerns of inconsistency of treatment.

56. Section 122(2) Employment Rights Act 1996 provides that, where the tribunal considers that any conduct of the complainant before the dismissal 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. Section 123(6) ERA 1996 provides that, 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. The exercise in relation to the two sub-sections is therefore different; to reduce an award under s. 123(6), the claimant's conduct must have caused or contributed to the dismissal, whereas there is no such requirement under s. 122(2). The conduct relied upon must in either case be *"culpable or blameworthy"* (*Nelson v BBC (No. 2)* [1980] ICR 110).

57. It is permissible for a tribunal to make a 100% reduction for contributory fault, under both s. 122(2) and s. 123(6), but such results will be rare, and tribunals will need to set out reasoning explaining why it is just and equitable to make such a reduction (*Ladrick Lemonious v Church Commissioners* UKEAT/0253/12/KN, at paragraphs 31 – 35).

58. The principles to be applied in considering whether a *Polkey* deduction should be made, and in what amount, are summarised in *Software 2000 Ltd v Andrews and others* [2007] ICR 825 as follows, at paragraph 54:

"(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.) (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. (4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise

that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. (5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role."

CONCLUSIONS

<u>Unfair Dismissal</u>

The Reason for the Dismissal and "genuine belief"

59. I have no hesitation in concluding that the reason for the Claimant's dismissal was the conduct relied upon in the dismissal letter, namely fighting with K on 6 October 2019 and causing him injuries, providing inconsistent accounts of that fight on various occasions thereafter, and in behaving aggressively during the investigatory interview, although the latter was, based on Mr Chalmers' evidence, very much a subsidiary reason. This conduct was regarded by Mr Chalmers and Mr Goad as a breach of trust and confidence, and a breach of the Respondent's duty of care to provide a safe working environment for its employees. The Respondent has therefore proved that there was a potentially fair reason for dismissal, which was a reason relating to conduct.

60. I further accept the evidence of Mr Chalmers and Mr Goad that they genuinely believed that the Claimant had committed these acts of misconduct. This point was not truly in dispute between the parties; the Claimant's challenges related principally to the investigation and the fairness of the sanction in all the circumstances.

Reasonable Grounds and Reasonable Investigation

61. I deal with the issues of whether the Respondent's managers had reasonable grounds for their conclusions, reached after the Respondent had carried out as much investigation as was reasonable in the circumstances, below. As the procedural issues raised by the Claimant largely relate to the investigation carried out by the Respondent, I also deal with the question of whether a fair procedure was followed in this section.

62. The Respondent clearly had reasonable grounds to believe that the Claimant had been involved in a fight with K; that much was admitted by the Claimant. In my view, the Respondent also had reasonable grounds on which to conclude that the Claimant had inflicted the injuries recorded in K's hospital discharge summary, namely a black or swollen eye and a crushing injury to the neck. As

both managers found, these injuries were consistent with the Claimant's original account of the fight in the statement provided via his brother, which stated that the Claimant had *"held [K] tightly"* and *"headed"* him, as well as with K's account of the Claimant's actions.

63. I find that the Respondent also had reasonable grounds to believe that the Claimant had made inconsistent statements about how and when the fight started, and also what occurred during it. The Claimant initially suggested that the fight occurred directly because of the incident between K and Ms Abebrese (and indeed on the same day), but later changed his account to make it clear that the fight was on a different day and arose following an altercation about rubbish collection. The initial account gives the impression that the Claimant was provoked by K's conduct towards Ms Abebrese, which is not supported by the later account. The Claimant also radically changed his story in relation to his conduct during the fight, denying, in his later interviews, that he had held K tightly or headbutted him and instead saying only that he had *"pushed him to the wall"* to defend himself and/or grabbed him. The Respondent did not accept the Claimant's explanation that the initial account from his brother contained mistakes, and I find that conclusion to have been reasonable. The Claimant accepted that he had provided his account to his brother in his own language, and this statement – unlike the later accounts – was consistent with K's injuries. The Claimant appeared to be downplaying his actions in the later interviews.

64. I also find that the Respondent had reasonable grounds to believe that the Claimant had behaved aggressively in his meeting with Mary Saakian on 30 October 2019. As Mr Goad noted, the Claimant's behaviour had been such as to cause an independent witness to intervene in the meeting, and then to write a statement expressing her concerns. Both managers observed that the Claimant had spoken at a normal level and calmly during his hearings with them, and thus did not accept his position that speaking loudly was normal for him.

65. In his submissions, the Claimant raises three main arguments supporting his position that the Respondent did not conduct a reasonable investigation.

66. The Claimant alleges that the initial investigation meeting was not fair as the Claimant was required to attend shortly after arriving home from Ghana and was not permitted to have a translator. Whilst I accept that the investigatory meeting took place only a couple of hours after the Claimant had arrived home, the Claimant was rostered to work three hours after arriving home in any event. It is not clear that the Claimant asked Ms Saakian to postpone the hearing, but even if he did, in circumstances where he had been made aware of his suspension before he went away on holiday, and was rostered to work at approximately the same time as the investigatory meeting took place, I find that it was reasonable to proceed with it at the allotted time. Further, the notes do not record that the Claimant asked for a translator at the meeting itself, and the notes of the disciplinary hearing indicate that it was only after the meeting that

the Claimant suggested Ms Saakian had not understood him and requested an interpreter. I accept that the Claimant expressed himself in English on a day-to-day basis at work, and that the Respondent had no reason to consider that the Claimant required a translator until he requested one.

67. The Claimant also argues that the Respondent should have interrogated the medical evidence as to the injuries suffered by K more carefully, by seeking expert advice, as the diagnosis of “suborbital oedema” could have been caused by other factors, including allergies and lifestyle factors. The Claimant also argues that the prescription of Prednisolone supports the possibility that the oedema was allergy-related. I do not consider it is reasonable to expect the Respondent to have sought expert evidence on the discharge summary. I find it was reasonable for the Respondent to consider the discharge summary alongside evidence from witnesses stating that K had a black eye after the fight (and did not have a black eye that morning), and conclude that he sustained a black eye in the fight.

68. There is some argument in the Claimant’s submissions that the charges against the Claimant were not clearly framed. I do not accept this criticism. I consider the charges against the Claimant to have been clear, and I find that he had a fair opportunity to respond to them at the investigatory meeting, the disciplinary hearing and the appeal hearing.

69. Although it is not addressed in the Claimant’s submissions, the Claimant also contended during oral evidence and cross-examination that Mr Twum was not an appropriate interpreter, as he was a manager within the Respondent business, and did not translate the Claimant’s answers correctly during the hearing. Despite having legal representation prior to his appeal, the Claimant did not raise this point at the disciplinary hearing, in his appeal letter, or at the appeal hearing. The Claimant said in his oral evidence, for the first time, that he had asked the Respondent to replace Mr Twum following the disciplinary hearing, but I did not find that evidence credible, particularly as he said he had made the request of Ms Saakian, who had by this point left the Respondent. In all the circumstances, I find that it was reasonable for the Respondent to conclude that Mr Twum was an appropriate interpreter and was translating the discussion faithfully.

70. The Claimant also raised a point relating to disparity of treatment, which I have dealt with in the section below.

71. That point aside, I conclude that the Respondent had reasonable grounds for concluding that the Claimant had committed the misconduct alleged, reached following a reasonable investigation, and applying a fair procedure.

Did the sanction of dismissal fall within the range of reasonable responses?

72. The Respondent's employee handbook provides as examples of gross misconduct fighting, assault and lying. The Claimant's conduct clearly falls within those categories and was reasonably regarded by the Respondent as very serious. The dismissing and appeal managers considered the mitigating factors advanced by the Claimant, in particular his three years of service and clean disciplinary record, but nevertheless concluded that dismissal was an appropriate sanction. Taken by itself, I consider that dismissal would clearly have fallen within the range of reasonable responses to the Claimant's actions.

73. However, the Claimant was treated differently from another employee who was involved in the same fight, and who was not dismissed but issued with a warning, and I must consider whether this apparent disparity means that the sanction of dismissal did not fall within the range of reasonable responses.

74. The Respondent reasonably concluded that it could not determine who started the fight. Both men sustained injuries, and the Respondent has not sought to differentiate between the two cases on the basis of the severity of the respective injuries. Mr Goad accepted in cross-examination that there were inconsistencies in the accounts given both by the Claimant and by K. Notably, in his first account, K denied hitting the Claimant with a dustpan and causing him injuries, whereas in the disciplinary hearing he accepted that he had "defended himself" with the dustpan. However, Mr Goad said in oral evidence that, reading through the investigatory and disciplinary notes in K's case and in the Claimant's case, he felt there were more inaccuracies in the Claimant's account. He had previously been asked in cross-examination how many discrepancies there were in the Claimant's account and was unable to give a figure.

75. In submissions, the Respondent has also sought to differentiate between the cases on the basis that the Claimant was subject to an additional charge of aggressive conduct in the interview with Ms Saakian. I have considered carefully whether this point is sufficient to render the cases non-comparable, as discussed in the authorities cited above. This is a difficult point, but I find it is not in itself so sufficient. Mr Chalmers' oral evidence indicated that he would not have dismissed for this charge alone (thus it was subsidiary) and he regarded it more as an indication that the Claimant could not be trusted not to repeat his conduct in future. This could potentially be a differentiating factor between the two cases, but neither Mr Chalmers nor Mr Goad said they had differentiated on that basis. I also noted that there was a second allegation, the nature of which has not been explained by the Respondent, against K. In such circumstances, given that both men were involved in the same fight, both gave inconsistent accounts of what had happened, and both faced more than one allegation in disciplinary proceedings, I find that the cases were, on the face of it, comparable.

76. With that foundation in mind, the evidence of Mr Chalmers and Mr Goad, given frankly in both cases, was that they had not really given consideration to the

reasons for the different outcome in the two cases. Mr Chalmers had not been involved at all in K's case and had given it no consideration in reaching his decision. Mr Goad read the investigation and disciplinary notes in K's case and noted that there appeared to be more inaccuracies in the Claimant's account, but his evidence demonstrated that this conclusion was impressionistic. Importantly, he did not also read the outcome letter in K's case, or speak to Ms Kubiec-Nowakowska about her reasons for deciding not to dismiss him. It is difficult, therefore, to discern any clear, rational basis for his decision that it was fair to treat the Claimant more harshly.

77. For these reasons, I find that this is one of those unusual cases referred to in *Hadjioannou* where the circumstances of the two employees are "sufficiently similar" to give rise to a pure disparity argument, and where the Respondent's witnesses did not have in mind any "clear, rational basis" for differentiating between the Claimant and K.

78. For this reason alone, I find that the decision to dismiss the Claimant fell outside the range of reasonable responses.

79. As the Claimant's claim for unfair dismissal succeeds, I must go on to consider the issues of *Polkey* and contributory fault. In the circumstances of the present case it is simplest to deal first with contributory fault.

Contributory fault

80. In determining the questions posed by s. 122(2) and s. 123(6) ERA 1996, I must decide whether, on the balance of probabilities, the Claimant <u>in fact</u> conducted himself in the way described in those sections.

81. Having carefully considered all the evidence before me, I find, on the balance of probabilities, that the Claimant was involved in a physical fight with K, and that during the course of that fight, he held K tightly around the neck, and headbutted him. I make those findings based on the photographic evidence, the contents of the discharge summary, and the Claimant's own original account of the incident in the statement produced by his brother. I am unable to find on the balance of probabilities that the Claimant instigated the fight.

82. I also find on the balance of probabilities that the Claimant gave inconsistent accounts of the fight, most notably in that:

(a) he initially suggested that he had been provoked by K's treatment of Ms Abebrese, occurring immediately before the fight; and

(b) he retracted his original admission that he had held K tightly and headbutted him, which I have found to be an accurate account of events.

83. Finally, I find on the balance of probabilities that the Claimant did raise his voice during the meeting with Ms Saakian in a manner that was audible some distance away and caused Ms Bowers to feel she had to intervene in the meeting.

84. In all the circumstances, I consider that the Claimant's conduct during the fight, particularly combined with his statements thereafter seeking to downplay his part, and his conduct when being questioned about the matter, constitute very serious misconduct. Fighting, assault and lying are clearly identified as gross misconduct in the Respondent's disciplinary policy and would be so regarded by most employers. This extremely serious misconduct was the sole cause of the Claimant's dismissal. Having taken all these matters into account, I find that the Claimant's conduct prior to his dismissal was culpable and blameworthy to such a significant extent that it is just and equitable to reduce the basic award by 100% under s. 122(2) ERA 1996. I also find that the Claimant's conduct was the sole cause of his dismissal, and that the seriousness of the conduct means it is also just and equitable to reduce the compensatory award by 100% under s. 123(6) ERA 1996. The combined effect of these findings is that no basic or compensatory award would be payable to the Claimant.

Polkey

85. In view of my findings on contributory fault, it is strictly unnecessary for me to make any finding on a *Polkey* reduction. However, for completeness, having reviewed all the evidence before me about both cases (which is incomplete in K's case), I consider it highly likely that, had Mr Chalmers and Mr Goad considered the cases together, they would still have reached the conclusion that dismissal of the Claimant was fair. In reaching this conclusion I have had regard in particular to the injuries sustained by the two men, the fact that the Claimant sought to back-pedal on an earlier admission of more serious conduct whereas K appears to have accepted greater culpability during his disciplinary hearing, and the apparently additional factor of the Claimant's conduct during the investigatory meeting. As I cannot be certain that dismissal would have resulted in view of the more lenient treatment of K, I would apply a *Polkey* reduction of 90% to any compensatory award.

Wrongful Dismissal

86. For the reasons given at paragraphs 81 – 84 above, I consider that the Claimant's conduct did amount to gross misconduct, for which the Respondent was entitled to dismiss him without notice. I therefore find that the Claimant was not wrongfully dismissed.

Costs

87. In accordance with the timetable set out at the end of the hearing, the Respondent made an application for costs arising from the postponement of the original hearing on 3 March 2021, by letter dated 27 April 2021. The application raises potentially complicated issues of whether any order made should be an order for costs against the Claimant, or an order for wasted costs against his solicitor. It also raises a factual issue as to why the requirement for a Twi interpreter was not raised with the Tribunal prior to 3 March 2021.

88. The Claimant was ordered to provide a response to the Respondent's costs application by 4 May 2021. The Claimant failed to do so, and the Respondent wrote to the Tribunal on 6 May stating that as the application was not opposed, the Respondent was content for the Tribunal to consider its application on the papers. Mr Mensah responded on the same day, arguing that the response had not yet been submitted because the Tribunal had (as detailed above) extended the "date for submissions" to 21 May 2021. The Respondent disagreed with this by a further email of the same date, contending that the Claimant had neither applied for nor been granted an extension of time for submission of its response to the costs application (as opposed to his submissions in relation to the substantive claim). On 21 May, the Claimant submitted his response to the costs application, in which he stated that he also considered the matter suitable for determination on the papers. The response does not contain any information about the Claimant's means.

89. In the event, I did not receive any of these documents, or the written submissions, until 24 May 2021. Whilst I accept that EJ Martin's Order is, on the face of it, limited to submissions, the delay from the Claimant in providing his response to the costs application has not caused any delay in my considering the matter. The prejudice to the Claimant were I to proceed without considering his submissions would be considerable, and I therefore considered it appropriate to have regard to them.

90. On reviewing the correspondence, it does not appear to me that the costs application is appropriate for determination on the papers, in view of the points of complexity detailed at paragraph 87 above, neither of which has been (or in my view, could be) properly explored in correspondence. I have therefore made case management orders for a hearing to determine the costs application, which may, if appropriate, be combined with a hearing to determine remedy should the Claimant wish to pursue reinstatement or re-engagement.

Employment Judge A. Beale

Dated: 4 August 2021