EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"This has been a remote hearing not objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and no-one requested the same."

Claimant		**Respondent**
Mr M Akins	**v**	**Metroline Travel Ltd**

Heard at: Watford (by CVP)

On: 11 & 12 May 2021 (& 18 May 2021 in chambers)

Before: Employment Judge Bloch QC (sitting alone, remotely)

Appearances

For the Claimant: In person
For the Respondent: Ms Nicolaou

RESERVED JUDGMENT

The complaint of unfair dismissal is not well founded and is accordingly dismissed.

REASONS

1. This is a very sad case, in which a valued and proud employee, who had provided many years of excellent service to the respondent, with a clean record throughout, (up until the unfortunate events that occurred), was dismissed following events set in train by his grievance against a colleague.

2. At this hearing the parties presented the following documents:

   2.1 an electronic bundle of documents numbered pages 1-287 (but containing more than that number of documents by reason of inserts);

2.2 a list of issues prepared by the respondent;

2.3 chronology of events prepared by the respondent;

2.4 witness statements on behalf of the respondent of T. Whitthread, W. Harvey and R Brusa; and

2.5 witness statement of the claimant and of Marie Lang;

2.6 respondent's submissions.

3. All of the witness statements were unsigned but were shown to me by video as either being signed or identified as being the final witness statements of the relevant witnesses.

4. I heard evidence of the following witnesses:

4.1 Tony Whitthread, engineering manager;
4.2 William Harvey, engineering manager;
4.3 Rodolfo Brusa, garage manager at Cricklewood Garage; and
4.4 The claimant and Mrs Lang.

5. There was an initial issue about whether the claim form had been presented to the Tribunal in time since it was stamped as received in the Watford Tribunal on 15 June 2020 but also bore a stamp "CPF E&W 11 March 2019".

6. The Tribunal staff identified that stamp as the stamp of the Central Office, Leicester and this supported the claimant's assertion that he presented the claim form by sending it by post to the Leicester Tribunal in March 2019. The respondent accordingly accepted that the claim form had been presented in time and in any event I find that it was presented in time by being presented to the Leicester office on 11 March 2019.

7. Accordingly, the only issue before the Tribunal was whether the claimant was fairly or unfairly dismissed. The reason for the dismissal put forward by the respondent was "some other substantial reason" namely an irretrievable breakdown in the relationship between the claimant and the respondent.

8. The issues before me were accordingly whether:

8.1 The respondent at the relevant time held the belief that the relationship between itself and the claimant had broken down irretrievably; and

8.2 If so, whether the respondent acted reasonably in treating that reason as a sufficient reason for dismissal.

Background facts

9. The essential facts of the case were not much in dispute and are set out briefly in the ensuing paragraphs.

10. The claimant commenced employment with the respondent on about 3 April 1989. He was latterly employed as Senior Running Shift and Service Engineer at the respondent's Willesden garage. The respondent is one of the major London bus companies with a number of garages and routes around London and the Home Counties. The claimant was employed at the Willesden garage until his employment was terminated by the respondent on 1 February 2019. He was a valued employee with an exemplary (until the events described below) and indeed had received an award for his services.

11. On 26 January 2017 the claimant raised a grievance against a gentleman who has been referred to in these proceedings as "Mr C". I have followed the parties in using that abbreviation throughout this judgment. (The precise of Mr C seems to have no particular relevance and I do not regard this procedure as impinging in any material way on the open nature of these proceedings). On 31 January 2017 the respondent wrote to the claimant to offer mediation.

12. On 14 March 2017 the respondent wrote to the claimant providing an outcome to his grievance. The grievance was not upheld.

13. On 1 February 2018 the claimant raised a second grievance concerning Mr C. In summary he alleged that Mr C had:

    13.1 made other members of staff take photographs of him to entrap him;

    13.2 driven away from the claimant at speed having seen him driving to work one morning, then deliberately waited in his car once he had arrived at the garage as he was "plotting and scheming";

    13.3 challenged the claimant about not wearing a hi-viz vest while walking across the garage;

    13.4 adopted a "Hitler-style" regime at the garage;

    13.5 victimised people; and

    13.6 failed to send assistance to the claimant and a bus driver when they were unblocking an entrance that was blocked by a broken down bus.

14. The claimant also alleged that Mr C was a habitual liar and ought to be removed from the garage at Willesden.

15. The above is a highly summarised form of the grievance but, given the greater relevance of matters which occurred towards the end of the claimant's employment, is a sufficient summary for present purposes, even if it does not set out the full nuance of the different complaints. Following

the receipt of this grievance, the claimant attended both a grievance hearing and a further mediation with the claimant. Although the notes of the mediation meeting and the grievance hearing are both dated 18 April 2018, it is not entirely clear whether that is precisely correct and if so what gap (if any) occurred between the two meetings. However, the notes from the mediation meeting which was before Mr Keith Ali, senior service delivery manager, who also chaired the grievance meeting, indicate that by the time of the mediation meeting, Mr Ali had rejected the grievance except in one small respect (ie Mr C should have dealt with the issue of non-compliance by the claimant regarding wearing a hi-viz jacket while walking through the garage sooner rather than wait until later in the day to mention it). Mr Ali said that the rest of the work-related charges were a reflection of Mr C carrying out his day- to-day routine.

16. The notes of the mediation meeting recorded that the claimant had produced a bible and sworn on it in front of everybody and then asked "in an aggressive manner" for Mr C to do the same. When there was no reply from Mr C, the claimant said that that was because he lied. Mr Ali had said that this was inappropriate as this was about mediation and not accusations and inflammatory statements. Later on Mr Ali is recorded as saying that the grievance had been investigated and had been found to be "unfounded". The claimant was then recorded as relaying his grievance and aggressively interjecting saying that everyone needed to listen to what had happened in the past. Mr Thomas, who was there as the claimant's representative or witness, eventually called for an adjournment as he wanted to speak to the claimant. Mr C apparently sat silent but Mr Ali recorded that he was made aware from Mr C's representative that Mr C felt uncomfortable and uneasy with the aggressive behaviour the claimant was portraying towards him. Mr Ali recorded that he himself was uneasy about the stance of the claimant, as he was "shouting me down and not listening to what I had to say and completely ignored any instructions".

17. The meeting reconvened at 13:45 and Mr Ali recorded that after his previous attempts to suppress the claimant's outburst he allowed him the floor to express his initial thoughts on why the relationship between himself and Mr C was so poor. He recorded that as matters proceeded the claimant was becoming even more aggressive and did not want to listen while confronting him and raising his voice. There was then an adjournment to allow matters to calm down. The notes then recorded that it was made clear to Mr Ali by Mr C's representative that Mr C no longer felt safe and did not want to be in the same room. The representative said that he would explain Mr C's absence after they have reconvened. The notes recorded that during the adjournment Mr Ali sought advice from Mr Howells, the engineering manager, (who had been present during the mediation meeting) who was of a similar view that the claimant was aggressive and did not recognise Mr Ali or anybody else and that if this continued, he would have to deal with him. The meeting reconvened at 14:45 and Mr C's representative (Mr Fitzgerald) explained why Mr C could not return. The claimant stated that Mr C could not handle the truth and could not even look him in the eye. He referred to Mr C as being a coward.

18. Mr Ali told the claimant that he regretted his actions and aggressive stance towards Mr C and himself and this left him with no option but to call a halt to the proceedings and to warn him that the meeting was about mediation not recrimination and attacking individuals in an aggressive manner. He then stated that for these actions and unacceptable threatening manner he was suspending the claimant. Mr Ali concluded that having found that there was no case against Mr C and based on the mediation meeting, he found that there was an element within the grievance which was offensive, uncalled for and malicious in that the character of Mr C was being slighted and tainted. He also found the claimant's behaviour to be very intrusive and unhealthy and implying an obsession.

19. In a statement dated 19 April 2018 Mr C reported that he had had no issues with the claimant and had hoped for resolution of the matters and that he and the claimant should shake hands and move on positively from the situation. He referred to how the claimant had become very irate at the mediation meeting and had insulted him. He referred to how Mr Ali had asked the claimant to stop but that the claimant had refused and tried to continue, adding that "you are protecting your boy" (referring to Mr C who was junior to Mr Ali.) The claimant had then got extremely angry saying that all his claims had been rubbished and disregarded. He seemed to be getting out of control, shouting. Mr Ali had adjourned the meeting for a second time and the claimant left the room angrily. He went on to state that the claimant had caused a tense hostile environment within the room and that Mr C had been advised by his union representative not to return to the meeting as he was unsure as to what actions the claimant might take while Mr C was in there.

20. There was also a statement from Mr Andy Howells dated 20 April 2018 who had (as appears above) also attended the mediation meeting. He stated that during the meeting the claimant had to be reminded to stay calm and allow others to speak but repeated what had come up from the first grievance. He was getting very agitated at the meeting and Mr Howells believed that the claimant felt he was not being heard. He added that while the claimant did not make a threat of violence against Mr C he did state that he felt that Mr C had lied throughout the process and his (the claimant's) stance was becoming intimidating. Towards the end of the meeting the claimant had become very angry and at that point Mr Ali had put a stop to the meeting and told the claimant that he was being suspended.

21. Following the claimant's suspension from duty on 1 May 2018 the respondent formally requested the claimant to attend an investigation meeting. That was to investigate allegations of misconduct in that the claimant had allegedly engaged in aggressive intimidating and threatening behaviour towards Mr C and Mr Ali during the mediation meeting. The second act of alleged misconduct was the malicious content of the second grievance regarding Mr C.

22. The latter act of alleged misconduct refers back to the respondent's grievance policy and procedure. Paragraph 2 states:

> "As well as aiming to resolve workplace issues, Metroline's policy is to protect anyone who raises a genuine grievance. If you raise a grievance in good faith even if it is not upheld, you have the right to protection from any retribution. However, anyone raising a malicious grievance or making allegations which they believe or ought reasonably to know are untrue, will themselves be subject to disciplinary action which may result in their dismissal."

23. Mr Thomas provided a statement dated 3 May 2018 in regard to the claimant's alleged behaviour during the mediation meeting of 18 April 2018. His summary of the meeting was that the claimant was trying to put his points across in regard to the grievance against Mr C but was not allowed to do so and this was getting him upset. He may have raised his tone of voice from time to time as he was trying to put across his views on the matter because he felt that his voice was not being heard. His behaviour was not threatening at any time. In the interview notes of Mr Harvey, Mr Thomas repeated that the claimant had not been aggressive. He did raise his voice and was passionate about his views. In his opinion he could not tell if Mr C felt intimidated but he did not believe so.

24. Following various investigations Mr James Harvey concluded that there was a case to answer. This resulted in an invitation to attend a disciplinary hearing dated 8 May 2018. The hearing was to consider the following allegations:

    24.1 Aggressive, intimidating and threatening behaviour towards [Mr C] and Mr Ali while trying to hold a mediation meeting; and

    24.2 The malicious and damning content to the second grievance regarding Mr C.

    The letter said that one of the outcomes could be the claimant's dismissal. The claimant was told that he was entitled to be accompanied by a workplace colleague or a trade union representative and if he wished to have any witness to attend to give evidence he was to notify the respondent.

25. The next meeting after the investigation meeting which the claimant had attended was a disciplinary meeting held on 15 May 2018. There was a detailed note of this meeting in which the claimant was accompanied by his representative, Mr Black. Evidence was given to the tribunal by Mr Whitthread who had conducted the disciplinary meeting. He concluded that the claimant had no evidence to give him for any of the allegations against Mr C so he moved on to the mediation meeting and what had happened there. Having gone through Mr C's statement and that of Mr Howells the claimant said that he believed that both were untrue accounts of what had happened in the mediation. Mr Whitthread went through Mr Harvey's notes of the investigation and again the claimant made various assertions that parts of the notes were untrue. Eventually Mr Whitthread adjourned the

meeting to consider the evidence. He was very concerned about the claimant's behaviour towards Mr C and although the claimant claimed not to have been aggressive in the mediation, there were a number of accounts confirming the contrary. In regard to his grievance, the claimant had given him no evidence at all to support his allegations, and, taking into account the nature of those allegations he believed that the claimant's grievance against Mr C was malicious. However, on balance he was satisfied that his behaviour did not constitute gross misconduct, although in the circumstances he concluded that it would not be appropriate for the claimant to return to the Willesden garage to work. Given that he lived near Metroline's Potters Bar garage he decided to arrange for the claimant to be transferred there. However, before he made his decision on the appropriate disciplinary sanction he wished to speak to certain witnesses from the mediation meeting since the claimant had alleged that their written statements were untrue. He therefore explained that he would adjourn the hearing whilst he did this and whilst he arranged the transfer.

26. Mr Whitthread was able to arrange the claimant's transfer to Potters Bar with effect from 21 May 2018. He telephoned him on 16 May to let him know but the claimant told him that he had had some annual leaved booked so it was agreed that he would start on 23 May instead.

27. In the meantime Mr Black had contacted Mr Whitthread to say that there had been an incident of a racial nature at the Potters Bar garage and that the claimant was anxious that he could be a target for racial abuse if anyone took a dislike to him. Mr Whitthread investigated the matter and was able to confirm that the two individuals who had been involved in the incident were no longer employed by the respondent.

28. Mr Whitthread was informed on 24 May that the claimant had not turned up for his shift on 23 May. On 25 May Mr Howells received a letter from the claimant enclosing a fit-note that signed the claimant off work with work related anxiety and stress from 23 May. The claimant remained on sick leave until the end of his employment in February 2019.

29. The notes of the disciplinary meeting on 15 May 2018 show Mr Whitthread as repeatedly asking the claimant to name witnesses or to provide evidence to support his claims - and the claimant repeatedly saying he would hold on to that for later. He told me that he did not want to reveal names because they might be victimised by the respondent. The notes show that when Judith Thom, senior engineering administrator who was taking the minutes, recorded that as she was collecting her pens and minutes together Mr Whitthread asked the claimant if this was the end of the matter – "you won't do anything will you?" – to which the claimant responded: "no, not on the premises". In evidence the claimant accepted that he had said this but that he had not intended thereby to imply anything.

30. At the reconvened disciplinary meeting on 8 June attended by the claimant and Mr Black, Mr Whitthread informed the claimant that he had spoken to the relevant people and that they confirmed that what they had said in their

statements was accurate. The claimant said that everyone was ganging up on him and telling lies. Mr Whitthread told the claimant that Mr Ali had felt threatened and intimidated by the claimant's behaviour during the meeting but the claimant continued to maintain that he had not been threatening or aggressive and that people were just rubbishing him. Mr Whitthread told the claimant that he would adjourn to make his decision. Mr Black told him that it would victimisation if the claimant was moved to another garage.

31. In his witness statement confirmed during his evidence Mr Whitthread told the tribunal that during the adjournment he considered all the evidence. He checked the claimant's staff file and he did not have any live sanctions on his record. He maintained his earlier view that the claimant's conduct did not warrant dismissal as a gross misconduct offence but he was very concerned about his conduct both in relation to the malicious allegations and his behaviour in the mediation meeting which he was satisfied did amount to serious misconduct. Given that the claimant did not accept that he had behaved in a threatening and intimidating manner despite a number of accounts to the contrary he was not satisfied that he would correct his behaviour should another issue with Mr C arise. Given the complaints that the claimant had made about Mr C, seemingly without evidence, Mr Whitthread was sure that further issues would arise if he remained at Willesden. Therefore he concluded that a final written warning would be the appropriate sanction and that the claimant would have to be transferred to another garage because he could not have him working alongside Mr C in these circumstances.

32. He reconvened the hearing to let the claimant know his decision. He also explained that if he did not want to go to Potters Bar the claimant could go to Cricklewood or one of the Metroline West garages that had a vacancy and he asked the claimant to confirm where he wished to go. He told the claimant that he had the right to appeal against the decision. Mr Black then told Mr Whitthread that he believed that the claimant had been forced to move to another garage because he had raised a grievance and that he would be taking this matter to the tribunal.

33. By letter dated 8 June 2018 Mr Whitthread recorded that the circumstances giving rise to the final written warning were that the claimant had raised a grievance dated 1 February which was deemed to be malicious and that during the mediation meeting on 18 April 2018 he had threatened and intimidated Mr C and Mr Ali. He recorded that during the hearing he had given the claimant a choice of garages to which he could relocate on a permanent basis, these being Potters Bar, Cricklewood or any of the Metroline West garages, as they all had vacancies. The claimant was referred to his right to appeal.

34. In the bundle there was a file note of 12 June 2018 by Mr SH Anders, head of engineer development and recruitment, recording a telephone call he received from the claimant in which had "proceeded to rant" about recent events which had resulted in a final written warning. He insisted that Mr Anders had to stand up and stop being a coward. He said that the

claimant's demeanour and speech were aggressive and intimidating. The claimant refused point blank to give any indication as to which garage he would return. He gave no indication when he would return. Mr Whitthread was recorded as being present and witnessing this conversation. In his evidence Mr Whitthread said that while he could not hear what the claimant was saying, he could hear that the claimant's voice was raised and that he was angry. After the call, which lasted approximately 40 minutes, Mr Anders told Mr Whitthread that the claimant accused everyone of lying, setting him up and was shouting that he done nothing wrong.

35. The claimant attended an appeal meeting which was conducted by Mr William Harvey on 5 July 2018. The typed notes of the hearing were sent to the claimant and he was advised that the hearing notes would stand as being accurate unless the claimant wished any changes to be made. The claimant did not request any changes. Broadly, the grounds for appeal were breach of procedure, disputed evidence and an erroneous decision. complaint was made that a Mr Harvey Stewart (who was not a witness to any of the relevant events) should have been interviewed. After Mr Black had gone through the grounds of appeal Mr Harvey adjourned the meeting to carry out further investigations and to consider the evidence. The claimant had alleged that before he submitted his second grievance he had sat down with Mr Bennett, a garage manager, and Mr Howells and taken him through his proposed grievance and they advised him to take it to Mr Ali, which he did. Accordingly Mr Harvey contacted Mr Bennett to ask him about the claimant's grievance but he could not recall having dealt with any grievance. Likewise, having asked Mr Howells about the matter, he told him that he had read the grievance but then passed it on. Mr Bennett later on came back to tell Mr Whitthread that he had not seen the claimant's grievance.

36. During this process the claimant continued to be signed off sick with stress so Mr Harvey believed that it would be a good idea to arrange for the claimant to see the respondent's occupational health doctor. The occupational physician, Dr Weadick, concluded that the claimant remained unfit for work and that there was no medical cause for his stress. It arose from his belief that he had not been treated fairly. Mr Weadick suggested that mediation from an external source might assist and Mr Harvey planned to discuss these matters with the claimant at the reconvened appeal hearing. There were various delays in setting up the reconvened appeal hearing which took place on 21 August and was attended by the claimant and Mr Black. Mr Harvey informed the claimant that he had written his findings into a report and would send him a copy of the outcome letter and minutes of the meeting and he started to read through the document. Mr Black (according to Mr Whitthread) repeatedly interrupted Mr Harvey to disagree with his findings and after approximately 20 minutes they both got up and walked out.

37. Mr Whitthread did not uphold the appeal for the following reasons:

37.1 There was no unfairness with Mr Harvey Stewart not having been interviewed. He was not a witness to any of the relevant events. Mr Harvey concluded the claimant could and ought to have called Harvey as a witness, if he believed that that individual had relevant evidence to present.

37.2 The decision to transfer the claimant to another garage was not made before any investigation had been taken. Mr Whitthread had already investigated the matter.

37.3 There was no evidence supporting any allegations that the claimant made about Mr C and it was not a breach of Metroline's grievance procedure that Mr Whitthread believed Mr Adkins' allegations to be malicious.

37.4 The claimant's transfer to another garage was not a punishment because of the fact he had raised a grievance but because he had made malicious complaints about another individual at the same garage and Mr Whitthread was not satisfied that a similar situation would not arise again. If anything the claimant was being offered a new start.

37.5 The claimant had not been set up to fail. Indeed, he could have been dismissed for his conduct and instead he was given an opportunity to have a fresh start at a garage closer to his home. Mr Harvey believed that this was the opposite of setting him up to fail. He was not only given the option of Potters Bar but also Cricklewood or Holloway, both of which were closer to the claimant's home than Willesden. There had been an issue at Potters Bar relating to a racial incident but that was an isolated event and had been dealt with some time previously. Accordingly, Mr Harvey concluded that the appropriate sanction had been given and there were no grounds to overturn it. Neither the claimant nor Mr Black had presented any new evidence to him – they had simply disagreed with the outcome. The claimant was informed of the outcome by letter dated 24 August 2018.

38. By email dated 30 August 2018 the claimant wrote to Mr Shaun Anders in which he concluded: "I will not accept any form of sanction for something that I haven't done."

39. Thereafter the claimant attended a "Pre Mediation Meeting" on 19 September 2018 conducted by an external mediator, Mr Will Parkes. The meeting continued for over six hours and no conclusions were reached as to the suitability of mediation. Thereafter on 20 September 2018 Mr Anders received a call from the claimant which in a file note he described as a "rant". He made accusations that Mr Ali had concocted the charge of intimidation to "protect his boy" and that Andy Howells (engineering manager) was a coward. He went on to state that Tony Whitthread had not interviewed witnesses that he had supplied names for and that had he

interviewed Mr Harvey Stewart it would have exposed the lies against the claimant He also criticised Mr Harvey, who he said had changed his tune and towed the party line.

40. Thereafter the claimant communicated with Mr Sean O'Shea, the chief executive officer of the respondent, and in Mr O'Shea's email of 15 November 2018 to Rodolfo Brusa, Mr O'Shea said that he was not in a position to agree to the claimant's demands, ie to come back to work, to come back to Willesden and to have his final written warning expunged. He said that this was incompatible with what was mutually acceptable for the claimant and the business.

41. Mr Brusa gave evidence (in accordance to his witness statement) that he was approached in November 2018 by Mr O'Shea and asked to help in relation to the claimant. A meeting was arranged with Mr Brusa, the claimant and Mr Black. Even before he had met Messrs Akins and Black it was clear to Mr Brusa that the relationship between the claimant and the company had broken down, at least from the claimant's perspective. He appeared to believe that everyone had conspired against him and set him up to be guilty of something he had not done. By now he had been off work for five months and was simply refusing to return to work unless or until his final written warning was overturned and he was reinstated. He appeared not to accept that he had been given a chance of a fresh start at a garage closer to his home where he had no previous issues with any other employees or managers. Arguably the respondent could have treated his refusal to work as a conduct issue in the circumstances, but given the claimant's long service it appeared that both sides wished matters to be resolved, amicably if possible. These were the initial conclusions formed by Mr Brusa on his study of the papers.

42. He met with the claimant and Mr Black on 28 November to discuss how to go forward. After some without prejudice correspondence there was a meeting on 10 December between the claimant, Mr Brusa and Mr Black. The claimant kept insisting that he had done nothing wrong and had been set up. He showed once more that any attempt to reconstruct a relationship would most likely have been futile. He kept refusing his sanction and transfer. On 19 December 2018 the claimant contacted Mr Brusa to instruct him not to discuss matters with the claimant's representative, Mr Black, but on 9 January 2019 the claimant contacted Mr Brusa to inform him that he no longer objected to Mr Brusa contacting the claimant's representative. On 10 January 2019 Mr Black contacted Mr Brusa. In the meantime Mr Brusa had made a further referral to occupation health as he believed it was important to get an updated report on the claimant's absence.

43. After 9 January 2019 Mr Brusa was informed that the appointment with occupational health for 14 January was inconvenient for the claimant so Mr Brusa wrote to offer him an appointment on 18 January instead. Mr Brusa then received a further email from the claimant in which he informed Mr Brusa that he was not prepared to attend the appointment unless it was moved from Harrow to Leadenhall and was with Mr Weadick rather than one

of the other occupational health physicians. Mr Brusa responded to confirm that there were no other available slots and that all physicians at Medigold, the respondent's occupational health provider were trained to the same standards. He reminded the claimant that under the respondent's sickness absence procedure he was required to attend medical reviews when requested.

44. On 11 January the claimant responded to Mr Brusa's email to inform him that he would not be attending an appointment at Harrow regardless of the date or time. There followed various further discussions about an occupational health appointment and on 18 January the claimant emailed to say that he would try and make an effort to attend the occupational health appointment now at Harrow. However, in the event he arrived too late to be seen so that the appointment did not go ahead.

45. By the end of January despite further discussions with the claimant it was clear to Mr Brusa that no amicable solution could be achieved and that the claimant was still not prepared to return to work unless his final written warning was overturned and he returned to Willesden without further mediation or any attempt to restore any of the relationships that had been broken. It was clear to Mr Brusa that the claimant did not trust any of the managers with whom he had been involved including Mr Brusa. He did not accept any accountability at all for his actions. That was evident from his many communications to a number of different managers including the CEO and Mr Brusa regarded the claimant as now being completely entrenched. Had he taken some accountability or at least acknowledged that he had played a part in what had happened over the previous several months and agreed to some meaningful mediation it might have been possible to place him back at Willesden on a trial basis to see if it was possible that he could get back to work there without raising any further issues. However, Mr Brusa concluded that the claimant had only seemed to get angrier and more set in his belief that everyone was out to get him and with that mindset it was impossible in the view of Mr Brusa to try and achieve any realistic solution. Eventually the claimant had stopped engaging completely and instructed Mr Black to do the same so that there was simply nothing else the respondent could do in Mr Brusa's estimation. He regarded the claimant's demands as being too great. He was not prepared to accept any kind of disciplinary sanction and he was not prepared to take any job at any other Metroline location. To have invited him to a further meeting to consider dismissing him would have been utterly futile in the circumstances, in the estimation of Mr Brusa.

46. By this time he had been absent from work for eight months and was not prepared to return unless it was entirely on his terms, which were not acceptable to the respondent. Regrettably (in Mr Brusa's opinion) there was no option other than to terminate the claimant's employment with effect from 1 February 2019 and pay him in lieu of his twelve weeks' notice. He wrote to the claimant to confirm this on 21 February 2019. This letter stated:

> "You have, as I have said, now agreed that the working relationship has broken down irretrievably. This is naturally very disappointing, as you have very long service with Metroline and until the events leading to this final warning a good record of which you were proud. I was personally happy to offer you a position at Cricklewood rather than lose you to the business altogether. It seems, unfortunately, that this is not a choice you are willing to make; there is nothing I can think of now to improve the situation and we cannot continue with a contract where there is a breakdown in the essential term of mutual trust and confidence. Therefore I confirm that your employment terminated as I indicated it would if no agreement could be reached, on the 1 February 2019."

47. In my judgment all the respondent's witnesses were witnesses of truth and were all doing the best they could to recollect matters. While I accepted the claimant as a witness of truth, I did not accept his perspective of the respondent and its employees conspiring to terminate his employment.

48. Evidence was also given on behalf of the respondent by Marie Lang who while I accepted her as a witness of truth, given that she did not witness the key events and was not an employee of the respondent, her evidence was of limited value.

The law

49. An employee has a right under s.94 of the Employment Rights Act 1996 ("ERA") not to be unfairly dismissed by his employer. Under s.98 ERA (1)

> "In determining… whether the dismissal of an employee is fair or unfair it is for the employer to show –
>
> (a) The reason (or, if more than one, the principal reason) for the dismissal and
>
> (b) That it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

50. According to sub-section 4 of s.98:

> "Where the employer has fulfilled the requirement of sub-section 1, the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) Shall be determined in accordance with equity and the substantial merits of the case."

51. In Gallacher v Abellio ScotRail Ltd (UK ET/0027/19/SS paragraph 37) it was accepted that a dismissal on the ground of a breakdown of trust and confidence relating to the employment relationship fell within the definition of "some other substantial reason" referred to in s.98(1)(b) ERA. In Ezsias v North Glamorgan NHS Trust [2011] IRLR 550 the Employment Appeal

Tribunal held that a Tribunal had correctly found that a dismissal following the breakdown of the working relationship between the claimant and his colleague was for some other substantial reason rather than conduct. The Tribunal was entitled to find that the fact of the breakdown was the reason for the dismissal and the responsibility for it was incidental, so that the failure to follow the employer's disciplinary procedure which applies to dismissals for conduct did not render the dismissal unfair. In Seers v Metroline Travel Ltd 3321258/2019(V) the tribunal noted that the reason or reasons for the breakdown in the relationship can be relevant to the reasonableness of the decision to dismiss the claimant because of that breakdown. I regard these decisions as accurately setting out the law.

52. It is well-known that the tribunal must not put itself in the position of the employer and consider what it would have done in the circumstances. Instead the tribunal should look at whether the actions of the employer fell within the band (or range) of reasonable responses open to an employer: Iceland Frozen Foods Ltd v Jones [1993] ICR 17.

53. While the claimant had ticked the box in the claim form for compensation arising out of alleged breach of health and safety the parties accepted that the tribunal did not have jurisdiction to hear a stand alone claim for personal injury.

54. There were no particulars provided of the "other payments" claimed by the claimant and he did not pursue this aspect in his evidence.

Submissions of the parties

The respondent

55. While the claimant never accepted that he had done anything wrong it was the conclusion of Mr Ali, Mr Harvey and Mr Whitthread that the claimant had committed the misconduct that had led to the final written warning and the transfer from Willesden. These were the matters that led to the breakdown of the relationship between the claimant and the respondent.

56. By the time of his dismissal the claimant had made allegations about almost all the managers who had been involved at various stages in the grievance and disciplinary process, namely:

    56.1 Mr C – Ibus supervisor (Willesden);
    56.2 Mr Ali – senior service delivery manager (Willesden);
    56.3 Mr Howells – engineering manager (Willesden);
    56.4 Steve Bennett – garage manager (Willesden)
    56.5 Mr Whitthread – engineering manager (Greenford);
    56.6 Mr W Harvey – engineering manager (Holloway and Kings Cross);
    56.7 Mr Anders – head of engineering;
    56.8 Mr Brusa – garage manager (Cricklewood); and
    56.9 Mr Jones – engineering director.

57. Although Mr Anders and Mr Bennett had since left the respondent, it left few locations where the claimant could have been transferred and worked alongside colleagues about whom he had not complained. Notably Mr Jones who the claimant believed was behind the conspiracy against him was still the engineering director. While the claimant claimed that Mr O'Shea, the respondent's CEO, was looking to overturn his final written warning the respondent submitted that this was not the case. Mr O'Shea had informed Mr Brusa that this was not an option.

58. The claimant had agreed in the meeting on 22 January with Mr Brusa that there had been a complete and irretrievable breakdown of the working relationship between the claimant and the respondent. The claimant was not prepared to return to work in any capacity until or unless the respondent expunged his final written warning and returned him to Willesden.

59. Mr Brusa recognised that the claimant's refusal to return to work could have been treated as a conduct matter. If the claimant had not been such a long serving employee it was extremely likely that it would have been dealt with as such. Even issuing the claimant a first written warning for failing to attend work would have led to his dismissal with notice, given that he had a live final written warning. In fact the respondent would have been entitled in the circumstances to consider that the claimant's refusal to work was gross misconduct, which would have led to summary dismissal. Either of these scenarios would have meant a far earlier dismissal.

60. However the respondent concluded that the issue was that there had been a complete breakdown in the essential term of mutual trust and confidence and it was no longer possible for the claimant's contract to continue. Accordingly the respondent submitted that the reason for the dismissal was properly identified as "some other substantial reason" and that this was the principal reason for the dismissal, namely the fact of the breakdown of the relationship.

61. As to the reasonableness of the decision and fair procedure the respondent relied on the two disciplinary hearings and two appeal hearings. Both the initial hearing and appeal hearings were carefully conducted with adjournments to consider the evidence further. The claimant was given ample opportunity to put his side of events He was given an opportunity to challenge the notes of the hearings during the disciplinary process but did not do so. The claimant was represented by a union representative – and he did not challenge the accuracy of the notes. The claimant had been through a grievance process including exercising his right of appeal in addition to an internal mediation. There had been an (attempted) external mediation . Although there was no further right of appeal the claimant went directly to Mr O'Shea, the CEO who passed the matter to Mr Brusa to attempt to find a mutually agreeable solution. The respondent had obtained a medical report from an occupational health consultant and made reasonable efforts to obtain a further report.

62. The claimant had gone off sick on 23 May 2018 and made it clear that he was not prepared to return unless or until his final written warning was expunged and he was returned to Willesden. This refusal had continued for eight months. The claimant was not clinically unwell. He was paid full company sick pay throughout.

63. It was reasonable for Mr Brusa to conclude that the claimant could not return to Willesden because:

    63.1 The claimant's grievances against Mr C were found not to be based on any evidence yet the allegations were serious and the claimant had called for Mr C's dismissal;

    63.2 The claimant had accepted no wrongdoing at all; he continued to maintain that the allegations against him had been fabricated and he took no accountability, nor did he believe he needed to change any of his behaviour; and

    63.3 The claimant had without any evidence accused a significant number of managers of collusion and having set him up.

64. Mr Brusa in evidence under cross-examination said that his intention was to give the claimant a fresh start at "neutral" location at which he would have the opportunity to make new relationships in an environment that he did not consider hostile or toxic. The claimant's final written warning would expire after 12 months and the claimant's record would be clean. One of the options included Cricklewood where Mr Brusa was the garage manager and he confirmed in evidence that he would have been very happy to take the claimant on there.

65. Mr Brusa's evidence, unchallenged by the claimant, was also that the claimant had shown that had the claimant shown any accountability or at least acknowledged that he had played a part in what had happened and agreed to some meaningful mediation, it might have been possible to place him back at Willesden on a trial basis to see if it was possible for him to return there without fear of similar further issues being raised.

66. The claimant was offered a choice of garages all of which were closer to his home: Potters Bar (where Mr Whitthread had confirmed that the racial issue had been dealt with there), Cricklewood or Holloway (all closer to the claimant's home address. Although internal mediation was unsuccessful the respondent attempted a further mediation in September 2018 with an external mediator but following a long meeting with the claimant and Mr Black he confirmed he would not agree to further mediation since the mediator had no power to overturn the sanction.

67. Mr Brusa entered into a series of meetings with the claimant between November 2018 and the end of 2019 at which various options were discussed on a without prejudice basis. During this period the claimant

continued to reiterate that he had been set up and that he was guilty of no wrongdoing. The claimant maintained his position at the tribunal confirming that "to move anywhere on a final written warning was just setting me up to fail; it was never going to happen".

68. Mr Brusa attempted to refer the claimant back to occupational health but the claimant refused to attend until the day of the scheduled appointment, 18 January 2019 and when at the last minute he did decide to attend he arrived too late for the appointment. Mr Brusa's evidence, unchallenged by the claimant at the hearing, was that it was clear that to have invited the claimant to a further meeting to consider dismissing would have been utterly futile.

69. These submissions of the respondent were in writing and supplemented briefly orally.

The claimant

70. The claimant made brief submissions orally. I do not mean any disrespect if I refer to these briefly. In essence they were that he had done nothing wrong and therefore it was wrong to accept any sanction. In particular it would have been an admission of guilt on his part to "accept" the final written warning and the transfer to another garage. He referred to his excellent record and to his award in this regard.

Discussion and conclusion

71. In my judgment the reason for the dismissal (namely the set of beliefs in the mind of the relevant managers of the respondent at the time of dismissal) was the irretrievable breakdown in the relationship between the claimant and the respondent. Indeed, this was hardly challenged beyond the general assertions of a "conspiracy" against the claimant. For the reasons set out above I reject that there was any such conspiracy.

72. I accept for the reasons submitted by the respondent that the irretrievable breakdown in the relationship could be and was "some other substantial reason" within ERA s.97.

73. For all the reasons submitted by the respondent, I concluded that the respondent acted reasonably in treating the irretrievable breakdown as a sufficient reason for dismissal. They did all that was reasonably appropriate to try to resolve matters with the claimant and restore the relationship between the claimant and the respondent. This included the grievance hearings, the grievance appeal, the disciplinary meeting and disciplinary appeal as well as the attempts at different stages to mediate the dispute and the other communications entered into between the claimant and the respondent including the respondent's CEO, referred to above. The respondent further engaged or sought to engage occupational health professionals.

74. It was clear to me at the hearing and reiterated by the claimant on several occasions that there was nothing short of the respondent rescinding the final written warning and allowing him to return to Willesden garage which would have been satisfactory to the claimant. Anything else was “not an option” as he repeatedly told me.

75. In all the circumstances I find that there was nothing further that the respondent could reasonably have been expected to do, so that dismissal on the grounds of the irretrievable breakdown in the relationship was an entirely reasonable sanction for the respondent to adopt, as it did. Indeed, it is difficult to see what else they could have done.

76. As to alleged acts of misconduct:

    76.1 While it was a puzzle to me why a man with such a good record of long service would have concocted a grievance against Mr C (and therefore left with me with a suspicion that there might have been more to this than met the eye), the legal authorities make it clear that it is not for me to substitute my view for that of management. In this vein, there was plainly a reasonable basis on which the respondent could conclude (as it did) that the claimant had brought an unfounded complaint against Mr C;

    76.2 Again, while the question of whether the claimant went over the line between being assertive to being aggressive is bound to involve an element of subjective opinion (witness Mr Thomas’ view), there was plainly a sufficient basis on which the respondent could reasonably form that view. There was evidence of Mr Ali, Mr C and Mr Howells to that effect. Further, the respondent was faced with the claimant not being prepared (even if out of a sense of protectiveness) to disclose fully his sources or evidence to the contrary.

    76.3 Therefore in my judgment it was reasonable for the respondent to conclude as it did that the claimant had been guilty of the misconduct alleged.

    76.4 However, and more pertinently, having formed that conclusion, for the respondent without more to have rescinded the final written warning would, on the face of it, have been very difficult (as matter of staff relations, if nothing else) but even if that were not the case, it was simply unreasonable on the claimant’s part to require the rescinding of the final written warning, as a condition for his return to the Willesden garage. The company’s procedures had been completed (and other avenues exhausted) and however aggrieved the claimant may have felt, he was overreaching by presenting the respondent with this ultimatum.

Conclusion

77. I accordingly concluded that the dismissal was fair.

78. I cannot conclude without observing that I had considerable sympathy for the claimant. He was (as he said) an extremely proud man and was no doubt deeply upset by the fact that a grievance by him against Mr C resulted in a disciplinary sanction against himself. He rightly regarded himself as a

very valued employee, who had provided years of excellent service to the respondent and had a clean record throughout, up until the unfortunate events that occurred. It is most unfortunate that he allowed himself to become entrenched in an inflexible position to the extent which he did, so that he was unable to "move on". It is particularly sad given (as I understand) that the claimant has not yet been able to find suitable employment. I do hope that he can now put this unfortunate episode in his life behind him and use his no doubt excellent skills to find further employment.

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Employment Judge Bloch QC

Date: 28 May 2021

Sent to the parties on: 7/6/2021

N Gotecha
For the Tribunal Office