**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4104405/16**

**Held in Glasgow on 13, 14, 15 & 16 February 2017;
(Written Representations) 24 and 27 February 2017, & 2 March 2017; and
(Deliberation) 7 April 2017**

**Employment Judge: Ian McPherson**

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| **Mr Brian Keith Glassford** | **Claimant**<br>**Represented by:**<br>**Mr Paul Santoni - Solicitor** |
| **Royal Mail Group Limited** | **Respondents**<br>**Represented by:**<br>**Dr Andrew Gibson - Solicitor** |

**WRITTEN REASONS for**
**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**
**dated 5 May 2017 and entered in the Register**
**and copied to parties on 8 May 2017**

## Introduction

1. This case called before me, as an Employment Judge sitting alone, for a Final Hearing for its full disposal, including remedy if appropriate, further to a Notice of Final Hearing issued by the Tribunal to both parties` representatives on 26 October 2016.

## Claim & Response

**E.T. Z4 (WR)**

2. By ET1 claim form, presented by his solicitor, Mr Paul Santoni, of Messrs Freelands, Solicitors, Wishaw, on 25 August 2016, the claimant complained of unfair dismissal, and unlawful disability discrimination, arising from the termination of his employment with the respondents as a Delivery Postman/Driver on 23 May 2016. In the event that his claim before the Tribunal was to be successful, the claimant sought reinstatement to get his old job back, and compensation.

3. His claim was accepted by the Tribunal on 26 August 2016, and a copy served on the respondents requiring them to lodge an ET3 response by 23 September 2016. Further, the case was listed for a Case Management Preliminary Hearing to be held on 20 October 2016. By ET3 response, lodged on their behalf, on 13 September 2016, by Dr Andrew Gibson, Senior Solicitor and Solicitor Advocate, with Morton Fraser LLP, Glasgow, the respondents resisted the complaint brought against them.

4. They admitted that the claimant had been dismissed, but it was explained that he had been dismissed, with notice, for misconduct, and they denied that he had been unfairly dismissed as alleged or at all. Further, the claimant having sought reinstatement to his old job, they submitted that it would not be reasonable to expect the respondents to reinstate the claimant.

5. The respondents also submitted that, if the Tribunal found the dismissal to be unfair, any compensation should be reduced to reflect the claimant`s contributory conduct. As regards the claimant`s claim of disability discrimination, they submitted that it was misconceived, and it should be struck out and that, even if the claimant was a disabled person, which they denied, they had not discriminated against him because of his disability as alleged or at all.

**Initial Consideration**

6. Following initial consideration by Employment Judge Mary Kearns, on 15 September 2016, she ordered that the claim would proceed to the Case Management Preliminary Hearing already listed on 20 October 2016. On that basis, she did not instruct the issue of the standard Case Management Orders which would ordinarily be issued by the Tribunal as regards a forthcoming Final Hearing.

7. In the event, the Case Management Preliminary Hearing assigned for 20 October 2016 did not take place. That was because, on 22 September 2016, the claimant`s solicitor, Mr Santoni, wrote to the Glasgow Tribunal Office, advising that there was no need for the Preliminary Hearing, and that the case should simply be listed for a full Tribunal to determine the merits of parties` respective cases.

8. Mr Santoni explained, in that regard, that he had erroneously included within the ET1 that the claimant suffered from a disability, and while he had ticked a box to that effect, what was intended to be meant was that the claimant had an alcohol problem, and that the respondents had failed to address or deal with that at various levels to include dealing with the matter fully and comprehensibly with the claimant, for making due allowances with regard to the procedures followed which had a bearing on the fairness or otherwise of the dismissal and the procedures followed.

9. Further, on 22 September 2016, the respondents` solicitor, Dr Gibson, confirmed that as there were now no preliminary issues to discuss, as the claimant had withdrawn the apparent disability discrimination claim, he also saw the benefit of simply setting dates for a Merits Hearing and discharging the Case Management Preliminary Hearing fixed for 20 October 2016.

10. Accordingly, on instructions from Employment Judge Susan Walker, by letter dated 3 October 2016, parties' representatives were advised that a postponement of the Preliminary Hearing arranged for 20 October 2016 had

been granted, on the grounds that that Preliminary Hearing was no longer required, and that it was proposed to list the case for Final Hearing.

11. While Mr Santoni's email of 22 September 2016 had requested that the case be listed for a full Tribunal, the respondents made no submissions in that regard, and when the case was listed, for Final Hearing, by Employment Judge Lucy Wiseman, on 26 October 2016, she listed the case to be heard by an Employment Judge sitting alone.

**Final Hearing before this Tribunal**

12. When this case called for that Final Hearing, before me as an Employment Judge sitting alone, on Monday, 13 February 2017, the claimant was in attendance, accompanied by his solicitor, Mr Santoni, while the respondents were represented by Dr Gibson, solicitor, who appeared on their behalf.

13. I was presented with Joint Bundle of Documents, containing 30 documents, extending to 159 pages, as per an index provided, within a black A4 ring binder, which was produced for use at this Final Hearing. In the course of the Final Hearing, additional documents were added to that Joint Bundle, by both parties' representatives, with leave of the Tribunal.

14. At the start of the Final Hearing, I sought to clarify issues with both parties' representatives, and to discuss with them which witnesses were being called, and in what order, and, arising from that discussion, an issue arose as to the legal basis of the unfair dismissal head of complaint before the Tribunal.

**Clarification of the Issues before the Tribunal**

15. Mr Santoni, the claimant's solicitor, explained that it was a complaint of automatically unfair dismissal, contrary to **Section 99 of the Employment Rights Act 1996,** as well as "ordinary" unfair dismissal, whereas Dr Gibson,

the respondents' solicitor, stated that he had understood it only to be a complaint of ordinary unfair dismissal, albeit the claimant had pled, in the course of the ET1 claim form, what was referred to as refusal of a **Section 57A** application to the respondents for time off for dependents.

16. While Mr Santoni frankly conceded that there was no reference to **Section 99** in the ET1 claim form, he submitted that the claimant was dismissed due to the **Section 57A** request, made of the respondents, and that was the case he wished to run before this Tribunal.

17. For the respondents, Dr Gibson stated that no **Section 99** claim had been foreshadowed whatsoever, in the ET1 claim form lodged by Mr Santoni on the claimant`s behalf, and Dr Gibson further stated that he would have expected such a claim to have been expressly referred to, to allow the respondents to reply to it, and that is why he had proceeded to prepare for this case on the basis that it was a simple, unfair dismissal claim, involving consideration of the **Burchell** test and nothing more. If a **Section 99** case had been pled, Dr Gibson advised me that he would have responded to that automatically unfair dismissal claim in his ET3 response lodged on behalf of the respondents.

18. At that stage, I referred both parties' representatives to the Judgment of the Employment Appeal Tribunal in **Chandhok –v- Tirkey [2015] IRLR 195**, and in particular at paragraphs 16 to 18 of Mr Justice Langstaff`s Judgment in **Chandhok**, where the learned EAT President referred to the importance of the ET1 claim form setting out the essential case for a claimant. When I allowed an adjournment for Mr Santoni to handwrite an application for leave to amend the ET1 claim form, the clerk to the Tribunal provided a copy of the EAT`s Judgment in **Chandok** to both Mr Santoni and Dr Gibson for their information, as, somewhat to my surprise, neither solicitor was familiar with this case law authority.

19. Also, in that clarification of issues discussion with both parties' representatives, I had noted, from the date listing stencil returned by Mr Santoni, that he had estimated ¾ of a day being required, being ½ a day for the claimant, and 2 hours for a further unnamed witness, who would be speaking to meetings attended by the claimant. In reply, Mr Santoni confirmed that the only witness to be led on behalf of the claimant would be the claimant himself, and that there would not now be any further witness for the claimant.

20. For the respondents, I noted that 3 witnesses had previously been identified, and it was confirmed that these were Mr David Goldie, who conducted the fact finding meeting with the claimant; Mr Craig Wallace, who conducted the formal conduct meeting with the claimant; and Mr Graham Nielson, who conducted the appeal hearing with the claimant.

21. I had noted, in my pre-read of the case file, that on 2 February 2017, Dr Gibson, for the respondents, had applied to the Tribunal, under **Rule 46 of the Employment Tribunals Rules of Procedure 2013**, to allow evidence from Craig Wallace to be heard by the telephone, on the basis that Mr Wallace remains an employee of the respondents, but he now lives and works in London, and it was stated that it would cause Mr Wallace considerable inconvenience and the respondents would incur significant expense if Mr Wallace was required to travel to Glasgow and back to give evidence before the Tribunal.

22. In those circumstances, Dr Gibson, on behalf of the respondents, had submitted that it would be just and equitable to allow Mr Wallace the opportunity to give his evidence by telephone, and whilst the respondents acknowledged that this was not the ideal, it was submitted that there would be no prejudice caused to the claimant as both parties would be in a similar position.

23. By email, on 7 February 2017, Mr Santoni responded to that request from the respondents` solicitor stating that his view was that it was a matter entirely for the Tribunal, and he did not wish to cause undue expense to the respondents, or inconvenience to any witness, however, the way or from where a witness gives evidence was, he submitted, for the Tribunal, and he had no further input to make to the Tribunal`s request for comments.

24. On consideration of parties' correspondence of 2 and 7 February 2017, Employment Judge Laura Doherty, on 8 February 2017, had asked Dr Gibson to indicate, in broad terms, what Mr Wallace was intended to speak to and how long it was anticipated his evidence might take to complete.

25. In reply, on 8 February 2017, Dr Gibson had stated that Craig Wallace was the claimant`s line manager, who spoke to the claimant on the morning of 6 February 2016, when the claimant was requesting a day off, and that Mr Wallace`s next involvement in the case was to act as the dismissing manager at a formal conduct meeting, which led to the claimant being dismissed with notice, and that he would expect Mr Wallace`s evidence in chief to take around 1.5 hours.

26. On referral to Employment Judge Shona MacLean, on 7 February 2017, she directed that, while she had no desire to incur the parties in unnecessary expenses, she was concerned about a material witness giving evidence over the telephone, and she wondered if it would be possible for Mr Wallace`s evidence to be given over video link, as that would allow the Tribunal and representatives to see the witness while he was giving his evidence. Urgent comments were sought by return.

27. While no further comments were forthcoming from Mr Santoni, on behalf of the claimant, Dr Gibson, on behalf of the respondents, by email sent on Thursday, 9 February 2017, at 17:06 hours, informed the Tribunal that Mr Wallace would be happy to give evidence via video link, that he works in the Whitechapel area of London, and he had suggested to the clerk to the

Tribunal that it would be easier to hear Mr Wallace`s evidence first, but he understood that depended on the availability of video link conferencing room in a London Employment Tribunal Office, if this could be arranged.

28. Dr Gibson's email asked the Glasgow Tribunal clerk to inform him as soon as possible where Mr Wallace was to go and when and who he was to report to. Unfortunately, while Dr Gibson`s email of 9 February 2017 was received, and printed by the Tribunal administration on Friday, 10 February 2017, it was not referred to the Employment Judge, until immediately prior to the start of this Final Hearing, on Monday morning, 13 February 2017.

29. At this Final Hearing, Dr Gibson referred to his email exchange with the Glasgow Tribunal Office, on 9 February 2017, and he advised me that he had spoken with a male Tribunal clerk, whose name he thought was Paul (surname unknown), and that he had spoken to this clerk, on both Thursday 9 and Friday 10 February 2017, and he understood that the Glasgow Tribunal clerk was making arrangements with the London Employment Tribunals.

30. On hearing this explanation, I expressed some surprise that had been the information provided to Dr Gibson, and that I would take the matter up with the Tribunal`s local administration in Glasgow, but I enquired of him what he knew about what video facilities the Royal Mail had available in London to allow Mr Wallace`s evidence to be given by video link from London to the Glasgow Employment Tribunal.

31. Dr Gibson conceded, openly and frankly, that he did not know what Royal Mail had available by way of video link facilities, but it would be inconvenient for the witness to be absent from his place of work in London for up to 2 days, for up to 3 hours of evidence before the Tribunal, and, in addition, there would be travelling costs, and accommodation costs, to be incurred by Royal Mail for Mr Wallace travelling to and from Glasgow to London.

32. I advised Dr Gibson that any application for Mr Wallace`s evidence to be heard by telephone was refused, as a Tribunal could not properly assess credibility of a witness over the telephone, and, on that basis, Dr Gibson made application for Mr Wallace`s evidence to be taken by video. In reply, Mr Santoni, for the claimant, stated that his position was neutral, and he had no issues about taking Mr Wallace`s evidence by video link, if a video link could be established.

33. After an adjournment of the proceedings, caused by a fire evacuation of the Eagle Building, when the public Hearing resumed, Dr Gibson advised that one of his witnesses, Mr Nielson, the respondents' Appeals Manager, had made telephone enquiries, on his behalf, and he understood that Royal Mail, Victoria Embankment, London, had video facilities, which could be used for such a video link.

34. While I allowed Mr Wallace's evidence to be taken by video link, with arrangements for the video link to be made by Dr Gibson, on behalf of the respondents, and in consultation with the clerk to the Tribunal, so as to ensure compatibility and a effective link to the Glasgow Tribunal Office, Dr Gibson later, that same afternoon, advised the Tribunal that Mr Wallace had now been instructed by the respondents to attend, and give his evidence in person, which he duly did later in the week.

**Claimant's Schedule of Loss**

35. The other matter, discussed in advance of this Final Hearing taking any evidence, was the fact that, surprisingly, the Joint Bundle contained no Schedule of Loss for the claimant. In reply, Mr Santoni stated that there were still two issues outstanding, between him, and Dr Gibson, the respondents` representative, concerning the claimant`s claim for loss of pension rights, and share scheme, and that he had been in contact with the respondents` solicitor, but he did not think he had sent a Schedule of Loss to the respondents.

36. Dr Gibson, in reply, stated that he did not recall seeing any Schedule of Loss from Mr Santoni. Mr Santoni confirmed that the claimant still seeks reinstatement, as sought in the ET1 claim form, and Dr Gibson advised that all 3 of the respondents` witnesses, to be led at this Final Hearing, could address the matter of reinstatement being opposed by the respondents, in particular Mr Goldie, given he is still the Delivery Manager at Royal Mail`s Motherwell Delivery Office.

37. While, as noted earlier in these Reasons, no standard Case Management Orders had been issued by the Tribunal, requiring a Joint Bundle and Schedule of Loss, a Joint Bundle of Documents had been lodged, and I stated that I was somewhat perplexed and bewildered why no Schedule of Loss had been lodged by Mr Santoni, or requested by Dr Gibson. As such, I ordered Mr Santoni to produce a Schedule of Loss for the claimant by no later than 9.30am the following morning, Tuesday 14 February 2017, with copy to be sent to Dr Gibson for the respondents.

38. I pause to note and record here, that by an email sent at 19:00 hours on the evening of Monday, 13 February 2017, to the Tribunal Office, and copied to Dr Gibson, for the respondents, Mr Santoni intimated a Schedule of Loss for the claimant. At the start of proceedings on Tuesday, 14 February 2017, I allowed that Schedule of Loss for the claimant to be received, and added to the Joint Bundle, and I further ordered that Dr Gibson should produce a Counter Schedule, and lodge it with the Tribunal, with copy to Mr Santoni, for the claimant, by no later than 9.30am the following morning, Wednesday, 15 February 2017.

39. It was duly produced by Dr Gibson, and, on 15 February 2017, I allowed the respondents' Counter Schedule to be received, and added to the Joint Bundle, as also their Further and Better Particulars, replying to the **Section 99,** automatically unfair dismissal complaint, which I allowed Mr Santoni to add to the ET1 claim form, as detailed below.

**Claimant`s application to amend ET1 claim form allowed by the Tribunal**

40. In the course of discussion with Mr Santoni, and Dr Gibson, on the morning of Monday, 13 February 2017, the first day of this Final Hearing, Mr Santoni tendered a handwritten, application for leave to amend the ET1 claim form, in the following terms, to add a new **paragraph 13** to the paper apart to the ET1 as follows:-

> "***13. Separately and additionally the Claimant was automatically unfairly dismissed in terms of Section 99 of the Employment Rights Act in the respect of the facts above mentioned in relation to his request for time off in terms of Section 57A of the said Act, and his dismissal in relation thereto***."

41. Having heard submissions from Mr Santoni, solicitor for the claimant, then from Dr Gibson, the respondents` solicitor, in opposition, and Mr Santoni again, in reply, I adjourned, at around 12.15pm, for private deliberation in chambers, the Tribunal clerk providing to both parties' representatives, at around 12.30pm, a copy of the Court of Appeal`s Judgment in **Abercrombie & Others –v- Aga Rangemaster Ltd [2013] EWCA Civ 1148; [2013] IRLR 953**, and in particular, the Judgment of Lord Justice Underhill, at paragraphs 42 to 57 in particular.

42. When proceedings resumed again, at around 12.45pm, I heard further submissions from both parties` representatives, concerning judicial guidance on amendment applications, from the Judgment in **Selkent Bus Co Ltd –v- Moore [1996] ICR 836**, and **Abercrombie & Others –v- Aga Rangemaster Ltd** following which, at around 12.55pm I again adjourned, for lunch, and for private deliberation in chambers, resuming the public Hearing at around 2.05pm, when I read, *verbatim*, from the following Note, written in chambers, during the lunch adjournment, as follows:-

"***Having carefully considered Mr Santoni`s application, intimated this morning, for leave to amend the ET1 claim form to add a new paragraph 13 to the paper apart, to separately and additionally add to the claimant`s claim, a complaint of automatically unfair dismissal, in terms of Section 99 of the Employment Rights Act 1996, and having taken account of Dr Gibson`s objections to that application for leave to amend, I have decided, in the interests of justice, and consistent with my duty under Rule 2 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 to deal with the case fairly and justly, including saving expense and avoiding delay, and also to ensure that there is fair and adequate notice of the claimant`s case, that the amendment be allowed, there being no impact on the need for any further witnesses than those already identified by both parties, and the Tribunal still being able, on the basis of parties` representatives` timetabling estimates, to conclude their case in the allocated 4 days for this Final hearing, notwithstanding the Tribunal has had to vacate tomorrow afternoon on account of my own non-availability. I will issue written Reasons later under Rules 61 and 62.***

***In allowing the amendment, I allow Dr Gibson, solicitor for the respondents, the right to lodge any Further and Better Particulars in reply, augmenting what is already stated on the respondents` behalf in the ET3 response, and to do so in writing, by intimation to the Tribunal, and copied to Mr Santoni, by no later than 9.30am tomorrow morning, Tuesday, 14 February 2017, being the same time for compliance as I set earlier today for Mr Santoni to intimate to the Tribunal, and copy to Dr Gibson, his detailed Schedule of Loss for the claimant.***

***I will reserve the matters of Costs, or Expenses occasioned by this late application for leave and its impact on this Final***

> ***Hearing to be addressed by both parties` representatives` in their closing submissions to the Tribunal. We will now discuss scheduling of witnesses, which party leads evidence first, and the need for any Timetabling Order under Rule 45, as also arrangements for Mr Wallace`s evidence to be taken, by video conferencing in terms of Rule 46.***"

43. My oral ruling, allowing the claimant`s application for leave to amend the ET1, having been given, Dr Gibson indicated that he was withdrawing his application for video evidence in respect of Mr Wallace, who would now be attending and giving evidence in person, and he further sought leave of the Tribunal to delete the first, and third sentences, in paragraph 14 of the paper apart grounds of resistance attached to the ET3 response form lodged on 13 September 2016.

44. There being no objection to the deletion of those two sentences, by Mr Santoni, the claimant`s solicitor, I allowed those two sentences to be deleted. For the record, the two sentences deleted read as follows:-

> "***The Claimant had at no time prior to 6 February 2016 intimated to the Respondent that he was the carer for a dependent person".***
>
> ***"The Claimant could have informed the Respondent that he was a carer for a dependent person so that any reasonable request for time off could be accommodated."***

**Further & Better Particulars for the Respondents**

45. In the respondents` Further and Better Particulars, intimated on 14 February 2017, they denied that the reason or principal reason for the claimant`s dismissal was related to time off under **Section 57A of the Employment Rights Act 1996**, and reiterated that the claimant was dismissed by reason

of conduct, he having taken an unauthorised absence on Saturday, 6 February 2016.

46. Further, the respondents stated, in their Further and Better Particulars, that it became clear to them at the appeal hearing that the claimant did so because he was under the influence of alcohol on the morning of Saturday, 6 February 2016, whilst on a two year suspended dismissal for attending work whilst under the influence of alcohol on 24 July 2015, and that the claimant was not making a request for time off, covered by **Section 57A**, but he was trying to avoid attending for work whilst under the influence of alcohol.

## Findings in Fact

47. I have not sought to set out every detail of the evidence which I heard nor to resolve every difference between the parties but only those which appear to me to be material. On the basis of the evidence heard from witnesses over the course of the Final Hearing, and the various documents included in the Joint Bundle of Documents before the Tribunal, the Tribunal has found the following essential facts established:-

### Claimant

(1) The claimant, aged 51 years at the date of the Final Hearing before the Tribunal, was born on 12 February 1966.

(2) He was formerly employed by the respondents, as an Operational Postal Grade ("***OPG***"), and his employment with them started on 19 April 1993, and it was terminated on 23 May 2016. The Royal Mail has been his only full-time employment since he left school.

(3) For a 39 hour working week, the claimant was paid by the respondents at the rate of £472.41 gross per week, producing £355.52 net per week.

(4) No copy payslips were produced to the Tribunal by either party, nor was a copy of the claimant`s P45, issued to him by the respondents, following the termination of his employment with effect from 23 May 2016.

(5) The claimant was dismissed, on or about 29 February 2016, following a formal conduct meeting held on 23 February 2016, and he was dismissed with 3 months' notice, and placed on gardening leave for the bulk of his notice period, with his last day of attendance at work being 29 February 2016.

(6) His last day of service was 23 May 2016, and, as at that effective date of termination of employment with the respondents, the claimant had 23 years` full service with the respondents.

(7) Further, as at the date of dismissal, the claimant was in the respondents` pension scheme, and he also received other benefits, in particular those arising from his participation in the Royal Mail Share Incentive Plan.

(8) No vouching documents were produced to the Tribunal, by either party, in respect of the claimant`s membership of the respondents` pension scheme, and / or relating to the respondents' Share Incentive Plan.

(9) The claimant's ET1 claim form, at section 6, referred to the claimant's benefits in employment, and the respondents' ET3 response, at section 5, admitted that the claimant's brief details and specification of his benefits were correct.

**Previous Incidents involving the Claimant**

(10) In general, the claimant had a relatively unblemished employment record with the respondents although, at or around November 2014, when he attended for work smelling strongly of alcohol, and he stated he was not sure if he was fit to drive, he was sent home as being unfit to work and precautionary suspended, and thereafter given an informal reprimand by his first line manager, but that incident was not escalated to any formal disciplinary action taken nor recorded against him.

(11) Thereafter, on 24 July 2015, the claimant attended for work smelling strongly of alcohol, and as one of the duties he was expected to perform that day was driving, the claimant was sent home as being unfit to work, and precautionary suspended. Informal notes of a meeting with the claimant, taken by Craig Wallace, Delivery Manager, were produced at page 46 of the Joint Bundle.

(12) On 31 July 2015, the claimant attended a fact-finding interview with his line manager, David Goldie, and the claimant was accompanied by his trade union representative, James McKinstrey, a unit representative from the CWU trade union.

(13) Minutes of that fact-finding interview with the claimant, taken by Mr Goldie, and counter-signed by him and the claimant, as a true account of the interview on 31 July 2015, were produced at pages 47 and 48 of the Joint Bundle.

(14) At that interview, the claimant denied he had a problem with alcohol, and the outcome of the meeting was that the claimant had a case to answer and the matter was referred to Stewart Donaldson for a disciplinary hearing, as Mr Goldie considered the potential penalty to be outside his level of authority.

(15) Copy letter from Mr Goldie to the claimant, passing up the case to Mr Donaldson, was produced at page 49 of the Joint Bundle. It appeared to the respondents, at that stage, that the informal reprimand, issued to the claimant in or around November 2014, had not been sufficient to effect a change in the claimant`s behaviour.

**Suspended Dismissal**

(16) On 4 September 2015, the claimant attended a disciplinary hearing convened by Stewart Donaldson, Delivery Office Manager, at Hamilton Delivery Office.

(17) The allegation against the claimant, at that disciplinary hearing, was that he had reported for work, as a Royal Mail driver, on 24 July 2015, whilst being under the influence of alcohol, therefore being unfit to drive a Royal Mail vehicle.

(18) Following that formal disciplinary hearing, at which the claimant was represented, by his CWU unit representative, Mr McKinstrey, the allegation was upheld, and the Disciplinary Officer's decision was to issue a suspended dismissal which should remain on the claimant`s record for 2 years.

(19) Copy undated letter from Mr Donaldson to the claimant was produced to the Tribunal, at pages 71 and 72 of the Joint Bundle, confirming the suspended dismissal to remain on the claimant's record for 2 years, and enclosing a summary and conclusions report detailing how Mr Donaldson made his decision to impose a 2 years suspended dismissal, rather than dismissing the claimant from the respondents' employment.

(20) At that disciplinary hearing, on 4 September 2015, the claimant admitted that he had reported for work while being under the

influence of alcohol and that he was unable to carry out his responsibility of driving a Royal Mail vehicle, and he also admitted that was the second time it had happened and he had been sent home on both occasions.

(21) The Disciplinary Officer, Mr Donaldson, considered that this type of behaviour was totally unacceptable and it worried him that the claimant had twice made a conscious decision to consume an amount of alcohol which would potentially put him above the legal limit to drive, and it was worrying to him that Mr Glassford was prepared to do so when who knows what could have happened if he had been allowed to drive a vehicle on that day.

(22) Taking all these facts into account, and also considering the claimant`s previous conduct record, Mr Donaldson decided the claimant should receive a penalty of a suspended dismissal, which should remain on his record for 2 years, and that the claimant should also be removed from all driving duties with immediate effect during this time to ensure his own safety and that of other road users.

(23) Although Mr Donaldson's letter to the claimant advised him that he had the right to appeal against this 2 years suspended dismissal, the claimant did not appeal against Mr Donaldson's decision to impose a 2 year suspended dismissal, although, by undated letter addressed to Craig Wallace, a copy of which was attached to the ET1 claim form, and a further copy produced to the Tribunal at page 11 of the Joint Bundle used at the Final Hearing, the claimant wrote:-

> "***I wish to register a grievance against the decision to remove me from my driving duty.***"

(24) Further, within that undated letter to Mr Wallace, the claimant further stated as follows:-

"***As you will be aware I recently received a 2yr suspended dismissal for being unfit for duty due to alcohol.***

***At my conduct interview with Stuart*** (sic) ***Donaldson after his questioning he stated that my offence could bring a penalty for dismissal however on this occasion he would be giving a lesser penalty of suspended dismissal. I was more than happy with this as after 25 years I would be quite despondent to lose my job.***

***During my meeting Mr Donaldson raised several points based on the information regarding my case, he also mentioned a previous incident, Jim McKinstrey my rep intervened at this point and stated that there was no correct procedural paperwork for this alleged incident and as such asked it be struck from the proceedings, Mr Donaldson agreed stating that he would make no further reference to this incident and it would not be used in the proceedings.***

***I received a letter from Mr Donaldson whilst on annual leave. It was his decision, Charge: major offence, Penalty: two year suspended dismissal.***

***I signed the top copy and sent it back to Mr Donaldson, I did not read any other attached correspondence (my error).***

***On return from my annual leave I was told by my manager that I had also been removed from my driving duty, this was not on the sheet I had signed, the manager pointed out that in his conclusion. Mr Donaldson had stated that he recommend removal from driving duties as well.***

***I accept my error in the offence I committed and I also accept the penalty given to me on the charge sheet, I am however disappointed to find that I have now after almost thirty years` service been placed back to spare man. I am also disappointed that Mr Donaldson used in evidence for his decision the incident that he had already agreed to discount.***

***Dismissal is considered to be the ultimate penalty, suspended dismissal just short, I believe I have now been given a double penalty for the offence and feel somewhat grieved.***

(25) Following the respondents' receipt of that undated letter from the claimant, sent sometime after his return from annual leave between 14 September and 4 October 2016 (according to the respondents' absence record card, produced at page 45 of the Joint Bundle), there was an informal meeting between the claimant, and Mr Wallace. That meeting was not recorded, and no further action was taken. According to the claimant`s evidence given at this Final Hearing, notwithstanding Mr Donaldson's recommendation (in September 2015) about him being removed from driving, he was subsequently driving Royal Mail vehicles, during the Christmas 2015 festive period.

(26) On 10 December 2015, Craig Wallace, the respondents' Delivery Manager, wrote to the claimant with a letter detailing an "***Attendance Review Outcome",*** and advising the claimant that, if he incurred any further absences from work, which exceeded the respondents' Attendance Standards, then further action might be taken by the respondents, which might lead to the claimant's dismissal under their Formal Attendance Process. Copy letter to the claimant, in this regard, was produced at pages 51 to 53 of the Joint Bundle.

**Events leading up to the Claimant's Dismissal from Employment**

(27) At around 05:30 hours on Saturday, 6 February 2016, the claimant phoned Motherwell Delivery Office to say he was not coming into work. He was told by a Mr Ronnie Cambridge, a Postman Higher Grade to phone back when the managers came in and, accordingly, the claimant phoned back at around 06:30 hours and spoke to Craig Wallace, the respondents` Delivery Office Manager.

(28) In that telephone conversation with Mr Wallace, the claimant informed Mr Wallace that he was not coming to work that day as he needed to get the house ready for his mother coming out of hospital the following Tuesday. Mr Wallace informed the claimant that this would be treated as an unauthorised absence, and he also informed the claimant that he should come into work, but they would try to get him the Monday off as annual leave.

(29) The claimant then was passed to speak to the Motherwell Delivery Office's CWU unit representative, Mr James McKinstrey, who told him that his absence would be unpaid, and that management would go down the conduct route if the claimant did not attend for work as he was rostered to do on Saturday, 6 February 2016.

(30) The claimant did not attend for work as he was rostered to do on Saturday, 6 February 2016, despite the terms of his telephone conversation with Mr Wallace, and Mr McKinstrey. He had a day off on Sunday, 7 February 2016, and on Monday, 8 February 2016, the claimant attended for work, as rostered.

(31) On his return to work, on 8 February 2016, the claimant was interviewed informally by David Goldie, his line manager, and Mr Goldie advised him that there would need to be a fact finding interview held to decide on further action. A written invitation was

thereafter issued to the claimant by Mr Goldie, by undated letter, copy produced at page 73 of the Joint Bundle, inviting the claimant to attend a fact-finding meeting " ***at 8.30am on 11/1/16***" (sic).

**Fact-Finding Interview**

(32) On 11 February 2016, the claimant attended a fact finding interview with Mr Goldie, at Motherwell Delivery Office. The claimant was accompanied by his CWU representative, Robert Brothwick, the CWU's area representative.

(33) At the fact finding interview, the claimant stated that he took the decision not to come into work on Saturday, 6 February 2016, because he had to get the house ready for his mother's return home from care on Tuesday, 9 February 2016, and he admitted he had been drinking on the evening of Friday, 5 February 2016, but he denied that he had a problem with alcohol.

(34) Notes of that fact-finding interview with the claimant, taken by Mr Goldie, and counter-signed by him and the claimant, as a fair account of the interview on 11 February 2016, were produced at pages 77 to 79 of the Joint Bundle.

(35) By letter to the claimant, undated, but sent on or about 16 February 2016, Mr Goldie advised the claimant that, following the fact finding meeting held on 11 February 2016, concerning the claimant`s unauthorised absence from work, the case had been referred to Craig Wallace for consideration of any further action, as Mr Goldie considered the potential penalty to be outside his level of authority.

(36) Mr Wallace wrote to the claimant, by undated letter, also sent on or about 16 February 2016, inviting the claimant to a formal conduct meeting at 7.15am on 19 February 2016 at Motherwell Delivery

Office. Copies of these letters were produced to the Tribunal, at page 80, and pages 80A/C, of the Joint Bundle.

**Formal Conduct Meeting**

(37) On 19 February 2016, the claimant attended a formal conduct meeting, otherwise known as a disciplinary hearing, held by Craig Wallace, Delivery Office Manager, at which the claimant was represented by Mr McKinstrey, his CWU unit representative.

(38) The claimant repeated his reason for not coming into work on Saturday, 6 February 2016, stating that his priority was his mother, and he could not see any other way out of it, and having been given the opportunity to state his case, the claimant denied that he had a problem with alcohol.

(39) Mr Wallace's amended notes of that formal conduct meeting with the claimant, taken by Mr Wallace, and counter-signed by him and the claimant, as an accurate account of the formal conduct meeting on 19 February 2016, were produced at pages 81 to 83 of the Joint Bundle.

**Claimant's Dismissal by the Respondents**

(40) On or about 29 February 2016, Mr Wallace, as chair of the formal conduct meeting, wrote to the claimant, advising that he had carefully considered all the circumstances of the case, and that his decision was "***Dismissal with Notice***", the claimant`s last day of service being noted as 29 February 2016.

(41) Mr Wallace enclosed, with his undated letter to the claimant, a decision report, setting out the employee background, the case

investigation outlined, his deliberations, and his conclusions, as also heads of decision which was in the following terms:-

> "***Mr Glassford was issued with a suspended dismissal in September 2015, he was also removed from driving duties as part of this case. The penalty was issued on 07/09/15 and as of 06/02/16 Mr Glassford is again involved in a conduct case. After considering the mitigation I still feel that Dismissal with Notice is the correct decision. Mr Glassford was given a suspended dismissal on his previous conduct case. As the previous case was the 2nd time he had been suspended for the same offence, I believe that the business really has tried to help Mr Glassford and give him the opportunity to change his behaviour. On the Saturday in question Mr Glassford was given all of the relevant facts about his situation, he was offered a day off on the Monday to help his situation, he was allowed the chance to seek council*** (sic) ***from the unit Union Representative and the Manager insured*** (sic) ***Mr Glassford understood the decision he was making, still Mr Glassford chose not to attend his work. Unfortunately, I see no other option as Mr Glassford has been given multiple chances. As there have been 3 serious incidents in November 2014, July 2015 and Feb. 2016 the correct decision in this case Dismissal with Notice***."

(42) A copy of Mr Wallace's dismissal notification letter, sent to the claimant on or about 29 February 2016, was produced to the Tribunal at pages 87 and 88 of the Joint Bundle. A copy of his decision report, enclosed with his letter, was produced at pages 89 to 92 of the Joint Bundle.

**Claimant's Appeal against Dismissal**

(43) On 1 March 2016, the claimant, having received Mr Wallace's decision letter and report, completed a *pro-forma* reply slip stating that he did wish to appeal against the penalty given, and he stated the grounds for his appeal shortly as follows:-

"***PERSONAL CIRCUMSTANCES***"

(44) No further specification was provided in that reply slip from the claimant. A copy of his Appeal reply slip was produced at page 93 of the Joint Bundle.

**Respondents' Consideration of the Claimant's Appeal**

(45) On 7 March 2016, Mr Graham Nielson, Independent Casework Manager, at Edinburgh West Delivery Office, Tallents House, wrote to the claimant inviting him to an appeal hearing on 21 March 2016 at Glasgow Mail Centre, Turner Street.

(46) Thereafter, on 21 March 2016, Mr Nielson wrote again to the claimant re-arranging the appeal hearing for Friday, 25 March 2016, at Motherwell Delivery Office. Relevant copy letters were produced to the Tribunal at pages 94/95 and 98/99 of the Joint Bundle.

(47) On 10 March 2016, Craig Wallace, Delivery Office Manager, wrote to the claimant, at Mr Nielson's suggestion, clarifying the claimant's last day of service, in the following terms, as per copy letter produced at page 97 of the Joint Bundle:-

"***I am writing to clear up the matter of your last day of service. We have waived your requirement to work your notice so your last day of attendance in Motherwell DO***

***was 29/2/16. The actual last day of service in terms of employment with Royal Mail will be 23rd May.***"

**Appeal Hearing by Independent Casework Manager**

(48) On 25 March 2016, the claimant attended for his appeal hearing with Mr Nielson, at Motherwell Delivery Office. The claimant was accompanied by his CWU representative, Mr Norrie Watson, the CWU divisional representative for Scotland & Northern Ireland.

(49) At his appeal hearing, the claimant`s representative, Mr Watson, informed Mr Nielson, the Appeals Officer, that the claimant had been under the influence of alcohol when he phoned the Motherwell Delivery Office on Saturday, 6 February 2016.

(50) It was only at this appeal hearing that the claimant stated he did have a problem with alcohol, but he also informed Mr Nielson that he had not taken up his GP`s offer of help to address his problem with alcohol.

(51) At the appeal hearing, the claimant confirmed to Mr Nielson that he had a current 2-year suspended dismissal on his conduct record which had been issued for coming into work smelling of alcohol.

(52) At no time prior to his appeal hearing, on 25 March 2016, did the claimant state to the respondents that he had a drink problem. On the contrary, when asked on numerous occasions if he had a drink problem, the claimant had answered in the negative.

(53) To the best of the respondents` knowledge, at no time during his employment with them did the claimant seek assistance from Occupational Health Services for counselling or assessment.

(54) A copy of the appeal hearing notes, prepared by Mr Nielson, the Appeals Officer, were produced to the Tribunal, at pages 103 to 108 of the Joint Bundle used at the Final Hearing.

(55) The claimant agreed with the notes of the appeal hearing being a true record, subject to some minor amendments he made, as set forth in his handwritten note of amendment, copy produced to the Tribunal at page 110 of the Joint Bundle.

**Appeal Outcome**

(56) On 12 April 2016, Mr Nielson wrote to the claimant informing him that his decision was to dismiss the appeal against dismissal, and uphold Mr Wallace's decision to dismiss the claimant with notice.

(57) In his letter of 12 April 2016 to the claimant, Mr Nielson stated as follows:-

> "***I have carefully considered the appeal that you presented to me on 25 March 2016.***
>
> ***I have now completed my re-hearing of the case and given full consideration to everything that was put forward at the appeal.***
>
> ***In the light of all the evidence, my decision is that you have been treated fairly and reasonably and therefore I believe that the original decision of dismissal with notice is appropriate in this case.***
>
> ***The reasons for my decision are in the attached document.***

***Your appeal is therefore rejected and your penalty stands.***

***This letter concludes correspondence with you regarding this appeal.***"

(58) A copy of that appeal outcome letter was produced to the Tribunal at page 111 of the Joint Bundle used at the Final Hearing. Attached to Mr Nielson`s letter of 12 April Mail Conduct Code/Policy, dated January 2013, a copy of 2016 there was an appeal decision document, a copy of which was produced to the Tribunal at pages 112 to 119 of the Joint Bundle, and which referred to the claimant's previous conduct record not being clear, but subject to a 2 years suspended dismissal expiring on 17 September 2017.

(59) The appeal decision document prepared and issued by Mr Neilson referred to the Royal Mail Group's Conduct Agreement with the relevant trades unions, and the Code of Business Standards.

(60) A copy of the National Conduct Agreement between Royal Mail Group, CWU and Unite, was produced to the Tribunal at pages 132 to 159 of the Joint Bundle.

(61) Although the National Conduct Agreement produced to the Tribunal is undated, it was agreed between parties' representatives at this Final Hearing that it replaced an earlier Royal which was produced at pages120 to 130 of the Joint Bundle.

(62) It was further agreed, between parties' representatives at this Final Hearing, that the claimant's previous disciplinary record had all been dealt with under the fact-finding interview, formal conduct meeting and appeal meeting procedures, as set forth in that earlier Conduct Code / Policy adopted by the respondents.

(63) In his appeal decision document, Mr Neilson, the respondents' Appeal Officer, made the following findings, at paragraphs 34 to 38, reproduced at pages 118 and 119 of the Joint Bundle, as follows:-

"***34.*** ***Mr Glassford has never denied that he planned to take the day off irrespective of the consequences which were pointed out to him by the delivery office manager and his trade union representative. Whilst, to an extent, I can understand his reluctance to take the advice of the delivery office manager on the matter I find it difficult to understand the reluctance to take the advice of his unit trade union representative. Why he did so will only be known to Mr Glassford but I am clear in my own mind that he was well aware of the consequences of his non-attendance at work on Saturday 6 February and wantonly ignored the advice given to him by his unit manager and his trade union representative.***

***35.*** ***Whilst I can understand Mr Glassford's desire to ensure the house was ready for his mother's homecoming I find it difficult to believe he thought no-one else in the family would have helped him to ensure everything was in place. After all I have no doubt that the rest of the family would have wanted to ensure everything was in place in order to avoid their mother returning to a nursing home or elsewhere if it wasn't.***

***36.*** ***The final point to consider is the penalty to be awarded. The Royal mail Conduct Agreement offers a range of [penalties up to and including dismissal without notice – i.e. summary dismissal – and I***

***have considered the merits of each. I am conscious of the fact that at the time of the appeal Mr Glassford had almost 23 years' service which on its own carries a good deal of weight. I have also noted that his conduct record is not clear and he has a 2-year suspended dismissal which does not expire until 7 September 2017 for attending work whilst being under the influence of alcohol.***

***37. The ethos of the Conduct Agreement is that of being corrective but I am not convinced that warding Mr Glassford a penalty of less than dismissal would have the desired effect given that his latest incident occurred only 5 months after he was awarded a 2-year suspended dismissal albeit for a different offence but alcohol was involved. In addition I remain unconvinced Mr Glassford is serious about tackling his alcohol problems and anything attempted now is, in my view, too little too late.***

***38. Accordingly, I believe the penalty of dismissal with notice to be fair and reasonable under the circumstances and thus Mr Glassford's last day of service remains 23 May 2016."***

**Claimant`s Circumstances post Dismissal**

(64) Since the claimant's dismissal by Royal Mail, his old job at Motherwell Delivery Office has not been filled by any permanent replacement, but it has been covered on *ad hoc* basis by other staff as and when required.

(65) As at the date of the Final Hearing before this Tribunal, the Tribunal was advised by the respondents that there were no vacancies open for an ordinary grade Postman at Motherwell Delivery Office.

(66) The claimant sought, in the event being successful in his claim of unfair dismissal, to be reinstated to his old job with the respondents, and, in his evidence to the Tribunal, he stated that he would like to be returned to his old job in Motherwell, with or without driving duties.

(67) He advised the Tribunal that he believed that with his old job back, he could get on with his work for the Royal Mail, as he had started his career as a working postman, and he did not see a problem in him returning to that job, even though his reinstatement was resisted by the respondents, on the basis that they believe the trust and confidence which an employer requires to have in their employee has broken down in the claimant's case, and it would not be reasonable to expect the respondents to reinstate the claimant.

(68) As at the date of the Final Hearing before the Tribunal, the claimant remained unemployed, in receipt of State benefit, through Universal Credit, and having been unable to secure any new employment with a new employer post-termination of his employment with the respondents.

(69) He continues to live at home with his mother, and in evidence he spoke of being on a "***Routes to Work***" programme, through the Job Centre, and going fortnightly to sign on, and try and find new employment. While he had not been offered any new job, as at the date of the Final Hearing, he spoke of being fit to work, but unfortunately he had not been able to find any new job, as yet, despite looking for a new job.

(70) There was produced to the Tribunal, at pages 54 to 63 of the Joint Bundle, and also at pages 62A and 63A/C, additional entries from the claimant's job search diary, as well as a copy of his CV, at pages 64 and 65, and additional vouching documents at pages 66 to 70 of the Joint Bundle.

(71) With Mr Santoni's written representations for the claimant, intimated post close of the Final Hearing, on 24 February 2017, he intimated supporting documents for the claimant requesting that these should be allowed in by the Tribunal as additional productions in relation to the case.

(72) While, on 2 March 2017, Dr Gibson, the respondents' representative, advised the Tribunal that he had no further comments or objections to make in regards to the claimant's request that the Tribunal should grant leave to allow the claimant's additional documentations to be received, after the close of evidence at the Final Hearing, the Tribunal has refused to grant that leave, for the reasons given later in the Reasons for this Judgment.

**Tribunal's Assessment of the Evidence led at the Final Hearing**

48. In considering the evidence led before the Tribunal, I had to carefully assess the whole evidence heard from the various witnesses led before me, and to consider the many documents produced to the Tribunal in the Joint Bundle lodged and used at the Final Hearing, which evidence and my assessment I now set out in the following subparagraphs:-

**(1) Mr David Goldie: Delivery Manager (Investigating Officer)**

(a) Mr Goldie, aged 50, was the first witness to be heard by the Tribunal on 13 February 2017, and continued on 14 February

2017. Employed as Delivery Manager at Motherwell Delivery Office, he was the claimant`s immediate line manager.

(b) In giving his evidence to the Tribunal, Mr Goldie did so under reference to the various documents lodged with the Tribunal, in the Joint Bundle lodged for use at the Final Hearing, identifying those to which he had access at the time of his involvement in the claimant`s case, and he explained his role, and his knowledge of the claimant`s employment with the respondents.

(c) Mr Goldie did so clearly and confidently, under reference to the relevant productions contained within the Joint Bundle lodged for use at the Final Hearing, and he was clear and articulate in answering questions put to him in examination in chief by Dr Gibson, and he was the subject of some cross-examination by Mr Santoni, on behalf of the claimant.

(d) Overall, Mr Goldie`s evidence relating to his role as Investigating Officer, in the incident leading to the claimant`s dismissal, and also his previous involvement in the claimant`s case, satisfied me that he was giving the Tribunal his best recollection of events, as best he could remember them, assisted by contemporary records from the material times, and he came across to the Tribunal as a credible and reliable witness.

**(2) <u>Mr Graham Nielson: Independent Casework Manager (Appeals Officer)</u>**

(a) I then heard evidence from Mr Nielson, aged 59, the respondents' Independent Casework Manager, and his evidence, on 14 February 2017, was continued over to the

following day, 15 February 2017. He is "independent", as in detached from the local management, but he is himself an employee of the Royal Mail, rather than an independent external consultant engaged to deal with appeals for the respondents.

(b) Mr Nielson spoke to his involvement in the claimant`s case, as Appeals Officer, including the key fact that he had upheld Mr Wallace`s decision to dismiss the claimant from the Royal Mail`s employment.

(c) Further, Mr Nielson gave his evidence under reference to the various documents lodged with the Tribunal, and in the Joint Bundle used at the Final Hearing, identifying those to which he had access at the time of making his decision to reject the claimant`s internal appeal against dismissal, and he generally explained his role, and his reasons for upholding Mr Wallace`s decision to dismiss the claimant from the respondents` employment.

(d) Overall, Mr Nielson was a witness who satisfied me that he was recounting events as best he could recall, assisted by contemporary records from the material times, and he came across to the Tribunal as a credible and reliable witness.

(3) **Mr Craig Wallace: Delivery Office Manager (Dismissing Officer)**

(a) Mr Wallace, aged 29, was the final witness for the respondents to be heard by the Tribunal, on 15 February 2017. His evidence was taken out of chronological order, due to logistical difficulties in securing his attendance to give evidence, in person, at this Hearing, he now working for the Royal Mail in Whitechapel, London, since October 2016.

(b) An application by the respondents to allow his evidence to be taken by telephone was refused, and while evidence by video conferencing was allowed, the respondents` representative, Dr Gibson, advised that arrangement had been made by Royal Mail for Mr Wallace to appear and attend in person. As such, his evidence was taken in the usual manner, by examination in chief, cross-examination by Mr Santoni, for the claimant, and questions by the Tribunal.

(c) In giving his evidence to the Tribunal, Mr Wallace did so under reference to the various documents lodged with the Tribunal, and in the Joint Bundle used at the Final Hearing, identifying those which related to his involvement in the claimant`s case, his knowledge and dealings with the claimant while employed by Royal Mail, as Delivery Office Manager at Motherwell, from August 2014 to September 2016, and, in particular, his involvement in making his decision to dismiss the claimant, and he explained his role, and his reasons for dismissing the claimant from the respondents` employment.

(d) Mr Wallace gave his evidence clearly and confidently, under reference to the relevant productions contained within the Joint Bundle lodged with the Tribunal, and used at the Final Hearing, and he was clear and articulate in answering questions put to him in examination in chief by Dr Gibson, for the respondents, as well as in cross-examination by the claimant`s solicitor, Mr Santoni, and in questioning by the Tribunal.

(e) Overall, Mr Wallace`s evidence relating to his role as Dismissing Manager was clear and consistent, and also in accord with the contemporary records taken at the time, and I was satisfied that he was giving the Tribunal his best

recollection of events, as best he could remember them, and he came across to the Tribunal as a credible and reliable witness.

(f) Although he is no longer working as Delivery Office Manager at Motherwell, Mr Wallace was able to give the Tribunal evidence, on behalf of the respondents, about the impracticality of reinstating the claimant to his old job at Motherwell Delivery Office, in the event his unfair dismissal complaint were to be upheld by the Tribunal.

(g) He spoke in evidence of the claimant's conduct record with Royal Mail being "***not very good for the business***", and, in answer to a point of clarification from me as the Judge, Mr Wallace further stated that it was not at all practicable to put the claimant back to his old job as that would "***send out the wrong message to the rest of the workforce."***

(h) I was particularly struck by his comment, in answer to a request for clarification from me, that Mr Wallace advised that Mr Glassford was the first person he had had to dismiss within the Royal Mail, that he had not taken that position lightly, and that the claimant's Trade Union had been trying to get him a "***further chance"***, even although the claimant was already on a 2 year Suspended Dismissal, being disciplinary action just short of dismissal.

**(4) <u>Mr Brian Glassford: Claimant</u>**

(a) The final witness heard by the Tribunal was the claimant himself, aged 51, and his evidence was taken on 15 February 2017.

(b) While I am sure the claimant was doing his best to recollect matters as best he could recall them, regrettably even with the benefit of the copy documents produced to the Tribunal in the Joint Bundle, he was often unable to clearly recollect matters. In his opening evidence in chief, the claimant advised his solicitor, Mr Santoni, that he has problems with his memory, and that he has noticed this over the years.

(c) That perhaps explains why the claimant appeared unsure at certain points in his evidence to the Tribunal as to what had, or had not, happened at the various investigatory, disciplinary and appeal meetings held with the respondents. It may be, of course, that this was down to no more than his nerves in giving sworn evidence in a public Hearing before the Tribunal, but he generally did not come across as a good historian of events.

(d) The claimant accepted the respondents' chronology of events about the dates of meetings at which he was present, he agreed that he had signed notes of various meetings, and he also agreed the dates and terms of the correspondence sent to him by the respondents, and he stated that none of the documents produced by the respondents in the Joint Bundle used at the Final Hearing were disputed by him.

(e) Overall, I felt that the claimant was not a confident or compelling witness. While not doubting his general credibility, I did have cause to have some doubts about the reliability of certain aspects of his evidence given to the Tribunal.

(f) It appeared to me that the claimant was suffering from a distortion of recall of events, and some changing of his position while giving evidence, and where there was a dispute

between his evidence, and that given to the Tribunal by the respondents` witnesses, all of whom were clear and consistent, I preferred their account of events.

(g) I thought it was particularly telling that, during his cross-examination, by Dr Gibson, solicitor for the respondents, the claimant stated that Mr Goldie had known him throughout his employment with Royal Mail, and that he had been aware of previous incidents, and so the claimant freely conceded stated that he could understand why Mr Goldie could not place trust in him anymore, and why the respondents resisted his reinstatement to his old job.

**(5) <u>Joint Bundle of Documents</u>**

(a) There was no real dispute between the parties about the documents included in the agreed Joint Bundle, and I was satisfied that the minutes of meetings, in 2015 and 2016, signed by the relevant Manager from the respondents, and also signed by the claimant himself, were good, contemporary evidence of what had been asked and answered at each of the investigatory, disciplinary and appeal meetings held with the claimant. Similarly, I was satisfied that the notes of meetings produced to the Tribunal in the Joint Bundle fairly and accurately recorded the gist of matters discussed at such meetings, albeit not a full ***<u>verbatim</u>*** record.

(b) Further, I was also satisfied, from the documents included in the Joint Bundle, about the terms of the correspondence entered into between the parties relating to the investigatory, disciplinary and appeal meetings held with the claimant, the outcomes of his disciplinary and appeal hearings, as also the terms of the relevant disciplinary and appeals procedures

adopted by the respondents, and applicable to the claimant's employment by Royal Mail.

(c) I pause here to note and record that, in the Joint Bundle, at documents 3 to 6, at pages 30 to 43, there were produced copy documents relating to a serious warning for late attendance procedures (10 March 2010), formal fact-finding interview notes (17 February 2011), and letter to the claimant, and interview notes regarding charges of persistent late attendance (4 March 2011), where a previous Cluster Operations Manager, Alan Connell, gave the claimant action short of dismissal, and an opportunity to address his attendance issues.

(d) These productions were not relevant to the claimant's misconduct resulting in his dismissal in May 2016 and they were, in any event, time expired by the time of his dismissal, the serious warning from 10 March 2010 then being more than 2 years old. In these circumstances, it is not clear to me why either party felt it relevant or necessary to include these productions in the Joint Bundle, except that the notes of 17 February 2011 refer in passing to the claimant sharing his house with an elderly dependant (presumably his mother) who needs case ( at page 36 of the Joint Bundle).

(e) Further, the Joint Bundle also included, at page 50, an e-mail of 6 August 2015 from a Bina Shah, Royal Mail HR Services to Craig Wallace, which refers to the claimant being on a reprimand from November 2014, but no contemporary documentation was produced by the respondents to vouch that the claimant had, at that time, received any disciplinary reprimand from the respondents. Indeed, it is appropriate to pause and note here that the respondents' record keeping as

an employer is not well evidenced by the paperwork in this case.

(f) As no standard Case Management Orders had been issued by the Tribunal, when the case was listed for Final Hearing, while a Joint Bundle had been prepared, without any formal Order of the Tribunal, it was disappointing to note, in the course of the Final Hearing, that additional documents required to be added to it, by both parties' representatives.

(g) Similarly, the absence of a Schedule of Loss for the claimant, without it having been called for by a standard Case Management Order, was mystifying, as both sides were professionally represented, by agents who have previous Employment Tribunal experience, and who should have known that a Schedule of Loss should have been included.

(h) Accordingly, it is disappointing to have to note and record that this was not an example of parties' representatives assisting the Tribunal in the overriding objective under **Rule 2** to ensure the case was dealt with fairly and justly, including avoiding delay and saving expense. Fortunately, by the Case Management Orders that I made, at the start of the Final Hearing, on my own initiative, the Final Hearing was able to progress, uninterrupted, and evidence conclude within the allocated sitting, thus furthering the overriding objective by avoiding delay.

**Closing Submissions**

49. At the close of proceedings on Wednesday, 15 February 2017, day 3 of 4, when it looked certain that evidence would conclude the following day, leaving only closing submissions, I enquired of parties` representatives

about how they proposed to address the Tribunal by way of closing submissions.

50. For the respondents, Dr Gibson stated that he would be working from a written skeleton submission, which he had already prepared in draft, whereas Mr Santoni indicated that he would be delivering oral submissions on behalf of the claimant. While not making a formal Order for parties' representatives to prepare, and tender to the Tribunal, written skeleton arguments of their respective closing submissions, I did state that it would be of assistance to the Tribunal, if both parties' representatives could seek to do so.

51. I am pleased to note, and record, here, that I am obliged to both Dr Gibson, and Mr Santoni, for their respective written closing submissions, which were handed up to me at the Hearing on Submissions, on Thursday 16 February 2017, following the close of the claimant`s evidence to the Tribunal.

**Respondents' Closing Submissions**

52. Dr Gibson's written submissions for the respondents, running to 9 typewritten pages, addressed matters by way of (a) background; (b) the issues relevant to the claim – unfair dismissal, and automatic unfair dismissal, and remedy; (c) the legal test and evidence, regarding the unfair dismissal complaint; (d) the automatic unfair dismissal complaint, and **Section 57A of the Employment Rights Act 1996**; and (e) remedy, including ***Polkey*** and contributory conduct. His written submissions referred to ***Burchell*** and ***Polkey***, both case law authorities well cited in unfair dismissal cases, but he did not produce copy judgments in either case, as I had advised both agents that it was not necessary to produce hard copies of well-known, familiar unfair dismissal authorities.

53. His written submissions did refer to one further case law authority, related to remedy, that he did not produce a hard copy judgment for, that being **Wood**

**Group Heavy Industrial Turbines Ltd v Crossan [1998] IRLR 680 (EAT).** He produced hard copy, judgments in two other cases, being: **Royal Bank of Scotland plc v Harrison [2009] ICR 116 (EAT)**, and **Qua v John Ford Morrison [2003] ICR 482 (EAT)**, both related to time off for dependants under **Section 57A of the Employment Rights Act 1996**.

54. The written submissions for the respondents are long, and detailed, and I have taken them fully into account in coming to my Judgment. A full copy is retained on the Tribunal`s case file, so it is not necessary to reproduce their whole terms here *verbatim*. Indeed, it is neither proportionate nor appropriate to repeat them here at length. Instead, I have extracted the following passages from those submissions, which I have taken to be Dr Gibson's main points on behalf of the respondents, as set forth in those written submissions, as follows:-

> "***Was the dismissal of the Claimant by the Respondent for the potentially fair reason of conduct?***
>
> *The stated reasons for the Claimant's dismissal were unauthorised absence.*
>
> *Whether that unauthorised absence was due to the Claimant still under the influence of alcohol when he contacted the delivery office on the Saturday or because he required time to organise his house in preparation for his mother's return is not really relevant to the question of the potentially fair reason of conduct. The conduct he was dismissed for was that whilst already on a two year suspended dismissal he failed to attend for work on Saturday 6 February 2016 despite being informed by his Line Manager and his TU rep that if he did so it would be treated as an unauthorised absence. He was obviously not told at that time that he would be dismissed if he did not come into work as that would be pre-judging a matter, but he was*

*certainly given a very firm indication that if he did not attend for work on Saturday 6 February 2016 it would be a conduct matter.*

*The Claimant seeks to argue that his dismissal was for an automatically unfair reason and to succeed in this will have to satisfy the Tribunal that conduct was not the reason for his dismissal. I will say more as to why his dismissal was not for an automatically unfair reason below. But what I would say in regards to the question of whether or not the dismissal of the Claimant by the Respondent for the potentially fair reason of conduct the fact that the Claimant did not attend for work on 6 February 2016 whilst already on a two year suspended dismissal in the knowledge that it would be treated as an unauthorised absence has never been in dispute.*

*It is clear that the dismissal of the Claimant by the Respondent was for the potentially fair reason of conduct.*

***Did the Respondent have a genuine belief that the Claimant was guilty of the allegations which led to dismissal?***

*There is no evidence that either Mr Wallace or Mr Nielson lacked a genuine belief that the Claimant had committed misconduct which warranted dismissal with notice. It was never put to either Mr Wallace or Mr Nielson that they lacked any such genuine belief.*

*Mr Wallace and Mr Nielson both gave evidence that they genuinely believed that the Claimant had taken an unauthorised absence whilst on a two year suspended dismissal against the express advice of his Line Manager and TU rep. Further, the Claimant has always accepted that he did not go into work on 6 February 2016, was on a two-year suspended dismissal at the time and was advised by his Line Manager and TU rep that if he did not go into work it would be treated as an unauthorised absence and a conduct matter. The only*

*thing he has said is that he did not think that would lead to his dismissal.*

***Was the Respondent's belief that the Claimant had committed misconduct based on reasonable grounds?***

*The Respondent's belief* (sic) *that the Claimant had committed misconduct was based on reasonable grounds.*

[8 detailed paragraphs are thereafter set out.]

***Did the Respondent conduct a reasonable investigation?***

*The Respondent's investigation cannot be seriously criticised. The only criticism levied at it is the lack of paperwork from the reprimand. This might be an issue if the Claimant had denied that the incident of Nov 14 had ever taken place or had made a significant issue of not having received a reprimand during the internal proceedings, but he did not. He was fully aware and fully accepting of the fact that he had turned up for work under the influence of alcohol in November 2014.*

***Was the decision to dismiss within the band of reasonable responses?***

*The Claimant was on a two-year suspended dismissal issued in July 2015 for attending work whilst under the influence of alcohol when in February 2016 he phoned in to the delivery office whilst under the influence of alcohol and asked for a day off. He was informed by both his TU rep and Line Manager that if he did not attend for work it would be treated as an unauthorised absence. He did not attend for work.*

*In all the facts and circumstances of this case the decision to dismiss with notice for misconduct fell within the band of reasonable responses. How many chances did the Claimant expect to be given? Two warnings had not changed his behaviour or led him to seek assistance with any drink problem. He took an unauthorised absence having phoned in to work still under the influence of alcohol. He is the classic example of a completely unreliable employee who has been given various opportunities to get himself sorted and fails to do so.*

***Was dismissal of the Claimant by the Respondent procedurally fair?***

*In terms of procedural fairness, it is necessary to consider the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures.*

*A failure to follow the Code does not render a dismissal unfair. However, compliance with the Code is a factor for the Tribunal to take into account when considering the reasonableness of the approach taken.*

*It is submitted that a fair procedure was followed and one which was compliant with both the Respondent's Conduct Code and the ACAS Code of Practice.*

*It is therefore submitted that overall a fair procedure was followed by the Respondent.*

[12 separate bullet points are then set out, with further explanation. The two references at the third bullet point to the claimant as "***her"*** is an obvious typographical error. ]

*Looking at the whole matter in the round, it is submitted that the Respondent adequately fulfilled each aspect of the **Burchell** test, conducted a fair procedure and the Respondent was entitled to conclude that dismissal was the appropriate outcome. The Claimant's claim should therefore be dismissed.*

***Automatically Unfair Dismissal***

[The respondents' detailed submissions are not included here, and reference is made to later in these Reasons, at **paragraph 112** below.]

***Remedy***

*In the event that the Tribunal is not with the Respondent in its principal submission that the Claimant's claim should be dismissed, then I now address the Tribunal in relation to remedy.*

*The Claimant seeks re-instatement. You have heard evidence from Mr Goldie, the Claimant's first line manager that he has lost trust and confidence in the Claimant and could not be fully satisfied that if placed in a like position again he would not act in a similar way. The Claimant had 2 disciplinary sanctions which did not have the desired corrective effect, one of which was still live at the time of his unauthorised absence. The Tribunal also heard in more general terms from Mr Nielson and Mr Wallace why they would not see the Claimant returning to Motherwell delivery office as something they would be supportive of. Mr Wallace made the point that he felt it would send the wrong message to other members of staff. Further, there is no position available in Motherwell delivery office at this time.*

*This is a case where the Respondent had a genuine belief based on reasonable grounds that the Claimant had committed the*

*misconduct. In these circumstances the law is clear - re-instatement would not be practicable.*

***Wood Group Heavy Industrial Turbines Ltd v Crossan** [1998] **I.R.L.R. 680** held that the remedy of re-engagement had very limited scope and would only be practicable, within the meaning of **Employment Rights Act 1996 s.116(3)(b),** in the rarest cases where there had been a breakdown in trust and confidence between employer and employee. Even where there has been a finding of unfair dismissal, the remedy in that context would invariably be compensation. Where, as in the instant case, allegations of serious misconduct were made and investigated by the employer who then formed a genuine belief as to the employee's guilt, the essential bond of trust and confidence that must exist between an employer and employee could not be satisfactorily repaired by the re-engagement.*

*In my submission this case is clearly one where allegations of serious misconduct were made and investigated by the employer who then formed a genuine belief as to the employee's guilt and therefore the essential bond of trust and confidence that must exist between an employer and employee could not be satisfactorily repaired by re-instatement.*

***Polkey***

*In the event that the Tribunal concludes that dismissal was unfair for any procedural reason then it is submitted that **Polkey v A E Dayton Services Limited** **1988 ICR 142** applies and an appropriate reduction to compensation should be made to reflect the likelihood that there would have been a fair dismissal in any event.*

*The Reprimand being taken into consideration is the only procedural unfairness I think is being argued in this case. In my submission the*

*Reprimand could be taken into consideration in regards to the dismissal because the reprimand and dismissal were sandwiched between a two-year suspended dismissal. It was relevant to the case as to why a two-year suspended dismissal was issued. The Reprimand was not considered in isolation. It was part of the overall picture of a continuing course of conduct.*

*If the Tribunal thinks there was procedural unfairness here I would argue that the Claimant would certainly have been dismissed anyway. He never denied having received the reprimand and in any event the reprimand had been superseded by a two-year suspended dismissal.*

***Contributory Conduct***

*Even if the Tribunal are to find that the Claimant's dismissal was unfair the Claimant has contributed to his dismissal by his conduct. The contributory conduct aspect to this case is the undisputed fact that the Claimant did not turn up for work on Saturday 4 February 2016 having been told that it would be treated as an unauthorised absence."*

**Claimant`s Closing Submissions**

55. Mr Santoni's written submissions for the claimant addressed matters by way of several chapters, namely:-

(1) the claimant`s reprimand;

(2) the letter from the claimant produced at page 11 of the Joint Bundle, which it was submitted constituted an appeal against the 2 year suspended dismissal issued in September 2015;

(3) the claimant`s alcohol addiction;

(4) the incident on 6 February 2016, and the resultant fact finding and disciplinary hearing;

(5) the statutory test in terms of **Section 57A of the Employment Rights Act 1996;**

(6) his arguments as to why the Tribunal should find that the claimant was unfairly dismissed; and

(7) matters relating to the preferred remedy of reinstatement, which failing, compensation; and

(8) the matter of any contribution by the claimant.

56. Mr Santoni produced no copy case law authorities with his written submissions, but he did hand up to me an extract from ***Harvey's HIREL***, Issue 240, pages J125 to J132.1, covering the "***Right to time off to care for dependants",*** at paragraphs **[720] to [733].** Further, on the matter of unfair dismissal remedies, he produced no copy authorities, but instead he handed up a copy of an extract from ***Tolley's Employment Handbook*** (30th edition, 2016), at pages 1329 to 1333, reproducing text and analysis of agreed rules from statute and case law on re-instatement and re-engagement, at sections **[54.1] to [54.6]** dealing with remedies open to the Tribunal for a successful unfair dismissal complaint.

57. Again, those written submissions for the claimant are long, and detailed, and I have taken them fully into account in coming to my Judgment. A full copy is retained on the Tribunal's case file, so it is not necessary to reproduce their whole terms here *verbatim*. Indeed, it is neither proportionate nor appropriate to repeat them here at length. Instead, I have extracted the following passages from those submissions, which I have

taken to be Mr Santoni's main points on behalf of the claimant, as set forth in those written submissions, as follows:-

*"**Reprimand***

*We submit that this is a fundamental issue which has been overlooked whether intentionally or not by the Respondents from at the very least July 2015 through to the present time. The issue to do with the non availability of the paperwork relating to the alleged reprimand which was first raised at the disciplinary hearing with Mr. Donaldson in September 2015…*

*Because of this point alone we submit any decision to (a) remit to disciplinary procedure by Mr. Goldie; (b) to invoke dismissal by Mr. Wallace; and (c) refuse the appeal by Mr. Neilson are all fundamentally flawed.*

*At no time during the fact finding or the disciplinary or the appeal discussions with the Claimant did anyone say that he had been the subject of a reprimand and that they sought to take into account the reprimand as a major factor in their determination.*

*Indeed the letter inviting the Claimant to the disciplinary hearing, production 80A, does not refer to that as a relevant consideration to be considered. It only refers to the two years suspended dismissal. Clearly neither the Claimant nor his representative would have notice that it was going to be relied upon by Mr Wallace. It should have been picked up in the appeal. It wasn't. If Mr Neilson was carrying out a full review then it does seem odd that such a pertinent fact of the employees' record was not checked by him.*

*Accordingly we say that the reliance on a reprimand being a formal disciplinary step invalidates not only the procedure in July 2015, but more importantly the dismissal decision and appeal decision.*

***Page 11 Letter.***

*It is accepted that Mr. Goldie and Mr. Wallace that they both had sight of the letter and this would have been in or about September October 2015. The Claimant was on holiday from 14 September to 4 October and it is not clear when the decision following the meeting on 4 September 2015 was actually communicated. The claimant says that he got the letter when he was on holiday at home.*

*Any proper interpretation of that letter must be that the issue of the reprimand and taking it into account in any respect was a fundamental issue. That aspect of the letter has plainly been completely ignored by the Respondents although plainly the issue was not pursued by the claimant as it should have been. We submit that if it was Mr Wallace who carried issued the reprimand, a suggestion that he hadn't and the paperwork wasn't complete, should have alerted him to this issue and he appears to have done nothing whatsoever about this. One would expect that if the matter was in doubt to forward copies of the relevant documents to the Claimant. Nothing was done.*

*Secondly, whilst there is an appeal form which plainly was not completed a reasonable interpretation of that letter would be that the decision reached was being sought to be appealed and again that was plainly ignored.*

*Even if we are wrong on this it plainly raises an issue of the validity or existence of a reprimand which was simply ignored.*

***The Claimant's alcohol addiction***

*The Claimant has accepted that he had an alcohol addiction. Tribunals are entitled to apply their own common sense and knowledge, if any, of such matters. We submit that as was put to Mr. Neilson people with an addiction have to get to a point where they accept they have an addiction and that they need help. If somebody is in denial of their addiction then plainly they are not going to seek help until they accept it.*

*… If the Tribunal accepts that he had a troubled employee who now has shed his troubles and is seeking to convert himself then that surely is what the entire Conduct Code as spoken to by various witnesses is meant to assist with.*

***Fact Finding on 6 February 2016 and Disciplinary Hearing***

*In relation to both of these effectively Mr. Goldie and Mr. Wallace had made up their mind that the Claimants request for leave was refused. And that therefore he should have been at work and he had an unauthorised absence. Consequently both Goldie and Wallace went into these meetings with their mind already made up.*

*…Whilst remarkably no objection was taken to this by the Claimant or his Representatives that does not mean that the Tribunal cannot consider whether this procedure or investigation was in any way fair or reasonable.*

*We submit that it is fundamentally completely and utterly unreasonable and fundamentally unfair and that there was no prospect whatsoever of the Claimant having a fair hearing. The result therefore was completely inevitable.*

***The incidents on 6 February 2016***

*It is open to the Tribunal to make its own interpretation of what the Claimant's position was that morning. On any view it appears to be broadly accepted that the Claimant was concerned about his mother's return home to try to get the house ready for her. If he was incompetent and disorganised that may be his problem. He was the person who was best able to access his ability or inability. If he thought he had to move a mountain whereas another person would have taken a much more organised and thorough and meticulous approach that is not the point. It is the position of the claimant at the material time that mattered.*

*… We submit that the standard to be applied is that from the position of the Claimant as he perceived matters on Friday night and Saturday morning. He did not know at that time what assistance or what level of assistance he would get and the decision cannot be assessed by hindsight as appears to have been done by everyone in particular Mr. Wallace and Mr. Neilson and in cross examination. As the Claimant said on the Monday and in the facts finding if he knew on Saturday what he knew on Sunday night then he would not have insisted on a day off.*

[To avoid unnecessary duplication, the remainder of the text of this part of the claimant's written submission is reproduced below, at **paragraph 111** of these Reasons.]

***Unfair dismissal.***

*For the reasons advanced above we say in brief in relation to the procedure:*

*Firstly: The procedure used for the fact finding and disciplinary hearing were completely unfair. The claimant could not get an impartial hearing. The outcome was inevitable. Neither Mr Goldie and in particular Mr Wallace should have conducted these.*

*Secondly: The reliance by Mr Wallace on the First Alleged Reprimand should not have happened. Separately and additionally it had expired. It should not have been relied upon.*

*Thirdly: In so far as reliance was being made on an alleged reprimand, it was not mentioned in the letter of invitation to the meeting and should have been.*

*Fourthly: if he intended to rely upon it and was aware of the dispute as to its existence, then that should have been produced and clarified. It wasn't.*

*In relation to the facts:*

*Firstly: That Mr Wallace substituted his opinion on necessity or emergency for that of the claimant without proper justification in evidence and simply applied hindsight to justify his conclusions.*

*Secondly: In any event his position was unreasonable in all the circumstances.*

*Thirdly: That whilst if this is not automatically unfair in terms of **Section 99**, that a proper consideration of the position in terms of **Section 57A** was still appropriate and simply not done.*

*That in any event the decision to dismiss fell outwith the band of reasonable responses in all the circumstances of this case.*

*For these reasons we say that the tribunal should find the claimant was unfairly dismissed.*

***Remedy:***

*The claimant seeks reinstatement in terms of **section 113/114**. The evidence from the Respondents effectively is that they don't trust him and therefore he can't get his job back. We submit that this really goes to the heart of the case and possibly the whole reasons here. If the Tribunal decide in favour of the Claimant, then that means the Respondents got it wrong. It does seem remarkably arrogant of them to suggest that if so ordered and told they got the dismissal wrong that somehow it is the claimants fault and can't be trusted.*

*It is for the employers to show that reinstatement is not practicable and to adduce evidence to that effect and we submit that they haven't. Ref **Tolley 54.4***

*We submit that it should be so ordered and that compensation as calculated per the schedule of loss should be awarded.*

*If an order is made and a there is a failure to reinstate then a further hearing should take place to assess damages and loss.*

*If the tribunal are not so minded to order reinstatement then we would ask for the orders for compensation as per our Schedule of Loss.*

***Contribution.***

*Our primary position is that there should be no contribution by the Claimant to his dismissal. He requested leave and was dismissed*

*for taking it. If it was reasonable for him to ask for it then dismissing him for taking it was plainly wrong and there can be no contribution."*

**Reserved Judgment**

58. In concluding proceedings, on the afternoon of Thursday, 16 February 2017, I reserved my judgment, and advised both parties` representatives that I would issue my full, written Judgment, with Reasons, in due course hopefully within 4 weeks after receipt of parties' further written representations, which I allowed in respect of certain matters related to the claimant`s Schedule of Loss, and the respondents` Counter Schedule.

59. I apologise to parties for the delay in producing my Judgment, and further delay in producing my Written Reasons. As was explained in the Tribunal's letter to parties' representatives, dated 12 April 2017, the initial delay in producing the Judgment, issued to parties on 8 May 2017, was due to other judicial business.

60. In a subsequent letter of 16 May 2017, parties' representatives were updated that due to the exigencies of other judicial business, I hoped to complete and sign off these Written Reasons, within around the following 2 weeks. Unfortunately, yet again, other judicial commitments impacted on that target in the intervening period, when I was arranging to give this outstanding writing priority, and the further delay has also been impacted as well by a recent period of annual leave.

**Parties` further Written Representations**

61. By letter from the Tribunal, dated 17 February 2017, both parties were advised, in writing, as regards my Orders, delivered orally at the close of the Hearing on Thursday afternoon, 16 February 2017, including an Order as regards both parties' representatives preparing further written

submissions restricted to submissions (and Joint Agreed Statement of Facts, if that could be agreed between them) as to the claimant`s asserted losses in respect of Share Save, loss of pension rights, loss of free English Heritage membership, and loss of free Xmas stamps.

62. This Order arose from the claimant`s Schedule of Loss intimated on 13 February 2017, and a reply thereto from the respondents, intimated on 14 February 2017, on the basis that the respondents` revisions to the claimant`s Schedule of Loss did not address the claimant`s heads of loss for these specific items, and the respondents` solicitor then awaited instructions from his clients about what the respondents agreed, or disputed.

63. Further, in that letter from the Tribunal of 17 February 2017, it was stated to both parties' representatives that the respondents should clarify whether or not they agreed those sums sought by the claimant were correct and due to the claimant, in the event of his claim of unfair dismissal being upheld by the Tribunal and, if they were not accepted, to explain why not. Parties' further written submissions were ordered to be produced by no later than 4pm the following Friday, 24 February 2017.

64. I pause to note and record here that, on 24 February 2017, Mr Santoni provided to the Tribunal, by email sent at 15:02, with copy sent to Dr Gibson for the respondents, his further written submissions, in a one page, typewritten document, extending to five numbered paragraphs, together with supporting documents, that he requested should be allowed in as additional productions in relation to this case.

65. In his written submission for the claimant, Mr Santoni stated as follows:-

> "**1.** ***The Claimant submits that the losses specified and the information provided per the Schedule of Loss represents***

***the losses which he has sustained and the benefits to which he was entitled.***

***2. The Claimant seeks leave of the Tribunal to lodge further documents being his Benefits Statement for the period ending 31 March 2015 which shows an annual pension build up of £5,842 which is the figure used per the Claimant's Schedule of Loss. The shares issued and lost and his Universal Credit Award.***

***3. We understand that the Respondent may assert that the pension contribution by the Claimant was 17.1%. Insofar as the Claimants*** (sic) ***have no basis for properly refuting that figure they*** (sic) ***accept the figure.***

***4. The Claimant produces the Share Statement indicating 832 shares that were issued to him which were forfeited. This was accepted in terms of the ET3 that 832 shares were issued and the dividends were paid as set out in the ET1.***

***5. We submit in the absence of any contrary information provided and documents provided by the Respondents, except as provided for herein, that the Claimants Schedule of Loss and the figure we had used and the dates used are justified."***

66. On 27 February 2017, Dr Gibson provided to the Tribunal, with copy sent to Mr Santoni for the claimant, his further written submissions, in an e-mail sent at 11:37, stating as follows:-

***"The earliest Mr Glassford could have traded his shares was on the third anniversary of receipt, that being 15 October 2016. His last day of service was 23 May 2016.***

***We can also comment that we accept that all employees get 50 free 1st class stamps at Christmas. Mr Glassford received these during Christmas 2015.***

***We have no information on the claim for Free English Heritage Membership or whether the Claimant had even taken his employer up on this benefit. It is not a loss if he had not made use of the benefit during his employment.***

***In the Royal Mail Pension Plan applicable at the date of dismissal the employer contributed 17.1% of the pensionable pay and employee contributed 6% of their pensionable pay."***

67. On 2 March 2017, having seen Mr Santoni's further submissions, I ordered that, within the next 7 days, Dr Gibson should advise whether or not the respondents had any comments or objections to make on Mr Santoni's request that the Tribunal should grant leave to allow the claimant's additional documents to be received after the close of evidence at the recent Final Hearing.

68. In his response to the Tribunal on 2 March 2017, copied to Mr Santoni for the claimant, Dr Gibson advised, by email sent at 12:53, that in regards to the Tribunal's letter dated 2 March 2017 the respondents had no further comments or any objections to make in regards to the claimant's request that the Tribunal should grant leave to allow the claimant's additional documents to be received after the close of evidence at the recent Final Hearing.

**Issues for the Tribunal**

69. This case called before the Tribunal for full disposal, including remedy, if appropriate. The principal issues before the Tribunal were to consider the respondents` liability (if any) for the claimant`s complaints of ordinary unfair dismissal, and automatically unfair dismissal and, if the Tribunal found the claimant to have been unfairly dismissed by the respondents, on either basis, then the further issue arising was for the Tribunal to proceed to determine the appropriate remedy, the claimant seeking reinstatement to his old job, in the event of success, and the respondents resisting that application for reinstatement.

**Further Productions intimated for the Claimant refused by the Tribunal**

70. Having received written representations from both parties' representatives, post close of the Final Hearing, I considered those written representations as received by the Tribunal, but I refused to allow the claimant's representative to lodge further productions on behalf of the claimant, the evidence having closed on 16 February 2017, and no good cause shown having been established as to why such productions should be received, when late, in circumstances where they could have and should have been lodged by the claimant's representative timeously for use at the Final Hearing.

71. In coming to that ruling, I am conscious of the fact that it might be seen by Mr Santoni and his client as unduly harsh, in the absence of any formal objection by the respondents, but I took the view that, despite Dr Gibson's neutral stance, I still have to be satisfied that it is in the interests if justice, and consistent with the Tribunal's overriding objective to deal with the case fairly and justly, to allow late productions.

72. I was not so satisfied. In terms of **Rule 2,** parties and their representatives have a statutory duty to assist the Tribunal to further the overriding objective

and in particular to co-operate generally with each other and with the Tribunal.

73. What I found somewhat troubling about Mr Santoni's approach to this litigation is that it can be conducted on his terms, and without regard to the undisputed fact that it is his duty to ingather relevant and necessary evidence to present to the Tribunal as part of the productions to be referred to or relied upon by the claimant at the Final Hearing. The reference to no standard Case Management Orders having been issued by an Employment Judge, at an earliest stage, is quite frankly a "***red herring***". This is a case where both parties are represented by professional agents with considerable experience of the Tribunal and its practices and procedures.

74. If there was a real difficulty on Mr Santoni's part in obtaining relevant information from the respondents, prior to the start of the Final Hearing, then Mr Santoni was at liberty, as any claimant's agent is, to make formal application to the Tribunal, at an early stage, for production of documents, or the provision of additional information, from the respondents, by way of a case management application under **Rule 30**. He took no pro-active steps to do so, and it is not appropriate that I allow him in now, late.

75. This case was listed for Final Hearing, by Notice issued by the Tribunal, dated 26 October 2016, for a 4 day Final Hearing starting on Monday, 13 March 2017. That extended period was more than sufficient time for the claimant's solicitor to have made, well in advance of the start of the Final Hearing, any appropriate case management applications, if his informal attempts, through Dr Gibson, had not borne sufficient fruit to give him the necessary documents / additional information he felt he needed to establish his client's losses.

76. While, at section 5.4 of the ET3 response, Dr Gibson, on behalf of the respondents, had accepted that the ET1 claim form details provided by the claimant about pension and other benefits were correct, there was nothing

in the paper apart to that ET3 response to provide any context to that acceptance of factual accuracy, and parties' agents had not agreed matters in any Joint Statement of Agreed Facts, prior to the start of the Final Hearing, or even after it, as I had suggested they might consider doing, when I closed formal proceedings at the end of the Hearing on Submissions on 16 February 2017.

77. Looking back, at section 6.4 and 6.5 of the ET1 claim form, the claimant's ET1 claim form merely ticked that he was in his employer's pension scheme, and ticked that he received certain other benefits, for which the only detail provided was "***Royal Mail Share Incentive Plan, SIP 832 Shares (Forfeited), Dividend 31/07/2015 £104.24, Dividend 13/01/2016 £58.24",*** but no relevant detail was provided in the paper apart to the ET1 claim form, and no relevant vouching documents were included in the Joint Bundle lodged for use at this Final Hearing.

78. Averring pension and other benefit entitlements is one thing, but in the absence of any Joint Statement of Agreed Facts, it is the responsibility of the claimant's representative in any claim before the Employment Tribunal to ensure that all relevant and necessary evidence is available to the Tribunal in time for the Final Hearing to vouchsafe a claimant's asserted losses arising from the termination of their employment, whether that be oral evidence, or documentary productions, to which a witness will speak in evidence to the Tribunal at the Final Hearing.

79. In the course of the claimant's evidence to me at this Final Hearing, when it appeared that the claimant was speaking of documents existing top vouch his attempts to secure new employment, post termination of employment with the respondents, it emerged that Mr Santoni had received further documents from his client, but simply forgotten to lodge them with the Tribunal, for which he offered his sincere apology, stating that that error was entirely his fault, and he had simply forgotten to lodge the supporting vouching documents received by him from the claimant, Dr Gibson, for the

respondents, took a very fair and pragmatic view, and he did not object to them being lodged late as productions 62A, 63A, and 63B/C.

**Relevant Law: Unfair Dismissal**

80. The law relating to unfair dismissal is contained in **Section 98 of the Employment Rights Act 1996** ("***ERA***"). It is for the respondents to establish the reason for dismissal as being one which is potentially fair in terms of **Section 98 (1) and (2) of ERA.** A reason for dismissal is a set of facts known to the employer, or it may be of beliefs held by the employer, which causes the employer to dismiss the employee: **Abernethy v Mott, Hay & Anderson [1974] ICR 323 (CA).** A reason for dismissal is potentially fair if it relates to the conduct of the employee.

81. The leading case law authority relating to conduct as a reason for dismissal is the Employment Appeal Tribunal's judgment in **British Homes Stores v Burchell** [**1978] IRLR 379 / [1980] ICR 303 (EAT)** which states that in order for an employer to rely on misconduct as the reason for dismissal there are three questions that the Tribunal must answer in the affirmative, namely, as at the time of the claimant's dismissal: -

- Did the respondents genuinely believe that the claimant was guilty of the misconduct alleged?
- If so, was that belief based on reasonable grounds?
- At the time it formed that belief, had the respondents carried out as much investigation into the matter as was reasonable in the circumstances?

82. The respondent employer's investigation does not require to be to the standard of an investigation which might be involved if a crime is thought to have been committed. The investigation must be within the band of

investigations which would be carried out by a reasonable employer. It must therefore be a reasonable investigation. This approach was confirmed by the Court of Appeal in the well-known case law authority of **Sainsbury Supermarkets Ltd v Hitt [2003] IRLR 23/[2003] ICR 111 (CA).** The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

83. Further, in considering the disciplinary sanction imposed by the respondents, the Tribunal must take care not to substitute its own view of what it would have done if in the shoes of the employer. If dismissal lies within the band of reasonable responses of a reasonable employer, it matters not that the Tribunal would have taken a different view as to the sanction which would appropriately be imposed in the circumstances of the case.

84. This band of reasonable responses approach, confirmed by the Employment Appeal Tribunal in the well-known case law authority of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439/ [1983] ICR 17 (EAT),** was also confirmed in further case law authority from the Court of Appeal in **Post Office v Foley; HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] IRLR 827/ [2000] ICR 1283 (CA).**

85. When considering whether or not dismissal is within the range of reasonable responses, the test is always the objective one of the reasonable employer; it is not a matter of the Tribunal's own subjective views : **London Ambulance Service NHS Trust v Small [2009] IRLR 563 (CA)).**

86. Nor is it a matter of the employer's own views as to the reasonableness of its disciplinary decisions. As was observed by Lord Justice Longmore, at paragraph 18, in the Court of Appeal's judgment in **Bowater v Northwest London Hospitals NHS Trust [2011] IRLR 331**:

> "...***the employer cannot be the final arbiter of its own conduct in dismissing an employee. It is for the Employment Tribunal to make its judgment always bearing in mind that the test is whether dismissal is within the range of reasonable options open to a reasonable employer."***

87. Further, following the well-known House of Lords' case law authority of **West Midlands Co-operative Society v Tipton [1986] IRLR 112/[1996] ICR 192 (HL)**, the respondent employer's actions during the appeal stage of any dismissal procedure fall to be considered in assessing the reasonableness of the dismissal process. It is plain from the House of Lords' Judgment in **Tipton,** applied by the Court of Appeal in **Taylor v OCS Group Ltd [2006] IRLR 613/ [2006] ICR 1602 (CA),** that in determining the reasonableness of an employer's decision to dismiss for a potentially fair reason, the Employment Tribunal must look at the whole of the disciplinary process, including any post-dismissal internal appeal.

88 If the employer succeeds in proving there was a potentially fair reason for the dismissal, then whether the dismissal is to be considered fair or unfair depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee. This question has to be determined, under **Section 98(4) of ERA,** in accordance with equity and the substantial merits of the case.

89. What has to be assessed is not whether the dismissal is fair to the employee in the way that is usually understood, but whether, with the knowledge that the employer had at the time (**Devis v Atkins [1977] ICR 662, HL**), the employer acted reasonably in treating the misconduct that they believed had taken place as reason for dismissal. It is not relevant whether in fact the misconduct took place. The question is whether, in terms of **Burchell,** the employer believed it had taken place (with reasonable grounds and having carried out a reasonable investigation) and whether in those circumstances it was reasonable to dismiss.

90. The Tribunal must be careful not to assume that merely because it would have acted in a different way to the employer that the employer has therefore acted unreasonably. There may be a band of reasonable responses to a given situation. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the respondent employer's decision to dismiss, including any procedure adopted leading up to dismissal, falls within that band of reasonable responses. If so the dismissal is fair. If not the dismissal is unfair.

91. If the Tribunal finds that the claimant has been unfairly dismissed by the respondents, then it can, subject to the claimant's wishes, order re-instatement to the old job, or re-engagement to another job with the same employer, or alternatively award compensation. The claimant has indicated in this case that she seeks an award of compensation only in the event of success before the Tribunal. Compensation is made up of a basic award and a compensatory award. A basic award, based on age, length of service and gross weekly wage, can be reduced in certain circumstances.

92. **Section 122(2) of ERA** states that where the Tribunal considers that any conduct of the claimant before the dismissal (or where the dismissal was with notice before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to

any extent, the Tribunal shall reduce or further reduce that amount accordingly.

93. **Section 123 (1) of ERA** provides that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer.

94. Subject to a claimant's duty to mitigate their losses, in terms of **Section 123(4),** this generally includes loss of earnings up to the date of the Final Hearing (after deducting any earnings from alternative employment), an assessment of future loss of earnings, if appropriate, a figure representing loss of statutory rights, and consideration of any other heads of loss claimed by the claimant from the respondents.

95. Where, in terms of **Section 123(6) of ERA**, the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, then the Tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

96. An employer may be found to have acted unreasonably under **Section 98(4) of ERA** on account of an unfair procedure alone. If the dismissal is found to be unfair on procedural grounds, any award of compensation may be reduced by an appropriate percentage if the Tribunal considers there was a chance that had a fair procedure been followed that a fair dismissal would still have occurred.

97. This approach (known as a **Polkey** reduction) approach derives from the well-known case law authority from the House of Lords' judgment in **Polkey v AE Dayton Services Ltd [1987] IRLR 503/ 1988] ICR 142 (HL),** and further principles have since been set out in by the Employment Appeal Tribunal in the case of **Software 2000 Ltd v Andrews [2007] IRLR**

**568 / [2007 ICR 825 (EAT).** In this event, the Tribunal requires to assess the percentage chance or risk of the claimant being dismissed in any event, and this approach can involve the Tribunal in a degree of speculation.

98. **Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA") provides that if, in the case of proceedings to which the section applies, it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice applies, and the employer has unreasonably failed to comply with the Code in relation to that matter, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase the compensatory award it makes to the employee by no more than a 25% uplift. The ACAS Code of Practice on Disciplinary & Grievance Procedures is a relevant Code of Practice.

**Relevant Law: Time Off for Dependants**

99. **Part VI of the Employment Rights Act 1996** deals with Time Off Work, including Time off for dependants. The relevant statutory provisions provide as follows:-

"***57A Time off for dependants.***

*(1) An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary –*

*(a) to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted,*

*(b) to make arrangements for the provision of care for a dependant who is ill or injured,*

*(c) in consequence of the death of a dependant,*

*(d) because of the unexpected disruption or termination of arrangements for the care of a dependant, or*

*(e) to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him.*

*(2) Subsection (1) does not apply unless the employee –*

*(a) tells his employer the reason for his absence as soon as reasonably practicable, and*

*(b) except where paragraph (a) cannot be complied with until after the employee has returned to work, tells his employer for how long he expects to be absent.*

*(3) Subject to subsections (4) and (5), for the purposes of this section " dependant " means, in relation to an employee –*

*(a) a spouse or civil partner,*

*(b) a child,*

*(c) a parent,*

*(d) a person who lives in the same household as the employee, otherwise than by reason of being his employee, tenant, lodger or boarder.*

*(4) For the purposes of subsection (1)(a) or (b) "dependant" includes, in addition to the persons mentioned in subsection (3), any person who reasonably relies on the employee –*

*(a) for assistance on an occasion when the person falls ill or is injured or assaulted, or*

*(b) to make arrangements for the provision of care in the event of illness or injury.*

*(5) For the purposes of subsection (1)(d) " dependant " includes, in addition to the persons mentioned in subsection (3), any person who reasonably relies on the employee to make arrangements for the provision of care.*

*(6) A reference in this section to illness or injury includes a reference to mental illness or injury.*

***57B Complaint to employment tribunal.***

*(1) An employee may present a complaint to an employment tribunal that his employer has unreasonably refused to permit him to take time off as required by section 57A.*

*(2) An employment tribunal shall not consider a complaint under this section unless it is presented –*

*(a) before the end of the period of three months beginning with the date when the refusal occurred, or*

*(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be*

*presented before the end of that period of three months.*

*(2A) Section 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a).*

*(3) Where an employment tribunal finds a complaint under subsection (1) well-founded, it -*

*(a) shall make a declaration to that effect, and*

*(b) may make an award of compensation to be paid by the employer to the employee.*

*(4) The amount of compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to –*

*(a) the employer's default in refusing to permit time off to be taken by the employee, and*

*(b) any loss sustained by the employee which is attributable to the matters complained of.*

100. While the above provisions are found in **Part VI**, they interrelate, in the event of a claim of automatically unfair dismissal, with the relevant provisions of **Part X of the Employment Rights Act 1996**, dealing with ***"Unfair Dismissal"***, and **Chapter I of Part X** dealing with the "***Right Not To Be Unfairly Dismissed"***.

101. So far as material for the purposes of the present case, the relevant statutory provisions in **Part X** are as follows:-

***"94 The right.***

*(1) An employee has the right not to be unfairly dismissed by his employer.*

***98 General**.*

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

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

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

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

*(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

*(b) relates to the conduct of the employee,*

*(c) is that the employee was redundant, or*

*(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

*(3) In subsection (2)(a) –*

*(a ) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*

*(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*

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

*(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

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

*(6) Subsection (4) is subject to –*

*(a) sections 98A to 107 of this Act, and*

*(b) sections 152, 153, 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).*

***99 Leave for family reasons.***

*(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if –*

*(a) the reason or principal reason for the dismissal is of a prescribed kind, or*

*(b) the dismissal takes place in prescribed circumstances.*

*(2) In this section " prescribed " means prescribed by regulations made by the Secretary of State.*

*(3) A reason or set of circumstances prescribed under this section must relate to -*

*(a) pregnancy, childbirth or maternity,*

*(aa) time off under section 57ZE,*

*(ab) time off under section 57ZJ or 57ZL,*

*(b) ordinary, compulsory or additional maternity leave,*

*(ba) ordinary or additional adoption leave,*

*(bb) shared parental leave,*

*(c) parental leave,*

*(ca) paternity leave, or*

*(d) time off under section 57A;*

*and it may also relate to redundancy or other factors.*

*(4) A reason or set of circumstances prescribed under subsection (1) satisfies subsection (3)(c) or (d) if it relates to action which an employee –*

*(a) takes,*

*(b) agrees to take, or*

*(c) refuses to take,*

*under or in respect of a collective or workforce agreement which deals with parental leave.*

*(5) Regulations under this section may –*

*(a) make different provision for different cases or circumstances;*

*(b) apply any enactment, in such circumstances as may be specified and subject to any conditions specified, in relation to persons regarded as unfairly dismissed by reason of this section.*

***111 Complaints to employment tribunal***.

*(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.*

**Discussion & Deliberation**

102. In the respondents` ET3 response, submitted by Dr Gibson, on 13 September 2016, the respondents' grounds of resistance to the unfair dismissal complaint brought against them, were set out as follows:-

"***15. It is admitted that the Claimant was dismissed but it is denied that the Respondents dismissal of the Claimant was either procedurally or substantively unfair.***

***16. The Claimant was dismissed with notice for misconduct, namely unauthorised absence. He had a poor conduct record in that he was already on a 2-year suspended dismissal. The Respondent was entitled to take the view that his unauthorised absence was also linked to excessive alcohol consumption.***

***17. The Claimant was dismissed for the fair reason of conduct. It is submitted that the Respondent had a reasonable belief that the Claimant had committed misconduct, conducted a reasonable investigation and aced reasonably in all the circumstances in treating the misconduct as sufficient reason for dismissing the Claimant.***

***18. The Respondent contends in the circumstances (including the Respondent's size and administrative***

***resources) it acted reasonably in treating the Claimant`s conduct as sufficient reason for dismissing her and that the Respondent had due regard to equity and the substantial merits of the case.***

***19. The decision to dismiss was within the band of reasonable responses. It is, therefore, denied that the Claimant was unfairly dismissed as alleged or at all.***

***20. If, which is denied, the Tribunal finds that the dismissal was procedurally unfair, the Respondent will rely on <u>Polkey –v- EA Dayton Services Limited</u> [1997] ICR 142 to argue that the Claimant would have been dismissed in any event and to seek a reduction in any award for compensation accordingly.***

***21. Further, if, which is denied, the Tribunal finds that the dismissal was unfair any compensation awarded should be reduced to reflect the Claimant`s contributory conduct.***

***22. The Claimant seeks reinstatement. The trust and confidence which an employer requires to have in their employees has broken down. It would not be reasonable to expect the Respondent to reinstate the Claimant."***

103. Those grounds of resistance to the "ordinary" unfair dismissal complaint were adhered to at the Final Hearing before me, and I took them into account, along with Dr Gibson's Further & Better Particulars for the Respondents, intimated on 14 February 2017, in reply to the claimant's amended ET1 claim form, adding the **<u>Section 99</u>** complaint of automatically unfair dismissal, all as referred to above, earlier on in these Reasons, at **<u>paragraphs 40 to 46</u>**.

104. In a nutshell, Dr Gibson's defence to the proceedings brought against the respondents was that the claimant had been fairly dismissed for a conduct related reason, that **Section 57A** does not apply, and that the claimant had not been automatically unfairly dismissed under **Section 99**. For the claimant, Mr Santoni's position was that the claimant had been unfairly dismissed and, separately and additionally, automatically unfairly dismissed.

105. Arising from parties` closing submissions to me, on 16 February 2017, it was not really in dispute that if the respondents` reason for dismissing the claimant related to his conduct, then that reason was a potentially fair reason for dismissal, in terms of **Sections 98(1) and 98(2) (b) of the Employment Rights Act 1996.** However, the claimant's submissions, as advanced by Mr Santoni, raised a separate, and additional, argument that there was a competing reason, and that it was the real, or principal, reason for the claimant's dismissal.

106. While neither Dr Gibson, nor Mr Santoni, made any reference in their closing submissions to me about the burden of proof, and the rules applicable to alleged automatically unfair dismissals, as compared to "ordinary" unfair dismissal, in coming to my Judgment I directed myself to the applicable test to be applied in considering the burden of proof in automatically dismissal cases, as that test was set out by Lord Justice Mummery in the Court of Appeal's well-known judgment in the whistleblowing case **of Kuzel v Roche Products Ltd [2008] EWCA Civ 380 / [2008] ICR 799 / [2008] IRLR 530 (CA).**

107. At paragraph 30 of that Judgment in **Kuzel,** the Court of Appeal specifically approved the approach previously taken by the Employment Appeal Tribunal when it had identified the following four questions for consideration, as follows:-

> *"The EAT held that the ET should have followed the approach as summarised by the EAT in paragraph 47. The EAT reviewed the*

*authorities, in particular the decisions of this court in* ***Smith v. Hayle Town Council*** *[1978] IRLR 413 and* ***Maund v Penwith District Council*** *[1984] IRLR 129, and considered the rival submissions. The EAT supplied a helpful analysis of the burden of proof, first by setting out a series of questions on the burden of proof and then answering them-*

> *"(1) Has the Claimant shown that there is a real issue as to whether the reason put forward by the Respondent, some other substantial reason, was not the true reason?*
>
> *(2) If so, has the employer proved his reason for dismissal?*
>
> *(3) If not, has the employer disproved the section 103A reason advanced by the Claimant?*
>
> *(4) If not, dismissal is for the s103A reason.*
>
> *In answering those questions it follows:*
>
> *(a) that failure by the Respondent to prove the potentially fair reason relied on does not automatically result in a finding of unfair dismissal under s103A;*
>
> *(b) however, rejection of the employer's reason coupled with the Claimant having raised a prima facie case that the reason is a section 103A reason entitles the Tribunal to infer that the s103A reason is the true reason for the dismissal, but*

*(c) it remains open to the Respondent to satisfy the Tribunal that the making of the protected disclosures was not he reason or principal reason for dismissal, even if the real reason as found by the Tribunal is not that advanced by the Respondent;*

*(d) it is not at any stage for the employee (with qualifying service) to prove the s103A reason."*

108. In coming to my Judgment in the present case, I took the view that the proper approach to the burden of proof for the purposes of a claim under **Section 99 of the Employment Rights Act 1996** is the same as is required in a case of automatically unfair dismissal by reason of whistleblowing brought under **Section 103A,** as per the approach set out in **Kuzel.**

109. There was no question, on the undisputed facts of the present case, where the claimant had significant length of service with the respondents, that the claimant lacked the necessary two year period of qualifying service so as to bring a complaint of "ordinary" unfair dismissal, in which event it would have been for him to prove the relevant prohibited reason for dismissal, by application of the long-established principle set out in **Smith v Hayle Town Council [1978] IRLR 413**, which continues to apply to complaints of automatic unfair dismissal where the claimant lacks two years' qualifying service, as per the EAT's judgment in **Ross v Eddie Stobart Limited UKEAT/0068/13.**

110. Accordingly, I considered whether the reason, or if more than one the principal reason, for the claimant's dismissal was a reason related to his conduct, or with him seeking to take time off under **Section 57A**. In so doing, I paid specific attention to the competing submissions made to me by Dr Gibson for the respondents, and Mr Santoni, for the claimant, in their closing submissions to the Tribunal.

111. In his closing submissions on **Section 57A**, part of which I have already recorded above in these Reasons, at **paragraph 57**, Mr Santoni had further stated that:-

> *"The Tribunal should apply a position in terms of **Section 57A** as to whether the employer was reasonable in refusing the request. We say that his position on Saturday could not have been otherwise considered other than to be a request for time off.*
>
> *The Respondents appear to have considered this to be a request in terms of their own procedures for either special leave with or without pay, neither of which was offered to him as what was offered by Mr. Wallace was a day off on Monday conditional upon him coming in on the Saturday. We submit that if operationally it made little difference to Mr Wallace if the Claimant didn't come in on the Saturday, then why not suggest he took the day off and reconsider the position on the Monday if he did or didn't need time off. The claimant said the Monday wouldn't be enough in addition. However he did turn up for work.*
>
> *Mr. Wallace's decision appeared to be based on whether or nor there was an emergency and him deciding that there was no such emergency. The word emergency does not appear on the legislation and is not the test. It may be in terms of the Respondents policies for special leave, which have not been produced. However the test here is whether the Claimant was entitled in terms of **Section 57A** to the right to leave. There is no need to use technical language for that section to apply for a request for leave. It appears that the Respondents and Mr. Wallace were completely oblivious to it.*

*The test in terms of **Section 57A** are:*

*Was the Claimant a Carer for a dependant?*

***57A 3 c and d** would apply; and **4** and possibly **5.** It doesn't appear to be disputed any longer from Monday this week that the Claimant was a carer.*

*The entitlement is in terms of **57A 1 b and d***

*AND must tell the employer as soon as reasonably practicable **57A 2 a***

*The Tribunal can therefore hold that the employers were unreasonable in their refusal to grant the leave. and if they were the Claimant has been automatically unfairly dismissed. The reason for the dismissal was taking unauthorised leave. "*

112. For the respondents, Dr Gibson, in his closing submissions, which I have already noted above in these Reasons, at **paragraph 54**, stated , as regards the automatic unfair dismissal head of complaint, that:-

***"Automatic Unfair Dismissal***

*The Claimant makes various averments in relation to **section 57A of the 1996 Act.***

*These are:-*

*The Claimant's mother was a dependent as defined in terms of **Section 57A of the Employment Rights Act 1996**. He was entitled to be permitted to take time off for a dependent.*

*Failure to consider any application in terms of **section 57A** was fundamentally unfair.*

*In terms of the procedure in February and at the Appeal the Respondents failed to take account of **section 57A** and its impact or effect in relation to the case. They elected to substitute their own decision as to what was reasonable for the Claimant to take off and deal with his personal affairs for his decision when the Claimant was best placed at the time he made the decision to make that determination.*

*The relevant parts of **section 57A** read:-*

[Not reproduced again, as recorded above under **Relevant Law**.]

*The leading case in this area is **Qua v John Ford Morrison** **[2003] I.C.R. 482** in which the EAT held that the right provided by **section 57A of the Employment Rights Act 1996** was a right given to all employees to be permitted to take a reasonable time off during working hours in order to deal with a variety of unexpected or sudden events affecting their dependants and in order to make any necessary longer term arrangements for their care; that the right was to a "reasonable" amount of time off in order to take action which was "necessary", and, in determining whether action was necessary, factors to be taken into account included the nature of the incident, the closeness of the relationship between employee and dependant, and the extent to which anyone else was available to assist, whereas the disruption and inconvenience to an employer were irrelevant; that an employee was not entitled to unlimited amounts of time off work even if on each occasion he complied with the relevant notice requirements and took a reasonable amount of time off; that, since the entitlement was to time off to deal with something unforeseen, once it was known that a child was suffering from an underlying*

*medical condition and likely to suffer regular relapses, the situation would no longer fall within **section 57A**.*

*If I understand the Claimant correctly he is seeking to argue that it was for him and not his employer to determine what "a reasonable amount of time off" was. I am not sure I agree with that submission for reasons that I hope are clear. The employer must be allowed some input into an assessment of what is "a reasonable amount of time off" might be otherwise the right would be entirely open to abuse. The Respondent must permit the time off - surely that suggests that they have a say in what is a reasonable amount of time off.*

*More importantly in this case however is the fact that the request that the Claimant made on the Saturday morning, "the reasonable amount of time off" he was asking for, was for one day. The "reasonable amount of time off" he was offered was for one day.*

*The Claimant was not asking on Saturday morning for both Saturday and Monday off. The Respondent offered him Monday off as a replacement for Saturday. Not in addition to. So "the reasonable amount of time off" that the Claimant was requesting was the same amount of time off that the Respondent was offering. The only difference was the date that time off would be taken and the amount of notice the Respondent had to accommodate the request. The right applies to the "amount" of time off, not when that time can be taken - as long as there is time for the employee to take the action which is necessary. At no time on the Saturday morning did the Claimant say he would take the Monday off as well. Indeed he did not and attended for work that day. He never gives an explanation as to why he refused this offer*

*Further, for **section 57A(1)** to apply the employee must tell his employer the reason for his absence as soon as reasonably practicable and tell his employer for how long he expects to be absent. In my submission the Claimant did not tell the Respondent the reason for his absence as soon as reasonably practicable. He could have phoned his manager on the Friday evening.*

*There can be no basis for arguing that on Saturday morning the Claimant might have been thinking that Monday alone might not have been enough so refused that option because for **section 57A** to apply he must tell his employer for how long he expects to be absent. He did - one day - and was offered one day.*

*Further, the Claimant knew that his mother was going to be coming out of the home 2 weeks prior to when she did. He gave his employer no forewarning that he would require time off in the next two weeks albeit he did not know the exact date.*

*Further, as in **Qua** where once it was known that a child was suffering from an underlying medical condition and likely to suffer regular relapses, the situation would no longer fall within **section 57A** as something unforeseen, once it was known that the Claimant's mother was to be discharged in the next two weeks the Claimant was not dealing with an something unforeseen.*

*This was not an emergency, which in my submission is the clear purposive effect of **section 57A**. The Claimant had 3 full days notice that his mother was being discharged on a specific date. He asked for one day off and was offered one day off. The real reason it had to be Saturday and not Monday that he took off has nothing to do with his mother and everything to do with the fact he was under the influence of alcohol.*

*The Claimant's definition of an emergency was that "a job had to be done". It was a peculiar part of the Claimant's evidence that he said in his examination-in-chief that he was unable to move all the items on his own. In that regard he was always going to require assistance to complete the work that required to be done. Requiring the time to do what had to be done was not the only issue. He required help. He would have needed to have sought this out if it had not arrived anyway."*

113. Having carefully considered the evidence, and parties' solicitors' competing submissions, I preferred the submissions advanced by Dr Gibson on behalf of the respondents. By Dr Gibson's deletions of averments in the ET3 response (as noted above, at paragraph 44 of these Reasons), there was no dispute at this Final Hearing that the claimant's mother was a person where he qualified as a carer for that dependant person , and so entitled to ask for time off to care for her..

114. However, on the evidence available to me, I was satisfied that the claimant did not request time off covered by **Section 57A**, because his unauthorised absence was not to deal with something unforeseen, sudden or unexpected. He had known for two weeks previously that furniture was being delivered for his mother. On the evening of Friday 5 February 2016, he was informed that his mother would be returning home on Tuesday 9 February 2016.

115. On receipt of this information, the claimant continued to drink alcohol during the evening of Friday 5 February 2016, when he had Friday evening, Saturday evening, all day Sunday and all day Monday to arrange furniture for his mother's return. In these circumstances, it is self-evident that there was nothing unforeseen, sudden or unexpected about the care he had to provide on his mother's return.

116. Further, I am equally satisfied that the **Section 57A** right is to take a reasonable amount of time off in order to take action which is necessary. On the evidence before me at the Final Hearing, I was satisfied that the claimant was offered a reasonable amount of time off in order to take action which was necessary, as he was offered the same amount of time off as he had informed the respondents that he was taking.

117. Again, on the evidence before me, it is clear that the claimant informed the respondents that he was not attending work on the morning of Saturday 6 February 2016, but it only became clear to them at the stage of the Appeal hearing before Mr Nielson that the claimant did so because he was under the influence of alcohol on the morning of Saturday 6 February 2016, and that whilst on a two-year Suspended Dismissal for attending work whilst under the influence of alcohol on 24 July 2015.

118. In these circumstances, it was clear to me that, at the relevant time, the claimant was not making a request for time off covered by **Section 57A**, but that he was trying to avoid attending for work whilst under the influence of alcohol, because he was well aware of the likely consequences for his employment if he did so.

119. In his submissions for the claimant, Mr Santoni laid great emphasis on the reprimand and on the claimant's letter at page 11 of the Bundle, arguing that the letter was an ***"appeal***". I found that argument to be quite without merit, having regard to the undisputed fact that the claimant's own words, in that letter, as I have recorded them in my findings in fact, at paragraph 47(23), was that he was registering a "***grievance***" (not against the 2 year Suspended Dismissal imposed by Mr Donaldson), but against the decision to remove him from his driving duty.

120. While Mr Santoni further argued that reliance on that reprimand invalidates the dismissal and appeal decisions, I reject that argument as wholly misguided, as it is clear that there was no appeal against the 2 year

Suspended Dismissal, and I equally reject the argument that a reasonable interpretation of the claimant's page 11 letter would be that he was appealing. The claimant's own written words defeat Mr Santoni's argument in this respect.

121. It is established law, as per the Court of Appeal's well known judgment in **Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374 (CA),** that, except in rare circumstances, such as where a prior warning was "***manifestly inappropriate***", it is generally not legitimate for an Employment Tribunal to go behind a final written warning given before an employee's dismissal. Further, in **General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43 (EAT),** the Employment Appeal Tribunal considered that the judicial guidance given in **Davies** limits the possibility of re-opening an earlier warning to circumstances where the warning was allegedly issued in bad faith, manifestly improper or issued without *prima facie* grounds.

122. No such challenge was made here in the present case, where Mr Santoni's concern about the non-availability of paperwork for the reprimand seems to have clouded his vision, given the letter inviting the claimant, at production 80A, refers to the 2 years Suspended Dismissal, and so that, and the implications of dismissal being a possible outcome, were clearly intimated to the claimant in advance of his disciplinary (conduct) meeting with Mr Wallace.

123. Having determined that there was only one reason for dismissal, and that it was the reason given by Mr Wallace in his dismissal letter, the next issue for the Tribunal to determine in this case was the fairness or unfairness of the claimant`s dismissal, having regard to the statutory test set forth at **Section 98(4) of the Employment Rights Act 1996**. It is useful, at this point, to remember the role of the Employment Tribunal in an unfair dismissal complaint.

124. As stated by His Honour Judge David Richardson, in the unreported Employment Appeal Tribunal judgment in **MBNA Ltd v Jones [2015] UKEAT/0120/15**, at paragraph 20, the role of the Employment Tribunal in an unfair dismissal complaint is as follows:-

> "***Where there is an appeal against a finding of unfair dismissal, the respective roles of the ET and EAT are well-known, but it remains important in a case of this kind to restate them briefly. It is the task of the ET to apply section 98(4) to all aspects of the employer's decision to dismiss: the investigation, the process, the conclusions and the sanction imposed. The ET must apply section 98(4), recognising that there may be a range of reasonable ways in which an employer may react to the circumstances which give rise to the dismissal. The question for the ET will be whether the employer's treatment of the case fell within the band of reasonable responses. It is an error of law for the ET to substitute its own view for that of the employer."***

125. Having carefully considered the whole evidence led before the Tribunal, I was satisfied that all three legs of the ***Burchell*** test had been satisfied, and that the respondents had a reasonable belief that the claimant was guilty of misconduct, that reasonable belief was formed on reasonable grounds, and that they had carried out as much investigation into the matter as was reasonable in the circumstances.

126. Further, I was satisfied that a fair procedure had been carried out by the respondents, and that it was fair to investigate matters before proceeding to a disciplinary hearing, and that the claimant had had an opportunity to know the allegations against him, to be accompanied or represented, and to put his case at both the initial disciplinary hearing, and at the later appeal hearing.

127. On the evidence available at the Final Hearing, I was satisfied that the respondents had done all of the following:-

- They carried out a fact finding interview;
- They invited the claimant to a disciplinary hearing in writing;
- They informed the claimant that if the charge against him was substantiated, then a possible outcome could be his dismissal;
- They gave the claimant full opportunity to make any representations at the disciplinary hearing;
- Mr Wallace took into account the points put forward by the claimant and decided on appropriate action;
- Mr Wallace gave evidence that he took into account the claimant's disciplinary record and length of service when making the decision to dismiss;
- The respondents provided the claimant with an opportunity to appeal, which he exercised;
- They allowed the claimant to be accompanied at the appeal hearing;
- Mr Nielson held an appeal hearing which was a full re-hearing of the case at which the claimant was allowed to be accompanied;
- Mr Nielson gave the claimant full opportunity to make any representations at the appeal hearing;
- Mr Nielson also gave evidence that he fully considered whether another lesser sanction would be appropriate; and

- Mr Nielson took into account the claimant's disciplinary record and length of service when making his decision

128. While it was suggested by Mr Santoni that there were some procedural irregularities here, and although not advanced as such as an unreasonable failure by the respondents to comply with the ACAS Code, I did not accept those arguments, as overall I was satisfied that the procedures adopted by the respondents were fair and reasonable.

129. Further, I thought it of note that Mr Santoni, in his Schedule of Loss for the claimant, did not advance any claim for a statutory uplift on any compensatory award (in terms of **Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992**), for alleged unreasonable failure to comply with any specific part of the ACAS Code.

130. Similarly, his written closing submissions were silent on any such argument being advanced on the claimant's behalf, and, in answer to a point of clarification raised by me, at the hearing of closing submissions, on 16 February 2016, Mr Santoni acknowledged that there was no claim for a **Section 207A** uplift in the ET1, or Schedule of Loss, and he accepted that the respondents had complied with the ACAS Code, and he had no submission to make for any statutory uplift.

131. Accepting that there was fair procedure, I turned then to the alternative argument on which it was asserted that the claimant's dismissal was unfair, and that is the submission made on the claimant's behalf that even if there was no procedural unfairness, Mr Santoni for the claimant nonetheless insisted that the claimant's dismissal was unfair, because he felt that the respondents' decision to dismiss the claimant ***"fell outwith the band of reasonable responses in all the circumstances of this case".***

132. His closing submission to that effect was build upon the foundation of what, in the ET1 claim form, paper apart, at paragraph 10, he had stated in

bringing the claim against the respondents, namely that : ***"The respondents sought to dismiss the Claimant in consequence of his actions in February. The decision to do so was completely unfair and unjustified and the decision and remedy imposed of dismissal fundamentally unreasonable in all the circumstances."***

133. In essence, the main point of this part of Mr Santoni's closing submissions to the Tribunal was that he did not believe it was within the band of reasonable responses for the respondents to take disciplinary action against the claimant, which resulted in his dismissal, with notice, and that it was outwith the band for the respondents to have dismissed his client.

134. Dr Gibson, for the respondents, took an entirely different view, submitting to me that there had been a procedurally fair dismissal , and that the respondents were entitled to conclude that dismissal was the appropriate outcome, and accordingly that the claim should be dismissed by the Tribunal.

135. In resolving these diametrically opposing positions, I reminded myself, when coming to my own judgment in this case, of the judgment of Lord Justice Mummery, in the Court of Appeal, in **London Ambulance Service NHS Trust –v- Small [2009] IRLR 563,** and the learned Judge's reminder to Employment Tribunals to guard against being drawn to re-trying a disciplinary case against the dismissed employee because of a consideration of what, in fact happened, ignores the issue with which the Tribunal ought truly to be concerned.

136. In ***Small,*** Lord Justice Mummery stated, at paragraph 43 of the Court of Appeal's judgment, as follows:-

> ***"It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often***

***comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."***

137. On this particular point, I recognised that this is primarily a matter for the employer, and the question is whether a decision to so label the conduct in question fell within the band of reasonable responses open to the employer in the circumstances. So too I recognised that the Tribunal must not substitute its view of the situation for that of the employer.

138. Guidance as to the interpretation of the relevant statutory provisions on misconduct dismissals has been given to ETs by the EAT, and higher Courts, over many, many decades now, so much so that, as Lord Justice Aikens stated, in **Orr v Milton Keynes Council [2011] EWCA Civ 62 / [2011] ICR 704 / [2011] IRLR 37( CA)**, that the case law on the interpretation and application of **Section 98 of ERA** is "***vast; indeed, it could be said that the section has become encrusted with case law."***

139. Fortuitously, Lord Justice Aikens then helpfully summarised, in 9 points, at **paragraph 78** of the Court of Appeal's Judgment, the relevant principles established by the case law, including, at point (9):***"The employment tribunal must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice."***

140. Having considered the matter carefully, I decided that the claimant`s conduct was indeed misconduct, being unauthorised absence, and I reminded myself that **Section 98(4) of the Employment Rights Act 1996** requires consideration of "***all the circumstances***". The test for unfair dismissal requires consideration of whether the employer acted reasonably in the circumstances, so a Tribunal should give consideration to whether any mitigating factors render the dismissal unfair, notwithstanding the misconduct, and such factors might include, amongst others, an employee's long service, general work record, work experience, position, and any previous unblemished disciplinary record.

141. As such, having carefully considered the evidence heard at the Final Hearing, I decided that the disciplinary officer in coming to the view that it was misconduct, and then the appeals officer upholding that decision, both acted fairly and reasonably in treating the claimant`s conduct to be what they both felt merited dismissal, with notice, as an appropriate sanction under the National Conduct Agreement with the relevant Trades Unions. Accordingly, I was satisfied that both of their decisions fell within the band of reasonable responses.

142. In coming to my Judgment, on this particular aspect of the case, I was mindful of paragraph 16 of the unreported EAT judgment from Lady Smith, on 15 June 2011, in **Strathclyde Joint Police Board v Cusick [2011] UKEATS 0060/10**, particularly her reference to the Lord Justice Clerk in **Arnott,** where the learned EAT Judge stated as follows:

> ***"16. If the "Burchell test" is passed and the dismissal is, accordingly, potentially fair, when it comes to considering, under Section 98(4) of the 1996 Act, whether it was fair, a tribunal requires to be careful to make an objective assessment. It must avoid falling into what is often referred to as the "substitution mindset": see, for instance, London Ambulance Service NHS Trust v Small***

> ***[2009] IRLR 563 CA. It is not a matter of the tribunal asking itself whether or not they would have dismissed the claimant. Further, the tribunal ought to consider the question of what a reasonable employer would have done in context; that is, by asking themselves not just what any employer, acting reasonably, would have decided but what a reasonable employer whose business/activities were the same as or similar to those of the respondent, would have done in the circumstances: see Ladbrokes Racing Ltd v Arnott [1981] SC159, where the Lord Justice Clerk referred to considering what "would have been considered by a reasonable employer in this line of business in the circumstances which prevailed".***

143. Finally, I wish to refer to the fact that, in coming to my Judgment in this case, I also had regard to the judgment of the Court of Appeal on 3 July 2015 in **Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677 / [2015] IRLR 734 (CA)**, where Lord Justice Bean, at paragraph 61, stated as follows:-

> ***The "band of reasonable responses" has been a stock phrase in employment law for over thirty years, but the band is not infinitely wide. It is important not to overlook Section 98(4)(b) of the 1996 Act, which directs employment tribunals to decide the question of whether the employer has acted reasonably or unreasonably in deciding to dismiss "in accordance with equity and the substantial merits of the case". This provision, originally contained in Section 24(6) of the Industrial Relations Act 1971, indicates that in creating the statutory cause of action of unfair dismissal Parliament did not intend the tribunal's consideration of a case of this kind to be a matter of procedural box-ticking. As EJ Bedeau noted, an employment tribunal is entitled to find that dismissal was outside the band of***

***reasonable responses without being accused of placing itself in the position of the employer. The authority he cited as an example among decisions of this court was Bowater v NW London Hospitals NHS Trust [2011] IRLR 331, where Stanley Burnton LJ said: -***

> ***`The appellant's conduct was rightly made the subject of disciplinary action. It is right that the ET, the EAT and this court should respect the opinions of the experienced professionals who decided that summary dismissal was appropriate. However, having done so, it was for the ET to decide whether their views represented a reasonable response to the appellant's conduct. It did so. In agreement with the majority of the ET, I consider that summary dismissal was wholly unreasonable in the circumstances of this case`."***

**Disposal**

144. As per paragraph (7) of my Judgment, having considered the whole evidence led, closing submissions and written representations from both parties, I found that the claimant was fairly dismissed by the respondents, for a conduct related reason, and not for any reason related to time off for dependants. Accordingly, I dismissed his complaint of unfair dismissal, and automatically unfair dismissal, as not well-founded.

**Closing Remarks**

145. The claimant not having succeeded on the merits of his case to establish the respondents` liability for an unfair dismissal, or an automatically unfair dismissal, it is not appropriate that I proceed, at length, to address the competing submissions from both parties' representatives on the matter of remedy, and appropriate compensation for the claimant.

146. As, however, I was addressed on remedy by both parties' representatives, and both the claimant and some witnesses for the respondents gave some evidence to the Tribunal about the disputed matter of re-instatement of the claimant to his old job, in the event of success with his claim being upheld by the Tribunal, I do consider it appropriate that I should make some closing remarks.

147. Suffice it to say here that even if I had found the claimant was unfairly dismissed, I would have reduced both his basic and compensatory awards, by a significant extent, based on his undoubted, culpable or blameworthy, contributory misconduct.

148. He was very much the author of his own downfall, and to that extent, reduction of his compensation would have been appropriate, in respect of both basic and compensatory awards. As such, I would have rejected Mr Santoni's submission that there should be no reduction in compensation for contributory conduct.

149. While Dr Gibson's written submissions were silent, on the extent of the claimant's contribution, in answer to a point of clarification raised by me, he stated that he sought 100% reduction, for both basic and compensatory awards, to reflect the claimant's contributory conduct, as set forth in his written responses to the claimant's Schedule of Loss.

150. In that document, Dr Gibson had stated that the whole situation could have been avoided if the claimant had turned up for work on the Saturday, and thereafter taken the Monday off as leave, but he did not turn up on the Saturday because he was "***still under the influence of alcohol and on a two-year suspended dismissal for like conduct."***.

151. In cross-examination by Dr Gibson, on 15 February 2017, the claimant agreed with the respondents' solicitor that if he had turned up for work on Saturday, 6 February 2016, he would have been doing so while under the

influence of alcohol, and he also accepted that he was still drinking between September 2015 and February 2016, including the Christmas 2015 period when he was driving Royal Mail vehicles, at the same time as he had an alcohol problem, which he only acknowledged at his Appeal hearing before Mr Neilson.

152. I also noted, from the claimant's cross-examination by Dr Gibson, that he accepted that the incident on 6 February 2016 leading to his dismissal was the third time, in 16 months, that he had been subject to the respondents' conduct proceedings, and that it occurred whilst he had a live 2 years' Suspended Dismissal still on his conduct record.

153 On further aspect of remedy that was disputed between the parties, at the Final Hearing, was the matter of re-instatement, in the event I found the claimant had been unfairly dismissed by the respondents. I drew to both representatives' attention the judgment of the UK Supreme Court in **McBride v Scottish Police Authority [2016] UKSC 27**, per Lord Hodge, and its discussion of the relevant law regarding reinstatement orders by Tribunals.

154. While, in Mr Santoni's written submissions, I had been referred to the copy extract from ***Tolley***, and Dr Gibson had cited **Wood Group**, I was somewhat disappointed that neither party's legal representative had identified, or referred me, to **Mc Bride**, a Scottish case very much to do with re-instatement, and which Glasgow ET case had been through several appeal judgments reported earlier in its progress through the judicial hierarchy.

155. At the lunchtime adjournment, on 16 February 2017, I advised both Mr Santoni and Dr Gibson to look at the Supreme Court's judgment, and address me on their further submissions on re-instatement in light of that judicial guidance.

156. Mr Santoni, in his further oral submissions, stated that having looked at the judgment on the Supreme Court website, the Tribunal should order re-instatement to the post of delivery postman / driver, and, as there is no difference in salary for a driver, it would then be for the Royal Mail to decide how to deploy the claimant, if he was re-instated by order of the Tribunal.

157. For the respondents, Dr Gibson stated that the claimant's job title is OPG (being Operational Post Grade) at Motherwell Delivery Office, albeit he had agreed the job title given in the ET1 claim form, as Delivery Postman / Driver, and Mr Santoni stated that he accepted that, if the Tribunal was minded to order re-instatement, then it should be to the accurate job title of OPG at Motherwell Delivery Office.

158. Had I found the claimant to have been unfairly dismissed, I would not have ordered his re-instatement. The EAT's judgement in **Wood Group**, as cited by Dr Gibson, vouches safe the proposition that a breakdown of trust and confidence between employer and employee may be sufficient to render re-employment impracticable, and I took on board, in that regard, the clear and convincing evidence from Mr Wallace about that re-instatement of the claimant to his old job would "***send out the wrong message to the rest of the workforce."***

159. Further, I also took account of the claimant's own evidence that he freely conceded how Mr Goldie, who had known him throughout his employment with Royal Mail, and who had been aware of previous incidents, could not place trust in him anymore, and why the respondents resisted his reinstatement to his old job. Allied to his undoubtedly contributory conduct, this was not, in my view, a case for re-instatement, or even re-engagement.

160. Next, and on a specific point in respect of which, at the Hearing on Submissions, I stated I would write more fully, I note and record here that in the claimant's Schedule of Loss, intimated on 13 February 2017, the

claimant's solicitor, Mr Santoni, sought a specific sum of **£2,300** compensation in respect of "***loss of statutory rights***" for 23 years' service. Dr Gibson, in his Counter Schedule responses, assessed that element of any compensatory award for the claimant at a significantly reduced figure of **£300**.

161. When, at the Hearing on Submissions, I queried Mr Santoni about the factual and legal basis for his asserted figure of **£2,300**, he advised that it was **23 years**' service at **£100 per year**, that being the agreed period of the claimant's continuous employment by the respondents, multiplied by an annual amount, which he had selected at £100 p.a. Somewhat tongue in cheek, I believe, rather than flippantly, he described his method of calculation for LOSR as down to his "***inspiration and genius***".

162. I stated then that I regarded **£2,300** as being an excessive amount compared to what is normally awarded by Tribunals, in my experience, as a nominal amount around £350 to £500, for a successful claimant., and I referred him to the well-known judicial guidance from the Employment Appeal Tribunal in **S H Muffett Ltd v Head [1986] IRLR 488 (EAT).**

163. The **Muffett** judgment was made during the time when the qualifying period for claiming unfair dismissal was raised from one to two years, and the EAT in **Muffett** decided to increase substantially the nominal sum awardable of £20 (at which it had stood since being set by the National Industrial Relations Court in **Norton Tool Co Ltd v Tewson 1972 ICR 501, NIRC**) to £100, on the basis that the pound sterling (£) had undergone considerable devaluation in the interim.

164. Further, it will be recalled that the qualifying period (in terms of **Section 108 of the Employment Rights Act 1996**) for claiming unfair dismissal changed from one to two years' continuous employment as from 6 April 2012, and so two years' is now the qualifying period for claimants complaining of unfair dismissal. While the EAT in **Muffett** noted that the

figure of £100 should be reviewed within 3 to 4 years, in fact, the figure awarded by Tribunals has remained fairly static since that time and appears largely unrelated to inflation and the retail prices index.

165. It is now fairly standard, if not common practice, for Tribunals to award nominal sums anywhere between £350 and £500. I am not aware of any judicial uprating of the figure suggested in **Muffett,** On that basis, even if I had found in favour of the claimant, I would not have awarded more than **£475**, being just over one week's gross pay, for loss of statutory rights.

166 Finally, I note and record here that, in closing submissions, in answer to a point of clarification raised by me, both Mr Santoni and Dr Gibson confirmed that neither party was seeking any costs or expenses arising from the delay in proceedings on the first day of the Final Hearing.

167. Similarly, I received no closing submission from Mr Santoni for reimbursement of any Tribunal fees to the claimant, in the event of success, and there was no sum for any Tribunal fees shown in the claimant's Schedule of Loss. As the claimant has not been successful, I need not consider that matter any further.

Employment Judge: G. Ian McPherson

Date of Judgment: 7 July 2017

Entered in register and copied to parties: 11 July 2017