EMPLOYMENT TRIBUNALS

Claimant: Mr S Myers

Respondents: R Soper Limited

HELD AT: Manchester **ON:** 4 & 5 January 2017
3 February 2017
(In Chambers)

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: Mr L Bronze, Counsel
Respondents: Mrs L Fenton, Employment Consultant

RESERVED JUDGMENT

It is the judgment of the Tribunal that:-

1. The claimant was not unfairly dismissed and this claim is dismissed.

2. The claimant was wrongfully dismissed, and is entitled to notice pay as damages for breach of contract.

3. The parties are to seek to agree the appropriate award of notice pay, and further to consider whether the parties can also agree that the claimant should be entitled to recover in addition any Tribunal fees paid by him in connection with these claims. The parties are to notify the Tribunal by **31 March 2017** as to whether any further hearing as to remedy is required, and if so, to specify what issues the Tribunal is to determine, and to provide an estimated length of hearing and dates to avoid for such a hearing.

REASONS

1. The claimant was represented by Mr Bronze of Counsel and the respondents by Mrs Fenton, an Employment Consultant. The claimant complained of unfair dismissal, and wrongful dismissal, arising out of the termination of his employment with the respondent on the 11th March 2016. He contends that his dismissal was

both unfair, and wrongful. The respondent admits that the claimant was dismissed, but contend that his dismissal was fair in all the circumstances, and, further, that the respondent was entitled to dismiss the claimant without notice on the grounds of his conduct.

2. The respondent called Kevin Stewart, the Site Manager who carried out the initial dismissal, Tony Jones, a director who conducted the subsequent appeal, and Jim Kidd, another director who conducted a further appeal. The claimant gave evidence himself, but called no witnesses. There was an agreed bundle.

3. Having heard the evidence of the witnesses, considered the documents in the case, and the submissions made by both parties representatives the Tribunal finds the following relevant facts.

3.1 The claimant was employed by the respondent as a Maintenance Fitter. He had originally been employed by another company, Albert Hartley Limited, but this firm was subsequently acquired by the respondent in or about 2000 or 2001. The claimant had been so employed since 1974, and hence had 42 years of service.

3.2 At the time of his dismissal the claimant was employed as a Maintenance Fitter at the respondent's works at Crow Nest Mill, Skipton Road, Barnoldswick.

3.3 The respondent carries on business in the provision of textiles for the furniture trade, and at its works had a number of machines for use in its production processes, the maintenance of which was the responsibility of the claimant. The claimant attended work as usual around 8 o'clock in the morning of the 10th March 2016. Damien Hodkinson around about 8 am approached Kevin Stewart, the Site Manager and informed him that the claimant had refused to attend to repair a broken cutting table. Kevin Stewart was about to speak to the claimant about this matter when he saw that he was approaching the table in question, and therefore did not pursue the matter any further. During the course of the morning, the claimant did attend to, and repair the machine.

3.4 Around 9.30 am another colleague Simon McNulty, approached Kevin Stewart and told him that the claimant was "pissed" and that he was "steaming". Kevin Stewart along with Simon McNulty therefore went to see the claimant who was in a store room, which he occupied when not required to be out on the shop floor. Kevin Stewart approached the door which was closed, knocked on it and asked the claimant to come out. Kevin Stewart noticed that the claimant's eyes were glazed, reddened and bloodshot and that his breath smelt of alcohol. He told the claimant that he had had reports of him being unfit for work, whereupon the claimant said "am I going then am I?" whereupon Kevin Stewart told him that he believed him to be unfit for work due to the fact that he was under the influence of alcohol, and that he was suspended on full pay. He also told him that he should attend a disciplinary hearing the following day, Friday 11th March 2016. This exchange

between Kevin Stewart and the claimant was very brief, and lasted less than a minute or so. Steven McNulty was present with Kevin Stewart when this conversation took place. The claimant duly left. He had driven to work that morning, and drove away from it. Nothing was said to him by Kevin Stewart or anyone else as to whether he should or should not drive home. Kevin Stewart then wrote a letter to the claimant (page 81 of the bundle) in which his suspension was confirmed, and he was invited to the disciplinary meeting the following day at 1.30 pm. In this letter Kevin Stewart stated that the company believed that he was basically unfit for work, and that he had reports from more than one person that his breath smelt heavily of alcohol, that his hands were shaking and that he appeared to be "generally not with it" in going about his duties. The letter warned the claimant that these actions could be considered to be gross misconduct and could lead to disciplinary action or dismissal. The claimant was told in that letter that he was entitled to be accompanied by either a trade union representative or a work colleague.

3.5 There was some difficulty with that letter being delivered, as the incorrect address was used upon it, but the claimant did attend the following day at the appointed time for the disciplinary meeting with Kevin Stewart. He had not been provided in advance of the meeting with any further details of the allegations, save those set out in the letter of the 10th March 2016, nor were any statements from any of the potential witnesses provided to him in advance of this meeting. Kevin Stewart had in fact obtained witness statements from Damien Hodkinson, (page 82 of the bundle), and Simon McNulty (page 83 of the bundle). These were not, however provided to the claimant in advance of the disciplinary meeting, nor during the course of it.

3.6 The meeting on 11th March 2016 was held by Kevin Stewart with Andrea Heaton and Ian Franklin in attendance. One was there to take notes, and the other as the representative of the claimant. The notes of this meeting were at page 87 of the bundle. Kevin Stewart outlined the allegation, and that he had independent witnesses who had stated that the claimant smelt heavily of alcohol, his hands were shaking and that he appeared "not to be with it" when going about his duties. The claimant claimed that he was not under the influence of alcohol, and explained that he had only had a couple of drinks the night before and was in bed for 12 o'clock. He accepted that his hands were shaking because he was trying to get a nut onto a machine and it would not fit. He denied being under the influence of alcohol, and had actually put a guard on a machine, made it safe and fixed it. He could not see how it could be said that he was not going about his duties. He asked for a copy of the statements and asked for the names of the witnesses, but Kevin Stewart was not prepared to give him the names, and stepped out of the office to make a phone call. That phone call was in fact to a director, Ben Soper, who sanctioned the decision that Kevin Stewart then took to dismiss the claimant for gross misconduct with immediate effect. That decision was confirmed by letter of 14th March 2016

(page 85 of the bundle) in which the decision to terminate the claimant's employment with immediate effect was confirmed for the reason of gross misconduct. In that letter Kevin Stewart stated that the company was firmly of the belief that he was unfit for work on 10th March 2016 as he was under the influence of alcohol and that his actions that day, and the statements of witnesses, underlined that belief. The claimant was told that he was not entitled to any monies in lieu of notice but would be paid any outstanding holiday entitlement. He was advised in this letter that he had the right to appeal the decision, and that such an appeal should be put into writing to arrive within five working days of receipt of the letter referred to. A subsequent letter of the 18th March clarified that any appeal should be addressed to the directors of the respondent company, and reminded the claimant of his right to be accompanied at any appeal by a trade union official or work colleague.

3.7 The claimant did appeal, his letter of 18th March 2016 (page 87 of the bundle being in effect his notice of appeal), and the respondent subsequently arranged for his appeal to be heard by Tony Jones, a Director, on the 31st March 2016. The appeal was indeed heard that day by Tony Jones, with Tony Simpson present taking notes, and the claimant being represented by Derek Sutcliffe of the GMB union. Derek Sutcliffe opened the appeal, and advanced the reasons why the claimant considered that his dismissal was unfair. He raised the issue of compliance with company procedures, and in particular a 1999 procedure that he contended was applicable in the circumstances, in relation to what was to be considered misconduct, and what was to be considered gross misconduct. The claimant's position, supported by his union representative, was that if he had been under the influence of alcohol this was misconduct and not gross misconduct. Derek Sutcliffe also made the point that the claimant had not been provided with witness statements prior to the hearing with Kevin Stewart. He suggested that the disciplinary hearing had been rushed, had not fully investigated the issues, and the claimant had not been interviewed before the disciplinary hearing. Derek Sutcliffe asked that the claimant be re-instated.

3.8 The claimant went on in that appeal hearing to set out his account of the events of that morning, and in particular how he saw Kevin Stewart and Simon McNulty. Tony Jones appreciated that in not providing the claimant with the evidence against him in advance of the disciplinary hearing, and not interviewing him before that hearing took place that the respondent had not followed a fair procedure. He took advice and consequently made arrangements to completely re-start the disciplinary procedure. The notes of the first appeal meeting on 31st March are at pages 91 to 92 of the bundle. Tony Jones wrote to the claimant on the 11th April 2016 (page 93 of the bundle) in which he informed him that he agreed that there had been a procedural error in the disciplinary process, but he intended to re-convene the appeal hearing and treat it as a complete re-hearing of the case so that he

could look at all the evidence, and everything put forward by the claimant and his union representative, before a decision was made on the matter. He also had obtained a copy of the disciplinary code of conduct which had been referred to in the meeting by Derek Sutcliffe who had provided a copy of it to him. In this letter Tony Jones enclosed the witness statements taken from Damien Hodgkinson and Simon McNulty, the suspension letter, the minutes of the meeting of 11th March 2015, the dismissal letter of 14th March 2015, the Albert Hartley disciplinary and grievance procedure dated 1999, and a copy of the revised terms and conditions dated 18th December 2015. Finally he enclosed a copy of the minutes of the meeting of 31st March 2016 and arranged for the appeal to be re-convened on 14th April 2016.

3.9 The appeal was re-convened in fact on 21st April 2016 for reasons that are not contentious, and in that appeal meeting Tony Jones was accompanied by Mrs Fenton, the Employment Adviser who appears for the respondent before the Tribunal in this hearing. There was no advance warning to the claimant that she would be present, but no point has been taken upon this by the claimant's Counsel. The claimant was again represented by his union representative Derek Sutcliffe. The minutes of this meetings are at pages 94 to 97 of the bundle.

3.10 For this meeting the claimant prepared a statement entitled "statement on my dismissal" in which he set out his account of the events of the 10th March 2016 (pages 98 to 99 of the bundle). The claimant read out his statement, and Derek Sutcliffe made a number of additional points. In particular Derek Sutcliffe made reference to the difference between the original Albert Hartley code of conduct, and the subsequent 2015 terms and conditions issued by the respondent. Tony Jones view was that the most recent terms and conditions were the appropriate ones, but he did express the view that in any event one of the offences listed in the original Albert Hartley document was endangering the health and safety of self or others by failing to adhere to safe working methods or safety regulations. Derek Sutcliffe said that there had been no such endangerment. Mr Jones, however considered that the more recent terms and conditions were the appropriate ones to apply. There was some discussion as to the way in which the 2015 terms and conditions had been introduced, and whether there had been any appropriate consultation in relation to them. The claimant's contentions basically were that he was not under the influence of alcohol, but in the alternative it was being advanced on his behalf that it was unfair to dismiss him for that alleged offence on the basis of the contractual terms and conditions that applied at the time, or indeed generally.

3.11 In the course of the claimant's appeal he had mentioned that he had that morning seen another employee Danny Pickles. Mrs Fenton suggested that it would be a good idea to obtain a statement from him, as the claimant had suggested that he would have supported his case

that he was not under the influence of alcohol. Further, Kevin Stewart had not made any witness statement. Tony Jones adjourned the meeting at 10.50 am, but reconvened at 11.20. What he said upon reconvening the meeting is set out on page 97 of the bundle in the notes of the appeal hearing. He made some six points at this stage, which indicated that he had come to the conclusion that the claimant had indeed been under the influence of alcohol on the morning in question, that the relevant terms and conditions were the 2015 terms and conditions, that the claimant's 42 years unblemished record with the company would not prevent dismissal for gross misconduct and that in relation to the investigation he had wanted to look at everything properly but he felt that it was sensible to get statements from Danny Pickles and Kevin Stewart. He then went on to deal with the issue of whether or not the claimant should have had a breath test or a blood test, and the issue of the respondent's Drugs and Alcohol policy. He ended by saying that, before making a final decision he felt it necessary to get statements from Kevin Stewart and Danny Pickles and these would be obtained and sent to the claimant prior to the reconvened hearing on 26th April 2016.

3.12 Kevin Stewart subsequently made a statement dated 21st April 2016 (page 102 of the bundle). In that statement in the second paragraph he refers to going to the claimant's store room with Simon McNulty and asking him to come out. He then says that the claimant staggered to the door with reddened glazed eyes and that there was "an incredibly strong smell of alcohol". His statement then goes on to deal with the suspension of the claimant that ensued. The statement made by Danny Pickles is also dated 21st April 2016 (page 103 of the bundle) in which he says that he saw the claimant whilst he was working on the cutting table on the 10th March 2016, and that he did not notice anything different about him and could not smell alcohol on him.

3.13 Those two statements were sent to the claimant before the meeting of 26th April 2016 and the reconvened meeting took place that day at 1pm, with Mr Jones again being accompanied by Mrs Fenton and the claimant again being represented by Derek Sutcliffe. Danny Pickles' statement had only been handed to the claimant in that meeting. Derek Sutcliffe questioned whether Tony Jones had asked sufficient questions given the brevity of Danny Pickles' statement. The claimant and his union representative had themselves obtained a statement from Danny Pickles, (page 107 of the bundle) which was produced to the meeting. Tony Jones observed that there were four independent statements, three of which suggested that the claimant was under the influence of alcohol and one which said that he was not. There was then discussion of Kevin Stewart's statement, and what he could and could not have seen prior to the claimant coming to the door, and whether he could have formed the view that the claimant was under the influence of alcohol in those circumstances.

3.14 In the course of this meeting the claimant raised for the first time that he considered that for some five or six years the company had been waiting to make him redundant. This arose from previous conversations that he had had with the former (now sadly deceased) Chairman of the company in relation to the eventual removal of machines from the workplace that the claimant was responsible for maintaining. He advanced the theory that the company had just wanted to get rid of him to save some redundancy money. This was discussed in the course of the appeal hearing, and the claimant stated that the respondent no longer needed a fitter on site. There was further discussion of the type of mouthwash that the claimant contended he had used, namely Listerine, and further challenge to whether the claimant was in fact under the influence of alcohol as opposed to merely smelt of alcohol. The claimant did question that he was being dismissed because he was apparently incapable of work, but he had successfully repaired a machine and put it back into operation. His union representative also questioned why it was that if the witnesses thought that the claimant was unfit for work they did not stop him working.

3.15 Tony Jones adjourned the meeting for some twenty minutes, and upon re-convening announced his decision. He explained how, because of the procedural error, there had been a complete re-hearing of the case and went on to say that he was firmly of the belief on the balance of probabilities that the claimant had been under the influence of alcohol. He went on to say that he did view this as gross misconduct, as it was described in the most recent policies issued in December 2015. He also considered that as maintenance employees were normally champions of health and safety, this was inherent in their training and this made the offence even worse in his view. He therefore confirmed that he believed the claimant should be dismissed without notice and that that was the correct decision.

3.16 However, as this had been a re-hearing of the case the claimant had a further right of appeal. The claimant and his union representative were informed that the further appeal would be to Jim Kidd who would consider the matter afresh.

3.17 By letter of 29th April 2016 (pages 109 to 110 of the bundle) Tony Jones confirmed his decision to the claimant and his reasons for it. Arrangements were then made for the claimant to appeal to Jim Kidd, following the claimant's letter of appeal of 30th April 2016 (page 111 of the bundle). By further reference of 3rd May 2016 the claimant wrote to Tony Jones seeking to correct some errors in the notes of the appeal hearing of 26th April 2016. Mrs Fenton then responded directly to the claimant by email of 10th May 2016 (page 113 of the bundle). Subsequently amendment of the minutes was agreed, and the appeal hearing was convened for the 17th May 2016. Jim Kidd chaired the meeting and he too was advised by Mrs Fenton in that appeal. The claimant was again represented by Derek Sutcliffe. The minutes of

this appeal hearing are at pages 116 to 119 of the bundle. Jim Kidd's appeal was not a re-hearing of the disciplinary process conducted by Tony Jones, or indeed by Kevin Stewart, but was a review of the decision taken by Tony Jones to dismiss.

3.18 In the course of the appeal Derek Sutcliffe again challenged the conclusion that the claimant had been under the influence of alcohol, and also asserted in the alternative that even if he had been the decision to terminate his employment without notice after more than 40 years service was unfair for a first offence. The issue of the claimant's potential redundancy was also raised again in this appeal.

3.19 Jim Kidd, in conclusion, decided that he needed to carry out further investigations of his own and wanted to talk to the witnesses to ensure that their statements were accurate. He also wished to investigate the alleged diminution in the claimant's duties, and would therefore investigate the alleged redundancy issue as well. It was agreed that there would be no need for a further meeting and that Jim Kidd could communicate his decision in writing.

3.20 The claimant had prepared a further statement for his appeal, entitled "Appeal on my dismissal Mr Kidd", which is at pages 123 to 124 of the bundle.

3.21 Following the appeal hearing Jim Kidd did indeed speak with Danny Pickles who provided a further statement dated 19th May 2016 (page 129 of the bundle), and Kevin Stewart who similarly provided a further statement of the same date page 130 of the bundle. Similarly he spoke with Simon McNulty, who also provided a further statement dated 19th May 2016 (page 131 of the bundle). Jim Kidd rejected the claimant's appeal and set out in his letter of 25th May 2016 his reasons for doing so. He responded to the various points made by the claimant and his union representative, and in particular set out the results of his further enquiries with the three witnesses who had provided further statements. In relation to the further statement from Danny Pickles, Jim Kidd considered that there had been some inconsistency in his evidence in relation to when he had delivered a letter to the claimant by hand. Jim Kidd had been unable, however, to speak further with Damien Hodkinson as he was off work. Jim Kidd set out in his outcome letter the reasons why he remained of the view that the decision taken by Tony Jones that the claimant had been under the influence of alcohol was a reasonable one and added his own conclusion that in his experience Listerine (the mouth wash which the claimant had stated he had used) did not smell of alcohol. He went on to summarise that he felt he was under the influence of alcohol on 10th March 2016, and that this offence was so serious that even in the case of a first offence dismissal on the grounds of gross misconduct was justified.

3.22 Subsequently Danny Pickles has written a further brief statement (page 133 of the bundle), in which he clarified the statement that he had given to Mr Kidd of the 19th May 2016 in which it was suggested that he had delivered a letter to the claimant prior to his disciplinary hearing on 11th March 2016. He confirmed that this was not the case as he did not deliver any letters to him until the following week.

3.23 Since the claimant's dismissal the respondent has not yet employed a replacement, but intends to . In the meantime it has managed by utilising fitters from associated companies in the Group, though this is less satisfactory, as it leads to production delays until such a person can attend the site, whereas the claimant was on hand to deal with breakdowns and repairs as and when needed.

3.24 In terms of the relevant procedures and documents referred to, that referred to and relied upon by the claimant, the Albert Hartley Limited disciplinary and grievance procedure dated 11th August 1998 is at pages 65 to 80 of the bundle, and the respondent's terms of conditions of employment revised 18th December 2015 are at pages 28 to 38 of the bundle.

4. Those then are the relevant facts. In terms of credibility, save for the reason for the dismissal, little really turns in this case upon the credibility of any party or witness. The Tribunal is satisfied that all parties gave their evidence in an honest attempt to recollect the relevant events. The Tribunal had no reason to disbelieve anyone's account, and where there have been any discrepancies the Tribunal fully accepts these have been issues of recollection rather than of honesty. As will be apparent, however, little if anything in the determination of these claims turns upon the credibility of any party or witness.

5. The parties made submissions. For the claimant, Mr Bronze went first. He categorised his submissions in to the following headings. Firstly whether the dismissal fell within the band of reasonable responses, secondly Polkey, thirdly what he termed the third option, fourthly redundancy and fifthly the claim for wrongful dismissal. In relation to the first of these he submitted it must clearly be the case that the original dismissal by Kevin Stewart was unfair, the response of the respondents even suggests that this is the case. This was the dismissal to be considered, the claimant was not paid thereafter and was dismissed at that point without notice. The evidence that Kevin Stewart had obtained was not shared with him, and there was no real time for the claimant to obtain proper representation. This was a classic case of unfair dismissal. Whilst the respondents say that the Tribunal is entitled to then look at the appeal procedure thereafter, the claimant says that the respondent has not done enough to entitle the Tribunal to find that the dismissal was fair. The reasons advanced by the respondent for the dismissal have varied and need examination. The health and safety related reason was not advanced originally by Kevin Stewart, and is not pleaded as the reason in the respondent's response. It has only been advanced by the respondent from the start of this hearing when the difficulties in relation to the breach of contract claim arose. Reliance is placed upon page 55 of the bundle, as part of the 1999 code of conduct which the respondent on the other hand says is not applicable. The only evidence

relied upon is that of Mr Jones, who suggested that Mole Wrenches could fly across the room in the circumstances and that they were discovered on the morning in question. Mr Jones, however, is not an engineer and was not familiar with this machinery or indeed the issue, and on examination, it turns out that his fears and concerns were somewhat exaggerated and not borne out on the evidence of the claimant who is far more experienced in these matters. It has therefore been unclear as to what exactly the respondent has been accusing of. Smelling of alcohol is one thing, but being under its influence is another. There is no evidence that the claimant could not actually do his work, indeed there was no review of the work that he did do that morning. He did in fact complete a complex task well, and it has not been disputed that he carried out that repair. The minutes of the meeting held on 11th March at page 84 of the bundle do not reflect that the claimant was found to be under the influence of alcohol. In terms of the honesty of the respondent's belief, Kevin Stewart had not actually said that he believed the claimant was under the influence of alcohol, saying that he did not personally say that. When considering the documents that were prepared it was logical for him to leave out his own statement as he had not met the claimant earlier in the day and had had no concerns. The suspension meeting was only for a few seconds and was the briefest of meetings. In relation to the reasonableness of the investigation, Mr Bronze referred the Tribunal to the case of ***James Martin v. British Railways Board EAT/362/91***. Where the Employment Tribunal found a dismissal was unfair in similar circumstances. As soon as the respondent was on notice some form of medical enquiry should have been undertaken. In relation to the evidence of Damien Hodkinson, he had only been there a few weeks and did not know the claimant. It was unfair to rely upon his view. Simon McNulty let the claimant work on for quite some time when if he really believed that he was unfit, he could have stopped him. These discrepancies count against the conclusion that was reached. The respondents (i.e. all three managers involved) did not even look at the claimant's personnel file. The respondent has no right to assume that the claimant was not exhibiting these symptoms from his condition of hypertension. The respondents effectively put their heads in the sand as to any alternative explanation. Objectively, from the work that he was able to do that morning, and from the evidence of Mr Pickles that day, where he was insistent that the claimant was not under the influence of alcohol, the respondent should not have concluded that the claimant was. He also referred the Tribunal to a first instance decision of ***Mr M McElroy v. Cambridge Community Services NHS Trust, Case Number 3400622/2014.*** This was a case where a Healthcare Assistant was dismissed by an NHS Trust on the grounds of gross misconduct because he presented for work smelling of alcohol. The feature that Mr Bronze wished to highlight in this case was the difference between somebody smelling of alcohol, and being under the influence of alcohol. In that case the finding was only that the claimant in question had smelt of alcohol, and the dismissal was unfair because the respondent had then gone on to conclude that that thereby meant that he was unfit for his duties. There was no evidence to support that position, the Tribunal concluded (para 20.3) which was similar to the position in this case Mr Bronze Submitted. Tony Jones did not make any enquiries as to any further evidence of any impairment to the claimant's work. The argument that the appeal could remedy any defects in the original dismissal was not sound, and could not render it fair when these matters were not investigated properly, and were not put to the claimant.

6. Turning to the contractual position, and conduct or gross misconduct issues, the revised terms and conditions of December 2015 had not been consulted upon and had not been put in place with adequate notice. They could not therefore be terms of the claimant's employment contract. In any event these terms and conditions do not refer to endangering health and safety, those are only referred to in the previous document at page 95. In short at its height the claimant's conduct could only be misconduct and not gross misconduct in very similar circumstances to the ***McElroy*** case referred to by Mr Bronze. The claimant was a long standing employee entitled to rely upon the terms and conditions of his employment. The respondent failed to investigate this aspect of his case and it was significant that Tony Jones thought that his trade union representative was from UNITE. The documents referred to are not simply about the expiry of stewards positions they were more important than that. Turning to the band of reasonable responses, it is clear that the respondent did not consider other sanctions. Again he referred the Tribunal to the ***McElroy*** case. Tony Jones clearly did not consider that a written warning would be sufficient, regardless of its effect on the rest of the workforce. Turning to the question of any ***Polkey*** reduction, the Tribunal of course has a complete discretion. ***Polkey*** was itself, of course, a redundancy payment case, and it would be entirely logical that even if not pleaded it should be considered in such a context. Consequently ***Polkey*** does not have to be applied in cases which are not redundancy cases, but Mr Bronze accepted that it can be. He submitted however that the respondents should not get the benefit of any ***Polkey*** reduction in this case. The respondent has been professionally represented from an early stage, and representation is a powerful factor in deciding whether or not a party should or should not be allowed to advance a particular argument. He referred to the ***Abbott –v- Remploy*** case before the EAT, which had been referred to at the beginning of the hearing in consideration of whether the claimant could advance particular arguments that had not been pleaded, and he referred to it in this context as well. Moving on to what he termed a third option, this was ***Polkey*** in everything but name. The respondent has been seeking to have an extra two bites at the cherry. It was far too hypothetical to say that this was the same situation as may pertain in redundancy where a Tribunal can make a proper assessment of the likelihood of someone being dismissed. In this instance whilst the respondents seek to argue that if the reason was, as the claimant has suggested, his potential redundancy, that there should be any reduction on that basis is itself far too speculative and would require the Tribunal to carry out some sort of hypothetical exercise as to what, if a proper redundancy consultation exercise was followed with the claimant, the result would be. Ultimately the reason for dismissal was for the respondent to show. Moving on to the breach of contract claim, Mr Bronze submitted that the only evidence in support of the respondent's case had come from Kevin Stewart. He had somewhat backed off his original evidence and had been hesitant to state that the claimant was under the influence of alcohol. It is thus difficult for the respondent to establish the breach that it relies upon. There was insufficient evidence of any breach and the other witness statements from the other potential witnesses had not been tested by cross examination. Kevin Stewart did not even count himself as a witness originally and there was some delay in him giving his account in any event. The respondent's case on breach of contract therefore he submitted must fall away.

7. For the respondent, Mrs Fenton submitted that the claimant had himself suggested that working under the influence of alcohol would be something for which

an employee could be fairly dismissed. He was indeed dismissed for that very offence, working under the influence of alcohol. The respondents take their responsibilities for health and safety matters very seriously and this is why the two things are linked. The introduction of sentencing guidelines in 2016 for personal and corporate liability for health and safety failings show what could be very serious consequences of any breach. The claimant complains that no account was taken of any medical issues, but none could be, until the respondent was told of them. There was no medical evidence to suggest that the symptoms of being under the influence of alcohol would appear to be the same as the symptoms of the condition from which the claimant suffers. The claimant says that the respondent wanted to get rid of him in order to avoid redundancy, but this is a ludicrous suggestion as it would be only to avoid the maximum of, say, some forty weeks pay. The respondent's response fell within the band of reasonable responses both procedurally and substantively. The respondent believed that the claimant had attended work under the influence of alcohol and had put himself and others at risk. The respondents had believed the witnesses to be truthful in giving their statements. There might be alternative explanations for some of the features of the claimant's behaviour if looked at individually, but taken as a group of indicators, any sensible conclusion was that the claimant had indeed attended work, but was unable to carry out his work properly because he was under the influence of alcohol. Much had been made of the fact that he had apparently completed his work satisfactorily, and she wondered if that meant that the law required the respondents to wait for some form of danger to himself, others, or machinery to materialise before taking any action. The respondents acted immediately, thereby averted any dangers. The respondents did consider this as one of the gross misconduct offences and the question was where does one draw the line? It would be unfair if they made a different decision for different employees. The matter is so serious, considering what was at risk. Hence the decision to terminate. It was appropriate to terminate without notice because of the express provisions on page 33 of the bundle in relation to gross misconduct which this was. The claimant had relied upon documents having contractual force, but even if the 1999 rules applied, on page 75 of the bundle, his conduct would fall under Section 10.12(e) endangering the health and safety of self or others by failing to adhere to safe working methods or safety regulations. The respondent accepted that the manner in which it dealt with the issue on the 11th March was incorrect, there was no doubt about that, and it was for that reason that Tony Jones made the decision to restart the disciplinary process. For the period between 11th March and 26th April 2016 when the appeal was finalised the respondent accepts that the claimant really should have been paid, he should have been re-instated and paid for that period. She stated that the respondent does intend to make that payment to the claimant regardless of any finding by the Tribunal. The dismissal on 26th April, however, was fair, but originally the correct documents were not sent to the claimant, and the respondent does owe the claimant something for this. Tony Jones was conscientious, he sent the relevant documents and adjourned in order to take a statement from Kevin Stewart and Danny Pickles. At the end of this process Tony Jones had three people saying that the claimant was under the influence of alcohol and one person saying he did not smell of alcohol. That was sufficient to persuade the respondent. On the further appeal to Jim Kidd, the respondent again acted fairly as he too re-examined the witnesses, and did not just simply rubber stamp the previous decision. He double checked the outcome clearly before he too decided. The claimant was not it is true given the further

witness statements or a chance to respond to them further, but they were not that different from those that he had been given before, and did not change anything.

8. Mr Kidd had queried why Mr Pickles' statement had changed much, because at the end of the day both Mr Stewart and Mr McNulty said much the same as they had previously. She has admitted that the dismissal fell within the range of reasonable responses for an employer who takes health and safety as very important. Health and safety was mentioned because clearly there was a link and there should have been no conclusion from the claimant's point of view. The offence was working under the influence of alcohol. It was right to terminate his employment without notice whichever of the procedures applied. There had been three statements before Mr Jones and three people who had stated that the claimant was under the influence. It would be a flight of fantasy to suggest that these witnesses were in league to get rid of the claimant. These witnesses were re-examined by Mr Kidd, and they had both been questioned by Mr Jones and Mr Kidd. In terms of any ***Polkey*** reduction, other than that arising out of the appeal itself Mrs Fenton was not contending for any further reduction. The Tribunal took this to mean in other words that she was not seeking to argue that the claimant might have been dismissed for redundancy had he not been dismissed for the alleged misconduct.

9. In reply Mr Bronze rightly pointed out that Mrs Fenton's references to any sentencing guidelines introduced matters that were not before the Tribunal, which Mrs Fenton accepted, and the Employment Judge acknowledged.

The Law

10. The relevant statutory provisions in relation to unfair dismissal are set out in Annex A hereto. Although not cited by either representative, the relevant test to be applied in any conduct dismissal is that laid down in ***British Home Stores v Burchell [1990] ICR 303.*** In relation to ***Polkey*** reductions, the law in relation to this issue is as follows. To clarify , this is a reference to the decision in ***Polkey v A E Dayton Services Ltd [1988] ICR 142*** a House of Lords judgment which held that if there has been an unfair dismissal, a tribunal may reduce the amount of the compensatory award , on the basis that it was just and equitable to do so. where , had, for example, a fair procedure been followed, the claimant would have been dismissed in any event. This can be by up to 100% when the tribunal is satisfied that the claimant would have been dismissed, or a lesser per centage, where a tribunal is not so satisfied, but considers that there was a per centage chance of such a dismissal.

11. The law was helpfully reviewed by Elias J in ***Software 2000 Ltd v Andrews [2007] ICR 825*** and has more recently been summarised in ***Grayson v Paycare (A Company Ltd by Guarantee) UKEAT/0248/15/DA***, where Kerr, J, considers the judgment in that case and says:

"21 Elias J's summary provides a useful reminder that Tribunals need to disentangle in their minds distinct questions that may need to be addressed in particular cases. The following are possible formulations of the questions that may arise in particular cases:

(1) How long the employee would have continued working for the employer, but for the dismissal; this is the question that in ordinary cases must be answered on the balance of probabilities, to assess loss;

(2) Whether either party has adduced evidence entitling the Tribunal to conclude (the burden of satisfying the Tribunal being on the employer) that the employee would or might have ceased to be employed in any event had fair procedures been followed;

(3) Is the evidence relied on to support a Polkey reduction in compensation too unreliable or vague to be useful, and is the exercise of seeking to reconstruct what would have happened too uncertain to ground any sensible prediction based on it?

(4) If not, what is the chance - not the probability or likelihood - that that would have happened at a time in the future, and if so at what point in the future might that chance have produced the relevant event, namely the end of the employment?

(5) Has the employer satisfied the Tribunal that there was a chance of the employment terminating in the future, and if so how great or small was that chance? This is commonly expressed as a percentage.

(6) Has the employer satisfied the Tribunal that employment would have continued, but only for a limited fixed period, whether or not for reasons wholly unrelated to the circumstances relating to the dismissal itself?

In terms of the effect of an internal appeal, the authorities in relation to this and consideration of this aspect will be further considered in the ensuing discussion.

Discussion and Findings

(i)Unfair Dismissal

12. At the outset, the Tribunal, of course, recognises that in deciding whether the claimant was unfairly dismissed, it must not substitute its view for that of the employer, and decide whether it would have dismissed, but must consider the position from the standpoint of the range of reasonable responses, in accordance with the authority of ***Foley v Post Office ; HSBC Bank plc v Madden [2000] IRLR 827***. The first matter to be determined is the reason for dismissal. The burden of establishing that lies with the respondent, and the reason put forward in this case is quite simply the claimant's conduct. Whilst terminology such as "gross misconduct" is often used in these circumstances, the wording of the statute is simple, and the potentially fair reason here is simply that of conduct. The claimant has suggested, albeit late in the day in the course of his appeal, that there was some ulterior motive on the part of the respondent in dismissing him, on the basis that he was potentially redundant. He therefore suggests that the respondent's motivation was not his alleged misconduct, but was seeking to save a redundancy payment that would inevitably have to be made to him in the event of his subsequent redundancy. He bases this on some conversation with the now deceased former Chairman some six

or seven years ago when there was discussion about removal of machinery from the workplace. It is right that the machinery in question has been diminishing over the years, and the respondent's need for maintenance has diminished. The evidence was, however, that the claimant was still employed full time and although he responded to maintenance requirements largely on an ad hoc basis, there was no evidence before the Tribunal that there was not still a full time position for him. Indeed the evidence was that since his dismissal the respondents have obtained maintenance from associated companies, but this has not been as satisfactory in that it inevitably involves production delays while a maintenance fitter is obtained from another location. Thus the presence of maintenance fitter on site albeit one who may not have been fully engaged for 100% of his working week was still beneficial to the respondent. Further, since the claimant's dismissal their evidence is that whilst this practice has continued, it has continued pending this hearing, and hereafter the respondent will seek to recruit a permanent maintenance fitter. In any event even if the claimant's workload had been diminishing, the respondent would have been, in the view of the Tribunal, more likely to seek to reduce his hours to a part time basis than to make him redundant. Whatever the claimant's suspicions, the Tribunal considers that the answer to the question as to what was the real reason for dismissal is clear from the circumstances giving rise to his dismissal. It is to be noted that his dismissal was not instigated by any senior manager or director, but was carried out by Kevin Stewart, after receiving information from two even more junior employees, Damien Hodkinson and Simon McNulty, about the claimant's apparent behaviour. It seems , as was suggested by Mrs Fenton, something of a flight of fancy to suggest that these lowly employees, with all due respect to them should have conspired at this particular point of time, and for some particular reason to engineer a situation whereby the claimant was suddenly dismissed by Kevin Stewart the day after. In other words this was very much a spur of the moment dismissal, and it seems highly unlikely that it was orchestrated by anything other than a perception (right or wrong) about the claimant's behaviour on the day in question, rather than some ultimate design of senior management to engineer a situation to avoid making a redundancy payment. In these circumstances the Tribunal can see no basis on which to doubt the reason given by the respondents for the dismissal, which is their belief that he had turned up at work on the day in question under the influence of alcohol i.e. that the reason for his dismissal was the potentially fair reason of his conduct, and the Tribunal so finds.

13. That then leads to the major consideration in this claim which is whether that dismissal was fair. Clearly when the Tribunal talks about "the dismissal" the question arises as to what is meant by that term. In one sense, the dismissal occurred when Kevin Stewart dismissed the claimant on the 11th March without notice. His employment ended then, and he was not subsequently re-instated. He did however then appeal, and his appeal took the form of a re-hearing, followed by a yet further appeal. In those circumstances the respondents argue that, notwithstanding the admitted deficiencies in the original dismissal as carried out by Kevin Stewart, they can none the less rely upon what they contend is the subsequently fairly constituted appeal process, in which any defects in the original dismissal are remedied , predominantly by the fact that Tony Jones then carried out a complete re-hearing, investigating the allegations for himself, obtaining the evidence, hearing from the witnesses and giving the claimant a fair opportunity to respond to the allegations against him in a manner that did not occur in Kevin

Stewart's original dismissal. Thereafter, the respondents argue that the further subsequent appeal whilst not itself a further re-hearing was nonetheless a thorough review of Tony Jones' decision in which Jim Kidd himself also made further enquiries and interviewed the witnesses.

14. The question then arises as to whether, in these circumstances, the subsequent appeal can remedy, *ab initio*, the original unfair dismissal. The Tribunal was presented here with something of a dichotomy. On the one hand the Tribunal can see the force in the argument that it is unfair to allow an employer who has originally unfairly dismissed an employee, and who does not re-instate that employee pending an appeal, to obtain the benefit of any subsequent re-hearing type appeal, on the basis that this remedies the defects in the original dismissal, and thereby renders the original dismissal fair. On the other hand, the authorities the Tribunal is satisfied, are indeed to that effect. It may be tempting for a Tribunal in these circumstances to hold that as the dismissal, in the sense of the original dismissal was unfair, but was then subsequently made fair by a subsequent appeal when there has been no re-instatement, so the Tribunal could then find that there had been an unfair dismissal, but that by reason of the subsequent remedial effect of an appeal, the claimant would not be entitled to any compensatory award beyond the date of the appeal, but would at least obtain a basic award.

15. That approach, however seems to be firmly precluded by the authorities. Whilst this not a matter that has been expressly addressed as such as the *ratio* in the authorities, it seems to the Tribunal that the effect of the authorities such as ***Whitbread & Co plc v Mills [1988] IRLR 501*** ***Taylor v. OCS Group Limited [2006] IRLR 613,*** ***West Midlands Co-Operative Society Limited v. Tipton [1986] IRLR 112*** and ***Khan v Stripestar Limited UKEATS/002/15 (unreported)*** is to constrain the Tribunal not to so find. The latter case is particularly instructive as it is a judgment of Lady Wise sitting in the Scottish Division of the Employment Appeal Tribunal. On the facts of that case there had been an original, and unfair, dismissal in which the claimant was summarily dismissed. He appealed, and his appeal took the form of a re-hearing which the Employment Tribunal and the Employment Appeal Tribunal considered remedied the unfairness of the original dismissal. Between the original dismissal and the subsequent appeal that claimant was not re-instated. The EAT, in finding that the subsequent appeal did rectify the original dismissal, and conscious of the fact that in between times the original summary dismissal had not been reversed or suspended pending an appeal, nonetheless held that the subsequent appeal rectified the original unfairness, and made the original dismissal fair. Whilst it was not expressly argued in that case to the contrary, it seemed to be accepted, and indeed is the thrust of all the authorities on this point , that the effect of a subsequent fair appeal in the form of a re-hearing or something akin thereto, will be to render the original dismissal fair.

16. Thus, in this case the Tribunal must consider whether or not the subsequent appeals held by the respondents were sufficient to rectify the originally unfair dismissal and make it fair. The Tribunal takes account of the guidance in ***Taylor v OCS Group*** that it should not judge the matter solely on the narrow basis of whether the subsequent appeal was properly to be regarded as a review or a re-hearing, but should look at the totality of the position to see if the appeal is sufficiently comprehensive to redress any previous procedural defects. The Tribunal's view, on

balance, is that the subsequent appeal appeal to Tony Jones, and indeed beyond to Jim Kidd, did remedy the unfairness of the dismissal carried out by Kevin Stuart.. The appeal held by Tony Jones, had it been the original disciplinary hearing would have been very difficult for a claimant to contend was unfair. He carried out an investigation, he provided the claimant with the evidence against him , gave him an opportunity to respond to it, and evaluated the competing arguments. Procedurally it would be very hard to fault such a process and consequently the Tribunal considers particularly as reinforced by Mr Kidd's further appeal, where he too made further investigations, the respondents at that point acted fairly in terms of the procedure they adopted.

17. That, of course, is not the end of the matter because even if they followed a fair procedure at that point and would have fairly dismissed procedurally the question would still remain as to whether their conclusion that the claimant should be dismissed was one which fell within the band of reasonable responses. The nub of that issue it seems to the Tribunal is this. Applying the ***Burchell*** test, did the respondents believe honestly, on reasonable grounds following a reasonable investigation, that the claimant was guilty of conduct which entitled them to dismiss him ? Put that way, and avoiding therefore issues such as gross misconduct , and other terminology which is perhaps somewhat over technical, and is rooted in the competing terms and conditions, the proper question can then be addressed. In essence, this comes down to whether the respondent reasonably believed in those circumstances that the claimant had been under the influence of alcohol when he attended work on the 10th March 2016. The respondents had evidence that that was the case from initially two witnesses, and eventually a third witness Kevin Stewart. That third witness was perhaps something of an additional witness, whose witness statement was not obtained until later in the day, but in terms of the evidence before the respondents that was what they had. Against that they had the evidence of the claimant himself and of Mr Pickles. Tony Jones , the Tribunal considers, weighed up this evidence fairly. He took into account the claimant's explanations for how his appearance may have been on that day, and indeed did take into account the fact that there may be some medical or other explanations for some of the symptoms he exhibited. At the end of the day, however, he took all matters into consideration and took into account the witnesses who he himself had interviewed, he also took into account the claimant's account and that of Danny Pickles. He concluded on the balance of probabilities, which is the only test that he needed to apply, that the claimant had indeed been under the influence of alcohol on the day in question. The test for the Tribunal, for these purposes, in these circumstances is, of course, not whether that was right or wrong, but whether it was a conclusion that was reasonably open to him after a reasonable investigation on the evidence that was then available to him. The Tribunal has concluded that it was.

18. That, however, is not the end of the matter either, as that does not of itself mean that it was then reasonable to dismiss the claimant for that conduct. Again, questions as to whether this was gross misconduct falling within one or other of the procedures to which the claimants contract was subject, is, the Tribunal considers not a relevant consideration. It would be a different issue if there was some question of the claimant contending that he did not know that a particular form of conduct was prohibited by any particular provisions of his contract or disciplinary procedures, but that is not the case here. Whether an employee knows that

something is or is not acceptable in the workplace is often relevant in these circumstances, but the claimant himself accepted that if he had in fact been under the influence of alcohol his employers would be entitled, at the very least to consider disciplinary action against him, as indeed most people would expect to be a reasonable conclusion. Thus the question is whether having come to the conclusion, as they reasonably did, that the claimant had attended work under the influence of alcohol , the respondents acted reasonably in treating that reason as sufficient to dismiss. The claimant, it is right, had 42 years service and it is also right that the respondents took no further account of his personnel record. Against that and very much a recurrent theme in Mrs Fenton's submissions, is perhaps the culture and climate that presently pertains, and has done since early 2016 of greater potential corporate and personal responsibility for health and safety issues, this was a reference that Mrs Fenton made, and indeed some of the witnesses made in the course of their evidence. Thus health and safety issues, whilst always important have perhaps assumed an even greater importance in this climate. Against that background the claimant was working as a Maintenance Fitter. He was responsible for maintaining and hence working with potentially dangerous machinery. To that extent it seems to the Tribunal that it is reasonable for the respondents to equate attendance at work under the influence of alcohol with a potential risk to health and safety. It is for that reason, perhaps, that the first instance decision of ***McIlroy*** referred to and relied upon by Mr Bronze can be distinguished. It is to be noted that in that case the claimant was a Healthcare Assistant. His dismissal was unfair because the extent of the misconduct alleged was that he attended work smelling of alcohol. That was held not to be sufficient, and particularly not sufficient in terms of the specific disciplinary procedures to which he was subject, to justify his dismissal. He was not, however, working with potentially dangerous machinery, and no potential health and safety risks were identified by the respondents , or were relied upon by them in that case. That is not the case here, and indeed it is apparent to the Tribunal that, given the nature of the claimant's work, and the workplace in which he was employed, attending work in a condition under the influence of alcohol for the claimant, or indeed anyone else working with such machinery was, or could reasonably be considered to be, a potential health and safety risk. It is for that reason that the Tribunal considers that the respondent was entitled, having concluded that the claimant was under the influence of alcohol to also conclude that he also thereby posed a serious health and safety risk, which, given the nature of his own duties as a Maintenance Fitter with considerable experience, and indeed some considerable seniority, that these were matters that the respondent was entitled to consider which were sufficiently serious to warrant his dismissal.

19. Consequently, on balance, and by virtue solely of the respondent having rectified on appeal the defective nature of the original dismissal the Tribunal is, although with some sympathy for the claimant, constrained to find that the decision to dismiss him ultimately was fair, and fell within the band of reasonable responses, and his complaint of unfair dismissal is accordingly dismissed. As will be apparent, were it open to the Tribunal to have found that the original dismissal was unfair, and was only rectified on appeal, so that the claimant would be entitled to a basic award, and, potentially a compensatory award up until the date of the fair dismissal on appeal, it would have so found, but it considers that it is constrained by authority to hold that the subsequent appeal has the effect of rendering the original dismissal fair. Whether that is the correct or fair conclusion, when considering the overall

equity and substantial merits of the case under s.98, may be open to question, and it is an issue that is perhaps ripe for re-consideration. It is, however, the Tribunal is satisfied, the orthodoxy by which this Tribunal is bound.

(ii)Breach of Contract

20. The test to be applied in relation to breach of contract, of course, is different. The matter there is not whether the respondent reasonably believed in the misconduct, but whether the respondent has shown on the evidence before the Tribunal that the claimant was actually guilty of the misconduct that would entitle it to dismiss without notice. Whilst that may involve the Tribunal ultimately determining whether the 1999 or 2015 terms and conditions were applicable, on any view it would first involve the Tribunal in making a finding of fact that the claimant was actually, as a matter of fact, under the influence of alcohol when he attended at work on the 10th March 2016. It is to this issue, therefore that the Tribunal first turns. The only evidence before the Tribunal that the respondents called in support of this contention was that of Kevin Stewart himself. The respondent did not call Simon McNulty or David Hodkinson. That is entirely a matter for them, but it means that the only direct evidence of what occurred that morning comes from the claimant himself and from Mr Stewart. The Tribunal cannot put much weight on the written statements of the two witnesses which the respondent relied upon for the dismissal, in the same way as it cannot put much weight on the evidence of Mr Pickles, who equally was not called by the claimant either .

21. At the end of the day the burden of establishing that the claimant was indeed guilty of the misconduct which entitled the respondent to dismiss without notice rests upon the respondent, and it must call the relevant evidence to persuade the Tribunal so as to discharge the burden of proof upon it. In this case Mr Stewart's evidence was of , what would be described in other jurisdictions as, a "fleeting glimpse". He had a very brief conversation with the claimant as he came out of his store room, and suspended him at that time. He was perhaps in any event somewhat pre-influenced by what he had been told by Mr McNulty and Mr Hodkinson, and so his views may have been influenced by that but in any event his experience of the claimant's demeanour directly that morning in a face to face situation was very brief. The claimant denies that he was under the influence of alcohol, that there is no reason the Tribunal has to disbelieve his account. The account of Mr Stewart may be right or wrong in terms of what he observed, but as to whether the conclusion is to be drawn from the claimant's demeanour when he saw him that the claimant was in fact under the influence of alcohol (as opposed to merely smelt of it) is something which the Tribunal considers is very much open to doubt. At the end of the day the best the Tribunal can do is conclude that the claimant <u>may</u> have been under the influence of alcohol, but he equally may not. The burden of proving that he was rests upon the respondent, and the quality of the evidence , and the quantity of the evidence directly on this point before the Tribunal is such that the Tribunal cannot safely come to that conclusion.

22. Consequently, the respondent has failed to discharge the burden upon it of proving that the claimant was, as a matter of fact, under the influence of alcohol and was accordingly guilty of any form of conduct entitling it to dismiss without notice, regardless of which set of terms and conditions applied, or as a matter of general

contractual construction. The claimant is entitled to damages for breach of contract in the form of a notice pay to which he would otherwise have been entitled.

Conclusion

23. Consequently, whilst the claimant fails in his claim of unfair dismissal he succeeds in the breach of contract claim. It should be possible for the parties to agree the appropriate notice pay to which he would be entitled. Further, whilst the respondent is not strictly speaking liable to do so, the Tribunal notes that it has agreed that, in respect of the period between the original decision and the finding on appeal of 26th April 2016, the respondent will pay the claimant his pay on the basis that he should have been reinstated during that period. Finally, having succeeded the claimant may seek, and the respondent may not oppose, an award in respect of his Tribunal fees. The parties are encouraged to reach an agreement on all these matters, but if they cannot, they are to notify the Tribunal that a Remedy Hearing is required.

Employment Judge Holmes

Dated: 17 February 2017

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

22 February 2017

FOR THE SECRETARY OF THE TRIBUNALS

ANNEXE A

THE RELEVANT STATUTORY PROVISIONS

Unfair Dismissal : Employment Rights Act 1996

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) [N/a]

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) [N/a].

(3) [N/a]

(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) [N/a]