Case Number: 2300245/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr L Jackson		**1) ISS Facility Services Limited** **2) Mr Hassan Elouassi**

HELD AT **London South** **ON: 18 & 19 October 2016**
In chambers 18 November 2016

Before: Employment Judge Freer
Members: Ms V Massiah
Ms S J Murray

Appearances
For the Claimant: Mr S Martin, Legal Executive
For the Respondent: Ms N Siddall-Collier, Representative

JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. **The Claimant's claims of direct race discrimination and race harassment against both Respondents and wrongful dismissal against the First Respondent are all unsuccessful;**

2. **The Claimant's claim of unfair dismissal against the First Respondent is well-founded. The Compensatory award shall be reduced by 85% having regard to the *Polkey* principle and the Basic and Compensatory Awards shall be reduced by 90% having regard to contributory fault;**

3. **This matter will be listed for a remedy hearing.**

REASONS

1. By a claim presented to the employment tribunals on 01 February 2016 the Claimant claimed unfair dismissal, race discrimination, and wrongful dismissal.

2. The Respondents resist the claims.

3. The Claimant gave evidence on his own behalf together with Mr Scott Cairney, Bus Station Controller for Transport for London.

4. The Respondents gave evidence through the Second Respondent Mr Hassan Elouassi, Area Supervisor; Mr Zubeer Debbagh, former Contract Manager; Mr Adetokunbo Ademola Jiboye, Contract Manager; Mr Sundeep Patel, Project/MSS Manager; and Mr Ian Constant, General Manager.

5. The Tribunal was presented with a bundle comprising 427 pages and additional documents during the course of the hearing as agreed by the Tribunal.

The Issues

6. The list of issues was agreed between the parties and is set out in an order from a Preliminary Hearing on 06 April 2016 at pages 41 and 42 of the bundle. It was confirmed on behalf of the Claimant that he was withdrawing the claims of harassment at paragraphs 17.1, 17.5 and 17.6 in that list.

7. It was agreed that the Tribunal will address liability and general unfair dismissal remedy issues in the first instance as appropriate.

A brief statement of the relevant law

Unfair dismissal

8. The legal provisions relating to unfair dismissal are contained in Part X of the Employment Rights Act 1996.

9. Section 98 provides that, where dismissal is not controversial, the Respondent must show that the reason for dismissal is one of a number of permissible reasons. The Respondent in this case relies upon a reason relating to the Claimant's conduct.

10. If there is a permissible reason for dismissal, the Employment Tribunal will consider whether or not the dismissal was fair in all the circumstances in accordance with the provisions in section 98(4):

> "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"

11. The standard of fairness is achieved by applying the range of reasonable responses test. This test applies to procedural as well substantive aspects of the decision to dismiss. A Tribunal must adopt an objective standard and must not substitute its own view for that of a reasonable employer. (**Iceland Frozen Foods –v- Jones** [1982] IRLR 439, EAT as confirmed in **Post Office –v- Foley** [2000] IRLR 234, CA; and **Sainsbury's Supermarkets Ltd –v- Hitt** [2003] IRLR 23, CA).

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

13. It is also established law that the **Burchell** guidelines are not necessarily determinative of the issues posed by section 98(4) and also that the guidelines can be supplemented by the additional criteria that dismissal as a sanction must also be within the range of reasonable responses (also a neutral burden of proof) (see **Boys and Girls Welfare Society –v- McDonald** [1997] ICR 693, EAT).

14. The Court of Appeal in **Taylor –v- OCS Group Ltd** [2006] IRLR 613 emphasised that tribunals should consider procedural issues together with the reason for the dismissal. The two impact upon each other. The tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason as a sufficient reason to dismiss.

15. This decision was echoed in **A –v- B** [2003] IRLR 405, EAT and the Court of Appeal in **Salford Royal NHS Foundation Trust –v- Roldan** [2010] ICR 1457 with regard to assessing reasonableness of the process and the decision to dismiss with the seriousness of the alleged conduct.

16. The statutory provisions relating to remedy for unfair dismissal are set out in sections 112 to 127 of the Employment Rights Act 1996.

17. It is well-established law that the principle contained in **Polkey –v- A E Dayton Services Ltd** [1987] IRLR 503, HL, applies to the consideration of the just and equitable element of the Compensatory Award. A Tribunal may reduce the Compensatory Award where an unfairly dismissed employee may have been dismissed fairly at a later date or if a proper procedure had been followed.

18. There is no need for an 'all or nothing' decision. If the Tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.

19. In **Software 2000 Ltd -v- Andrews** [2007] IRLR 568, the EAT reviewed the authorities and set out some guidance, such as:

> ''If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself".

20. By combination of Section 207A and Schedule A2 of the Trade Union and Labour Relations (Consolidation) Act 1992 and section 124A of the Employment Rights Act 1996, where a claim by an employee is made under any of the jurisdictions listed in Schedule A2 of the 1992 Act and is also one to which the ACAS Code of Practice on Disciplinary and Grievance Procedures applies, where a party has failed to comply with that Code in relation to that matter, and that failure was unreasonable, the Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase or decrease any compensatory award by no more than 25%.

21. Such an adjustment shall be applied immediately before any reduction for contributory fault and any adjustment under section 38 of the Employment Act 2002 for a failure to provide employment particulars.

22. By virtue of section 122(2), a Tribunal may reduce the basic award where the conduct of the employee before the dismissal was such that it would be just and equitable to do so. Also, by virtue of section 123(6), the Tribunal may reduce the compensatory award by such proportion as it considers just and equitable where the dismissal was to any extent caused or contributed to by any action of the employee.

Direct race discrimination

23. Section 13 of the Equality Act 2010 ("the EqA") provides:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

24. Under section 9 of the EqA:

> (1) Race includes—
> (a) colour;
> (b) nationality;

(c) ethnic or national origins.

(2) In relation to the protected characteristic of race—
(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;
(b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.

(3) A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.

(4) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.

25. On comparison between the Claimant and the case of the appropriate comparator, real or hypothetical, there must be no material difference between the circumstances relating to each case (section 23).

Harassment

26. 14. Section 26 of the Equality Act 2010 provides:

"(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. . .

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are - . . . gender reassignment; . . . and sexual orientation"

27. A Tribunal should consider all the acts together in determining whether or not they might properly be regarded as harassment (**Driskel –v- Peninsular Business Services Ltd** [2000] IRLR 151, EAT and **Reed and Bull Information Systems Ltd –v- Stedman** [1999] IRLR 299, EAT).

28. The motive or intention on behalf of the alleged harasser is irrelevant (see **Driskel** above).

29. The Court of Appeal confirmed in **Land Registry –v- Grant (Equality and Human Rights Commission intervening)** [2011] ICR 1390 "when assessing the effect of a remark, the context in which it is given is always highly material".

30. In **Richmond Pharmacology –v- Dhaliwal** [2009] ICR 724 the EAT held that the Claimant must have felt or perceived his or her dignity to have been violated. The fact that a Claimant is slightly upset or mildly offended is not enough.

Burden of proof

31. Section 136 sets out the provisions relating to the reversal of the burden of proof provisions. Guidance is provided on the burden of proof reversal provisions in the case of **Igen Ltd –v- Wong** [2005] IRLR, CA. In essence, the Claimant must, on a balance of probabilities, prove facts from which a Tribunal could conclude, in the absence of an explanation by the Respondent, that the Respondent has committed an act of unlawful discrimination. The Tribunal when considering this matter will raise proper inferences from its primary findings of fact. The Tribunal can take into account evidence from the Respondent on the primary findings of fact at this stage (see **Laing –v- Manchester City Council** [2006] IRLR 748, EAT and **Madarassy –v- Nomura International plc** [2007] IRLR 246, CA). If the Claimant does establish a *prima facie* case, then the burden of proof moves to the Respondent and the Respondent must prove on a balance of probabilities that the Claimant's treatment was in 'no sense whatsoever' in consequence of the protected characteristic, subject to justification.

32. The Supreme Court in **Hewage –v- Grampian Health Board** [2012] UKSC has confirmed:

> "The points made by the Court of Appeal about the effect of the statute in these two cases [*Igen* and *Madarassy*] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

Facts and associated conclusions

33. This case arises from an incident that occurred on 2 October 2015 and an allegation that the Claimant was under the influence of alcohol whilst at work.

34. In essence, the Claimant was considered to be intoxicated when reporting for work, stopped duty and returned home. He later returned to work to undertake an independent alcohol breathalyser test for which the result was significantly positive. The Claimant argues that he was not under the influence when reporting for work, but had consumed alcohol whilst at home before returning to take the test.

35. Following the alleged incident, the Claimant was suspended from work on full pay from 02 October 2015, as confirmed in a letter from Mr Debbagh dated 12 October 2015 (see page 152).

36. The reason for the suspension was that: "On Friday, 2 October 2015 at 15:45 you were found by ISS Area Supervisor under influence of alcohol while reporting for duty at Crystal Palace. A drug and alcohol test was carried out by BUPA at West Croydon station on the same day and it was confirmed that you were over the acceptable limit in the alcohol test".

37. By a letter dated 14 October 2015 the Claimant was invited to a formal investigation meeting, which was subsequently rescheduled to 21 October 2015. That investigation meeting went ahead on that date and was conducted by Mr Jiboye, Contract Manager. Robert James, HR Officer, was present at this meeting. The typed notes that meeting start at page 155 of the bundle and the handwritten notes commence at page 159. The typed notes are out of order and have a section missing when compared to the handwritten notes.

38. Further to the disciplinary investigation, it was decided that the matter should be considered as a formal disciplinary matter and by a letter dated 29 October 2015 the Claimant was invited to a disciplinary hearing to be conducted by Mr Patel, Project/MSS Manager (pages 166 to 167).

39. The letter states:

> "During the formal disciplinary hearing the question of disciplinary action against you will be considered in relation to the alleged breach of code of conduct.
>
> General i. Employees must not be in possession, or under the influence of alcohol and/or drugs (except those prescribed and unauthorised for use at work by a qualified person), as well as being in contravention of the ISS drug and alcohol policy.
>
> This relates to the incident on Friday, 2nd October 2015 where it has been alleged that you arrived at your place of work intoxicated and were subsequently suspended from your duties by your supervisor, Hassan Elouassi and removed from site. Drugs and alcohol test was arranged to take place on the same day. The test was undertaken at West Croydon Bus Station which produced a positive result indicating a breath alcohol level of 53/100 ml."

40. The Claimant was informed of his right to be accompanied.

41. The disciplinary hearing that took place on 3 November 2015. Typed notes of that meeting commence at page 168 of the bundle and handwritten notes commence at page 172. The Claimant was represented by his trade union, representative who was experienced in representing unions members.

42. The Tribunal accepts the evidence of Mr Patel that prior to the hearing he read the notes from the investigation meeting, witness statements from Mr Debbagh and Mr Elouassi and an email from Mr Cairney dated 04 October 2015.

43. The statement of Mr Debbagh is at page 143 of the bundle and the statement of Mr Elouassi is at page 151.

44. The email from Mr Cairney is at is at pages 144 to 145 of the bundle and states:

> "As for the incident on Friday I am positive that it was a one-off and will not happen again. Leroy has assured me of this and I believe him. Leroy has told me in private that he has personal problems away from work and he also received a telephone call from Jamaica, which was upsetting he know he should have phoned in sick but being Leroy he did not want to let us down. But as I said to him only person he let down was himself and he knows that. Leroy has for all the time I have worked for London Buses never had a station failed for cleaning and has always been more than helpful towards all the BSC's we don't have to worry about checking the cleaning when Leroy is on duty as we know it's always done to a high standard. Leroy is not just a cleaner to us he is a very important part of the team who does more than his fair share of the running of the station and if he was to be dismissed he would be greatly missed by all of us. It is for this reason I that I am personally pleading for leniency in this case, what Leroy done was wrong and he knows it. Could you please if you can give him one more chance, maybe a final written warning…".

45. The Claimant's trade union representative provided to the disciplinary hearing a statement from Mr Cairney in which he contended that he had not smelt any alcohol on the Claimant's breath and also alleged that Mr Elouassi had attempted to antagonise the Claimant and had picked on certain cleaners (see page 181 of the bundle).

46. The Tribunal finds that Mr Patel went through the various statements with the Claimant, as corroborated by the manuscript notes made by him on them. Mr Patel adjourned for 45 minutes to consider the matter and gave his decision to the Claimant that he was summarily dismissed.

47. During the adjournment Mr Patel had spoken to HR and also Mr Debbagh. Mr Patel spoke with HR to verify the management team account of conversations with Mr Debbagh on the day of the incident, which the Tribunal finds was essentially the information contained in a statement by Jo Horrell of HR dated 23 February 2016 at pages 202 to 213. Indeed, that account has not materially been challenged by the Claimant.

48. In the conversation between Mr Patel and Mr Debbagh, Mr Debbagh simply confirmed his own account and denied the Claimant's account, which the

Tribunal accepts was not of any great assistance to Mr Patel and did not give any occasion for him to go back to the Claimant for his further views.

49. The Claimant's dismissal was confirmed in a letter dated 12 November 2015 at pages 191 to 193 of the bundle. The findings of Mr Patel are set out at pages 191 and 192 and the Tribunal concludes that it was within the range of reasonable responses on the information available to Mr Patel for him to reach his conclusions. The Tribunal finds that Mr Patel's letter is a fair, accurate and balanced account.

50. It is worth setting out Mr Patel's decision in full as it accurately records the surrounding circumstances and competing arguments as presented to both him and also the Tribunal at this hearing:

> "I have found that you reported for work and were subsequently sent home by your Supervisor, Hassan Elouassi, and he advised you that owing to your apparent intoxicated state, you were not fit or required for that particular shift. You were directed by Hassan to leave site but initially you were not suspended, your Supervisor made the decision at the time to not handle the matter as a misconduct issue and he expected that you would report for work the following shift.
>
> The statement of Zubeer Debbagh, the Contract Manager, differs from your own recollection, but on balance, I believe that in response to the allegation of being intoxicated you made a request to be tested for alcohol consumption. Following this telephone conversation with Zubeer Debbagh, a drugs and alcohol test was arranged and took place on the same day and you voluntarily went to the West Croydon site to participate. The test took place roughly two hours later and produced a positive result indicating a breath alcohol level of 53/100ml.
>
> This level is particularly high. The company policy is that you should not report for work under the influence of alcohol at all and as a guide the reading which much not be exceeded is 13/100ml, although considering the contract you work on, the policy from the client and ISS is zero tolerance. The current drink-driving reading in the UK is 35/100 ml and so I trust you will appreciate that your test readings are extremely high.
>
> I have considered that your work environment is a bus depot and you are required to work in areas where there are moving vehicles. This is a dangerous environment and compliance with the drugs and alcohol policy is critical.
>
> I have understood from your representations that you were issued with the employee terms and conditions handbook, which contains the company codes of conduct, and specifically include conduct descriptions about drugs and alcohol. I was concerned to learn that you had not read and digested the content of the handbook, and I would always have the expectation that employees have the

responsibility of reading the content and ensuring they work safely and in accordance with those codes and terms. In regard to this particular behaviour, I think that even in the absence of specific codes of conduct, it is generally implied and reasonable to expect that employees do not report for work under the influence of alcohol.

In explanation, you disputed that you voluntarily took part in a test, you stated that you had only consumed alcohol when and after you had been sent home, and that in that time period of 1 hour 20 minutes you drank 3 pints of beer or lager and one shot of a spirit, and you were unaware that you could be called back to work to be tested. I raised this challenge specifically with Zubeer to better understand what had occurred and he informed me that he had taken HR advice at the specific time you made your request to be tested. To verify this point I spoke directly with Jo Horrell, the HR Manager for ISS Transport who verified that Zubeer made several calls to her on the Friday night and this included questions about whether it is ok to test someone who had already left site, but specifically requested a test to prove that they were not under the influence. In normal circumstances, if an employee leaves site when they are directed to do so, because in a supervisor or a manager has judged they are unfit for work and the person in charge does not direct them to participate in an alcohol test at that time, we wouldn't then insist on an employee returning to work, to be tested. However, in this particular case Zubeer informed HR that you were unhappy at being asked to leave site for this reason and that you were insistent on being tested, to seemingly demonstrate that you are not intoxicated. It is evident to me that you were only tested following your specific request, and that Zubeer acted reasonably in making the testing arrangements in response to that. I appreciate this version differs from your own account, but owing to the fact that Zubeer took HR advice at the time, I have on balance, decided that Zubeer's account is more likely to be representative of the incident.

At the disciplinary hearing you presented additional information not produced or available during investigation process, this included a statement from Scott Cairney, Bus Station Controller. I accept these statements are in support of you and they do help me form a view of your typical work character. However, Scott has evidently misjudged your intoxicated state and made a statement to say that you were not, in his view, apparently under the influence. The test results clearly show a high level of alcohol and so I am afraid that this statement does not positively influence my decision.

You also explain the smell of alcohol in your breath might have been caused by medication taken by you to control your diabetes. I would accept this was a possibility and if the reading had been much lower this could have been something which influenced my decision and provided some mitigation, but as aforementioned, the reading was particularly high".

51. Mr Patel then confirmed that, after careful consideration, it was his decision that the Claimant was summarily dismissed in accordance with the First Respondent's disciplinary procedure. The Claimant was informed of his right of appeal.

52. The Claimant appealed by a letter dated 05 November 2015 (page 186), in which he states: "I recognise I made a violation of the company's work ethics by testing positive for an alcohol breathalyser test. I never consumed any alcohol before the start of my duty. I currently have a diabetes medical condition and due to the medication that I am taking the scent from the medication can appear that I have consumed alcohol. Alcohol was only consumed after was sent home by Hassan the ISS supervisor. I subsequently thought I would not be on duty after being sent home and due to the following day being my day off. I then decided to consume alcohol. However, I believe that dismissing me is too grave a punishment for this violation. The offence was committed due to a moment of bad judgement while going through unrelated personal issues at the time".

53. The Tribunal finds that this letter was before Mr Constant, the appeal adjudicator, when he made his decision.

54. The Tribunal was also taken to a more detailed letter at page 187 of the bundle dated 5 November 2015. It is unsigned and looks to have been written by persons who were giving advice to the Claimant at the time. The Tribunal accepts the evidence of Mr Constant that this letter was not seen by him at the appeal and the tribunal concludes on balance that this letter in fact was not received by the First Respondent at any time before the appeal.

55. On 15 December 2015 Ms Horrell received an email from ACAS chasing the progress of the appeal. The Claimant was invited to an appeal hearing by letter dated 18 December 2015 from Mr Constant. The appeal hearing was arranged for 23 December 2015. The Claimant was given notice of his right to be accompanied.

56. By letter dated 19 December 2015 to Mr Patel, written by the Claimant’s wife, it is stated: "I write with reference to the recent letter I receive on 19/12/2015. 23 December 2015 affords me insufficient time to prepare my case for appeal. I therefore I make a reasonable request for a postponement until after the festive period".

57. Mr Constant replied by letter dated 23 December 2015, acknowledging the Claimant's letter that he had received that day and stated: "I have considered your request and have rescheduled your formal appeal hearing to be heard by myself on Tuesday 29th of December 2015… Given your appeal was first raised some seven weeks ago, I believe this further week is sufficient time enough to prepare… Please note that, in accordance with current employment legislation, you must take all reasonable steps to attend the hearing. You are advised that failure to attend this rescheduled meeting will result in it being held in your absence and a decision being made on the information available to me on the day".

58. A letter dated 24 December 2015 to Mr Constant, again written by the Claimant's wife, states: "I note and thank you for the postponement until 29 December 2015. However, this date still affords me insufficient time to prepare my case for appeal. I am also unable to contact the union representation as the office is closed over the festive period. I therefore make a further reasonable request for a postponement until January 2016,".

59. The Claimant confirmed in evidence that at this time he had left the membership of his trade union.

60. By letter dated 30 December 2015 to the Claimant, Mr Constant stated: "I write to you further to my letter dated 23rd December 2015 inviting you to attend a rescheduled appeal hearing noting your failure to attend your second hearing. I can confirm receipt of your letter dated 24th December requesting a further and third postponement. However, as stated in my earlier letter this is a re-scheduled hearing and as you've now had some eight weeks to prepare I do not feel a further postponement is appropriate or reasonable. On that basis I can confirm that the hearing was conducted in your absence. In line with the company's appeals hearing process and I write to advise you the decision made,".

61. The Tribunal finds as fact that Mr Constant had not at any time prior to the final rearranged meeting notified the Claimant that his final application for a postponement had been declined.

62. Mr Constant also sets out in a letter the 30 December 2015 his conclusions on the points raised in the Claimant's appeal letter. Mr Constant also spoke with Ms Horrell about the conversations with Mr Debbagh on the evening in question. Mr Constant concluded: "After careful consideration of the information and facts as I see them it is my decision to uphold the decision made by Mr Patel, which was summary dismissal in accordance with the Company Disciplinary Policy".

63. Mr Constant confirmed in evidence to the Tribunal that the issue of the Claimant's non-pay payment of wages would have amounted to an "extenuating circumstance" and also if the content of the unsent letter at pages 186 to 189 had been referred to it would also have amounted to extenuating circumstances and been a "different scenario".

64. With regard to the Claimant's claim of direct race discrimination the Tribunal concludes that this claim is without merit. The allegations of less favourable treatment are set out at paragraphs 5; 7; 8; 10; 12 and 14 of the list of issues. The Claimant describes himself as Black Jamaican. He relies upon a hypothetical comparator.

65. The Tribunal finds as fact that Mr Elouassi did not falsely accuse the Claimant of swearing and grabbing Mr Elouassi's arms on 2 October 2015, nor did Mr Debbagh instruct the Claimant to return to the workplace to take an alcohol test, nor constantly yell at the Claimant before and after the alcohol test as to

why the Claimant informed Mr Debbagh that he had been told to go home due to intoxication.

66. The Tribunal prefers the evidence given by Mr Elouassi and Mr Debbagh in this respect. Their evidence was credible and consistent.

67. The Tribunal finds as fact that Mr Elouassi did not send the Claimant home on the morning of 02 October 2015. The Claimant had stated he was going home, which Mr Elouassi acknowledged and the Claimant left the workplace. The Tribunal concludes that Mr Elouassi did not falsely accuse the Claimant of swearing and grabbing his arms.

68. Mr Debbagh's account of events regarding the Claimant's return to the workplace to take the alcohol test was consistent with the reasonably contemporaneous account of Ms Horrell given to Mr Patel at the disciplinary stage and recorded in writing later by her. It is not in dispute that by allowing the Claimant to go home Mr Elouassi had not followed the Respondent's "Procedures for Testing for Cause/Post Incident" (see page 59) in that any screening test would have been undertaken before the Claimant left the work environment. However, the Tribunal accepts the evidence of Mr Debbagh that he spoke with the Claimant and informed him that he had not been dismissed, but had been sent home (as erroneously understood by him) because he was under the influence of alcohol. The Tribunal finds as fact that the Claimant had wanted to return to work to take an alcohol test "to clear his name" and as a consequence the drug and alcohol test was arranged. The Tribunal finds that the Claimant was not instructed to attend by Mr Debbagh.

69. The Tribunal concludes that the Claimant's omission to inform anyone prior to taking the alcohol test that he had been drinking heavily and home is a significant omission, particularly as the Claimant contends that he was instructed to take the test and was aware of the serious consequences of a positive result. It is equally notable is that the Claimant contended in oral evidence that he had told Mr Cairney immediately after he had taken the alcohol test that he had been drinking at home. However, that is not mentioned in Mr Cairney's e-mail to the Respondent, or his statement as part of the disciplinary process, or in his witness statement for this Tribunal. It is also not mentioned in the Claimant's witness statement for this Tribunal hearing. These matters damage the Claimant's credibility.

70. Although Mr Cairney's statement to the Respondent stated that Mr Elouassi had attempted to antagonise the Claimant and had picked on certain cleaners who were non-Muslim. The oral evidence of Mr Cairney to the Tribunal was significantly less categorical. It was accepted by Mr Cairney in oral evidence that in his view Mr Elouassi spoke to everyone in the same manner irrespective of race. With regard to events before and after the alcohol test, in evidence Mr Cairney and the Claimant were not consistent in their version of events. Mr Elouassi's evidence was detailed and credible.

71. Mr Elouassi may have alleged that the Claimant was under the influence of alcohol in the presence of others, possibly 'Jamal', but crucially, even if the all

the allegations are made out factually, the Claimant has not established primary facts from which the Tribunal could conclude any causal link between those actions and the Claimant's race. There are no matters from which the "something more" can be established.

72. There was no history of events between the Mr Elouassi and the Claimant. The Claimant, Mr Elouassi and Mr Debbagh had all got along prior to this event. The was no evidence of occasions on which Mr Elouassi had detrimentally treated others of the same racial group as the Claimant, or more favourably treated those not of the Claimant's racial group.

73. The Tribunal accepts that Mr Elouassi genuinely considered the Claimant to be intoxicated at the time. Even on the Claimant's evidence, he suggests that Mr Elouassi may have mistakenly thought there was alcohol on his breath due to the alleged effects of the Claimant's diabetes tablets.

74. Indeed, as stated above, Mr Cairney, a witness for the Claimant, confirmed in his evidence that in his view Mr Elouassi could sometimes have an abrupt manner and that he treated everybody the same way, irrespective of race, when displaying this attributed characteristic.

75. There was nothing produced evidentially to suggest, even by inference, that that Mr Elouassi had acted the way that he had because of the Claimant's race.

76. The same observations can be applied to the Claimant's claims of race harassment which, after the withdrawal of a number of matters by the Claimant, are set out at paragraphs 17.2 and 17.3 and 17.4 of the list of issues.

77. The Tribunal finds as fact on a balance of probability that the allegations raised within those paragraphs did not occur as a matter of fact for the reasons set out above.

78. The Tribunal further concludes that even if they did occur, as with the direct race discrimination claim, the Claimant has not shown evidence from which the Tribunal could infer that these acts related to the Claimant's race. As stated above, the Tribunal preferred the evidence of Mr Elouassi and there is no history of any past events and no evidence of any treatment of others from which any inference may be drawn. There is no suggestion of the something more that infers a causal connection between the Claimant's race and the events under review. The evidence suggests that even if it is accepted that Mr Elouassi may sometimes be abrupt in his dealings with staff, he treated everyone the same.

79. There was no evidence to suggest any treatment of the Claimant at the times in question was because of, or related to, his race.

80. With regard to the unfair dismissal claim, the Tribunal concludes that the Respondent held a genuine belief in the conduct of the Claimant. There was

no suggestion that the dismissal was a sham. The decision to dismiss was genuinely taken on the material before the dismissing officer.

81. With regard to whether there was a reasonable process, there was an investigation; the Claimant was invited to attend an investigation meeting; that meeting was noted; the Claimant was invited to a disciplinary hearing; informed in advance of the disciplinary charge; informed of his right to be accompanied; was represented at the meeting at which Mr Patel went through the statements with the Claimant; the meeting was noted and Mr Patel made additional enquiries. The Claimant received a detailed dismissal letter and informed of his right of appeal.

82. A number of specific issues were raised by the Claimant. With regard to the availability of CCTV the Tribunal finds as fact that it would not have been available had Mr Patel made any enquiries. It also contained no audio reference and therefore would not have been of assistance as to whether Mr Elouassi sent the Claimant home or not, which was the issue that the Claimant wished to be clarified. The Tribunal concludes that the non-provision of CCTV did not place the process outside the range of reasonable responses.

83. There was a potential witness to the initial events mentioned in the investigation statement of Mr Elouassi named 'Jamal', a Bus Controller. The evidence was that Jamal worked for Transport for London, the client of the Respondent Company. The Claimant did not raise the matter of Jamal being a prospective witness at the disciplinary hearing and it is not mentioned in either appeal letter. The Tribunal concludes on balance that given the relationship between TfL and the Respondent it was reasonable for Jamal not be approached as a witness for the disciplinary proceedings.

84. With regard to the issue of the Claimant's diabetes, the Claimant confirmed in oral evidence that at the time of the incident he was taking, and had taken, tablets for diabetes. However, it was argued that the alleged smell of alcohol on his breath would be caused by him not taking his tablets causing a build-up of ketones associated with high blood sugar. In any event the Tribunal has received no medical evidence to confirm this state of affairs one way or another, or with particular regard to the Claimant and his own condition. The Respondent also received no such details at the time of the disciplinary matters. The Tribunal concludes that it was reasonable in the circumstances for the Respondent to proceed as it did through Mr Patel on the basis that it was a possibility and could have been something that influenced the decision had the alcohol test result not been so high.

85. With regard to mitigation, the Tribunal concludes that Mr Patel received and took into account evidence of the Claimant's surrounding circumstances and had enquired of the Claimant whether there was anything else he wished to be taken into consideration. That approach was reasonable in the circumstances.

86. The Tribunal concludes that all the matters referred to above placed the process within the range of reasonable responses.

87. However, the Tribunal also concludes that, when objectively considered, it was unreasonable for the Respondent not to delay the appeal hearing until after the festive period and into the new year as requested by the Claimant. The delay up to that time had been wholly caused by the Respondent. The Claimant had heard nothing from the Respondent with regard to the appeal and his enquiries through ACAS prompted a response.

88. In the absence of communication from the Respondent it was objectively unreasonable for the Respondent to proceed on the basis that the Claimant had that time available to prepare his appeal.

89. There were no pressing circumstances, particularly given the Respondent's own delay, for the time scale to be so truncated. The Respondent may argue that it was because of the delay that the time scale was shortened, but it was the Claimant who had suffered the delay and it was him who was requesting more time, which was not unreasonable given the time of year and the unlikely availability of any type of assistance. The Claimant had only received three clear days' notice of the first meeting and a further five days' clear notice of the re-arranged hearing, which of course included the Christmas period.

90. The letter from Mr Constant dated 30 December 2015 setting out his rationale for refusing the second postponement request states that the Claimant was requesting a third postponement, which was factually inaccurate, it was the second request.

91. The Claimant confirmed in his oral evidence that in fact at the time of the correspondence he had no trade union representative and indeed was no longer a member of a trade union. The Tribunal accepts the Claimant's evidence that his wife had written the letter and may not fully have understood the Claimant's circumstances.

92. In any event, Mr Constant, the appeal officer, was unaware of the Claimant's personal circumstances and on the face of it the Tribunal concludes it was objectively unreasonable not to provide the delay requested. The actuality of the Claimant's situation is a matter for consideration when assessing remedy.

93. The Tribunal further concludes that it was objectively unreasonable for the Respondent to fail to inform the Claimant that his second application for a postponement had in fact been declined by Mr Constant. The Claimant was informed after the event. There was reasonable time for him to be informed prior to the hearing.

94. The Tribunal concludes that an objective reasonable employer would inform an employee before the arranged meeting that a postponement request had been refused and the hearing would proceed, which would allow the employee to consider their options and decide whether, despite the

postponement rejection, they wished to attend, perhaps with some sort of assistance, or to take a view on the risks of non-attendance.

95. The Tribunal concludes that it is objectively unreasonable in the circumstances only to convey the non-granting of a postponement request after the hearing has gone ahead and a decision taken. Again, the impact of that decision is a matter for assessment in remedy.

96. Accordingly, the Tribunal concludes that the process adopted by the Respondent was outside the range of reasonable responses and unfair.

97. With regard to reasonable belief, the Tribunal concludes that at the dismissal stage the Respondent had a reasonable belief in the Claimant's misconduct on the evidence available to it at the time. The independent test results showed a high alcohol reading and it was open on the evidence available for Mr Patel on balance to believe the accounts of Mr Elouassi and Mr Debbagh, particularly given the account given the Ms Horrell and the email from Mr Cairney.

98. With regard to sanction, the Tribunal concludes that once Mr Patel concluded that the Claimant had been under the influence of alcohol at work and having regard to the level of alcohol displayed in the independent test results, dismissal was within the range of reasonable responses. Mr Patel did consider the Claimant's length of service work record and took other mitigating factors into account as produced to him at the time the dismissal decision was made.

99. Therefore, the Tribunal concludes that the Claimant's unfair dismissal claim is successful having regard to the flaws in the appeal process.

100. When considering general remedy issues and the *Polkey* principle, the Tribunal concludes having considered the Claimant's evidence that had he been notified of the second refused postponement of the appeal hearing he still would not have attended. Therefore, Mr Constant's actions made no difference in that respect.

101. However, had the hearing been reasonably delayed the Tribunal concludes that the Claimant would have attended, either on his own or with somebody permissible to accompany him.

102. The Tribunal received mixed evidence on whether testing positive for alcohol at work was a zero tolerance offence. It is not a zero tolerance offence under the Respondent's own procedures and the Tribunal refers to page 58 of the bundle where it is stated under the heading "Positive Results and Discipline": "Employees will be subjected to disciplinary action in accordance with ISS disciplinary procedures which *may* lead to dismissal if they: Fail an alcohol test . . ." (our emphasis).

103. The evidence from the Respondent suggested that TfL considered it to be a zero tolerance offence. However, the evidence from Mr Patel was that he

considered the Claimant's possible mitigating factors and was of the view that a good service record can make a difference. It was also the oral evidence of Mr Constant that had he received information from the Claimant as set out in the unsent letter at pages 187 to 189 it would in his view have "amounted to extenuating circumstances" and been "a different scenario". Accordingly, the Tribunal concludes that there is clearly a possibility that a delay allowing the Claimant reasonable time to prepare and attend may have made some difference to the overall outcome. The Tribunal concludes on balance that had the meeting been delayed, there is a chance the Claimant would have attended and provided the type of information contained in the undated letter and a chance that Mr Constant would then have considered that information to have been some level of extenuating circumstances and a different scenario. However, the Tribunal concludes that even with those possibilities the chances of the dismissal being overturned is not high given all the surrounding circumstances.

104. On balance, the Tribunal concludes that there is a 15% likelihood that Mr Constant would have overturned the disciplinary decision and applied action short of dismissal. Therefore, the Tribunal will reduce any Compensatory Award by 85% to reflect that possibility.

105. The Tribunal concludes that the Claimant is culpable and blameworthy in contributing to his dismissal, not least by not informing the Respondent before taking the alcohol test that, on his account, he had drunk large amounts of alcohol at home in the short space of time after he had left work and then testing positive in the test itself. The Tribunal concludes that the Claimant's failure to inform the Respondent of the alleged drinking whilst at home is a striking omission and one that significantly played a part in Mr Patel considering on balance that the Claimant was over the alcohol limit at work and had been dishonest in his account.

106. The Tribunal concludes on balance in all the circumstances that it is just and equitable to reduce the Basic and Compensatory Awards by 90% to reflect the Claimant's contributory action.

107. The Tribunal concludes that no adjustment is appropriate having regard to the ACAS Code of Disciplinary and Grievance Procedures. Indeed, it was not argued in submissions.

108. With regard to the wrongful dismissal claim, the Tribunal has considered and weighed all the evidence produced to it at this hearing, in particular the Claimant attending to take the alcohol test and failing to mention the extremely obvious matter that he had been heavily drinking at home after leaving work, the lack of credibility in his evidence to the Tribunal that he had informed Mr Cairney immediately after the alcohol test of his drinking at home, and the content of Mr Cairney's contemporaneous email of 04 October 2015. The Tribunal concludes that the Claimant was substantially over the alcohol limit when he attended at work, which amounts to a repudiatory breach of contract entitling the Respondent to summarily dismiss. This conclusion does not cut across the Tribunal's conclusions above with regard to unfair dismissal

and the Respondent's ability to take into account mitigating factors when considering whether to dismiss the Claimant in all the circumstances.

Employment Judge Freer
Date: 28 February 2017