Case No: 1802164/2016

EMPLOYMENT TRIBUNALS

Claimant: Mr D Cox

Respondent: East Riding of Yorkshire Council

Heard at: **Hull** **On:** **7 and 8 June 2017**
28 July 2017 (Reserved)

Before: **Employment Judge Keevash**

Representation
Claimant: In person
Respondent: Mr E Beever of counsel

RESERVED JUDGMENT

The complaint of unfair dismissal succeeds.

REASONS

Background
1 By his Claim Form the Claimant complained that (a) he was unfairly dismissed (b) the Respondent acted in breach of his contract of employment and (c) "discrimination for being part of a trade union and previously being a union representative". By its Response the Respondent resisted the complaints. Among other matters it contended that the reason for dismissal was some other substantial reason and/or, alternatively, capability.

2 At a Preliminary Hearing on 1 March 2017 the complaints under section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 and the breach of contract complaint were dismissed on withdrawal by the Claimant.

Issues
3 The Employment Judge identified the following issues for determination:-

3.1 Had the Respondent shown that the reason for dismissal was potentially fair under the provisions of section 98 of the Employment Rights Act 1996?

3.2 Did the Respondent act reasonably or unreasonably in treating that reason as a sufficient reason fro dismissal having regard to the factors set out in section 98(4) of the Employment Rights Act 1996?

Hearing

4 At the beginning of the Hearing the Employment Judge asked the Claimant to clarify what complaints were comprised in his Claim Form. After an adjournment, Mr Beever provided information based on his Instructing Solicitor's note taken at the Preliminary hearing. After discussion, the Employment Judge explained that he was satisfied that "ordinary" unfair dismissal was the only complaint left to be determined.

5 The Employment Judge also asked the parties for their views as to the order in which the witness evidence should be taken. Mr Beever asked that the Respondent's decision maker be taken first before interposing the three witnesses who attended on witness orders. The Employment Judge acceded to that request. Mr Tripp gave evidence first. After lunch and after he had been cross examined and re-examined, the Employment Judge asked whether the three witnesses could be interposed. He wished to minimise any inconvenience caused to them and he was concerned that there might not be sufficient time to conclude their evidence on that day. Mr Beever agreed with that approach.

6 The Claimant gave evidence on his own behalf. Neil Thomas Tate, former Respondent employee, and Tony Cox, the Claimant's father and former Respondent employee, gave evidence on his behalf. With Mr Beever's consent, the Employment Judge also read the witness statement of Derek Green, former Respondent employee, which was adduced on behalf of the Claimant. Paul Tripp, Group Manager for Environmental Services, and Rebecca Jane King, Human Resources Manager, gave evidence on behalf of the Respondent. Daniel Stephen Coates, refuse loader, Colin Thomas Crisp, area supervisor and trade union convener, and Ian James Wood, refuse loader, attended on Witness Orders and gave evidence. The Employment also considered two bundles of documents.

Facts

7 The Employment Judge found the following facts proved on the balance of probabilities:-

7.1 On 18 December 2000 the Claimant was employed by the Respondent as a Rapid Response/Bulk Driver. His statement of terms and conditions of employment provided:-

> "…
> 9. HOURS OF WORK
> The standard working week for full time employees is 37 hours. Where applicable those employees required to maintain a 39 hour week will be paid 2 additional hours contractual overtime at time and a quarter.
>
> Your normal working week is one of 37 hours …
>
> Should you be required to work overtime, payment will be made in accordance with Attachment 2 …"

7.2 By a letter dated 7 January 2013 Mr Tripp informed the Claimant (and other staff involved in kerbside waste collection):-

"…
During these meetings, you were advised of the decision made at Cabinet on 27 November 2012 to adopt a fortnightly collection of green, blue and brown bins and the subsequent proposal for staff within the waste and Recycling Collection Service to work between Christmas and New Year's Day, which has historically been a close down period, and for the two statutory days and the concessionary days to be added to your annul leave entitlement …

A decision has therefore been made that staff within the waste and Recycling Collection Service will be required to work between Christmas and New Year's Day and for the two statutory days and the concessionary day to be added to your annual leave entitlement.

Therefore, the purpose of this letter is to provide you with 12 weeks notice that the Council will vary your terms and conditions of employment and with effect from 1 April 2013 the two statutory days and the concessionary day will be added to your annual leave entitlement …

Understandably, demand for annual leave for the period between Christmas and New Year's Day may be high, however in order to ensure service continuity, the Waste and Recycling Collection Service will determine a minimum level of staffing to form a framework around which to grant annual leave requests …"

7.3 On 5 January 2004 the Claimant was employed by the Respondent as a Refuse Driver based at its Pocklington depot. His statement of terms and conditions of employment provided:-

"…
9. HOURS OF WORK
The standard working week for full-time employees is 37 hours. However, you are required to maintain a 39 hour week for which you will be paid 2 additional hours contractual overtime at time and a quarter.

Your normal working week is one of 37 hours plus 2 hours contractual overtime … Where collections are required to be changed because of a Bank Holiday you will be required to work on additional days to make up. Christmas/New Year collection arrangements will be decided on an annual basis …"

7.4 The Respondent's job outline for a Refuse Driver provided:-

"…
Principal Accountabilities:
…
11) To work overtime or weekends to catch up the refuse/recycling service after a bank holiday, due to vehicle breakdown/inclement weather or other operation pressures. On occasions, when the service dictates, you will be required to work on Saturdays, Sundays and bank/Public Holidays for which the appropriate enhancement will be paid …"

7.5 The Respondent's employee specification for a Refuse Driver provided:-

"…
Essential
… Flexible to meet requirements of the role ... To work overtime or weekends to catch up the refuse/recycling service after bank holiday, due to vehicle

breakdown/inclement weather or other operation pressures. On occasions, when the service dictates, you will be required to work on Saturdays, Sundays and bank Holidays for which the appropriate enhancement will be paid. There is a requirement to work between Xmas and New Year …"

7.6 On 5 January 2004 the Claimant was employed by the Respondent as a Refuse Driver based at its Market Weighton depot. His statement of terms and conditions of employment provided:-

"…
9. HOURS OF WORK
The standard working week for full-time employees is 37 hours. However, you are required to maintain a 39 hour week for which you will be paid 2 additional hours contractual overtime at time and a quarter.

Your normal working week is one of 37 hours plus 2 hours contractual overtime … Where collections are required to be changed because of a Bank Holiday you will be required to work on additional days to make up. Christmas/New Year collection arrangements will be decided on an annual basis …"

7.7 By a letter dated 25 January 2007 Ms Blyth, GMB trade union organiser, informed the Respondent that the Claimant had been elected as a GMB Shop Steward/Health and Safety Representative to represent that trade union's members at the Market Weighton refuse depot.

7.8 On 24 February 2009 the Claimant was given a formal warning under the Respondent's attendance management policy. He appealed. On 20 April 2009 he attended an appeal hearing. He was represented by Mr Richardson, trade union officer. The appeal was rejected

7.9 On or about 18 January 2013 the Claimant reported to the Respondent that had suffered an accident at work and injured his left shoulder. He began a period of absence from work. On 31 January 2013 the Respondent completed an accident/incident investigation report.

7.10 By a letter dated 28 February 2013 Mr Robinson, Divisional Manager, informed the Claimant:-

"… We discussed the accident and your subsequent absence and I confirmed that this period of absence would not be included in the totting up process under the Attendance at Work Policy …".

7.11 On 25 March 2014 the Claimant had surgery to his left shoulder. By a letter dated 31 March 2014 Mr Thompson-Holland, Occupational Health Advisor, informed Mr Beevers, Area Supervisor, that "recovery from this type of surgery is likely to take between 4-6 weeks as long as there are no significant post-operative complications …".

7.12 On 19 June 2014 the Claimant attended an attendance at work hearing which was conducted by Mr Brackenbury, Service Manager. The notes of that hearing recorded:-

"…
<u>Sum Up</u>

Daniel hurt his left shoulder at work on 18th January 2013 following which he

was absent from work for 9.5 days! This absence will not be included as part of the totting up process for the attendance at work policy…

The latest absence (56 days) occurred 14 months after the initial accident at work. Between these two absences Daniel has been absent on a further 8 occasions totalling 18 days for various other ailments.

Due to the length of time that has elapsed since your initial accident Accompanied by other unrelated absences it is my decision that your latest absence is not classed as an extension to your accident at work in January 2013. (If anything this would fall under the category of an un-resolving ill health issue should further absences continue to occur). Therefore the 56 days' absence from work is to be included as an absence under the attendance at work policy …".

7.13 By a letter dated 24 June 2014 Mr Brackenbury referred to that hearing and informed the Claimant:-

"… Having reviewed your attendance record it was agreed that you had taken a total of 74 days made up of 9 periods of absence in the past eighteen month period.

I explained to you that your attendance record is unacceptable, although I accepted that the reasons given for your absence have been genuine.

Having considered all of the circumstances surrounding the situation, including the representations made by yourself at the meeting, I decided that you should be formally warned about your level of attendance. It was also agreed that we should continue to work together to achieve a significant improvement in your level of attendance, and that I would continue to monitor your absence over the next 12 month period.

Action agreed at the meeting was as follows:-

- To discuss at the earliest opportunity with your supervisors or manager any problems you are experiencing so that they may continue to offer support to improve your level of attendance.
- Advised that any further accumulation of absences that exceeds 12 working days in the following 12 month period, or a 9 month continuous period of absence, may place your future employment with the Council at risk …"

The Claimant did not appeal against that decision.

7.14 On 16 July 2015 the Claimant attended a meeting under the formal warning stage of the Respondent's Attendance at Work Policy. The meeting was conducted by Mr Height, Service Manager. The Claimant was given a formal warning. By a letter dated 17 July 2015 Mr Height confirmed his decision and informed the Claimant:-

"… If your attendance levels do not improve and you have 94 hours absence during the 12 months following the date of the meeting your future employment with the Council may be at risk, and could ultimately lead to dismissal …".

7.15 By an email dated 28 July 2017 Ms Smith, Senior Human Resources Officer, informed Mr Crisp:-

"…
The i-Trent system calculates available working time by using the contracted for an individual. This includes contracted overtime (i.e. the 2 extra hours for refuse staff).

I am aware that the extra days (catch up days following bank holidays) that refuse staff work are offered and paid a overtime. These days are offered on a voluntary basis in the first instance. The full workforce is not usually required to fulfil these days.

Therefore any overtime on this basis is not included within the calculations and there are no plans to change this."

7.16 By an email dated 2 August 2016 Mr Crisp informed Ms Smith:-
"The AAW Policy states; "The representation of the trigger points as percentage threshold ensures that the attendance management case event report trigger points are prorated and applied consistently to all employees irrespective of their work arrangements".

Following discussion with my colleagues, our position is that the catch up Saturdays and Christmas/New Year make-up periods are factually part of the Refuse crews work arrangements, and we would expect, going forward, that these are included in the calculation where relevant, in term of the AAW Policy …".

7.17 On 5 August 2016 the Claimant gave a Grievance Form to the Respondent. He explained that the Respondent could resolve his grievance by increasing the trigger level to 99 hours "in line with Policy", not proceeding with a dismissal hearing and by managers treating him equally.

7.18 By a letter dated 8 August 2016 the Respondent invited the Claimant to attend a meeting "to consider your continued employment with the Council and decide whether you should be issued with notice of termination due to your level of sickness absence".

7.19 By a letter dated 8 August 2016 Ms Piercy, Senior Human Resources Officer,informed the Claimant that she had arranged a meeting for Mr Tripp "to consider your continued employment with the Council and decided whether you should be issued with notice of termination due to your level of sickness absence." In that letter she set out details of his sickness absence which showed that between 21 September 2015 and 27 June 2016 he had 96 working hours absence.

7.20 By an email dated 10 August 2016 Ms Piercy informed the Claimant:-
"… The trigger points stated within the Attendance at Work Policy are pro rata for employees working more or less than 37 hours per week and this is based on an employee's normal working week rather than an average calculation over the year. The trigger points do not take into account any other overtime undertaken above your normal working week regardless of whether or not this overtime forms part of your contract of employment.

In accordance with your contract of employment, your normal working week is one of 37 hours plus 2 hours contractual overtime. In addition, you are required to work the two statutory and one concessionary days if your work pattern falls

on these days and where collections are required to be changed because of a Bank Holiday you are required to work on additional days to make up. Although based on the minimum staffing levels required, not all employees within the service area work on these days and any requests approved not to work on these days are not recorded as annual leave or sickness absence.

I can confirm that, based on you're your normal working week, following the formal warning stage the trigger point to convene a hearing to consider continued employment is 94 hours and your sickness has reached this trigger point. Therefore, the Attendance Hearing … will go ahead as planned …".

7.21 On 16 August 2016 the Claimant attended a meeting which was conducted by Mr Tripp. He was represented by Mr Crisp. Ms MacRae, Senior Human Resources Officer, and Mr Robinson, Operations Manager, also attended. At the end of the meeting Mr Tripp stated that he would inform the Claimant of his decision. On the same day the meeting was reconvened and Mr Tripp stated that he had decided to dismiss the Claimant with notice.

7.22 By a letter dated 16 August 2016 Mr Tripp gave the Claimant "formal notice of your termination on the grounds of some other substantial reason due to unsustainable lack of attendance". The Claimant was given twelve weeks notice.

7.23 By a letter dated 31 August 2016 addressed to Mr Leighton the Claimant appealed against his dismissal.

7.24 On 30 September 2016 the Claimant attended an Appeal Hearing which was conducted by Mr Leighton, Director of Environment and Neighbourhood Services. He was accompanied by Mr Crisp. Ms Wilkinson, Senior Human Resources Officer, and Mr Tripp also attended.

7.25 By a letter dated 14 October 2016 Mr Leighton informed the Claimant that he had decided not to uphold the appeal

7.26 At the material time the Respondent had an Attendance at Work Policy and Procedure. This stated:-

"…

4 Managing Absence

4.1 <u>Reporting Requirements and Maintaining Contact</u>

…

4.1.4 If an employee's absence I attributed to an accident, assault, injury or disease whilst undertaking the duties of their post, they must report this to their Line Manager as soon as practicable …

4.2 <u>Return to Work Contact and/or Discussion</u>

When an employee returns to work following any period of sickness absence it is good management practice for the Manager to make contact with the employee. In the main this will be a brief chat, or telephone conversation where the employee's work base is remote, and held in the spirit of concern for the well being of the employee …

4.4 Prompts for Action

4.4.1 Action will need to be taken when certain triggers are reached … All triggers will be pro rata for workers working more or less than 37 hours per week and will take into account the various work patterns across the Council ...

4.4.2 When the following levels of cumulative absence have been reached, of more than one occasion within the rolling period as stated below, action will be taken in the form of a Case Review Meeting and where applicable a Case Conference, to be arranged by the Manager … The representation of the triggers as percentage thresholds ensures that the attendance management case event report triggers are pro-rated and applied consistently to all employees irrespective of their working arrangements.

4.5 Formal Warning Stage

…

4.5.3 Absences which are as a direct consequence of pregnancy, or arising out of an accident, assault, injury or disease whilst undertaking the duties of the post will not be included in calculating absence within the formal warning stage …

4.5.4 If the formal warning stage is entered into, the Manager must have previously explained to the employee at a Case Review meeting that their poor attendance level, if not improved, may lead to the issuing of a formal warning …

4.5.9 During the 12 month period following the date the formal warning was issued, the Manager must continue to take appropriate supportive action for any subsequent absences, and must hold at least one case review meeting after 59 further working hours absence …

4.6 Dismissal

…

4.6.1 A meeting will be arranged to consider the future employment of the employee where:

(a) during the 12-month period following the formal warning being issued further sickness absnces have exceedied 89 working hours …

4.7 Appeals

…

4.7.2 Any appeal against dismissal must be on grounds of misapplication of the procedure … or that the person making the decision to dismiss failed to adequately take into account any extenuating circumstances …"

The Law

5 Section 98 of the Employment Rights Act 1996 ("the 1996 Act") provides:-

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

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

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

(2) A reason falls within this subsection if it –
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) …
(3) In subsection (2)(a) –
(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality …
(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."

Submissions

6 Mr Beever made oral submissions. He referred to **Wilson v Post Office** [2000] IRLR 834 CA; **Davies v Sandwell Metropolitan Borough Council** [2013] IRLR 374 CA. The Claimant made oral submissions. Where appropriate, reference will be made to the submissions in the Discussion section of these Reasons.

Discussion

What was the reason for dismissal?

7 During the internal process and in his Claim Form the Claimant suggested that the reason for his dismissal was related to his trade union activities. He did not make that contention during this Hearing and he did not challenge the genuineness of the dismissal. In **Wilson** the Court of Appeal confirmed that an employee's failure to comply with the employer's attendance procedure was capable of constituting some other substantial reason – a potentially fair reason for dismissal under s98 of the 1996 Act. In the instant case the Respondent applied a settled attendance policy and procedure. In those circumstances the Employment Judge found and decided that the reason for the Claimant's dismissal was some other substantial reason.

Did the Respondent act reasonably or unreasonably under section 98(4) of the 1996 Act?

8 In addressing this question the Employment Judge took care not to lose sight of the imperative that a Tribunal must not substitute its opinion for that of an employer. He recognised that there was a range of reasonable responses available to the Respondent – not just in relation to the decision itself but also in relation to the conduct of the process.

9 The Claimant contended that the dismissal was unfair because the Respondent failed to comply with its policy a) when it decided not to disregard absences which were related to an accident at work (b) when it failed to prorate the trigger point to take into account catch up days he was contractually obliged to work and in fact worked and (c) when it conducted a Case Review Meeting by telephone instead of holding a face to face meeting.

Failure to disregard absences

10 The Claimant submitted that in line with its Policy the Respondent should have disregarded all absences which were related to his work accident. In particular it should have disregarded the absence necessitated when he had his shoulder operation. Had it done so, he would not have been given a Formal Warning in June 2014.

11 Mr Beever submitted that the authorities on warnings were relevant. In **Davies** the Court of Appeal decided that it was legitimate for an employer to rely on a final warning, provided that it was issued in good faith, that there were at least prima facie grounds for imposing it and that it must not have been manifestly inappropriate to issue it (see Mummery LJ at paragraphs 20 and 21). These were exceptional circumstances and directly went to the issue of reasonableness. In the absence of such circumstances it was not appropriate for a Tribunal to go behind a warning.

12 The Employment Judge found that during the meeting on 16 August 2016 Mr Crisp asked Mr Robinson (who presented the management case) whether he knew why the Claimant had his operation. Mr Robinson replied that the Claimant had his operation because he had injured his shoulder in a workplace accident. The Claimant relied on that statement when he told Mr Tripp that in June 2014 Mr Brackenbury wrongly decided that the Claimant's latest absence was unrelated to the work accident which occurred in January 2013. As a result of the accident he injured his shoulder; he had physiotherapy treatment for five weeks; he was given a cortisone injection; then in line with the usual treatment for such an injury a period of 6 months had to elapse before further assessment; he had an Xray before it was decided that he should have an operation. He also told Mr Tripp that in July 2015 Mr Height refused to listen to such evidence because there had already been an adjudication on the issue.

13 The Employment Judge found that in reaching his decision Mr Tripp failed to give any consideration to Mr Robinson's admission that the Claimant's absence to have the operation was arising out a work accident. As a result he failed to have regard to paragraph 4.5.3 of the Policy – such absence had to be disregarded for the purpose of calculating whether the trigger point had been reached. In circumstances where the Respondent placed reliance on the Policy before reaching its decision the Employment Judge decided that it was unreasonable for Mr Tripp to ignore what Mr Robinson had told him. In reaching that decision he rejected Mr Beever's submission that it was not Mr Tripp's role to reopen the past. Even if that was not his role before Mr Robinson made his admission, it was very much his concern afterwards. The Employment Judge doubted whether **Davies** was binding because in the instant case the warning in question had not been given because of an employee's conduct. Nevertheless he found and decided that, if Mr Tripp had acted reasonably, he would have concluded that the Formal Warning given by Mr Brackenbury was (adopting the formulation in **Davies**) manifestly inappropriate. Paragraph 4.5.3 of the Policy unambiguously provided that work accident related absence would be disregarded. It did not allow for any exercise of discretion in the matter. It was of no consequence that the Claimant did not appeal at the time or that he did not produce any medical evidence at any of the review meetings. Mr Robinson's admission was sufficient. Mr Tripp no longer had reasonable grounds to consider that the Respondent had correctly applied its Policy. He acted unreasonably by continuing with the meeting in circumstances where it had become apparent that an earlier Formal Warning (which formed the basis of later steps being taken

under the Policy) ought not to have been given. In the Employment Judge's judgment no reasonable employer would have continued with the meeting and made the decision to dismiss the Claimant. At the Appeal Hearing Mr Leighton had an opportunity to put matters right. However, he concluded that the procedure had not been misapplied. In the Employment Judge's judgment he also acted unreasonably when ignoring Mr Robinson's admission. He further compounded this omission by relying on the Claimant's failure to produce any medical evidence of a link between the accident and the operation. After Mr Robinson's admission it was reasonable at the very least to expect the Respondent either to make its own enquiries about that matter or to request the Claimant to provide evidence.

Catch up Saturdays

14 The Claimant gave evidence that during his interview for his current post he was told that the role included working catch-up Saturdays following a Bank Holiday. The Respondent shut down each Christmas. The Claimant worked an additional 40-45 hours during the period after Christmas including 3 Saturdays and extended days. In December 2014 the Claimant and his colleagues were told by their managers that they would not be allowed to take off all 3 catch-up Saturdays; any time booked off would be considered the following year; the managers would decide what day off they would be allowed. This was repeated in 2015 and 2016. According to his calculations the trigger point was reached when he had 98 hours absence.

15 Mr Tripp gave evidence that since 2013 an average of 28% of refuse staff did not attend the catch up Saturdays following Monday bank Holidays. Employees who did not wish to work Saturday catch up did not have to apply for annual leave on that day. Employees who expressed a desire to work on a Saturday but failed to do so because of sickness did not have that absence recorded as part pf their sickness absence record.

16 The Employment Judge understood that the correct question was not whether the policy had been misapplied but rather whether Mr Tripp PT acted reasonably. He found and decided that the Respondent placed reliance on the Policy when addressing the Claimant's absence. It convened the final meeting when it believed that the trigger point had been reached. The question whether it acted reasonably depended on whether it had reasonable grounds for its belief that the trigger point had in fact been triggered. In the Employment Judge's judgment there was only one reasonable interpretation of the Policy. By paragraph 4.4.1 the Respondent committed to ensuring that trigger points would be calculated by reference to various work patterns. The Employment Judge accepted the Claimant's evidence. Over three years the Claimant's working pattern in his job included working three Saturdays after Christmas and New Year and Saturday catch ups after Monday Bank Holidays. It was the Claimant's working pattern which determined when his trigger point was reached. The contractual documents made clear that he was obliged to work those days; if he refused, the Respondent was entitled to take disciplinary action. He could only be released from his obligation with the Respondent's consent. If that consent was not given, he remained under an obligation to work those days. The Employment Judge accepted the Claimant's calculations as to the number of hours worked on these Saturdays. He found and decided that the trigger point in his case was not reached until he had 99 hours absence. Since the Claimant had not been absent for that amount of time, the Respondent did not have reasonable grounds for its belief that the trigger point had been reached. In reaching that conclusion, the

Employment Judge rejected Mr Beever's submission that this approach in some way involved a rewriting of the Policy "on the hoof". The Respondent had unreasonably failed to follow its Policy.

17 In the Employment Judge's judgment if Mr Tripp had acted reasonably he would have accepted that there was no reasonable basis for convening the final meeting. It was not a question of having to decide between two equally plausible interpretations of the Policy. Further it was of no consequence that the Claimant only raised this issue at the final stage of the process. There was no evidence that he had done so deliberately. He was entitled to raise it at any stage during the process. If the point was well made, the Respondent had to address it in interests of reasonableness

18 Accordingly the Employment Judge decided that the Respondent acted unreasonably when convening the final meeting and when deciding to dismiss the Claimant. Its failure to adjust the trigger point at the Appeal Hearing was further evidence of its unreasonable conduct.

Case Review Meeting

19 The Employment Judge noted that the Policy required a manager to convene a case Review Meeting. The purpose of such meeting was to discuss the employee's absence and explore what support might be offered. There was no express prohibition of a telephone discussion. The Respondent gave evidence that in its Environmental Services Division such meetings were conducted on the telephone. In the Claimant's case there was no dispute that his manager had spoken to him over the telephone. There was nothing to suggest that the conversation had not fulfilled the purpose required by the Policy. There was no suggestion that the Claimant had been in any way disadvantaged by not attending a face to face meeting. In the circumstances the Employment Judge decided that in holding a case Review meeting on the telephone the Respondent did not act unreasonably.

Conclusion

20 The Employment Judge decided that the dismissal was unfair for one or both of the reasons referred to above, namely its unreasonable action when failing to disregard certain absences and when failing to recognise that the trigger point had not been reached. He ordered that the matter be listed for a Remedy Hearing.

Employment Judge **Keevash**

Date 31 July 2017