



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102465/2016

Hearing Held at Dundee on 13, 14, 15 & 16 March and 15, 16, 17, 18 & 19 May 2017

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**Employment Judge: I McFatridge
Members: Mr N Rowlands
Mr M Keenan**

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Mr G McIver

Claimant

Air Service Training (Engineering) Ltd

Respondents

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that

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1. the claimant was unfairly dismissed by the respondents. The respondents shall pay to the claimant a monetary award of Thirty Two Thousand, Seven Hundred and Twenty One Pounds and Fifty Pence (£32,721.50); and
2. the respondents shall pay the claimant One Thousand, Two Hundred Pounds (£1200) in reimbursement of Tribunal fees paid by him.

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REASONS

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1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unfairly dismissed by the respondents. The respondents submitted a

response in which they accepted that the claimant had been dismissed but stated that the dismissal was substantively and procedurally fair. The respondents' primary position was that the reason for the claimant's dismissal had been gross misconduct. Their secondary position was that the reason had been some other substantial reason, namely a breakdown of relationship and loss of trust and confidence.

2. The Hearing was originally set down to take place over five days in March 2017. Unfortunately it proved impossible to conclude the evidence during that time and a further five hearing dates were fixed in May 2017. At the Hearing evidence was led on behalf of the respondents from Susan Bald, Vice Principal HR and Commercial at Perth College UHI; Rhona Munro, Head of Learning Resources at Perth College UHI; Peter Farrow, Chief Executive of the respondents; Margaret Munckton, Principal of Perth College UHI and a Director of the respondents and Mark Bell, Chairman of the respondents' Board. The claimant gave evidence on his own behalf and evidence was also led on his behalf from Mr Hamza Aamer, a student with the respondents who gave specific evidence regarding a conversation he had overheard between Mr Farrow and a Mr Fletcher; Mr Sutcliffe, a former colleague of the Claimant; Mr Cervantes, a former colleague of the Claimant and Mr Beasant, a former colleague of the Claimant. It should be noted that, with the agreement of the parties, the evidence of Ms Bald was interrupted so as to allow Mr Aamer to give his evidence out of turn for reasons of availability. Similarly Mr Bell gave his evidence interposed between that of Mr Sutcliffe and Mr Cervantes for reasons to do with availability. The parties lodged a joint bundle of documentary productions which was added to with consent during the course of the Hearing. It should be noted that some items were added by the respondents fairly late in the day and were admitted *quantum valeat* on the basis that it would be up to the Tribunal to make of them what they could in the absence of anyone specifically speaking to them. On the basis of the evidence and the productions the Tribunal found the following essential facts relevant to the case to be proved or agreed.

Findings In Fact

3. The respondents are a limited company who are wholly owned by Perth College UHI. The College currently employs around 550 staff at five sites in Scotland. The respondents employ approximately 30 staff and are based at the College Campus in Perth and also at a site at Perth Airport approximately four miles away. The respondents provide training to students who wish to pursue a career in the aircraft and aeronautical industry. A substantial part of their business is involved in training engineering and ground staff. A number of years ago the respondents decided to become involved in commercial pilot training by setting up a Ground School.
4. Attendance at Ground School is a key part in the training of a student who wishes to become a Commercial Pilot. Generally speaking a student will first of all obtain a private pilot's licence. They then require to attend a Ground School during which they will study for around 14 examinations which are set on a syllabus fixed by the CAA. During this time it is also usual for the student to be doing as much flying as possible as a student requires to have completed a certain number of hours as a private pilot before going on to the next stage. Once a student has completed Ground School and passed all of their exams they then move on to the next stage which is carried out at a Flying School. This involves obtaining certification on multi-engined aircraft, instrument flying and commercial flying. The Student then acquires what is called a frozen commercial pilot's licence. This is essentially a licence which can be validated as a full commercial pilot's licence provided the student then does the requisite number of hours.
5. Within the aviation training industry it is not unusual for one organisation to deal with the provision of a Ground School whilst another organisation deals with flying training. In the case of the respondents there was another organisation based at Perth Airport in close proximity known as ACS. This organisation had a fleet of aircraft and carried out flying training for commercial pilot students. Over the years the respondents had developed what they described as a "path programme". This basically provided training which would allow an individual to complete all of the training he required in order to obtain a frozen commercial pilot's licence. The path programme included training for a private pilot's licence, the ATPL Ground School and thereafter commercial flight training with a view to obtaining the commercial

licence, the instrument rating and the multi-engine rating. The Ground School was provided by the respondents. Other aspects including all aspects to do with flight training were provided by ACS. The legal arrangement was that the students would belong to AST, the respondents, but that they would sub-contract out the flying training to ACS.

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6. One particular advantage of arranging things this way was that many students wishing to obtain flying training come from overseas. They will often require some form of visa to remain in the UK for long enough to complete such a programme. It is difficult for a student to obtain a visa on their own. The respondents, due to their links with Perth College UHI which is recognised as a tier four visa partner by the Home Office, were able to provide visas for suitable students who wished to carry out the path programme.
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7. Whilst many students who wish to train as a Commercial Pilot are self-funding a substantial number of students worldwide are sponsored by their companies. Given economies of scale it is often much more effective for an organisation such as the respondents to seek to obtain a single contract with such a company who are in a position to send 20 or 30 students at a time rather than market their services to individual students.
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8. The claimant is an Avionics Engineer by profession. He worked in pilot training for BA from around 1989 onwards. He worked as an Instructor in a Ground School for type training. In 2002 an opportunity came up to take voluntary redundancy and he decided to take this. Thereafter he worked freelance for a number of years for various airlines situated near Gatwick in the South East of England. In 2012 he and his wife were living in the South East of England where he had two young children. He saw an advert for a job with the respondents as Chief Ground Instructor. Having discussed matters with his wife he decided that he would apply for the job but he was naturally apprehensive about moving from the South East of England, where there were substantial career opportunities for someone with his background and qualifications, to Scotland where there were very limited opportunities. He was told that he would be interviewed and was asked to prepare a presentation in advance of the interview. He then travelled to Perth where he met
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with Mr Farrow, the Chief Executive of the respondents. Mr Farrow then showed him round the airport and had various chats with him about the way forward. At the end of this visit the claimant expected to be taken to a formal interview where he would be asked to give his presentation but instead was simply told that if he wanted the job as Chief Ground Instructor then it was his. The claimant raised with Mr Farrow his concerns that he did not wish to move to Perth and then find that the Ground School closed within a few years and he would be unemployed in an area where there were very few alternative employers in this line of work. Mr Farrow assured him that this was unlikely. He told the claimant that the respondents were in advance negotiations with a company which was in a position to send a substantial number of Libyan students to the respondents. He also indicated that there was a further contract with a Nigerian company in the course of being negotiated. Mr Farrow pointed out to the claimant that AST was a wholly owned subsidiary of Perth College UHI and that there were always lecturer vacancies available. He indicated to the claimant that in the unlikely event of anything happening to the Ground School then he was certain that they would “snap up” the claimant as an Engineering Lecturer. The claimant’s position was that if it were not for these assurances he would not have taken the job. The claimant duly accepted the job and commenced employment as Chief Ground Instructor on 1 January 2013. Shortly after his appointment the CEA changed the terminology used for posts such as the claimant’s and the claimant was then referred to as Chief Theoretical Knowledge Instructor (CTKI).

9. Pilot Training Ground School such as the one operated by the respondents are subject to strict regulation by the CAA. They require to have a licence to operate known as an Air Training Operator’s Licence. In order to obtain such a licence they require to demonstrate to the CAA that they are able to provide proper training. They require to provide the CAA with copies of their manuals and some of the training materials which they use. These manuals cover matters such as health and safety and compliance regulations. They also have to satisfy the CAA regarding the premises from which they operate. They required to show that the Head of Training and the CTKI have the appropriate professional skill and experience to deliver the training.

10. The claimant was the only full time employee of the Ground School. The claimant taught some of the courses himself but other courses were taught by part time lecturers who were generally individuals with extensive experience in the aeronautical industry. By the summer of 2015 there were two other part time lecturers who had been with the college for some time and a third lecturer who the claimant understood had just joined. Mr Sutcliffe and Mr Cervantes were both experienced airline pilots who taught with the respondents on a part time basis and had done so from around 2012. Mr Beasant was hired to teach a particular course in July 2015 and taught that course. His understanding was that he would be asked back to teach the course to other intakes of students however in the event, as will be seen, this did not happen.
11. Shortly after the claimant arrived as CTKI the respondents announced that they were putting a moratorium on future recruitment. The reason for this was that management did not feel there were enough new self funding students coming in to make it worthwhile. It is not clear how long this moratorium lasted for. While the moratorium was ongoing neither the claimant nor any of his co-workers were placed at risk of redundancy and it would appear the moratorium was lifted fairly quickly. Ms Munckton joined the Board in 2014 and one of the matters being discussed at her first Board meeting related to the lifting of this moratorium.
12. During this period the claimant became concerned that he did not feel Mr Farrow was promoting the Ground School properly. He was also concerned that the respondents suffered through their association with ACS. It was his view that ACS were using old aircraft and that students were reluctantly to use the respondents' services if the flying part of their course was going to be with ACS. The claimant raised the matter with Mr Farrow on a number of occasions but nothing came of this. During this period there was also further discussion regarding the Libyan students. In principle the proposal was that around 65 Libyan students paid for by a Libyan aircraft company would come to Perth and train as Commercial Pilots. The Libyan company involved was EACS. This contract, if it materialised, would have a significant effect on the finances not just of the Ground School but other parts of the College. A number of meetings took place at high level with politicians and others relating to this proposal. The principal difficulty which the College

identified was that if there were any difficulties with these students and if the students had been brought in using the College's tier four visa authorisation then the College might well find that their tier four visa authorisation was placed at risk. This would have a catastrophic effect on other parts of the College which also relied substantially on overseas students. The respondents were aware that the Home Office were rigorously looking at the way tier four visas were used and a number of colleges had lost certification with catastrophic results for them. As a result of this the College wished to find some other way of bringing the students in which would not involve the College putting their tier four visa authorisation at risk. Negotiations with the Libyans dragged on over this issue for some time and as at the date of the Hearing have still not been resolved. It would appear that at some stage the Libyans had paid a deposit of around half a million pounds to AST which is to be set against tuition fees if and when the visa issues can be resolved so that the students can come. Given that the claimant was advised that the Libyans were coming in 2012, over the course of his employment his view and that of his colleagues was that there was actually no possibility of the Libyan student issue ever being resolved so that the students would come to the College.

13. On 29 June 2015 Mr Farrow sent an e-mail to Mr McIver and the other instructors Mr Cervantes and Mr Sutcliffe as well as to Allan Falconer of ACS. This e-mail was lodged (pages 61, 62). It stated

"... It now seems very unlikely that we will ever see a resolution to the EACS visa issue. We are speaking with another sponsor, but this is in the very early stages. Whilst the flight training is currently producing a break even, as students leave this situation will turn to a loss, unless we replace those graduating or improve on numbers.

Essentially, if no further students are recruited, the ground school will cease to operate in December 2015.

There is a Board meeting in late July, and not wishing to hide anything from them will have to express these facts

I believe we therefore have until the October Board meeting to turn this around, otherwise the decision would be the obvious one.

Whilst we have all contributed to the marketing effort, and put in a lot of time trying to recruit, the time is now right for us to consider one last big push.

None of us want to see the Path programme fail I'm sure, and therefore I would like to hold a meeting to discuss the issues and determine our strategy going forward.

I think to hold the discussion this week is important, therefore I would ask that you provide your availability. We simply cannot delay any longer."

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14. The claimant was concerned to receive this as he saw the most likely outcome as being that the Ground School would close in December. A meeting took place with Mr Falconer of ACS at which the respondents and Mr Falconer decided to collaborate in pushing distance learning. Distance learning is a process whereby individuals who wished to complete the Ground School can do so without attending every day and without having to give up their other employment. Since these students are not full time the Ground School will take them longer.
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15. The Claimant approached Mr Farrow and reminded him of what he had said as regards redeployment. Mr Farrow's response was to the effect that if there was a vacancy of an Engineering Lecturer it would not be up to Mr Farrow but up to HR to decide whether or not the claimant would be redeployed to this. The claimant felt Mr Farrow was backing down on the commitment he had given at the time the claimant had been recruited and formed the impression that Mr Farrow did not wish to redeploy him elsewhere in the respondents' organisation. The claimant also asked if he could see the figures for the Ground School. Mr Farrow said the business was not profitable and they were possibly looking at a £70,000 loss. The claimant spoke to Helen Warne on the telephone. She is Secretary of the Board. He asked her for figures. Mr Farrow then produced figures to the claimant but placed them quickly in front of his face but refused to give him a copy. From the little the claimant could see he did not believe that the loss of £70,000 was a correct figure. It appeared to him as if Mr Farrow was showing the full costs of the Ground School from August 2015 to August 2016 on the basis that there would be no student income from new students. The claimant felt that it was inaccurate as if
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there were no students then the costs of the part-time instructors would be less. He was aware that the other three lecturers were on zero hours' contracts and that if there were no students then there would be no need to pay them anything. His view was therefore that the figure of £70,000 was incorrect. The claimant's view was that Mr Farrow was not putting sufficient effort into promoting pilot training as he wished to concentrate on the engineering side of AST given that his own background was in engineering. The claimant was aware from his general contacts in the business that pilot training is a booming industry and he felt that if the respondents used a different and better quality flight training provider they would get many more students.

16. At some point in early July Mr Farrow spoke to Susan Bald about the potential staffing implications were the Ground School to close. On 10 July 2015 Ms Bald wrote to Mr Farrow referring to this discussion and providing information regarding the start dates of the three employees. She indicated that as two had more than two years' service then they had full employment rights and this would be a redundancy situation. At that point the claimant had less than two years' service having started on 1 January 2013. She went on to say

"We'd need to consult if there was a potential redundancy situation – a month would begin and conclude our need for consultation before any notice to terminate contract was issued. Of course, we would try for redeployment, voluntary redundancy etc before getting to stage of compulsory redundancy. Does AST have a redundancy scheme or do you follow College procedure? I'd also need to check if any AST redundancies are covered by the College's strict requirements under ONS.

I'm in the office on Monday if you need to discuss."

17. As part of their effort to obtain students the respondents would sometimes take a stand at an Air Show. Usually this would be attended by the claimant on behalf of the respondents. In July Mr Farrow attended a meeting to discuss the respondents' participation in the Prestwick Air Show. Following this Mr Farrow sent an e-mail to the claimant on 13 July suggesting that AST, ACS and PCUHI

form a joint stand. He suggested that an AST student pilot should be made available to answer questions.

18. On 17 August 2015 the respondents' Board met for what was termed a Strategy Meeting. At this event Mr Bell took over as Chairman of the Board from the previous Chairman, Mr Napier. A minute of this meeting was lodged (pages 65-69). The section relating to the Ground School is contained on page 67. It is noted that Mr Farrow set out the draft budget for 2015 showing a potential loss of £70,000. It was stated that this was an unacceptable level of loss which could undermine the rest of the business. He stated with regard to the Libyan students

"There has been no progress in resolving the visa problems and it is considered too high a business risk at this time to apply for the visas, since any rejection could adversely affect Perth College's highly trusted status with UKBA, which in turn could result in all of the overseas students being sent back to their respective countries.

High level discussions are being held with the Scottish Government, Ministers, UKBA and others to try and resolve the issue. Ian Watson to contact Andrew Dunlop in his position as a Scottish Minister to try and resolve the problem.

Peter recommended an immediate cessation of recruitment of single self-funding students be actioned and if there were no corporate customers forthcoming, the Pilot Training be discontinued when the current students graduate around December/January 2016. AST would retain the license to train for two years."

It was also noted

"This timing would reduce the loss to around £30k rather than a full year loss of £70K. A decision in advance of the next scheduled Board meeting is required to enable discussions to commence with HR regarding staffing implications."

Although the Tribunal heard conflicting evidence on the subject, none of which it could entirely accept, it would appear that Mr Farrow advised the Board that if they ceased to operate the Ground School then they would be able to retain their ATO Licence for a period of two years which would enable them to simply re-start the Ground School without reference to CAA if and when they decided to do so. This information which Mr Farrow provided to the Board was incorrect.

19. Immediately following the Board meeting on 20 August 2015 Mr Farrow wrote to the claimant and various others including Margaret Munckton and Susan Bald stating

“Following recent discussions with all parties concerned, it is with regret that we must now direct that there is to be no more recruitment of individuals for either the Path Programme or residential or distance learning Ground School.

As you are aware, the current budget indicates a significant loss in the current financial year. And therefore we need to take action now to minimise this.

Obviously, if there is a change in the situation, then we shall review this decision at Senior Management level. However, at the present time we must anticipate a cessation of ground school, in December 2015/January 2016, and of the Path Programme when the last of the current students completes flight training in early 2016.

This is a regrettable situation, but is necessary to avoid continuing losses.

We shall be requesting our colleagues in HR, to undertake the necessary actions relevant to staff currently employed in the ground school.” (page 70)

20. The claimant’s understanding following receipt of this e-mail was that the Ground School would be closing in December. His view was that clearly there could be no further recruitment of self funding students if the respondents had placed a moratorium on such further recruitment. His view was that, given that the respondents had been attempting to finalise the Libyan students’ contract since at

least 2012 with no success, it was extremely unlikely that any commercial contracts would be forthcoming. His role was entirely involved in the Ground School and if there was no Ground School there would be no role for him as CTKI. The Claimant's belief therefore was that when the Ground School closed he would be out of a job.

21. Following receipt of the e-mail on 20 August Mr McIver responded to Mr Farrow raising issues regarding students. The e-mail states

"Peter,

Thank you for letting me know.

There are several issues to consider regarding the students.

1. There are two distance learners who started on Monday and are due to complete their course in April 2016.

2. There is an additional full PATH student who has already paid a deposit of £1000 intending to start his course in December 2015.

3. Two of the existing Tier 4 visa students will not have passed all their exams by December and will be required to repeat all of the ground school modules.

4. There is an additional Tier 4 visa student from Bahrain who wishes to return to the UK to resume his second series studies.

When should an announcement be made to the existing students?

I will be coming to the college this afternoon to see Ian Jones and I will pop in to your office to discuss the above."

22. Later that afternoon Mr Farrow e-mailed a response to the claimant which was also copied to various others including Margaret Munckton. He answered the questions posed by the claimant as follows

"1. We will continue to support the DL students. However, we should encourage them to use their 8 weeks classroom time before December.

2. We should advise the students that at the current time, we are uncertain as to whether the course will run. Please offer them the

option to A. receive a refund or B. wait until further communication from AST.

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3. *I assume these guys have undertaken the full ground school, or will have undertaken the full Groundschool by December. The Groundschool will not run past December, or the latest contracted date for full completion, therefore the students will be given the opportunity for self-study or withdrawal at that time.*
4. *We should advise him that the ground school will not run beyond December 2015.”*
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On 21 August Mr McIver sent a further e-mail to Mr Farrow stating

“Can you confirm that the DL students will be given the opportunity to have lectures during the two revision weeks in February and April?”

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Mr Farrow responded

“We would hope that all students would finish scheduled classroom training by the end of December.”

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The claimant responded on 21 August stating

*“Peter,
They will have done only half the subjects by December.”*

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Mr Farrow responded stating

*“Gerard,
The regulations require a minimum of 3.2 weeks, this doesn't have to be over all subjects, the remainder they can self-study surely?
In any case, our intention was that with no additional students we would close the ground school in December.*

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However, we also need to support the students, so we might need to review this. But, bringing an instructor in for 2 students would be very expensive, and our income from D/L is minimal.

Therefore perhaps we should advise them now that the classroom lessons will only be available until December 2015.”

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On 24 August Mr Farrow e-mailed Mr McIver about a telephone call which he had received from the mother of one of the Tier 4 visa students. This individual who was an overseas national would be placed in some difficulty by the closure of the Ground School in December in that he would not have passed all of his examinations by then. This would mean that he would effectively have to return to his home country without having anything to show for his studies and he would be unable to continue with his commercial pilot training without finding another Ground School and obtaining another visa which could be difficult. Mr Farrow's conversation with the individual's mother had been a difficult one particularly as she did not speak good English and during the course of it she had indicated her understanding was that the whole of AST was closing in December. Mr Farrow's e-mail to Mr McIver advised him of this and stated

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“I had a call from a relative of this young man, they seemed to have got the idea that all training ceases in December.

This is clearly not the case, and I told them that the ground school taught lessons end in December, and that if/when the students pass the exams they will progress onto commercial flight training as per schedule.”

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23. At some point in August the claimant had a discussion with Norman Beasant. Mr Beasant was a former RAF pilot however following this he had worked for a time for Short Brothers before buying over an engineering business in England. He had purchased the business from the liquidators. He had then turned the business round over a period of four years and eventually sold it. Following this he had re-trained as a Commercial Pilot and worked in commercial aviation until 2015 when he reached the age limit for commercial flying and was required to retire. By that time he already worked as a part time lecturer at Perth College and had been

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asked to help out by doing some of the technical lectures at the Ground School. He had commenced doing this in June 2015.

24. Mr Beasant suggested to the claimant that the appropriate thing to do in the present circumstances would be for the four employees of the Ground School, Mr Mclver, Mr Cervantes, Mr Sutcliffe and Mr Beasant to set up a company to take over the Ground School from Perth College. It would be a management buyout. He considered this was a sensible suggestion. Like the claimant he felt the business was viable but was being badly run by Mr Farrow. He felt there would be advantages to AST and Perth College in still having a Ground School situated at Perth Airport and associated with the College. Like the claimant he felt that the College would probably wish to arrange its flight training with a different provider from ACS. Mr Mclver had not considered the matter before and was aware that he personally did not have any business experience or skills in setting up and running a private business himself. He did however believe that since Mr Beasant had direct experience of doing this that the matter was one which should be explored further.

25. Mr Beasant and the claimant met with Mr Farrow on 25 August in Mr Farrow's office to discuss their proposal for a management buy-out. The report of this meeting given to us by Mr Beasant and the claimant differed from the report given by Mr Farrow. We preferred the evidence of Mr Beasant and Mr Mclver. Mr Farrow told Mr Beasant and Mr Mclver that he would wholeheartedly support their proposal. He said that it would have to go to the Board but that usually the Board would act on his recommendations. He promised the claimant and Mr Beasant every support. He did say that there might be an issue with the new management buy-out company operating from the existing classroom space used by the respondents at hangar 75B at Perth Airport. He said that at some stage in the future AST might require this space to deliver engineering lectures. He indicated however that this was something which could be sorted out at a later stage. He told Mr Beasant and the claimant that they should put the proposal in writing so that he would have something to give to the Board. He said that he would immediately obtain confirmation from the Board that they were prepared to proceed. During the course of this conversation there was a discussion about the

fact that the new business would require an ATO licence granted by the Civil Aviation Authority and that the process of applying for this took some time. All of the parties were aware that if the new business wished to be in a position to take over the business of the respondents' Ground School from the end of December then immediate steps would require to be taken to obtain this approval. All parties were aware that no Air Training Ground School could operate without an ATO licence.

26. Following the meeting Mr Beasant and the claimant worked on putting together a proposal. Their understanding was that what they required to do was to produce a document summarising the verbal discussion they had had with Mr Farrow and this is what they did. They prepared a document which was lodged at page 150. It is based on the conversation which took place between the claimant, Mr Beasant and Mr Farrow on the 25th. The document was e-mailed by the claimant to Mr Farrow at 9:55 am on 27 August 2015 (page 83) he copied it to Margaret Monckton as he was the only other board member whose email address he was aware of. The proposal was that the AST Board *"quickly transfers the existing pilot training business to NewCo"*. It mentioned that speed was of the essence and that a joint statement should be given as soon as approval in principle had been given and that a legal contract of sale would follow. The new company (described as NewCo Ltd) would take over the business 'as it stands on a no cost basis' and AST would then have no future liability for any new business or cost generated. There was a provision that AST would discontinue any involvement in pilot training for five years. There was a discussion that a new CAA approval would be required and it was suggested that AST sub-let building 75B to the new company for a period of 12 months to allow the new business to become established and to assist with the CAA approval. The claimant's rationale for this was that if NewCo submitted their application for an ATO licence to the CAA proposing the use of new premises then the CAA would require to send an inspector to look at these premises before the approval could be granted. This would add approximately 4-6 weeks on to the approval process. On the other hand if NewCo applied for their ATO licence using the existing premises at 75B which were already known to the CAA then there would be no need for this inspection to take place. The proposal also stated that the new company would like permission to use the PATH name and logo and that

all manuals and the 'existing IT licensing arrangement for PadPilot' would transfer to the new business at no cost. Finally as consideration it was suggested that the existing four employees' contracts would transfer to NewCo and that the four employees would waive their right to any redundancy payment. There was a short section setting out the mutual benefits of the arrangement including various benefits which would accrue to AST.

27. The understanding of Mr Beasant and the claimant was that Mr Farrow would put the proposal to the full Board. At the meeting Mr Farrow had indicated that he would be in a position to come back within seven days albeit he had also said that this was simply a formality given that he approved the proposal.

28. At some point in August a discussion took place between the claimant and Mr Farrow regarding a business training course run by Acorn Enterprise in Rosyth. The claimant was painfully aware that he lacked experience in running a small business of his own and discovered that Acorn ran a 20 week course for budding small businessmen. He suggested to Mr Farrow that he be allowed to go on this course so that he might develop the appropriate skills and Mr Farrow agreed to this. The claimant started attending the course every Tuesday and Friday from around the beginning of September. Early on in the course the course organisers asked the claimant and other participants to put together biographical details and details of the business which they were planning to set up. The claimant provided them with this information. Although the claimant was unaware of this at the time Acorn later used this information as well as information about other participants in the course on their website.

29. On 1 September Mr Mclver e-mailed Mr Farrow asking him if the Board had had a chance yet to consider the proposal. Mr Farrow responded also on 1 September stating

"I am meeting to discuss this tomorrow afternoon". (page 81).

30. The Prestwick Air Show took place over the weekend of 5-6 September 2015. Normally the claimant would attend such air shows to man the recruitment stall for

the respondents however on this occasion Mr Farrow attended along with Allan Falconer, the Chief Executive of ACS. In the week following the air show the claimant had a conversation with Mr Falconer at which Mr Falconer advised him that the PATH programme was still being actively advertised on the stand at the air show and indeed that Mr Falconer had the names of 15 individuals who had attended the show and asked for more details of this. The claimant found this slightly odd and e-mailed Mr Farrow on 8 September stating

"I have spoken to Allan Falconer who told me that the PATH programme was still being promoted at the Prestwick Airshow at the weekend and that if we had a minimum amount of students starting then the PATH programme would continue. This is not in line with your email below which makes it quite clear that if the situation continues as it has been then the ground school will close in December. To my knowledge there has been no change in the situation therefore I must assume that ground school will close. I would be grateful for an unequivocal response from you to clarify the above." (page 86)

Mr Farrow responded to this on 14 September stating

"In fact it is in line with my previous email as the following statement suggests 'Obviously, if there is a change in the situation, then we shall review this decision at Senior Management level'. We must hope for the best, and prepare for the worst." (page 85)

During this period one of the students at the Ground School who was going to be affected by the closure and had been given the option asked for a refund and on 14 September the claimant wrote to Mr Farrow asking him to progress this. (page 88)

31. At some point around the middle of September Mr Farrow and Ms Munckton discussed the written proposal for the management buy-out. Mr McIver had forwarded a copy to Mrs Munckton as well as to Mr Farrow. Mrs Munckton, as well as being a member of the AST Board is also Principal and Chief Executive of Perth

College. Her e-mail address was in the Perth College internal directory. Most of the other members of the Board apart from Mr Farrow are non-executive Directors.

32. On 16 September Mrs Munckton wrote to Mr Bell, the Chairman of AST Board.
5 The e-mail was lodged (page 93-94). She states

"Hi Mark

We discussed and agreed a way forward at AST Strategy Day for our ground school/pilot training operations – agreeing to keep our approval and reignite the business as and when a major customer approached us.

Days later we received this proposal from Gerard – our only full time member of staff of the ground school. Jackie, Peter and I have now managed to discuss this proposal and recommend the following:

- 1. That we do not accept this proposal and that Peter writes to inform Gerard formally of this*
- 2. That we continue to pursue the HR processes with Susan in relation to voluntary severance etc of our current ground school staff*
- 3. That we continue to advertise the PATH programme in conjunction with ACS and continue to have good relationships with ACS*
- 4. That we support ACS – at no cost to us – to deliver some online learning at a distance re ground school*
- 5. That we can respond positively and quickly to the Libyan contract and use our Tier 4 UKVI Licence status to reignite our ground school arrangements on an international basis.*

Gerard has been pushing us for a response from the Board and it would be good if you could get back to me on this. A lot to digest and I'm happy to talk to you about this."

30 The following day (17 September) Mr Bell responded to Ms Munckton copying his response to Mr Farrow and stating

*"Afternoon Margaret/Peter,
Many thanks for your note.*

Obviously, I don't know the detail of your conversation regarding the proposal but would be content to trust in your judgement regarding the appropriate decision and communication to Gerard."

- 5 At no time was there any verbal discussion between Mr Bell and either Mr Farrow or Mrs Munckton regarding the proposal prior to Mr Bell sending his e-mail agreeing with them.
33. In the meantime on 14-16 September Mr Farrow was in e-mail communication with
10 Susan Bald relating to the steps which would require to be taken to start a redundancy consultation process with the claimant and the other three employees (pages 89-92).
34. On 21 September 2015 a short meeting took place between Mr Farrow and
15 Mr Falconer in the cafeteria at Perth Airport which was overheard by a student, Hamza Aamer. The claimant was unaware of this conversation at the time and it was only at a later date that he heard that such a conversation had taken place and been overheard by a student. He then succeeded in tracing the student involved and found out his details so that he could be cited to attend the Tribunal
20 Hearing.
35. Mr Aamer was at that time a student at AST. By the date of the Tribunal his studies were finished but he had current resits. He was familiar with Mr Farrow and knew that he was CEO of the company having met him when he carried out a
25 few classroom visits and on induction days. He also knew Allan Falconer from ACS. He knew Allan Falconer because he had previously gone to ACS a few times to enquire about flying lessons. He would often go to the Touchdown Café for lunches. This is the name of the café at Scone Airport. In the week starting 21 September he was having lunch in the café in close proximity to Mr Farrow and
30 Mr Falconer who were sitting at an adjacent table. He overheard the conversation between them. He found that although there were a lot of people in the café at the time their conversation was noticeable because it was so intense. He heard Mr Farrow say to Mr Falconer *"give me the fucking money and I will give you the students"*. At that time Mr Aamer did not know the claimant. He mentioned the

conversation to some of his friends and word eventually got back to the claimant. In or about September 2016 the claimant's wife went to the airport to look for Mr Aamer and met up with him. He mentioned the conversation to her.

5 36. At some point following the exchanges between Mr Farrow, Susan Bald and Mark Bell, Mr Farrow passed on to the claimant and others that the proposal was not going to be accepted. It is not entirely clear how this was done. Mr Farrow's evidence on the subject was vague and indicated that he may have sent an e-mail or it may have been face to face. The claimant for his part thought he had probably received an e-mail from Mr Farrow at around this time but no e-mail was lodged by either party.

15 37. On 23 September Mr Cervantes attended a meeting of the JNC (Joint Negotiating Committee) which was also attended by Mr Farrow. After the meeting Mr Farrow invited him into his office for a chat. Mr Farrow advised Mr Cervantes that Allan Falconer was planning to get an extension of his Air Training Organisation licence to provide ATPL theoretical training. He said that AST planned on providing ACS with assistance by giving him all the relevant data, paperwork and organisational structure and support to help them get an ATO for theoretical training. He said that they were already in contact with the CAA with regards to this. Mr Farrow told Mr Cervantes that Allan Falconer considered there was a market for self sponsoring student ground studies. Mr Farrow told Mr Cervantes that AST planned to keep their own ATPL air training organisation licence and in the event of a foreign corporate contract the path programme would be resurrected making use of the tier 4 visa approval which UHI held. Mr Farrow told Mr Cervantes that with regards to the redundancy there were various options available which would be addressed in the coming weeks. Mr Cervantes brought up the subject of TUPE but Mr Farrow said he did not consider that TUPE was "at the top of the list". Mr Farrow told Mr Cervantes that Allan Falconer was keen to talk to the four employees of AST to explore whether a mutual arrangement could be made. Following this Mr Cervantes sent an e-mail to the claimant and the other employees confirming his recollection of what had been said. This e-mail was lodged (pages 168-169). The position was that in order to get an ATO for ATPL

theoretical training ACS would require to have manuals, staff, a head of training and a CTKI. Mr Falconer personally would not have the expertise to draft manuals.

38. At around this time Mr Beasant was also in e-mail correspondence with Mr Farrow. The correspondence was lodged at pages 95-100. It begins on 22 September when Mr Beasant e-mailed Mr Farrow. He indicated that he had met with Mr Haufe a manager with the respondents earlier that day to carry out his induction. He stated that Mr Haufe had told him that since the ground school was definitely closing there was little point in doing the induction and it had not taken place. Mr Beasant made the point that Mr Farrow must have known about this plan when he had offered Mr Beasant the job during the summer. He asked why he was not made aware of this possibility at the time. Mr Farrow responded on 23 September. He stated

“As indicated previously, the ground school is to be closed in response to a marked downturn in business. Regarding staff, AST is anxious that due process is followed and therefore we have requested colleagues in HR to conduct the required process. Whilst this process may lead to redundancy, we must await their completion of the work before any such decision could be made.”

39. He stated that the closure was not known at the time Mr Beasant was hired and made reference to the two contracts each for 20 pilot cadets which had been signed. He indicated that these contracts had been impacted by visa issues. He then went on to say

“I can however state, that we are in discussion with another party that wishes, like AST, to see a ground school remain at Perth Airport, and if this comes to fruition, would need high calibre instructors, albeit not under AST.

This is a regrettable situation, and one that the company has striven to avoid, but as you will understand it cannot face increasing losses, and a situation where there are more staff than students. Therefore we as a

company must take the necessary steps to protect the business, and do so at this juncture.”

40. Mr Beasant responded to Mr Farrow on 24 September. He thanked him for his
5 explanation but went on to say

*“Unfortunately it is untrue, as you informed all other employees and related parties that it was very unlikely that the EACS visa issue would ever be resolved and the likely closure of the business in December in
10 an email to them dated 29 June. This was the same date I accepted your offer of employment and so very definitely I should have been informed of this situation by you before starting work with AST in July.*

*Also, you state that you would like to see a high calibre ground school remain at Perth Airport. This was the essence of the proposal that
15 Gerard and I put to you at our meeting last month and subsequently submitted a formal proposal to the Board to transfer the existing groundschool business to a new company proposed by the 4 employees. You said unequivocally at the meeting with Gerard and me that you would support our proposal, but it was later rejected without any
20 meaningful explanation. Our proposal would also have protected your need to fulfil the EACs contract should it actually come to pass in the future, albeit through an independent business. An independent business would also protect the need of ACS to have an associated groundschool business in the future.*

*The feedback we have had from the JNC meeting yesterday and the subsequent discussion with you is that it is now your intention to transfer the ATPL ground school business to ACS and you are working with
25 them to that end.*

*This may or may not be good news for the 4 employees who would need to be transferred to ACS under the TUPE regulations, but I would
30 question the viability of this route as it has already failed once. Personally, I do not believe that ACS will be willing to take on the projected losses next year.*

5 *Whatever the final outcome, the 4 current employees are all very concerned about their contracts after December this year and the imminent threat of redundancy. Mike Haufe indicated to me on Tuesday that redundancy was the likely outcome and, if so, there is a stringent redundancy process that should be being followed to protect our rights. There is a deafening silence on even instigating this process at the moment, which is very unsettling and unfair to us all.”*

10 41. Mr Farrow responded on 24 September (13:10). He said he did not have a copy of the e-mail of 29 June so could not comment. He then went on to say

15 *“The transfer of business to an independent company as suggested in your proposal, would not have protected any overseas business, because as I stated at our meeting, one cannot sub-contract Tier 4 students. This combined with the proposition for AST not to engage in such training for 5 years was an issue, and the reason for the proposal not meeting current operational and strategic vision.*

20 *It is not AST’s intention to transfer any business, since one cannot transfer an approval. My suggestion was that ACS could seek its own approval and therefore continue to offer a ground school of some description. In which case TUPE is also not appropriate since we would not be transferring any business or staff. I’m not sure I understand the statement ‘but I would question the viability of this route as it has already failed once.’*

25 *As you say, there is a clear process for businesses to deal with such matter, and that is why we have directed HR to undertake this work as they are the professionals.”*

30 42. Mr Beasant responded later that day (page 102). He stated

“.....

- The current overseas students on the PATH programme are trained by ACS as a subcontractor, so I do not see why the*

groundschool element should be any different should it be carried out by an independent business.

- *The reason for the 5-year exclusion was to stop AST re-starting as a competitor (as you would still hold an ATO) until the new business got established and the new investors could realise a ROI, but the new business would also have undertaken to provide any ATPL groundschool needs for AST/ACS during this time and would, in fact, welcome a continuing and close relationship with both AST and ACS. This point was emphasised strongly during our meeting.*

- *I fully agree that you cannot transfer an ATO. However, my understanding from the feedback from yesterday's meeting was that you intended actively cooperating with ACS to transfer the business and ATO essentials to them. After some discussion with our corporate solicitor based on this information, he very much viewed it as a transfer of the existing business to which TUPE would apply. The fact that you are clearly trying to avoid the TUPE issue for the existing employees speaks volumes.*

Finally, to be more positive, our original proposal was very carefully designed to best meet the future needs of AST, ACS and the current employees from what is a very difficult situation for all of us, so perhaps you might like to re-consider accepting it to avoid where we seem to be heading at the moment.

Gerard and I would welcome any more discussions you may wish to have to move this forward."

43. Mr Farrow responded briefly to this that evening stating

"Norman,

Thank you for your reply.

Whilst AST can easily answer all of these points, your suggestion of involving 'our corporate lawyer' means that it would be inappropriate for the company to do so, until it has similar representation of its own.

I am aware that the HR Director has now written to Gerard, and the process will be undertaken very soon.”

- 5 44. Mr Beasant was at this point in close contact with the claimant and passed on the gist of this e-mail exchange to him. They also had various discussions and felt that they should perhaps alter their proposal so as to deal with the matters which they understood had caused it to be rejected. By this time it was also clear that whilst Mr Sutcliffe and Mr Cervantes would be happy to be employed by any new company they did not want to have any involvement in running it. Prior to this
- 10 Mr Beasant had incorporated a company so that the new organisation would have a name rather than simply be referred to as NewCo. He and the Claimant felt this would enhance their credibility with the college but also they required to have the actual company in place when applying for ATO licence. They also felt from Mr Farrow’s letter that one of the issues might have been their request that ATS
- 15 undertake not to themselves set up an ATPL ground school for a period of five years. At around this time the claimant and Mr Beasant lost a degree of trust in Mr Farrow. They could not understand why he had moved from giving 100% backing to their proposal when they had met with him and then had it turned down. They were also somewhat confused by what he was now saying about transferring
- 20 the business to ACS and could not understand why if this happened it would not be a TUPE transfer.
45. Around mid-September the claimant was surprised to receive a call from Mr Falconer of ACS in which Mr Falconer asked the claimant for the log-in details
- 25 for the PadPilot software used by the respondents for training purposes. The claimant asked who had authorised Mr Falconer to have these codes and was told that Mr Farrow had authorised this. He said he would speak to Mr Farrow about it. He could not think of any justifiable reason for Mr Falconer being provided with these log-in details for the respondents’ software.
- 30 46. On 25 September Ms Bald wrote to the four employees inviting them to a consultation meeting to take place on 29 September (page 120). The letter stated

“As you are aware, we are proposing to close the ground school at the end of the year, and this could impact on the four members of staff employed at the ground school.”

5 47. Prior to this meeting the claimant and Mr Beasant produced a second proposal which was updated. A version of this dated 28 September 2015 was lodged (page 112). The changes from the original proposal were that the name of the new company (Pathway Pilot Training Limited) was used instead of the generic “NewCo” and that there was no longer any restriction on whether AST could
10 operate a ground school for the coming five years. In addition it was no longer stated as essential that hangar 75B be provided to the new company although within the proposal it was indicated that it would greatly speed up and facilitate the CAA approval if hangar 5B could be sub-let to the new company for a period of 12 months. The proposal was e-mailed to Mr Farrow on 28 September (page 115). In
15 his e-mail Mr Beasant stated

“.....

*This should address your concern about AST fulfilling the ATPL ground school element of the Libyan (or any other) contract that might come to
20 fruition and I would emphasise once again that the new business would be keen to work harmoniously with both AST and ACS as customers.*

*As Gerard has mentioned, our proposal is the only current avenue that has any chance of securing a future job for the 4 AST employees and so a very relevant topic for this consultation meeting. Delays to its
25 acceptance will only jeopardise or delay these future jobs. Also, we cannot leave this proposal open indefinitely as it now only 2 months to the closure of the existing business and so time is of the essence.*

If you are not prepared to discuss at least the employment aspect of our proposal, then the consultation meeting is unlikely to be meaningful.”

30 48. Following receipt of the new document there was an email correspondence between Mr Farrow and Mr Beasant and the claimant relating to whether or not the proposal could be discussed at the consultation meeting. Mr Farrow’s position was that the consultation meeting was to deal with HR issues only and that it would not

be appropriate to discuss the business proposal there. Mr Mclver suggested a meeting beforehand but after some to-ing and fro-ing no such meeting took place. The consultation meeting did take place on 29 September. A minute of this meeting was prepared. It is not a full minute of the discussion which took place at the meeting.

5

49. By this stage Mr Beasant and Mr Mclver and to some extent the other two employees had lost faith in Mr Farrow's evenhandedness. Mr Farrow appeared to the four employees to be under pressure at the meeting. Mr Mclver challenged Mr Farrow at the meeting over his dealings with ACS. During his challenge the claimant became quite emotional about it. He was angry as it appeared to him that Mr Farrow was doing a clandestine deal with ACS in order to make the claimant and his colleagues redundant whilst avoiding obligations under the TUPE regulations. Mr Mclver accused Mr Farrow of doing a backhanded deal with ACS. Mr Beasant accused Mr Farrow of misleading the employees over his support for buyout proposal and wanted to raise the matter with the Board. The claimant raised with Mr Farrow the fact that he had received a telephone call from Mr Falconer around mid-September asking for the access codes for the PadPilot software which AST used for training purposes. Mr Falconer had told the claimant that Mr Farrow had authorised this. The claimant could see no good reason why Mr Falconer would need this information. He also raised with Mr Farrow the point that following the Prestwick Airshow Mr Falconer had told the claimant that he (Mr Falconer) had the name of 15 individuals who had expressed an interest in pilot training. This conversation was misrepresented in the minutes as stating that

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"GMC stated that there were 15 student enquiries. PF stated that AST would reconsider the need to cease operations if there were viable student numbers".

30

As Mr Farrow well knew, Mr Falconer was the one who had taken the names of students, not Mr Mclver. Mr Mclver had not been at the Prestwick Airshow. There was a discussion about the viability of the employees' plans with Mr Farrow stating that he did not think that Scotland was a popular destination for trainee pilots. The employees' position was that the respondents were not properly marketing the

current courses. There was a discussion regarding the Libyan contract and Mr Farrow indicated that a decision was expected on 9 October. He said it was highly unlikely that it would go ahead but that if it did the ground school would remain open.

5

50. Mr Farrow stated that the staff could open their own business in the future however they would need to require ATO approval for this. He said that there were no plans to transfer the business to ACS. Mr Farrow indicated that he believed that AST would need building 75B in the future and this would not be available to the new business. Ms Bald stated that the revised management buyout proposal would be considered on 5 October which was the next board meeting. She suggested that the parties meet again on 9 October by which time the position regarding the Libyan contract would be known.

15

51. The following day Mr McIver wrote to Mr Farrow stating

"We had a long chat with Allan Falconer from ACS yesterday further to our discussions on the continuation of an ATPL ground school facility post closure by AST. We told Allan that our new company, Pathway Pilot Training (PPT), hoped to gain its own ATO approval in the coming months ready to take new students from early January 2016.

20

Allan has students lined up to start the course and recognising that PPT staff have the expertise in delivering ATPL ground school, agreed for us to take on these students.

25

We would therefore be grateful if you could make the request, at next week's Board meeting, that AST provides us with every assistance to gain ATO approval as soon as possible, including the use of Building 75B for approval purposes. We would find a classroom in another location before the first students start.

30

Finally we apologise if there have been any misunderstandings this week in what is, I'm sure you'll agree, an extremely unsettling and uncertain time for all parties involved."

52. Mr McIver's purpose in including the apology in the last paragraph was that at that stage he relied on Mr Farrow to take the proposal to the Board. He did not wish to further antagonise Mr Farrow and recognised that both he and Mr Farrow had become somewhat upset at the meeting the day before. Mr Farrow responded to this e-mail simply stating *"Thank you for this."*

53. The respondents' Board met on 5 October 2015. A copy of an excerpt from the minute of this meeting was lodged. The meeting was attended by Mr Bell, Mr Farrow, Michael Baxter the Vice Chair, Ms Munckton and Iain Neilson. Jackie Mackenzie and Helen Warne were also in attendance. Helen Warne took the minutes. Section 6a of the minutes states

"A decision was made at the strategy day to discontinue the Pilot Training activities at AST. This was due to falling numbers of students and to avoid future losses being incurred.

Subsequently, four members of staff who are employed at the ground school have submitted a proposal to the board of AST for their consideration. These employees have formed a limited company called PPT Ltd and would like to take over the running of the ground school.

The consideration for this transfer would be the waiver of any redundancy payments due to these individuals from AST Limited.

The board considered the implications of such a transaction and concluded that it was not a viable proposition and the answer would be no.

The rationale behind this decision was that AST has a duty of care towards the employees and it would be unethical to transfer to them a loss making entity. If there is a demand for this training then it should have been maximised by the employees under AST ownership.

Peter to liaise with HR on how to proceed with regards redeployment/redundancy of the ground school employees and to respond to PPT Limited proposal."

54. On 6 October Mr Farrow sent an e-mail to Ms Munckton stating

"I thought the Board gave an unequivocal and well considered response to the resubmission by ground school staff. It also indicated that such matters should not be considered as a part of the consultancy process we are engaged in with staff.

5 *Therefore I feel that an official letter from me to the staff involved should be issued out with the consultancy, and offer the attached initial draft for your review and feedback."* (Page 131).

The draft letter is situated at page 132. It stated

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"The Board of Directors of Air Service Training would like to thank you for the re-submission of the offer of a management buyout of the Pilot Ground School.

15 *After much consideration and discussion, Directors feel that under its duty of care to staff it would be morally wrong to agree to a transfer of a business, on the basis of a waiving of potential redundancy, when there is no evidence that there is sufficient business for the new undertaking to be viable.*

20 *Indeed, Directors also consider that it may be legally wrong to offer this as 'alternative employment' because they have little evidence of this viability.*

25 *The Board of Directors must therefore decline the offer of transfer, and state that the consultation process must continue based upon HR matters only."*

Although the letter and the draft letter was sent by Mr Farrow and received by Ms Munckton there is no evidence that any letter was actually sent.

55. On 7 October Laura Rodriguez who works within the respondents' HR department
30 sent to Susan Bald a schedule showing the statutory redundancy pay and double statutory redundancy pay which would be payable in respect of the four employees. In redundancy situations it was the respondents' practice to often offer voluntary severance to individuals who would otherwise be made redundant. If the

individual accepted voluntary severance then they would receive double statutory redundancy pay.

56. A further consultation meeting took place with the Ground School staff on 9 October 2015. A minute of this was lodged (page 135-136) but again as with the previous minutes the Tribunal did not consider that this accurately reflected the discussion at the meeting. At the start of the meeting Mr Farrow advised those present that the Board had rejected the revised management buyout proposal. He stated that the Board of Directors felt that under their duty of care to staff it would be wrong to transfer the business as an alternative to redundancy when the Board did not believe the business was viable.
57. The claimant and the other employees considered the reason given by Mr Farrow to be nonsense. Mr Mclver asked for copies of the Board minutes and indeed minutes of various other meetings including the consultation meeting. Voluntary severance was discussed but the claimant made clear his position that he required a job and that voluntary redundancy was not an option for him. He indicated that he wanted redeployment. He knew of a vacancy in AST and also a vacancy in the college so he asked about that.
58. The employees were asked to send copies of their CV to HR.
59. The claimant's understanding following the meeting was that he and Mr Beasant were free to continue their preparations with regard to setting up PPT Limited. At no time were they told that they should stop their preparations. The claimant's preference would be to be redeployed however he had ceased to trust Mr Farrow and believed that this was being blocked. If he was not redeployed then he would require to continue with PPT. He believed that Mr Farrow was well aware of this and at the meeting he had specifically said that the employees could set up their own company. On 22 October the claimant sent his CV to Susan Bald as arranged. The e-mail and accompanying CV were lodged (pages 138-141).
60. On 12 October Mr Beasant wrote to Susan Bald copying his e-mail to Margaret Munckton and Mr Mclver. It is probably as well to set this e-mail out in full since,

on the basis of the evidence, the claimant's understanding of the position was at this point the same as that of Mr Beasant.

5 *"We were very disappointed by the news that the AST Board have rejected our proposal again. Also, at the meeting last week, Peter Farrow did not offer any assistance towards transferring the business – quite the opposite, in fact. However, I would add that we made it clear that speed was the essence of our proposal. It was originally submitted to Peter on 27 August and we have been told that has since been twice*
10 *presented to and refused by the Board. Given the very delayed response, the 6 potential students that were on the AST books for next year have all since disappeared or will be disappearing shortly, so there is now no pilot ground school business. This lack of prospects has been caused directly by the management direction not to take on new*
15 *students and the general knowledge since June that AST pilot training was being closed in December.*

The latest reason given for rejecting our proposal was 'duty of care to our staff'. It is just not credible that the best interests of the affected AST employees are being served by rejecting our proposal. It is quite
20 *legitimate for AST to close the current PATH business due to the projected losses next year. However, the reasons that the PATH business has failed are simple: wrong strategy, abysmal marketing and under investment in flight training. We could all agree that it would never be successful under the current management and its closure has*
25 *become the CEO's self-fulfilling prophecy. However, this closure has not been caused by the high-quality ground school training delivered for many years by the current staff which is highly respected and valued by the student pilots, so it is rather ironic and very unfair that the 4 of us*
seem to be heading for redundancy.

30 *However, we did agree at the meeting to follow due process, so my current CV is attached as requested for your consideration for alternative employment.*

....."

61. Mr Beasant also wrote to Mr Bell and in a letter dated 29 October 2015 Mr Bell responded stating

5 *“Thank you for your letter dated 22 October 2015 regarding the proposed closure of the AST Ground School. I understand you are disappointed by this proposal and your points are noted.*

The proposal to close the Ground School came about as a result of the forecasted loss of £70,000 in 2015/2016.

10 *The AST Board carefully considered the staff proposals to buy-out the Ground School business and we decided to reject the proposals. It was the view of the Board that the Ground School is not a viable business and we would not therefore accept a staff buy-out of the business.*

15 *I am reassured that it has been agreed to follow due process, and have been advised by Susan Bald that arrangements have been made to hold individual meetings with staff to continue the consultation process.*

I appreciate that this is a difficult time for staff and that you will be disappointed by our decision. I will ask Susan to keep me updated on due process and the outcome of the individual and collective consultations that will be taking place shortly.”

20

62. A year or so prior to the commencement of the claimant’s employment with the respondents the respondents had found themselves engaged in other proceedings before the Employment Tribunal. The circumstances were that an individual employed as a lecturer in aircraft engineering had set up his own company and was advertising the services of this company in competition with those of the respondents. In addition this individual was believed by the respondents to be actively directing students to further study with his own company rather than the respondents. The respondents had investigated the matter and following a disciplinary hearing had dismissed this individual. The individual had lodged a claim with the Employment Tribunal claiming unfair dismissal and the Tribunal had dismissed that claim following a Hearing. Ms Bald of the respondents had been actively involved in that case as had Mr Farrow albeit Mr Farrow did not give evidence at the Employment Tribunal. Mr Farrow was therefore well aware that it could potentially be classed as gross misconduct if an employee was setting up a

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30

company in competition with the respondents. . I should say for the sake of completeness that the Employment Tribunal in that case was held in front of Mr McFatridge sitting alone who issued an oral judgment dismissing the claim.

- 5 63. The claimant, Mr Mclver, is on the social networking site LinkedIn. As part of the normal process he would regularly obtain information from LinkedIn about who had access to his profile. From around the beginning of October onwards Mr Mclver began to note that one of Mr Farrow's reports, Mr Neil Fortune appeared to be accessing Mr Mclver's LinkedIn page on a very regular basis. He had not known
10 of Mr Fortune ever visiting his page before this.
64. Around the beginning of November Mr Farrow contacted Ms Bald to say that he was concerned that the claimant and the other three members of the Ground School appeared to be promoting a rival business. Mr Farrow told Ms Bald that he
15 had one of his employees, Mr Fortune checking the internet on a regular basis to see what the respondents' competitors were doing and that it had been brought to his attention that the new company PPT Limited appeared to be being promoted by members of the Ground School staff. He passed to Ms Bald information which he said he had gleaned from the internet and from carrying out some further
20 investigations of his own.
65. At some point over this period Ms Bald decided that the claimant and the other members of Ground School staff should be suspended.
- 25 66. Ms Bald had arranged a consultation meeting with the ground staff employees which was to take place on 11 November. This meeting was cancelled. On 12 November Ms Bald telephoned Mr Mclver at around 10:30 am. She apologised for cancelling the meeting the previous day and asked him if he could come to Mr Farrow's office at Perth campus for 11:30. She asked him to arrange for
30 Mr Cervantes to also attend.
67. The claimant contacted Mr Cervantes who advised that he was teaching and asked if the meeting could be put off until 1 o'clock after he had finished teaching the students. The claimant contacted Ms Bald who said that the meeting had to take

place at 11:30. She did not say what the meeting was for. The claimant and Mr Cervantes both drove separately to Perth campus. Mr Cervantes had to abandon his class halfway through. On arriving at Perth campus there was a delay in starting the meeting. Mr Cervantes had been unable to find a parking space in the main car park and had therefore parked in a grassed area some distance away. He had suffered a fall when getting out of his car and required to go for medical treatment. The claimant had just arrived at the meeting and been surprised to see that Ms Bald was accompanied by John Dobney who is Mr Farrow's assistant. It was at this point the claimant was advised by Mr Cervantes that he had fallen and had to go to sick bay. The claimant accompanied Mr Cervantes to the sick bay. Whilst going to sick bay he saw Mr Farrow coming towards him. He was surprised to see Mr Farrow ducking into a classroom as if to avoid him.

68. During the delay while Mr Cervantes was being treated the claimant received a call from Calum Boyd, one of Mr Cervantes' students, who was in a distressed state. He said that after Mr Cervantes left the students had been ordered out of the classroom and the locks to the doors of the classroom and other areas were being changed so that the students would no longer have access. The claimant advised the student to contact AST in the engineering part of the building.

69. When the meeting finally convened Ms Bald told both Mr Cervantes and the claimant that they were being suspended. They were told it was because they had set up a company to compete with the respondents. It was suggested to Mr McIver and Mr Cervantes that they had ordered some books to be photocopied from Perth College. It had been the usual practice of the staff at the Ground School to have any large pieces of photocopying which they required to have carried out done at the Perth College Reprographics department. Mr Cervantes was aware that at the end of September he had ordered around 10 copies of a CAA document 696. This was a document which he believed he would need in connection with the next module he was teaching on mass and balance. Mr Cervantes accepted that he had ordered this book. As it happens Mr Farrow had advised Ms Bald that by going through the e-mails of the ground staff he had concerns about an order for photocopies which had been made by Mr Sutcliffe. This had not been made clear to either the claimant or Mr Cervantes at the meeting.

70. Following the meeting Mr Dobney sent the claimants a letter confirming their suspension (page 166-167). Within this document it states

5 *"I explained that the issues that have come to senior management's attention concerned the four members of staff employed at the AST Ground School. You are a member of AST Ground School staff and it is alleged that you and your three colleagues have set up a company without AST permission and in competition with the business of AST, and this breaches your contract of employment. It is also alleged that*
10 *you have used AST's materials and resources and Perth College resources for your own business, in that you registered your business at AST premises, and copied AST materials using the photocopying services of Perth College."*

15 The claimant was advised that during the period of suspension he remained bound by the rules of AST and must not have contact with any other staff of AST. He was barred from coming on to AST premises. He was told that his access to AST's and college's IT systems would be suspended. He was told that an investigating officer
20 would be appointed to conduct an investigation and that that person would be in touch in due course. He was advised that if he had in his possession any college materials or documents they had to be returned with immediate effect. The respondents had already obtained from the claimant his college mobile phone and
25 ipad.

30 71. Shortly after the meeting Susan Bald decided that she would appoint Rhona Munro, the respondents' Acting Head of Learning Resources to carry out the investigation. Ms Munro had done a number of disciplinary and grievance investigations for the respondents in the past. In the previous four years she had carried out approximately five disciplinaries and four grievance investigations. She sits on the college's management team and had an awareness of the business of AST. She had an awareness of the business structure. She had previously carried out a job evaluation for AST in December 2014 relating to Mr Sutcliffe and

Mr Cervantes but apart from that she had not met the claimant or his colleagues before.

72. Ms Bald provided Ms Munro with an investigating officer's brief. This document was lodged (pages 217-218). It is probably as well to set out the terms of this in full.

“Investigating Officer’s Brief for Rhona Munro, Acting Head of Learning Resources

A potentially serious matter was brought to the attention of AST’s senior management team concerning the four members of staff employed at the AST Ground School. It is alleged that the four members of staff set up a company without AST permission and in competition with the business of AST, and this breaches their contract of employment (copies attached). It is also alleged that the staff have used AST’s materials and resources and Perth College resources for their own business, in that they registered the business at AST premises, and copied AST materials using the photocopying services of Perth College. AST senior management were aware that the four members of staff were forming or were to form a company however, they did not know that the company had been formed and was trading in competition with the AST Ground School. It is proposed to close the ground school at the end of the year if business did not pick up and the staff had put in a management buy-out proposal but this was rejected. Consultations had begun with the staff about the possible closure and the impact this could have on them in terms of possible redundancy. The attached minutes note what was discussed at two consultation meetings.

Web, Facebook and other on-line pages are also attached that show the staff’s company PathWay Pilot Training (PPT) is trading and promoting opportunities for potential students to apply for the same courses that are offered by the AST Ground School. There is a particular concern therefore regarding potential student enquiries to AST Ground School and how these have been managed and this has to be investigated.

The attached Companies House print out shows that PPT was set up and the registered address is an AST address; and the attached e-mails and booklets show that the staff copied AST materials using College photocopying for use in the new company. This was admitted to by Santiago Cervantes during a meeting on 12 November when senior managements concerns were put to Santiago and Gerard Mclver.

The alleged serious misconduct potentially breaches AST's Disciplinary rules (Policy attached) regarding dishonest behaviour and staff actions that are detrimental to the company's business interests. A copy of the Resource Pack for Investigating Officers is also attached to guide you through this process and you will need to read this thoroughly and seek advice from me or Laura Rodriguez, Senior HR Adviser if you require clarification on any point.

It will be necessary for you to interview:

- 1. The four members of staff employed at AST Ground School – Gerard Mclver, Santiago Cervantes, David Sutcliffe and Norman Beasant.*
- 2. Reprographics staff to establish if College photocopying services have been used to print materials that are not for AST Ground School business.*

You may also wish to interview any other person that you feel would help you with this investigation, or have sight of any relevant documentation. If you require site of other documentation or the staffs' laptops etc then John Dobney will be able to assist you with this.

The staff have been suspended while the investigation is carried out and a copy of their suspension letter is attached.

Kirsty Campbell, Curriculum Admin Team will provide administrative support – can you please check with Isobel Syme that this support has been put in place.

I am requesting that you complete the investigation and have the report to me by Friday 27 November at the latest but if this is not possible if you can let me know as soon as possible.”

73. There was attached to this brief a number of documents (pages 219-235). These were print-outs from the Pathway Pilot Training website which had been set up by Mr Beasant. There is also attached an excerpt from the Companies House file for Pathway Pilot Training Ltd which indicates that it was incorporated on 2 September 2015 with company no. SC514684. The only officer is stated to be Norman Beasant who gives a correspondence address of Building 75B, Perth Aerodrome, Scone. This excerpt is noted as having been prepared by Mr Farrow on 4 November. There was a further excerpt dated 8 November which confirmed that the claimant had been appointed as a director of Pathway Pilot Training Ltd on 8 November 2015. There also appear to have been copies of emails relating to Mr Sutcliffe ordering printed materials. All of the information had been put together by Mr Farrow.

74. Following the meeting on 12 November the claimant and indeed the other three members of staff considered that Mr Farrow was behaving in an underhand manner with a view to pushing them out of the business so that he could transfer it to ACS. The claimant felt extremely angry at this. On 14 November Mr Cervantes sent an e-mail to Mr Beasant, the claimant and Mr Sutcliffe. In this e-mail he stated

“As you say Norman, I do not think they will get away with it.

The email forwarded and all other similar correspondence as you have described will, if produced at an industrial tribunal be grist for the mill. I am quite happy for this email to be used in evidence.

The areas of weakness are the orders of books by me and Herb, a possible conflict of interest with Gerard and lastly the registering of the PPT at Building 75. Look at it from their point of view.

They will say that we are not operating in the best interest of AST. We will say that they are not looking after us.

.....”

The claimant felt extremely aggrieved at the way he had been treated and decided that he should lodge a grievance. He believed that the whole issue of the disciplinary action which was now being taken was a set-up. He believed that he had been suspended for doing something which Mr Farrow knew all about and had

given permission to do. He wrote to Mr Bell the Chairman of the Board on 16 November. The letter was lodged (pages 172-173). He stated

5 *“..... I wish to lodge a complaint against the AST CEO Mr Peter Farrow for misleading AST senior management and the HR department of Perth College into instigating allegations of gross misconduct against me, which has led to the suspension of my employment on 12th November 2015 pending a disciplinary hearing. The allegations against me and my three colleagues are that we have set up a company in competition with*

10 *AST and without their permission.*

The company in question, Pathway Pilot Training Ltd (PPT), was set up following a meeting in August 2015 between the Ground School staff and Mr Farrow with his full knowledge and unequivocal assured support. PPT is part of our formal proposal to take over the operation of the

15 *failing business of the AST Ground School. It was necessary to form a company in order to apply for CAA approval and that the Board might consider our proposal a serious one. As you are probably aware, AST announced on 20th of August 2015 that no more students are to be recruited for the Ground School as it will close on 30th November 2015*

20 *after the remaining students have completed their training. PPT is not in competition with AST as is not trading as alleged. Therefore the allegations against me are unsubstantiated.*

It has been communicated to us by Mr Farrow that the attached business plans were twice voted against by the Board of Directors of

25 *AST. However no formal written reasons for the Board’s rejection have been presented to us despite several requests to Mr Farrow and HR.*

I attach for your reference a copy of our initial proposal submitted to Peter Farrow on 27th August 2015. I also attach an updated proposal dated 28th September 2015 which Mr Farrow was to present to the

30 *Board of Directors at the meeting on 5th October 2015.*

Secondly, I wish to complain about the manner in which my suspension was handled by the HR department and AST senior management. On Thursday 12th November at 10.30 in my office at Scone I received a phone call from HR Vice-Principal Ms Susan Bald requesting my

attendance at a meeting in the College at 11.30 along with my colleague Mr Santiago Cervantes. Ms Bald implied that the issue was the rescheduled redundancy consultation. It transpired later that this was a ruse to get us out of the building. On arrival at the College I received a call from a very distressed student at Scone informing me that AST senior manager Mr Mike Haufe demanded that the students leave the building immediately and told them that they could not return and the locks to the building were being changed. No arrangements were made to provide the students with another classroom or further lectures for the remaining two weeks of their course. Their tuition is therefore incomplete and vital revision tests for their final CAA exams scheduled for 1st December have not been delivered. The above appalling treatment of AST staff and students is disrespectful and highly unprofessional.

AST have known since August 2015 that Pathway Pilot Training was set up as part of the business proposal to take over the ground school. A redundancy consultation was already underway at the time of the suspension. These facts coupled with the timing of the suspension on 12th November 2015 when there are only two weeks to go before the closure of the ground school strongly suggest that the suspension is merely a ploy by AST senior management to dismiss the instructors for gross misconduct thereby avoiding redundancy and notice period payments which are rightfully due to the staff of the Ground School.

The above is a highly regrettable situation which could have been avoided if AST senior management had been committed from the outset to provide the required resources, leadership and vision to ensure the success of what should have been a perfectly viable ground school business. However the most inexcusable failing is the conduct of AST senior management towards four highly experienced and dedicated aviation professionals who have given their utmost efforts to avoid redundancies and lasting damage to AST's reputation.

I welcome Ms Munckton's comments on the aforementioned appalling treatment of fee paying students to whom AST and Perth College have a strong duty of care towards."

Mr McIver copied the letter to Ms Munckton and Ms Bald.

- 5 75. On receiving his copy of the letter Mr Bell contacted Susan Bald and discussed with her what should happen. Ms Bald's view was that Mr Bell should respond to say that as the complaints appeared to relate directly to the circumstances in which the claimant and other members of staff were suspended pending investigation and as the grievance covered some of the same ground as the matters currently under investigation it would not be appropriate to arrange a grievance hearing or
10 indeed to take any further steps in the grievance process until after the outcome of the disciplinary investigation.
- 15 76. On 18 November 2015 Mr Bell wrote to the claimant in those terms confirming that no further steps would be taken in the grievance process until the outcome of the disciplinary investigation was known (page 174).
- 20 77. At around this time Mr Beasant returned from overseas. He saw for the first time the letter which Mr Bell had sent to him on 29 October 2015 confirming in writing that the staff proposal to buy out the Ground School business was rejected and giving the reason for this (page 144). He also, following his return, contacted Susan Bald to indicate that he had not yet received minutes of the consultation meetings which he had been promised. On 18 November Ms Bald responded to him enclosing what she stated was a copy of an e-mail which had been sent on
25 27 October sending copies of the management notes of the consultation meetings to Mr Beasant as well as the other three employees (page 176-177). On 18 November Mr Beasant wrote to the claimant and the other two employees stating

30 *"Did you get Susan's original email with these notes that she says were sent to us all on 27 October? I did not receive them on 27 Oct although my email was working normally that day.*

Also, do you agree with the content. I think they are largely accurate but she has inserted a couple of points to support their current position which is very naughty.

Regards”.

78. Neither the claimant, Mr Cervantes nor Mr Sutcliffe had received the e-mail which Ms Bald claimed to have sent on 27 October.

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79. Ms Munro met with a number of individuals to interview them in connection with her investigation. Her method was to prepare questions in advance and then ask them at the interview. Statements were prepared which were in some cases signed by the individual from who they had been taken. She interviewed Elaine Fairlie and
10 Arlene McArthur, Perth College Reprographics department around 18 November 2015. This was in connection with a request dated 7 November 2015 from David Sutcliffe asking for 30 copies of three different documents. They confirmed that normally requests for major units would come from Susan Ross or Neil Fortune and occasionally Jackie Drysdale. They indicated that sometimes if they were
15 doing a talk or presentation a lecturer would send a document directly to reprographics e.g. Gerard and Santiago would forward to reprographics leaflets or flyers for copying.

20 80. The statements from these individuals were lodged (page 257-263). Ms Munro met with Mr Beasant on 23 November 2015. The notes of his interview were lodged (page 265-273). Following this interview Mr Beasant provided Ms Munro with a timeline of events to assist with chronology as well as a copy of an e-mail of 18 September from Peter Farrow to Gerard McIver (this e-mail does not appear to have been lodged for the Tribunal). The timeline which Mr Beasant produced was
25 lodged (page 328).

30 81. Ms Munro interviewed Mr Cervantes on 23 November 2015. The notes of the interview were lodged (pages 275-280). Mr Cervantes' position was that he was neither a shareholder, director or postholder in the new company but intended to become a part-time employee of the new company once his employment with the respondents was terminated. He said that he did not yet have a contract of employment with PPT and that given that AST were ceasing ATPL training in December and had turned away potential students and returned deposits and as his employment with PPT didn't start until January at the earliest he failed to see

how he was in competition with AST. He disputed that he had broken his contract of employment. He was a part time employee and entitled to take on other work. He said he had no idea what “resources” the respondents were referring to. Mr Sutcliffe was interviewed on 24 November. The notes following his interview were lodged (pages 283-288).

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82. Mr Sutcliffe responded in similar terms to Mr Cervantes. He indicated that he was not a director or shareholder in the new company. He pointed out he was a part-time employee of AST and did not require permission from or need to inform AST whether he had other work. He was asked about what happened to enquirers. He said that he had no idea and that unless students phoned Gerard directly most enquiries came via the website and would be dealt with by office personnel. He was asked about a specific enquiry from a Ben Meechan and stated he had been aware of this enquiry and that Mr Meechan would have been told that AST had announced they were no longer training and no longer recruiting students. He denied that PPT was in competition with the respondents because it was not trading and had no intention of trading until the closure of the AST Ground School. He was asked about a request he made to Perth College Reprographics on 7 November for 30 copies of some unbranded materials. He responded that these were not AST materials but materials produced by him on his home PC in his own time for the purposes of aiding delivery of the ATPL course. He said that he had made these sort of reprographic requests in the past and that it was required to have stock of certain teaching materials which was replenished when required. With regard to the suggestion that the timing was strange given there were only two students he said that previously there had been moratorium on recruitment which had been reversed. He said that it would not be good practice not to have the materials available. He said it would be considered contingency planning and part of normal activity. He was asked about his request on 7 September for 30 copies of two CAA documents. He confirmed that these were CAA materials freely available for download and that he intended them for the AST ATPL course.

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83. The claimant was then interviewed on 26 November. A note of his meeting with Ms Munro was lodged (pages 290-300). The claimant set out the history of the proposal and denied that PPT was in competition with the business of AST. He

5 pointed out they could not deliver courses without an ATO licence which they did not have. They were planning to deliver courses from January 2016 after the closure of the Ground School and therefore could not be competing. The claimant said he did not know anything about any photocopying. With regard to the use of the premises he said that originally the new business was to be registered at building 75 as part of the initial proposal which Mr Farrow had backed. It was necessary to have premises to register the company. PPT had now secured an office in Rosyth that they would hope to run courses from but didn't currently have a secure contract to do so. The claimant indicated that he understood it was a definite closure and student numbers were being run down and there was to be no more recruitment. He set out the history of the proposal for a management buyout. He referred to the grievance he had submitted.

15 84. Somewhat oddly, Ms Munro at that stage indicated that much of the information the claimant was giving her was information she had not been aware of before and she would therefore be departing from the prepared questions.

20 85. The claimant then gave the history of the Libyan contract and also made various criticisms of Mr Farrow. He indicated that he had asked Mr Farrow if he could have a five minute slot at the board meeting to discuss the proposal but Mr Farrow had not agreed to this. He complained that Mr Farrow "rules AST as if it was his own company" (page 294). With regard to the use of building 75B the claimant indicated that the original proposal was that the new company would use this however Mr Farrow had then said that it was required by AST and the company had now arranged premises in Rosyth. He disagreed with the suggestion that AST would reconsider the need to cease operations if there were viable student numbers. He indicated that the direction from 20 August 2015 was to stop recruiting. He was asked about the 15 student enquiries and advised Ms Munro that these were 15 names which Allan Falconer mentioned to him that he had obtained from exhibiting at the Prestwick Airshow. He made the point that Mr Farrow had also been at the show and Mr McIver had not been at the show and did not know the names of the enquirers. He made the point that statements in the minutes of 29 September meeting were either omitted or taken out of context. When asked if these enquiries had been followed up by AST he said that this could

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not be possible as the enquiries were never passed on to him. The claimant was asked about attending the Acorn Business Course at Rosyth and confirmed that he had consent to do this. At the end of the meeting the claimant indicated he would e-mail copies of various documents to Ms Munro which she did not appear to have.

5 Ms Munro was then sent a copy of the claimant's grievance. She read this. She considered it to be outwith her remit to deal with any of the matters addressed in the grievance document. She spoke to Susan Bald who advised her that she should interview Mr Farrow but only about the disciplinary issues. She also spoke to Susan Bald about her concern that the charges had been framed as two generic

10 charges against all four individuals and not being differentiated in any way. Ms Munro produced a report at pages 200-210 which summarised her investigation and then at pages 211-214 she set out various things which she called investigation findings. These related to the two allegations. With regard to Allegation 1 she indicated her view which was that although closure was proposed

15 and recruitment of individual students had ceased, senior management would review the decision should the position change and this had changed once before. She accepted that Pathway Pilot Training was not yet training, didn't have ATO approval. She noted that Peter Farrow had indicated that two potential corporate clients were being actively pursued. She noted there was documentary evidence

20 relating to the setting up of the company and registration of the two staff as directors of the company. They had allowed their personal testimonies to be published on the new website. She provided some information she had found from browsing the internet on when HMRC considered a company to be trading. Her position was that whilst the company were not yet delivering a service they were

25 actively promoting and selling the company, taking enquiries and had an application form on their website through which students could apply for courses. She made the point the student testimonials on Pathway Pilot Training's website which were lodged at appendix 1 were confirmed as former AST students. She noted that all the staff under investigation stated they were personal testimonials in

30 relation to Santiago Cervantes and David Sutcliffe and their teaching rather than references in relation to their experience of AST. Norman Beasant accepted in interview that the reference in one point to "one of our recent students" was misleading and should be removed.

86. With regard to how enquirers to AST were dealt with she noted that the Claimant had responded to enquirers saying *“We are reorganising our business and courses will be offered under a revised structure from early January 2016”*. She set out her view that this was not consistent with Peter Farrow’s e-mail to Neil Fortune of 24 August 2015 which she stated as being *“We do not have a firm schedule intake at this time, but if they (potential students) wish, they can remain on a waiting list and will be contacted once arrangements are made.”*
87. Ms Munro spoke of an incident regarding a particular student Ben Meechan being in her view actively directed towards Pathway Pilot Training Ltd. She referred to an e-mail exchange she lodged (page 419-420). A telephone call had come in from a Mr Meechan and Mr Sutcliffe had passed this on to Mr Beasant. Two days after he had done this Mr Sutcliffe advised the claimant of this and passed a copy of the e-mail he sent to him.
88. Ms Munro noted that none of the staff considered they had breached their contract of employment. Mr Beasant indicated he didn’t have a contract and the other three stated that they had been open and honest in all their dealings with AST senior management.
89. With regard to the second allegation relating to the use of AST materials and resources Ms Munro referred to the two orders made by Mr Sutcliffe. She indicated that it was clear that AST teaching staff had ordered materials in the past. It was inconclusive as to whether in the past they had carried AST branding or not. She stated that Mr Sutcliffe was clear that the materials were for AST purposes however she felt this was difficult to reconcile with his statements during interview that no further students were to be recruited.
90. Ms Munro interviewed Mr Farrow on 30 November 2015. A copy of the interview notes from this were lodged (pages 440-444). Ms Munro’s entire report extended to some 200-plus pages and was lodged (pages 196-444). It was sent to Susan Bald at some point around 2 or 3 December 2015. On 4 December she wrote to the claimant stating that

"I am writing to let you know that a final decision as to whether the AST Ground School will close will not be taken until the New Year as a possible business opportunity has arisen and we need time to explore this possible opportunity.

5 *Any further collective or individual consultation meetings will not take place until the New Year.*

The investigation report into the allegations communicated to you has now been received and is currently being reviewed and you will be notified of the outcome as soon as possible."

10
Shortly thereafter there was an exchange of correspondence between Mr Beasant and Susan Bald which led Ms Bald to express the view that Mr Beasant did not have any contract of employment with the respondents. It would appear that from then on the respondents proceeded on the basis that Mr Beasant was not an
15 employee of theirs and in fact never had been.

91. On 15 December Ms Bald wrote to the claimant inviting him to a disciplinary hearing which was to take place on Tuesday 12 January 2016. She indicated that the disciplinary meeting would be conducted by Margaret Munckton, Director of the
20 AST Board accompanied by Laura Rodriguez, HR Manager and that Rhona Munro would be in attendance in her capacity as Investigating Officer. The claimant was advised that the meeting would be conducted with particular reference to the following allegations.

25 *• That you have breached your implied duty of loyalty to AST by setting up or being party to the setting up of a business and/or a company that competes with the business of AST and has been recruiting students for commercial courses while you were still employed by AST.*

30 *• By actively participating in the setting up and/or running of the new business while still employed by AST Ground School you have placed your own interest above that of AST and have created a serious conflict of interest with your duty of loyalty to your employer.*

- *You were less than honest about the setting up of the new business and company. Although you informed AST that you would be setting up a business and company to offer pilot training if the AST Ground School closed, and submitted two buy-out proposals that were rejected by the Board, you did not inform AST that the new business was actively recruiting students whilst you were employed at AST Ground School.*
- *You have directed or assisted in the direction of prospective student enquiries to AST Ground School to the new business and company while employed by AST.*
- *In order to prepare and plan for the launch of the new business, you used or were party to the use of Perth College resources for the purpose of the new business, in that you used the College's photocopying services to produce training materials for the new business.*
- *Without consent of AST, you used AST's premises as an address to register the new company with Company's House.*
- *Without the consent of AST, you used a testimonial from an AST student on your Facebook page to promote the new business. You also deliberately misrepresented the basis of the testimonial by suggesting that the student had attended a course provided by the new business, when in fact that student had attended AST Ground School."*

The claimant was advised that the allegations were serious and if substantiated

"they will amount to a breach of trust and confidence that goes to the heart of the employment contract."

The letter went on to state that the respondents acknowledged that the claimant had submitted a grievance but stated that the grievance related directly to the matters which were to be heard at the disciplinary hearing and indicated that for that reason Margaret Munckton would consider the claimant's grievance at the

same time as the disciplinary matters were being considered at the hearing on 12 January.

92. The respondents then went on to state

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“We have also concluded the investigation into the complaints made against you by former AST Ground School student David McIlroy. We wrote to Mr McIlroy on 18 November and upheld a number of his complaints, including harassment and bullying by students and staff; lecturers making an assertion that he had a learning disability; being sworn at by a lecturer; and being called a liar by a lecturer. The upholding of Mr McIlroy’s complaint has cost AST £43,000 by way of a refund of the student’s course fees.

10

AST must now consider whether, in relation to the complaints made by the student, you acted inappropriately in the course of your duties, causing actual financial loss and incalculable damage to AST’s reputation.

15

This is a very serious matter that we now must address. As you were one of the accused parties in the allegations made by Mr McIlroy, we will address the findings of the investigation at the disciplinary hearing on 12 January 2016. You have already been interviewed as part of the complaint investigation. I have enclosed a copy of the investigation report and the outcome letter for your consideration.”

20

25 93. The claimant was told that he had the opportunity to present witness statements and call witnesses. He was advised that if he intended to call witnesses he should notify the respondents and provide copies of witness statements no later than two working days ahead of the hearing. The letter went on to state

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“It is important for you to understand that AST is treating this as a very serious matter. If, after hearing what you have to say, it is decided that you did behave as alleged, the outcome will be disciplinary action up to and including dismissal without notice.”

94. The reference to Mr McIlroy was a reference to an issue which had arisen some time previously between Mr McIlroy who was a student of the AST Ground School and the Ground School. Since the respondents' witnesses were agreed that the issue regarding Mr McIlroy would not have led to the Claimant's dismissal I shall only deal with these briefly.
95. The claimant was shocked when he saw that the McIlroy issue was apparently being included in the disciplinary allegation against him. He was aware of the background but was unaware of any specific evidence relating to him. He was unaware of any specific allegations about what he was supposed to have done regarding Mr McIlroy.
96. Included with the letter was a copy of Ms Munro's report and also a copy of various documents relating to Mr McIlroy. The claimant's understanding of the position with Mr McIlroy was that there had been various issues with Mr McIlroy behaving inappropriately whilst he had been attending his course. There had been complaints by other students. Both Mr Sutcliffe and Mr Cervantes had separately spoken to Mr McIlroy. On one occasion Mr McIlroy had told them that he suffered from Asperger's and/or learning difficulties. Mr McIlroy had made no complaint during the time he was at the Ground School. He failed several of his exams and on 26 March 2015 Mr Cervantes put in a report about Mr McIlroy in highly critical terms. He mentioned that he was disruptive towards other students. Mr Cervantes considered that he was dishonest and that certain remarks he made were deeply offensive. Mr Cervantes accepted that he swore at Mr McIlroy. Mr McIlroy made no complaint at the time however some months later his mother wrote to the college complaining about his treatment. The letter of complaint was lodged (pages 720-721). Mr McIlroy's mother sought return of the fees which he had paid. An investigation had been carried out by Mr Dobney. Mr McIver had been interviewed as part of the investigation and his interview notes were lodged (pages 704-706). The claimant's involvement in the allegations put at its highest was that he had not been aware of the allegations of bullying prior to them being made in August. He had been aware that Mr McIlroy was recording lessons which Mr Cervantes and Mr Sutcliffe had found upsetting but after meeting with Mr McIlroy had agreed that this could continue. During the investigation Mr McIlroy

had implied (but not said) that he had previously told Mr McIver about the bullying and Mr McIver had denied this. The claimant felt that there was no specific allegations relating to him in the report and that this had simply been put in in order to increase pressure on him to resign. In addition to this he was aware through Mr Cervantes that a key witness had not been interviewed by Mr Dobney until some time after the report had been concluded. This witness was the only student who was in a position to independently verify or otherwise Mr McIlroy's statement. He had eventually been interviewed at the beginning of November 2015. His statement was lodged (page 723). He had basically confirmed that there were no issues about the way Mr McIlroy had been treated by either of the lecturers.

97. The respondents did not provide any explanation why when the McIlroy report had been completed on 25 September the matter was not being raised until now, mid-December.

98. Mr Beasant continued to be concerned that Mr Farrow was not telling the truth about whether or not he had made a deal with ACS. He arranged for his nephew, a Mr Taylor to send an e-mailed enquiry to the respondents on 18 December. This was lodged (page 458-459). The e-mail stated

"I have just recently completed by Private pilot licence and I am exploring options for further training, career avenues etc. I hope to go on to be a commercial pilot eventually. I would like to go on and do a ATPL and I am quite interested in your PATH programme.

Could you please send me some more details about this programme, i.e. what are the costs and any information about accommodation would be appreciated?"

99. Mr Fortune responded on 5 January. He stated

"Dear Matthew,

Thank you for your email and interest in Air Service Training.

At the moment we are restructuring our training provision, which may lead to a cessation of flight training delivery.

However, our partners at Perth Airport continue to provide the private and commercial pilot licence training, and you should feel free to contact Mr Allan Falconer in this regard.

I have included Mr Falconer's email at the CC to this reply."

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100. Mr Falconer responded to Mr Taylor on the same day stating

"Good morning Matthew,

Thank you for your interest in training towards your pilot license.

10 *We can provide the training required towards a Frozen ATPL which is required to become a commercial pilot.*

You can start the course any time as the initial training for the Private Licence is flexible. When this is completed you will start the ground school which is again flexible. The first part of the course which is set is the ground examinations. These are conducted monthly and the dates are set by the Civil Aviation Authority.

15

You can expect the course to take approximately 15 months although if you progress efficiently through each module.

The basic training which includes:-

20 *Private License,*

Night Rating,

Hour Building,

ATPL Ground school,

Commercial License,

25 *Multi engine rating,*

Instrument Rating.

The above training costs £44,995.00. As you have already completed your PPL the cost is reduced by £37,995.00. If you have additional hours this price may reduce further depending on the hours flown.

30 *You will have additional fees including CAA examinations and tests.*

If you are interested please contact me directly and we can discuss further what is required and your options."

101. Mr Beasant saw this response as confirming what he believed which was that Mr Farrow had reached a private deal with Mr Falconer whereby Mr Falconer would take over the business of AST's Ground School.

5 102. The claimant's disciplinary hearing was due to take place on 12 January. The claimant became ill suffering from stress which led to gastro-intestinal symptoms. On 8 January 2016 he wrote to the respondents advising he would be unable to attend the disciplinary hearing. He annexed a sick note. His letter and sick note were lodged (pages 460-461). In his letter he also indicated that he had been
10 advised that his grievance to Mark Bell should be heard separately before the disciplinary hearing. He also indicated that he was requesting the attendance of Peter Farrow and Mark Bell as witnesses at the disciplinary hearing when it eventually took place.

15 103. M. Cervantes and Mr Sutcliffe also faced disciplinary hearings in which they faced similar allegations to those made against the Claimant. As part of their preparations for the hearing Mr Cervantes asked if he could have access to various documents which were stored in a filing cabinet at Perth Aerodrome.(p455) On 7 January 2016 John Dobney sent an e-mail to Mr Cervantes and Mr Sutcliffe
20 stating

"The locations and the filing cabinet you mentioned have been cleared out some weeks ago. Any non official documentation was destroyed at that time.

25 *The only official method of written student feedback is via the company website as detailed in the ATOM (extract attached).*

We have only received one feedback from the pilot students which I have also attached." (p609)

30 104. Interestingly, as part of the preparation for the Tribunal the claimant's representative asked the respondents for information regarding this. On 19 October 2016 Mr Farrow wrote to Susan Bald stating

“There was one point I think I didn’t provide information for in the solicitors email; the assertion that we had destroyed documents.

The actual fact is, that the contents of the CTKI Office in Building 75B, were not touched until after the outcome of the appeal process.

5 *Following that, AST staff from the airport site went through the office and removed anything they considered to be rubbish or general office clutter. All regulatory paperwork relating to staff and students that we are duty bound to keep, I have in my office.” (p480)*

10 105. In any event, on 8 January, Mr Sutcliffe and Mr Cervantes wrote to the respondents confirming that they were resigning their employment. They had been due to attend disciplinary hearings at around the same time as the claimant. Neither of the three employees liaised with each other with regard to the timing of their resignations or the timing of Mr McIver’s letter. On 11 January Ms Bald
15 acknowledged receipt of the claimant’s letter and indicated she would be writing more fully the following day. On 12 January she wrote to say

20 *“As you have obtained a medical certificate for four weeks, I have arranged for you to see Occupational Health so that we have the benefit of a medical report. The OH appointment will take place on Friday 15th January and I will contact you tomorrow with a time. You are required to attend this Occupational Health appointment.”*

25 She indicated that she had arranged a provisional date for the disciplinary and grievance hearings to take place on Tuesday 19 January. She said that she would contact Peter Farrow and Mark Bell and let them know that he had requested their attendance at the disciplinary hearing. Ms Bald made an Occupational Health referral, a copy of this was enclosed (pages 467-470).

30 106. At 11:35 on 13 January Amanda Cramb of the respondents e-mailed the claimant to say that OHSAS had had a cancellation and they’re proposing to meet with the claimant at 2:30 on 13 January. The claimant would require to attend their clinic in Perth. She also said that if the claimant was unable to make this appointment then he should attend an appointment in Dunfermline at 11:00 am on 14 January. The

claimant responded later that morning to say that he was unable to attend any of the appointments due to the fact he was feeling not well enough to do. He indicated that he had been signed off with a sick note for four weeks.

5 107. On 13 January (page 475) Ms Bald e-mailed the claimant at 16:42 noting that he had not attended the Occupational Health appointment arranged for that day. He said that the following day's Occupational Health appointment had been changed to a telephone assessment and that the Occupational Health nurse would call at 11:00 am to conduct the assessment. He stated that the claimant required to be
10 available for the call and to co-operate.

108. The claimant responded early on the morning of 14 January stating

15 *"I did not 'refuse' but am unable to attend due to my symptoms. I am also unable to undergo a telephone interview assessment because of the mental stress and anxiety that I am currently suffering caused by the coercion and sheer harassment of the HR department repeatedly insisting that I attend an OH meeting and disciplinary hearing while I am ill. My physical symptoms have also worsened as a result."*

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Ms Bald responded an hour or so later stating

25 *"The occupational health nurse will be calling you at 11 am as advised and I strongly urge you to take the call and undergo the occupational health assessment.
If you do not, we will make a decision on how to proceed as we see fit."*

30 109. The Occupational Health nurse subsequently set out her version of events in an email (p508). She had two telephone numbers for the claimant. One of these was his work mobile number which he did not have any access to having had to return the mobile telephone it was assigned to. The occupational health nurse reported that she telephoned this number and (unsurprisingly) did not receive any answer. The Occupational Health nurse reported that she had then telephoned the

claimant's home number which was out of order. The claimant did not receive any telephone call from Occupational Health.

110. On 18 January 2016 Ms Bald wrote to the claimant stating

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"Thank you for your e-mail requesting a postponement.

As you have proved uncooperative in assisting the College to obtain a medical assessment from OH, and have even refused to accept an assessment conducted by telephone, the College is unwilling to postpone the disciplinary hearing tomorrow on grounds that you are not fit to attend.

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The hearing will proceed tomorrow and you are urged to attend. If you do not do so, a decision will be made on the basis of the evidence available." (page 479)

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111. The hearing was due to commence at 1 o'clock on 19 January. At 9:19 that morning Peter Farrow wrote an e-mail to Susan Bald stating

"Following our recent discussion regarding the disciplinary hearing for Gerard McIver, I would like to offer the following.

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Having reflected upon Gerard's request for me to appear at the hearing, and my initial acceptance, upon reflection I find that as it was I who initially raised concerns about activities of the Ground School staff, that it would not be in Gerard's interest for me to do so.

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I would therefore request that I am excluded from the hearing."

112. Mr Bell had already confirmed to Ms Bald that he was not prepared to attend the hearing as a witness for the claimant.

113. The claimant did not attend the hearing at 1:00 pm. Despite this Ms Munckton conducted the hearing accompanied by Laura Rodriguez. Rhona Munro who had prepared the investigation report was on holiday, Kirsty Campbell who had been the Deputy Investigating Officer and had provided support to Ms Munro did attend.

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Ms Munro conducted a hearing in the absence of the claimant. A note of the meeting was prepared (pages 482-507).

5 114. On 28 January 2016 Ms Munckton wrote to the claimant. The letter was lodged
(pages 513-514). She stated that the claimant had declined to attend the
disciplinary hearing arranged for Tuesday 12 January and 'refused to' attend
Occupational Health appointments. She said that she had made a provisional
decision regarding the allegations but wanted to give the claimant the opportunity
10 to answer certain questions. Questions were basically asking whether the claimant
had the consent of approval of AST senior management to do certain things. She
also asked if the claimant was currently carrying out the post of Head of Training
and Chief Theoretical Knowledge Instructor as detailed in the Pathway Pilot
Training website. She asked the claimant to respond by 3 February. The claimant
provided a response which was lodged (page 516). He referred to Peter Farrow
15 having given his support for the business proposal. He indicated that the
testimonials on the website were from former AST students and related to
individual instructors. With regard to the final question he stated that due to
confidentiality he was not prepared to answer questions related to the business of
Pathway Pilot Training.

20 115. On 4 February 2016 Ms Munckton wrote to the claimant setting out her decision
and advising that the claimant was being dismissed for gross misconduct. This
letter was lodged (pages 517-522). The claimant was advised of his right of
appeal. Ms Munckton also indicated that she was not upholding the claimant's
25 grievance.

30 116. With regard to the allegations she found that the claimant had set up a business
and was recruiting students for commercial courses in competition with AST whilst
he was still employed by AST. She considered the company website and facebook
pages were evidence that the company was recruiting for students to apply for the
same commercial courses offered by AST. She referred to the claimant's answer
to question 5 and noted that the claimant had not been able to provide any
evidence that he was given permission to recruit students to the new business
while employed by AST. She referred to Peter Farrow's statement showing that he

supported taking the buyout proposal to the board but gave no other support to the business proposal. With regard to allegation 2 she considered that by participating in the setting up and/or running of the new business the claimant had placed his own interests above that of AST and created a conflict of interest. She referred to evidence within the report that the claimant used AST paid working time to set up the new business and that he was running the business during his working time as he redirected AST Ground School student enquiries received during AST working time to the new business. With regard to allegation 3 she considered that the claimant was less than honest about setting up the new business and that although he had informed AST that he would be setting up a business to offer training if the AST Ground School closed he had not informed AST that the new business was actively recruiting students whilst he was employed at AST Ground School. She referred to the investigation report showing that AST senior management did know that he was setting up a company but there was no evidence that the claimant informed AST senior management he was actively recruiting for students. With regard to allegation 4 he considered there was sufficient evidence to conclude the claimant did redirect prospective student enquiries for AST Ground School to the new business. She considered there was evidence in the investigation report where details of seven prospective AST Ground School students were redirected by the claimant during his working time with AST to the new business. With regard to allegation 5 she considered that there was sufficient evidence to uphold this. She referred to the investigation report showing that the claimant was copied in to an e-mail from David Sutcliffe requesting 30 bound copies of training materials and noted that the claimant in his statement denied any knowledge of the photocopying of materials. She indicated she had formed the view that the claimant and Mr Sutcliffe arranged for training materials to be copied for the new business and that was why the claimant was included in David Sutcliffe's e-mail request. With regard to allegation 6 she found it established that the claimant had used AST's premises as an address to register the new company with Companies House without consent. Her view was that Mr Farrow had not given permission for this. With regard to allegation 7 she found it proved that the claimant had used the testimonials from an AST student on the Facebook page to promote the new business. It was her view the claimant had deliberately misrepresented the basis of

the testimonial by suggesting the student had attended a course provided by the new business when in fact that student had attended the AST Ground School.

5 117. On 7 February Ms Munckton e-mailed Mr Farrow, Mark Bell and Susan Bald stating

10 *“To let you both know that I sent a letter to Gerard McIver on Friday 5 February advising him of my decision as chair of the disciplinary hearing. He has been dismissed with immediate effect for gross misconduct without notice period. Happy to discuss with you at an appropriate time.”* (page 524)

118. On 8 February 2016 Mr Farrow replied to Ms Munckton stating

15 *“Many thanks for this.*

Under the new EASA regulation, we will have to return the approval certificate and surrender the approval, and I am undertaking this at the moment, along with removing all references to flight training from social media, website etc.

20 *This does not preclude us seeking the approval in the future should it be deemed appropriate.*

I have also written a very brief email to staff to appraise them of this, which makes no mention of circumstances.”

25 119. Up to this point Ms Munckton’s understanding of the position had been that if the Ground School were closed the respondents could maintain the ATO licence for a period of up to two years. This was the information which Mr Farrow had provided to the Board. Without an ATO licence the respondents would not be legally permitted to provide a Ground School. There had been no change in the legislative
30 position between Mr Farrow advising the board in August that they could keep the licence for two years and February when he said that they had to surrender it immediately they no longer had a CTKI.

120. The claimant decided to appeal his dismissal. He wrote to Ms Warne of the respondents on 18 February 2016 setting out his grounds. He indicated that he had been unable to attend the hearing through ill health and that given the seriousness of the disciplinary issues the hearing ought to have been re-scheduled. He stated that he believed there was insufficient consideration of his explanation in the circumstances leading up to the dismissal. He stated that it was evident that certain matters required further explanation and had the hearing been adjourned and re-scheduled when he was well enough to attend then matters could have been addressed thoroughly. He noted that following his suspension he had been denied the opportunity to contact potentially relevant witnesses. He indicated he believed it would have been appropriate for his grievance to have been thoroughly investigated prior to the commencement of the disciplinary proceedings. He repeated his position which was to the effect that on the announcement of the closure of the Ground School he and his colleagues had met Mr Farrow with a pro-active proposal to buy out this aspect of the business and that this had been supported by Mr Farrow. He also set out his position to the effect that dismissal was too harsh a penalty given the circumstances. He indicated that the actions taken by he and his colleagues were taken in good faith in an attempt to try and take over the operation of the Ground School from January 2016 to avoid inevitable redundancies and that he and his colleague were of the view that they had full support and backing of Mr Farrow. He made the point that had no announcement been made that the school was to close neither himself nor his colleagues would have presented a business proposal to Mr Farrow as an alternative to redundancies.

121. On 7 March 2016 Susan Bald wrote to the claimant confirming that his appeal hearing would be conducted by Mark Bell, Chairman of the Board and Iain Neilson, a Director of the Board on 14 March.

122. On 8 March the claimant requested that Norman Beasant accompany him to the appeal and act as his witness. He also requested access to his UHI e-mail account and a printer. The appeal hearing took place on 14 March as planned. The claimant attended accompanied by Mr Beasant. Mr Bell and Mr Nielson were assisted by Amanda Cramb, an HR Adviser with the respondents who took notes.

Ms Cramb's notes were lodged (pages 535-594). The meeting lasted from 10:30 until around 1:45.

5 123. Following the meeting Mr Bell decided that he required further information before making a decision. He wrote to the claimant on 16 March 2016 indicating that he wished to clarify one or two points and that accordingly the sub-committee would not be in a position to communicate the outcome within the preferred timescale (page 595). On 21 March he wrote to Ms Munro indicating that the sub-committee required further information. He asked that she clarify certain points with
10 Mr Farrow, they were:

15 *"1. To provide a precise response about the nature of the conversation held on 25/08/15 between Gerard Mclver, Peter Farrow and Norman Beasant.*

2. To outline what exactly what said during the meeting held on 25/08/2015.

20 *3. Were all elements of the buy-out written proposal mentioned to Peter during the meeting held on 25/08/2015? If not, what areas were covered during the meeting?*

4. Did Peter share the conversation on 25/08/2016 with either or both Jon Dobney and Mike Haufe?"

25 Mr Bell went on to say

30 *"Ideally I'd like to know if Peter feels there was any chance that Gerard might have felt that Peter was giving them the encouragement to get set up and get started while they awaited the Board decision."*

124. Ms Munro met with Mr Farrow on or about 22 March 2015 and produced a document setting out the answers which he gave. This was lodged (page 597). Mr Farrow's answers contradicted those of Mr Beasant and Mr Mclver. He also

indicated it was difficult to remember exactly what had been said during an un-minuted meeting six months ago and that he did remember indicating at a later meeting that the staff concerned had more than enough expertise between them should they wish to go ahead with seeking CAA approval in terms of information and documentation required for setting up a Ground School.

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125. On 4 April 2016 Mr Bell wrote to Mr McIver indicating that the appeal had not been upheld. He also indicated that the appeal against the grievance outcome was not upheld. Mr Bell set out his conclusions in a number of bullet points. He indicated that the claimant had not provided medical evidence he was too ill to attend the hearing. He indicated that the claimant had been asked to attend an Occupational Health appointment but had declined to attend on grounds he was too ill but again had not provided any medical evidence. He stated that arrangements were made for the claimant to speak to Occupational Health by telephone but that the claimant had declined on grounds he did not wish to discuss his health with a stranger by telephone. It is not clear whether or not Mr Bell or his colleague ever saw the email from Occupational Health to the respondents dated 20 January (p508) setting out the correct position. Mr Bell and his colleague considered that it was reasonable for the respondents to conduct the hearing in the claimant's absence. He noted that the claimant had been provided with the opportunity to give answers on certain points prior to the dismissal decision being made. He also stated

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“Having heard your representations at the appeal hearing, we do not consider that there is anything you could have raised at the disciplinary hearing, but were unable to do so without attending, that would have made a significant difference to the decision of the disciplinary officer.”

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The letter then goes on to discuss the role of Mr Farrow and indicated that the appeal panel had not accepted that the claimant had expressed or implied consent from Mr Farrow. He noted that the proposal had been 'put to the Board' twice and rejected twice. The panel considered that the activities undertaken went far beyond anything that could be construed as implied consent by Mr Farrow or AST that the activities included registering the business at an AST premises address,

using AST resources and attempting to divert students and testimonials based on AST courses used to promote the new venture. The letter stated

5 *“As a director in the new company you cannot escape liability for the actions of others acting in the company’s interests, regardless of whether you were directly responsible for each individual act.”*

10 The panel indicated that they had considered the claimant’s representation that dismissal was not an appropriate sanction but that at most a written warning would have been appropriate and rejected this.

126. The grievance was rejected essentially for the same reasons.

15 127. As at the point of dismissal the claimant’s preference would have been to have been redeployed to another post with either AST or Perth College UHI. The claimant had never in his life been involved in running his own business and saw this as a last resort. During the preparation for the Tribunal the respondents referred to requests for information made by the respondents. Their responses were lodged at page 615. It is stated that Susan Bald sent four hard copy CVs to
20 Aidan Henderson and Jennifer Thomson-Young to see if there were any opportunities for the four individuals in AST in the event of a redundancy situation. It stated that Aidan Henderson returned these indicating there was nothing concrete available. Within the respondents it is extremely unusual to send documentation by hard copy, every other correspondence between Ms Bald and
25 AST has been with e-mail. In any event there are six departments within Perth College UHI. Only one of these was contacted by Ms Bald.

30 128. As part of the arrangements for the hearing the claimant’s representative sought a list of vacancies which would have been available for the period between June 2015 and May 2016. This list was provided and lodged (pages 627-630). Within this list the claimant considered that he could have successfully carried out two jobs from page 630 namely AST Lecturer Mechanical which was advertised in May/June 2015 and AST Lecturer Mechanical which was advertised in April/May 2016. Although the Claimant’s primary expertise was in avionics the Tribunal

accepted his evidence to the effect that he could have carried out these roles. In addition there were several other jobs which the claimant could have carried out which were listed. One of these was the job of Examinations Officer details of which were provided for on page 631. The other was the job of Research and Scholarship Co-ordinator, details of which were provided at page 636. Another was the job of Wellbeing and Support Officer details of which were provided at page 640, another was Work Placement and Volunteer Co-ordinator details of which were provided at page 644. Another was that of Lecturer details of which were provided at page 650. The claimant would have been prepared to take a pay cut in order to remain in employment and was prepared to learn new skills should they be required.

129. Following the termination of his employment the claimant carried out work for PPT in June, July and August 2016. The claimant was at that time was a Director of PPT. He and Mr Beasant had agreed that during the first year neither of them would take a salary for the work they carried out nor would they take anything out of the business. The business did not make a profit in the first year. The claimant was on the books as a nominal shareholder in the company having been allocated a shareholding at the outset by Mr Beasant. When Mr Beasant came to complete the annual return for the company he maintained the claimant as being a shareholder although this was not in fact correct. Various discussions took place between Mr Beasant and the claimant as to the terms on which the claimant would invest in the business and become a shareholder but at the end of the day the claimant did not become a shareholder. The claimant resigned as a Director on or about 27 February 2017. By that time it was clear that the level of income from the business was such that the directors would not be able to take an income for the second year. The claimant felt he was not in a position to support this.

130. During the first year the claimant's wife had arranged to change from part time to full time employment from around February 2016 onwards. As a result of this the claimant had extra child care duties.

131. The company PPT is still trading. It employed Mr Cervantes and Mr Sutcliffe as lecturers on a paid basis during the first year. The claimant anticipates that he will

be paid as a lecturer for the work he carries out for PPT in future. Mr Beasant is now the sole proprietor of the company.

Matters Arising from the Evidence

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132. In this case there was a marked contrast between the quality of evidence given by the claimant's witnesses and that of the respondents. In general terms the claimant's witnesses came over as decent, if not impressive, individuals with lengthy and successful careers in the aviation industry behind them who wished to assist the Tribunal by giving truthful evidence and fully answering all questions which were put to them. It is clear that in particular Mr Beasant, Mr Sutcliffe and Mr Cervantes were completely puzzled by the situation in which they had found themselves in 2016. Their evidence was entirely in keeping with the contemporary documentation and they were prepared to fully answer questions put to them in cross examination, as indeed was the claimant. The Tribunal accepted their evidence including the evidence of the Claimant as being entirely credible and reliable. The Tribunal entirely accepted the evidence of Mr Hamza Aamer. His evidence was that he had over heard the conversation between Mr Farrow and Mr Falconer. He was not known to any of the claimants at that point. He had discussed the conversation with various student colleagues. He would appear to have been entirely unaware of any of the background. His evidence, which accorded with that of the claimant, was that he had absolutely no thought of the matter going further until he was approached by the claimant's wife in December 2015. He was not appearing voluntarily but under compulsion of a Witness Order. It was clear that as someone who was still sitting their examinations under the auspices of AST he had no axe to grind one way or the other and if anything would have been expected to be unwilling to do anything which might jeopardise his relationship with AST. His evidence was clear and unequivocal and was not in any way shaken in cross examination.

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133. Unfortunately the same could not be said about the respondents' witnesses. All of the witnesses for the respondents were heavily criticised, and in the view of the Tribunal correctly so by the claimant's representative. All of them appeared to have an agenda and wished to tailor their evidence to that which suited the

respondents' case rather than answer questions truthfully. Ms Bald was extremely evasive in her evidence. In examination in chief as well as in cross examination she required to be reminded by the tribunal that it appeared she was simply refusing to answer questions where she believed the answer would damage the respondents' case. She appeared to have a complete inability to step back and consider matters neutrally. On many occasions during her evidence she was asked why she had taken certain actions and she was entirely unable to answer. There was never any real explanation as to why the McIlroy matter had been included in the list of disciplinary allegations sent to the claimant. Her position at many points in her evidence was that she had stepped back and allowed Ms Munro to get on with the investigation but when being questioned about details it was clear that she had given Ms Munro very detailed instructions. It was quite clear that she had a close relationship with Mr Farrow although she attempted to downplay this. In particular she and Mr Farrow both raised the issue of the previous Tribunal claim where the Tribunal had upheld the respondents' actions in dismissing an employee who had been guilty of setting up a company in competition with the respondents. The Tribunal were extremely suspicious regarding certain documentary items. In particular it was alleged that an e-mail had been sent to the claimant and others in late October enclosing copies of the minutes of the consultation meeting. All four of the claimant's witnesses gave evidence that they had not received this e-mail. It was also noteworthy that when Ms Bald printed out e-mails from the claimant's account in the course of preparation for his appeal hearing this particular e-mail was missing. Additionally it seemed very odd that in an organisation where e-mail was used almost universally Ms Bald claimed that the CVs of the four employees sent to her by email had been sent out by printing them and handing over hard copies to a member of staff. At the end of the day we did not feel we had to make detailed findings in respect of these matters however it was noteworthy that Ms Bald when giving evidence simply refused to answer questions relating to these matters. It was also very clear to the Tribunal that Ms Bald appeared to have a definite personal interest in the outcome of the case and it was clear that she did not have the demeanour of a disinterested professional which is what we would have expected from an HR professional in this situation.

134. Peter Farrow got off to a bad start in his evidence. He had given evidence about the length of time he had been a director of the respondents which was quite simply untrue. Despite being challenged on this he maintained his position until eventually the written documentary proof was provided at which point he simply accepted he was mistaken. In evidence he accepted that he regularly would have a cup of tea with Mr Falconer but entirely denied that the conversation witnessed by Mr Hamza Aamer had taken place. Not only that but he said that he would never ever talk to Mr Falconer in the way that Mr Aamer suggested. He did not answer questions put to him in cross examination. He maintained that he was unaware that the respondents had set up a company and that the difference between using the phrase NewCo in their original proposal and PPT in their second proposal was just because this was the name they intended to use. He denied that he had given any encouragement to the claimant in setting up the new company other than to say he would put it to the Board. He was vague about when he had told the staff that their first proposal was not accepted. He claimed not to remember but said it would not have been long afterwards. When asked why certain aspects of the minute of the consultation meeting did not accord with what he was now saying was the position he indicated that he had not written the minute of the consultation meeting. In evidence in chief he indicated that he had probably also told the claimant about the commercial reason for not accepting their proposal but could not have any detailed recollection of this. With regard to the 15 enquiries he said he didn't know anything about this until it was raised at the consultation meeting and he claimed to have asked Mr McIver for the names. He did say that his recollection was that it wasn't just Mr McIver but others also said 15 enquiries. He said he assumed that these had come through the enquiry line to flight training. He did not give any evidence about what he had been doing at the Prestwick Airshow. Subsequently in cross examination he indicated that he had not at any time told the claimant that there were commercial reasons for their proposal being refused. He indicated in evidence that he had Neil Fortune regularly carry out internet searches checking on competition and that it was as a result of one of these regular searches Mr Fortune had come across the PPT website. He confirmed that following this he had looked at the website himself and then looked at the Companies House website. He claimed to have then asked Mr Fortune to do more research and had then gone to Ms Bald with the information

he had found along with that found by Mr Fortune. Mr Fortune had found the Facebook page. He confirmed that he was well aware that the claimants would need an ATO licence to set up in business. His evidence regarding the evolution of his understanding about what would happen to the respondents' ATO licence was frankly confusing and at the end of the day we were unable to establish exactly what it was that he had believed at what point. It was absolutely clear that at the Board Meeting in August he had indicated that if the respondents closed the Ground School they would be able to keep their ATO licence for a period of two years. It was also crystal clear that the day after he was advised that the claimant had been dismissed for gross misconduct Mr Farrow advised Ms Munckton that the respondents would require to give up their ATO licence immediately. He confirmed that he was present in the same building when the claimant and Mr Cervantes were being told of their suspension. He confirmed that he had caught a glimpse of the claimant but denied ducking into a classroom to avoid him. He said that he had been unaware of the suspension. Interestingly his evidence contradicted that of Ms Bald who said that she had asked Mr Dobney to be present because Mr Farrow was abroad. Mr Farrow's position was that following the grievance being lodged against him he had asked that Mr Dobney accompany Ms Bald to meetings with Mr Cervantes and Mr McIver. The problem is that this makes absolutely no sense in explaining why Mr Dobney attended the suspension meeting rather than Mr Farrow. The grievance was submitted by Mr McIver after he was suspended.

135. The Tribunal considered that when answering questions Mr Farrow would simply try to find an explanation which fitted the facts as he knew them and tried to run with it. When, as happened various times in cross examination, he then ran into a logical impossibility he would try to obfuscate matters and say he could not remember.

136. Rhona Munro also got off to a bad start. For some reason known only to herself she had decided that it was appropriate to check out the Facebook page for PPT a week before the Tribunal hearing. Whilst on the site she had liked a page with a photograph on it and then, no doubt realising what she had done, had unliked it. She was clearly unaware that an electronic record would be kept of this and whilst she initially accepted she had gone on the Facebook page she denied that she had liked or unliked the photograph until, once again, the evidence was presented to

her and she agreed that her earlier denial was incorrect. Whilst most of her evidence was strictly factual and involved simply identifying documents it was clear to the Tribunal that for some reason Ms Munro also appeared to believe that her job was to only give evidence that suited the respondents' case rather than honestly answer the questions which were put to her. On various occasions she volunteered matters which it is clear she felt would help demonstrate the guilt not just of the claimant but of the other three employees. She appeared to have lost all sense of distance and proportion.

10 137. It was also clear from her evidence that she adopted a completely mechanistic approach to the gathering of evidence. She prepared questions in advance and attempted to shoehorn the responses into answers to these questions. We agreed entirely with the claimant's representative that her evidence demonstrated a complete failure to test and probe any of the responses she received. Despite the fact that it was clearly relevant she failed to probe in any way what was said at the meeting on 25 August. She also left dangling the issue of the 15 students and where this information had come from. The Tribunal felt that we could rely on her evidence where it was backed up by the contemporary documents but that was as far as it could go.

20 138. Ms Munckton who was the Decision Maker was also in our view a poor witness. When asked perfectly reasonable questions during cross examination she would refuse to answer or give answers which were not in any way related to the question being asked. We would agree with the claimant's representative that if one accepted her evidence at face value, she appeared to fundamentally misunderstand basic words such as transfer, competition and takeover. It was clear that she had formed a view and in order to maintain that view would ignore crucial facts. During her evidence she accepted, when asked by one of the panel that the claimant had been dismissed because PPT was preparing to compete with the respondents rather than actually competing. When it was subsequently pointed out that this appeared to contradict everything that had been said in her decision letter and indeed the respondents' case she was very quick to backtrack. It was noticeable that she found it easy to recall dates in examination in chief but impossible to recall dates in cross examination. Like Mr Farrow her evidence

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regarding the issue of the respondents' ATO licence was so vague and contradictory that at the end of the day we were not sure what her position was. She did agree that Mr Farrow had told the meeting in August that if the Ground School was closed the respondents could keep the ATO licence for two years. In her evidence in chief she in fact said that this was a key consideration. Notwithstanding that she accepted that immediately after the claimant's dismissal Mr Farrow had told her that the ATO licence required to be surrendered and it in fact had been surrendered. At one point in her evidence she appeared to indicate that she believed there had been some sort of change in the law but when pressed appeared to backtrack from this suggestion. Many of her answers entirely lacked any sense of proportion and she would often use the opportunity to attempt a character assassination of the claimant and his three colleagues with absolutely no justification.

139. Mr Bell's evidence suffered from the same defect as the evidence of the other respondents' witnesses. It was absolutely clear when he began his evidence and particularly when he began cross examination that he believed that the respondents had come to a correct decision and he was not prepared to accept the slightest bit of criticism. He appeared to regard the questions asked by the claimant's representative as a personal attack on his honesty and, either refused to answer questions or persisted in answering questions he had not been asked rather than the question he had been asked. It was clear to the Tribunal that like the other respondents' witnesses he was intent on trying to uphold the respondents' position at all costs. At one point in his cross examination when asked a purely factual question by Mr Russell he asked the Tribunal for further time to consider his answer "*so I can work out where he is going with this*". It did appear however that towards the end of his evidence he was listening to the various points put by Mr Russell and was at least prepared to engage with him to the extent of accepting that if he had known various matters at the time he might well have viewed things differently.

Discussion and Decision

140. Both parties lodged written submissions which were expanded upon orally. Rather than attempt to repeat these at length they will be referred to where appropriate in the discussion below.

5 **Issues**

141. The claim before the Tribunal was one of unfair dismissal. If the Tribunal found in favour of the claimant then the remedy sought was compensation. It was the respondents' position that the claimant had failed to mitigate his losses. It was also
10 the respondents' position that any compensatory award should be reduced on the basis of *Polkey*. It was the respondents' position that both the basic and compensatory awards ought to be reduced on the basis that the claimant had contributed to his own dismissal. With regard to the issue of contribution the Tribunal found it necessary to make certain additional findings in fact which are
15 noted at the appropriate part in the decision below.

Unfair Dismissal

142. The relevant law is well known and is set out in Section 98 of the Employment
20 Rights Act 1996. Section 98 states

“(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 -

25 *(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.”

30 143. In this case it was the respondents' primary position that the reason for dismissal was conduct which is a potentially fair reason falling within Section 98(2)(b) of the said Act. The Respondents also at various times in the case maintained a secondary position that the reason had been for some other substantial reason,

namely a loss of trust and confidence. Not a great deal was said about this during submissions and in any event the Tribunal considered that this argument was completely unsustainable on the facts and the evidence of the respondents' decision makers. The decision makers were clear they had based their decision on what they said was the Claimant's conduct. Any alleged loss of trust and confidence would have been on the basis of that alleged conduct. A dismissal based on a diminution of trust and confidence in the circumstances of the current case would not be a dismissal for "some other substantial reason justifying dismissal".

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144. The claimant's representative neither accepted nor denied that the reason for the dismissal was the respondents' beliefs regarding the claimant's conduct. During the course of the Hearing it was clear that the claimant's personal view was that the respondents had decided for whatever reason that they wished to get rid of the claimant. It was suggested that one reason was to avoid a redundancy payment and another reason was to avoid any question of TUPE operating. There was certainly enough evidence before the Tribunal to make us believe that there was something else going on in the background. Many of the things the respondents did are simply inexplicable otherwise. That having been said and bearing in mind the definition of "reason" contained in the case of **Abernethy v Mott Hay Anderson [1974] IRLR 213 CA** the Tribunal accepted that whilst the context and background to the dismissal was important the immediate reasons given for the claimant's dismissal related to the respondents' purported beliefs regarding his conduct. We can quite see that the claimant's representative would not wish to muddy the waters by going too far down the road of trying to prove that the respondents were motivated by some other reason and in those circumstances the Tribunal were prepared to accept that the respondents had demonstrated that the reason for dismissal was the claimant's conduct.

30 145. That is not to say that we reject the claimant's contention that the respondents were in many ways looking for a pretext to get rid of the claimant and his colleagues. The Tribunal found it strange that both Ms Bald and Mr Farrow independently raised the issue of the previous Tribunal claim which had been made against the respondents in circumstances where someone had been

dismissed for setting up a rival company. The Tribunal's view was that at some stage in the process Ms Bald and Mr Farrow decided between themselves that the issue of competition would provide a useful pretext for getting rid of the claimant and his colleagues.

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146. Our view is that having looked for and found a pretext based on the claimant's conduct the claimant's conduct was the precipitating reason for his dismissal.

147. Section 98(4) of the 1996 Act goes on to state

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"Where the employer has fulfilled the requirements of sub-section (1) the determination of the question of whether the dismissal was fair or unfair (having regard to the reasons shown by the employer)

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(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

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

148. Both parties were agreed that the Tribunal's approach should follow that set out in the well-known case of **British Home Stores Limited v Burchell [1978] IRLR 379**
25 **EAT**. Where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an Employment Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the
30 employee of the misconduct at that time. This is not a question of the Tribunal substituting its own judgment for that of the employer but requires the Tribunal to look at the conduct of the employer and establish whether the conclusion reached is one which the employer was entitled to reach in terms of employment law. This famously involves three elements. First, the Tribunal must be satisfied that the

5 employer in fact believed in the employee's guilt. Secondly, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief and finally the employer at the stage at which he formed that belief on those grounds must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

10 149. We were referred by the claimant's solicitor to the case of **Khan and Hemming v Landsker Child Care Limited UKEAT0036/12/DN** which was a case where EAT upheld an appeal against a decision of the Employment Tribunal which dismissed claims of unfair dismissal brought by two employees. The charges against these employees were in similar terms to those involved in the present case in that the allegations stated:

15 *"By planning to set up in business in competition with Landsker Child Care and using the company resources to do so you have breached the fundamental trust and confidence essential to our contractual relations."*

20 150. In that case the Employment Tribunal was criticised by the EAT for failing to consider what they described as "a further dimension to the legal arguments". This was to the effect that what the respondents believed which was that the claimants were guilty of planning certain business in competition with the respondent and using company resources to assist in doing so was not (1) capable of amounting as a matter of law to gross misconduct and (2) not supported by any evidence or analysis by the Tribunal as to what the resources might have been and whether it was capable of being confidential information. In the present case the Tribunal
25 took this as meaning no more than that a Tribunal faced with the type of situation in the present case must make enquiry as to whether the respondents in reaching the decision to dismiss were entitled to find not only that certain acts had been carried out by the claimant but that those acts amounted to conduct such as would justify
30 dismissal. So far as the second point of the **Landsker** case was concerned the Tribunal's understanding in this case based on the evidence before it was that there was no suggestion by the respondents in this case that confidential information was being used by the claimant. This was certainly not mentioned in evidence.

151. In submission the respondents' representative indicated that the Tribunal should take a narrow approach and simply confine itself to applying the Burchell test to the question of whether or not the respondents were justified in reaching the view they had on whether or not the Claimant had carried out the acts complained of. On the other hand the claimant's representative indicated that context and background was extremely important. The Tribunal considered that the claimant's position was correct. It was in line with the approach set out in the 'Landsker' case.

152. In this case the context was that the respondents had advised the claimant and his colleagues that they were closing the Ground School. At various points during evidence the respondents' witnesses were careful to say that this was simply a proposal but the vast preponderance of the contemporary documentation showed that the claimant and his colleagues were absolutely correct in their understanding that there was virtually no doubt the Ground School would be closing. As is nowadays fairly common in these circumstances the claimant and Mr Beasant decided to explore the possibility of a management buyout. Initially the other two employees were to be involved but it was fairly clear that after a short period of time they indicated that whilst they were prepared to work for the new company on an employee basis they did not wish to take part in the management or funding of it. The Tribunal accepted entirely the evidence of Mr Beasant and Mr McIver, the claimant to the effect that when the matter was raised by Mr Farrow he was extremely supportive and gave them to understand that he was 100% behind their proposal. Their understanding was that it would be put to the Board but this was a formality since generally speaking the Board followed Mr Farrow's lead. The claimant's position which the Tribunal entirely accepted was that all steps which they had taken after this were simply the normal steps which one would take in contemplating a management buyout. The company was set up. There was no attempt to hide this. Initially the claimant and Mr Beasant were very keen to use building 75B for reasons which they explained several times to Mr Farrow. Mr Farrow had initially indicated this might be possible at least in the short term but eventually said this would not be happening because the building was required. At that point it was changed. The Tribunal consider it inconceivable that the claimant and Mr Beasant would have arranged to have the new company registered at an

address belonging to the respondents if they were planning to keep this secret or wished to hide it in any way. The remaining steps which the claimant and Mr Beasant took with regard to the website and the Facebook page were simply the normal concomitants of setting up a new business or planning to set up a new business in 21st century Britain.

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153. Having initially said he would fully support the application Mr Farrow then appears to have come back to the claimant and Mr Beasant after a time to say that the Board had not approved it. It is very strange that this does not appear to have been communicated in any written document which survived to the date of the Tribunal. It is also somewhat strange that, having indicated he would take it to the Board, what appears to have happened is that Mr Farrow discussed the matter with Ms Monckton and reached a view and that Ms Monckton then contacted the Chairman of the Board (who had only just been appointed) and asked him to confirm his view. It is clear from the terms of his email that Mr Bell's view was to go along with whatever Ms Monckton wanted.

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154. The claimant and Mr Beasant found the position somewhat puzzling in that Mr Farrell seemed to be backtracking on his support. There is at least a suggestion that Mr Farrell by this time is contemplating some kind of private deal with a third party. Even without considering the evidence of Mr Aamer which would appear to suggest there was a degree of corruption involved it is clear from the evidence both of Ms Munckton's email at page 93 and what Mr Farrell said at the JNC meeting that some sort of a deal with a third party is in contemplation.

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155. There is absolutely nothing untoward in this in itself (if one ignores the imputation of some degree of corruption involved in what Mr Aamer overheard). If at that stage the respondents had said "*Look we are planning to sell/give the business to someone else and you must immediately stop whatever you are doing with your management buyout*" the Tribunal is in absolutely no doubt that the claimant and Mr Beasant would have immediately ceased. It is clear that the claimant had no interest in setting up a new business other than as a last resort if there was absolutely no alternative way of him earning a living for himself and his family. It would appear that at this stage Mr Farrow is well aware of TUPE and is at pains to

advise Mr Sutcliffe that TUPE would not apply. The Tribunal found this extremely odd since if the respondents did transfer their business to a third party then we would agree with the claimant's representative that this would appear to be, at the very least, a service provision change and there is a very good chance that TUPE would have applied. By this stage the claimant and Mr Beasant are becoming very suspicious about what exactly is going on. They raise their suspicions at the first consultation meeting and it is clear from the witness evidence of what took place that all four employees considered that there had been a bit of a blow up between the claimant and Mr Farrow. Very strangely none of this appears in the eventual minute. Despite their misgivings Mr Beasant and the claimant decide that they will try to deal with what they understand to be Mr Farrow's and the Board's concerns about their proposal and submit amended proposal. This proposal is put in in the name of the new company. It is absolutely clear that by that stage at the very least, not only Mr Farrow but the entire Board must have been aware that the claimants had set up a new company. The minute of the Board meeting state that the proposal was considered and rejected. It states that the reason for rejection was that the business of the Ground School was not viable. During the Hearing several of the respondents' witnesses tried to indicate at various points that we should ignore the minute and accept that the respondents had some other reason for refusing to transfer the Ground School. To do so would not only involve ignoring the minute but involve ignoring Mr Farrow's evidence as to the reason he gave the claimant as well as the evidence of the claimant and his other witnesses and indeed the letter which Mr Bell sent to Mr Beasant at the time. It is clear that the context in which the claimant was operating at this point was one where (1) it was clear the respondents were going to close the Ground School and he would potentially be out of a job, (2) the respondents were clear that the Ground School business had absolutely no value to them, (3) the Claimant suspected Mr Farrow might be trying to do a private deal with a third party but he continually denied this when challenged.

156. The respondents in their evidence tried to suggest that there was a realistic possibility that if additional students were found the Ground School would not close. The fact of the matter was that the Libyan contract had been in the offing for some years and had hit a brick wall. Albeit that the respondents appear to have

retained a deposit of around half a million pounds from the Libyan company it appeared to the Tribunal that the claimant and his colleagues were absolutely correct in their assumption that there was no real possibility of things moving forward with this contract. The respondents had been trying to get other commercial contracts for some time with no success and the claimant and his colleagues were, in the view of the Tribunal, correct in assuming that this was not going to change. In evidence the respondents referred to various suggested leads but at the end of the day it is absolutely clear that nothing came of them and nothing was going to come of them. The respondents had instructed that no further recruitment would take place. It is absolutely clear from the evidence that Mr Farrow had gone to the Prestwick Air Show with Mr Falconer and had allowed Mr Falconer to take the details of the 15 individuals who had enquired. If the respondents had any serious intention of continuing with the Ground School, Mr Farrow would have got these names himself and would not have permitted them to be kept only by Mr Falconer, a potential competitor.

157. It was against this context that the Tribunal considered it appropriate to apply the Burchell test.

158. So far as the issue of genuine belief is concerned the Tribunal had serious doubts with regard to Ms Munckton. It appeared to the Tribunal that there was a close nexus between Ms Munckton, Ms Bald and Mr Farrow in relation to this matter. As the claimant points out in his submission there is no smoking gun but the circumstantial evidence certainly suggests that the respondents in the form of Mr Farrow, Ms Munckton and Ms Bald had an agenda which involved getting rid of the Ground School staff. We have no doubt that by the close of proceedings Ms Munckton did have a genuine belief that either the claimant or some of his colleagues had been involved in carrying out the specific matters which were referred to in the investigation report. The website and Facebook page existed as did the entry on the Acorn website. The claimant had sent the emails to enquirers. Given the context, however, the Tribunal could not see that the respondents' belief that this somehow amounted to disloyalty to the company was even genuine. Ms Munckton herself in response to a question from the Tribunal confirmed that what the claimant and his colleagues were doing was preparing to compete rather

than actually competing. At various points she seemed to accept that there was no possibility of the new company being able to teach students at a Ground School until it had an ATO Licence. At other points she appears to have forgotten this. It appeared to the Tribunal that the attitude of both Ms Munckton and Mr Bell to the issue of individual responsibility was also a somewhat curious one. Mr Bell summarised this in his statement as saying that he considered the claimant was in some way vicariously responsible for things his co-workers did. This was a rather bizarre statement to make. Throughout the whole process there was little attempt to find out what the claimant was actually responsible for doing and, as will be noted below, no attempt whatsoever made to explore the claimant's explanations.

159. Moving on from the genuineness of the belief the Tribunal considered that in this case there were no reasonable grounds upon which a reasonable employer could have sustained the belief that the claimant was guilty of what he was alleged to have done. It was clear that the four employees as a whole had carried out various actions. They had set up a company. They had registered it at hanger 75B. Mr Beasant had arranged to set up a website and put some testimonials on this, Acorn Enterprise, who the claimant was attending with the blessing of the respondents, had put certain things the claimant had told them up on a website, the claimant had sent certain emails to enquirers, Mr Sutcliffe had ordered certain materials. Given the context there was no evidence that these acts showed disloyalty to the company or in any way showed an intention to set up in competition with the respondents. The respondents were closing their Ground School. The claimant and his colleagues could not operate a Ground School without an ATO licence which they did not have. The respondents could not continue to run a Ground School after they dismissed the claimant because they would no longer be allowed to keep their ATO licence.

160. It was suggested by the respondents in submission that at the Appeal hearing the claimant had admitted that he was guilty of some misconduct when he had suggested that he should have received a warning. The Tribunal did not accept that this was correct. We accepted the claimant's evidence that what he had wanted to convey to Mr Bell was that if he had received a warning that the respondents were in any way concerned by the actions he and his colleagues were

taking as regards PPT then he would have immediately desisted. The claimant's position all along was that his preferred option was to continue in employment.

5 161. So far as the investigation is concerned the Tribunal considered that Ms Munro's investigation of the matter was completely inadequate. It was clear that she adopted a formalistic approach drafting her questions in advance and entirely failing to ask supplementary or follow up questions where it was quite obvious that these needed to be asked. Ms Munro's attitude appeared to be that she should prepare an investigation report and then move on. It is also clear that most of the
10 "findings" of her report did nothing more than repeat the information which she had been provided with at the outset by Mr Farrow via Ms Bald. It is quite clear that she acted under a considerable degree of instruction from Ms Bald. The claimant's representative drew our attention to the case of **Ramphal v Department for Transport UKEAT0352/14/DA**. The EAT in that case cautioned against HR
15 becoming too involved in the investigation of a case. There is little doubt that in this case HR did become too involved at various stages.

20 162. The Tribunal considered that it ought to have been clear to anyone carrying out a proper investigation that the case being made against the claimant stood or fell dependent on what Mr Farrow had been told about the MBO plans and what he had said in response. Despite this the decision was made that a full investigation of the matters raised by the claimant in his grievance would not be carried out. Ms Munro even says that in the report of her meeting with the claimant. At other points it is clear that Ms Munro is happy to simply write down what the claimant
25 and Mr Beasant have said without in any way exploring it further but simply saying she does not accept this because it does not accord with her preconceived idea. There were a number of matters raised during the investigation which simply cried out to be investigated properly and "bottomed out". One example of these is the reference to 15 students. The claimant is absolutely clear as to where the
30 information came from. It is clear that he did not have the names but that Mr Farrow and Mr Falconer had gone to Prestwick Airport and after the Air Show Mr Falconer had ended up with these names. This statement could have been verified in a number of ways. Such was Ms Munro's blinkered vision that all she asks Mr Farrow is whether he knows anything about it and when he says he

doesn't then this is translated into yet another charge to be laid at the claimant's door. It was also clear from the evidence that Ms Munro appeared to see it as her job to bolster the respondents' case for dismissal. Having eventually admitted that she had gone on to the PPT Facebook site just before the Tribunal she accepted that one of her reasons for doing this was to find out whether the claimants had in fact recruited a particular student so that she could add this to the case at the Hearing.

163. The Tribunal also considered that a reasonable employer would not have interviewed Mr Farrow last. All of the allegations came from Mr Farrow. He said that he had got the information from Mr Fortune. The claimant's position was that he had noticed that all of a sudden Mr Fortune was accessing his LinkedIn page. The claimant's position was that Mr Farrow had almost certainly instructed Mr Fortune to start looking for the evidence. A reasonable investigator would have spoken to Mr Farrow first and ascertained where all the evidence came from. She would then have been in a position to put what Mr Farrow said to the claimant and his colleagues in context. If they had raised any matter relating to Mr Farrow she could have spoken to him again at the end. This was a case which a reasonable employer would have considered it important to investigate carefully. There was no doubt that serious allegations were being made against the claimant and also very serious allegations being made by the claimant. A proper investigation rather than the mechanistic listing of questions and answers was obviously required and this was not carried out.

164. There was also no real attempt to investigate the claimant's individual culpability for any of the matters raised. His explanation that he had been unaware of something was simply recorded and then ignored. In some cases Ms Munro referred to evidence in her summing up which had not been put to the claimant, for example in relation to the allegation that the email that Mr Sutcliffe sent to the Reprographics Department had been copied to the claimant. The claimant had a good explanation for this matter which would have exculpated him but the matter was simply not put to him

165. The case of **Sainsbury's Supermarkets v Hitt** makes it clear that the reasonableness or otherwise of an investigation requires the Tribunal to apply the test of the range of reasonable responses. In this case the Tribunal was absolutely satisfied that the investigation carried out fell far below that which fell within the range of reasonable responses.

166. Taking everything into account and bearing in mind the three strands of the Burchell test the Tribunal was of the view that the respondents had not been entitled to come to the view that the claimant was guilty of the conduct alleged against him or that what he had admittedly been involved in doing amounted to misconduct given the context and circumstances.

167. The claimant also made the point that there were a number of procedural irregularities in this case which would of themselves render the dismissal unfair. The Tribunal agreed with this. In this case the Tribunal was concerned that Ms Munckton appears to have decided that she would hear the disciplinary herself. She is the most senior person in UHI and the Tribunal found it odd that she would wish to take this on in the knowledge that this would of course make finding the right person to carry out the appeal somewhat difficult. Additionally, it was clear that Ms Munckton had been involved heavily in the matters which led to the disciplinary hearing. She had discussed the original MBO proposal with Mr Farrow and was on the Board which discussed the second one. Whilst not considering that of itself this rendered the decision procedurally unfair the Tribunal was concerned that in a case like this it would have been obvious to a fair employer that it was important to appoint someone independent to deal with the disciplinary hearing. The Tribunal is of this view particularly since we consider that had an independent person been called in to hear the disciplinary the very first thing that independent person would have wanted to do would be to fully explore exactly what had happened and to investigate properly the role of Mr Farrow.

168. To put it mildly there is a very strong smell of fish about a situation where, on the one hand, an employer is telling its employees that it cannot accept their management buy out proposal because the business is unviable and the employer would be breaching their duty of care if they did this whilst, on the other hand,

5 instituting disciplinary proceedings and seeking to dismiss those same employees for allegedly competing with this worthless business. Anyone independent looking at the matter would clearly have asked many more questions than Ms Munckton did. The Tribunal also considered that the claimant was correct in his assertion that in the particular circumstances of this case it was unfair not to investigate the grievance lodged by the claimant first. In many cases it will be appropriate to proceed as the respondents did in this case but in some cases the facts of the grievance are inextricably linked with the disciplinary allegations. That was the case here. By saying that they would proceed with the disciplinary allegations without investigating in any way the serious allegations which were made in the grievance then the respondents in the view of the Tribunal acted unfairly. The Tribunal felt it was outwith the range of reasonable responses to proceed in this way. It would have been clear to any reasonable employer that the facts regarding the claimant's guilt or otherwise could not be determined without sorting out in some way the allegations made by him in the grievance.

169. The Tribunal also considered that the claimant's representative was correct in criticising the fairness of the appeal on the basis that by the stage the appeal hearing took place Mr Farrow had already surrendered to the ATO Licence. The Ground School could not proceed without an ATO Licence. If Mr Bell had upheld the claimant's appeal there was no work which the claimant could do for the respondents. The respondents could no longer run a Ground School. The Tribunal also considered that the circumstances in which the dismissal hearing proceeded in the claimant's absence amounted to procedural unfairness. The respondents had received Ms Munro's report around 4th December. For reasons known only to them they had decided that the disciplinary hearing would not take place until 12th January. The claimant's representative suggested that this was so as to ensure that by the time of the disciplinary hearing PPT would be up and running, the Ground School having finally closed. The Tribunal considered we had insufficient evidence to make that finding, however it is extremely odd that when the claimant is unable to attend through illness on 12th January the respondents take quite extraordinary steps to ensure the disciplinary hearing is held with or without his presence one week later. The claimant produced medical evidence that he was unfit to work as at 12th January. In those circumstances it was

unusual, but not in any way incorrect, for the respondents to seek Occupational Health advice immediately as to whether or not he would be fit to attend a Hearing and, if so, when. The Tribunal, like the respondents, had no reason to dispute the claimant's assertion that he was unable to attend an Occupational Health appointment in person. They then arrange a telephone appointment. What is interesting is that it is clear from the email sent by the nurse on 20th January (page 508) that the nurse did not at any stage make contact with Mr McIver and Mr McIver did not decline to speak to her. The letter is quite clear in saying that she called the claimant's work mobile number and it went to voicemail. She then tried his home number but the number was "out of order". The claimant was unable to pick up his voicemail from his work mobile since he no longer had this. The claimant's position certainly was that he was not medically fit to attend the Hearing. Given that the respondents themselves had been happy to delay the Hearing by over a month for no reason which we could discern then, in those circumstances, we consider it was outwith the range of reasonable responses to proceed in the claimant's absence.

170. We also consider that there was procedural unfairness in that it would appear that all of the allegations were lumped together against the four employees with really no consideration of individual responsibility.

171. With regard to sanction we agreed with the respondents that in any event even if one accepted that the respondents had been justified in coming to the conclusion they did regarding the claimant's guilt (which the Tribunal did not) the sanction imposed was overly harsh. Once again the respondents entirely ignored the context in which the claimant's actions took place. The claimant was under serious threat of losing his job and required to find a means of earning a livelihood for himself and his family. Even if the respondents were justified in finding that the claimant had been guilty of competing with them and using their resources to divert students to the new company (which they were not) the Tribunal considered that it would have been outwith the range of reasonable responses to dismiss. During the appeal hearing the claimant at various points indicated that he considered the sanction of dismissal too harsh and that he ought to have received a warning. The respondents' response did not address this issue but instead pounced on it as

demonstrating the claimant was aware he had done something wrong. The Tribunal considered it was nothing of the sort. We accepted the claimant's position which was that all along had either he or his colleagues been told that they should stop what they were doing then they would have stopped forthwith. We accepted the claimant's position that in fact the claimant would have welcomed this as suggesting that there was some other way forward which might involve him keeping his job. The Tribunal was in no doubt that this was correct.

172. The Tribunal, therefore, considers that the claimant was unfairly dismissed. With regard to the issue of remedy the respondents' position was that any award should be reduced to take account of the claimant's contribution. Before considering the matter the Tribunal felt they required to make some additional findings in fact with regard to the precise detail of what the claimant actually did. So far our findings have been mainly related to the events which took place from the point of view of what the respondents did. The claimant was, however, accused of certain specific matters and it is as well that we briefly set out our view regarding this.

173. One of the charges against the claimant related to the fact that he allowed his photograph to be used on the website of Acorn Enterprise. This was the organisation which he had started going to shortly after the closure announcement with Mr Farrow's consent. On his first day a photograph was taken and he gave various details to them. Acorn is an Enterprise company which trains budding entrepreneurs and without further reference to the claimant they produced the information on the website which is found at page 245. This included the information *"his current employer is divesting himself of the pilot training business in order to concentrate on his core market of engineering training. Gerard together with his colleague, Norman Beasant, have identified a gap in the market and therefore they have founded Pathway Pilot Training Limited. The strategy is to capitalise on the growing demand for pilots by supplying students to various flight schools in Europe."* Apart from providing biographical information to Acorn the claimant had absolutely no involvement in this.

174. The claimant was criticised for the PPT website. The website contains various testimonials from students to Mr Sutcliffe and Mr Cervantes. Mr Beasant set up

the website and was responsible for obtaining the quotes from Mr Cervantes and Mr Sutcliffe. The claimant was not involved in this. The claimant was aware that the website had been set up and had viewed the website. He was aware that the website contained within it an application form and a statement to the effect that PPT would be running its first training sessions from January 2017.

175. With regard to the allegation regarding the orders Mr Sutcliffe made for reprographic materials, Mr Sutcliffe had made two orders, each for 30 documents. The claimant was not aware at all of one of these. With regard to the other one he often assisted Mr Sutcliffe by picking up documents from Perth College. The claimant's commute to work took him from Scone to Crieff which involved going past Perth College. He received a telephone call from Mr Sutcliffe one day asking if he would pick up some copying. He agreed to do this and asked Mr Sutcliffe to send him a copy of the email so as to remind himself to do it on his way back from work. Mr Sutcliffe did this, sending the first page of the email only. The first page did not include the number of copies and the claimant was unaware of the precise detail of what Mr Sutcliffe had ordered.

176. So far as the enquiries were concerned the claimant sent emails to various enquirers responding along the lines of

"Thank you for your enquiry

We are organising our flight training activities in the coming months and courses will continue under a revised structure in early 2016. I shall contact you soon with further information and we appreciate your patience during this time."

These emails were not copied to Mr Beasant or anyone else at AST. They were sent by Mr Mclver to Evan Dunn, Daniel Sloan and Ross Mitchell. With regard to the enquiry from Ben Meecham the claimant did not deal with this but was advised by Mr Sutcliffe that he had received the call and that he had dealt with it by passing it on to Mr Beasant.

177. The claimant was aware of the company's Facebook page and had viewed this but was not involved in preparing it or setting it up.

5 178. In light of the above findings the Tribunal was of the view that the claimant had not contributed to his dismissal. Applying the test both in relation to basic and compensatory awards we were of the view that no deduction ought to be made. We did not believe his conduct was blameworthy.

10 179. So far as the respondents' position that there ought to be a *Polkey* deduction was concerned the Tribunal disagreed. The Tribunal considered that if the respondents had dealt with the matter properly and investigated matters in the way that a reasonable employer would have investigated matters, there was no possibility that the claimant would have been dismissed.

15 180. The Tribunal is aware that as at the time of dismissal the claimant was at risk of redundancy. The claimant's view was quite categoric to the effect that had he not been dismissed his preference would have been to be redeployed to another job either with the respondents or within UHI. The Tribunal accepted his evidence that he had been told by Mr Farrow when he commenced employment that this would
20 be virtually certain. The Tribunal also accepted the evidence regarding the two alternative jobs within AST which the claimant could have done. We also accepted the evidence regarding the other jobs within UHI which the claimant would also have been qualified to do. The Tribunal considered that if the respondents had dealt with the matter properly then if the Ground School had closed there was a
25 very high chance amounting to a virtual certainty that the claimant would have been redeployed. If the respondents had transferred the Ground School business elsewhere then the claimant would have transferred to the new owners under TUPE. Although we consider that it is almost certain that the claimant would have been redeployed we appreciate that the probability was not 100%. In the
30 circumstances we consider it appropriate to make a deduction of 5% from the compensatory award to take account of this.

181. The claimant produced a Schedule of Loss. We accept his figure for his earnings. The basic award amounts to £2,137.50 (4.5 weeks at £475). With regard to the

compensatory award we accepted the claimant's calculation. We consider it appropriate that he be granted his wage loss from the date of dismissal to 3rd February 2017 amounting to 52 weeks. We consider that the claimant took appropriate steps to mitigate his losses. He works in a specialised industry. The opportunities for finding another job within that industry in the vicinity are extremely slender. There are no other ground schools. The main employer of lecturers is UHI. In the circumstances we consider that an individual not expecting compensation would have tried to mitigate his losses by acting exactly as the claimant has done in trying to build up the business of PPT. We accept the wage loss figure of £31,720. We award £450 for the loss of statutory rights. We would deduct the figure of 5% from the wage loss giving an adjusted wage loss figure of £30,134. The total compensatory award is £30,584 (30,134+450). Adding the basic award of £2137.50 gives a total monetary award of £32,721.50. The claimant was not in receipt of recoupable benefits and there is no prescribed element.

182. The claimant required to pay a fee of £1,200 to bring his case. The Tribunal considers it just and equitable that he be reimbursed this sum by the respondents.

Employment Judge: Ian McFatridge
Date of Judgment: 18 July 2017
Entered in Register: 19 July 2017
and Copied to Parties