EMPLOYMENT TRIBUNALS

Claimant: Mr R Wilkinson

Respondent: National Maritime Museum

Heard at: London South (Croydon) **On: 14 & 15 August 2017**

Before: Employment Judge John Crosfill

Representation

Claimant: Mr Adam Ross of Counsel

Respondent: Mr Matthew Sheridan of Counsel

JUDGMENT having been sent to the parties on 5 September 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. All other claims brought by the Claimant, Mr Wilkinson having been dismissed, the only remaining claim that I was required to determine was a claim for breach of contract brought pursuant to the Employment Tribunals (Extension of Jurisdiction) Order 1994. Mr Wilkinson was dismissed by the Respondent and he accepts that he was paid in lieu of notice. He does not, and cannot, complain about the dismissal per-se but he says that the dismissal was in breach of contract. The way he puts it is that it was in breach of an express, or alternatively implied, term of his contract of employment that the Respondent would not dismiss him without following a formal process or whilst off sick. The claim is for the loss of wages for the notional period that it would have taken the Respondent to follow the contractual procedure he says applied. The line of authority recognising the possibility of such a claim flows from the case of ***Gunton v London Borough of Richmond upon Thames*** **[1980] IRLR 321**. Whilst reserving the right to argue that ***Gunton*** was wrongly decided, Mr Sheridan accepted that I was bound by it.

2. The parties had agreed a bundle of documents many of which I was able to pre-read in advance of the evidence. I then heard from the Claimant on his own behalf and Helen Kenny his trade union representative. Anne Read the Head of Human Resources and Dr Kevin Fewster, a Director, gave evidence on

behalf of the Respondent. All of the witnesses were cross examined in the usual way.

3. At the conclusion of the evidence, both Counsel spoke to their written skeleton arguments. Whilst I do not repeat those submissions in full, I refer to the material parts of the competing arguments below. I was very grateful for the assistance I received from both Counsel, both of whom had clearly put a lot of work into their written arguments. I took some time to deliberate and gave an oral judgment on 15 August 2017. These written reasons are not a reproduction of the oral reasons I gave but have been tidied up and in some respects amplified. They are substantially the same as the reasons given orally.

4. Prior to giving judgment I pointed out to the Claimant that in his ET1 he had "reserved the right" to pursue his breach of contract claim in the civil courts. In Mr Ross's skeleton argument, he contended that the time it would have taken the Respondent to lawfully terminate the contract would have been 18 months. As such his loss was far in excess of the £25,000 cap on jurisdiction in the Employment Tribunal. Having taken instructions Mr Ross indicated that the Claimant was content for his claim to be dealt with in the Employment Tribunal.

5. I apologise to the parties for the time that it has taken me to produce these reasons. I have had a considerable number of sitting days, and other professional commitments, that have unfortunately pushed back the completion of this important task.

Findings of fact

6. Having listened to the evidence and submissions I made the following findings of fact:

7. The respondent is a public body which operates four separate museums, which are collectively described as the National Maritime Museum, from sites all of which are located in Greenwich. These include the Cutty Sark and Greenwich Observatory in addition to the National Maritime Museum itself.

8. Since 2009 there has been a gradual decline support for the Respondent from central government. In 2009 the Respondent received a grant of some £16.2 million. By 2017 that had declined to some £13.8 million and now represents only half the income of the museum. This is, over the same period, a drop from 70% to 50%. The Museum has therefore become more and more dependent on what could be described as self-generated income. It generates such income from matters such as exhibitions from sales shops and cafeterias from events and functions

9. In 2014 Dr Fewster, then a Director, conducted an organisational review. There were a number of redundancies and this led into in turn to instability in the senior management team, as people who were able to do so, and wished for more security, left the organisation. In the middle of this process, Dr Fewster decided that a new role could be created for a Director of Enterprises. Essentially, that person would be responsible for maintaining and generating commercial revenue to make up the shortfall in the grant received from central government.

10. In December 2014 the Claimant, who was then working in a similar level job in the Victoria and Albert Museum, was recruited to the role of Director of

Enterprises. In the course of the recruitment process he negotiated a salary of £85,000 with provision for a bonus of in the region of 20% of base salary. The Claimant worked out his notice at the Victoria and Albert Museum and commenced working for the Respondent in March 2015.

11. The Claimant's appointment was made at a challenging time. The instability led to the loss of seven key managers. In addition, as many streams of commercial income such as exhibitions and other long-term projects, were already in place, this limited, but did not entirely extinguish, the ability to make rapid changes. The Claimant was given a broadly favourable three-month review and successfully passed his probation period in September 2015.

12. A "6-month Probation Report" was produced by Dr Fewster the material parts of which read as follows:

> *"Richard and I discussed his progress since taking up the post last March and a range of issues and opportunities within his division. The Enterprises Division is very broad ranging in its remit thus, not surprisingly, it takes time to understand fully the very wide spectrum of issues and opportunities within it. This process been made more difficult by the abnormally high level of turn-over at managerial level within the division in recent months which has slowed down Richard's ability to drive forward in some areas as fast as he would like. Senior staff recruitments have also occupied considerable time thus further impacting on time available to Richard and some of his senior managers.*
>
> *From my observations, Richard has deservedly gained the confidence and respect of his team and is also well regarded by his colleagues within the Executive. He fully recognises the very considerable opportunities that are available to raise our commercial performance but also the challenges that exist. We both see the new Enterprises Board is potentially valuable tool to help us drive revenue in selected areas, and getting this new committee fully functioning and engaged is an important objective for coming months. Improving the performance of the main NMM shop is recognised as a key target for coming months, especially with our Pepys exhibition soon to open…..*
>
> *I am pleased to recommend Richard's confirmation in post"*

13. In November 2015, there was an interim meeting of the Respondent's Remuneration Committee. A short report was generated and the material part concerning the Claimant reads as follows:

> "*The starting position of this new role was acknowledged as a challenge, and this has been compounded by slow start to the Enterprise Board and staff turnover in the commercial team.*
>
> *Nonetheless clear priorities are now in place with Retail as a key area. Travel Trade was making good progress, though would require a long lead time"*

14. In January 2016 Dr Fewster prepared an annual appraisal report. The purpose of this report, as I understand it, was for onwards submission to the Remuneration Committee who annually set the level of remuneration for the senior employees. The material parts of that report are as follows:

14.1. *"Richard has been in post 11 months, having joined RMG on 2 March 2015. The new Enterprises Divisions is very broad ranging in its remit thus, unsurprisingly, it has taken him time to understand fully the very wide spectrum of issues and opportunities within it. Added to this is a complex multi-site nature of RMG's operations which, I know from my conversations with Richard, takes time to digest. Richard's setting-in phase was made more difficult by the abnormally high level of turn-over at managerial level within the division in his early months which impacted on his ability to drive forward in some areas as fast as he would like."*

14.2. "the Marketing team continues to make good progress in improving our audience research work. Our Pepys marketing has proven not be as strong as other recent campaigns and we must learn from this as we develop our marketing strategies for Emma."

14.3. in relation to the Royal Observatory*: "new site manager Lance Boon seems settled in well and perform strongly in the year ahead I shall look into Lance and Richard to take more of a lead role in driving new projects that are planned for the site."*

14.4. in relation to Cutty Sark: *"I stressed to Richard that is vital that he, Arron and his team think creatively about new business opportunities strategies to boost income and/or visitation"*

14.5. under the key personal targets, under a heading "expanding our partnership with travel trade": *"Good initial progress has been made against this target. We need to build on these in the year ahead, especially as they can have such positive impacts on business at Cutty Sark, ROG and the reopening of Queen's house. We also need to build on our early engagement the new Greenwich cruise ship terminal in readiness for its opening 2017."*

14.6. the final paragraph says: *"not surprisingly Richard's first year in post has been one large learning the business. My expectation for 2016/17 is that he will identify the key business opportunities he believes we need to pursue and made good progress with their implementation."*

15. Overall, I read that as being a broadly favourable report as to the Claimant's progress within his role in the first year. It did highlight some work to be done in the future, but the Claimant could quite reasonably have believed but his work and performance, up to that point in time, had been satisfactory.

16. The conclusions of the remuneration committee, apparently reached at a meeting of 3 March 2016, were as follows:

16.1. "Newest in post and adapting to the complexity and challenge of the 4 different sites. A broad remit and there had been some unhelpful turnover of management roles in the division. The role had previously been difficult for the Museum and a degree of partnering with the Director to provide additional help and guidance would be beneficial. The Enterprises Board has been slow in starting may also provide helpful input."

16.2. *"Director of Enterprises: a good start with some way to go and recruited on a good starting salary slightly over target rate. No increase in basic pay."*

16.3. In relation to the bonus payment: *"Director of Enterprises: new and challenging role 9%"*

17. When Dr Fewster gave evidence, he suggested that the award of a bonus of 9% should have indicated to the Claimant that there were real concerns as to his performance. I do not find that that to be realistic. A person in the Claimant's position could quite reasonably have concluded that, having achieved essentially 9% and from an available 10%, their performance was at least adequate, if not exceptionally good.

18. The award of the bonus did not concern the Claimant but he was unhappy not receive any increase in his basic pay. When the rationale for that decision was later explained to the Claimant by Dr Fewster, no suggestion was made that his basic salary was not increased because of his own personal performance. Instead, the rationale provided to him, was that his salary had been pitched above the market rate in the first place. The Claimant, dissatisfied with that explanation, asked for his basic salary to be reviewed by the trustees. Dr Fewster advised against this and suggested instead that he used the year to *"prove his performance".* He did not however suggest in terms but that there are any particular performance concerns at that stage. Nevertheless, the Claimant pressed for a review.

19. The trustees met on 23 June 2016 to consider the matter of the Claimant's pay and a minute of that meeting at records that there had been, and I quote *"some reservations about performance"*. However, none were specified in that document. In the event, a modest increase in pay was agreed. In my view that is an outcome wholly inconsistent there being any serious concerns about performance by that date.

20. The decision of the trustees was communicated to the Claimant by Dr Fewster. On 24 June 2016 Dr Fewster sent an email recording the events of that meeting to Sir Robert Joyce. He said this:

> *"I had my regular weekly meeting with Richard this afternoon. As part to this meeting, [sic] I told him that the remuneration committee met yesterday and decided that, whilst there was no change in the market rate for his post, it was accepted that the job weighting had perhaps not fully recognised the addition of Cutty Sark into his formal remit, thus the committee decided to give him a 1% uplift in base salary effective 1 April 2016.*
>
> *Before I had a chance to say anything else, Richard exclaimed that he regarded this as 'pathetic' and 'inconsistent'. I asked him to say why he used these words. He said 1% was pathetic, implying that I think that it was derisory recognition. I replied that there have been many occasions during my tenure when individual director's base pay have received 0% or 1% uplift as this is how the comparative system operates. He said his 'inconsistent' comment was referring to a 1% increase being inconsistent with uplifts that occur in other parts of the Museum when job weighting changes. I replied that a Director's post is not like other parts of the Museum."*

21. It is clear at this stage Dr Fewster was somewhat concerned at the Claimant's attitude and a copy of that email appears to have been placed on the Claimant's personnel file. On 22 September 2016 at there was a meeting of the trustees. In advance of that meeting, a summary of the financial position was prepared.

It showed a reduction in revenue surplus. The main reasons being explained as reduction in sponsorship of the Queen's house and the firm performance of the "Above and Beyond exhibition". It is worth noting that neither of those two matters would directly within the Claimant's remit in the sense that, he could not be held responsible for the loss of sponsorship and the "Above and Beyond" exhibition was something which was been set in train in advance of his appointment.

22. During the meeting minutes were taken and after an apparently extensive discussion of the revenue the following was recorded *'Taking into account all of the above the trustees concluded that commercial income was not growing as the museum needed'*. This was a reference to the fact that that there had been no growth in commercial income. Commercial income was something that did properly fall within the Claimant's remit.

23. On 3 October 2016 the Claimant was unwell. He was referred to psychiatric services for an assessment. He informed the Respondent straight away but it was not until 4 October when the Claimant was able to speak to Dr Fewster. At that stage he told him that he was suffering from stress and depression and that he had been referred at first psychiatric assessment.

24. At some point between the meeting of 22 September and 17 October. Dr Fewster, with the assistance of the Human Resources Department, came to the conclusion that the Claimant ought to be dismissed by reason of his performance. The Respondent received advice to the effect that they were not obliged to follow any form of process and, in the particular circumstances, they decided not to do so.

25. On 17 October 2016, Dr Fewster telephoned the Claimant, and told him at that his contract would be terminated. That decision was confirmed in writing by letter dated the same day. It was received by the Claimant on 18 October 2016. On 16 November 2016 the Claimant endeavoured to appeal the decision to dismiss him. He was told that no such right of appeal existed in his case and it was asserted at that the dismissal was entirely lawful and indeed it was asserted the dismissal was fair.

<u>The contractual documents</u>

26. In advance of his appointment the Claimant was sent a document dated 14 January 2015 which is headed "Personal Contract of Employment". In my view the following are the material parts of that document for the purposes of this case:

    26.1. Under the initial heading: *"This document sets out your principal terms and conditions of employment (incorporating the written particulars required for the Employment Rights Act 1996) and with our Staff Terms and Conditions from time to time constitute your contract of employment with the Board of Trustees of the National Maritime Museum".*

    26.2. Clause 1.7: *"Three month's notice will be given in writing by Museum to terminate your employment. You are required to give three month's written notice of resignation if you wish to terminate your employment. Your employment may be terminated without notice or pay in lieu of notice for*

gross misconduct or the equivalent. The Museum reserves the option at it's absolute discretion to pay salary in lieu of notice".

26.3. Clause 1.8 refers to a probationary period. It says: *"Your employment will be probationary for the first six months in post. In exceptional circumstances the Museum reserves the right to extend the probationary period without prior warning if it is considered necessary. The Museum reserves the right not to follow its formal disciplinary procedure during the probationary period".*

26.4. Under the heading disciplinary rules and grievance procedures in clause 1.10 it is said: *"Section 4, Policies and Procedures contains the Disciplinary and Grievance procedures which apply"*.

26.5. Without any further heading but at the foot of the contract is found the following: "*The terms and conditions section of the Staff Handbook forms part of your contract and may be amended or updated from time to time normally by agreement or negotiation. Notice of changes in terms and conditions will be given in writing*.

26.6. Below that are the words: *"if you are in agreement with the above terms please sign and date one copy of this contract referred return to human resources retaining the other for your information"*.

26.7. Below the electronic signature "Head of HR" is essentially a confirmation slip. That contains the following:

I confirm receipt of Parts 1 to 4 for the updated contract of employment staff handbook dated July 2014.

I confirm my acceptance of part 1 and 2 as my contract and terms and conditions of employment with the National Maritime Museum as amended from time to time.

I confirm my acceptance of the policies and procedures the National Maritime Museum as outlined in part for the staff handbook as amended from time to time.

26.8. The Claimant signed that confirmation slip on 10 March 2015.

27. When the Claimant arrived at work and he was given a further copy of that personal contract and a copy of a composite document which is entitled: National Maritime Museum Contract of Employment and Staff Handbook. The contents of that document are extensive. It is as suggested above in 4 sections.

27.1. Section 1 is headed personal contract of employment. That contains the document which I have just summarised above and contain specific terms in relation to each appointed employees such as salary and like matters.

27.2. Section 2 is entitled "terms and conditions of employment" and includes such matters as sickness absence, parental adoption leave and paternity leave, shared parental leave, jury service and the like. Also set out in that section are, the pay system, the pensions arrangement the contractual retirement age and arrangements for flexible working.

27.3. The third section is entitled "staff handbook". In contrast to the section above it starts off with an introduction and describes the museum, history of the site, funding and the organisation of the museum and its structure. It gives an organisational chart at sets out the organisational communication routes. It talks about staff lunches, trade unions, career development, recruitment, welfare and other general and human resources matters.

27.4. The fourth section is entitled "policies and procedures" it contains no less than 16 policies including, the health and safety policy, the Records Management policy, child protection policy, uniform code of practice intellectual property policy, and the like. The fourth of those policies is the disciplinary procedures.

28. The Disciplinary policy is broken into sections for the purposes of this claim section 4.4 contains the material part:

28.1. Clause 4.4.1 is headed objective and reads as follows:

"The Museum aims to ensure that there will be a fair and systematic approach to the implementation of standards and conduct affecting all employees. To this end the following procedure will apply. The purpose of the procedures set out the process the Museum normally will follow unless there is a valid reason for doing otherwise. Please note that this procedure does not form part of the employees' contracts of employment and may be subject to amendment at any time."

28.2. Below that introductory paragraph is found a disciplinary procedure that mirrors to a very great extent the ACAS code of practice and guidance to that code. It provides that where there are minor breaches of discipline, misconduct, poor timekeeping, poor attendance and poor performance, ordinarily any process would start with an informal discussion with a line manager. A line manager might issue an "informal warning". In fact, the policy requires such informal warnings to be recorded.

28.3. If an informal warning fails to improve matters or more serious misconduct was involved was involved the policy provides for an investigation followed by a system of formal warnings. The policy sets out two stages of warnings. A formal written waring and a final written warning. The final stage is a decision to dismiss. The policy provides that a manager taking such a decision would take account of the relevance of any mitigating factors, interview the employee and consult with human resources.

28.4. The policy also provides that in cases of gross misconduct a decision may be taken to dismiss. The policy provides a non-exhaustive list of matters considered to be gross misconduct.

The Claimant's case and issues for determination

29. It the Claimant's ET1 his breach of contract case was advanced in three ways. He argued:

29.1. that the disciplinary policy was an express term of his contract of employment [paragraphs 10-14 of the ET1]; and

29.2. that, if that was wrong, there was an implied term that the policy would be followed unless there was a good reason not to do so [paragraph 14]; and

29.3. That, as a third alternative, there was an implied term *"that the Museum would operate fairly in procedurally administering its Disciplinary Procedure and/or in a way an objective observer would consider reasonable"* [paragraph 16].

30. In his skeleton argument Mr Ross addressed the first and second of these points but, sensibly, did not press the third. However, he did take an additional point. He argued that it was an implied term of the contract that the Respondent would not dismiss the Claimant whilst he was in receipt of and entitled to contractual sick pay. Mr Sheridan noted the divergence from the pleaded case but made no objection to the point being raised.

The disciplinary procedure as an express term

31. Mr Ross argued that the personal contract is a document which clearly intends to record the contractual terms between the parties. He says the clause at 1.10 refers expressly to the disciplinary procedure at "which apply". In support of his argument that the clause is intended to be of contractual effect he says that this must be the case otherwise there would be no need to reserve "the right" not to apply the full procedure during the probationary period as set out in clause 1.8. If the Respondent reserves "the right" not to apply the process during the probationary period he says that this leaves the implication no such right exists afterwards. He says that the expression "right" underlines or reinforces the suggestion that the language used is intended to be contractual.

32. Dealing with the apparent difficulty that the introduction to the Disciplinary Policy states in terms that it is non-contractual Mr Ross said that the reference in clause 4.4.1 is simply a reference to the right of the Respondent to amend those provisions from time to time. He argues that that should not mean that the terms actually adopted from time to time should not have contractual force.

33. Mr Sheridan made the following arguments in response. Firstly, he says that any references within the Personal Contract have to be seen in what he described as a "Section 1" context. He reminded me that Section 1 of the Employment Rights Act 1996 requires an employer to give a statement of basic terms and conditions of employment. It must inform the employee where any disciplinary or grievance procedures may be found. He said that any reference to such procedures even within a contractual document had to be seen in the light of the requirement to mention such procedures whether contractual or not. In support of that proposition he relied upon ***Johnson v Unisys Ltd*** **[2003] 1 AC 518** and in particular the speech of Lord Hoffman at paragraphs 63-66.

34. Dealing with the issue of express incorporation he argued that I should have regard to the layout of the staff handbook. I should note that that it is in four distinct sections. He says it is quite plain that sections 1 and 2 are intended to be contractual. He argued that it was equally obvious that sections 3 and 4 were not so intended. He said that Section 3 could never have been intended to have any contractual force as its contents are simply matters of guidance.

35. He argued that the distinction between the relevant sections of the handbook is reinforced by the personal contract employment from particular the sections at the bottom where it says. "*The terms and conditions section of the Staff Handbook forms part of your contract".* He says that the "terms and conditions section" was clearly a reference to section 2 of the staff handbook. He also relies on the confirmation slip where it is said: "*I confirm my acceptance of part 1 and 2 as my contract and terms and conditions of employment with the National Maritime Museum as amended from time to time".* He pointed out that the policies and procedures are not referred to as contractual.

36. Mr Sheridan then turned to the wording of the introduction of the disciplinary policy and unsurprisingly he said that it was fatal to the Claimant's case that it is expressly stated that the policy is not of contractual effect. He submitted that, on any fair reading of that introduction, Mr Ross's ingenious argument that the statement of non-contractual effect was included only to provide an unfettered right to vary terms from time to time, was wrong.

Law – Contractual interpretation

37. Mr Ross and Mr Sheridan were in agreement as to the proper approach to contractual interpretation and had both cited a number of well-known authorities. Each agreed that the starting point was the decision of the House of Lords in ***Investors Compensation Scheme and West Bromwich Building*** **Society [1998] 1 W.L.R. 896** where Lord Hofmman, with whom the majority agreed, said:

> The principles may be summarised as follows.
>
> *(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
>
> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The*

background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] A.C. 749.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191, 201:

> *"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."*

38. In assessing whether a document not itself a contract contains terms which are taken as being be included by express or implied incorporation into the contract between the parties, the parties are agreed that the proper approach is that set out in ***Alexander and others v Standard Telephone and Cables Ltd*** **[1991] IRLR 286** and in particular in paragraph 31 of the judgment of Mr Justice Hobhouse where he said:

> *"The principles to be applied can therefore be summarised. The relevant contract is that between the individual employee and his employer; it is the contractual intention of those two parties which must be ascertained. In so far as that intention is to be found in a written document, that document must be construed on ordinary contractual principles. In so far as there is no such document or that document is not complete or conclusive, their contractual intention has to be ascertained by inference from the other available material including collective agreements. The fact that another document is not itself contractual does not prevent it from being incorporated into the contract if that intention is shown as between the employer and the individual employee. Where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract. Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not the inference should be drawn".*

39. In support of his contention that the disciplinary policy was expressly of implicitly incorporated Mr Ross invited me to have regard to the summary of the law set out in ***Hussain v Surrey and Sussex Healthcare NHS Trust*** **[2011] EWHC 1670** where Mr Justice Andrew Smith said:

> *"There is no single test as to whether an employer and employee intended to agree that provisions of an agreement such as the Practitioners Disciplinary Procedure should be contractual between them (rather than advisory or hortatory or an expression of aspiration), and if so which provisions. The*

indicia that a provision is to be taken to have contractual status which are, I think, of some relevance to this case include these:

(i) The importance of the provision to the contractual working relationship between the employer and the employee and its relationship to the contractual arrangements between them … the more important the provision to the structure of the procedures, the more likely it is that the parties intended it to be contractual. …

(ii) The level of detail prescribed by the provision: as Penry-Davey J said in Kulkarni v Milton Keynes Hospital NHS Trust [2008] IRLR 949 at para. 25, the courts should not "become involved in the micro-management of conduct hearings", and the parties to the contract of employment are not to be taken to have intended that they should be. (In the Court of Appeal in Kulkarni, [[2010] ICR 101] at para 22, Smith LJ endorsed this observation of Penry-Davey J.)

(iii) The certainty of what the provision requires: as Swift J observed (in Hameed [[2010] Med. LR 412] at para. 68), if a provision is vague or discursive, it is the less apt to have contractual status.

(iv) The context of the provision: a provision included amongst other provisions that are contractual is itself more likely to have been intended to have contractual status than one included among other provisions which provide guidance or are otherwise not apt to be contractual.

(v) Whether the provision is workable, or would be if it were taken to have contractual status; the parties are not to be taken to have intended to introduce into their contract of employment terms which, if enforced, would not be workable or make business sense: see Malone v British Airways plc [2010] EWCA Civ 1225 at para 62."

An express term – discussion and conclusions

40. I understand the Claimant to be putting his case in two ways. He says that Clause 1.10 of his personal contract expressly incorporates the disciplinary policy or if that is not the case then it is to be inferred that the parties intended the disciplinary policy to be incorporated into their bargain.

41. Essentially for the reasons given by Mr Sheridan, I cannot accept the Claimant's case on this point. I consider that the proper approach is not to read the documents one by one but, to look at all of the documents together, in order to ascertain whether or not it was the intention of the parties that the disciplinary procedure should form part of the contract of employment. I accept Mr Ross's point that if one looks in isolation clause 1.10, it could be read as elevating the disciplinary policy to having contractual effect. That would mean having to disregard the words of the policy itself when, it says in terms that it is not contractual, and has little regard to the context. I accept Mr Sharon's point that any reference to the existence of a disciplinary procedure must be viewed against what he described as a section 1 background.

42. In my view, the following matters point distinctly against the policy having any contractual effect:

42.1. I cannot accept Mr Ross's argument that the clear statement that the disciplinary policy is not part of the employees' terms can be regarded only as a right to amend those terms. That construction is strained. Simply put that is not what the sentence in the introduction says. On any fair reading it informs the reader that the terms below are not contractual.

42.2. I accept Mr Sheridan's argument that the Personal Contract of Employment makes a distinction between the terms and conditions found in sections 1 and 2 of the Employee Manual and parts 3 and 4. It is in my view an important feature that the employee is asked to acknowledge the terms and conditions separately from the policies.

43. I have regard for the fact that, in contrast with cases for example that deal with the pay mechanism, the contract of employment does not require a contractual disciplinary procedure in order to make the relationship workable. I have regard to the first and last of the principles set out in ***Hussain v Surrey and Sussex Healthcare NHS Trust*** above. Some contracts of employment contain contractual disciplinary policies, but many do not. If the entirety of the Respondent's policy were contractual then the employee might be able to dispute each stage of the warnings process in the courts. Words such as "improve performance" reek of managerial discretion rather than words of a contract. The Claimant's contention that, even if the Respondent had lost all trust and confidence in his abilities as a pivotal employee, they could not dismiss him without following a process, which he says would have taken 18 months, does add weight to the suggestion that the contractual incorporation of such a policy would be unworkable. Incorporating every part of the disciplinary policy would also introduce a level of micromanagement inconsistent with the idea that the parties intended the policy to be contractual – see the second indicia in ***Hussain v Surrey and Sussex Healthcare NHS Trust***.

44. Mr Ross's argument in relation to the probation period did cause me some concern. I agree that reading the Personal Contract of Employment in isolation the wording of that clause would tend to suggest that the full procedure would always be available once the probation period has passed. However, that still in my view leaves the question whether the policy would be applied as of contractual right justiciable in the courts, or whether it would apply simply as a matter of policy. In my view reserving a right not to apply a policy during the probationary period is not inconsistent with the position afterwards remaining a matter of policy rather than contract.

45. Overall, I am of the view that the clear statement at the top of the policy that it is not a part of the employees' contracts of employment is a matter which is not outweighed by any other matter. It is a clear statement of what was intended. There is no basis for inferring that the parties intended the policy to be incorporated expressly or by implication.

Implied Terms

46. I turn then to the next question about whether or not there is some implied term stands in the way of dismissal in the way that was in fact carried. I have set out above how Mr Ross put the Claimant's case. Hoverer, in the ET1 and the agreed list of issues, a further argument is found that there was an implied term

that the Respondent would act fairly and reasonably and in accordance with the ACAS code before reaching any decision to dismiss.

The legal test for the implication of terms

47. Again, the parties were in agreement as to the proper test for the implication of terms into their contract. The following principles emerge from the authorities the parties cited to me:

    47.1. The implication of terms is part of the exercise of construction. It is part of asking what the agreement should be reasonably understood to mean ***Attorney General of Belize v Belize Telecom Ltd*** **[2009] 1 W.L.R. 1988 (PC)**; and

    47.2. A term will not be implied just because the court considers it reasonable. But only if the court finds that the parties must have intended that term to form part of their bargain ***Attorney General of Belize v Belize Telecom Ltd***

    47.3. It is not enough to show that the term could have been part of the bargain it must be shown that it is a necessary part of the bargain ***Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*** **[2014] EWCA Civ 603**

    47.4. A term will not be implied into a contract where it would contradict or be inconsistent with an express term ***Johnson v Unisys Ltd*** **[2003] 1 AC 518**.

Implied terms discussion and conclusions

Implied term to act fairly and in accordance with the ACAS Code

48. Whilst Mr Ross very wisely did not make any submissions in support of the contentions in the ET1 that there was an implied term that the Respondent would act fairly I shall deal with it for completeness. No doubt Mr Ross's reluctance to argue this point was because he recognised that it was an argument that had been comprehensively ruled out by the House of Lords in ***Johnson v Unisys***. In that case it had been argued that the recognition of the implied term that an employer would not, without reasonable cause, act in a manner calculated or likely to seriously damage the mutual trust and confidence necessary to the employment relationship should permit the recovery of damages for psychological injury caused by the unfair manner of the dismissal. That could not have been achieved without departing from the previous decision of the House of Lords in ***Addis v Gramophone Co Ltd*** **[1909] AC 488**. The majority of the House of Lords declined to do so. Their reasons were that there was no reason to extend the common law to permit such claims because parliament had provided a limited statutory right to complain of unfair dismissal and the limitations on that right were a matter for parliament. At paragraph 54 Lord Hoffman, with whom the majority agreed, said:

    "My Lords, this statutory system for dealing with unfair dismissals was set up by Parliament to deal with the recognised deficiencies of the law as it stood at the time of Malloch v Aberdeen Corpn [1971] 1 WLR 1581. The remedy adopted by Parliament was not to build upon the common law by creating a statutory implied term that the power of dismissal should be exercised fairly

or in good faith, leaving the courts to give a remedy on general principles of contractual damages. Instead, it set up an entirely new system outside the ordinary courts, with tribunals staffed by a majority of lay members, applying new statutory concepts and offering statutory remedies. Many of the new rules, such as the exclusion of certain classes of employees and the limit on the amount of the compensatory award, were not based upon any principle which it would have been open to the courts to apply. They were based upon policy and represented an attempt to balance fairness to employees against the general economic interests of the community."

49. The same reasoning must apply to any attempt to imply some general term essentially not to unfairly dismiss an employee. If such a term existed then any employee could essentially elect between the employment tribunal and the civil courts. That is exactly what was ruled impermissible in ***Johnson v Unisys***.

Implied term not to dismiss when contractual sick pay was being provided

50. Mr Ross took me to a line of authority in support of his contention that the Claimant's dismissal whilst in receipt of contractual sick pay was a breach of contract.

51. His starting point was a reference to ***Aspen v Webbs Poultry and Meat Group*** **[1996] IRLR 525** where Sedley J (as he then was) had held where the employee was in receipt of an insurance benefit which was contingent upon him remaining employed there as an implied term: *"that its contractual powers of dismissal would not be used where their use would frustrate an accruing or accrued entitlement under the insurance scheme"*. He also relied upon the Scottish case of ***Hill v General Accident Fire and Life Assurance Corporation*** **[1998] IRLR 645** where it was held that an employer could not dismiss an employee in order to relieve itself of the burden of paying contractual sick pay.

52. The cases above were considered in the Court of Appeal in **Briscoe v Lubrizol [2002] IRLR 619** where Ward LJ said:

106. It derives from Sedley J's judgment in Aspden. He found there was a mutual intention that the provisions for dismissal would not be operated 'otherwise than by reason of the employee's own fundamental breach'. In paragraph 21 he expressed the mutual intention in these terms:

'The mutual intent did not impinge at all upon the ability of the company at any time to accept the employee's repudiatory conduct – for example malingering – as putting an end to the contract and with it the entitlement to insurance benefit.'

107. However, I agree with Lord Hamilton in Hill v General Accident Fire and Life Assurance Corporation plc [1998] IRLR 641 at paragraph 34 that:

'In so far as Sedley J's conclusion is to be understood as laying down a general proposition that gross misconduct is the only circumstance in which the employer could lawfully dismiss an employee in receipt of sick pay and with the prospect of permanent sickness provision, I must respectfully disagree.'

To limit dismissal to gross misconduct is to circumscribe the right to dismissal too narrowly. I do not believe Sedley J had that in mind. I do not believe he would disagree with Lord Hamilton's broader proposition in paragraph 20 of his judgment that:

> *'I accept that the defender's power to dismiss is subject to limitation. Where provision is, as here, made in the contract for payment of salary or other benefit during sickness, the employer cannot, solely with a view to relieving himself of the obligation to make such payment, by dismissal bring that sick employee's contract to an end. To do so would be, without reasonable and proper cause, to subvert the employee's entitlement to payment while sick.'*

In my judgment, the principle to emerge from those cases is that the employer ought not to terminate the employment as a means to remove the employee's entitlement to benefit but the employer can dismiss for good cause whether that be on the ground of gross misconduct or, more generally, for some repudiatory breach by the employee."

53. I reviewed all three of those authorities in my view the reason that, in all of these cases, the court was prepared to accept the implied term contended for, was that it was accepted that an employer should not be able to take the one hand precisely that at which it has offered with the other. The question I have asked myself is whether or not there is a distinction between the facts of the present case and those of the decisions relied upon by Mr Ross. In all three cases the contractual benefit conferred was one of an ongoing entitlement to replacement income. In each case the reason for the dismissal was bound up with the receipt of that benefit. It is acknowledged in those cases that the implied term would not bite an unconnected reason such as redundancy.

54. I consider that there is a material distinction between a dismissal "as a means to remove the employee's benefit" and a dismissal for a cause unrelated to that benefit. If such a distinction were not possible it could lead to absurd results. In the present case whilst the Claimant was off sick there was no hint that his ill health would exceed his notice period. Would an employer be in breach of contract if it gave proper contractual notice of dismissal and within the notice period the employee fell seriously ill triggering a PHI entitlement. Would a lawful dismissal be converted into an unlawful dismissal? I do not read the authorities cited to me as precluding a lawful dismissal for a reason in no sense connected with the availability of otherwise of ordinary contractual sick pay simply because the Claimant was in receipt of sick pay on the date of the dismissal.

55. I accept the existence of an implied term preventing dismissal because the employee is entitled to sick pay but not one drawn as widely as Mr Ross needs it to be. That is to prevent a dismissal for a cause unrelated to sick pay. If he was correct in his formulation it would be impossible to give otherwise lawful notice to an employee on sick leave, on maternity leave or similar unless the employer could establish gross misconduct. There is no suggestion in the present case that the reasons for dismissal related in any way to the existence of the sick pay scheme and accordingly on the narrower approach to the implied term there was no implied impediment to giving lawful notice.

56. In any event, I had no evidence of how long the Claimant had been unwell for and at what stage he would have been able to return to work. As such he failed to establish any evidential case for a claim in damages. The evidential basis for

Mr Ross's ingenious extension of the Claimant's case had not been trailed in his witness statement or evidence.

Implied term that the Respondent would follow its contractual policy unless there was good cause for not doing so

57. It was this aspect of the Claim that troubled me most. It is clear from the introductory words of the disciplinary policy that the Respondent held out that it would not depart was adopted policy at without good reason. Even without such words Clause 1.10 of the Personal Employment Contract would suggest to the employee that the policy referred to would be the one followed in his case. If the matter was simply to be decided on the basis of reasonable expectation I think there would be no answer to the claim. However, the test is not reasonable expectation it is, as set out above, either one of necessity or be a term which was so obvious that the parties must be taken to have agreed it.

58. In support of his argument Mr Ross relied upon ***Lakshmi v Mid Cheshire Hospitals NHS Trust*** **[2008] EWHC 878**. In that case as in the present one it had been argued that the provisions of a disciplinary policy HR2 were expressly or implicitly incorporated into the employee's contract of employment. The arguments were very similar to those dealt with above and were rejected for some of the same reasons. In particular, the fact that many aspects of the policy were not apt to be contractual terms. That argument having been rejected an alternative position was advanced. The argument and conclusion is found in the following passages:

"27. As an alternative Mr Hendy argued that the trust had contracted to adopt and follow the policy set out in HR2. He argued that it must be accepted that the contract of employment contained an implied term of mutual trust and confidence that neither the claimant nor the defendant would, without reasonable and proper cause, conduct themselves in a manner likely to destroy or seriously damage the relationship of trust and confidence, (Malik v BCCI [1997] IRLR 462). He submitted that to act contrary to published policy could breach that implied term of trust and confidence (or good faith). Mr Hillier accepted that that might be so. However, he submitted that all the trust had to do to comply with the implied term was 'have due regard' to the provisions of HR2.

28. I do not accept that. First, the expression 'have due regard' is so wide as to be almost meaningless. What is meant by 'due' and what is meant by 'regard'? Does it mean that the trust simply has to show that it was cognisant of the policy and no more? I cannot accept that. The medical profession had given away the right to an appeal to the Secretary of State in the collective bargaining that gave rise to HR2. It was well aware of the fact that by permitting the individual trusts to determine procedure in disciplinary matters the medical profession had lost the protection that might be provided from independent sources. In exchange it had negotiated a policy that the trust had agreed to follow, but which was not mandatory because circumstances might arise whereby that was not workable, fair or rational. Thus, the trust had to have some discretion. The only appropriate way of looking at the policy was that it would be followed by the trust unless the trust could establish that there was a good reason not to do so.

29. I therefore find that although HR2, or more particularly clauses 3.7 and 3.9 of HR2, were not expressly incorporated into the contract of employment, there was a term of the contract that the trust would comply with HR2 unless it could establish good reason not to do so. I find that this was a free-standing term of the contract of service, necessary for the contract of service to be effective; and in the alternative that the trust only complied with its obligation to act in good faith if it complied with HR2, absent a good reason not to do so.

30 I should add this: I also find that the implied term to act in good faith applied irrespective of the existence of HR2. Thus, if there was a disciplinary hearing and a request was made on apparently reasonable grounds for it to be adjourned, then it would be a breach of the implied term to decline to adjourn it in the absence of good reason not to do so."

59. It is clear from those passages above that the implied term contended for which is much the same as Mr Ross contends for was accepted as a matter of rephrasing the usual implied term of mutual trust and confidence. That was the way it was argued, and that is what the judge accepted. The question is then how does that sit with ***Johnson v Unisys*** which expressly ruled out reliance on that implied term to found an action in damages arising from a dismissal.

60. *In* ***Lakshmi v Mid Cheshire Hospitals NHS Trust*** the Deputy High Court Judge awarded damage not for the dismissal which followed from the breach of contract that he had identified (the failure to adjourn a disciplinary hearing) which he held was separate and distinct from the dismissal (outside the exclusion zone) but held that he was not entitled to award and damages for the dismissal which arguable flowed from and certainly followed that breach.

61. ***Lakshmi v Mid Cheshire Hospitals NHS Trust*** was a case decided on a particular set of facts a particular set of facts. Of particular importance was the fact that the HR2 policy which had been adopted was in substitution for a robust national disciplinary scheme. Equally the nature of the breach by the employer permitted the Judge to separate out the breach from the dismissal. I should take care not to assume that I should reach the same conclusion on the facts of the case I have to decide. The question is really not as to the existence of the implied term but as to its scope or more precisely the scope for any award of damages. Can such an implied term be used to recover damaged arising from a the decision not to follow any disciplinary process at all in this case?

62. In ***Eastwood and another v Magnox Electric plc McCabe v Cornwall County Council and another*** **[2005] 1 AC 503** the scope of the exclusion zone was in issue in the speech of Lord Nicholls of Birkenhead, with whom the majority agrees, he said the following:

"27 Identifying the boundary of the "Johnson exclusion area", as it has been called, is comparatively straightforward. The statutory code provides remedies for infringement of the statutory right not to be dismissed unfairly. An employee's remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute. If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. By definition, in law such a cause of action exists independently of the dismissal.

28 In the ordinary course, suspension apart, an employer's failure to act fairly in the steps leading to dismissal does not of itself cause the employee financial loss. The loss arises when the employee is dismissed and it arises by reason of his dismissal. Then the resultant claim for loss falls squarely within the Johnson exclusion area.

29 Exceptionally this is not so. Exceptionally, financial loss may flow directly from the employer's failure to act fairly when taking steps leading to dismissal. Financial loss flowing from suspension is an instance. Another instance is cases such as those now before the House, when an employee suffers financial loss from psychiatric or other illness caused by his pre-dismissal unfair treatment. In such cases the employee has a common law cause of action which precedes, and is independent of, his subsequent dismissal. In respect of his subsequent dismissal he may of course present a claim to an employment tribunal. If he brings proceedings both in court and before a tribunal he cannot recover any overlapping heads of loss twice over.

30 If identifying the boundary between the common law rights and remedies and the statutory rights and remedies is comparatively straightforward, the same cannot be said of the practical consequences of this unusual boundary. Particularly in cases concerning financial loss flowing from psychiatric illnesses, some of the practical consequences are far from straightforward or desirable. The first and most obvious drawback is that in such cases the division of remedial jurisdiction between the court and an employment tribunal will lead to duplication of proceedings. In practice there will be cases where the employment tribunal and the court each traverse much of the same ground in deciding the factual issues before them, with attendant waste of resources and costs.

31 Second, the existence of this boundary line means that in some cases a continuing course of conduct, typically a disciplinary process followed by dismissal, may have to be chopped artificially into separate pieces. In cases of constructive dismissal a distinction will have to be drawn between loss flowing from antecedent breaches of the trust and confidence term and loss flowing from the employee's acceptance of these breaches as a repudiation of the contract. The loss flowing from the impugned conduct taking place before actual or constructive dismissal lies outside the Johnson exclusion area, the loss flowing from the dismissal itself is within that area. In some cases this legalistic distinction may give rise to difficult questions of causation in cases such as those now before the House, where financial loss is claimed as the consequence of psychiatric illness said to have been brought on by the employer's conduct before the employee was dismissed. Judges and tribunals, faced perhaps with conflicting medical evidence, may have to decide whether the fact of dismissal was really the last straw which proved too much for the employee, or whether the onset of the illness occurred even before he was dismissed.

32 The existence of this boundary line produces other strange results. An employer may be better off dismissing an employee than suspending him. A statutory claim for unfair dismissal would be subject to the statutory cap, a common law claim for unfair suspension would not. The decision of the Court of Appeal in Gogay v Hertfordshire County Council [2000] IRLR 703 is an example of the latter. Likewise, the decision in Johnson v Unisys Ltd [2003] 1 AC 518 means that an employee who is psychologically vulnerable is owed

no duty of care in respect of his dismissal although, depending on the circumstances, he may be owed a duty of care in respect of his suspension.

33 It goes without saying that an interrelation between the common law and statute having these awkward and unfortunate consequences is not satisfactory. The difficulties arise principally because of the cap on the amount of compensatory awards for unfair dismissal. Although the cap was raised substantially in 1998, at times tribunals are still precluded from awarding full compensation for a dismissed employee's financial loss. So, understandably, employees and their legal advisers are seeking to side-step the statutory limit by identifying elements in the events preceding dismissal, but leading up to dismissal, which can be used as pegs on which to hang a common law claim for breach of an employer's implied contractual obligation to act fairly. This situation merits urgent attention by the Government and the legislature".

63. Mr Sheridan referred me to ***Edwards v Chesterfield Royal Hospital NHS Foundation Trust*** **[2011] UKSC 58; [2012] ICR 201** he said that the effect of the decision of the majority in that case that case is that damages are never recoverable for a dismissal in breach of any contractual dismissal procedures. Lord Dyson, with whom Lord Walker and Lord Mance agreed, said this:

"38 It follows that, if provisions about disciplinary procedure are incorporated as express terms into an employment contract, they are not ordinary contractual terms agreed by parties to a contract in the usual way. At para 38 of his judgment in Mr Edwards's case [2010] ICR 1181, Moore-Bick LJ said: "Whether the parties intend the provisions relating to disciplinary procedures to sound in damages depends on the true construction of the contract." As a general proposition, this is obviously true. But in the present context, it ignores the statutory link between the provisions about disciplinary procedures and the law of unfair dismissal.

39 The question remains whether, if provisions about disciplinary procedure are incorporated into a contract of employment, they are intended to be actionable at common law giving rise to claims for damages in the ordinary courts. Parliament intended such provisions to apply to contracts of employment, inter alia, in order to protect employees from unfair dismissal and to enhance their right not to be unfairly dismissed. It has specified the consequences of a failure to comply with such provisions in unfair dismissal proceedings. It could not have intended that the inclusion of these provisions in a contract would also give rise to a common law claim for damages for all the reasons given by the House of Lords in Johnson v Unisys Ltd for not extending the implied term of trust and confidence to a claim for damages for unfair manner of dismissal. It is necessarily to be inferred from this statutory background that, unless they otherwise expressly agree, the parties to an employment contract do not intend that a failure to comply with contractually binding disciplinary procedures will give rise to a common law claim for damages. In these circumstances, I agree entirely with para 66 of Lord Hoffmann's speech."

64. In relation to the decision in ***Gunton*** Lord Dyson suggested that that was a case decided on its own facts where the employer had contractually agreed that it could not give notice without following a particular procedure.

65. I have concluded the following. First I recognise that Mr Ross is essentially arguing that the implied term of mutual trust and confidence would prevent the departure from the disciplinary policy unless there was good reason to do so. I accept that, in relation to anything short of dismissal, that may give rise to a cause of action. That was the result in ***Lakshmi v Mid Cheshire Hospitals NHS Trust***. However, I am equally clear from the authorities I have cited above that the implied term contended for by Mr Ross cannot have any application, or perhaps more strictly, cannot give rise to any claim in damages available under the Employment Tribunals (Extension of Jurisdiction) Order 1994 because a decision to dismiss, however unfair, falls plainly into the ***Johnson v Unisys*** exclusion zone.

66. I have therefore been driven to the conclusion that it is not open to the Claimant to advance his claim as he does, based on an implied term that the disciplinary policy would be followed is simply an adjunct of the implied duty of mutual trust and confidence. In other words, there is no material distinction between tis way of putting the case and the direct reliance on an implied term that the Respondent would act fairly, which I have dealt with above. In my oral reasons I note that I somewhat inelegantly suggested that there could be no such implied term. I had intended to, and I hope my reference to the authorities showed, explain that it is the scope of the implied term to recover damages for dismissal which is not available rather than suggesting that no such implied term exists at all. However, the effect is the same in this case.

67. For the reasons set out above this claim must fail.

68. At the conclusion of my oral reasons I made some comments which were not intended purely as comfort to the Claimant nor did they form any part of my reasons. They were an expression of my surprise that the Respondent seemed to believe that it had acted fairly. I repeat that surprise here. This was a dismissal of a man who had given up valuable employment to take up his role with the Respondent. He had been given little or no reason to believe that there were serious shortcomings in his performance. He was dismissed by way of a telephone call and not even given the courtesy of an appeal hearing in which he could argue his case. I described the dismissal as brutal and have no reason to think that that language was not merited.

69. I then tempered that comment by saying that I accepted that the Respondent did have genuine but unarticulated concerns about the Claimant's conduct. I do not consider that the disciplinary policy was appropriately drafted for the particular situation which could have been handled properly and fairly and resolved within a few months rather than the 18 months contended for by the Claimant.

70. I concluded by echoing the sentiments of Lord Nicolls of Birkenhead at paragraph 33 of his judgment in ***Eastwood and another v Magnox Electric*** **plc** and expressed sympathy that, as a consequence of the statutory exclusions to the right to present unfair dismissal claims, Claimants are forced to rely on creative arguments often revealed as square pegs for round holes.

Employment Judge John Crosfill

Date 13 December 2017