



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs L Frodsham

**Respondent:** Callplus

**HELD AT:** Manchester

**ON:** 31 August 2017  
19 September 2017  
1 December 2017  
(in Chambers)

**BEFORE:** Employment Judge Feeney

## REPRESENTATION:

**Claimant:** Mr J Oliver, Friend

**Respondent:** Mr S Lewis, Counsel

# JUDGMENT

The judgment of the Tribunal is:

1. The claimant was unfairly dismissed.
2. that there should be a Polkey deduction of 50%
3. there was no contributory conduct

# REASONS

1. The claimant brings claims of unfair dismissal following her dismissal by the respondent on 10 February 2017. The claimant was dismissed for gross misconduct in being under the influence of alcohol at work.

## Witnesses

2. For the respondent the Tribunal heard from Rebecca Turner, employee; Karen Mercer, General; Manager; Shonaz Cummins, Direct Law and Personnel HR Adviser; and Demi Shaw, Direct Law and Personnel HR Adviser. For the claimant the Tribunal heard from the claimant herself, Sylvia Firgrove, volunteer, and Pamela Smith, volunteer. There was an agreed bundle.

## Findings of Fact

The Tribunal's findings of fact are:

3. The claimant had worked for the respondent for 16 years. It is an organisation providing support for cancer sufferers and their families. The claimant regularly went to events with Rebecca Turner and their common practice was for the claimant to drive over to Rebecca Turner's house and then Rebecca Turner would drive them to the actual event.

4. On 20 January 2017 they were due at an event at Central Manchester Hospital. Attending this event were many other organisations with which they were familiar and some clients. On that day the claimant went to Rebecca Turner's house. Rebecca Turner says that when she arrived she said she was "hammered", that she had had some bad news the day before and had drunk an awful lot overnight. Ms Turner drove the claimant to the event and said she behaved erratically at the event, introducing herself to people that she already knew, failing to remember peoples' names, disappearing to the ladies, mimicking and whispering over one of the speakers.

5. At the end of the event at around lunchtime Ms Turner drove the claimant back home and then allowed her to drive back in her car to her own home. The claimant argues at tribunal that if she was so drunk would Ms Turner not have stopped her? That afternoon the claimant attended the funeral at which a number of volunteers were present.

6. Ms Turner was a friend of the claimant's and did not report the matter immediately to the respondent. She said she had been supportive to the claimant in the past but she was uncomfortable with this situation. She said the claimant rung her late at night, often inebriated, to discuss personal matters. They would not discuss these during the day as she did not believe the claimant would remember any of these conversations, but they were disturbing to Ms Turner's private life. Ms Turner said she raised them with the Chief Executive when she raised the 20 January events, but the Chief Executive's witness statement was inconsistent with this saying that it was raised in the previous November. I find this evidence unreliable due to the inconsistency in dates, the failure to record this information anywhere and the implausibility of never mentioning it to the claimant.

7. Ms Turner did report what had occurred on 20 January 2017 on 6 February 2017. She explains the delay by the fact that because of her friendship with the claimant she did not want to report her, but that after she had had a session with her counsellor (provided by the respondent to assist the employee due to the stressful nature of their role) she decided to report it. The counsellor had asked her how would she feel if the claimant had knocked down and killed or seriously injured somebody whilst driving under the influence. After considering this Ms Turner decided to report the matter. A note taken by the counsellor from 27 January 2017 was produced to support this contention. The note said "colleague drinking to excess and unfit to work", and therefore I accept that this was the reason why Ms Turner delayed reporting the matter.

8. Ms Turner reported the matter to Karen Mercer, the Chief Executive of the organisation, on 6 February 2017, and the claimant was suspended the same day.

Karen Mercer asked Ms Turner to write out what had happened. Ms Turner wrote as follows:

“20 January 2017 Head and neck event at MRI 10.00am until 1.00pm (arranged with Lisa Evans who runs the Macmillan Information Centre):

- LF arrived at my home address for me to drive us both to the event at 8.30am.
- I was greeted with ‘I’m hammered’.
- We agreed to go and get coffee and food to help! Went from laughing to full blown crying in the car and apologised for being ‘hammered’.
- Arrived at the venue. Set up at the front of the room.
- LF spoke to health professionals that we had spoken to on many occasions asking if they had ever heard of us. Health professionals said ‘yes of course’. (We attend every one of these events and the majority of the health professionals are always the same people that attend to do the talks to the large group).
- While the professionals were doing their talks to the group LF was whispering and saying things under her breath.
- I would prefer to attend future events alone as a representative being there or with the support of the SSA or SSA(C) if necessary.”

9. In the suspension letter of 6 February the allegations were set out as follows:

“It is alleged under the heading of gross misconduct that:

- (1) You have failed to carry out the tasks of your role properly, effectively or otherwise whilst under the influence of alcohol;
- (2) You have breached the organisation’s policy; and
- (3) You have potentially placed the organisation’s reputation at risk.”

10. On 6 February 2017 Rebecca Turner said the claimant rang her several times in the morning after she had been suspended asking her to go and meet her and asking her to say that she was not drunk. The claimant challenged this on the basis that there was no evidence that this is what she had been talking to Ms Turner about and it was unlikely as she did not know at that stage that Ms Turner was the informant against her. She said she was ringing to ask her about her meeting with Mrs Mercer which had taken place whilst the claimant was on holiday. Ms Turner had been thinking about resigning and was going to raise her unhappiness at this meeting. The claimant also made a point relating to telephone records. The telephone records showed two calls to the respondent’s office from the claimant and one call to a mobile. The second two calls, however, were extremely short and on the balance of probabilities I find that the claimant could not have actually spoken to

Ms Turner given that they were six and three seconds. Therefore there was one call the content of which was disputed.

11. Ms Turner reported that the claimant had rung her. She reported this to Mrs Mercer and was told to bar her from her mobile phone, which she did, the claimant ringing her that afternoon but not getting through because the number was barred.

12. One of the details which was later troubling was that Ms Turner in evidence to the tribunal said that they would often go to McDonalds' to discuss personal matters but Ms Turner's statement said that she had taken the claimant to McDonald's on 20 January 2017 specifically to sober the her up. However, Therefore Ms Mercer was relying on a belief that the McDonald's trip was specifically to sober up the claimant, which was an erroneous belief.

13. Ms Turner also mentioned at the Tribunal an incident involving the claimant's neighbour when the claimant had rung her and wanted Ms Turner to help her find this neighbour who had gone missing. The claimant said this neighbour had been in a care home for two years. This was volunteered in cross examination and as neither side had the opportunity to corroborate it I have discounted that information.

14. When Ms Turner reported the telephone calls to the respondent they wrote a further letter to the claimant on 7 February saying that she was in breach of the terms of her suspension as she was not allowed to contact any members of staff, and they added that to the matters she was being asked to answer to.

15. At the disciplinary hearing the claimant, in respect of contacting Rebecca Turner, stated that she had not read all the suspension letter and therefore had not realised she was not to contact any member of staff. She agreed that she had spoken to her after getting the letter and was in shock although I note she was not specifically asked if she asked Ms Turner to say she was not drunk accordingly the respondent could not have legitimately drawn any conclusions about the content of that phone call.

16. The claimant had been advised of the disciplinary hearing in her suspension and it was held on 10 February 2017. Karen Mercer and Shonaz Cummings from the respondent's HR advisers, Direct Law and Personnel, would be the panel for the disciplinary hearing. There was no investigation into the matter other than the note from Rebecca Turner. The claimant was not given that note before the hearing and therefore at the hearing she only knew that she had been accused of being under the influence of alcohol, which she denied. She did agree she had had a drink the night before because she had had bad news, and she did not know whether she would still be over the limit in the morning. It was never put to her that she had said to Rebecca Turner "I am hammered". She did say she thought she should not have attended the event because she was upset after the bad news she had had the night before. The claimant was never asked what that bad news" was. After the hearing there was no further investigation of the allegation. Rebecca Turner was not spoken to again, but then given that the claimant did not have Rebecca Turner's statement at this stage it would have been difficult for her to have specifically challenged anything in it. She challenged the notes of the disciplinary hearing as being accurate but she had signed them at the time. She denied that she said she had had a lot to drink. She thought it was probably two glasses in the evening. She had not slept well because of the personal crisis, but she was not under the influence in the morning

and denied that she said “I am hammered”. Ms Mercer decided that the claimant should be dismissed for gross misconduct.

17. Ms Cummings explained why there had been no investigation. She said it was a small organisation and it was in this situation as they did not want to reveal Rebecca Turner’s identity as their informant; they thought it was better to go to the disciplinary and undertake any investigation necessary at the disciplinary.

18. The dismissal letter told the claimant that they had taken Rebecca Turner’s statement of events into account. Their findings were as follows:

“During the hearing you claimed you were not drunk on 20 January 2017 but that you had consumed alcohol the previous evening on 19 January as you had received some upsetting news. This led the panel to believe the alcohol was still in your system the following day. On 20 January you advised you were focussing hard on the day’s tasks and trying to hold yourself together. At one point you told us you went to the ladies and nearly broke down. In hindsight you agreed you should have gone home. In relation to driving you advised you wouldn’t have driven if you were drunk, however this contradicts Rebecca Turner’s statement that you greeted her with ‘I’m hammered’ when you arrived at her house on 20 January 2017. Rebecca then made the decision to drive you to the work event because she didn’t want you driving back home in your hammered state. Rebecca Turner made the decision to take you to McDonalds to try to sober you up. Rebecca Turner has said she is frightened of repercussions in relation to you knowing that she was the one raising the issue. However Rebecca Turner recognises that it is necessary for her name to be used so that you realise the seriousness of the situation and that Rebecca Turner is not going to cover for you anymore.

The panel have also taken into account the repercussions for Rebecca Turner upon your return to work. In terms of speaking with a colleague while you were suspended you confirmed you hadn’t read the second page of the letter prior to speaking to Rebecca Turner as you were in shock. Our investigations show you have tried to persuade Rebecca Turner to tell the organisation you were not drunk. The panel believe the fact that you did not read the second page of the letter is no excuse for contacting a witness. It is confirmed within the opening paragraphs of the letter dated 6 February that you must not contact any fellow employee. The panel consider contacting a witness to change their evidence is significantly serious amounting to gross misconduct. The panel has also taken into account your behaviour during networking events as this is unprofessional and has substantially damaged the organisation’s reputation.

#### Outcome

On the basis of the above the organisation has decided that the burden of gross misconduct has been evidenced. Due to the seriousness of your actions the organisation has no alternative but to terminate your contract of employment on the grounds of gross misconduct...”

19. The claimant was advised how to appeal.

20. Ms Mercer in cross examination stated that she did not ask any of the questions. There was a pre-agreed script devised with the assistance of their HR advisers.

21. Ms Mercer also said that in addition to the written statement she had interviewed Rebecca Turner on the phone but there were no notes of this at all. She agreed that she felt Rebecca Turner was credible.

22. There was no question in the script or recorded in any other minutes of the claimant being asked whether or not she was “hammered”. Neither was the claimant asked specifically how much she had had to drink. She said she had had a drink and how many drinks this meant or whether she meant the singular was not explored. She was also not asked what she had said to Ms Turner when she had rung her yet the panel concluded that she had asked Ms Turner to say she wasn’t drunk. There were questions about drinking and driving but although the claimant asserted she would not drink and drive the panel concluded she had done on the basis of Ms Turner ‘having’ to drive her to the event and taking her to McDonalds “to try and sober her up” although it is now clear it was normal to go to McDonalds. Again these points were not put to the claimant so that she could have answered them and raised the points she raised in tribunal namely that they always went to McDonalds, that Rebecca Turner always drove them both from her house and that if she was so drunk why did Rebecca Turner let her drive herself home?

23. The claimant appealed and the appeal was held by Demi Shaw of Direct Law and Personnel. The grounds of appeal were that she had not been supplied with any evidence of the allegations and that she had worked for the respondent for 16 years and never had a complaint of disciplinary against her. At the hearing the claimant stated that there was insufficient evidence, that the company should have stated in more detail the allegations against her and that she should have been given any witness statements. The claimant pointed out she was only asked questions. She did not see the detail of the evidence against her. Everything Rebecca Turner said had been accepted. The claimant felt some of the answers she gave were given a different twist in the notes. There was no evidence to support anything she had said; it was simply her word against the claimant’s. None of the description that she had given of the day’s events was written down at the meeting. She also suggested that other people should have been contacted to confirm whether they could support Rebecca Turner’s allegations or not. The claimant said she could not understand the delay as the event was on the 20<sup>th</sup> and it was only reported from Ms Turner had a meeting with Karen Mercer which was generated because Ms Turner was thinking of resigning. The claimant said that she had rung Rebecca Turner that morning to see how the meeting had gone and that that was the content of the telephone call to her before she was suspended.

24. The claimant also denied that she had asked Rebecca Turner to say she was not drunk. She did not know what the allegation was at that stage, nor that she had made it. She also queried that the disciplinary panel had taken into account that Rebecca Turner was frightened of the claimant and that needed elaboration and clarification as they always been good friends. She also pointed out that Rebecca Turner did not raise this for two weeks and that if she had been as drunk as Rebecca Turner alleged she would not be able to remember the events of the day, but she remembered having conversation with Lisa Evans which she would not have recalled, or that Lisa Evans would have complained about had she been drunk.

25. The claimant's appeal failed and the dismissal was upheld on the basis that the evidence from Rebecca Turner was convincing. She was consistent and her evidence had not been challenged in any detail. There was no new evidence from the claimant and although she complained about the disciplinary hearing minutes being inaccurate she had signed and agreed them at the time. Ms Shaw considered whether there was any reason for Rebecca Turner to lie; she could not think of one and the claimant had not suggested one at the appeal hearing. Ms Shaw did not undertake any further investigation.

26. The respondent's disciplinary procedure stated that there could be an informal procedure and informal resolution. In the formal procedure there should be an investigation stage, although it did say "if applicable in the circumstances". It also said the investigation stage may or may not be in person. Stage three would be the disciplinary hearing followed by an appeal. Examples of gross misconduct warranting summary dismissal included bringing "Being There" into disrepute and "the inability or physical incapability of carrying out your duties due to the influence of drugs or alcohol".

27. At the Tribunal hearing the claimant suggested that Rebecca Turner may have complained about her being drunk because she was very unhappy working in an open plan office and the claimant had an office to herself. This was the only reason she could think why Ms Turner might have sought to discredit her.

28. The claimant had also obtained some evidence from an individual who attended the event, Lisa Evans, who confirmed in writing by email that there was nothing unusual in the claimant's behaviour, although she did not attend as a witness. Two volunteers attended as witnesses who had attended the funeral that the claimant had attended in the afternoon and they said that the claimant had behaved completely normally, that she did not smell of alcohol neither did she behave like that.

## The Law

### Unfair Dismissal

29. Section 98 of the Employment Rights Act 1996 sets out the relevant law on unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within section 98(2). Conduct is a potentially fair reason for dismissal. In **Abernethy v Mott, Hay & Anderson [1974]** it was said that:

"A reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee."

30. Once the employer has shown a potentially fair reason for dismissal a Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. Section 98(4) states that:

"The determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer:

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee; and
  - (b) shall be determined in accordance with equity and the substantial merits of the case."
31. In relation to a conduct dismissal **British Home Stores Limited v Burchell** sets out the test to be applied where the reason relied on is conduct. This is:
  - (1) did the employer Did the employer genuinely believe the employee was guilty of the alleged misconduct?
  - (2) were there reasonable grounds on which to base that belief?
  - (3) was a reasonable investigation carried out?
32. In respect of deciding whether it was reasonable to dismiss **Iceland Frozen Foods Limited v Jones [1982]** states that the function of the Tribunal:

"...is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted."
33. The Tribunal must not substitute its own view for the range of reasonable responses test.
34. In respect of procedure, the procedure must also be fair and the ACAS Code of Practice in relation to dismissals is the starting point as well as the respondent's own procedure. In **Sainsbury's PLC v Hitt [2003]** the court established that:

"The band of reasonable responses test also applies equally to whether the employer's standard of investigation into the suspected misconduct was reasonable."
35. In addition, the decision as to whether the dismissal was fair or unfair must include the appeal (**Taylor v OCS Group Limited [2006]** Court of Appeal). Either the appeal can remedy earlier defects or conversely a poor appeal can render an otherwise fair dismissal unfair.
36. The claimant relied on the case of **Ramphal v Department for Transport [2015] EAT**, which concerned the influence of a Human Resources Officer on the final decision to dismiss. It was stated:

"If the integrity of the final decision to dismiss has been influenced by persons outside the procedure it in my opinion will be unfair all the more so if the claimant had no knowledge of it."
37. Serota in that case went on to say:



“Although a dismissing or investigating officer is entitled to seek guidance from Human resources or others such advice should be limited to matters of law and procedure and to ensuring that all necessary matters have been addressed and achieve clarity.”

38. The respondent also referred to the cases of **Wincanton PLC v Atkinson & another EAT [2011]**; **Boys and Girls Welfare Society v McDonald EAT [1996]**; **Whitbread & Co PLC v Mills EAT [1988]**; **Slater v Leicestershire Health Authority EAT [1989]** (concerning whether a person conducting an investigation could then hold a disciplinary. In this case it was not inevitably unfair for this to happen); **Hussain v Elonex EAT [1999]** which concerned the employer’s failure to disclose the existence of statements obtained from independent witnesses in relation to the incident. This said there was no universal requirement in natural justice and that in all cases an employee must be shown copies of witness statements obtained by an employer about the employee’s conduct. It is a matter of what is fair and reasonable in each case; **Khanum v Mid Glamorgan Area Health Authority EAT [1978]** set out the rules of natural justice that should apply:

- “(1) That the person should know the nature of the allegations against him.
- (2) He should have been given an opportunity to state his case.
- (3) That the disciplinary hearing should act in good faith.”

### **Polkey**

39. In addition, if it is found that the claimant's dismissal was unfair, in relation to remedy the following issues must be considered (**Polkey v A E Dayton Services [1988]**). If the Tribunal finds there was a failure to adopt a fair procedure and the consequence was that dismissal was unfair then the Tribunal can consider whether, had a fair procedure been followed the claimant would still have been dismissed? If the procedure failings were so severe that no reasonable employer acting reasonably would have dismissed the claimant then **Polkey** does not act to reduce any compensation.

40. In **Software 2000 Limited v Andrew & others [2007] EAT** the President of the EAT reviewed all the authorities on the application of **Polkey** and summarised the principles to be extracted from them. These included:

- “In assessing compensation for unfair dismissal the Employment Tribunal must assess the loss flowing from that dismissal which would normally involve an assessment of how long the employee would have been employed but for the dismissal.
- If the employer contends that the employee would or might have ceased to be employed in any event had a fair procedure been adopted, the Tribunal must have regard to all the relevant evidence including any evidence from the employee.
- There will be circumstances where the nature of the evidence for this purpose is so unreliable that the Tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so

riddled with uncertainty that no sensible prediction based on the evidence can properly be made.

- However the Tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation even if there are limits to the extent to which it can confidently predict what might have been. It must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.
- A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can be effectively ignored.”

41. The President stated that:

“The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example there may be insufficient evidence or it may be too unreliable to enable a Tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the Tribunal to conclude that on any view there must have been some realistic chance that he would have been some. Some assessment must be of that risk when calculating the compensation even though it will be difficult and to some extent a speculative exercise.”

#### Contributory Conduct

42. Section 123(6) of the Employment Rights Act 1996 says:

“Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the...compensation award by such proportion as it considers just and equitable.”

There must be a causal link between the blameworthy conduct and the dismissal.

#### **Conclusions**

#### Fair Procedure

43. I find that the respondent in relation to the disciplinary hearing did not follow a fair procedure. The procedure was defective in a number of ways.

- (1) There was no investigation. I was not convinced that the respondent could not have undertaken some investigation. The respondent's procedure is deficient in allowing for the possibility of no investigation.
- (2) Mrs Mercer took part in the disciplinary hearing having herself been the person who spoke to Rebecca Turner, and she clearly formed the view from an early point that Rebecca Turner was a reliable witness.
- (3) The claimant was not provided with Rebecca Turner's statement and therefore was not able to challenge Rebecca Turner's evidence; she was very much in the dark
- (4) Some specifics of Rebecca Turner's evidence were not put to the claimant, for example that she had said "I am hammered" and the issue of going to McDonald's specifically to help her sober up. If it had been realised that this was a normal event this may have led to Rebecca Turner's evidence being reconsidered.
- (5) The claimant also raised the issue that other witnesses should have been interviewed. However, because other witnesses would have been partners or clients of the respondent. The respondent did not wish to do this. However I am not persuaded that it would have been detrimental to the respondent to seek out the view, certainly at the appeal stage, of Liza Evans, for example, without causing any damage to their reputation.
- (6) The respondent did not at any point interview Rebecca Turner exhaustively and there were no notes of the alleged phone call with her.
- (7) That unsubstantiated conclusions were drawn, for example when the claimant said that she had gone to the ladies and nearly broke down, and also that she agreed she should have gone home. This was taken as evidence that she was drunk whereas she was linking this to the fact that she was very upset because she had had bad news. I have given other examples in paragraph above
- (8) Rebecca Turner saying that she was frightened of repercussions. There was no evidence of that recorded anywhere and it was unfair of the respondent simply to accept that and be influenced by that factor rather than simply the allegations against the claimant.
- (9) In respect of the claimant trying to persuade Rebecca Turner to change her evidence, again there was no note of Rebecca Turner actually saying this and the phone records cast doubt on there being any contact by the claimant after 9:15.

44. The real question is whether the appeal corrected the defects in the disciplinary hearing. The claimant by this stage knew what Rebecca Turner's evidence was and Mrs Mercer was no longer involved. Ms Shaw considered there was no reason to disbelieve Ms Turner and thought about whether or not Ms Turner had any reason for lying and could not think of any reason for making this up.

However she undertook no further enquiry and did not re-interview Mrs Turner or speak to any of the attendees at the event. Accordingly the appeal did not cure the defects in the original procedure.

45. The dismissal therefore was unfair.

#### Range of Reasonable Responses

46. I have considered this for the sake of completeness. In respect of sanction, although I have found that the dismissal was unfair for the matter I have raised above, I accept that if someone was driving over the limit this would be grounds for gross misconduct, as well as the potential reputational damage to the organisation and its good work that could be caused. The question is whether in the light of the claimant's 16 years' service and the clean disciplinary record, and whether it would have been fair to dismiss in that situation.

47. I find that it would have been. However, the respondent did not distinguish between allegations that the claimant might have been drink driving and allegations that she was behaving erratically due to having some alcohol still possibly in her system after a bad night's sleep and being considerably upset by the bad news she had had the night before. If it was the latter and the evidence regarding drink driving was unsubstantiated then in light of the claimant's 16 years' service it would not have been appropriate to dismiss.

#### Polkey

48. In respect of **Polkey**, if further enquiries had been made would it have made any difference? I find it would have made a difference as whilst the respondent had reasons to believe Ms Turner, if they had made further enquiries as to whether the claimant's actions could have been misinterpreted and had distinguished between the driving allegations and the other allegations, this could have made any difference. The respondent did have sufficient grounds for believing Ms Turner was telling the truth as she saw it but they failed to pursue any other lines of enquiry which might have cast some doubt on whether, albeit Ms Turner was telling the truth, that there was a different explanation for how the claimant had behaved that day. The respondent's failure to conduct a proper investigation and disciplinary hearing and to interview any other witnesses means that I have sufficient material on which to conclude that the claimant had a chance of not being dismissed if those enquiries had taken place. There was still a chance, however, that the claimant would have been dismissed, and I put this at 50%.

#### Contributory Conduct

49. Contributory conduct involves a finding of fact that by being inebriated the claimant entirely contributed to her dismissal as the respondent contends for 100% contributory conduct. I have to make a factual finding as to whether the claimant was inebriated. I find that there was insufficient evidence on the balance of probabilities to establish this. It was one person's word against another's and there was no reason to believe one person over another. There were factors on both sides, for example the discrepancy over the McDonald's point assists the claimant; the note to the personal counsellor supports Ms Turner. Accordingly my finding is that the claimant had had a couple of drinks, had slept badly and had had bad news which

affected her demeanour and behaviour. This is not conduct which would have led to her dismissal by any means particularly given her 16 years service.

50. I find that the respondent did not have sufficient evidence, nor was I convinced Ms Turner had, to say that the claimant had been drinking and driving or that her behaviour was due to still being drunk or that her behaviour was that bad as to be a risk to the respondent's reputation.

51. Accordingly there is no deduction for contributory conduct.

**Remedy**

52. The parties are requested to contact the Tribunal within 14 days of the promulgation of this judgment to advise if a remedy hearing is required.

Employment Judge Feeney

Date 16<sup>th</sup> January 2018

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON  
17 January 2018

FOR THE TRIBUNAL OFFICE