EMPLOYMENT TRIBUNALS

Claimant: Mr O Taylor

Respondent: Nottingham City Council

Heard at: Nottingham

On: Monday 9 to Wednesday 11 October 2017

Before: Employment Judge P Britton (sitting alone)

Representation
Claimant: Mr M Millichamp, Retired Trade Union Official
Respondent: Miss N Owen of Counsel

JUDGMENT

For all the reasons given below, I have concluded that the claims must fail and thus are dismissed.

REASONS

Introduction and the issues

1. The claim (ET1) was presented to the tribunal on 30 January 2017. It had been drafted for the Claimant by his then solicitors, Thompsons, the well-known trade union related law firm. It set out how he had been employed by the Respondent: Nottingham City Council ("NCC"), from 1 April 1987 until his summary dismissal without notice for alleged gross misconduct on 9 September 2018. He described that although he was a fully qualified welder, he had actually been for some years on full-time secondment as a convenor for UNITE within the Nottingham City Council.

2. I am well aware from previous cases that the NCC, as with most local authorities, has close working protocols with the recognised trade unions and that it works within the concept of collective agreements. Thus such as the disciplinary code of conduct and its disciplinary procedures have been approved via consultation with those recognised trade unions including UNITE.

3. As to why the Claimant says his dismissal was unfair, essentially as pleaded as to the incident on 6 April 2016, which is at the heart of matters, he had not behaved in a threatening or aggressive manner as alleged or assaulted one of the two traffic wardens[1]; and furthermore that the CCTV was in fact inadmissible and could not be used because it was contrary to what he believed

[1] Also themselves employees of the NCC.

had been agreed with inter alia UNITE.

4. Not pleaded, albeit raised before me was that the Claimant was a victim, so to speak, of previous run ins with Mr Kimberley a manager employed by the NCC and that therefore his trade union activities led to his dismissal. What however was pleaded in terms of the decision to dismiss the Claimant for gross misconduct was that Mr Kimberley:

> "…appears to place a higher conduct requirement on the Claimant because of his trade union Role. This is a reference to comments made by Mr Kimberley in the dismissal letter whereby he says: ***" I would not have expected this sort of behaviour from any member of staff but more so from someone holding the post of full time convenor*** **for a Trade union, with many years experience in this role."**

Thus first claimed is that the dismissal was automatically unfair in accordance with s152 (1) (a) Trade Union Labour Relations (Consolidation) Act 1993 ("TULRCA")

5. Also claimed is unfair dismissal as per s98 (4) Employment Rights Act 1996 (the ERA"), at the heart of this being that he was not guilty of that which was alleged.

6. He also brought a claim for outstanding holiday pay. It was scant on detail, but I have established today that it would relate to being allowed to carry forward holiday leave from the previous holiday year.

7. There was also a claim for breach of contract because this was a summary dismissal without notice or pay in lieu thereof. Thus there is a claim for notice pay. The test is different. It is not the range of reasonable responses test that applies to an unfair dismissal claim pursuant to Section 98(4) of the ERA; it is whether objectively on a balance of probabilities the Claimant repudiated without proper and reasonable cause the contract of employment by behaving in a way that showed that he was not prepared to be bound by a fundamental term of it; in this case treating colleagues with respect and not using physical violence. So, it is for me to determine on the facts as I find them to be whether or not on a balance of probabilities the Claimant repudiated the contract of employment and thus whether or not he should be awarded notice pay.

8. As to the fundamental issues the Response (ET3) is clear: First that the process leading to the dismissal and the handling of the subsequent appeal was procedurally in accordance with its disciplinary procedures. Thus as these more than comply with the relevant ACAS Code of Practice (the CP), the Claimant's contention that the Respondent breached the CP is misconceived.

9. Stopping there, it is crystal clear from the bundle[2] before me that the NCC behaved scrupulously in this case in relation to its utilisation of its disciplinary procedures and which go beyond the requirements of the CP. Mr Millichamp has not sought to contend otherwise as the case has developed.

10. Otherwise essentially the Respondent pleads that the evidence was overwhelming, including the CCTV footage. Thus on 6 April 2016 the Claimant had not only threatened the two parking wardens, Keith Gretten ("KG") and Ben Hallam ("BH"), but had gone further and physically assaulted KG by deliberately

[2] Hereinafter references are Bp followed by the page number.

barging him. Therefore albeit Lee Kimberley ("LK") as the dismissing officer and thence David Halstead ("DH") at the Appeal took account of the mitigation; namely many years of unblemished service, including as a full time UNITE convenor within NCC, and his age (nearly 65 and thus on the cusp of retirement); nevertheless the seriousness of what had occurred outweighed that mitigation: Particularly as the Claimant had been throughout in denial on the crucial facts and the apology he sought to rely upon as per the ET1 was belated and equivocal thus displaying a lack of ownership for what was serious behaviour. Thus his dismissal was fair within the range of reasonable responses. Also his behaviour was repudiatory. And the reason or principal reason for the dismissal was not that he was a member of UNITE[3] but because he had committed an act of gross misconduct.

Admissibility of the CCTV footage

11. At paragraph 6 of the particulars to the ET1 it is pleaded:

"*…pointed out that the CCTV footage was controversial to the union because it had not been agreed that usage of such evidence was permissible in the context of a disciplinary enquiry/ hearing.* "

12. I can find nothing in the bundle whereby it was agreed as a policy or caveat thereto that CCTV footage could not be used in a disciplinary process. The reference by the Claimant to the CCTV Code of Practice[4] misses the point. Thus it is a separate CP: it is not within the disciplinary procedure. Indeed it would in this current day and age, and after many years of CCTV, be astonishing if use of CCTV footage was excluded from consideration in a disciplinary investigation as it is neutral evidence often of considerable forensic value in determining one way or the other an issue of fact. And it has long been the case in terms of the usage of such evidence before the courts and thus the employment tribunal that it is admissible, subject of course to such issues as its integrity i.e. has it been doctored. No such argument has been raised before me. This was not covert surveillance. The CCTV surrounding the depot and including the parking area was there to obviously inter alia prevent crime[5] i.e. theft of the NCC's vehicles and inter alia police the parking. And CCTV is of course admissible in the detection of crime. Thus if the CCTV helps to establish such activity, in this case threatening behaviour and common assault, then the evidence is admissible: see IDS Handbook: Unfair dismissal: September 2015 edition p355-357 for commentary and the jurisprudence.

The law and further introductory issues

13. As to Section 98 of the ERA. The NCC needs to satisfy me on a balance of probabilities that it had a reason for the dismissal as listed in the section and which it believed in. One such reason is misconduct. The hurdle is not a high one - it is "a set of facts known to the employer or beliefs held by him which cause him to dismiss the employee" - as to which see ***Abernethy v Mott, Hay and Anderson (1974) IRLR 213 CA.*** Having heard their evidence and observed them, I have no doubt that LK and AC genuinely believed that there had been the committing of the act of misconduct.

14. The next question is whether the process up to and including the end of

[3] S152 (1) (a) TULRCA.
[4] Bp 350.
[5] A stated aim in the CCTV CP.

the appeal passes muster in accordance with the well-known authority of ***British Home Stores ltd -v- Burchell (1978) 379 EAT***. I set out for the benefit of the Claimant and Mr Millichamp at the beginning of this hearing what that entailed. Essentially it is a) undertaking a full investigation commensurate with the issues and in the context making the Claimant aware of the allegations and giving him a fair opportunity to give his account with i.e. a TU representative present: that happened. Second the holding of a full and fair hearing by a person separate from the investigator the Claimant having received the investigation pack and having again the right to defend himself and be represented: that happened. Third being offered an appeal hearing and if taken up a sufficiently full hearing by a person previously uninvolved: that happened.

15. There has been a red herring in that the Claimant says the allegation couldn't have been serious and therefore if proven did not justify dismissal because he was not suspended and would have been if it was serious. I say red herring because the NCC policies do make particular reference to trade union officials. First, they cannot be suspended without consideration at the very highest level and including liaison with senior officials within the trade union. If they are taken down the disciplinary route, they have specific protections in terms of being entitled to have a full-time trade union official present. In this case it is clear that when the incident was reported at the end of 6 April and following through into the 7th, that NCC, if anything, wanted to take a softly approach. Doubtless because the Claimant was an influential longstanding UNITE official. That to me is absolutely self-evident from the email traffic taking place, i.e. with Christine Danvers (senior player in HR on 8 April). So the NCC was trying to get the Claimant to agree to going down an informal route. But the Claimant's stance was that he was not obliged to do so. If they wished to question him, he was entitled to have a trade union official present: thus deliberately or otherwise he therefore forced NCC down the formal route. So what this if anything shows is that the NCC had not been about treating the Claimant adversely because he was a full-time trade union official but rather the opposite. The same goes for not suspending him because it was felt the risk of re-occurrence was remote. I have no comparables but my extensive experience as a Judge is that usually an incident like this, and which for reasons I will come to was serious, does result in suspension: reasons in particular might be potential risk of witnesses being influenced: not that it happened in this case. So again prima facie not evidence of the Claimant being singled out as a TU official which has been a line of questioning before me but which was never raised by the TU Reps at the internal proceedings. Bp131 indicates the opposite.

16. Suffice it to say that although the word "frustration" has been used in this case by the NCC and that is because of the delay in terms of interviewing the Claimant and then getting the disciplinary hearing on because it may well be that the Claimant or his trade union were finding reasons not to participate or to avoid dates, it is irrelevant to the dismissal. It was not a factor at all in the decision making of LK and DH. However again it shows an accommodating approach to the Claimant and his TU reps.

17. And all of this goes to the theme of whether he was automatically unfairly dismissed because he was a trade union official pursuant to Section 152 of TULRCA. Again I take it short having looked at the bundle very thoroughly. Mr Alvin Henry (from whom I heard) is someone I found to be honest, of integrity, and credible. He was consistent throughout and what he did speaks for itself. He undertook a scrupulously fair disciplinary investigation; he interviewed all those that could assist and the Claimant was given a full opportunity to explain himself.

Findings of fact

18. That therefore brings me back to the facts in this case. It was necessary for me to see the CCTV footage of what occurred on 6 April in the utility vehicle spaces of the parking area at the Eastcroft Depot of the Respondent. This was because the Claimant was still challenging that it showed that he had committed acts of misconduct, particularly behaving aggressively towards the two traffic wardens including deliberately barging KG.

19. I watched the CCTV footage which was enlarged using a projector. I also had before me the chronology thereto (Bp194) and which is accurate. It was used at the disciplinary and appeal hearings. This was how it had been shown to the Claimant in the internal investigation and also viewed by KG and DH. I have absolutely no doubt whatsoever that it shows the following.

- That the Claimant had parked his car in an area where it should not be as it is in close proximity to heavy goods vehicles coming in and out of the depot.
- The traffic wardens (KG and BH on this occasion) were regularly policing the area and putting warning notices on employees' cars who were therefore wrongfully parking. They did not single out the Claimant.
- There is no evidence whatsoever that KG and BH knew the Claimant from Adam and the Claimant could not produce any evidence to me to the contrary.
- He left his car and he went into, what I understand to be a trade union office in the Eastcroft Depot. His car had been parked where it was for about 50 minutes when along came these two traffic wardens. Having parked up their van, after a short while they decided to go over and look at the vehicle. They started to put a warning ticket on it.
- As they were doing so, the Claimant wearing an orange high visibility jacket can clearly be seen to come out of the building; and he does not saunter over to them, he marches across in a determined way.
- What I can then clearly see is that after a short and heated discussion in terms of the Claimant's body language, KG started to try and take the parking ticket back off the windscreen clearly at the dictact of the Claimant.
- The Claimant then barged physically in front of him with sufficient force to dislodge KG from the area of the windscreen. It was not accidental.

20. Looking at the footage and after a lifetime in the law so to speak and as a Judge of many years and having watched many CCTV footages, to suggest that it was accidental or that it did not happen is quite frankly an argument lacking in any credibility. Yet the Claimant persisted well into the case before me with that stance: hence the need to see the footage. What it means is that the Claimant was in denial from the very beginning that he behaved in the way he so obviously did.

21. I add that these two traffic wardens made an immediate note of what had happened. They then went away and made up, as you would expect of quasi policemen, detailed statements; all of which were put through to line management and thus were with senior management by 7 January: hence the references I have already made to HR etc.

22. As to the disciplinary investigation that belatedly got underway because of

delays in relation to the Claimant, which I pass over, the Claimant seeks to suggest that some of the witnesses interviewed[6] collaborated to give false testimony. But they did not. I have watched the CCTV footage. What is clear is that the witness KF in many respects corroborates the two traffic wardens. The witness DH makes clear that he witnessed an altercation with the Claimant, although he did not witness an assault; there is the telephone reportage whereby BH phoned superiors, including his father NH who made the mobile 'phone record of what he could hear. And when the Claimant says the witness GR assists him, he does not because he came along after the material events had happened. He did not hear anything but then it is quite clear to me he was not present when that which had happened had gone off. As to what had gone off following the common assault (and I use that phase technically, although that is what it was), the Claimant had made clear threats, both at his car and then at the van when he had gone back there when KG went to get the camera because he has to photograph the car in relation to the ticket and the fact that in this case of course it had been thrown on the floor by the Claimant. His standing instructions require that he take a photograph as he needs to have a record.

23. The final witness the Claimant relies upon (GC) who again I have seen on the CCTV comes out of the building to the right at the tail end and is to be seen sauntering along a gangway once or twice turning round. But this is obviously from the footage after the serious chapter of events had occurred.

24. I do not need to go through the disciplinary process, suffice it to say that the Claimant was interviewed and he gave a full account of himself. He denied the material events; basically KG and BH were liars.

25. The disciplinary hearing was conducted on 6 September. LK, who like Alvin H I found to be an honest consistent and credible witness, presided. The Claimant submits via the valiant efforts of Mr Millichamp that as he was very stressed he should not really have been participating; and when it became clear he was so stressed the disciplinary hearing should have been stopped. But what is the stress; how was it displayed; what did his highly experienced full time TU rep do? It goes to the consistency of the Respondent's findings, and what I might call corroboration. The material evidence is at Bp425.

26. The Claimant was able to give a full account by way of his defence. As I have already said, he was in denial and challenging inter alia the integrity of the CCTV footage and in effect that the allegation was all made up. They were liars. Then after several breaks (the Claimant was accommodated insofar as he needed breaks and was clearly taking advice from his trade union official, Andy Shaw) we get to the stage when the first of these witnesses (KG) came into the room to give his evidence.

27. Suffice it to say as the note records, corroborated in his testimony by LK, the Claimant began to threaten and otherwise act in an intimidating way to KG. Before me by way of denial the Claimant says he is a man who will keep himself under control. He is a large well built man. He used to be a boxer. I gather that he may, even up until now, have undertaken roles as a bouncer; and although he may now have been diagnosed with prostate cancer and may have high blood pressure, nevertheless at the material time he presented as a reasonably fit well preserved man. And these two traffic wardens stated that as to the incident on the 6th April the way in which he behaved was such that they had never "been so frightened in their lives". Are they exaggerating and thus to

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[6] All references are to the Alvin Henry investigation.

not be believed? No, taking together the CCTV footage and the clear evidence that he was capable of being intimidating in the disciplinary hearing.

28. Thus the problem for the Claimant is that he disastrously damaged his own cause by the way he behaved at the disciplinary hearing. So threatening; so intimidating; that LK with the consent of AS had to stop the meeting and get the Claimant out. AS did not ask for an adjournment, albeit he made plain that the Claimant was very emotional hence the behaviour that had just been witnessed. And of course the behaviour flew in the face of the Claimant's contention that he was a man of self control hence he would not have behaved as alleged on the 6 April.

29. As to health issues, what had happened is that given the delaying tactics which I have touched upon on the 11 July the Claimant was given a date of 27 July 2016 for the disciplinary hearing[7] which was stated to be non-negotiable. On 19 July the Claimant went off sick with stress.

30. LK, because he was understandably suspicious as there had been no raising of health issues prior thereto, immediately made an occupational health referral because he wanted to know if therefore the Claimant was unfit to participate in a disciplinary hearing. The referral is at Bp 392.

31. Dr Muir of occupational health promptly replied on 28 July, having seen the Claimant face to face on that day. The Dr's opinion (Bp400-401) was that to continue with the disciplinary process was "*beneficial to his overall health and wellbeing to conclude the process as soon as possible.*" He made plain that the Claimant's current stress levels would not prevent him from attending or participating and that he was:

"fit to engage with the process and attend meetings. He will be bringing his TU Representative with him."

32. On 4th August the disciplinary hearing was thus rescheduled for the 5th September albeit it then took place on the 6th. So where is the medical evidence which Mr Millichamp valiantly tries to deploy that this process should have come to a halt on 6 September when the Claimant behaved in the way I have described? There is none; and so the opinion of OH has not been contradicted and upon which of course an employer is thus entitled to rely. Of course any such process is stressful, but that is not in itself a reason for halting the process.

33. Furthermore thus I am with the NCC, in particular LK and DH, that the behaviour on the 6th September is corroborative because if the Claimant could behave in the way he did on 6 September, then it adds weight to that he could have been intimidating and threatening in his behaviour on 6 April.

The automatic unfair dismissal claim

34. That brings me to this alleged linkage to trade union activities. I am going to therefore dispense at this stage with the issue of whether or not engaged is automatic unfair dismissal. Section 152(1) (a) (b) of TULRCA says:

"***152 Dismissal [of employee] on grounds related to union membership or activities.***

(1) For purposes of [Part X of the Employment Rights Act 1996]

[7] This was the third attempt: Bp345

(unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—

> *(a) was, or proposed to become, a member of an independent trade union, . . .*
> *(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time.*
>
> *...*"

35. Going back to first of all the claim (ET1). What was the linkage being pleaded by Thompsons for the purposes of this being an automatically unfair dismissal by reason of trade union activities? It was reliance on an extract from Mr Kimberley's dismissal letter, which I have already quoted. No other reasons were put forward. In particular, no allegation was made that LK had an axe to grind against the Claimant because a year or so before the Claimant in the context of his trade union duties, had alleged that the promotion of an employee into an HGV Operations Manager role - CC - was contrary to the provisions of the NCC: That LK had given the job to CC because his wife was a close friend of LK's wife. Thus he had behaved in a nepotistic way (my words). So he says LK was so taken aback by that criticism as to have kept it in his mind, and therefore reserve for himself the undertaking of this disciplinary hearing to get his own back on a trade union official who had overstepped the mark by making the accusation. That had never been raised by the Claimant before his last statement made in the run up to this hearing. It was never raised by the Claimant via AS at any time; either in the disciplinary interviews or the disciplinary hearing; the grounds of appeal or the appeal hearing. One would have thought that with such an allegedly dynamite point in his armoury, the Claimant (an extremely experienced trade union official) would have deployed it at the first available opportunity.

36. I am with Miss Owen that what the Claimant has done here is to seize on something that is in the email traffic early on where Mr Kimberley is basically saying he does not think he ought to be the investigating officer as the Claimant had raised a grievance about him in the past.

37. That raises a query as to whether he should nevertheless have heard the disciplinary hearing. He has made plain to me that to him it was all water off a duck's back; he was used to the rough and tumbles so to speak of blunt exchanges of views in trade union meetings and he was not in the least bit bearing a grudge. In passing having heard the evidence I observe that CC was validly appointed in circumstances which were not improper.

38. To put it simply, it was never put to him that he should not proceed in the disciplinary hearing. He conducted it in a fair way. The conclusions he reached are ones which factually are unassailable; and it was never suggested by AS or indeed the Claimant, that he ought not to be hearing it as he was biased.

39. Therefore, I do not find that there has been a significant procedural failure which would otherwise render this matter unfair. It perhaps logically follows that I find no link in this respect to the fact that the Claimant is a trade union official.

40. Thus, I am left with the reference in the disciplinary letter which I will repeat in full for the sake of emphasis

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> "*I was troubled by your behaviour during the questioning of Keith Gretten*[8]*. Although your trade union representative requested that this be not part of my consideration in making a decision, I find the behaviour you demonstrated in the hearing was consistent to that which was alleged in the events of 6 April and when Mr Gretten was answering questions as a witness, you constantly interrupted him, staring at him whilst he was speaking, which he found intimidating. You shouted at him and accused him of lying multiple times. This did concern me especially given your role as a full-time trade union convenor.*
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> *I would not have expected this sort of behaviour from any member of staff but more so from someone holding the post of full-time convenor with a trade union with many years of experience in this role. When you refused to stop the verbal attack even after being asked by your trade union rep, I had no choice but to remove you from the hearing in agreement with your trade union rep while I continued to question KG and then the other witness, BH*'.

41. LK is not dismissing the Claimant because of his trade union activities. What he is saying is wholly reasonable. The Claimant was entrusted with the distinction of being a full-time convenor for UNITE in the Nottingham City Council. He sat on committees; he took place in negotiations; he was permitted considerable freedoms in the way he exercised his role and he should thus have conducted himself above all suspicion. He himself accepts that the dignity of colleague workers is paramount.

42. So, if that be the case, is it unreasonable for the employer to expect that a senior trade union official such as the Claimant should adopt a high standard of behaviour towards his work colleagues? That is the point. What the behaviour on 6 September showed was a man who could not get outside himself and appreciate that he had undoubtedly done wrong and could not contain himself because he was in denial and was threatening when it came to those who had the temerity to give evidence against him.

43. But I was asked by the Claimant to look at three NCC disciplinary case files which the Claimant said showed that he had been treated disproportionately in comparison with those employees and which was thus indicative of that he was being punished as a trade union official or that the employer was being unduly severe and thus unfair in his case.

44. I looked at those three cases, albeit the only one that had been deployed by the Claimant at the appeal stage in the disciplinary process was that relating to Mr Z and an incident where there was an investigation completed on 28 October 2014. I have anonomised those mentioned because there is no need for their names to be broadcast.

45. In that case, there are some similar facts. The errant employee was also parked at Eastcroft where he should not be. He also had a run in (if that is the appropriate word) with traffic wardens, one of whom was KG and to whom he was angry using threatening words. But here comes the distinction. He did not physically assault either of the traffic wardens. Furthermore he had persuasive mitigation. He understood he could park where he did because of his health. When a ticket had been previously put on his car his managers interceded for

[8] I have referred to that and in terms of the 6 September disciplinary hearing.

him; but they told him not to go near the traffic wardens if they came again. Unfortunately, he could not resist doing so and the red mist descended. He was immediately fully apologetic. He confirmed the apology in writing, and he gave an undertaking that it would never happen again.

46. That did not happen in the Claimant's case.

47. As to the other two cases, they are simply not remotely on all fours and Mr Millichamp has accepted that.

48. So for all the reasons in this chapter, I do not find that this was a dismissal by reason of trade union activities.

The apology issue

49. In the run up to the appeal hearing, the Claimant put in an apology on 20 September 2016 (Bp 438):

> "...
> *I would like to send you this letter of apology for my behaviour on the day of my disciplinary hearing, 9th[9] September 2016.*
> *I may have appeared as irrational due to the nature of the case, and the fact that my job of over 29 years was now under threat: It was difficult to accept the allegations being made against me, and even worse, the submissions of the witnesses; the contents of* ***which I refute***[10].
> *It was difficult to remain composed at this time, however, I do regret my behaviour now and do apologise to all concerned for the way in which it affected me.*
>
> ..."

50. That is an equivocal apology. It is not in any way an admission that he was at fault on 6 April. In fact it is the reverse.

51. During the appeal hearing, the following was said by AS and as recorded by DH (Bp 465):

> ."...
>
> *Following the above submission by Andy Shaw, you stated that on reflection you should have taken the parking notice from the parking officers. You also said "I know I have caused the two officers a lot of stress. And my family and I have also been under a lot of stress. I am truly sorry"."*

52. Again, it is equivocal. He throws in the pot just as much that his family are stressed and himself and he does not admit the assault or that he was threatening, just that he should have accepted the parking ticket.

Mitigation

53. As elaborated upon before me the Claimant may have felt despondent on the morning of 6 April, what with thinking about his father it being the anniversary of his death and the imminent annual walk with his family in remembrance; and he may have become upset when he got a 'phone call from his doctor telling him hat he would need to be monitored for his blood pressure. But he was not at

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[9] Should read 6th.
[10] My emphasis

that stage being told his was at risk of a heart attack or a stroke and he did not know that he might have prostate cancer. Fundamental, he did not want Mr Shaw to deploy the bereavement issue. Thus he did not. There is no medical evidence to support that the Claimant was in such a frame of mind as to be incapable of controlling himself. What does it mean? It means that from the point of view of the decision making of first LK and then DH that yes there was mitigation, principally the previously unblemished long service, but it was outweighed by the gravity of the offence; the lack of ownership and the behaviour on the 6th September. Thompsons in the ET1 placed reliance on ***Brito-Babapulle -v- Ealing Hospitals NHS Trust [UKEAT/0358/12]*** per Mr Justice Langstaff; but the reliance is misconceived because in the case before me, the mitigation was considered and as to whether or not it would justify reducing the sanction of dismissal given the unimpeachable finding as is now obvious that this was gross misconduct. Thus, actually engaged is paragraph 40 of the judgment:

> "*It is not sufficient to point to the fact that the employer considered the mitigation and rejected it, largely upon the basis that the failure to observe the verbal notice and the letter undermined it, because a tribunal cannot abdicate its function to that of the employer. It is the Tribunal's task to assess whether the employer's behaviour is reasonable or unreasonable having regard to the reason for dismissal. It is the whole of the circumstances that it must consider with regard to equity and the substantial merits of the case. But this general assessment necessarily includes a consideration of those matters that might mitigate. ...".*

54. On my findings the Respondent did not ignore the mitigation. But it decided for the reasons I have now found that it did not sufficiently mitigate the gravity of the offence.

Conclusion as to s98 (4) unfair dismissal

55. From my findings the following applies:

> 54.1 The whole process was fair applying ***British Home Stores ltd -v-Burchell*** and ***Av B***.
>
> 54.2 The employer had a genuine reason for believing in the misconduct.
>
> 54.3 The finding that this was gross misconduct is unimpeachable.
>
> 54.4 Thus dismissal was fair the decision being well within the range of reasonable responses.

Breach of contract

56. The Claimant in this case was summarily dismissed, that is without notice. Of course in his case his notice entitlement would be the maximum of 12 weeks. So he brings a claim of breach of contract - failure to pay notice pay. For the purposes of the legal premise upon which it should be founded, albeit it is not spelled out in the ET1, it is as follows: thus even if a tribunal was to find, as in this case, the dismissal was fair within the range of reasonable responses, it does not follow on an objective analysis by the Judge on the facts that on a balance of probabilities, the behaviour was so serious as to fundamentally undermine trust and confidence and thus justify the dismissal without notice.

57. What Mr Millichamp prays in his aid in that respect essentially is the following:

> 56.1 Accepting as the tribunal has that it happened, the Claimant was never suspended, doubtless because nobody feared it would happen again and it did not, despite the fact that these traffic wardens would have been in the vicinity of the Claimant from time to time. I have already dealt with this point
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> 56.2 Albeit it was belated, he did make an apology by the end of the process. I have now dealt with this point
>
> 56.3 He was not a well man during the time. Also I have now dealt with this point.

58. Despite his valiant efforts they are not on point. Given my findings of fact the only issue is had the Claimant by his actions shown himself as not to be bound by a fundamental term of his contract and in so doing acted without reasonable and proper cause. Sadly in this case, the Claimant has been all at sea in his evidence in contrast with the other witnesses. A good example is that he has gone from it was "not me undertaking the assault" or "it did not happen" to by yesterday having seen again the CCTV footage, "I really cannot remember." So lack of ownership.

59. So none of that objectively would reassure the employer that there would be no repetition. In contrast to Mr Z there was no contrition from the word go and no undertaking to never behave like that again; and because the Claimant was in denial.

60. Yes of course I have the character references, which were put in at the appeal on his behalf. I have no doubt he is normally a man of impeccable character. It does not get over that he "lost it" on 6 April and behaved disgracefully and compounded the behaviour by his conduct in the disciplinary hearing on the 6th September.

61. Thus I am driven to the conclusion that this was a breach of a fundamental term of the employment. Thus logically it follows that the NCC was entitled to treat the behaviour as repudiatory and thus treat the contract as at an end, and without thus being required to give notice or make payment in lieu. Accordingly the claim for breach of contract is dismissed.

Holiday pay claim

62. In what has been a muddled issue before me in play is possibly 13.5 days of untaken carried over leave and thus a claim for the payment of the same. The following are my findings on this issue. I start with two documents. First the leave sheet for the Claimant (Bp 398) and second the annual leave policy (Bp 124). An employee such as the Claimant with long-standing service has an enhanced contractual holiday entitlement. Therefore in the Claimant's case, he had an overall entitlement to 32 days of leave a year. Like many organisations, the NCC has a use it or lose it policy in terms of carrying forward untaken leave. Engaged is paragraph 6.1:

> "*6.1 Wherever possible, you should use all your holiday entitlement during the leave year. However, you may carry over up to five days' holiday from one leave year to the next, as long as these days are used*

before 30 June of the new leave year.

6.2 In exceptional circumstances, managers have the discretion to allow more than five days' leave to be carried over. In such cases, the carried-over leave should still be used before the end of June, provided this is in line with the needs of the service"

63. I note the word "*should".* What I have learned from the evidence of the relevant line manager Ady Cawrey[11] (AC) is that he has got a discretion; if there are exceptional reasons why an employee in his team could not use up his carried forward leave and that includes more than 5 days, then he can grant an extension for the time for taking the same, although he needs to first of all get it passed by his line manager. The practice of the Claimant, who is afro Caribbean, was to in some years save up and carry forward leave in order that he could then take an extensive leave to Jamaica, his birth place. So in June 2012, he took 6 week's leave to visit Jamaica using carried forward leave as the holiday year runs 31 March to 6 April. He started that holiday sometime in June, so before the Para 6.1/6.2 cut off point of 30 June and it carried over into July. But at the end of the previous holiday year (i.e. 31 March 2012) he had let AC know in writing that he wished to carry forward leave and that he would be using it to go to Jamaica. He did not say when because he would leave that until closer to the time he had in mind and doubtless because he was waiting for such as the cheapest flights. Then what he would do was to go and see AC, tell him what his proposed leave dates were. AC would consider whether the leave could in principle be taken, and if so he would plead the case for the Claimant up the management chain and hopefully get consent including thus exercising discretion to allow accrued carried forward leave to be used post the end of June. This happened in 2012

64. But what actually happened in the year commencing circa 1 April 2016? That brings in Bp 398. This is his leave card. As the Claimant is classed as a manual, what is used is a leave card rather than the Oracle booking system. So the leave card records how the Claimant has got 32 days of leave for the holiday year commencing 1 April 2016 and it also sets down that he has carried forward 13.5 leave days, i.e. more than the 5 as per Para 6.1. So, he has got 45.5 days for the year subject of course to "use it or lose it" albeit factoring in the discretionary custom and practice as per 2012 which I have now explored.. I will accept that the Claimant had this leave saved up because he was as in 2012 planning to go to Jamaica. As to when I am not sure but it seems from what he has told me that he was probably going to go around the same time as he had gone in 2012 or possibly August (Bp399).

65. So what did he do? He wrote a letter rather like the one he wrote in 2012. But then the events starting on 6 April came into play. The Claimant could not face going to Jamaica with it hanging over his head. But from the evidence I have read and heard he did not put in writing to AC that he could not take his holiday in Jamaica because of this incident and could he thus defer it and retain the leave for the time being presumably until the 6 April issue had been dealt with. No such letter was written or certainly ever sent. AC would have needed it to get consent; he has told me that in principle he would have been inclined to grant the request subject to that approval.

66. The Claimant then says to me that he told AC; he saw him regularly and had told him. But when the Claimant was pressed on that by Miss Owen, he said

[11] As with the other NCC witnesses consistent and credible.

"I think I told him that I was not going to be able to go to Jamaica - I might not have said 'can you please let me keep my holiday saved up' but he should have realised that because he knows what is going on".

67. How far does AC's duty go? He by the way told me he was not told any such thing. Who do I believe? I have already commented adversely on the credibility of the Claimant. In contrast AC has not in any way been undermined by his evidence save for one possible aspect. This brings back in the leave card at Bp 398. Mr Millichamp has made a good point which I thought hard about. AC is the one who is ultimately obliged to keep an accurate record, albeit the document is retained as I gather it by the Claimant. The practice is that when he takes leave the entry is made on the leave card and both he and AC sign the same to confirm it has been taken; and the balance remaining leave is on each occasion recorded and thus as the carry forward figure. If this accrued outstanding leave automatically cuts off at 30 June unless consent to carry forward has been granted, then why is it not written off on the leave card? Why is it that when leave is taken thereafter on four occasions the balance carry forward accrued leave from the year before is still carried forward?

68. AC accepts that he should have deleted it. But he manages 48 employees; he had a lot of things to do; it was not a priority and therefore he had not got round to it. I accept his explanation

69. So I have a situation where the Claimant thinks he has still got accrued balance carry forward leave because it remains on the leave card. But he has not gone to Jamaica. AC says he did not think about the accrued leave issue at all, and because he was otherwise busy, until he was asked to prepare a calculation of what leave was still outstanding, apropos the terms and conditions, when the pay due was being calculated following the dismissal of the Claimant. At that stage he adjusted downwards for the carried forward leave not taken, save for the statutory leave element, which would leave only 1 days outstanding leave which was paid.

70. So did AC fail to act earlier not through an oversight but because, as the Claimant would maintain, the Claimant having told him he was not going to Jamaica for the time being and could he defer taking the carried forward leave and keep it, AC agreed: hence no reduction in the carry forward leave on the leave card? Did he then renege upon that in terms of the final calculation of only 1 days leave due?

71. I have a straight forward conflict. I have to assess credibility. For the reasons I have already gone to the credibility of the Claimant is somewhat undermined. In contrast I found AC in all respects a credible witness. It thus follows that I prefer his evidence. The Claimant did not as per 2012 come back with definite dates for his trip to Jamaica and thereafter he did not tell AC he was no longer going. I suspect that with everything else going on it slipped the Claimant's mind.

72. Reverting to paragraph 3.1 of the leave policy it reads:

> "*3.1 Payment in lieu of untaken statutory holidays can be made if you do not manage to use them before you leave. However, payment in lieu of untaken contractual holidays (i.e. anything in excess of statutory leave) will not be made, unless in exceptional circumstances where you have been prevented from taking holiday before your last due date due to the business needs of the Council.*

> *3.2 If you are on suspension or long term sick leave prior to your leaving date, this should not prevent you from using your leave entitlement, and will not be accepted as a reason for payment in lieu.*"

73. These clauses are not ambiguous. They are not incompatible with clause 6.2. An employee might get permission to carry forward leave and it might even be for more than 5 days but if untaken it is still lost if untaken at the end of the employment unless it was statutory leave outstanding.

74. Thus left is as follows, and which to assist Mr Millichamp's argument I myself sought to construct solely to assist him because he is not a lawyer. It is down to the action of AC in not deleting the untaken leave post 1 July. Does his action constitute waiver in accordance with common law principles? I took myself to Chitty on Contracts (32nd edition) and chapter 22, section 6 on the topic of waiver.

75. The first point is has that which AC failed to do thus constitute actually a forbearing to rely upon the term? Is mere inadvertence enough because there is no other representation by him for reasons I have now made plain? Suffice it to say that I have my doubts but in any event in those circumstances I am with Ms Owen that the other party must act in reliance on the representation if that is what it was.

76. But there was no such action.

Conclusion this issue

77. Thus I conclude that the inaction of AC, and it was no more than that, in circumstances where the Claimant did not act on it to his detriment does not constitute waiver. Thus it means that the Respondent is entitled to rely upon clause 3.1 of the contractual terms relating to annual leave apropos Bp 128.

78. Thus, it is only obliged to pay any outstanding statutory leave which it did. It thus follows that that claim must fail.

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Employment Judge P Britton

Date: 9 November 2017

JUDGMENT SENT TO THE PARTIES ON

20 November 2017

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FOR THE TRIBUNAL OFFICE