EMPLOYMENT TRIBUNALS

Claimant:	**David Carter**	
Respondent:	**Royal Mail Group Limited**	
Heard at:	**Southampton Employment Tribunal**	**On: Wednesday 21st and Thursday 22nd February 2018**
Before:	**Employment Judge Mr. M. Salter**	

Representation:
Claimant: Mr. M. Green, counsel.
Respondent: Ms. S. Hobson, legal executive.

RESERVED JUDGMENT

(1) The Claimant's dismissal was unfair.
(2) I decline to make an reduction under either principle of Polkey or contributory fault.
(3) The Claimant's dismissal was also wrongful.

REASONS

References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.

References in round brackets are to the paragraph of these reasons or to provide definitions.

Introduction

1. These are the reasons for my reserved judgment.

Background

The Claimant's case as formulated in his ET1

2. The Claimant's complaint, as formulated in his Form ET1, presented to the tribunal on 5th June 2017 [1] is, in short, he was unfairly dismissed, and that dismissal was wrongful. Further, at the time of his dismissal, he was owed payment for accrued, but untaken, holiday.

The Respondent's Response

3. In its Form ET3, dated 28th June 2017 [18], the Respondent accepted the Claimant was dismissed, but denied that dismissal was unfair or wrongful and that he was owed the payment he claimed for holiday pay.

Case Management to date

4. As is usual for cases of this type there was no Preliminary Hearing for Case Management and the matter was listed by way of written notice of hearing dated 17th November 2017. Standard directions were given, including those limiting the size of the bundle and the length of witness statements.

The Final Hearing

5. The matter came before me for Final Hearing. The hearing had a two-day time estimate. The Claimant was represented by Mr. Green of counsel, and the Respondent by Ms. Hobson a legal executive.

List of Issues

6. At the outset of the hearing the issues were identified as:

Unfair Dismissal

a. What was the reason for the dismissal? The Respondent asserts that it was a reason related to conduct, which is a potentially fair reason for section 98(2) Employment Rights Act 1996.

b. The actions relied on are those set out at [26 §7]:

   i. He increased the MPP (Man-Power Plan) leave ceiling;
   ii. Increased the number of duties against AWD (Actual Working Duties),

   both of which had financial impact on the unit and an impact on customer service.

c. Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances? The burden of proof is neutral here, but it

helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:

i. Was not misconduct at all, it was resourcing and performance management if at all
ii. Whilst the Claimant admitted that he did these two incidents the motivation was to improve efficiency and make things runs better

d. Did the Respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure in the following regards:

i. No questions were asked about motive of the Claimant;
ii. Was it reasonable for the Respondent to characterise this as gross misconduct and have treated it as sufficient to dismiss?

e. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses open to a reasonable employer when faced with these facts? Factors to consider include:

i. Considering the Claimant's length of service;
ii. The lack of warnings; the Claimant was never told that this could lead to dismissal

f. If the dismissal was unfair, did the claimant cause or contribute to the dismissal by culpable or blameworthy conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged. If so, is it just and equitable to reduce any awarded and, if so, in what amount?
   i. Culpable and blameworthy,
      1. he was DOM and responsible for planning and AL and because of the USO at risk and if this fails and the delivery fails and the cos belief;
      2. coms from three managers had spoken
   ii. if so, is did that conduct cause or contribute to dismissal?
   iii. If so, is it just and equitable to reduce compensation?

g. Polkey: absent any errors (procedural or substantive)
   i. Could the Respondent have fairly dismissed?
   ii. If so, would the Respondent have fairly dismissed?
   iii. If so, when and how?

Breach of contract

h. It is not in dispute that that Respondent dismissed the Claimant without notice.

i. Does the Respondent prove that it was entitled to dismiss the Claimant without notice because the Claimant had committed gross misconduct set out in [26 §7]? NB This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the gross misconduct.

j. To how much notice was the Claimant entitled: it is agreed the Claimant was entitled to 12 week's notice.

Financial Penalty

k. Did the Respondent breach the Claimant's employment rights to which the claim relates?
l. If so, are there aggravating circumstances?
m. If so, should I order the Respondent to pay to the Secretary of State a penalty?

7. At the conclusion of the hearing the parties were able to agree that the Respondent did owe the Claimant £1,321.20 for unpaid holiday. Accordingly, by consent, I gave judgment in that sum and have not set out the issues as identified as relevant to that claim here.

Documents and Evidence

Witness Evidence

8. I heard evidence from the Claimant and Mr. Keith Tarrant on the claimant's behalf. I also heard evidence from the following witnesses on behalf of the Respondent: Ms. Estelle Baillie, a Delivery Director of the Respondent who heard the Claimant's disciplinary hearing and Mr. Geoff Kyte and Independent Casework Manager of the Respondent, who heard the Claimant's appal against dismissal.

9. All witnesses gave evidence by way of written witness statements that were read by me in advance of them giving oral evidence. All witnesses were cross-examined

Bundle

10. To assist me in determining the application I have before me today an agreed bundle consisting of some [150] pages prepared by the Respondent. I labelled this document R3.

11. Despite the increase granted in bundle size and length of witness statements, the Claimant's witness statement referred to a supplementary "Correspondence Bundle" which appeared to be an inch think. However, Mr. Green was able to take out from that tome six pages, the admission of which was not objected to by Ms. Hobson. I labelled these additional pages R4.

Submissions

12. At the end of the sitting day on Wednesday, 21st February 2018 in light of the evidence I had heard that day I requested written skeleton arguments. Both parties provided these and supplemented their arguments orally. Since the skeletons are in writing it is unnecessary to repeat them here and they are referred to as appropriate in the conclusions.

The Material Facts

13. From the evidence and submissions, I made the following finding of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by the Claimant, Mr. Tarrant, Ms. Baillie and Mr. Kyte in evidence, both in their respective statements and in oral testimony. Where it is has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed. Rather, I have set out my principle findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

The Respondent

14. The Respondent is a large employer employing some 139,000 employees across the country [18 §2.7] in various offices.

15. The Respondent has a Universal Service Obligation ("USO"), effectively a service level agreement to ensure the delivery of mail in accordance with the service specification. If it fails in this, then it is subject to financial penalties from Postcomm.

Pressures on the Respondent

16. The Respondent needs to match its delivery capacity with the expected demands on it as those demands vary greatly throughout the year: at Christmas time there may be a larger volume of mail being sent, whilst in the summer more staff may be away. It meets these pressures by various means including having a ceiling on the number of people absent from any office on any given day and also by filling gaps in work by "lapsing" which is the Respondent's term for having employees at work taking on duties outside of their normal duties as cover.

17. Absence management is governed by the National Calendarisation Tool which sets absence levels for weeks dependant on expected work load. This was set at 10 for the weeks I am concerned with [57, 62]. The upcoming years absence figures are set in October of the year previously.

The DOM

18. The Respondent's offices are run by a Delivery Operations Manager ("DOM") who, as the name suggests, is responsible for the office's delivery of its services under the USO. Part of this would be the management of staff issues, including holiday and deal with the pressures identified above.

The Claimant

19. The Claimant commenced employment with the Respondent in 1982 upon leaving school at the age of 16. During his thirty-plus years employment he had occupied various roles and been promoted numerous times. He had been a DOM since 2002, albeit in the Gosport office. He remained at Gosport until 2015 when he transferred to the Andover Office. He had a clean disciplinary record and at the time of his dismissal had been the DOM at Andover for nine-months.

The Andover Office

20. On anyone's account this office was not reaching the standards expected of the post office and these failings were being reported in the press [43-44]. The problems at the Andover office were long-standing and pre-dated the Claimant's move there; indeed, the Claimant was moved there to improve the office as "they could not crack" the problems [DC2]. There had been a number of DOM's and managers at Andover within a relatively short period of time [KT20] none of whom had resolved these issues, and none had lasted very long.

21. The Claimant was aware and sensitive to the problems and perception of Andover [20d R4]

22. Ms. Bailliee asked the Claimant to move to Andover. Owing to the historic problems at Andover which he would be inheriting the Claimant expressed concerns about moving as he did not wish to be held responsible for these failings. Having received sufficient reassurances from the Respondent the Claimant moved to Andover.

Holidays at Andover

23. Employees at Andover carried over in excess of 400 days leave from the previous leave year as they had been unable to take it in that year and it had built up [KT11]. The Claimant was required, when he moved, to reduce this figure. He had to find a way to ensure the staff took their annual holiday and then the excess they had built up.

24. The high level of holiday carry over was causing industrial strife with the Communications Workers Union ("CWU") as their members were being refused leave when they requested it with the effect that they were not being able to take their contractually permitted leave entitlement.

Other Pressures at Andover

25. The Andover office also covered areas which had seen large developments and growth in the number of houses on each delivery route [66]. This led to routes increasing in length and often deliveries being missed as the duties were too big for the hours allowed for them [KT3]. These shortfalls may be covered by staff undertaking overtime, but staff were reluctant to do substantial overtime, I am told up to four hours each day, on a daily basis.

26. With overrunning work lapsing with current employees becomes impossible: if there are no vacant hours in an office there are no OPG (Ordinary Post Grade – Postman) with free hours in their day to lapse the overrun of another duty.

27. The Claimant also inherited this problem.

The Claimant's Approach

28. One of the ways the Claimant sought to reduce the annual leave carryover was to increase the ceiling on the number of staff he had absent in any given day. He raised this from 10 to 14 for some weeks in the year. He had done this in October 2015 when the absence levels were set. More staff being able to be absent would mean more holiday could be taken which in turn over the course of the year would mean the carry-over would reduce.

29. The Claimant sought approval of his plans for an increase in the absence ceiling from Stuart Khan in October 2015 [45]. It is fair to say that the response he received does not tell the Claimant he could not do what he wanted, rather it says the leave absence levels should be in accordance with the national model. The Claimant was also told that if he was going to go outside of the national ceiling he should email his DSM. Following this instruction, this is what he did [85].

30. He was told that he should introduce a lapsing plan to cover for the increase in this absence level [86, 135]. A lapsing plan would require the agreement of the CWU.

31. In accordance with the instructions the Claimant received, he sought the CWU's approval for a lapsing plan; however, the CWU representative he was dealing with (Eamonn Neilson) went off work unwell for an extended period of time and the replacement refused to discuss matters with the Claimant [88 §101]. Up until the time of his suspension, it is an accepted fact, that the Claimant was trying to agree a lapsing plan with the CWU to cover the increased MPP ceiling.

32. The Claimant also introduced 4 extra part-time duties (the Respondent's term for posts)[46-47]. He introduced these as the existing duties, he says, were unable to cover the size of the delivery rounds in the hours allocated and employees were refusing to undertake the overtime necessary on a daily basis to cover this work [90 §131][DC26]. As I say the Claimant says that this overtime amounted to about 4 hours every single day on each of the overrunning duties. He had introduced a system to assist with managing overtime, but staff were still unprepared to undertake it [66] regularly.

33. If the Claimant had not introduced these posts then, I accept, the deliveries would not have been made and the USO breached. The Claimant had previously added in special duties whilst the DOM in Gosport. He was never reprimanded or disciplined for this. Indeed, this is not surprising as Ms. Baillee told me that the introduction of special duties in itself was not a matter of misconduct, but a matter which fell within a DOM's discretion

34. The Andover office failed to meet the standards of the USO. Andover missed its USO commitments after there were four resignations, 6 sickness absence and a further

three people absent for a variety of reasons within a short period of time that caused staffing shortages and mail deliveries to be missed.

35. When looking into the USO failure the Respondent became aware of these extra duties and the increase in the absence ceiling after this failure. The Respondent commenced an investigation into the Claimant. By way of email dated 16th May 2016 Ms. Baillee asked Claire Phillips to:

> "commence seek and (sic) explanation Tuesday with Dave [the Claimant] and invite him in for formal conduct with yourself on Friday (ensure invite letters ect (sic) go out to time) we will then review the case but a potential you will pass to me as I cannot accept this poor lack of planning/MPP plan that has failed the customer"
>
> [57]

36. This interview took place on the 17th May 2016 [58] during which the Claimant showed Ms. Phillips the communication he had with Mr. Khan.

37. The Claimant was suspended from work on 31st May 2016 on the grounds that he had engaged in inappropriate behaviour and that there were serious breaches of his contract of employment which may be repeated and/or there was a risk to people, property, mail or the good image of the Respondent or that the investigation may be hampered if the Claimant remained at work [98]. The terms of this letter are surprising in light of the evidence there was the actions of the claimant were not misconduct, further there was no evidence at all the Claimant would hamper the investigation or the other reasons for the suspension applied particularly to the Claimant.

38. After this interview the Claimant was then called to a "Fact Finding" interview on 15th June 2017, again with Ms. Phillips [65]. In both of these meetings with Ms. Phillips the focus was on the Claimant's actions and not the motives he had for these actions. The Claimant accepted, as he always had and did, that he had increased the absence levels and had introduced the four duties. As a result of these meetings it is felt that the matter should proceed to a formal disciplinary hearing.

39. This was conducted by Ms. Baillee on the 6th December 2016 [79]. Again, the focus of this meeting is on the claimant's actions. Ms. Baillee does not ask him about any

motive he had for "covering up" his decisions. Indeed, Ms. Baillee told me, and I accept, that his actions were not of themselves misconduct but were permissible actions for a DOM, rather, the circumstances the Respondent found itself in (namely a failure to deliver in accordance with the USO) meant that the Claimant's actions had been cast into the light and this is what lead to the investigation.

40. The Claimant's suspension was renewed on 20 December 2016 [96] and two days later the disciplinary meeting continued [99]. Again, at no point are the Claimant's motivations or honesty questioned and Ms. Baillee believed the Claimant's motives to be that he acted to ensure the office met its USO obligations, for the benefit of his staff and the Respondent generally. Ms. Baillee, and latterly Mr. Kyte, both accepted before me there would be no issue with the absence levels exceeding the ceiling if a lapsing plan was in place.

41. The Claimant was summarily dismissed by way of letter dated 23rd January 2017 [109] for failing to follow reasonable instructions in his role as a DOM, specifically in relation to the increase in Andover's MPP ceiling and the increase in duties. There is no mention of the Claimant's motivation or honesty in his actions being a reason for his dismissal; indeed, Ms. Baillee does not mention these in her "Deliberation" letter [112] because, I find, she did not consider the Claimant to have been dishonest or in any way devious in his actions, indeed, to the contrary she accepted the Claimant had legitimate and positive motives for doing what he did.

42. The Claimant appealed his dismissal [120]. He appealed on the basis of the appropriateness of the penalty and the severity of the sanction. His appeal was heard by Mr. Kyte as "Appeal Manager" [121]. This appeal took the form of a rehearing. Despite this hearing being a fresh reconsideration of the matter, I have not been taken to any part of the minutes of the Appeal meeting where the Claimant's honesty was called into question, and, indeed, in his evidence Mr. Kyte confirmed that the Claimant's honesty was not raised in the meeting.

43. In his report Mr. Kyte, however, finds that the Claimant's actions were "unnecessarily reckless" [149](a point not addressed in the meeting) and "both wilful and dishonest" [150], both, again, not raised by him in the meeting. He upholds the Claimant's dismissal. I pause here to say I found Mr. Kyte a distinctively

unimpressive witness, who appeared quick to seek to justify serious findings in relation to the claimant without any basis of fact and one who did not appear to see the problems with such findings being made without the matter even being raised with the Claimant. Startlingly, Mr. Kyte stated I his evidence for the first time that the Claimant's actions were motivated to make himself (the Claimant) look better so that he would reive a performance bonus. Again, such a serious allegation was never raised with the Claimant in the meeting.

The Law

44. The law relating to unfair dismissal is well established. By section 94(1) of the Employment Rights Act 1996:

> "An employee has the right not be unfairly dismissed by his employer."

45. By section 95(1)(a):

> (1) For the purposes of the unfair dismissal provisions, an employee is dismissed by his employer if…
>
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice)."

46. By section 98(1) and (2): It is for the employer to show the reason (or principal reason) for the dismissal and, in the context of this case, that it related to the conduct of the employee.

47. In Abernethy Mott, Hay v Anderson [1974] IRLR 213, CA, it was held that the reason for a dismissal is a set of facts known to the employer or beliefs held by him that cause him to dismiss the employee.

48. By section 98(4):

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

49. The law to be applied to the reasonable band of responses test is well known. My task is to assess whether the dismissal falls within the band of reasonable responses of an employer. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair. I refer generally to the well-known case law in this area, namely Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, EAT; and Foley v Post Office; HSBC Bank PLC v Madden [2000] IRLR 827, CA.

50. The band of reasonable responses test applies equally to the procedural aspects of the dismissal, such as the investigation, as it does to the substantive decision to dismiss – see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA. As far as the investigation is concerned, and the formation of the reasonable belief of the employer about the behaviour, conduct or actions of the employee concerned, then I have in mind, of course, the well-known case of British Homes Stores Ltd v Burchell [1978] ICR 303, EAT. Did the Respondent have a reasonable belief in the Claimant's conduct formed on reasonable grounds after such investigation as was reasonable and appropriate in the circumstances?

51. There is no hard and fast rule as to the level of inquiry that the employer should conduct into the employee's (suspected) misconduct in order to satisfy the Burchell test. It will very much depend on the particular circumstances, including the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee. At one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase.

52. In judging the overall fairness of a dismissal, I should consider the "end-to-end" process, including the appeal stage. However, this does not mean that any defect of fair treatment that may occur leading up to the initial decision to dismiss is bound to be irrelevant, so long as a fair appeal process has been granted. There will be some cases where the unfairness arising at the first stage is so serious and fundamental, that the end-to-end process remains unfair.

53. The modern authorities on this point eschew the over-technical approach of distinguishing between appeal by way of review and re-hearing, or corresponding technical distinctions about the circumstances in which defects in fairness at the initial stage can or cannot be put right on appeal. I ultimately, always have to decide the fairness of a given dismissal, applying the words of section 98(4) and the statute makes no particular provision in relation to appeals.

54. However the ACAS Code, and case law, establish that, ordinary, fair treatment of an employee who is dismissed should include the opportunity of an appeal against the dismissal; and so there will still be cases, where the shortcomings of the initial stage mean that, even if the appeal process itself has been conducted entirely fairly, as such, I should conclude that, overall, the shortcomings of the disciplinary and dismissal stage mean that he has not, in the end-to-end process, been treated fairly.

55. These are all matters that are ultimately for my appreciation, applying the wording of the section 98(4) test. In Taylor v OCS Group Ltd [2006] ICR 1602, CA, when considering the effect of an appeal the question is whether the disciplinary process as a whole is fair. After identifying a defect, the Tribunal will want to examine any subsequent proceeding with particular care. Their purpose in so doing would be to determine whether, due to the fairness or unfairness of the procedure adopted, the thoroughness or lack of it in the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at an earlier stage.

56. In Brito Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854, EAT, it was held that a finding of gross misconduct does not necessarily make a dismissal fair. Even in cases of gross misconduct, regard must be had to possible mitigating circumstances such as, in this case, the Claimant's length of unblemished service and that dismissal would lead to her deportation and destroy her opportunity of building a career in the UK.

57. In Strouthos v London Underground [2004] IRLR 636, CA, it was held that length of service and a clean disciplinary record are factors which can properly be considered in deciding whether the reaction of an employer to an employee's conduct is an appropriate one.

58. In the context of the Claimant's suspension, as referred to the case of Agoreyo v London Borough of Lambeth [2017] EWHC 2019 (QB), such suspension must be justified on the facts of the case. It is not to be considered a routine response to the need for an investigation.

59. The commentary in Harvey on Employment Relations and Employment Law says that one particular problem here has been arguably the over- readiness of certain employers (particularly in the public sector, including the medical area and the education area) to resort to suspension as soon as allegations have been made against an employee, and then to allow that suspension to continue for a long period. See Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402, CA.

Conclusions on the Issues

60. Having made the relevant findings of fact I returned to the list of issues the parties asked me to determine.

Unfair Dismissal

What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct, which is a potentially fair reason for section 98(2) Employment Rights Act 1996.

61. A reason for dismissal is a set of facts known to the employer at the time that they dismiss the employee. In this case the facts relied upon by the Respondent in its dismissal letter are the Claimant's raising of the MPP and his addition of 4 duties. The Claimant, for his part accepts that this was done.

62. The Claimant contends this is not a matter of conduct, but rather of training or capability and, as the Respondent has labelled this as conduct, any dismissal under this label must follow as unfair owing to the mislabelling. This assertion I reject. It is incumbent upon a tribunal to consider the underlying facts of the dismissal and, for itself, consider which of the s98 labels (if any) those reasons fall within if it is being argued that the reason for the dismissal has been mis-labelled. In a mislabelling case, however, the subsequent question arises as to whether, by virtue of any mislabelling, the employee has been denied or deprived of an aspect of fairness he would otherwise have received but for that mislabelling: for instance where

capability has been mislabelled as misconduct was the employee deprived of the opportunity to show improvement.

63. On the accepted facts I find that the raising of the MPP and the addition of 4 extra duties are matters that relate to the Claimant's conduct and so they fall within that aspect of s98(2) as the Respondent contends.

64. Having found this I then have to ask myself, was there a genuine belief in the Claimant's misconduct? The evidence I have heard poses me serious doubts in relation to this: Ms. Baillee told me that these actions were not misconduct and that the Claimant would not have been disciplined if there had not been a failure to reach USO levels, indeed had there not been a mail failure they would not have looked into the Claimant's actions in raising the absence ceiling or introducing the four extra duties. I found support for this in the Claimant's evidence that whilst at Gosport he had added duties and never been reprimanded or disciplined.

65. I find that Mr Kyte also had these concerns and so drew the conclusions that he did in relation to the Claimant's honesty in an attempt to justify the decision to dismiss.

66. The Respondent, therefore, on the evidence before me, fails to establish it had a genuine belief in the Claimant's misconduct.

Did the respondent hold that belief in the claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances? The burden of proof is neutral here, but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:

i. Was not misconduct at all, it was resourcing and performance management if at all

ii. Whilst the Claimant admitted that he did these two incidents [26 §7] the motivation was to improve efficiency and make things runs better

67. Despite the Respondent having failed at the initial stage in establishing it held a genuine belief in the Claimant's misconduct, I still need to consider this point as it may influence my assessment under Polkey. There were matters of the Respondent's investigation that posed me concerns as well: The Claimant raised factual issues he had with one of the people who provided evidence relied upon by the Respondent when dismissing him: Paul Cahill. Despite having the Claimant's challenge to Mr. Cahill's assertions, and being aware that the actions of the Claimant were not in her eyes misconduct, Ms. Baillee still did not go back to Mr. Cahill and seek his response to the Claimant's challenge. I find this failing was one a

reasonable employer would not have made, such an employer, in circumstances where they had doubts as to whether the conduct was misconduct, would be sensitive to all factual evidence and make relevant and obvious checks. Further, whilst not challenging the Claimant's motives for doing what he did Ms. Baillee did not appear to have taken any steps to check that what the Claimant was saying was correct or not, namely that staff had refused to undertake substantial daily overtime to cover duties.

68. I find also that Mr. Kyte's conclusions as to the Claimant's honesty were also arrived at after an unreasonable investigation into this matter. It is agreed by the Respondent that there was no investigation into this at all, the matter was neither raised by Ms. Baillee (who appeared to accept the Claimant had good motives for doing what he did) nor Mr. Kyte; and certainly neither of them raised this with the Claimant. The allegation by Mr. Kyte that the Claimant was doing what he did in order to increase his chances of receiving a performance bonus was similarly not investigated or discussed.

69. A reasonable employer, if they were going to dismiss a long-standing and well-regarded employee like the Claimant would, I consider, take steps to investigate the motives and reasons the claimant had for the actions before deciding the Claimant was acting dishonestly and/or in order to benefit himself financially.

Did the Respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure in the following regards: No question asked about motive of the Claimant

70. The Respondent's failings here largely follow from what I have said above in relation to the wholesale lack of any investigation into the Claimant's motives: if an employee is to be dismissed for dishonesty they have a right to know the charge they are facing and an opportunity to answer that charge. If an employee is to be dismissed because their conduct is believed to have been motivated by a desire to reward themselves financially then they have a right to know that this is being alleged so they can answer this as well.

71. Looking at the process from end-to-end, as I must, I consider the procedure adopted by the Respondent fell outside the band of reasonable responses open to a reasonable employer. The Respondent appears to have immediately

progressed the matter as a charge of gross misconduct with the Claimant suspended for a long period of time in circumstances where the dismissing manager herself did not consider he was guilty of misconduct. Matters only got worse for the respondent when the appeals manager after not asking the Claimant about serious allegations which Mr. Kyte seemed all to ready to accept without any evidence or questioning.

72. Viewing these matters in the round puts the respondent's process well outside the band permissible to reasonable employers.

Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses open to a reasonable employer when faced with these facts?

i. Considering the Claimant's length of service;
ii. The lack of warnings; the Claimant was never told that this could lead to dismissal

73. Finally, I have to ask myself was dismissal, in these circumstances, within the band of reasonable responses open to an employer. I remind myself I am not to substitute what I would have done for that of the Respondent here but ask myself could a reasonable employer have done what the Respondent did and summarily dismiss the Claimant.

74. I find a reasonable employer would not have dismissed a long standing, well regarded and successful employee in these circumstances for doing what the Claimant did. The Claimant's actions were questioned only after a USO failing which came about out of a particularly high level of absence at Andover owing to sickness, resignations and other forms of absence. The Claimant's actions, per se, were not misconduct, he was doing what he considered the best in order to meet the USO commitments and would not have been disciplined for them had there not been a USO failing.

75. As a long serving employee and DOM in a successful office of Gosport the Claimant demonstrated his ability in the role and was able to show substantial personal mitigation.

76. Whilst the range of reasonable responses provides employers with a wide margin of appreciation when it comes to sanction, in the circumstances of this case, even if the actions were misconduct, I do not consider a reasonable employer would have dismissed this Claimant.

If the dismissal was unfair, did the claimant cause or contribute to the dismissal by culpable or blameworthy conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged. If so, is it just and equitable to reduce any awarded and, if so, in what amount?

i. Culpable and blameworthy,
   1. he was DOM and responsible for planning and AL and because of the USO at risk and if this fails and the delivery fails and the cos belief;
   2. coms from three managers had spoken
ii. Did these acts cause or contribute to dismissal
iii. If so, is it just and equitable to reduce compensation

77. I have found that, on the Respondent's own evidence, the actions of the Claimant were not misconduct; his actions, according to them were not worthy of censure. Even if I am wrong on this and the Claimants actions were culpable or blameworthy ones that caused or contributed to his dismissal, I would not have made any reduction to either the Claimant's Basic or Compensatory awards as I would not have felt it was just and equitable to have done so in the circumstances of this case with the profound failings of the Respondent and its lack of belief in the Claimant's misconduct.

Polkey: absent any errors (procedural or substantive):

i. Could the Respondent have fairly dismissed?
ii. If so, would the Respondent have fairly dismissed?
iii. If so, when and how?

78. Owing to the Respondent's lack of genuine belief in the claimant's misconduct I do not consider that they could have fairly dismissed the Claimant, even if they did genuinely believe his guilt the wholesale failings in the procedure in this matter lead me to conclude that only if the Respondent totally rewrote the history of this matter could a fair dismissal have potentially have arisen. I am aware I am required to speculate as to what would have happened in such circumstances and so I do as best as I can, and this I do: if the wholesale procedural and substantive errors were rectified in this matter then the Respondent still could not have fairly dismissed the Claimant as they did not consider the claimant's actions to be misconduct, despite what they said in writing.

79. I would, if I found the Respondent could have fairly dismissed the Claimant, need to ask myself would the Respondent have fairly dismissed the Claimant: it is here that I find the Respondent, if they had conducted a fair process would not have

dismissed the Claimant as they would have realized dismissal was unreasonable and unwarranted on the facts of this case and in light of the Claimant's lengthy service and motivations. Any dismissal in these circumstances would not have been fair.

80. Accordingly, I decline to make a reduction under the principles of Polkey.

Wrongful Dismissal

81. It was not disputed that the Claimant was dismissed without notice, and that in accordance with his contract he would have been entitled to 12 weeks' notice of dismissal, save for any dismissal on grounds of gross misconduct. The issue for me, therefore is: were the actions of the Claimant gross misconduct.

Does the Respondent prove that it was entitled to dismiss the Claimant without notice because the Claimant had committed gross misconduct in that [26 §7]? NB This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the gross misconduct.

82. I remind myself the burden of proof is on the Respondent to show their power to dismiss the Claimant summarily had been triggered: they have not. The evidence called on behalf of the Respondent was clear: the actions of the Claimant were not considered to be misconduct.

83. Further, I do not consider that the claimant's actions show a fundamental intention not to be bound by the terms of the contract, indeed it would appear the Respondent's own witnesses do not think it did, when they accredited him with good intentions and motives for increasing the MPP and appointing the 4 special duties.

<u>Financial Penalty</u>

84. Having found a serious breach of the Claimant's employment rights to which the claim relates: namely a serious failing in the law and procedures of unfair dismissal, a wrongful dismissal and the acceptance of unpaid holiday pay, I will need to hear submissions on the aggravating features of these breaches at the remedies hearing in order to consider my discretion under s12A Employment Tribunals Act 1996

CONCLUSIONS

85. I find that the Claimant's dismissal was unfair within the meaning of s98 and that that dismissal was also wrongful. Accordingly the parties are to prepare for the Remedies hearing provisionally booked at the end of the Full Merits Hearing for 24th May 2018.

86. Of my own motion I make the following directions in order that the Remedies Hearing is effective:

a. By 12th April there shall be disclosure of all documents relevant to remedy.
b. By 19th April 2018 the parties shall agree an index to the bundle.
c. By 26th April 2018 the Respondent shall serve on the Claimant a bundle consisting of all relevant documents both sides wish to rely on at the remedies hearing
d. By 10th May 2018 the parties shall simultaneously exchange witness statements relevant to the issue of remedy

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Employment Judge Salter

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Date 20 March 2018