EMPLOYMENT TRIBUNALS

Claimant: **Mr M Brough**

Respondent: **Sheffield Teaching Hospitals NHS Foundation Trust**

Heard at: **Leeds** **On: 21 and 22 February 2018**

Before: **Employment Judge Davies**

Representation

Claimant: Mr Pagdin (trade union representative)
Respondent: Mr Sugarman (counsel)

RESERVED JUDGMENT

1. The claim of unfair dismissal is well-founded and succeeds.
2. The chance that the Claimant would have been fairly dismissed in any event if a fair procedure had been followed is zero.
3. The Claimant contributed to his dismissal by culpable and blameworthy conduct and it is appropriate to reduce the basic and compensatory awards payable to him by 20%.

REASONS

Introduction

1.1 This was a claim of unfair dismissal brought by Mr M Brough against his former employer the Sheffield Teaching Hospitals NHS Foundation Trust. The Claimant was represented by a trade union representative, Mr Pagdin. The Respondent was represented by Mr Sugarman of counsel. I was provided with more than 1300 pages of documents. The vast majority were not referred to in the course of the two day tribunal hearing. I heard evidence from the Claimant and from Mr P Turner, former Security Manager, on his behalf. The Claimant had produced letters from Mr Wood and Mr Maynard. They did not attend to give evidence and only limited weight could be given to the letters. For the Respondent I heard evidence from Ms S Lawford, operations project manager and Mr K O'Regan, hotel services director.

1.2 Although the evidence was completed in two days, there was not enough time for the parties to make closing submissions. Submissions were therefore provided in writing and I am very grateful to both representatives for their detailed and careful submissions.

The issues

2.1 The issues to be determined were as follows:

2.1.1 What was the reason for the Claimant's dismissal? Did the Respondent have a genuine belief in misconduct on his part?

2.1.2 If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant, having regard in particular to whether:

2.1.2.1 there were reasonable grounds for that belief;

2.1.2.2 at the time the belief was formed the Respondent had carried out a reasonable investigation in the circumstances;

2.1.2.3 the Respondent otherwise acted in a procedurally fair manner;

2.1.2.4 dismissal was within the range of reasonable responses?

2.1.3 If the Claimant's dismissal was unfair, what is the chance, if any, that he would have been fairly dismissed in any event?

2.1.4 If the Claimant was unfairly dismissed, did he cause or contribute to his dismissal by his own culpable and blameworthy conduct?

The Facts

3.1 The Respondent is the Sheffield Teaching Hospitals NHS Foundation Trust. Its hospital sites include the Royal Hallamshire Hospital, known as Central, and the Northern General Hospital, known as Northern. The Claimant started work for the Respondent as a full-time security officer on about 16 January 2012. He was based at the Central site.

3.2 The events with which I was concerned began with the raising of a grievance by or on behalf of the Claimant and his colleagues. At that time the Claimant's manager was Mr Goodison, Security Manager. The Assistant Security Manager was Mr Eyre.

3.3 In January 2016 the Claimant had emailed the Chief Nurse on behalf of the security officers working at the Central site. He said that over the past three years difficulties had arisen in the Department and that the security officers had lost trust in management. The concerns were passed on to Mr Gwilliam in HR who met the Claimant in January 2016 to discuss them. On 5 February 2016 Mr Gwilliam sent an email summarising what had been said. He explained that the officers should not go straight to executive colleagues, but should use the appropriate workforce policy, i.e. the Grievance and Dispute Policy. He requested that the officers contact Mr Goodison's line manager, Mr O'Regan, to arrange a meeting to resolve the issues informally in the first place. The Claimant did not contact Mr O'Regan as advised.

3.4 Plainly the security officers continued to have concerns. This led to a meeting on 19 July 2016 at the Holiday Inn involving the officers and their trade union representatives, Mr Campbell and Mr Mercer. Mr Campbell advised them to put together a collective grievance.

3.5 The next day the Claimant sent an email to Mr Gwilliam on behalf of 10 security officers. He raised a concern about a consultation process to do with changing rotas that was underway. He said that staff wanted to raise a grievance about this and asked for the process to be put on hold in the meantime. It was

suggested in evidence that Mr Goodison wrote to staff on 8 August 2016 to tell them that the consultation process would be repeated. The Claimant did not remember such a letter and I was not shown a copy of it. However, there is no dispute that the consultation process was in fact repeated.

3.6 In late July 2016 a complaint was made that the Claimant and a colleague had failed to escort a doctor from the porter's lodge to the residential accommodation. Mr Eyre spoke to the Claimant on 26 July 2016. He decided to issue the Claimant with written advice that he must comply with the security officer's job description. It appears that the written advice was not issued to the Claimant until he raised a concern about this at a much later stage. The only copy shown to me was dated 17 January 2017.

3.7 On 16 August 2016 a grievance was submitted on behalf of the Claimant and seven other security officers. All the officers had contributed to the grievance but the Claimant put it in writing. It was signed by his colleagues and was submitted by Mr Campbell on their behalf. It appears that Mr Campbell wrote a short covering document, in which, amongst other things, he suggested that staff were aggrieved that since coming into post Mr Goodison had launched into a "personal vendetta" against them. Those who dealt with the grievance appear to have assumed that the covering note was part of the grievance as submitted by the security officers. However, the Claimant's evidence to me, which I accepted, was that he had not seen it before. Although it was included in the information for the disciplinary hearing (see below) it is entirely plausible that he would not have read it amongst the 1000 pages provided to him. He had been asked about "page one" of the grievance at an initial investigation meeting with Ms Lawford (see below). In oral evidence he said that was the index. That is consistent with page numbering in the documents I was shown: an index was numbered page one, the covering letter was numbered page two and the next page was headed "Security RHH Grievance" and signed by the seven officers. The Claimant told Ms Lawford that he did not type the index and did not know who did. In the light of that evidence, I accept that he did not type the index or cover letter. He prepared the grievance that started with the signed front page.

3.8 The grievance raised concerns under a number of headings:

3.8.1 Concerns about organisational change and consultation: the essence of this concern was that Mr Goodison had arranged consultation meetings to discuss changes to the security department rotas at very short notice. That is the consultation process that had subsequently been re-run.

3.8.2 Inconsistent information to security staff about the reasoning behind organisational change: this too related to the rota changes that the Respondent was seeking to introduce. The officers complained that Mr Goodison had given inconsistent reasons why the change was being introduced.

3.8.3 Recruitment: the officers complained that under Mr Goodison recruitment had been a drawn out process. Mr Goodison had told them that he could not advertise for new staff until existing post holders had left their employment. This left them understaffed. There was also a complaint that when an Assistant Security Manager post had been advertised in September 2015 one of the job requirements was previous experience in law enforcement or a relevant security qualification. The security officers

felt that the advert had been worded specifically to limit the number of current security staff who could apply to two or three.

3.8.4 Over-supervision of staff: the security officers felt that they were being over-supervised by Mr Goodison and Mr Eyre. They had never had to use clocking-in cards but had been told that they would now have to do so. However, they still had to sign in the security logbook and sign out again. They said that management had also tried to use another system called Morse Watchman to monitor their movements during the day. They felt that this was "over excessive and aggressive" by management and described it as a "bullying tactic."

3.8.5 The investigation meeting held with the Claimant and his colleague in July 2016 for failing to escort a doctor to the residency accommodation: the two officers were concerned about the amount of notice they were given and also suggested that Mr Eyre did not understand what their job entailed. The grievance said that the Claimant had had to inform Mr Eyre that all aspects relating to "issuing residencies" were not in their job description and were done on a goodwill basis.

3.8.6 Hospital lockdown incident: on 25 January 2016 the hospital had not been opened because no security officers were present for work. The Claimant had telephoned sick that morning and a colleague had attended work but was not in a fit state and went home. The complaint in the grievance was about the internal investigation launched by security management, which was said to have been "mainly aimed at" the Claimant's colleague. It was suggested that management thought that the security officers had deliberately left the hospital without security officers because of the current organisational changes. The grievance complained that the other security officer had been required to produce four statements and was still being pursued long after the incident.

3.9 The Respondent instructed Mr Burgin, an independent HR consultant, to investigate the grievance. On 13 October 2016 Mr Burgin interviewed Mr Goodison and on 14 October 2016 he interviewed Mr Eyre. Mr Burgin then held informal preliminary meetings with some of the complainants. Mr Burgin's subsequent written report said that at that stage it was unclear whether the grievance was department-wide or was being raised by specific individuals only. He therefore wrote to all control room and security staff at the Central campus inviting them to initial meetings to identify which staff members were signatories to the allegations, whether they were willing to make a statement in relation to allegations and so on. Staff were also given the option of signing a declaration that they did not wish to be a signatory to the collective grievance, but understood that they might be interviewed as part of the investigation process. In fact, following the initial meetings all the staff withdrew from the collective grievance sooner or later. The Claimant was the last to do so. In his witness statement he suggested that he had been pressured into doing so and that Mr Burgin was acting in bad faith because he was a personal friend of Mr O'Regan. While that was a line of questioning pursued by Mr Pagdin at the hearing before me, the Claimant's own oral evidence was much more to the effect that he had withdrawn from the collective grievance because it had got out of hand. I find that that is why he withdrew.

3.10 In his report Mr Burgin set out in detail when and how he said the various signatories had withdrawn from the collective grievance. Mr Burgin suggested that this provided the Respondent with an issue that needed resolving. He said that a number of very serious allegations had been made against Mr Goodison and Mr Eyre, which had now been withdrawn. He drew attention to provisions in the Grievance and Dispute Policy and Procedure, and in the Acceptable Behaviour at Work Policy suggesting that where grievances or complaints were found to have been made maliciously or in bad faith this would be treated as potential gross misconduct. He suggested that the Trust consider whether any further action should be taken as a result of the Central campus grievance being lodged and then withdrawn. I pause to note that Mr Burgin had not investigated the grievance, made findings of fact and determined that it had been made maliciously or in bad faith. He had simply conducted some initial interviews, following which the grievance was withdrawn.

3.11 Mr Burgin's report was passed to Mr O'Regan. He decided that a disciplinary investigation should be carried out and Ms Lawford was appointed to carry it out. Ms Lawford decided to investigate the grievance points so as to determine whether the grievance had been submitted in bad faith. That might in turn lead to a disciplinary hearing. She asked Mr Burgin to support her in the process. She explained in oral evidence that she discussed the situation with an HR business partner. The Respondent had a finite number of internal HR staff and given those limited resources she considered it was appropriate to retain Mr Burgin's services to assist her. Ms Lawford assembled a range of documentation relevant to the underlying grievance complaints. That included the notes of Mr Burgin's interviews with Mr Goodison and Mr Eyre. Ms Lawford did not carry out any further interview with Mr Goodison Mr Eyre. She did however form the view that they gave "detailed, convincing and plausible explanations for their actions which were criticised in the grievance" and that these explanations were corroborated by the documentation they had provided to Mr Burgin when he had been investigating the grievance.

3.12 On 6 December 2016 Ms Lawford wrote requiring the Claimant to attend an investigation meeting on 9 December 2016. The letter did not set out any disciplinary allegation. It said the purpose of the meeting was to understand the Claimant's personal involvement in the collective grievance. The meeting took place on 9 December 2016 and the Claimant was accompanied by Mr Mercer. I saw a note of it. At the outset of the meeting Ms Lawford explained that if it was felt that the collective grievance allegations were untoward or malicious there might be a disciplinary case to answer. Ms Lawford asked the Claimant about how the grievance had been put together. She asked what outcomes the officers were looking for. The Claimant said that they were hoping someone would listen to their concerns. He said that the grievance was not brought in bad faith they just wanted someone who would listen to them and act on it. After a brief discussion Ms Lawford expressed provisional views favourable to security management and said that she was not convinced that the grievance was not brought in bad faith. She went on to say that she was suspending the Claimant whilst this was investigated. Although all the security officers confirmed that this was a collective grievance put together as the Claimant described, and that he simply happened to be the person who typed it up, only the Claimant was suspended.

3.13 The Claimant's suspension was confirmed in writing by Ms Lawford on 14 December 2016. Her letter explained that the purpose of the investigation was to determine whether or not the grievance had been submitted with malicious intent.

3.14 In the meantime, the Respondent had been carrying out an investigation into another security officer, Mr Beck. This related to use of the consultants' underground car park. It was clear on the evidence that this matter had been ongoing for some time. I saw a document dated 23 September 2016 that the Claimant and seven colleagues had signed to say that over the course of many years security staff had been allowed to park in the underground car park. Several security managers and their deputies had been aware of this throughout the history of the department. No issue had ever been raised with regard to it and they were not aware that this permission had been challenged, revoked or altered at any time. They believed this allowance was custom and practice within the security department.

3.15 I was not provided with clear evidence by the Respondent but it appears that Mr Beck was subject to a disciplinary process that concluded in November or December 2016. One outcome of that process was that Mr Goodison was required to send an email to all the security officers about car parking. An email was sent on 10 January 2017. Mr Goodison said that he was reminding the staff that the Trust had a car parking policy. He drew attention to the security officer job description, which said that officers were responsible for car parking at nights and weekends when contractual car park management were not on site. He suggested that officers should have a clear understanding of the Trust's car parking policy in order to carry out those duties. He said that any abuse of the policy would be viewed as potential gross misconduct. He said that he had recently discovered that a member of staff did not hold a parking permit and appropriate action had been taken. He had discovered that other staff were not following the policy and they would be dealt with once he had collated all the evidence. He said that if staff were parking on site without holding a car parking permit, not paying the relevant car parking charges or breaching the terms of a permit they were not authorised to do so and their actions must cease immediately.

3.16 Another outcome of Mr Beck's disciplinary process appears to have been that wider consideration was given to whether staff were misusing the underground car park. Ms Lawford's investigation was widened to include this matter, but there was a complete lack of transparency in the evidence before me about who took that decision, when and how.

3.17 Ms Lawford's evidence was that she investigated the issue and gathered evidence, which included:

3.17.1 An email from Mr Goodison to Mr Baldwin, who had been Unit Administrator/General Manager between 1983 and 1993. Mr Goodison had emailed Mr Baldwin on 1 November 2016 setting out his confirmation of a conversation they had had about the underground car park. He asked Mr Baldwin to confirm that he had never authorised any staff to use the underground car park. Mr Baldwin had replied on 1 November 2016 confirming that Mr Goodison's summary was broadly correct. To the best

of his recollection, some 30 years on, he did not personally authorise any staff other than consultants to use the underground car park apart from female nursing staff on night duty who were considered to be at risk in and around the multi-storey car park. Responsibility for the day-to-day management of security services laid with Mr Marshall. Mr Baldwin indicated that he failed to see the relevance of all this to present circumstances since car parking arrangements must have been reviewed since then.

3.17.2 The car parking database indicated that the Claimant had submitted forms applying for a parking permit, which had not been approved. Ms Lawford said that she was therefore assured that he knew what the process for parking permissions was before he could park in the underground car park. She also had a copy of the application, dated 20 January 2012.

3.17.3 The security officer job description, which Ms Lawford said suggested that the Claimant should have been "well-versed" in the rules relating to car parking on Trust premises.

3.17.4 A note of an investigation carried out by Mr Singleton on 30 January 2017 with Mr Hogan. Mr Hogan was the Contract Supervisor for the parking contractor, Indigo, who managed the car parks during the day. Mr Hogan had told Mr Singleton that he started work in October 2007. One day a colleague had told him to raise the barrier. He asked the colleague why and the colleague said that it was "courtesy" because "one day we may need them (security)." Mr Hogan was asked whether anyone from security had ever put pressure on the car park attendants to let them in free or implied that they would not provide help if required and he said, "No, not to my knowledge." In her witness statement, Ms Lawford said that the undertone had come from security staff making a "veiled threat" that car parking contractors may need security one day.

3.17.5 A report from Mr Goodison based on data from Continuum and CCTV images. Mr Goodison had created a spreadsheet setting out dates and times when the Claimant had entered or left the underground car park. The spreadsheet related to dates from in March, April and June 2016.

3.17.6 The Continuum report itself, which was a printout based on the use of the Claimant's swipe card to enter and exit different parts of the premises, including the underground car park. The report covered the same dates in March, April and June 2016. This was a substantial and detailed document of almost 50 pages.

3.17.7 Some CCTV footage of the Claimant entering and exiting the consultant car park on nine dates in March and April 2016.

3.17.8 The signed document in support of Mr Beck referred to above.

3.18 On 5 January 2017 Ms Lawford wrote to the Claimant requiring him to attend a further investigation meeting on 16 January 2017. The letter explained that the meeting was to follow-up the information supplied in relation to the grievance, to discuss a potential breach of the conditions of the Claimant's suspension (not relevant for present purposes) and to discuss "issues relating to potential misuse of Trust car parking facilities." No information was provided to the Claimant in advance of the investigative meeting.

3.19 The meeting took place on 16 January 2017. I saw a note of it. The Claimant attended with Mr Mercer and Ms Lawford was accompanied by Mr Burgin. Ms

Lawford again asked the Claimant a number of questions about how the collective grievance had come to be submitted, whether it represented everybody's concerns, to whom particular parts of the grievance related and so on. The notes do not record her going through with him the substance of the underlying complaints, or the evidence relating to those. She did not show him the notes of Mr Burgin's interviews with Mr Goodison and Mr Eyre, or ask him about their explanations.

3.20 There was not enough time on 16 January 2017 to deal with the car parking issues, so a further meeting was held on 20 January 2017. The notes of that part of the meeting are 1½ pages long. The Claimant confirmed that he had never had a car parking permit. He said that he had verbal permission to use the underground car park, passed down from when he started in security from staff who were already allowed to use that car park at nights and weekends. He said that this was allowed by Mr Turner (the previous manager). He appears to have been asked whether Mr Turner had authority and he said, "No." He said that he had learnt the job from his peers and was following suit. He said that a colleague had followed this practice for 40 years with no issues. He was apparently asked how he accessed the car park and he said that he used his swipe card. He was asked if his application for a parking permit in January 2012 had been refused and he said that he had never received anything back. He was apparently shown a photograph from the CCTV and confirmed that it was his car. He appears to have been asked about the Continuum report for 13 March 2016. The question is recorded as, "Access to park or thoroughfare?" The answer is recorded as, "Thoroughfare as well." The Claimant appears to have confirmed that he used the underground car park at nights, weekends and bank holidays (which I shall refer to as "out of hours"). It looks as though Ms Lawford asked questions about two particular shifts, 9 March 2016 and 26 March 2016. Then she seems to have indicated that she could do more work to establish if any of the dates were not out of hours. Mr Mercer appears to have indicated that if Ms Lawford was suggesting that the Claimant had used the underground car park at times that were not out of hours it would be helpful to work out the dates. The Claimant is recorded as saying that he used the car park a lot as a thoroughfare, for example if it was raining using the underground car park and swiping was a faster route. It appears to have been suggested by Ms Lawford that they would reconvene and that she would share a copy of the full corresponding report relating to car parking. However, that does not appear to have happened.

3.21 Instead, having concluded her interviews with the other security officers who were subject to this investigation, Ms Lawford wrote to the Claimant on 23 January 2017 to confirm the outcome of the investigation process. As regards the collective grievance, Ms Lawford set out her conclusions on the underlying substance of that grievance, although it was not apparent that the underlying evidence had been shared or discussed in any detail with the Claimant. Ms Lawford's conclusion was that the grievance concerns were essentially not well-founded, she had therefore reached the conclusion that the collective grievance had been submitted in bad faith and should be considered as a disciplinary matter. This would therefore be dealt with as potential gross misconduct at a formal disciplinary hearing. As far as car parking was concerned Ms Lawford said that the Claimant had admitted that he had no parking permit and that the alleged permissions were not authority to park. She said that she believed he had

abused his swipe card access system for personal gain by using it to enter and leave the underground car park and thereby avoid paying for car parking. This too would be dealt with at a disciplinary hearing.

3.22 In oral evidence Ms Lawford was asked about her investigation and conclusions. In particular:

3.22.1 She was asked how Mr Hogan's account to Mr Singleton could be taken as suggesting that a "veiled threat" had been made by security officers, as she suggested in her witness statement. She said that it was the first sentence of the meeting report. That sentence, as referred to above, indicated that this was being done as a matter of "courtesy." When this was pointed out to Ms Lawford she was unable to explain how the first sentence gave rise to an inference that a veiled threat had been made. Then she volunteered that Mr Singleton had told her this. There was no note of any discussion with Mr Singleton and none had been provided to the Claimant. She then indicated that this was in fact in specific response to whether another member of staff had been let out of the barriers. She was asked what relevance this had to the Claimant's case and she accepted that it had none. She could not provide a satisfactory explanation of why she had suggested in her witness statement in this case that there was evidence of a veiled threat from security. In re-examination it became clear that staff only lifted the barrier into the multi-storey car park. Access to the underground car park was by swipe card only. It was therefore difficult to see what relevance Mr Hogan's evidence had to concerns about the Claimant misusing the underground car park in any event.

3.22.2 Ms Lawford was asked how she had investigated the Claimant's point that there was a custom and practice of security officers parking in the underground car park out of hours and that this was unofficially tolerated. She accepted that she was aware that since 1991 when parking permits were introduced not a single security officer had been issued with a parking ticket. She said that she, "Found it more fortuitous that staff had not been issued with penalty charge notices". She had not investigated the Claimant's contention that there was an unofficially tolerated custom and practice.

3.22.3 Ms Lawford was asked whether she had carried out any investigation into whether security officers had been trained in how to carry out the car parking duties that formed part of their job description. She simply said that she was aware from Mr Goodison that they were responsible for locking up and ensuring staff could leave.

3.23 So far as Ms Lawford's investigation into the parking issue was concerned, I therefore noted that the only investigation into the Claimant's contention that there was a custom and practice of using the underground car park out of hours was that Mr Goodison had contacted Mr Baldwin, who had been the manager more than 20 years earlier. Mr Goodison had tried unsuccessfully to contact other managers, including Mr Turner, to whom he had written on 25 October 2016. The account relating to Mr Hogan had come to Ms Lawford second or third hand and appeared in fact to relate to a different car park. There was detailed Continuum evidence and some CCTV. That was not provided to the Claimant before his investigation interview and he was not asked in detail about it during the interview. Ms Lawford did not interview Mr Goodison, Mr Eyre or the other

security team members who were not the subject of disciplinary proceedings. The car park team more generally was not interviewed.

3.24 On 15 February 2017 Ms Lawford wrote to the Claimant requiring him to attend a disciplinary hearing on 3 March 2017. The allegations to be answered were:
3.24.1 submission of a collective grievance in bad faith;
3.24.2 misuse of Trust access card to gain access to the underground car park;
3.24.3 parking on Trust premises without a valid parking permit; and
3.24.4 deliberately evading payment for car parking facilities between 1 March and 10 July 2016.

3.25 Ms Lawford provided a sequence of events, management case summary, almost 1000 pages of documents gathered during the investigative process, and relevant policies and procedures. The letter suggested that the disciplinary investigation had provided the Claimant with an opportunity to participate fully in the process and identify any witnesses and information he believed was important to his responses to the allegations. It suggested that he was not expected to provide any additional information or witness statements for the disciplinary hearing. That is surprising since this was the first time the Claimant had been given copies of the extensive evidence.

3.26 Ms Lawford's management case summary for the disciplinary hearing included the following:
3.26.1 Ms Lawford said that all staff had told her they agreed with the contents of the grievance and did not believe it was being made in bad faith. She said that the difficulty with that "generic" response was that the documentation and details provided by management contradicted the belief. She did not appear to draw a distinction between whether the grievance was well-founded and whether it had been submitted in bad faith.
3.26.2 Ms Lawford confirmed that all staff interviewed had suggested that historically security managers had given permission for use of the underground car park. She said that the managers did not have authority to give such permission.
3.26.3 Ms Lawford confirmed that the Claimant had admitted to using the underground car park but had said that the previous security manager Mr Turner had given permission to do so when working out of hours. The Claimant had said that other staff members had been parking there for their whole employment. Ms Lawford said that the Claimant was using his access card to park in the underground car park and also to enter and leave the car park to carry out operational activities whilst on shift. She said that those timings were not in question for this case.

3.27 The disciplinary hearing took place on 3 March 2017. It was chaired by Mr O'Regan who sat with Ms Ashton. The Claimant attended with Mr Mercer and the management case was presented by Ms Lawford. There was an HR representative in attendance. The hearing lasted three hours. The first hour was taken up by Ms Lawford presenting the management case. After a break the Claimant presented his case. In particular:
3.27.1 The Claimant said that it was never his intention to submit a grievance in bad faith. He believed that his concerns were genuine. He understood that he could put in a grievance without fear of recrimination. When he realised

the grievance was deemed to be in bad faith he decided to drop it. They did not want any managers to be disciplined they just wanted someone more senior to listen to their concerns. They felt that they were not listened to. He had never suggested that he wanted Mr Goodison to be disciplined and he did not expect it to be a possible outcome of the grievance.

3.27.2 He explained the outcomes officers were hoping for in respect of each complaint. They wanted to be given more notice of any consultation. They hoped in future that there would be more consistency in information given. They were hoping as far as recruitment was concerned that the outcome would address the needs of staff and give them confidence. They felt that they were being over-supervised. ACAS described over-supervision as "bullying", which is why that was included. They hoped that the timesheets and clocking-in would be removed not that Mr Goodison would be accused of bullying. As regards the lockdown, they felt that security staff were no longer respected within the Trust.

3.27.3 As far as car parking was concerned the Claimant said that he used his access card because his duties took him to all areas of the Trust. He never expected it to be misuse of the card and he would not have used it as a route if he had known that was not allowed. He said that he did accept the allegation of car parking but had been informed that it was custom and practice at night. There were a hundred spaces and about 20 were normally used. He was never given a ticket and would have paid the fine. He never realised it would be considered as gross misconduct. He never parked there for personal gain just for convenience. There were many places he could have parked free of charge.

3.27.4 The Claimant said he had had time to reflect and would do things differently in future. He asked for a sanction short of dismissal.

3.28 Mr O'Regan asked some questions. The Claimant explained that it was towards the end of the initial investigation with Mr Burgin that they found out there was a concern about the grievance being submitted in bad faith. Mr Burgin mentioned that he would be investigating under the Acceptable Behaviour at Work policy. The staff had a discussion and said that this was getting out of hand. They considered withdrawing then Mr Burgin gave them a letter inviting them to withdraw which they all did. The Claimant accepted that he could see now why it might be thought the grievance had been submitted in bad faith. He accepted that the information that Mr O'Regan had taken him through at the disciplinary hearing was available to him or was information he could have found out for himself. The Claimant also explained that it was Mr Campbell who advised the staff to put in a grievance. Mr O'Regan then asked a number of further questions about the grievance.

3.29 Mr O'Regan moved on to ask questions about car parking. He made clear that the allegation was not about using the card to move through the car park but to park in it. He asked the Claimant whether he accepted that he had personally gained by parking in the car park when he did not have a permit. The Claimant said that he did not see it that way but would accept Mr O'Regan's view. The Claimant accepted that he had applied for a parking permit but said that he did not receive one. He did not accept that he had no authority to use the car park. The Claimant accepted that he knew there was a need to pay for a parking permit. He had parked in the car park without paying when other colleagues had

paid. The Claimant accepted that he knew about the need for a permit and about the need to pay but had repeatedly parked without either. He pointed out that there were other people who did so on nights and at weekends. A little later Mr O'Regan asked him about the security officer job description. The Claimant accepted that he had responsibility for car parking at weekends and nights but said that as far as he was aware it was letting people in and out of the car park. It was suggested to him that he should have had an understanding of the car parking rules. The Claimant repeated that he thought their responsibility was to manage entry and exit. Mr O'Regan said that the job description required a much wider responsibility than just lifting a barrier; it was responsibility for car parking.

3.30 The meeting ended at 12:15pm and at 1pm Mr O'Regan gave his decision. He said that as far as the collective grievance was concerned the Claimant had shown some remorse and learning aspects, which gave potential to rebuild relationships. On that basis he would have been given a final written warning. As regards the car parking allegations however Mr O'Regan said that he believed these amounted to gross misconduct. His decision must be based on all four allegations and taking this into consideration his decision was dismissal. Mr O'Regan did not explain what findings of misconduct he had made nor did he explain what sanctions he had considered or why he considered dismissal appropriate. He did not ask the Claimant about mitigating circumstances.

3.31 Mr O'Regan's decision was confirmed in a letter dated 20 March 2017. Having summarised the management case and the Claimant's case Mr O'Regan set out the conclusions of the disciplinary panel. As regards the collective grievance Mr O'Regan said that from the findings of the investigation and the Claimant's responses during the hearing the panel formed the view that he failed to make any informal attempt to seek answers. There was no evidence that he gave the management team any opportunity to address his concerns formally or informally. Mr O'Regan said that the findings of the investigation showed that multiple facets of the grievance were factually inaccurate. There was no evidence that the Claimant attempted to qualify any of the information he submitted. The panel therefore concluded that his motivations and intentions in submitting it were vexatious.

3.32 As regards car parking Mr O'Regan said that the Continuum records confirmed that the Claimant's card was frequently used in the underground car park around his start and finish times. Mr O'Regan said that the Claimant, "Accepted you had parked your vehicle in the car park on the dates in question." The Claimant had never held a permit to use staff car parking facilities. This was said to be a clear misuse of the card and the Claimant's position. Mr O'Regan said that although the Claimant stated that he was originally told it was custom and practice for security staff to use the car park he provided no evidence to support it. These allegations were therefore upheld. As regards the allegation of deliberately evading payment for car parking facilities Mr O'Regan said that the panel found the Claimant's explanation unreasonable. They said that his job description required him to have an awareness and understanding of the car parking policy and that he must be responsible for car parking at nights and weekends. Given that the panel considered he had a responsibility to be aware of and adhere to car parking regulations as part of his role and that he accepted that he acted outside of the rules the allegation was upheld.

3.33 The outcome letter said that the panel considered the appropriate sanction and took into account any potential mitigation for the Claimant's actions. The letter said that the panel noted the Claimant had reflected on his actions and learned from events so far as the grievance was concerned. However, he had not provided a credible explanation for his actions after accepting allegations two, three and four. The panel found these amounted to persistent abuse of his position and could identify no acceptable mitigation for his actions. They also referred to revenue lost by the Trust and disadvantage to paying colleagues. Furthermore it was suggested that the Claimant's failure to accept responsibility for his actions in relation to allegations two to four brought his honesty and integrity into question. The panel concluded that his actions constituted gross misconduct. They therefore decided to dismiss him from employment with immediate effect.

3.34 I noted that to some extent the letter seemed to confuse the question whether there was gross misconduct, the question of mitigation and the question of appropriate sanction. Further, it was inconsistent with what Mr O'Regan said at the disciplinary hearing. The letter did not say that the concerns relating to the grievance formed part of the reason for dismissing the Claimant. It referred only to the car parking allegations as the reason for dismissing. In his witness statement Mr O'Regan said that he took into account the totality of the misconduct in deciding to dismiss the Claimant. He confirmed that the grievance issue alone would have led to a final written warning.

3.35 In his witness statement, Mr O'Regan said that he felt that the investigation, on the findings presented, demonstrated that the Claimant's intentions in submitting the grievance were to cause Mr Goodison and Mr Eyre to be removed from their positions via the acceptable behaviour policy and he therefore concluded it was brought maliciously or vexatiously. In his witness statement Mr O'Regan also said that a number of the Claimant's responses at the disciplinary hearing were of particular significance to his decision. So far as the misuse of the car park was concerned the significant points were, first, that the Claimant accepted Ms Lawford's view that he had personally gained by parking without a permit; secondly that he was aware of the need for a permit and had parked without one but attempted to justify this instead of accepting responsibility; and thirdly that he agreed his job description included responsibility for car parking at weekends and nights but gave an excuse when it was suggested he should have had an understanding of car parking rules.

3.36 In his oral evidence Mr O'Regan was asked about the fact that the Continuum evidence related to a period ending in June 2016. He was asked why there had been no attempt to put a stop to the car parking practice in June 2016 when Mr Goodison had evidently been investigating it. He explained that his first knowledge of the issue was when it was presented to him at the disciplinary stage. He was asked about the letter Mr Goodison wrote in January 2017 and he said that he "suspected Mr Goodison could have informed staff earlier." He suggested that he was under significant pressure. He was asked whether the fact that Mr Goodison had evidently known what was going on for months but had taken no steps to stop it, weighed in his decision as to the seriousness of the Claimant's conduct. He said that he did reflect on the timescales but found that

the Claimant did park there between March and June. That was not an answer to the question. The question was asked again and Mr O'Regan said that he thought more about monitoring. It appears therefore that Mr O'Regan did not take into consideration the fact that the security manager had been aware that security officers were parking in the underground car park from June 2016 at the latest but had not taken any steps to stop the practice until January 2017.

3.37 Mr O'Regan was asked what account he took of the letter of 23 September 2016 in which eight of the security officers described a custom and practice of parking in the underground car park. He said that he found it strange because they had applied for permits. He was "not surprised" that they would "try and defend this on custom and practice." He said that the Claimant had applied for a permit and been refused (although the Claimant had not been refused a permit, he simply had not received a response to his application).

3.38 Mr O'Regan was asked whether in considering the Claimant's point that there was a custom and practice, he took into account that no parking tickets had ever been issued by Indigo or Excel (the relevant contractors) during a period of more than 10 years. He was asked if he had considered whether this supported the suggestion of a custom and practice. He said that he had significant concerns about the remit of Excel and the potential relationship between security staff and Excel to which Ms Lawford referred. He was asked again whether the absence of parking tickets amounted to some evidence in support of the contention that there was a custom and practice. He said that he would expect checks to be carried out and that maybe when checks were carried out no security staff were parked there. He took the view that checks would have been undertaken. He was asked whether he had thought it necessary to investigate the point that no parking tickets had been issued and to find out why that was. He said that Ms Lawford would have checked whether any tickets had been issued and none had. He was asked again, more than once, whether he had thought it was necessary to investigate why no parking tickets had been issued for more than 10 years. Eventually he accepted that with hindsight that would have been helpful. He was asked whether he had considered at the time he reached his decision why no parking tickets had been issued and whether that was capable of supporting the contention that there was a custom and practice. Again he did not answer the question. He said that he gave it thought and was satisfied that no tickets were issued. I find that he did not consider whether the fact that no security officer had been issued with a parking ticket during a period of more than ten years might support the contention that there was a custom and practice.

3.39 Mr O'Regan confirmed that he had Mr Baldwin's email when he reached his decision and that he took it into account. He acknowledged that Mr Baldwin obviously allowed nursing staff to park but said that that did not mean that they did not have permits. Further, car park management was different in his day.

3.40 He did not have any information from Mr Turner, Mr Maynard or Mr Wood when he reached his decision but he said that if he had had the evidence they provided in these proceedings, it would not have made a difference (see further below). He said that Mr Turner's email would not have made a difference because he would expect all security staff to operate within the policy and they did not. He was asked about whether it would have made a difference if their senior manager

condoned the practice. Eventually in answer to that question that he said that the Claimant was not dismissed for parking in the underground car park out of hours but for parking there during the daytime. That was not in the outcome letter or in his witness statement and I found it wholly implausible.

3.41 Mr O'Regan was asked about the Respondent's car park policy. The policy says that it is designed to define and clarify parking arrangements for staff within the hospital grounds. It says that persistent failure to follow the requirements of the policy may be classed as a disregard of Trust policies and procedures and may result in disciplinary action. It indicates that staff wishing to park within the hospital grounds are required to apply for a parking permit and that failure to follow this will result in a warning or potentially a penalty charge notice ("PCN") being issued. The policy explains that staff will receive a warning notice in the form of a sticker issued by car park attendants if they are parked in a staff parking area without a valid permit. The next step is for a PCN to be issued. Persistent offenders or anyone attempting to interfere with the PCN will have their parking permits withdrawn and further action may be taken. Mr O'Regan accepted that the policy did not suggest that as well as receiving a warning notice and subsequently a PCN, members of staff who parked without a parking permit in the staff car park would be regarded as committing gross misconduct. He said that he regarded it as fraud under the disciplinary policy.

3.42 Mr O'Regan was asked whether he had any evidence from the current management, Mr Goodison or Mr Eyre, about whether there was a custom and practice of allowing security officers to park out of hours in the underground car park. He said that he was clear in his mind that Mr Goodison would not have expected this or been aware of it. He was asked if he had any evidence of that when he reached his decision. He said that he had spoken to Mr Goodison since dealing with the Claimant's case. Then Mr O'Regan said that Ms Lawford had said in the disciplinary hearing that she had spoken to Mr Goodison. That had not been said before. It was not recorded in the notes of the hearing. Mr O'Regan was asked whether he thought he needed to know what Mr Goodison said about the custom and practice in order to decide whether management condoned it. His answer was "It is reasonable as such and there is no evidence to suggest it was the case." I was not entirely clear what that meant. Mr O'Regan went on, eventually, to say that Mr Goodison could and should have been asked the question.

3.43 Mr O'Regan was then asked about the reliance that had been placed on the fact that the Claimant applied for a parking permit. The Claimant's position in evidence to me was that (apart from one occasion) he did not park in the underground car park during the daytime, but only out of hours. If he was right that there was a custom and practice tolerated by management of parking in the underground car park out of hours, he would still have needed a parking permit to park there during the daytime. Applying for a parking permit was not therefore necessarily inconsistent with his contention that there was a custom and practice relating to out of hours. Mr O'Regan was asked whether he had considered that. He said that he had not. He had not asked at the disciplinary hearing why the Claimant applied for a parking permit.

3.44 In re-examination, Mr O'Regan was asked some particular questions about the Continuum records and what conclusions he had reached at the time about the reason the Claimant had swiped into the underground car park on particular occasions. He said that he did not go through every specific date as such. However, when the Continuum report suggested that the Claimant had swiped into the car park around his work start time and swiped out around his work finish time, Mr O'Regan said that he was definite that the Claimant had parked his vehicle.

3.45 I did not find Mr O'Regan's evidence generally persuasive. As the examples above indicate, he repeatedly failed to answer questions and some of his answers were wholly implausible, for example the suggestion for the first time in oral evidence that the Claimant had been dismissed for parking in the underground car park during the daytime rather than more generally. However, I accept that he genuinely believed that the Claimant had committed gross misconduct. It was not suggested to him that his belief was not genuine and I accept that it was.

3.46 The Claimant was told how to appeal against the decision. He had to do so by 3 April 2017 and he appealed by email dated 30 March 2017. He repeated again his understanding that security staff had used the underground car park out of hours. He said that he was under the impression that security management knew about this, including his most recent manager, Mr Goodison, although he denied it. He said that there had been no complaint from management and no written warning, just straight into a hearing for fraud. The appeal was forwarded to the relevant individual. On 3 April 2017 Mr Gwilliam's PA said in an email that she had been contacted by the Claimant and had told him that he would shortly be receiving a written acknowledgement. A written acknowledgement of his appeal was sent to him on 10 April 2017. That told him that arrangements for his appeal hearing would be made as soon as possible.

3.47 Almost 2 months later, on 5 June 2017, Mr Baldwin, HR business partner, wrote to the Claimant inviting him to an appeal hearing on 20 June 2017. On 9 June 2017 the Claimant emailed Mr Baldwin to say that in view of the totally unacceptable timeframes he would not be attending the appeal. He said that it was clear that the Respondent had no intention of following the ACAS Code of Practice and that he had no doubt that they were aware he had three months to apply to an Employment Tribunal. On 13 June 2017 Mr Baldwin wrote to the Claimant to tell him that a decision had been taken to cancel the appeal hearing in view of the Claimant's non-attendance.

3.48 Mr O'Regan was asked about the delay in arranging an appeal in his oral evidence. He suggested that HR were under pressure. He said that he would hope and expect for a different timescale. He was asked whether he was happy with the level of communication about the Claimant's appeal. He said that an "updated position would have been reasonable." Mr O'Regan was also asked about the decision that was taken not to proceed with the Claimant's appeal because he had indicated an intention not to attend the hearing. He appeared to say that it was normal practice if a person was not attending an appeal that it would be treated as having been withdrawn.

Legal Principles

4.1 So far as unfair dismissal is concerned, the Employment Rights Act 1996 provides, in s 98, so far as material as follows.

> **98 General**
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it –
>
> …
>
> (b) relates to the conduct of the employee,
>
> …
>
> …
>
> (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.
>
> …

4.2 It is well-established that in a claim for unfair dismissal based on a dismissal for misconduct, the issues to be determined having regard to s 98 are: did the employer have a genuine belief in misconduct; was that belief based on reasonable grounds; and when the belief was formed had the employer carried out such investigation as was reasonable in all the circumstances: see *British Home Stores Ltd v Burchell* [1980] ICR 303. The burden of proof has of course changed since that decision: *Boys and Girls' Welfare Society v McDonald* [1996] IRLR 129.

4.3 Furthermore, the question for the Tribunal is whether dismissal was within the range of reasonable responses open to the employer. The range of reasonable responses test applies to all aspects of the decision to dismiss including the procedure followed: see *Foley v Post Office; HSBC v Madden* [2000] ICR 1293 *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23.

4.4 I emphasise, therefore, that with respect to the unfair dismissal claim, it is not for the Tribunal to substitute its view for that of the Respondent. The Tribunal's role is not to decide whether the Claimant was guilty of the conduct alleged, but to consider whether the Respondent believed that he was, based on reasonable grounds and following a reasonable investigation.

4.5 The ACAS Code of Practice on Disciplinary and Grievance Procedures is relevant and I have had regard to it.

4.6 Pursuant to s 122(2) and s 123(6) Employment Rights Act 1996, both the basic and compensatory awards may be reduced because of conduct by the employee. Under s 123(6) the relevant conduct must be culpable or blameworthy; it must actually have caused or contributed to the dismissal; and it must be just and equitable to reduce the award by the proportion specified: see *Nelson v BBC (No 2)* [1980] ICR 110 CA. By contrast, the basic award can be reduced where conduct of the Claimant before the dismissal makes that just and equitable. There is no requirement that the conduct should have caused or contributed to the dismissal.

4.7 In *Hollier v Plysu* [1983] IRLR 260 the EAT suggested broad categories of reductions: 100% where the employee is wholly to blame; 75% where the employee is mainly to blame; 50% where the employee is equally to blame and 25% where the employee is slightly to blame.

4.8 Where the Tribunal considers that there is a chance that the employee would have been fairly dismissed in any event, then the compensation awarded may be reduced accordingly: *Polkey v A E Dayton Services Ltd* [1987] 3 All ER 974. Guidance on how to approach that issue is set out in the case of *Software 2000 Ltd v Andrews* [2007] IRLR 568.

Application of the law to the facts

5.1 Against the detailed findings of fact set out above, I turn to the issues in this case. The first question is, what was the reason for dismissing the Claimant? As the findings above make clear, I accept that Mr O'Regan genuinely believed that the Claimant had committed gross misconduct and that this was the reason for dismissing him. That was not challenged in cross-examination.

5.2 I turn therefore to the question whether the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. I have no hesitation in finding that it did not. Dismissal was outside the range of reasonable responses.

5.3 The reasonableness of the investigation, the reasonableness of the grounds for believing in misconduct and the fairness of the procedure all overlap and I consider them together. I find that the Respondent's approach was unreasonable in particular for the following reasons, based on the above findings of fact:

5.3.1 When investigating whether the collective grievance was brought in bad faith, Ms Lawford did not ask the Claimant in any depth about the underlying allegations. She did not show him the notes of Mr Burgin's interviews with Mr Goodison and Mr Eyre, or the documents to which they referred, and ask for his version of events. She focused on the process of assembling the grievance. Yet she went on to draw conclusions about the substance of the grievance, and that formed the basis of her view that the Claimant should face disciplinary proceedings. Mr O'Regan did ask some questions about the substance of the grievance, but he did not make any findings on any of the specific grounds of complaint. Rather, the dismissal letter said that the "findings of the investigation showed that multiple facets of the grievance were inaccurate." Any such "findings" were made by Ms Lawford without the Claimant having seen any of the underlying documentation or been asked about it.

5.3.2 When investigating whether he had misused the underground car park, Ms Lawford did not provide the Claimant in advance with the 50 page Continuum report or the spreadsheet. She did not explore the allegation with him in anything but the most superficial terms. She did not take him through specific dates to find out what his account was. Although she appears to have agreed to return to this, she did not do so. She did not explore with him on what dates he accepted parking in the underground car park and what the reason for that was.

5.3.3 That was not put right at the disciplinary hearing. Although the Claimant had been provided with the full documentation by then, Mr O'Regan did not ask him about individual dates in any detail either. Furthermore, Mr O'Regan appears to have assumed that the Claimant admitted that he parked in the underground car park on the dates that the swiping in and out times matched his day shift times, without actually asking him. The superficial and generalised approach was simply unreasonable, given the importance of establishing when and why the Claimant had parked in the underground car park. It is not an answer to say that the Claimant could have volunteered the information, particularly given that the letter inviting him to the disciplinary hearing suggested that he did not need to call evidence or provide new information.

5.3.4 Both Ms Lawford and Mr O'Regan placed weight on the fact that the Claimant had applied for a parking permit without ever asking him why he had done so. Mr O'Regan did not consider whether there was an explanation that was consistent with the custom and practice the Claimant said existed.

5.3.5 There seemed to me to be a wholesale failure to give any proper consideration to the contention that there was an unofficially tolerated practice of using the underground car park out of hours. The Respondent's approach was perhaps exemplified by Mr O'Regan's evidence that he was not surprised that the officers would try to defend the allegations on such a basis. The starting point appears to have been that this was an excuse rather than an explanation that called for consideration. While Mr Goodison had tried unsuccessfully to contact Mr Turner, there were other obvious avenues of investigation and consideration. Mr O'Regan said that the Claimant provided no evidence in support of the custom and practice, but he failed to take into account the 23 September 2016 letter that was signed by eight of the security officers. Mr O'Regan assumed that Mr Goodison was not aware of any purported custom and practice, without ever asking him. He eventually accepted that he could and should have done so. He did not seem to have thought about why Mr Goodison had done nothing to stop the practice between June 2016 and January 2017. Neither Ms Lawford nor Mr O'Regan investigated why no security officer had ever been given a PCN over the course of many years. Ms Lawford apparently assumed it was "fortuitous." The car park managers were not asked. Indeed, Mr O'Regan did not take into account the absence of PCNs at all in deciding whether there was a custom and practice. This was the fundamental explanation advanced by the Claimant for parking in the underground car park out of hours and the approach of Ms Lawford and Mr O'Regan was

wholly unreasonable. No proper consideration was given to whether there was indeed such a custom and practice.

5.3.6 Furthermore, Mr O'Regan placed weight on the prejudicial and irrelevant evidence relating to Mr Hogan. Ms Lawford had formed the view that security officers had made a "veiled threat" either on the basis of a written document that could not possibly support such an inference, or on the basis of a conversation that was not disclosed to the Claimant. In any event, Mr Hogan's comments related to a different car park and were irrelevant to the Claimant's case. Nonetheless, this prejudicial suggestion featured in the disciplinary process and Mr O'Regan took it into account.

5.3.7 Both Ms Lawford and Mr O'Regan placed weight on the fact that the Security Officer job description included responsibility for car parking. The Claimant's explanation that this was just about locking up and ensuring staff could leave was not investigated at all. Nobody was asked whether the security officers were responsible for "policing" the car park or issuing tickets. Nobody was asked whether they had been trained in these matters. An assumption was made that the Claimant was "well-versed" in the policy on the basis of a job description and in the face of his explanation, without any further investigation.

5.3.8 None of these matters were corrected on appeal, because no appeal took place. The ACAS Code of Practice calls for an appeal without unreasonable delay. I was not given any adequate explanation as to why it took almost three months to arrange an appeal hearing. There were two months during which the Respondent simply did not communicate with the Claimant at all. The Claimant had been dismissed. This was his appeal to try and get his job back. It was not reasonable to delay for almost three months, for two of which there was no explanation or communication. The Claimant's decision not to attend is understandable. The Respondent could still have gone ahead without him, but chose not to do so. Its approach to the appeal was unreasonable and meant that none of the previous shortcomings were rectified.

5.4 I have reminded myself that it is not for me to substitute my view, either as to procedure or as to substance. I am quite satisfied that the matters set out above were outside the range of what was reasonable in terms of investigation, grounds for belief and procedure. In those circumstances no reasonable employer would have dismissed the Claimant and his claim of unfair dismissal succeeds.

Further findings of fact: *Polkey* and contributory fault

6.1 It is therefore necessary, for the purposes of deciding whether there is a chance that the Claimant would have been fairly dismissed in any event, and whether he contributed to his dismissal, to make findings about whether he actually committed misconduct. I start by observing that I found the Claimant's evidence generally to be credible. He was a careful and thoughtful witness, who had a clear recollection. He made concessions in cross-examination where appropriate and presented as a witness doing his best to give an honest and accurate account of events.

6.2 I have not made detailed findings of fact about the matters that were the subject of the collective grievance. I did not hear evidence from Mr Goodison or Mr Eyre and was not in a position to make findings about whether those complaints were

well-founded. The Claimant accepted throughout his evidence to me (as he had at the disciplinary hearing) that he had made mistakes. He said that he was a young security officer, and had been badly advised by his trade union at the Holiday Inn. That is why he withdrew the grievance. On that basis, I asked Mr Sugarman to deal with this in cross-examination by way of examples within the grievance only. In some respects, the Claimant made concessions – for example that explanations had in fact been provided to him at the time. In other respects, he maintained his position that he and the other security officers genuinely felt that they were being treated unfairly in the ways set out in the grievance. He disagreed with some of the points put to him, for instance when saying that he was not responsible for the covering letter to the grievance, which used the word "vendetta." I have already made a finding about that. He maintained that overall staff felt that Mr Goodison was using bullying tactics but he said that it was never their intention to get anyone dismissed they just wanted to get their point across. They did not believe that it would lead to an investigation under the Acceptable Behaviour at Work policy.

6.3 In the light of that evidence, and the Claimant's concession of wrongdoing, I find that he did behave inappropriately by participating in a grievance that included complaints about matters that had to some extent already been explained or addressed, or where he had failed to raise the matter informally or seek an explanation. However, I do not find that the grievance was submitted vexatiously or in bad faith. I accept the Claimant's evidence that he genuinely felt that staff were being over-managed and subject to unacceptable behaviour by their managers. Staff understood (on advice from the trade union) that this might be classed as bullying and, again on advice, they put in a grievance about it. When it became apparent that it might lead to an investigation of Mr Goodison under the ABAW policy, the Claimant (and his colleagues) withdrew the grievance. The mere fact that a grievance is withdrawn before it has been fully addressed does not mean that it was made maliciously. I find that it was not.

6.4 Turning to the question of car parking, I had the benefit of Mr Sugarman's careful questioning, by reference to the underlying evidence. As a result, the Claimant's position was rather clearer. He accepted that he had parked in the underground car park on two days some time before the dates Mr Goodison was investigating, when he was driving his previous car. He acknowledged that he should not have done so. He understood that he might have received a PCN, which he would have paid. He had not parked there during peak times on any other occasion. He had parked there out of hours because he had been told to do so when he joined the Trust. His colleagues did so and he understood that it was an unofficially tolerated custom and practice. They told him, "We use the consultant car park out of hours. Phil Turner knows. He's fine with it." The Claimant knew that no security officer had ever been given a PCN for this. He understood that Mr Turner did not have authority to given written permission, but he knew that he was fine with the security officers parking there and he did so himself if he called in on a night. The Claimant had applied for a permit on his first day because Mr Turner told him to do so. The explanation for his swiping in and out of the underground car park close to his start and finish times on day time shifts was that he used to park in the multi-storey car park and swipe into the underground car park to walk through it as a thoroughfare. When it was put to him that he had not said this during the disciplinary investigation, he said that he had said that he used the car park as a thoroughfare. He had not said that he was doing so when coming from the multi-storey, but he had not been asked. He accepted that the

timings may have "looked suspicious" but that was not an admission of guilt. He had not seen the Continuum report before the investigation meeting. Ms Lawford had it at the meeting. She asked him about particular sections only. It was in the pack for the disciplinary hearing, but Mr O'Regan did not ask him any questions about his use of the underground car park as a thoroughfare. The Claimant knew that a colleague, Mr Paramore, had a permit and was paying for it. He said that Mr Paramore had one because he had filled the form out when he started, just as the Claimant did. However, Mr Paramore got a permit and the Claimant did not. Mr Paramore used to say that he might get rid of the permit because he was paying and the other officers were not. He did not feel he needed it. The other nine officers did not have one and parked in the same place.

6.5 I also had before me evidence that was not available to Mr O'Regan. Mr Turner provided a statement and gave evidence. He explained that while he had not given written or verbal permission to the security officers, he was aware that they were using the underground car park out of hours, when it was never more than a quarter full. Had he discovered that any of them were using the underground car park at other times he would have dealt with them in a common sense way. He described at least two occasions when Mr Goodison had used the underground car park during peak hours. He also described two occasions when officers from the Northern campus were asked to cover at Central and Mr Goodison had told them to park in the underground car park. The evidence about Mr Goodison was not challenged and I accepted it.

6.6 In cross-examination, Mr Turner confirmed that he had left the Trust 16 months before Mr Goodison wrote to him in October 2016. He said that the reason he had not replied to the letter was because he was disillusioned with the Trust. He said that it was not because he knew he should have stopped security officers from parking in the underground car park and I accepted his evidence. He was a straightforward witness who no longer worked for the Trust and he made concessions where appropriate. I found his evidence on this credible. Mr Turner confirmed that he did not have authority to allow security officers to park in the underground car park. He was aware that they were doing so out of hours. He had worked for the Trust for 37 years, 26 of them in Security. Staff were already parking in the underground car park out of hours. That continued after a barrier was put in place. He had no problem with it. He always got new staff to apply for a permit straight away.

6.7 I accept the Claimant's evidence about car parking. I find that he only used the underground car park during peak times on the occasion when he was driving his previous car. The other occasions when he had swiped through the barrier at peak times were when he had parked in the multi-storey and was using the underground car park as a thoroughfare. He did use the underground car park out of hours, but this was because he had been told to do so when he started by his peers. Almost all of the security officers did so, their manager at the time was aware of this and sometimes did the same. This had been the practice for many years and, despite the contents of the car parking policy, no PCN had ever been issued. Further, there was no evidence that the Claimant had been given any training about the content of the car parking policy and I find that he had not. He had applied for a permit on the first day because Mr Turner told him to. That did not undermine his evidence about being told he could use the car park out of hours.

6.8 In accepting the Claimant's evidence, I considered the point that he had not advanced the explanation about the multi-storey car park clearly during the disciplinary process. However, it seems to me that he was not asked about it. He was not asked in detail about specific days. He gave the general explanation to Ms Lawford about using a thoroughfare. He was not asked by her or Mr O'Regan to expand on that. Further, he was not asked to clarify precisely the occasions on which he accepted parking during peak times and neither Ms Lawford nor Mr O'Regan made findings about the dates on which he had parked during peak times.

6.9 Taking all these matters into account, together with the fact that Mr Goodison took no steps to stop the out of hours use of the underground car park between June 2016 and January 2017, and indeed himself suggested on at least two occasions that security officers from Northern use that car park, I find that the Claimant's conduct did not amount to gross misconduct. Indeed, I do not find that it was culpable and blameworthy. He was doing what he had been told to do when he started, in the full knowledge of his then line manager and, subsequently in the knowledge of Mr Goodison. The one occasion on which he parked during peak hours was culpable and blameworthy, but did not by itself amount to gross misconduct. Under the terms of the parking policy, had it been spotted he would have been given a warning. The fact that it entailed use of his security officer's swipe card did not in my view mean that it was gross misconduct, particularly against a background of the custom and practice relating to out of hours parking.

6.10 Mr O'Regan did not have any information from Mr Turner when he reached his decision but he said that if he had had the evidence he provided in these proceedings, it would not have made a difference. He would expect all security staff to operate within the policy and they did not.

***Polkey* and contributory fault**

7.1 I turn to the question whether there is a chance that the Claimant would have been fairly dismissed in any event if a fair procedure had been followed. I find, applying the legal principles referred to above, that there is no chance that he would have been *fairly* dismissed. Mr O'Regan's position was that the wrongdoing relating to the grievance would, by itself, not have led to dismissal. As regards the car parking, any reasonable and fair procedure would, necessarily, have entailed proper consideration of whether there was a custom and practice relating to out of hours parking. Had there been such a consideration, it seems to me inevitable that a different approach would have been taken. No reasonable employer would dismiss an employee for doing something that he had been specifically told to do when he started work, that had been effectively condoned by his line managers, that had been done for years without issue and in respect of which no warning had been given even between June 2016 and January 2017. Further, any reasonable and fair procedure would have entailed actually asking the Claimant about the specific dates on which it was suggested that he had parked inappropriately and finding out his explanation. It would then have been understood that he did not accept that he had regularly parked in the underground car park during peak hours, rather that he had done so on the one occasion he admitted. No reasonable employer would have dismissed him for that. The chances of a fair dismissal in any event are therefore nil.

7.2 As regards contributory fault, in the light of my findings of fact above there were two elements of blameworthy conduct. One was the approach to the grievance. As I have found there was no question of bad faith or vexatiousness, but the Claimant was culpable in advancing criticisms when he had been provided with an explanation or when he had not made any effort to raise the matter informally, despite encouragement to do so. The other element was parking in the underground car park during peak hours on two days prior to March 2016. I find that those two matters fall at the lower end of the spectrum. The Claimant was slightly to blame for his dismissal, but no more than that. He was not culpable in parking out of hours in the underground car park, because he was told to do so by his manager and his managers unofficially condoned it. Nor did he park extensively in the underground car park during peak hours. This was an isolated instance and must be viewed against the practice out of hours and the content of the car parking policy.

Employment Judge Davies

Date: 8 May 2018