EMPLOYMENT TRIBUNALS

Claimant: **Mr. J Braithwaite**

Respondent: **Frank Key (Nottingham) Limited**

Heard at: **Nottingham**

On: **26th & 27th November 2018**

Before: **Employment Judge Heap (Sitting Alone)**

Representation
Claimant: **Mr. A Berk - Solicitor**
Respondent: **Mr. N Arora - Counsel**

JUDGMENT

JUDGMENT having been sent to the parties on 29th November 2018 and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, the following reasons are provided:

REASONS

BACKGROUND & THE ISSUES

1. The Claimant presented his claim by way of a Claim Form received on 21st October 2016. At that point the claim was one of unfair dismissal; wrongful dismissal and discrimination relying on the protected characteristic of disability. That latter complaint was withdrawn at a Preliminary hearing before Employment Judge Britton and I therefore need say no more about it. That withdrawal left the sole complaints before me as ones of unfair and wrongful dismissal.

THE HEARING

2. The hearing of this matter proceeded over two days, with evidence and submissions being completed on the afternoon of the first day. Thereafter, I considered the matter overnight before giving Judgment today.

3. Before taking my decision, I have taken into account all the evidence contained within the hearing bundle as agreed between the parties; the witness evidence that I

have heard and the helpful submissions from both Mr. Berk on behalf of the Claimant and Mr. Arora on behalf of the Respondent.

4. In terms of the witness evidence, I heard from Amanda Smith, Richard Baverstock and Richard Meeks on behalf of the Respondent. Mrs. Smith took the decision to dismiss the Claimant; Mr. Baverstock had suspended him and was a witness to one of the allegations which later formed part of the reasons for the Claimant's dismissal and Mr. Meeks dealt with the appeal against dismissal.

5. I considered all three witnesses to be credible witnesses who gave an honest and reliable account to the best of their recollection. Their evidence was consistent with the documentation before me and they answered the questions put to them appropriately and candidly.

6. I also heard from the Claimant. I was less impressed with the Claimant's evidence than that of the Respondent's witnesses and invariably I have therefore preferred their account unless I have expressly said to the contrary. In this regard, I found the Claimant to be evasive in his evidence – often simply repeating an assertion that Mr. Arora was asking him leading questions rather than answering the question that he was being asked. That situation generally manifested itself when the point being put to him by Mr. Arora was one that might well place his case in difficulties. The Claimant's evidence on a number of occasions also did not accord with the contemporaneous documents before me. For example, he maintained that he had apologised for his actions in a meeting, although he was not able to say which one, but I have not been taken to anything by the Claimant or by Mr. Berk in re-examination to suggest that that was the case. Moreover, the Claimant's witness statement had also been silent on that point and it was only mentioned for the first time in cross examination.

7. The Claimant was also unable to explain an inconsistency in the accounts he gave at two separate meetings about throwing his keys at Mr. Baverstock and I deal with that matter further in my findings of fact.

8. However, for those reasons I considered him a less than satisfactory witness and again, unless I have said otherwise, I have accordingly preferred the evidence of the Respondents witnesses where there is a dispute between the parties on the facts.

9. I was also provided on the morning of the hearing with a witness statement in respect of a Mr. Oldham which the Claimant sought to rely upon. Mr. Berk was not able to say why this had been provided so late, save as to say that the Claimant had only just given it to him. He was not able to say why Mr. Oldham had not previously been approached to be a witness at the time that witness statements were exchanged. Mr. Oldham did not attend the hearing and I have heard submissions from the parties as to the weight to be attached to his statement.

10. I have determined ultimately that I can place no weight on it. It directly contradicted evidence given by Mr. Meeks who had attended and was cross examined. Mr. Arora had no opportunity to cross examine Mr. Oldham as to the inconsistencies in the evidence contained in the statement when compared to the evidence given by Mr. Meeks. There was no suggestion that Mr. Oldham could not have attended had he been asked to do so and as he is still employed by the Respondent doubtless they could have made arrangements for him to have time off in that regard. Moreover, had the Respondent been on notice of the statement at an appropriate point – that is as at the date of exchange of statements or at the very least at some point before the commencement of the hearing – they could have disclosed the documentation referred to in Mr. Meeks' evidence in order to deal with the points raised. Before

having sight of the statement from Mr. Oldham, it was not understood to be the case that that aspect of Mr. Meeks' evidence was in dispute.

11. For all of those reasons, I have attached no weight to the statement from Mr. Oldham in the course of my determination of the claim.

THE LAW

12. Before turning to my findings of fact, it is necessary for me to set out a brief statement of the law which I shall in turn apply to those facts as I have found them to be.

Complaints of Unfair Dismissal

13. Section 94 of the Employment Rights Act 1996 ("ERA 1996") creates the right not to be unfairly dismissed.

14. Section 98 deals with the general provisions with regard to fairness and provides that one of the potentially fair reasons for dismissing an employee is on the grounds of that employee's conduct. The burden is upon the employer to satisfy the Tribunal on that question and they must be satisfied that the reason advanced by the employer for dismissal is the reason asserted by them; that it is a potentially fair reason for dismissal falling under either Section 98(1) or 98(2) ERA 1996 and, further, that it was capable of justifying the dismissal of the employee. A reason for dismissal should be viewed in the context of the set of facts known to the employer or the beliefs held by him, which cause him to dismiss the employee (**Abernethy v Mott, Hay & Anderson 1974 ICR 323, CA**).

15. It is therefore for the employer to satisfy the Tribunal as to the reason for dismissal. If they are not able to do so, then a finding of unfair dismissal will follow.

16. If an Employment Tribunal is satisfied that there was a potentially fair reason for dismissal and that that is the reason advanced by the employer, then it will go on to consider whether the employer acted fairly and reasonably in treating that reason as a sufficient reason to dismiss.

17. The all-important question of fairness is contained with Section 98(4) ERA 1996 which provides as follows:

> *"(4) Where the employer has fulfilled the requirements of subsection (1),* (in this case that they have shown that the reason for dismissal was redundancy) *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."*

18. The burden is no longer upon the employer alone to establish that the requirements of Section 98(4) are fulfilled in respect of the dismissal. That is now a neutral burden.

19. In conduct cases, a Tribunal is required to look at whether the employer carried out a reasonable investigation from which they were able to form a reasonable belief, on reasonable grounds, as to the employee's guilt in the misconduct complained of (**British Home Stores v Burchell [1980] ICR, 303 EAT**).

20. An Employment Tribunal hearing a case of this nature is not permitted to substitute its judgment for that of the employer. It judges the employer's processes and decision making by the yardstick of the reasonable employer and can only say that a dismissal was unfair if either falls outside the range of reasonable responses open to the reasonable employer.

21. Many employees will be able to point to something the employer could have done differently, or indeed better, but that is not the test. The question for the Tribunal is whether the employer acted within the range of reasonable responses open to it or, turning that question around, could it be said that no reasonable employer would have done as this employer did?

22. One consideration for a Tribunal in considering the question of whether a dismissal fell within the band of reasonable responses will be the issue of consistency of treatment. In such circumstances, a Tribunal should pay regard to the guidance in **Hadjioannou v Coral Casinos Ltd [1981] IRLR 352** in which the Employment Appeal Tribunal said this regarding the issue of disparities in treatment:

    "Firstly, it may be relevant if there is evidence that employees have been led by an employer to believe that certain categories of conduct will be either overlooked, or at least will be not dealt with by the sanction of dismissal. Secondly, there may be cases in which evidence about decisions made in relation to other cases supports an inference that the purported reason stated by the employers is not the real or genuine reason for a dismissal. … Thirdly … evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances."

23. Therefore, if an employee seeks to compare their treatment with that of other employees who have been afforded more lenient sanctions, a Tribunal must be satisfied that the circumstances of the two employees are truly parallel.

Wrongful Dismissal

24. A different test is to be applied to a claim of wrongful dismissal, that is a dismissal said to be in breach of a contractual right to notice. The Tribunal is seized of jurisdiction to consider such claims under the Employment Tribunals (Extension of Jurisdiction) England & Wales Order 1994.

25. The test to be applied in such a claim is not whether the employer had a reasonable belief upon reasonable grounds that the employee had committed an act or acts of gross misconduct but, rather, it requires the Tribunal itself to determine whether the employer has established that the employee acted in repudiatory breach of contract such as to entitle the employer to summarily dismiss him or her. This requires the Tribunal to undertake an evaluation of the evidence before it and to reach its own conclusions as to what took place. The Tribunal's obligation to determine this

question is not one that is simply parasitic on the employer's findings (see **Phiri v Surrey & Borders Partnership NHS Foundation Trust UKEAT/0025/15 and Cameron v East Coast Mainline Company Ltd UKEAT/0301/17**). The Tribunal has to evaluate the evidence for itself and reach its own conclusions as to what took place.

26. The Tribunal must then go on to consider, having reached conclusions as to what took place, whether that was sufficiently serious as to amount to gross misconduct and to permit the employer to terminate the contract of employment without notice.

FINDINGS OF FACT

27. I turn now to my findings of fact based on the evidence that I have seen and heard during the course of this hearing.

28. The Claimant was employed by the Respondent as a Heavy Goods Vehicle ("HGV") driver from 1st April 2005 until his summary dismissal on 14th July 2016. Although the Claimant appears to have had some previous disciplinary issues during the course of his employment with the Respondent, none remained live at the time of his dismissal.

29. The Claimant's dismissal came about as a result of an incident which arose on 17th June 2016 involving the Claimant and Andrew Breach, the Respondent's Group Human Resources ("HR") Manager. It is common ground that the Claimant approached Mr. Breach on that date to ask him for an update about the whereabouts of some notes from an earlier meeting.

30. That conversation took place in the Respondent's yard. That yard was accessible both to customers and other staff and indeed both other staff and at least one customer were in fact present at the time that the Claimant approached Mr. Breach.

31. The Claimant accepts that during his discussion with Mr. Breach regarding the notes he swore and that he said words to the effect of *"there's always a fucking steward's enquiry when my name's involved"* (see page 57 of the hearing bundle) and that he also said that *"not everyone here is treated equally and you know that".*

32. There is a difference of opinion as to exactly what in fact occurred on 17th June 2016 and I come to that further below.

33. After his exchange with the Claimant, Mr. Breach sought out Richard Baverstock. I accept the evidence of Mr. Baverstock that he noted Mr. Breach to be visibly upset at that time. Although he could not, with the passage of time, recall exactly what Mr. Breach had told him – something that is not wholly surprising given that the incident in question occurred almost two and a half years ago – I am assisted by a relatively contemporaneous account which Mr. Baverstock gave as part of a later investigation into the Claimant's conduct (see page 59 of the hearing bundle). That document records that Mr. Breach told Mr. Baverstock that the Claimant had been very aggressive towards him regarding the meeting notes; that he had sworn at him and that he had done so in the middle of the yard in front of customers. He was also told by Mr. Breach at that time that the Claimant had been pointing at him and using offensive language.

34. A decision was made that the matter needed to be investigated and that the Claimant would be suspended whilst that investigation took place. Mr. Baverstock and Mr. Breach therefore went to seek out the Claimant to deal with that issue.

35. Although Mr. Breach was present, it is clear that Mr. Baverstock took the lead in those discussions (see page 60 of the hearing bundle).

36. Whilst the Claimant contends that the presence of Mr. Breach was inappropriate as he had made the allegations against him nothing ultimately turns on this given that he did not play a significant role in the meeting, which was in all events only to suspend the Claimant. No formal account was taken from the Claimant at that meeting which may have rendered it inappropriate for Mr. Breach to have been in attendance. I accept, however, that Mr. Baverstock did ask the Claimant what had occurred so that he could determine if this supported what Mr. Breach had reported to him and therefore whether suspension pending investigation was appropriate.

37. The Claimant is also critical of the location of the suspension discussions as those were held in the staff canteen. He contends that that was an inappropriate location because it was not one that was sufficiently private for such a meeting. Whilst it would clearly have been better to have taken the Claimant to a private office, again in reality nothing turns on this point. In this regard, the Claimant does not dispute that the canteen was empty at the time of the suspension meeting. The evidence of Mr. Baverstock was that the room was checked and found to be empty before any discussion took place with the Claimant and the door was closed for the duration of the meeting. That evidence was not challenged on behalf of the Claimant and the Claimant did not suggest to the contrary in his own evidence. The best that he could say was that he did not know if the door was closed or not. Even if he was correct about that (and I prefer the more certain evidence of Mr. Baverstock on the point) it is not suggested anyone entered the canteen during the discussion and as such it is difficult to fathom what unfairness the decision to hold the meeting in this location could have caused. In reality, it made no difference whatsoever.

38. There is a conflict as between the Claimant and the Respondent as to his conduct during the suspension meeting. The Claimant says that he was intimidated by Mr. Baverstock, although it is perhaps notable that no specifics are given in respect of that assertion.

39. The Respondent contends to the contrary and that it was the Claimant who acted in an intimidating and aggressive manner and that he swore during the discussion and, in particular, that he threw his work keys across the table at Mr. Baverstock. I make my findings on what occurred during that meeting below.

40. After the Claimant's suspension, there was an investigation by a member of the HR Team by the name of Tina Wright. She was instructed to deal with that matter on 17th June 2016, that being the day of the incident in question, and she acted promptly to obtain a statement from both Mr. Breach and Mr. Baverstock about what had occurred. Both signed those statements as being an accurate record of what they had told Ms. Wright.

41. Mr. Baverstock confirmed what Mr. Breach had told him when he sought him out to discuss the Claimant's actions and he also set out his version of events at the suspension meeting. Particularly, he told Ms. Wright that the Claimant had denied swearing at Mr. Breach but admitted that he had sworn (albeit not directed at Mr. Breach) and that his recounting of the incident had included a number of swear words – most notably use of what was termed the "F Word" during the course of these proceedings. That accords with the evidence of Mr. Baverstock at the hearing before me that the Claimant used the word "fucking" on a number of occasions during the suspension meeting. Mr. Baverstock's account also referred to the Claimant being aggressive; throwing a set of keys onto the table and saying that the suspension "suited" him.

42. A statement was also obtained from Mr. Breach. He told Ms. Wright that during the discussion in the yard the Claimant had said the following and had done so in front of a customer who had been loading his van in the yard:

    - *"When am in going to get my fucking notes";*
    - *"I just want my fucking notes to take to the Union, they said you can't ask me questions and I want a separate copy of the questions";*
    - *That there had been said to have been an investigation in relation to another employee and that "fuck all" was done about it;*
    - *That the Claimant had asked how long it "fucking took" to write up some notes and "when am I going to get my fucking letter"; and*
    - *"All I want is my fucking notes, I know what these fuckers are like, they're all on to me, I know their game".*

43. Mr. Breach's statement set out that in his view the Claimant had been intimidating and threatening, including that the Claimant had been pointing at him and wagging his finger and that he had used a lot of offensive language.

44. He also provided his account of the suspension meeting and told Ms. Wright that the Claimant had again been aggressive and intimidating; that he had used offensive language and had slammed things on the table and thrown his boots to the floor and slammed a chair on the floor. He also said that the Claimant had thrown his keys across the table when asked for them by Mr. Baverstock.

45. In terms of the issue of offensive language, Mr. Breach told Ms. Wright that the Claimant had said words to the effect that he had done *"fuck all"* wrong; that he didn't *"fucking swear at him"* and that he had said that he had *done "fuck all wrong, you're all after me, I know your game".*

46. Ms. Wright wrote to the Claimant on 20th June 2016 to confirm his suspension and to set out the basis of the allegations which had caused it (see pages 67 to 68 of the hearing bundle). Those allegations were:

    - Aggressive and intimidating behaviour and the use of offensive language towards Mr. Breach on company premises and in an area where customers were present; and

    - Aggressive and intimidating behaviour and the use of offensive language towards other members of staff. That allegation referred to the Claimant's alleged conduct at the suspension meeting towards Mr. Baverstock.

47. The Claimant's suspension was confirmed as being on full pay and he was provided with a copy of the disciplinary policy.

48. Ms. Wright also spoke with another member of staff, Mr. Kibble, who had been present in the yard at the time. There was one other member of staff aside from Mr. Kibble who had also been present in the yard at the time of the incident. He was not interviewed. I have not heard from Ms. Wright as to why he was not interviewed, but there is nothing before me to suggest that that would have made any difference to the process and that that individual would have supported the Claimant's version of events. The Claimant was at all times was supported by his Trade Union who would have no doubt been in a position to obtain such evidence if it would have exonerated the Claimant. As I shall come to in due course, in all events there was more than sufficient evidence obtained during the investigation to

allow Mrs. Smith to take a decision in respect of the allegations against the Claimant.

49. In terms of the evidence of Mr. Kibble, he said that he had heard the Claimant raise his voice but that he did not see whether he was acting in an aggressive or intimidating way. He said that he had not heard the Claimant swear and that he thought at first the situation was joke and that he was not taking any notice. He added that Mr. Breach was *"clearly upset"* after the incident.

50. Ms. Wright met with the Claimant on 24th June 2016 (see pages 73 to 78 of the hearing bundle). The questions that she asked of the Claimant were open questions and ones that were reasonable given the matters that she was investigating. The Claimant denied that he had acted in an intimidating or aggressive manner, although he conceded that it was possible that that might have been a matter of perception. He said that he had only sworn once and not at anybody and that when asked if that was an appropriate way to talk to a senior manager he had replied that he was a *"straight shooter"* and it was just his personality. He said that he had not raised his voice *"any more than normal"* and that he *"could have"* pointed at Mr. Breach. He said that he had not been aware of a customer in the yard and that he had thought that it was empty.

51. Insofar as the suspension meeting was concerned the Claimant denied swearing at all during that meeting. He said that he had felt intimidated himself and that he had not thrown his keys but had handed them to Mr. Baverstock. He said that he thought that there was a "witch hunt". Ms. Wright raised with the Claimant of her own volition whether there were any extenuating circumstances at the time of the incident. The Claimant said that his father was in hospital having lifesaving surgery and he replied "maybe" when asked by Ms. Wright if that might have a bearing on his behaviour. He also referred to having depression, but that issue is no longer relevant to the contentions now advanced by the Claimant and so I say no more about it.

52. Ms. Wright compiled an investigation report which recommended disciplinary action be taken against the Claimant (see page 71 of the hearing bundle). The basis for that was that the allegations against the Claimant were in Ms. Wright's view confirmed by the witness statements of Messrs. Baverstock, Breach and Kibble and also the CCTV which she had seen and which demonstrated the proximity of a customer to the alleged incident.

53. The matter was thereafter passed to Mandy Smith, an external HR Consultant who had had no previous involvement in the matter. She wrote to the Claimant on 6th July 2016 to invite him to a disciplinary hearing to consider allegations of gross misconduct. She set out the same allegations as referenced in the suspension letter and included a copy of the investigation report (see pages 80 to 81 of the hearing bundle). As set out in the letter, the Claimant had already been supplied with the witness statements taken as part of the investigation by Ms. Wright and the CCTV stills. He also viewed the CCTV footage during a later meeting with Mrs. Smith.

54. The Claimant attended a disciplinary hearing with Mrs. Smith on 13th July 2016. The hearing had been rescheduled from an earlier date to allow the Claimant's Trade Union representative to attend with him.

55. At the hearing the Claimant accepted that he had sworn when in discussions with Mr. Breach, albeit giving a slightly differing account to that in his initial statement as read to Ms. Wright during the investigation in that he had said *"not everyone gets*

treated the fucking same at this company". He said he had not sworn at Mr. Breach but just sworn in a sentence said to him. He said that he had not been aggressive or intimidating; that he had not thrown his keys on the table at the suspension meeting but had simply placed them down and that if anyone was intimidating at that meeting then it was Mr. Baverstock.

56. The Claimant raised that the statement that he had from Mr. Baverstock made reference to several other members of staff commenting on his behaviour and asked why there were no statements from them. Mrs. Smith agreed that she would follow that up after the meeting.

57. I am satisfied that Mrs. Smith did her best to be fair to the Claimant during the meeting. Particularly, she asked him more than once if there was anything that he would like to add and, like Ms. Wright, raised of her own volition the possibility of extenuating circumstances relating to the situation with his father and discussed with the Claimant a reference that he had made to having suffered with clinical depression.

58. After the meeting, I accept that Mrs. Smith considered the position carefully and set out her rationale by way of the notes which at page 87a of the hearing bundle before taking her decision. Those notes set out that:

- There was consistency as between the statements of Mr. Breach and Mr. Baverstock as to the events in question;
- That it was reasonable to assume that the Claimant would have been aware of a customer in the yard given the CCTV stills showing the proximity of that customer to him and the fact that he was directly in front of the Claimant; and
- That whilst some bad language might be expected given the nature of the Respondent's industry, aggressive and intimidating behaviour was not acceptable and it went to the heart of the employment relationship.

59. I should note that Mr. Berk is critical of the reliance by Mrs. Smith on the consistency between the accounts of Mr. Breach and Mr. Baverstock and that, in particular, Mr. Breach provides additional detail such as the suggestion that the Claimant slammed a chair on the floor. I do not accept that such additional detail in one witness statement renders the decision to view them as corroborative and consistent an unreasonable one. Indeed, there is force in the argument of Mr. Arora that had the statements been identical then the submission would likely have been one of collusion. The statements were consistent on the central issues and allegations against the Claimant, and it was not unreasonable for Mrs. Smith to have concluded as she did in that regard.

60. Mrs. Smith wrote to the Claimant on 14th July 2016 summarily dismissing him for gross misconduct (see pages 88 to 90 of the hearing bundle). The key parts of her letter setting out her additional investigations and findings said this:

"Following the meeting I investigated the following things that were raised by you during the meeting. Specifically;

- *allegations that other staff in the Plant Hire Team and Transport Team were aware of the incident that had occurred in the yard with Andrew Breach as Richard Baverstock refers to commence that were made as he was on his way to see you. In this instance I refer to Andrew Breach's witness statement which states that said as he was walking past then they said "are you going to sack him".*

- *that the company were aware that you suffered from clinical depression and in 2014 your GP had provided a medical report.*

  My findings:

- *neither the Plant or Transport staff were in the yard during your interaction with Andrew Breach. Witness statements from Andrew Breach and Richard Baverstock are consistent in saying that these staff had no knowledge of the event that had just occurred. Their comments were made in jest as the HR Manager and another manager were asking where you were.*

- *There is no record on your personnel file of a medical report from your GP in 2014. There is a request from the Company in February of the same year, but no medical report is on file. Going back further to 2012, I find a medical report on file which briefly mentions that alongside other health issues you were suffering from depression. Furthermore, there were no copies of prescriptions on file as you suggested. I am aware that the Company has only introduced an HR department in the last few year, however, the Company have kept up to date paper based personnel records.*

I have now had the opportunity to consider this further information together with all the witness statements and your responses during the meeting and my decision is that you are dismissed on the grounds of gross misconduct. Your dismissal is effective from the date of this letter.

*I find that your behaviour towards two senior managers of the Company was extremely aggressive and unacceptable. Gary Kibble said that he heard you raise your voice and Andrew Breach said that you swore at him several times and used offensive language, initially saying, "where are my f****** notes". You approached Andrew Breach in an area where customers were present and your interaction was heard by another member of staff. Clearly, this could be highly damaging to Frank Key's image and reputation. I refer here to the Company rules[1] which clearly state that the use of bad language or aggressive behaviour on Company premises or in front of customers constitutes gross misconduct.*

I believe it is reasonable to believe that you would have been aware of other staff in the yard as the CCTV footage shows that you are facing the customer who was loading his lorry at the time. I accept that you may not have been aware of the two members of staff working behind you in the yard. However, Andrew Breach was clearly aware of the customer as it is one of the first comments he made in his witness statement. I find it difficult to believe you didn't see this customer when you were facing him. This is an area where staff and customers more freely and it was not the right place to have this discussion, although to be clear it is never acceptable to use the language you used towards work colleagues.

I acknowledge that you have stated more than once in the meeting that you didn't swear at Andrew Breach; you swore as part of the conversation. I find that the manner in which the words were said and interpreted by both managers was offensive to them and aggressive towards them. The fact that the swear words were not describing them personally was immaterial.

[1] As I have set out below, I have not seen a copy of the Company Rules referred to by Mrs. Smith in this regard.

With regards to your health, you advised the Company during the investigation that you have suffered from clinical depression for several years. During the hearing I referred to a health Review Meeting carried out in 8 January 2016. The meeting discussed your last three periods of absence. I note there was no record of clinical depression and indeed the final question on the form asks if you have any other *health issues that you would like to discuss in the meeting that could have an impact on your attendance. I respect your view that you health matter is private; however, the meeting was confidential and any employee has a duty to inform their employer if they have on-going health issues that may affect their work. In any event suffering from depression does not excuse acting towards two senior managers in any abusive and aggressive way.*

In summary, I find that your actions on 17th June on company premises warrant dismissal on the grounds of gross misconduct."

61. The Claimant was advised of his right of appeal and how to exercise that right.

62. Based on the evidence before her, the findings set out in the dismissal letter were ones that were entirely open to Mrs. Smith. Particularly:

    (i) There was corroborating evidence as between Mr. Breach and Mr. Baverstock which supported the allegations against the Claimant. There was no suggestion by the Claimant (nor indeed has he advanced one now) as to why they would have concocted false allegations against him;
    (ii) The fact that something untoward had occurred was supported by the evidence of Mr. Kibble who referred to Mr. Breach as being *"clearly upset"* and that he had heard the Claimant raise his voice; and
    (iii) The Claimant had accepted that he had sworn in the yard and it was clear from the CCTV stills that that had taken place (in addition to the other conduct found with regard to the first allegation) in front of a customer and that the Claimant would have been aware of that given the proximity of the customer to him.

63. I should observe that I have not seen Company Rules referred to in the outcome letter, but it was not put to Mrs. Smith by Mr. Berk that she was wrong about what they said or that the type of conduct that she found the Claimant to have engaged in (as opposed to what the Claimant had contended had occurred) was not sufficient to constitute gross misconduct.

64. In addition to considering the findings made by Mrs. Smith, I have also made my own determination as to what, on the balance of probabilities, I find occurred on 17th June 2016 as it is necessary for me to do so for the purposes of dealing with the wrongful dismissal claim.

65. I am satisfied, on the balance of probabilities, that the Respondent has discharged the burden of establishing that the Claimant did repeatedly swear and use the words "fuck" or "fucking" in conversation with Mr. Breach; that he did so in plain view of a customer when he must have known that that customer was there and that he had also continued his behaviour and language during the suspension meeting with Mr. Baverstock. In reaching that conclusion, I have taken the following matters into account:

    (i) Although I have not heard from Mr. Breach directly, I have his contemporaneous witness statement which is also supported by the contemporaneous statement from Mr. Baverstock and, to the best of his

knowledge at this hearing before me, Mr. Baverstock's evidence was that there was nothing about those accounts that was incorrect. The Claimant has suggested nothing to suppose that two senior managers would concoct deliberate untruths about him despite being invited by Mr. Arora in cross examination to address that issue;

(ii) I also have the statement of Mr. Kibble and it is plain that something was amiss given that Mr. Breach was described as being *"clearly upset".* That chimes much more with the account given by Mr. Breach and Mr. Baverstock than the Claimant's version of events that he had sworn once and that nothing was amiss and he had not acted inappropriately;

(iii) I have heard from Mr. Baverstock directly in evidence and although it is clear that his exact recollections have faded with the passage of time, his evidence was consistent with his contemporaneous statement that the Claimant had been swearing in the suspension meeting and that, in his words, there were "a few "fuckings"" said. That accords with the statement of Mr. Breach given at the time and given that I prefer the evidence of Mr. Baverstock to the Claimant on that point, it follows that I also find it more likely than not that that behaviour also manifested itself in the exchange with Mr. Breach and that the suspension meeting conduct was an extension of that;

(iv) I am satisfied that the Claimant did toss his keys at Mr. Baverstock across the table in temper. That is confirmed by Mr. Baverstock's evidence before me and his contemporaneous statement and that of Mr. Breach. The Claimant's evidence on that point has been inconsistent in that he told Ms. Wright that he had handed the keys to Mr. Baverstock and a different version to Mrs. Smith who he told that he had placed them on the table in front of Mr. Baverstock. The Claimant's explanation in cross examination that those were one and the same thing did not bear scrutiny;

(v) I am therefore satisfied that the Claimant did swear and that his actions were perceived – even if not intended by the Claimant – as being aggressive and intimidating. Given the level of language used and the throwing of the keys, it is not difficult to see why it would have been perceived in that way; and

(vi) The Claimant's conduct and behaviour towards Mr. Breach was, without any doubt given the CCTV stills which I have seen, done in front of a customer who could well have overheard the exchange. The fact that no complaint was made is not to the point, the behaviour was clearly highly inappropriate and potentially damaging to the Respondents reputation. The Claimant cannot have failed to notice that a customer was present in the yard who was standing within a reasonable distance of him and Mr. Breach. The customer was loading a flatbed truck which was straight in front of the Claimant and he was wearing a bright orange top. Whilst the Claimant maintains that he did not see any customers in the yard because he was not looking for any, that rings hollow given that that customer was about as visible as they come. I have seen the CCTV stills in that regard, which are at page 55 of the hearing bundle, and I have also seen colour copies which were produced at the hearing. It is apparent that the Claimant could not

have missed seeing the customer and I did not accept his evidence to the contrary.

66. Given that I accept the account of Mr. Baverstock as to what happened in that suspension meeting, it follows that I do not accept the Claimant's account that it was in fact Mr. Baverstock who intimidated him. As I have already observed, it is perhaps somewhat telling that no details as to that alleged intimidation have been provided by the Claimant.

67. As I have already touched upon above, Mrs. Smith offered the Claimant a right of appeal against dismissal which he duly exercised by way of a letter dated 9th July 2016 (see page 91 of the hearing bundle). The Claimant set out seven grounds of appeal, although only six are relied on in the context of these proceedings. Those six relevant grounds were as follows:

- That the CCTV showed no evidence of any aggression or intimidating behaviour;
- That the canteen was an inappropriate place to suspend him and that Mr. Breach should not have been present;
- That he was not convinced that a thorough investigation had take place;
- That Mr. Baverstock's statement had made reference to other individuals having commented on his alleged attitude, but he had not seen any statements to that effect;
- That Mr. Kibble had not heard the Claimant swear and the same might be said for the customer who had not been interviewed as part of the investigation;
- That no records had been kept about his clinical depression; and
- He would provide evidence of similar incidents which had resulted in lesser sanctions being applied.

68. In respect of the latter point, the Claimant wrote to the Respondent on 28th July 2016 setting out that another employee, a Mr. Oldham, had received a written warning despite swearing and having to be pulled apart from another employee during an altercation which had taken place in front of customers. The Mr. Oldham in this context is the same gentleman from whom I received a witness statement from the Claimant at the outset of the hearing and to which I have referred above.

69. The Claimant's appeal was allocated to be dealt with by Richard Meeks, the Group Hire Director. Mr. Meeks had not dealt with an appeal previously and did not appear to have received any training in respect of such matters, but I accept that he had HR support within the Respondent organisation to access as necessary.

70. Mr. Meeks wrote to the Claimant on 14th July 2016 to invite him to an appeal hearing. Unfortunately, his letter went rather further than that and set out his provisional thoughts in relation to a number of areas of the Claimant's grounds of appeal. In that regard, that was obviously somewhat premature and it is not surprising that Mr. Berk makes the submission that this suggested a pre-determination of the issues. I am satisfied, however, from the evidence of Mr. Meeks that these were only his preliminary observations and given what came later in respect of additional investigations by Mr. Meeks, I am satisfied that he had not made his mind up or reached and conclusions before the appeal hearing with the Claimant. That is despite the fact that a number of his provisional observations later crystallised to form his findings and conclusions in the appeal outcome letter.

71. The appeal hearing took place on 4th August 2016 and the Claimant was again represented by a Trade Union representative. I am satisfied from the notes of the meeting, which appear at pages 102 to 103 of the hearing bundle that Mr. Meeks gave the Claimant and his representative every opportunity to make representations and also that he undertook to investigate further in respect of the inconsistency point that the Claimant had raised regarding Mr. Oldham. I am satisfied that this demonstrated the fact that Mr. Meeks had not predetermined the outcome as otherwise, as Mr. Arora points out, he could simply have closed the Claimant down on that point without further investigation.

72. After the appeal hearing, Mr. Meeks considered the entire disciplinary file with regard to Mr. Oldham and concluded that the incident which had occurred was between two employees of the same level within the Respondent Company and, from further investigations undertaken of the area in which it had occurred, that this was a non-customer facing area. He therefore reasonably concluded that the circumstances of the two incidents were not the same. In that regard, the circumstances of the incident with Mr. Oldham was not aggression directed towards a member of the management team and there had been no risk of the altercation being witnessed by customers or members of the public. The same was not the case with the Claimant for the reasons that I have already given.

73. Following those further investigations, Mr. Meeks wrote to the Claimant dismissing his appeal. He dealt with each of the Claimant's grounds of appeal and although many of his preliminary observations crystallised into that final letter, for the reasons that I have already given I accept that he had not previously made his mind up about those matters. It is in reality perhaps little different than making preliminary observations to parties in a hearing such as this one.

74. The relevant parts of the appeal outcome letter said this (see pages 102 to 103 of the hearing bundle):

"Following our meeting I investigated the following points raised in your appeal letter and found as follows:

1. ***The CCTV evidence does not show any aggression or intimidating behaviour and given it is a visual recording, there is no evidence regarding the manner of the conversation.***

   As previously detailed, the CCTV evidence was purely to prove that the incident took place, the location of the conversation and the proximity of the customer. Rather, the decision in relation to aggression and intimidating behaviour was based on the evidence of Andrew Breach, Richard Baverstock and Gary Kibble.

2. ***I do not believe, either accept, that the canteen was the appropriate place to suspend me as anyone could have entered at any given time. Neither do I accept that it was appropriate for Andrew Breach, as the complainant, to be present. The fact that he was, clearly has placed me at severe detriment given their matching statements and my lack of witnesses.***

   As previously explained, the canteen was considered a private location to conduct the meeting and AB, although he was the complainant, is also the Group HR Manager and due to the nature of the incident, it was considered necessary to have the Group HR Manager present at the meeting.

3. ***Given the date of the meeting and receipt of the outcome, I am not convinced that a thorough investigation has taken place.***

   I can confirm that Tina Wright thoroughly investigated the incident prior to the meeting, including interviewing all relevant witnesses and considering all relevant documents. Additionally, there were also some additional points to be investigated by Mandy Smith based on issues raised by you during the disciplinary meeting which are set out in the disciplinary outcome letter and this concluded the full investigation.

4. ***In Richard Baverstock's statement, he clearly states that several other staff commented on my alleged attitude and aggressive nature, namely Plant Hire and Transport. This is not referred to in the findings and I request to see interview notes with all of these alleged people who made these statements.***

   As previously explained some of the comments were just off the cuff comments, statements were taken from all staff willing to do so and included in the investigation pack sent to you.

5. ***Gary Kibble's statement says that he heard my raised voice; he does not state that he heard me swear, there is more than a fair chance that the same applies to the customer who hasn't been spoken to as part of the investigation.***

   GK heard raised voices, the voices were loud enough for him to make the comment 'you can't talk to him like that' which even if it was said in jest, clearly indicates the volume of your exchange. It would not have been appropriate to speak to a customer about an internal disciplinary matter – in any event the CCTV clearly shows the customer was present and you have admitted to swearing during the exchange.

6. ***As an employer, you were aware of my clinical depression. I find it disturbing that you have failed to keep adequate records. I will be providing the copies from my GP sent at the time as evidence.***

   You failed to submit any evidence to support this claim and, as previously stated, your medical history had no bearing on the decision making process.

7. ***I will provide details of similar incidents which have resulted in lesser sanctions which, therefore, set a precedence* [sic] *which should be considered in my case.***

   You submitted a letter stating that Philip Oldham had received a lesser sanction for, in your opinion, a worse incident. I have investigated this and conclude that your account of the incident was not completely accurate as they were not pulled apart. In any event, your case is different due to the fact that there was a customer present and you have admitted to swearing in the yard in conversation with a member of the Senior Management Team.

You also made several comments as to the accuracy of the previous minutes, unfortunately, as you failed to draw this to the attention of the HR Department in the given timescale, this cannot be taken into consideration in respect of the appeal but your comments have been noted.

At the appeal hearing I considered in detail with you the allegations which led to the decision to terminate your employment. I considered the following allegations:

- *That on 17th June in the yard you used aggressive, intimidating behaviour and offensive language towards Andrew Breach on company premises in an area where customers were present.*
- *That on 17th June in the yard and canteen you used aggressive, intimidating behaviour and offensive language towards Andrew Breach and Richard Baverstock.*

Following out meeting I investigated the following additional points and found as follows:

1. *Your representative raised a point about perception and as such, although you say there was no malicious intent, your behaviour was perceived as aggressive and intimidating by both RB and AB and is clearly unacceptable and contrary to Company rules.*

2. *Your representative also said that you would offer an apology but this was not substantiated by you.*

3. *Your representative was concerned by the fact that you were dismissed on 14th July 2016 and a new driver started on 18th July 2016.*

   A new driver did start on 18th July, as a Relief Driver, but the need for more drivers had already been identified by the Branch Manager and he was recruited due to the volume of work.

   Please be assured that this recruitment was in addition to your role and not a replacement for you.

4. *Your representative requested that you were given more time to access your medical records.*

   As your medical history formed no part of the decision making process this request is denied.

I have decided to uphold the decision to terminate your employment for the following reasons:

1. *Your actions amounted to gross misconduct as detailed in our disciplinary policy.*

2. *I can find no reason to interfere with the original finding at the disciplinary meeting that you should be dismissed.*

My decision regarding your appeal is final and there is no further right of appeal."

75. As indicated in the appeal outcome letter, the decision of Mr. Meeks represented the conclusion of the internal disciplinary and appeal process and the Claimant thereafter issued his claim before the Employment Tribunal.

CONCLUSIONS

76. Insofar as I have not already done so, I now deal with my conclusions in relation to each of the remaining complaints before me.

77. I begin with the complaint of unfair dismissal and whether the Respondent has persuaded me, the burden being on them to do so, that there was a potentially fair reason to dismiss the Claimant and that that reason was conduct. I have no hesitation in determining that the Respondent has discharged that burden. The Claimant does not suggest any other reason for dismissal other than conduct nor was one put by Mr. Berk to the Respondent's witnesses.

78. Moreover, it is clear that the matters operating in the mind of Mrs. Smith were the allegations as to the Claimant's use of profanities, including in front of a customer, and his attitude when speaking to Messrs. Breach and Baverstock. I am satisfied that the reason for dismissal was therefore conduct.

79. However, that is not the end of the matter and I turn now to the question of whether the dismissal was fair or unfair having regard to the provisions of Section 98(4) ERA 1996. The burden in this regard is a neutral one.

80. Applying the principles under the **Burchell** test, I consider firstly whether the Respondent was able to form a reasonable belief, after reasonable investigation, as to the Claimant's guilt in the allegations against him. I am satisfied that the investigation was a reasonable one. Whilst Mr. Berk points to the fact that statements were not gathered from the individuals mentioned in Mr. Baverstock's statement as having made comments about the Claimant's attitude, as was clear from the evidence of both Mrs. Smith and Mr. Meeks none of those individuals were present either in the yard or the canteen when the incidents for which the Claimant was disciplined occurred. Therefore, it follows that none of them could have added anything about those matters for which the Claimant was disciplined and ultimately dismissed.

81. There was one other member of staff present in the yard who was not interviewed but there is nothing to suggest that that individual would have had anything to add to what the Respondent already had before them. Mrs. Smith had the evidence of the Claimant; of Mr. Breach and of an independent witness in the form of Mr. Kibble. The Claimant accepts that he swore and it is clear from Mr. Kibble that he was raising his voice. Mr. Breach's account was clear in what he reported to the Respondent and there is nothing at all to begin to suppose that the other employee who was not interviewed would have exonerated the Claimant. Indeed, by the Claimant's own account he had sworn, even if not directly at Mr. Breach then in discussion with him, and had done so in an area where it was abundantly clear that a customer was in earshot.

82. The Claimant is also critical of the decision not to interview that customer who was present in the yard. I can see why the Respondent would not wish to involve a customer in internal matters of this nature, particularly in view of the fact that that customer had made no actual complaint. The decision in those circumstances not to interview the customer was not one that fell outside the band of reasonable responses. Moreover, again there was sufficient before Mrs. Smith that that was not required given the evidence to which I have already referred.

83. I am satisfied therefore that there was reasonable and sufficient investigation and that the scope that that investigation took fell within the band of reasonable responses open to a reasonable employer.

84. I turn then to the question of whether, from that investigation, the Respondent had sufficient to form a reasonable belief on reasonable grounds in the Claimant's guilt in the allegations against him. I can perhaps do no better here than to refer again to the rationale document prepared by Mrs. Smith before she made her decision to dismiss. She had before her corroborating accounts from Mr. Breach and from Mr. Baverstock as to the events of 17th June and she also had a clear account from Mr. Kibble that whilst he had not particularly observed anything, Mr. Breach had looked to be "clearly upset". That was sufficient to provide more than an indication that something untoward had occurred as otherwise there would be no reason for Mr. Breach to be "clearly upset" if the discussion had progressed as the Claimant claimed that it had. The upset squared much better with the account given by Messrs. Breach and Baverstock than the one given by the Claimant.

85. Whilst Mr. Berk notes that Mr. Kibble did not come over to intervene in the incident and said that he was not taking much notice, suggesting in his submission that nothing untoward was going on, I do not accept that position. Not observing something is not the same as saying that it did not happen and I take into account the evidence of Mrs. Smith that her impression of Mr. Kibble in all events was that he did not want to get involved in matters.

86. There was therefore more than sufficient for Mrs. Smith to form a reasonable belief, on reasonable grounds, that the Claimant had acted aggressively and in an intimidating fashion to two senior managers; that he had used profanities towards both of them and that he had done so in respect of Mr. Breach in front of a customer. The latter point was obvious from the CCTV footage to which I have already referred.

87. In view of the weight of evidence, Mrs. Smith was entitled to prefer that to the account given by the Claimant.

88. This leaves the question of the sanction and whether dismissal was within the band of reasonable responses open to a reasonable employer. Mr. Berk suggests that a warning or a final written warning would have been more appropriate. However, I remind myself that in respect of the unfair dismissal complaint I must not substitute my view for that of the employer and Mr. Arora is correct that I need to consider not whether every employer would have dismissed the Claimant, but merely whether no reasonable employer would have done so.

89. Given the set of facts which Mrs. Smith had found to be made out, I have little hesitation in concluding that summary dismissal sat squarely in the band of reasonable responses open to a reasonable employer. The Claimant had used profane language towards the Group HR Manager on more than one occasion, no matter whether his initial approach to him had been for a legitimate purpose. His conduct had been perceived as intimidating and aggressive and given the level of swearing involved, it is perhaps not difficult to see why. To compound matters, that had been conducted in the yard, a customer facing environment, when the Claimant must reasonably have been aware that a customer was in close proximity. Indeed, as I have already observed the presence of the customer could not have been more obvious to the Claimant. Rather than show any remorse for his actions, the Claimant had compounded matters by continuing to swear and act aggressively in the suspension meeting, including throwing his keys onto the table towards Mr. Baverstock. Whilst, when pressed, the Claimant had made reference to the possibility of his actions being caused by the situation with his father, he had shown no remorse and as such this was a situation where the dismissal was one entirely open to the Respondent on the facts.

90. I turn finally, for completeness, to the specific allegations of unfairness made by the Claimant and which feed into the question of fairness under Section 98(4) ERA 1996. The first of those matters is that the CCTV evidence did not show any aggression from the Claimant. As set out in the Appeal outcome from Mr. Meeks, the CCTV did not have any audio and was purely for the purposes of demonstrating the proximity of the Claimant to a customer in the yard. The main issue as to aggression came from the word spoken by the Claimant and the profane nature of the same, which was not an issue that would have been picked up on CCTV.

91. The second issue raised by the Claimant was as to the suspension having taken place in the canteen and with Mr. Breach being present. I have already made my observations about those matters and I am satisfied that they caused no unfairness in the process.

92. The third matter was that the Claimant contended that a thorough investigation had not taken place. Again, for the reasons that I have already given I am satisfied that the investigation was more than sufficient to deal with the allegations against the Claimant.

93. The fourth issue was the failure to interview the individuals referenced in the statement of Mr. Baverstock. Again, as I have already observed they had not in fact witnessed either of the incidents for which the Claimant was dismissed and as such this caused no unfairness to him given that they could not have added anything at all about those matters.

94. The fifth issue was the failure to interview the customer present in the yard and, again, I have already dealt with my conclusions in respect of that matter and do not repeat them here save as to say that I am satisfied that it caused no unfairness to the Claimant. The fact that the customer had not complained or had not turned around during the exchange was not to the point; he could clearly from his proximity to the Claimant have overheard what was going on.

95. The final issue was in respect of the issue of inconsistency of treatment. I am satisfied that the circumstances with regard to Mr. Oldham were not truly parallel to those of the Claimant. That, I am satisfied from the evidence of Mr. Meeks, was an altercation between two members of staff of the same level. It was not directed at one or more senior managers as the Claimant's conduct had been. Moreover, I am also satisfied that this was not behaviour which was in front of customers as it took place in a non-customer facing area as determined by Mr. Meeks as part of the appeal process. The circumstances are therefore not truly parallel and as such there can be no basis to suggest that the decision fell outside the band of reasonable responses on the basis of any inconsistency of treatment.

96. Mr. Berk also raises of course the point that he contends that the outcome of the Claimant's appeal was predetermined given the observations made by Mr. Meeks in his letter of 14th July 2016. For the reasons that I have already given, I am satisfied that there was no predetermination and that Mr. Meeks considered the points put forward by the Claimant and his trade union representative and dealt with the appeal thereafter on its merits. I am satisfied that he had not made his mind up before that point for the reasons that I have already given.

97. I turn then to the wrongful dismissal claim. I must firstly be satisfied in this regard that, on the evidence before me, the Claimant acted as the Respondent contends. For the reasons set out in my findings of fact above, I am satisfied that the Claimant did use profanities towards Mr. Breach on more than one occasion and that in fact this occurred on a number of occasions during the discussion; that his conduct was

intimidating and aggressive and that he displayed that conduct in close proximity to a customer who he could not have failed to notice. I am also satisfied that he compounded that behaviour by continuing in the same vein towards Mr. Baverstock and, particularly, that he swore in the suspension meeting, again more than once, and that he again acted in an intimidating and aggressive manner, most notably by throwing his keys across the table towards Mr. Baverstock.

98. Having found that the Respondent has satisfied me, on the balance of probabilities, as to that conduct having occurred I turn to the question of whether that conduct was sufficient to constitute gross misconduct. Whilst, as I have already observed, I have not seen the Company Rules referred to in the dismissal letter, I note of course that it was not put by Mr. Berk that such behaviour was not classified under the Rules as gross misconduct nor that the type of conduct that the Claimant was dismissed for (again as opposed to what he contended had occurred) was not sufficient to constitute gross misconduct. I accept the submissions of Mr. Arora that it must in fact be a matter of common sense that such conduct would amount to gross misconduct and I have little hesitation on the facts that I have found them to be that the Claimant's actions were so serious as to entitle the Respondent to terminate the contract without notice.

99. It follows that both the complaints of unfair dismissal and wrongful dismissal fail and are dismissed.

Application for costs

100. Following my dismissal of the Claimant's remaining complaints of unfair dismissal and wrongful dismissal, Mr. Arora on behalf of the Respondent made an application for costs. I have listened to all that he has said in that regard but set out here in brief terms the nature of the application.

101. He says primarily that the case was effectively hopeless – that is to say that there was no reasonable prospect of the claim succeeding. In the alternative, he submits that the Claimant's conduct was unreasonable in pursuing the matter. In relation to that particular matter, Mr. Arora raises an issue with regard to the failure of the Claimant to engage with the issues, particularly in relation to the question of the prospects of success of the claim and also with regard to arguments as to **Polkey** reductions and reductions for contributory fault. He further points to the failure of the Claimant to accept what are said to be reasonable offers of settlement, over and above those which he could reasonably have hoped to achieve in these proceedings.

102. The Claimant resists the application and I have heard from Mr. Berk in relation to those matters after a short adjournment for the purposes of him seeking instructions. Mr. Berk relies primarily upon the observations of Employment Judge Britton given at an earlier Preliminary hearing and the note of which appears at page 54A and 54B of the hearing bundle. In particular, he relies upon paragraph 3 of that Order which made it clear that in the view of Employment Judge Britton there were clear triable issues on the unfair dismissal and breach of contract claims and that they would therefore proceed to hearing.

103. It is somewhat unclear as to whether or not Employment Judge Britton was at that stage considering whether to make any Orders under Rule 37 or 39 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 in respect of just the disability discrimination claim before the point that it was withdrawn at that hearing or, otherwise, whether he was also considering the unfair dismissal and wrongful dismissal claims. Given the fact that part of his Judgment was to

determine that those complaints would proceed and he recused himself from a hearing of the final claim, it appears to me that the unfair dismissal and breach of contract complaints may well have also been in scope for consideration for Orders under Rules 37 or 39 when the matter was before him. Mr. Berk certainly contended that to have been the case and he points in support of the resistance of the application the fact that Employment Judge Britton allowed the two remaining complaints to proceed. Thus, he says it is plain that the remaining aspects were not hopeless.

104. Rules 74 to 84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("The Regulations") deal with the question of whether an Employment Tribunal should make an Order for costs.

105. Rule 76 sets out the relevant circumstances in which an Employment Judge or Tribunal can exercise their discretion to make an Order for costs, which are as follows:-

> **"*When a costs order or a preparation time order may or shall be made***
>
> ***76.***—*(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
>
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
>
> *(b) any claim or response had no reasonable prospect of success.*
>
> *(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.*
>
> *(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—*
>
> *(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and*
>
> *(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.*
>
> *(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.*
>
> *(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing."*

106. In short, therefore, there is discretion to make an Order for costs where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing or conducting of the proceedings. Equally, the discretion is engaged where a party pursues either a claim or defence which has no reasonable prospect of succeeding or, to put it as it was termed previously, where a claim or defence is being pursued which is "misconceived".

107. With regard to unreasonable conduct it is necessary for the Tribunal to consider *"the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had." (***Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78)**

108. It should be noted that merely because a party has been found to have acted vexatiously, abusively, disruptively or unreasonably or where a claim or response has no reasonable prospect of succeeding, it does not automatically follow that an Order for costs should be made. Once such conduct or issue has been found, a Tribunal must then go on to consider whether an Order should be made and, particularly, whether it is appropriate to make one. Particularly, when deciding whether an Order should be made at all and, if so, in what terms, a Tribunal is required to take all relevant mitigating factors into account.

109. In accordance with Rule 84, a Tribunal is entitled to have regard to an individual's ability to pay any award of costs both in relation to the making of an Order at all, or the amount of any such Order. However, it is not a mandatory requirement that such consideration must automatically be given.

110. That brings me to my conclusions based on the opposing arguments which I have heard from Mr. Arora on behalf of the Respondent and Mr. Berk on behalf of the Claimant. I should observe that there was also an indication as to an application for costs in respect of the withdrawn disability discrimination claim, which was dismissed on withdrawal at the hearing of 29th March 2018 before Employment Judge Britton. Although his Judgment and the narrative thereafter in the reasons do not necessarily reflect that position, Mr. Berk tells me that the Respondent did in fact make an application for costs at that hearing which was refused by Employment Judge Britton. Mr. Arora was not present at that hearing and is not in a position to gain say that particular issue and therefore I say no more about that if it is a matter which, as Mr. Berk contends, has already judicially determined by Employment Judge Britton. Any revisiting of that refusal would need to be by way of an application for Reconsideration or appeal to the Employment Appeal Tribunal and it is not open to me to look at the issue afresh.

111. Turning then to the applications in relation to the costs of the unfair and wrongful dismissal complaints, it is firstly said by Mr. Arora of course that the case was hopeless, that is that it has no reasonable prospect of success. I cannot in the circumstances agree that the case was hopeless. It was clear after the dust had settled that it was a somewhat weak claim in light of all of the evidence - and particularly the witness evidence - but there were, in the words of Employment Judge Britton at the Preliminary hearing, clear triable issues. The Claimant was entitled to have those matters ventilated and tested with a view to the Tribunal determining if he had been unfairly dismissed. Moreover, the test for wrongful dismissal, which was also pursued in the alternative, is a different test and one which is dependent upon the Tribunals findings of fact. That was entirely dependent upon the evidence to be tested at this hearing and it cannot be said in

that regard that the wrongful dismissal claim was hopeless. I therefore reject the assertion that either the unfair dismissal or wrongful dismissal claim was misconceived or had no reasonable prospect of success so as for the costs discretion to become engaged.

112. That leaves, however, the question of unreasonable conduct. On 12th April 2018 the Respondent sent to the Claimant a detailed costs warning letter outlining an offer at that stage of £2,000.00 to settle the claim. That was subsequently increased to the sum of £3,721.41 in respect of the notice pay element of the complaint, thereafter to £6,000.00 and thereafter, recently as I understand it, to an offer of some £8,000.00. The cost warning letter itself set out detailed representations as to why the Respondent believed that the Claimant would not be successful in his claim. Those representations also included issues in relation to **Polkey** and the question of contributory conduct. Those were obvious areas for consideration in a case such as this one. It is contended by Mr. Arora that the Claimant did not engage with those particular matters.

113. Upon consideration of the documentation and communications between the parties, it is clear that the Claimant did engage with the offers made by the Respondent, indeed making counter proposals of some £15,000 at a later stage of the proceedings, but sadly he or those that he instructed did not engage fully with the consideration of the merits of the claim and, particularly, the **Polkey** or contributory fault points. It is clear that the Claimant hung his hat rather firmly on the comments of Employment Judge Britton that there were clear triable issues in the case and perhaps lost sight of the wood for the trees. The triable procedural points referred to by Employment Judge Britton did not equate to the recovery of substantial compensation, which was what was being sought by the Claimant in his Schedule of Loss and in respect of which the negotiations with the Respondent's solicitors appeared to focus.

114. It is regrettable with hindsight perhaps that the Claimant did not engage more fully with what might be realistically recovered in a case where there was a finding of procedural unfair dismissal but rather the focus become fixed on the sum set out in a very much best case Schedule of Loss. It is clear that the Claimant became focused on the value of the claim as set in that Schedule rather than perhaps the more realistic quantum that might have followed from any finding that the dismissal was procedurally deficient. To that degree, he or those instructing him lost sight of the wood for the trees in terms of their engagement with the issues set out in the Respondent's cost warning letter.

115. Whilst the Respondent's point is a good one that the last offer particularly of £8,000.00 - or indeed the one that proceeded that of £6,000.00 – was more than the Claimant could hope to achieve if successful, I do not find that there was a failure to engage with the Respondent. Instead, there was engagement but with a skewed focus on the overall quantum. That is unfortunately not particularly unusual in Tribunal proceedings and I am not satisfied that the Claimant's conduct met the threshold of unreasonable conduct. He did not deliberately fail to engage fully with all of the issues and it might better be termed perhaps as unfortunate conduct rather than unreasonable conduct. I do not therefore accept that the threshold of unreasonable conduct was met in this case.

116. I equally do not accept the submissions made on behalf of the Respondent that the Claimant set out to "bleed the Respondent to the last" by taking matters to the hearing to see what increased offers, if any, might be forthcoming. There is nothing to support that particular submission.

117. However, I should say that even if I had found there to be unreasonable conduct made out in relation to a lack of engagement with the costs warning letter, I would nevertheless not have imposed an Order for costs upon the Claimant as I would not have deemed it appropriate to do so under the second limb of the test. Those are for essentially the same reasons as I have not found there not to be unreasonable conduct and, moreover, the fact that the Claimant was somewhat blinkered by the comments of Employment Judge Britton and read into them a realistic prospect of recovery of a sum well in excess of that which was offered. It would not therefore in my view have been appropriate or just having regard to those matters to make any Order for costs.

118. For all of those reasons, I therefore refused the Respondent's application for costs.

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Employment Judge Heap

Date: 24th January 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE