# EMPLOYMENT TRIBUNALS

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| **Claimant:** | **Mr H M Harran** | |
| **Respondent:** | **Memory Lane Cakes Ltd** | |
| **Heard at:** | **Cardiff** | **On: 15, 16 and 17 April 2019** |
| **Before:** | **Employment Judge S Davies**<br>**Ms C Lovell**<br>**Ms L Thomas** | |
| **Representation:** | | |
| **Claimant:** | **Mr J Morgan, Counsel** | |
| **Respondent:** | **Mr G Probert, Counsel** | |

**JUDGMENT** having been sent to the parties on 27 April 2019 and reasons having been requested by the Respondent on 18 April 2019, in accordance with Rule 62(3) of the Rules of Procedure 2013:

# WRITTEN REASONS

1. It is the unanimous decision of the Tribunal that:

    a. the complaint of direct race discrimination is dismissed;
    b. the claim of unfair dismissal is upheld; and
    c. the claim of wrongful dismissal is upheld.

**Hearing**

2. We heard evidence from the Claimant and on behalf of the Respondent from Anthony Thomas, Hygiene Manager and Victoria Luke, Head of HR. We were referred to an agreed bundle of around 500 pages.

3. The Tribunal considered a written skeleton argument from the Claimant and written closing submissions on behalf of the Respondent. Both parties made oral submissions.

4. The hearing was split into two parts; first dealt with liability. Oral liability judgment with reasons was delivered during the morning of day three. After the lunchtime break, the Tribunal heard evidence on remedy and submissions from both parties. Judgment on remedy with reasons was delivered at the end of day three.

## Applications

5. An unopposed application to change the Claimant's name to Mr Hisham Mohammed Harran (formerly Mr Mohamed Al Hassan) was granted.

6. The Tribunal make determinations about challenges to fairness the Claimant could raise on his pleaded case. Oral reasons were given at the hearing and reasons have not been requested.

## Issues

7. The Claimant confirmed there was no claim for unauthorised deductions (holiday pay).

8. We were grateful to counsel for their cooperation in producing an amended agreed list of issues, summarised below:

### Unfair dismissal

9. What was the reason for dismissal and was it potentially fair? - the Respondent contends dismissal was for conduct;

10. Did the Respondent have a genuine belief in misconduct in that the Claimant deliberately failed to attend work during contracted hours on Christmas Eve 2016, failed to cooperate with the Respondent and ignored reasonable management instruction?

11. Was the belief in misconduct reasonably held?

12. The Claimant contends the Respondent did not have reasonable belief in particular:

    a. failings within the interview with Krystof, where it became apparent mixed and unclear messages were sent to staff regarding attendance on Christmas Eve;

b. failure to appreciate the Claimant's confusion surrounding whether the shift was going ahead following a call with Krystof after 19 December 2016;

c. as a result, the view reached by the Respondent that the Claimant willfully failed to attend was unreasonable in the circumstances

13. Did the Respondent carry out a reasonable investigation?

14. The Claimant contends the Respondent:

a. failed to establish full facts and details of what Krystof told staff regarding Christmas Eve shift;

b. failed to separate the roles investigation and disciplinary officer undertaken by Anthony Thomas (ACAS Code para 6).

15. Was the decision to dismiss outside the band of reasonable responses?

a. In particular the Claimant contends the decision to dismiss was disproportionate in relation to:

i. his length of service and clean disciplinary record;

ii. the circumstances - the Claimant contends a legitimate divergence in view about his contractual obligations, in particular about the time of the commencement the Christmas Eve shift.

16. The Respondent asserts it concluded the Claimant committed acts of gross misconduct meriting summary dismissal due to:

a. serious potential consequences to the Respondent business as a result of the cleaning shift not being performed;

b. inconsistent mitigation circumstances presented by the Claimant and lack of credibility in relation to them.

17. Was the decision to dismiss influenced by the Claimant's race?

18. Did the Respondent conduct a fair procedure?

19. In the event dismissal is found unfair, what is the likelihood of dismissal in any event (**Polkey**)?

20. In the event dismissal is found unfair, is it just and equitable to reduce compensation for contribution?

**Wrongful dismissal**

21. Did the Claimant commit a breach of contract that permitted the Respondent to terminate without payment of notice?

22. Did the Respondent rely on this breach in terminating the contract?

**Race discrimination**

23. Was dismissal an act of direct race discrimination (the Claimant relies on his skin colour)?

24. Was the Claimant treated less favourably than an appropriate comparator. The Respondent suggests hypothetical comparators:

    a. a white employee who deliberately failed to attend Christmas Eve shift;

    b. non-British employee who deliberately failed to attend the Christmas Eve shift;

    c. a white British employee who had deliberately failed to attend the Christmas Eve shift (this is the comparator named by the Claimant at paragraph 15 of his supplementary witness statement)

25. In response the Respondent contends that:

    a. it dismissed white colleagues for the same act of gross misconduct;

    b. it dismissed Polish nationals for the same of gross misconduct;

    c. non-British nationals were not dismissed for the same incident;

    d. white and British employees were dismissed for other instances of absence without authorisation [119S-Uii]

26. The Claimant alleges the decision to dismiss was influenced by race as the Respondent assumed the Claimant would not have knowledge, resource or organisational support available to challenge the fairness of the decision to dismiss;

27. If the Claimant establishes a prima facie case that he was treated less favourably because of race, was the dismissal for a non-discriminatory reason? The Respondent contends dismissal was due to gross misconduct;

28. Has the Claimant sufficiently mitigated his losses flowing from dismissal?

## Procedural background

29. This case was originally brought as part of a 7 claimant multiple (the lead claimant was Urban - case number 1600349/2017). Accordingly the pleadings for both parties were drafted in respect of a group of employees rather than the Claimant alone. Further particulars of claim were provided in respect of the Claimant on 21 September 2017 [47-48].

30. The Claimant's case is the only one to proceed to hearing.

## Summary

31. The central issue in this case is whether the Claimant's dismissal, for non-attendance at a cleaning nightshift at the Respondent's factory on Christmas Eve 2016 (a first offence), was unfair and/or an act of race discrimination.

## Background facts

32. The Claimant identifies as a black Sudanese man; he has been a British national since 2011. Having come to the UK 15 years ago, he settled in Cardiff which he considers his home and is a member of the local Muslim community. He relies on his skin colour as a protected characteristic.

33. The Respondent runs a large factory operation and has a diverse workforce. The Claimant was employed as a cleaner at the Respondent cake factory in Cardiff from 11 September 2013 until his dismissal on 13 February 2017. The make-up of the night shift blue team, on which he worked, was of mixed nationality and mixed skin colour.

34. The Claimant was provided with a written contract of employment [68] and he worked '4 days on, 4 days off' 12 hour night shift pattern. It is an accepted fact that the Claimant was a hard worker. In cross examination Mr Thomas noted that he was an exemplary worker with a clean disciplinary record, who was willing to work overtime.

35. The parties explained the distinction between the Claimant's role, which for convenience we refer to as that of a 'general' cleaner, and the role of others in the team who were paid more than the Claimant as they had responsibilities for cleaning machinery. Cleaners worked assisting the

production line during the day and night. We note Mr Thomas's evidence that factory work continually produces waste, however we accept the Claimant's evidence that there was an expectation that at handover the work area would be left in a clean state from the day shift cleaners.

36. The factory operates shut down periods on Christmas Day and New Year's Day both are days that employees are required to take as leave. Issues arose in the past with regard to practices of flexible working on Christmas Eve night shift. Shut down on Christmas Day, meant the factory would be closed from midnight (mid shift); there had been a practice of 'job and finish' at Christmas Eve which allowed the cleaning staff to complete their work and leave when the job was done whilst still being paid in full for a 12 hour shift. Disgruntlement had arisen on both sides; the Respondent felt one previous Christmas Eve that cleaning was not done to satisfactory standards and staff were dismayed because they were not paid for a full shift, contrary to expectation.

37. It was clear from the evidence that Mr Thomas was anticipating difficulty around Christmas Eve working. This is illustrated by email of 29 September 2016 [80] 'if we develop a sudden sickness bug amongst the team home visits will be the first thing on my list of things to do plus follow-up action were appropriate'. The previous year he sent a letter dated 13 October 2015 [72] which specified that working hours would be from 4pm until midnight and provided: 'Please note should someone who has requested holidays falls sick, this will be considered as preplanned absence. The usual sanction for this is gross misconduct where, in the past, this has led to dismissal'.

38. The Respondent asserts that the letter of 13 October 2015 was given to all night shift team including the Claimant, but the Claimant could not recall receiving the letter [112]. Despite the content of the letter, the hours actually worked on Christmas Eve 2015 were from 2pm till 6pm, in variance to the hours specified in the letter. This change in working hours was not confirmed in writing, despite the contract of employment [68] at paragraph 4 specifies that the Respondent is to confirm changes to shifts hours in writing.

39. Turning to Christmas Eve 2016, the Claimant's shift pattern was due to start that day. On 19 December 2016 there was a meeting held either in the laundry or in the canteen by the manager of the blue shift, Krystof. There is a dispute as to whether Krystof mentioned the hours of working at the meeting, several of the team specified that he did mention the hours of working but the Claimant cannot recall this (the Claimant's response in the appeal meeting [109]). We note as relevant to this issue, the Claimant's evidence that sometimes Krystof and the Polish members of the team would speak to each other in Polish and he would not understand what they were saying.

40. The Claimant's further particulars state that he was notified by Krystof that he was required to work from 4pm to 12am on Christmas Eve [47] but the Claimant's evidence was that this pleading was not accurate. We accept the Claimant's evidence on this, which is supported by his evidence at the appeal meeting on 7 March 2017 [109] and reflected in the appeal outcome letter [116] which describes the ground of appeal as: 'that you did not have the full information available to you, specifically the start time'.

41. On 20 December 2016 an email was sent by Krystof to Mr Thomas saying that the team would not attend to work hours they were not contracted for [81]. Mr Thomas spoke with Krystof after receipt of the email and asked him to remind the team of potential disciplinary consequences were they not to attend for work. On 21 December 2016 Krystof made a telephone call to the Claimant and asked him whether he was willing to work on Christmas Eve. The Claimant made it clear that he was more than willing to work, he just wanted confirmation of the shift time and whether the shift was on (paragraphs 35 – 36 of his witness statement). The Claimant asked Krystof to give him a confirmatory call back, but no call was received. On 22 December 2016 Krystof made attempts to ring around the other members of the blue shift team. The Claimant was not called. In reaching this conclusion and accepting the Claimant's evidence that he did not receive a call, we take into account the handwritten note [83] from which the Claimant's name is absent and there is no telephone number for the Claimant on [84].

42. Victoria Davies from HR assisted Krystof in making the calls and a message was left with the wife of a colleague, Guy Hillman, asking him to call them back. Mr Hillman called back, spoke to Mr Thomas and confirmed that he would be attending work on Christmas Eve; he was the only member of the blue shift who did so, working between 4pm and 7pm.

43. The Claimant and the rest of the blue team did not attend work on Christmas Eve, the factory was shut on Christmas Day and the Claimant returned to work on Boxing Day as per his normal shift and continued to work thereafter. The Respondent engaged agency staff to clean on Christmas Eve at no additional cost to the business overall.

44. A disciplinary investigation was commenced in January 2017 conducted by Mr Thomas and Ms Davies. Interviews started on 4 January 2017, with Mr Thomas interviewing Krystof on 6 January 2017. All of the blue shift were interviewed as part of the investigation, save for Mr Hillman (the only person who turned up for work that evening).

45. Mr Hillman produced a witness statement many months later in October 2017 [118] following the commencement of Employment Tribunal

proceedings by the Claimant and his former colleagues. Of course this witness statement was not available to Mr Thomas during the disciplinary process and at the point in time he made the decision to dismiss the Claimant. Mr Hillman refers in his statement to a meeting with Krystof in the laundry but that "he didn't raise the discussion of working Christmas Eve during this meeting. I believe I may have been a problem for them because I was happy to work any time. I was in the canteen on the same night, there was a bit of a meeting. I made it clear was coming into work. Krystof said that there is 'no point coming in because no one else is coming'. I had a phone call from Krystof a few days later to say that he was in HR office, he told me that I had to come into work otherwise there would be a disciplinary when, I wasn't really happy with this because I had already said I could work. He told me he would get back to me, but he didn't call."

46. The Claimant was interviewed on 26 January and 13 February 2017, with regard to an allegation, in summary, that he had refused to work on Christmas Eve despite attempts to contact him [90]. During the disciplinary meetings the Claimant acknowledged that he had not contacted the Respondent to check whether the shift was going ahead but had made the assumption that it was cancelled. He expressed his part in the situation by referring to him not calling to check as being 'my fault' but went on to say that he was 'waiting for my call from Krystof'; he expected the Respondent to contact him.

47. The Claimant was dismissed verbally on 13 February 2017, which was confirmed by letter a few days later [104] for gross misconduct. We note the potential consequences pleaded by the Respondent of the cleaning team not attending the factory (grounds of resistance at [29]):

    a. Increased difficulty to remove residues from the machines;
    b. potential for machinery to break down;
    c. increased food contamination risks;
    d. increased potential for pest control issues;
    e. delayed start-up for the next working shift;
    f. missed production deadlines;
    g. potential for client complaints/loss of business; and
    h. potential for the company to be shut down following an unannounced food hygiene inspector visit.

48. These risks were not referred to in the dismissal letter and did not materialise as Mr Thomas engaged agency staff to clean in the shift's absence.

49. The Claimant appealed his dismissal, which was dealt with by Mr Jason Ruddiforth, who has now left the employment of the Respondent. Mr Ruddiforth was supported by Ms Luke. Ms Luke drafted the appeal outcome

letter dated 13 March 2017 [116] which was approved by Mr Ruddiforth, however Ms Luke did not participate in the decision making at appeal. The Claimant's appeal was rejected; citing the following potentially serious consequences "costly delays to production and failure to comply with hygiene standards" [117].

50. The appeal letter records that the Claimant's manager spoke to him on 19 December and 24 December [116 & 117]; this is incorrect as Krystof did not call the Claimant on 24 December 2016.

51. With regard to the other members of the team who appealed their dismissal, all were dismissed save for two, Mr Joseph and Mr Mathai, who are both Indian Nationals; they are not white. Those workers were reinstated. They had been working in the Gwent building in contrast to the other members of the team who had been working in the Dyfed building.

52. At all times the Claimant made it clear that he was willing and ready to work. Both Respondent witnesses felt the Claimant was truthful in making this expression of intent. In Mr Thomas's records for the disciplinary he made a 'for' and 'against' note to support his decision making. At [102], in respect of the Claimant, his note records "agreed to work". Both Mr Hillman and the Claimant expressed the view that their willingness to work on Christmas Eve was likely to be problematic for other team members who did not want to work. In the main these were Polish workers for whom Christmas Eve was important and held significance as a holiday to be spent with family.

53. We accept the Claimant's submission that it is likely that Krystof did not call him back about Christmas Eve working because of the implications that may have for other members of the team. Mr Hillman gives very similar evidence about Krystof saying he would get back to him and then not calling, other members of the team expressing their dissatisfaction with Christmas Eve working and conflicting evidence about and from Krystof (for example the email from Krystof to Mr Thomas on 20 December 2017 is inaccurate as it states that the team are not prepared to work when this was not the case for the Claimant).

**Law**

54. We referred to sections 13, 23 and 136 of the Equality Act 2010, section 98 of the Employment Rights Act 1996 (ERA) and the ACAS Code of Practice on Disciplinary and Grievance.

55. We are grateful to counsel for their helpful written submissions. The Claimant's did not touch on the discrimination complaint, making only brief oral submission. We do not repeat the submissions but summarise as follows.

## Race discrimination

56. To succeed, the Claimant must have been treated less favourably than a real or hypothetical statutory comparator, who does not share their protected characteristic, in materially similar circumstances.

57. Evidence of overt discrimination is unlikely to be apparent and the reverse burden of proof provisions in part address this reality. Unreasonable actions do not necessarily equate to discriminatory actions. There are two ways in which we can approach a race discrimination complaint, we can either take the 'reason why' the act occurred approach or apply the two-step test; of whether the Claimant has established prima facia facts from which we could find discrimination and then look to the Respondent for a non-discriminatory explanation.

## Unfair dismissal

58. The test for a conduct dismissal is that in **BHS v Burchell.** The Tribunal must assess whether dismissal was in the range of reasonable responses and must not substitute their own view as to the appropriate sanction.

59. The Claimant referred us to **Harvey** (Division DI Unfair Dismissal 9.C.(6)(d) para [1550-1566]) with regard to dismissals for a first offence and the interplay with gross misconduct, in particular:

> 'Broadly, dismissals for a first offence may be justified in three rather different circumstances:
>
> — where the act of misconduct is so serious (usually constituting 'gross misconduct' at common law) that dismissal is a reasonable sanction to impose notwithstanding the lack of any history of misconduct;
>
> — where disciplinary rules have made it clear that particular conduct will lead to dismissal; and
>
> — where the employee has made it clear that they are not prepared to alter their attitudes so that a warning would not lead to any improvement.'

## Conclusion

### Race discrimination

60. Save for one member of the team, none of the shift attended for work on Christmas Eve. All of them were dismissed; staff of different skin colours were dismissed for the same incident. We find that non-attendance was the reason for dismissal; it was not skin colour. When considering the comparators, in particular the hypothetical white and white British comparators, we find that there was no less favourable treatment in a like for like situation. We conclude that the Respondent would and did treat others, who did not share the protected characteristic, in materially similar circumstances in the same way as the Claimant.

61. The make-up of the shift team was diverse. All of the team's white workers and Polish workers were dismissed and remained dismissed on appeal; the only two workers who were reinstated on appeal were not white. There has been no less favourable treatment.

62. The submission that the Claimant was in effect an 'easy target' for dismissal and would not understand his employment rights must be viewed in the context that the Claimant has been in the UK for 15 years and is well settled within the Muslim community within Cardiff.

63. The complaint of direct discrimination is dismissed.

### Unfair dismissal

64. We find that the reason for the Claimant's dismissal was conduct; non-attendance at the Christmas Eve shift and therefore potentially for a fair reason. This was a first offence.

65. The Respondent's witnesses found the Claimant to be genuine, truthful and apologetic in the disciplinary process. They had no doubt of his position as a Muslim, that he had no reason to want to have time off on Christmas Eve, additionally they recognised him as a hard worker with an unblemished record who regularly worked overtime.

66. The Respondent's witnesses conceded that the Respondent had not complied with its contractual obligation to advise staff of changed hours in writing. It is incumbent on the Respondent to be clear with staff about such changes, especially so, when many of the team have English as a second language. The Respondent's failure to adhere to the terms of its own contract led to confusion about what was required on the night shift on Christmas Eve 2016.

67. In light of the change of actual hours worked at Christmas Eve 2015 we conclude that the letter of 13 October 2015 did not have general application for Christmas Eve working going forward. This finding is made on the basis of the Respondent itself indicating that flexibility would be required and that there were likely to be last minute changes, (grounds of resistance [29].)

68. This is the context in which we consider whether the Respondent had a genuine belief, on reasonable grounds, following a reasonable investigation, in the Claimant's misconduct. Mr Thomas's findings were: that the Claimant had refused to attend his place of work, that this was pre-meditated, that the Claimant openly undermined his Shift Manager, refused a reasonable instruction, refused to cooperate and deliberately decided not to attend work [104 and 105].

69. We conclude that these findings cannot have been reasonably sustained, whilst also accepting that the Claimant was genuine in expressing his desire to work. Mr Thomas, in his 'for and against' list, noted that the Claimant agreed to work. Whilst the Claimant failed to attend work, and that could be considered a deliberate action, there is no evidence to support the finding that he failed to cooperate or ignored a reasonable management instruction. To the contrary, the Claimant was awaiting management instruction and never received the phone call he was expecting. There was no apparent reason for the Claimant not to want to attend on Christmas Eve, to the contrary, it was in his interests to do so because he would work fewer hours on shift but still receive 12 hours' pay.

70. We conclude that insufficient note was taken of genuine confusion on the Claimant's part; confusion which could have been dispelled by the Respondent setting out the changed working hours in writing, in accordance with the contract of employment.

71. The situation was unusual in that nearly a whole shift failed to attend for work, but despite this factor it appears insufficient notice was taken of the Claimant's particular circumstances and his explanation of confusion.

72. Mr Thomas's email correspondence of 29 September 2016 indicates that he was anticipating potential difficulty with attendance on Christmas Eve, we note this as relevant when considering that he lacked sufficient distance from events to properly consider the Claimant's circumstances at disciplinary. Mr Thomas acted as both investigator and disciplinary officer, contrary to the recommendations of the ACAS Code, which led to a lack of proper objectivity when considering the individual circumstances of the Claimant.

73. Inconsistencies in the accounts of what Krystof told staff were not tested properly at investigation, for example the comment [123] that Krystof is

alleged to have said that 'nobody will turn up'. There was a failure to establish details of what Krystof told individual staff regarding hours, in circumstances where team members sometimes spoke in Polish with each other. Several of the blue team said during investigation that Krystof told them of the changed working hours, however the Claimant did not recall this and was unsure of start time [eg 99 & 109]. The Claimant's comments were not put to Krystof during the investigation; the Claimant was interviewed several weeks after Krystof's interview. There appears to have been a 'lumping' together of the situations of all of the members of the blue team and insufficient consideration of the Claimant's circumstances.

74. Mr Hillman was not interviewed as part of the investigation, when cross examined about this Ms Luke's response was that he should have been. It does seem rather a striking omission from the scope of investigation. The Respondent did not record the reasons why Mr Hillman was the one person who did attend for work that night; his comments were not sought until the Tribunal claim commenced.

75. We did not hear from the decision maker, but the appeal was not a re-hearing, rather a review. Unfortunately that led to insufficient consideration of the Claimant's circumstances based on the initial investigation.

76. As for whether dismissal was within the range of reasonable responses. We noted the potential consequences for the Respondent's factory [29] if there was non-attendance by the cleaning team, but because of the nature of the Claimant's general cleaning role some consequences would not have arisen directly from the Claimant's non-attendance, as he was not directly responsible for cleaning the machinery (in particular: increased difficulty to remove residues from the machines; potential for machinery to break down).

77. In any event none of these potentially serious consequences came to pass. Mr Thomas was aware of potential non-attendance of staff from 20 December 2016 and engaged agency staff at no additional cost to the business overall (blue shift were not paid for their absence from work).

78. In the circumstances we consider that dismissal was outside the range of reasonable responses. There was a failure to properly take into account the Claimant's good service, good record and willingness to work overtime and at Christmas Eve and his genuine confusion about the shift; he had only worked one Christmas Eve previously and on that occasion, issues had arisen. His absence was a first offence and dismissal in such circumstances should usually be the exception. Non-attendance as a breach of contract must be viewed in the context of the Respondent failing to comply with the contract and confirm the changed hours in writing, mixed messages from

Krystof, together with the Respondent's failure to confirm the working hours to the Claimant even orally.

79. We were referred to [119(ui)] and a table of former employees dismissed by the Respondent for absence. We treat this document with some care because it was produced by the Respondent to deal with the race discrimination complaint and we did not hear evidence about the circumstances of each dismissal. The table shows dismissals for instances of absence of more than one shift for the majority of ex-employees on it. Perhaps the most appropriate comparison, if any can be made, is with the last individual on the table, whose length of service was just over 2 years and who was absent for well over a month before her dismissal took place. That can be contrasted with the Claimant's position; he returned to work as normal on 26 December after the one day shut down. We take into account Mr Thomas's evidence that he had never dealt with a dismissal for an instance of missing one shift before.

80. We reject the submission that the Claimant was inconsistent with regard to his mitigating circumstances during the disciplinary process. The thrust of his explanation for his non-attendance did not change; neither did his expression of willingness to work. Although we note he was able to participate in the disciplinary process, some latitude should be afforded to individuals using English as a second language and an overly forensic approach to his responses, in the circumstances, is not appropriate to infer inconsistency.

81. The claim of unfair dismissal is upheld.

82. As for wrongful dismissal it is accepted that notice pay was not paid and therefore the burden of proof is on the Respondent. For all the reasons already outlined, there was no sufficient reason for summary dismissal in the circumstances. The claim of wrongful dismissal is upheld.

**Adjustments to compensation**

83. We considered whether there should be a ***Polkey*** deduction but conclude that had a fair process been adopted with due consideration of the evidence from all relevant witnesses and proper consideration of individual circumstances that a dismissal would not have taken place.

84. As for the failure to comply with the ACAS Code there was an unreasonable breach of paragraph 6; Mr Thomas acted as investigator and disciplinary officer. The Respondent runs a large operation and has sufficient resource to have separated out these roles. We will hear submissions from the parties about the suitable level of uplift whilst bearing in mind that the purpose of the uplift is to incentivise compliance with the ACAS Code.

85. As for contribution, the Claimant acknowledged during the disciplinary process that there was some fault on his part. He acknowledged that he could have checked whether the shift was going ahead, but he did not take that initiative himself (and suggested that perhaps a warning may have been the most appropriate course of action rather than dismissal). In order for conduct to amount to contribution it must be culpable or blameworthy in some way and actually contribute to the dismissal itself. We find that it was contributory in this way but in the wider context we consider it minimal and a deduction of 10% is appropriate in the circumstances.

# REMEDY

## Uplift - ACAS Code

86. Bearing in mind the purpose of the uplift is to incentivise compliance with procedures and taking into account; that the Respondent is a large organisation with many employees, has a dedicated HR function, it would have been a simple matter to have complied with the Code, we consider an uplift of 25% is appropriate in the circumstances.

## Counter Schedule of Loss

87. We are grateful to the Respondent's representative for his work on the counter schedule of loss. The hourly rate of pay was agreed at £8.85. We checked the figures produced by the Respondent, which were not challenged, against the evidence of contractual hours of work and we agree the Respondent's calculation of basic award. Basic gross weekly pay is £350.99. Based on the P60 and deducting tax, we accept the Respondent's figure for net pay for calculating compensatory loss.

## Mitigation

88. The issue that remains is whether there was a failure on the Claimant's part to mitigate his losses. We are mindful that the burden of proof lies with the Respondent in respect of a failure to mitigate. The Claimant should take reasonable steps to mitigate but the standard applied to the Claimant should not be too demanding; he is the person who has been wronged by dismissal.

89. The Respondent accepts that there has been mitigation up until end of March 2018; the dispute lies with regard to the last 12 months or so period up to this hearing. The Respondent's witnesses accepted that the Claimant was a hard worker and that is evident in terms of what he has done since his dismissal. The Claimant has worked consistently and has not claimed benefits. The extent of what he has been prepared to do for work, includes

driving taxis not only in Cardiff but also in London. He is permitted to make the choice to become self-employed and that gamble paid off for him during the first year of working for Uber, but the second year became much more difficult because he could only work in Cardiff due to licensing requirements and the increased competition for taxi services.

90. The Claimant's earnings started to drop off in January 2018, but things appeared to be improving in April 2018 when his income started to increase again. We accept the Claimant's evidence that he could not just change jobs at the drop of a hat; he had studied for and obtained his license and was not able to change what he did to earn income immediately.

91. The Claimant gave evidence about what he had considered in terms of other sources of income when his Uber earnings started to drop off (lorry driving and the possibly of setting up a car wash) and we accept that evidence, even though it does not appear in the supplemental witness statement. We have found the Claimant to be a credible witness. It takes time to retrain to do other roles, such as driving a lorry which requires completion of driving manual, particularly with English as a second language. The Claimant indicated that he needed some help with understanding technical parts of the manual he must study in order to pass the relevant exams. The Claimant was reluctant to obtain another employed job working in a factory or for a company. In the circumstances, we do not consider that that was an unreasonable approach. The Claimant worked hard whilst at the Respondent over a period of time and felt treated badly.

92. We find that the Claimant has taken reasonable steps to mitigate his losses, he has not sat back but has found work. The available local jobs he was referred to in cross-examination may be similar in nature to his role at the Respondent, but they were located outside of Cardiff in Ystrad Mynach and Llantrisant. The roles paid not much above National Minimum Wage for night work. When paid at that level, travel outside the area where an individual lives, is an important consideration. In summary we consider there has been no failure to mitigate losses by the Claimant and that an award of compensation should be made up until the date of this hearing.

93. The cap on compensation will apply at a figure agreed between the parties of £18,188.00

94. A full calculation of compensation appears in the Judgment promulgated on 27 April 2019. In summary the sums are as follows:-

    Basic award: £947.67
    Wrongful dismissal: £1,431.41
    Compensation: £18,188.00

Total compensatory figure: £20,567.08.

Employment Judge S Davies
Dated: 4 June 2019

REASONS SENT TO THE PARTIES ON

……5 June 2019…….

……..
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS