EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112610/2018

Held in Glasgow on 25, 26, 27 and 28 March 2019
Members' Meeting 23 April 2019

Employment Judge: Robert Gall
Members: Peter O'Hagan

Mr M Littler	**Claimant** **Represented by:** **Ms M Gribbon - Solicitor**
R J Blasting (Scotland) Ltd	**First Respondent** **Represented by:** **Mr J Rennie - Solicitor**
Mr E McCafferty	**Second Respondent** **Represented by:** **- as above**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that:-

(1) The dismissal of the claimant by the first respondents on 4 May 2018 was for Some Other Substantial Reason of a kind such as to justify the dismissal of an employee holding the position held by the claimant ("SOSR"). SOSR was the perceived irretrievable breakdown of the relationship between the claimant and his line manager.

(2) The dismissal of the claimant by the first respondents was however unfair in terms of section 98 (4) of the Employment Rights Act 1996.

(3) The Tribunal orders that the first respondents shall pay to the claimant a monetary award of £12,268.83, made up as detailed below. The

prescribed element is £11,636.43 and relates to the period from 4 May 2018 to 26 April 2019. The monetary award exceeds the prescribed element by £63.24. The monetary award comprises:-

(a) A basic award of £4,572, based on the claimant's age, length of service and the cap on level of wages for purposes of calculation of the basic award.

(b) Loss of statutory rights due to dismissal, £300

(c) A compensatory award comprising loss of wages for the period until a fair dismissal would potentially have taken place (£1,590 + £186, a total of £1,776), balance of period of notice of 4 weeks (£4,263.60), loss from time of obtaining new employment until date of Tribunal, restricted in terms of the Judgment (£606.33), loss for a further 39 week period, restricted in terms of the Judgment (£725.40) and pension loss (£25.50).

(4) The first respondents did not provide to the claimant a statement of employment particulars as required in terms of the Employment Rights Act 1996. In terms of section 38 of the Employment Act 2002, the first respondents are ordered to make payment to the claimant of an amount in compensation as there are no exceptional circumstances which would make an award unjust or unequitable. It is considered by the Tribunal that it is just and equitable in the circumstances to award the higher amount to the claimant namely, four weeks pay. The sum which the first respondents are ordered to pay to the claimant amounts to £2,032 having regard to the cap on the weekly pay applicable at date of dismissal.

(5) The email sent by the second respondent on 9 August 2018 was something done by the second respondent in the course of his employment by the first respondent. It followed upon a protected act being done by the claimant. It involved the subjection of the claimant to a detriment because of that protected act. It caused upset and distress to the claimant. An award in respect of injury to feelings is

made. The compensation which the first respondents are ordered to pay to the claimant in respect of his injury to feelings is £3,000. Interest at 8% is applicable from date of discrimination (9 August 2018) until date of this Judgment. Interest payable in addition to £3,000 is therefore £171.22.

REASONS

1. This case called for hearing at Glasgow on 25 March 2019. It proceeded on that day and over the following three days.

2. Evidence was concluded by the end of the third day of hearing. Submissions were to follow when the Tribunal resumed sitting on the fourth and final day of hearing.

3. The Tribunal was initially constituted by the Employment Judge and two Members. Unfortunately, overnight between the third and fourth days of the hearing, a close family member of one of the Tribunal Members became very seriously unwell. That Tribunal Member contacted the Tribunal office on the morning of the final day of hearing to say that he was unable to sit.

4. This circumstance was made known to the respective parties and representatives. The Tribunal convened.

5. Various options were detailed by the Tribunal as possible ways of dealing with this situation. One was that both parties consented to the case being concluded in front of the two remaining members and being determined by those members. It was explained that if this was to happen consent of both parties was required in terms of the relevant Regulations. The option of reconvening when the third Member was able to attend also existed and was discussed. In addition, the option of parties preparing and presenting written submissions which might then be discussed at a Members' meeting involving all three Members was aired.

6. After a brief adjournment, both solicitors confirmed that they wished to proceed on the basis of the two remaining Members of the Tribunal hearing

submissions orally on the fourth day and then determining the claim. The Tribunal so proceeded.

7. At the hearing, evidence was heard from the following parties:

- The claimant.
- Andy Canavan, managing director and majority shareholder of the first respondents.
- Eddie McCafferty, quarries manager with the first respondents and the claimant's line manager.
- Fiona Fyfe, office administrator with the first respondents.

8. The following parties did not give evidence but are relevantly mentioned at this stage:-

- Ian McDonald, formerly director and minority shareholder with the first respondents. He left their business at the end of April 2018.
- Davie Graham, general manager with the first respondents.
- Gordon McCheyne, manager with the Forestry Commission and line manager of the claimant in his new employment.

9. A joint bundle of productions was lodged. Additional productions were added to that bundle in course of the hearing. No objection was taken to those additional documents being added to the joint bundle.

10. In addition to the documents, a voice file was played during the hearing. This occurred during cross examination of Mr Canavan. It was a voice file of a telephone call between the claimant and Mr Canavan on 4 May 2018. Prior intimation of the intention to play the voice file had been given to the respondents. A copy of the voice file had been made available to them prior to the hearing. A transcript of the relevant part of the voice file appeared in the joint bundle at pages 81 and 82. That transcript was accepted by the first respondents as being accurate.

11. The position of the first respondents prior to and during the hearing of evidence was that the claimant had resigned. He had not been dismissed.

12. Prior to commencement of submissions, Mr Rennie confirmed that the first respondents were no longer arguing that dismissal had not occurred. They accepted that the claimant had been dismissed either on 4 or 7 May 2018. They further accepted that there had been no procedures around that and that the dismissal was unfair due to absence of proper procedures. They did not accept that the ACAS Code of Practice applied to this dismissal. They maintained that the principles of ***Polkey v AE Dayton Services Limited 1988 ICR142 ("Polkey")*** applied, resulting in deductions from any compensation payable. They maintained that dismissal was for SOSR. It would have been a fair dismissal had proper procedures had been followed, they said.

13. The first respondents also confirmed during course of the evidence that they did not take any issue with the efforts of the claimant to mitigate his loss.

Facts

14. The following were found to be the relevant and essential facts as admitted or proved during the course of evidence.

Background

15. The claimant was employed by the respondents from January 2012 to 4 May 2018. He was, at date of his dismissal, aged 52, having been born on 23 June 1965.

16. The claimant was employed by the first respondents as a blasting engineer. He had initially been employed by them as a shot profiler. He became a blasting engineer in March 2016.

Respondent's business

17. The first respondents carry out drilling and the blasting operations. They use explosives. The objective is to assist with quarrying, by producing rock and materials, or to assist with the work of customers such as the Forestry Commission by clearing areas. Another customer base is that of operators of open cast mines.

18. The turnover of the first respondents is around £10.5m per annum. The work which they carry out for companies who operate quarries is worth approximately £4m per annum. That is the area of the business managed by Mr McCafferty.

19. Mr McCafferty reported to Mr Graham in relation to Mr McCafferty's general day to day workings. Mr Graham was the general manager with the respondents. Mr McCafferty also reported to Mr Canavan and was accountable to him on more general matters.

20. There were approximately six drillers operating within Mr McCafferty's team who reported to him. In addition, there were seven shotfirers or profilers. They also reported to Mr McCafferty. The claimant, as mentioned, was a blast engineer who carried out many of the same duties as a shot profiler. The claimant reported to Mr McCafferty.

21. A profiler, or the claimant as blast engineer, would specify the explosives required, the location of where holes were to be drilled to insert the explosive and the angle at which those holes were to be drilled. Accuracy is paramount given the use of explosives and the extent of explosive material in use. Health and safety is a big concern in the arrangements for and carrying out of the blasting work.

22. The first respondents have their headquarters in Mauchline in Ayrshire. There are two secretaries based there, Ms Fyfe and Ms Welsh. Mr Canavan is also based there. Operatives come and go to the office. They work mainly on site, however. The claimant was amongst those who worked almost entirely on site. He did not often visit the office.

23. In addition to Mr Canavan and Mr Graham, there are three managers who deal with different areas of the business or locations. There is a further manager who deals with health and safety matters. There are drillers and shot profilers as detailed above. In total, the first respondents had at time of termination of the claimant's employment around 40 staff.

24. One of the clients of the first respondents is the Forestry Commission. The first respondents have been doing work with the Forestry Commission for approximately twelve years. They know personnel there and the management setup. Both Mr Canavan and Mr McCafferty were aware that Gordon McCheyne was a manager within the Forestry Commission. The claimant dealt with the Forestry Commission when with the first respondents. As detailed below, after termination of his employment with the first respondents, he obtained work with the Forestry Commission as an employee. He continues to be employed by that body as at date of the Tribunal. Both Mr Canavan and Mr McCafferty had sufficient knowledge of the management structure within the Forestry Commission to know that it was almost certain that Mr McCheyne would be the claimant's line manager when the claimant joined the Forestry Commission as an employee.

Working relations

25. Mr Canavan and the claimant had worked together for some 18 months with a different company prior to the claimant joining Mr Canavan at the first respondents.

26. There was, during the employment of the claimant with the first respondents, no HR function within the first respondents. There were no annual appraisals carried out. There were no regular team meetings or one to one discussions. Mr McCafferty would assign tasks or jobs to managers within his team, including the claimant. Whilst the claimant reported to Mr McCafferty, there was no mechanism through which any regular review of the work of the claimant or other employees who reported to Mr McCafferty or any other manager took place.

27. Mr Canavan would also assign tasks to the claimant. Mr Canavan did not in that circumstance check with Mr McCafferty prior to doing this. He would simply speak directly to the claimant. He did not inform Mr McCafferty that he had done this. The claimant considered that he had no option but to follow these instructions. He was of the view that he required to carry out tasks as directed by the managing director, Mr Canavan, who was also the owner of the business. In these situations, if asked to do a task by Mr McCafferty, the claimant would respond to Mr McCafferty by saying that he had been requested to carry out a task for Mr Canavan and was therefore unable to carry out the task which Mr McCafferty wished him to. Mr McCafferty was somewhat annoyed and frustrated by this. He would express that to the claimant at those times. The claimant encouraged him to speak to Mr Canavan and also encouraged Mr Canavan to speak to Mr McCafferty. The claimant felt he was *"piggy in the middle"*. Other managers were also aware that Mr Canavan would speak directly to the claimant and ask him to carry out particular tasks. This caused a degree of unrest with them.

28. Mr Canavan regarded the claimant as a good employee, although he was aware of some concerns in March and April 2017 as detailed below. He regarded those as having been addressed. There were never any performance management steps taken in relation to the claimant nor were there any disciplinary proceedings instigated.

Meetings in March and April 2017

29. Two meetings were held involving the claimant. One was on 9 March 2017. The other was on 28 April 2017. Notes of those meetings appeared at pages 182 and 183 of the bundle.

30. Prior to the meeting on 9 March 2017, the claimant had been absent from work through stress related illness. This had been triggered by health issues with family and friends. This meeting was scheduled as one to discuss the health of the claimant and his return to work. That was confirmed at the commencement of the meeting. The meeting was held between the claimant, Mr Canavan and Mr Graham. The following sentence appears in the notes:-

> *"It was also agreed that any disagreements with team members were not carried out on site as it is not good practice. ML agreed these issues would be rectified by meeting with DG and other party* (sic) *to reach solution."*

31. The meeting on 28 April involved the same personnel, with the addition of Mr McCafferty. The purpose of that meeting is stated at commencement of the note. It is said:-

> *"Reason for meeting was to review with ML how things were going regarding his workload and well being as had been agreed at a previous meeting with him."*

32. The claimant had understood that this would be a meeting in relation to welfare. He had not anticipated Mr McCafferty being present at the meeting.

33. At this meeting, Mr McCafferty referred to one job where the claimant had, he said, not marked out four rows of holes as requested but rather had marked out three. The driller required to mark out the fourth row. Mr McCafferty also said that paperwork for another job was not done, with what had been produced not being good enough in his view. His view was that an improvement was required. He referred to communication with the claimant sometimes being difficult with there being a need for improvement in his view. Mr Canavan is noted as stating that communication and working relationships were important to the success of the company and that he would expect an improvement with that. There was a further reference by Mr McCafferty to concerns which he said there were on the part of shotfirers in the quarries as to the quality of paperwork produced by the claimant. Mr Graham is noted as stating that the claimant could solve this problem by communicating better with the supervisor on a blast. From the note, the claimant said he would try to improve effort in this area. Mr Graham stated, from the note, that Mr McCafferty would speak to shotfirers and supervisors to involve the claimant as and when required. The note concludes in the following terms:-

"It was agreed by everyone that communication was really important and that an improvement was required, working relationships were important and needs (sic) *improvement.*

Another review was agreed in one months' time.

A.O.B ML was reminded that his first point of contact for enquiries was E Mc C. ML was told to watch his expenses claims. No other issues. Meeting closed."

34. There was no subsequent such meeting whether after one month or later. Mr Canavan viewed the claimant's performance as improving after this meeting.

35. Mr McCafferty and the claimant had a working relationship rather than any friendship or social relationship. The claimant's view was that this was kept on a professional level. He considered that while they had disagreements, those were as to technical issues. He regarded the relationship as being *"decent"*. Mr McCafferty, on the other hand, had a very low opinion of the claimant. He did not make that known to the claimant. His view was that the claimant was not working as hard as other profilers. He regarded the claimant as avoiding calls which were made to him by Mr McCafferty in relation to jobs. He did not however raise these matters with the claimant. He would occasionally speak with Mr Canavan about them. Mr Canavan however was sympathetic to the claimant. The claimant was unaware of any discussion of that nature between Mr Canavan and Mr McCafferty.

Changes in the claimant's duties

36. By email of 25 March 2016, the claimant sent to Mr Canavan a document by way of attachment. A copy of that email appeared at page 75 of the bundle. The attachment appeared at page 76 of the bundle.

37. In the document attached to the email, the claimant said to Mr Canavan that he had become aware over the last year that his wage was low compared to that of others in his area of work, particularly given that others had less responsibility and tasks. He said that he had worked for the respondents for five years, that he had enjoyed work and the experiences with it but did not

feel that his work was reflected in wages paid to him. He went on to highlight that he had never received a contract of employment although had requested this on two occasions. One of those occasions had been at a time when he was requested by lenders to show to them his contract of employment in connection with a possible loan. His request to the first respondents had not resulted in the issue of a contract to him. He had been unsuccessful in obtaining the loan he had sought.

38. The letter contained the following paragraph:-

> *"This may sound as a large increase but I do feel you are getting value for money since Malcom Morrison would have cost you 50+ a year and the average pay for what I do is 40,000-45,000. I can put my hand on heart and say I have never worked so hard for someone in my life, the hours of overtime which I recently kept track of was shocking to the point of 70hrs plus a week was an average, and not being paid overtime or travelling time has been demoralising over time but always thinking this would have been corrected over time showing my commitment. The NVQ has been out of my hands but I have never questioned this in the work I cover regardless of the outstanding NVQ paperwork.*
>
> *Your Company has a Great Future as I though* (sic) *when joining and your position within the Aggregates industries will grow even more each year and I do hope to be part of that."*

39. Mr Canavan responded by email of 25 March 2016 stating that he had taken on board the requests of the claimant *"and you have a case on most points so I will sit down with you after the break and talk through your requests"*.

40. That discussion did take place between Mr Canavan and the claimant. It was followed by an email from Grace Welsh. A copy of that email appeared at pages 77 and 78 of the bundle. It read:

> *"Further to your meeting with Andy earlier, I can confirm:*

> *Weekly pay from 28 March 2016 will be £673.08 = £35,000.16/annum. Additional 5 days holiday per annum = 33 days total (includes bank and public holidays). Your competence certificate will be altered to show "engineer" status.*
>
> *I will speak to Ian regarding the Contract of Employment, the one I have on the system is outdated, but I will chase it up for you."*

41. The claimant replied by email of 30 March, also at page 77 of the bundle. He stated that all had been agreed *"although Andy may wish to add (Surveyor)/Blasting Engineer to the contract, if you could ask."* The reply went on to state *"there won't be any need for Employment status confirmation as I will be okay once my new contract arrives to signed* (sic) *in the next week or 2 weeks."*

42. Although Mr Canavan had agreed these alterations to the claimant's terms and conditions, he did not consult with Mr McCafferty prior to so doing. He did not inform Mr McCafferty of these changes. The changes became effective at time of agreement. No contract was however issued to the claimant notwithstanding the confirmation that this would happen.

43. The work which the claimant did with the respondents was at times physical. The claimant had difficulty with his back. An accident had occurred at work impacting on his back.

44. On 29 April 2018, the claimant sent to Mr Canavan an email. The email was in the following terms:-

> *"Hope you had a good holiday but sorry for to come back to this letter* (sic).
>
> *I have over the last few months struggled with my back and now decided I can't go on physically working on blasts. I am however still able to profile and produce blast specs, but that's my limit physically. I have been in such pain over the last year and constantly taking pills to ease this but I want to stop taking pills. My doctor has advised me to seek a less physical job and advised me to speak to you.*

I will understand if you wish me to leave but sincerely hope there could be other things within the company I could do. I have thought about this and have enclosed a list of possible duties I feel I could be very helpful to you and the company."

45. This email appeared at page 79 of the bundle. Page 80 of the bundle was the list of possible duties prepared by the claimant and sent with his email on 29 April 2018. That list contained headings, with a little detail in relation to each item.

46. The claimant's role within the first respondents was then discussed at a meeting between Mr Canavan and the claimant at the company premises on 30 April 2018. The records from the claimant's mobile phone confirmed that the phone was in Mauchline that morning. No notes of the meeting were taken.

47. At this meeting Mr Canavan said that the respondents were at the point of receiving a cash investment. They therefore had money to spend and wished to take work from their competitors. It was agreed that with immediate effect, the claimant would seek work on behalf of the respondents. The claimant was to report to Mr Canavan in relation to the obtaining of new business.

48. After the meeting between the claimant and Mr Canavan, the claimant informed Mr Graham of the change in his duties. He did not inform Mr McCafferty. He presumed that Mr Canavan would inform Mr McCafferty. In fact, Mr Graham informed Mr McCafferty. Mr McCafferty was extremely unhappy and very annoyed when told by Mr Graham that the claimant had been given this new role of being involved in obtaining new business. His view was that it encroached upon his own duties. He made contact with Mr Canavan as detailed below.

49. The claimant commenced this new element of his role immediately following the meeting with Mr Canavan, as stated above. He made contact with different potential customers. He updated Mr Canavan by telephone on the morning of 4 May prior to the conversation moving on to the discussion

detailed below in terms of which the claimant was dismissed by the respondents.

Events on 3 and 4 May 2018

50. The claimant's duties had therefore altered so that he had assumed some responsibility for seeking new business. Mr McCafferty was very annoyed by this. As mentioned, he had a very low opinion of the claimant. In his view the claimant did not respond to calls from him as swiftly as he should or alternatively did not on some occasions return calls at all. He regarded the relationship between Mr Canavan and the claimant as being far better than the relationship he himself had with the claimant. He thought that Mr Canavan was more than generous to the claimant in the way in which he treated him. Mr Canavan was not, in the opinion of Mr McCafferty, as strict with the claimant as he was with others. Mr McCafferty found the claimant very difficult to manage due in part at least to the claimant's relationship with Mr Canavan. He tended to pass on management of the claimant either to Mr Graham or to Mr Canavan. He regarded Mr Canavan as being very much on the claimant's side in relation to any issues which arose.

51. As mentioned, Mr McCafferty regarded the claimant's new role in assisting with obtaining new business as infringing upon his own work duties. He was also concerned as, in his view, the claimant was not up to obtaining new work.

52. Mr McCafferty therefore left site on the afternoon of 3 May and travelled to the offices of the first respondents in Mauchline. He spoke with Mr Canavan and expressed his annoyance at what he understood to be this variation in the claimant's role. This change in the claimant's duties was the reason for Mr McCafferty travelling to Mauchline and was the source of the anger he expressed to Mr Canavan.

53. Mr McCafferty said to Mr Canavan at this meeting that he had had all he could take, that he had had enough and that he could not go on working with the claimant. He said that others had said that if he left they would leave too. Mr Canavan asked Mr McCafferty if Mr McCafferty wanted Mr Canavan to *"get rid of"* the claimant. Mr McCafferty said that he was not asking Mr Canavan

to do that. Rather he was saying that he did not find it worth staying any longer given the hassle he was getting. He said that he could not work any longer with the claimant. Mr McCafferty also said to Mr Canavan that some of the shot blasting team were also unhappy with the claimant. Mr Canavan said to leave this matter with him. He then asked Mr Canavan whether the claimant's job had changed, saying that he had heard that the claimant was to be looking for new work for the respondents. Mr Canavan denied this, saying that nothing had changed. Mr McCafferty was relieved.

54. The conversation was not a long one. At its conclusion, Mr McCafferty was quite content that the claimant was not going to be seeking new work for the respondents and that things would be carrying on as normal.

4 May 2018

55. In the morning of 4 May 2018 around 10am, the claimant telephoned Mr Canavan. He commenced the call by updating Mr Canavan on various contacts he had made following upon the winning of new business becoming one of his duties.

56. The mobile phone records of the claimant, produced in the bundle, confirmed that his telephone was located at his house in Strathblane on the morning of 4 May. The claimant did not attend the offices of the first respondents that morning.

57. A transcript of the remainder of that call appeared at pages 81 and 82 of the bundle. The transcript was prepared from a recording of the call made by the claimant. The recording was made on an app downloaded to the claimant's mobile phone. The claimant had downloaded this app as he has hearing difficulties and as phone reception is not always good at some of the sites on which he worked. The app meant that calls were recorded automatically. The claimant was therefore able to replay them to check instructions given or to ensure that he had heard the full extent of everything covered during the call. At the end of a call, the option was given to the claimant to delete the recording. He had deleted the call with Mr Canavan. It proved possible to access the recording, notwithstanding its deletion. This was done by

someone with IT knowledge at the request of the claimant when the content of the call became of relevance to these proceedings.

58. The respondents were unaware that the claimant had this app on his phone. Had they known of it, Mr Canavan would have requested the claimant, or any other employee using such an app, to remove it from their phones. The employee would have been expected to comply with that instruction. A memo would have been issued to staff confirming the instruction to all staff. If an employee persisted in using the app, a warning would be issued. If the employee continued using the app in those circumstances, further disciplinary proceedings, including potentially dismissal, might occur.

59. Mr Canavan said in this conversation that Mr McCafferty had said to him that either Mr McCafferty left or the claimant left *"sorta thing"*. He said that Mr McCafferty had said that *"the guys* (were) *behind him".* He stated that he wished to make an offer to the claimant. He said that he had been *"backed into a fricking corner here really"*. In relation to the claimant, he said that he would give him the *"highest recommendation possible".* He repeated that. He said that he would give the claimant *"a glowing report".* He said to the claimant *"I rate you".* Mr Canavan said to the claimant that *"McCafferty and the gang are ganging up a wee bit"*.

60. The words used by Mr Canavan constituted dismissal of the claimant. The claimant understood himself to be dismissed during this call.

61. In course of the call, it was agreed between Mr Canavan and the claimant that they would meet on 7 May.

Meeting on 7 May

62. Mr Canavan and the claimant met on 7 May. Mr Canavan said that his hand had been forced in effect. He said that if Mr McCafferty and some of the men left, this would cripple the business. He said that Mr McCafferty had said to him that it was either him (Mr McCafferty) or Mr Littler . He said that Mr McCafferty was furious about the new role which the claimant had, saying that he (Mr McCafferty) was meant to be the one who was getting contacts, that

this was his role. An offer was made to the claimant by Mr Canavan that he could keep his car and phone for a period, that a financial payment would be made to him resulting in him receiving two or three months' money. Mr Canavan suggested that the claimant might go on sick leave for a mth in the interim.

63. The first respondents issued a P45 to the claimant confirming his employment as terminating on 7 May 2018. A copy of that P45 appeared at page 154 of the bundle

8 May

64. Notwithstanding what had been discussed and agreed between the claimant and Mr Canavan the preceding day, including retention by the claimant of the car for a period, employees of the first respondents appeared at the claimant's property on 8 May. They sought access to obtain the keys to the car to remove it. The claimant was not present at the property. He had received no notification that employees would appear. During the course of 8 May, there were four visits to the property of the claimant during which recovery of the car was attempted. Ultimately the car was removed.

65. This action by the first respondents to seek recovery of the car, conflicted with what had been agreed on that point with the claimant on 7 May. It angered the claimant. He sent emails to the respondents setting out an alternative view as to compensation due to him and expressing his annoyance in relation to the attempted recovery of the vehicle. He also rehearsed the discussion which had taken place on 7 May. A copy of the emails exchanged on 8 May appeared at pages 84 to 90 of the bundle.

9 May

66. On 9 May, the first respondents terminated the telephone contract such that the number used by the claimant on his work's mobile phone was no longer useable by him.

Respondents' business if Mr McCafferty and others left

67. If Mr McCafferty and others within his team of shot firers, profilers or blasters left, this would severely dent the respondents' business given that Mr McCafferty and his team were responsible for some 45% of the turnover of the respondents' business. In that situation, if dismissing the claimant would avoid departure of those employees, including Mr McCafferty, it would be very likely that the respondents would have dismissed the claimant.

The claimant's employment position since dismissed by the first respondents

68. The claimant was paid by the respondents up to 21 May 2018. He received Jobseekers Allowance.

69. During his employment with the first respondents, the claimant had dealings with the Forestry Commission. He secured a position with the Forestry Commission commencing on 14 June 2018. His net weekly wage with the respondents was £530. His gross weekly wage was £710.60. His net weekly wage with his new employers is £344.

70. The efforts made by the claimant to obtain alternative employment and the job which he obtained by the Forestry Commission were accepted by the respondents as having been appropriate and as having fulfilled the duty to mitigate loss.

71. The wage loss of the claimant to 25 March 2019, date of commencement of the Tribunal hearing is £8183.33. His ongoing wage loss from time of commencement with his current employers is £186 per week, being the differential between net pay as received from the first respondents and as received by his current employers.

72. The claimant also suffered loss of pension contributions for six weeks. The sum in which he suffered loss is £4.25 per week.

Victimisation claim

73. The first respondents dealt with the Forestry Commission, as stated above. Gordon McCheyne was known to the first and second respondents as a senior

employee within the Forestry Commission. Both respondents were also aware that the claimant had obtained employment with the Forestry Commission and that Gordon McCheyne was senior to the claimant and likely to be the claimant's line manager.

74. The claimant in his role with the Forestry Commission had interaction with the first respondents in relation to blasting which the first respondents were carrying out on behalf of the Forestry Commission at Inverardran Quarry.

75. In early August of 2018, the claimant was dealing with Peter Drummond of the first respondents in relation to that matter. Emails exchanged between the claimant and Mr Drummond appeared at pages 97 to 99 of the bundle.

76. In response to an email of 8 August from the claimant to Mr Drummond, a copy of which appeared at page 98 of the bundle, the claimant received the reply from Mr Drummond that he was on holiday, and was back on 21 August.

77. The claimant was keen to obtain progress in relation to the job although Mr Drummond was on holiday. He decided therefore that he would send an email to Mr Drummond, copying that to Mr McCafferty. He did that, also copying the email to Mr McCheyne, so he was aware of the position. The email from the claimant was dated 9 August 2018 and appeared at page 97 of the bundle. It read:

> *"As your* (sic) *on Holiday I was wondering how this can be done before Mondays blast. We will require the recalculated burdens with amended angles applied.*
>
> *Please advise."*

78. By email later that afternoon on 9 August, Mr McCafferty replied. He sent the email to the claimant and Mr Drummond. He also copied it to Mr McCheyne and Mr Canavan. He spoke with Mr Canavan regarding the terms of the proposed reply before it was sent. Mr Canavan was aware of and agreed with the contents of the email. That email read:

> *"I have passed your request to our office and it will be processed before Monday. I have been instructed to have no contact with you due to ongoing legal proceedings. Any further correspondence should be carried out through our office."*

79. By the time this email was sent, Tribunal proceedings had been commenced by the claimant in this claim against both respondents. Mr McCafferty was aware of those legal proceedings. He was aware that the claim at that time included a claim of discrimination, the protected characteristic being disability. Mr McCafferty had seen the email exchange between the claimant and Mr Drummond, being the emails prior to 9 August 2018. Those had been purely work related. They had no connection with the legal proceedings.

80. Mr McCafferty had details of the claimant's email account within his new employers. He could have addressed the reference to legal proceedings solely to the claimant. Mr McCafferty was also aware, as was Mr Canavan, that the claimant had consulted a solicitor in relation to the claim to an Employment Tribunal. He was also aware, as was Mr Canavan, that a solicitor had been instructed to act on behalf of both Mr McCafferty and the first respondents in answering the Tribunal claim.

81. The raising of proceedings by the claimant was a protected act in terms of section 27 of the Equality Act 2010. The respondents accept this. The email was sent because legal proceedings had been raised.

82. The claimant's new employers were aware that he had formerly worked for the first respondents. The claimant had not however informed his new employers that he had initiated Tribunal proceedings against the respondents.

83. The claimant had sight of the email from Mr McCafferty of 9 August that afternoon shortly after it was sent. He was very concerned on reading its terms. He realised that Mr McCheyne would, through this email, become aware of the fact that there were legal proceedings between himself and the respondents. The claimant at this point was engaged on a probationary basis by his new employers. His concern was that he might be viewed as not having been truthful with his new employers and that he might be dismissed.

He deleted the email. He thought that might remove the email from the system and that Mr McCheyne would not see the email. That however was incorrect. The claimant was very worried and embarrassed by the email being sent to Mr McCheyne referring to ongoing legal proceedings. His worry was whether his job might come to an end.

84. The claimant did not see Mr McCheyne on the afternoon of 9 August. He went home and spoke to his wife regarding the situation. The discussion was on the basis that he might lose his job. He took a pill to calm himself down. He regarded the terms of the email as being hurtful and spiteful. He was of the view that Mr McCafferty might be seeking to remove him from his new job.

85. On the morning of 10 August, the claimant spoke with Mr McCheyne. He said to him that he was aware that he had been copied in on an email which had referred to a legal dispute. He said that he did not expect that to be raised in a work email. Mr McCheyne said that it was fine. He said that it was a private matter and that he would delete the email.

86. This email has not been raised since that time by Mr McCheyne. The claimant has continued to be employed by the Forestry Commission. He has suffered no ongoing detriment.

The issues

87. The hearing had been arranged on the basis that one of the key issues was as to whether the claimant was dismissed or had resigned. That remained an issue between the parties during the hearing. After the evidence had been concluded and at the point when submissions were to be made, the respondents confirmed to the claimant and to the Tribunal that it was now accepted and conceded that dismissal had occurred.

88. The issues for the Tribunal were therefore as follows:-

    (i) Had the respondents shown the reason for dismissal or the principal reason for dismissal, with that being SOSR? This is as set out in section 98 (1)(b) of the Employment Rights Act 1996 ("ERA").

(ii) Was the dismissal of the claimant by the first respondents fair or unfair in terms of section 98 (4)(a) and (b) of ERA?

(iii) If the dismissal of the claimant by the first respondents was unfair in terms of ERA, what sum was to be paid by the first respondents to the claimant in compensation for that?

(iv) Was any compensation payable in respect of an unfair dismissal to be uplifted due to a failure to comply with the ACAS Code of Practice? If it was to be uplifted on that basis, by what amount was it to be uplifted?

(v) Had there been an act of victimisation in terms of section 27 of the Equality Act 2010 ("EQA")?

(vi) If there had been an act of victimisation in terms of section 27, what sum was to be paid by the respondents to the claimant in compensation for that?

(vii) Was the higher or minimum amount (four weeks or two weeks) to be paid to the claimant by the respondents due to failure to issue him with a statement of employment particulars, assuming success in his claim of unfair dismissal?

Applicable law

89. Section 98 (1) of ERA states that it is for the employer to show the reason or principal reason for dismissal and that, relevant to this case, it was SOSR.

90. Section 98 (4) of ERA states that whether a dismissal is fair or unfair having regard to the reason for dismissal:

"(a) depends on whether in the circumstances (including the size and administrative resources of the employers' 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."

91. In considering whether there has been an irretrievable breakdown in relationships such as to warrant ending of the contract of employment, the case of ***Turner v Vestric Limited 1980 ICR 528 ("Turner")*** states that failure to take reasonable steps by an employer to improve relationships and moving to dismiss without attempting such steps renders a dismissal unfair. It is appropriate for a Tribunal to consider whether the situation might be capable of being addressed and rectified. It should consider whether the position of one party who does not, for example, wish to work with another party, is reasonable or not.

92. If dismissal is unfair, compensation is to comprise a basic award and a compensatory award. Calculation of the basic award is to be in accordance with sections 119 and 122 of ERA. Calculation of the compensatory award is to be in accordance with the provisions of sections 123, 124 and 124A of ERA.

93. If a dismissal is unfair due to a failure to apply proper procedures, a Tribunal is to consider what in its view would have happened had proper procedures been followed. This is in terms of ***Polkey***. The Tribunal should consider on a percentage basis the likelihood that a fair dismissal would have followed if proper procedures had been adhered to. It should then reduce compensation awarded to reflect the percentage chance of there being a fair dismissal.

94. In assessing compensation, a Tribunal should also consider what might have happened in the employment relationship had employment not been terminated at the point when that occurred. This involves a degree of speculation. The principles set out in the case of ***Software 2000 Limited v Andrews & others 2007 IRLR 568 ("Software")*** are appropriately kept in mind.

95. An uplift to the compensatory award falls to be considered if there has been a failure to follow the ACAS Code of Practice in a case to which the Code

applies. Such an increase is possible in terms of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

96. The cases of ***Jefferson (Commercial) LLP v Westgate UKEAT/0128/12 ("Jefferson") Lund v St Edmond's School Canterbury UKEAT/0514/12 ("Lund"), Hussain v Jury's Inn Groups Ltd UKEAT/ 0283/15*** and ***Ezias v North Glamorgan NHS Trust 2011 IRLR 550*** considered the applicability of the ACAS code to circumstances where there had been an unfair dismissal, the reason for the dismissal being SOSR. The position on that point was slightly unclear following those cases.

97. The case of ***Phoenix House Ltd v Stockman and another 2017 ICR 84 ("Stockman")*** however saw the Employment Appeal Tribunal state in paragraph 21 of the Judgment that clear words were required in the Code if a sanction for non-compliance was to apply. It held that the Code did not apply to dismissals for SOSR where there had been a breakdown in working relationships.

98. Section 38 of the Employment Act 2002 states that, if a claim is successful on certain grounds, one of which is unfair dismissal, and there has been no statement of employment particulars issued to the claimant, the Tribunal is to award either two or four weeks' pay to a claimant, unless it considers that there are exceptional circumstances which would make an award unjust or inequitable.

99. Section 27 of EQA states that a person victimises another person if the other person is subjected to a detriment because the other person has done a protected act.

100. Compensation in respect of any such detriment comprises an award in respect of injury to feelings. The amount which a Tribunal may award is to be set with regard to the cases of ***Vento v Chief Constable of West Yorkshire Police (No.2) 2003 ICR 318*** and ***Da'Bell v NSPCC 2010 IRLR 19.*** The Tribunal should also keep in mind the Presidential Guidance issued on 5 September 2017, as updated by the addendum to that issued on 23 March 2018. That reflects the position in respect of claims presented on or after 6

April 2018 as involving a lower band of compensation of £900 to £8,600 for less serious cases. Those figures are set to include the 10% uplift detailed in ***Simmons v Castle 2012 EWCA Civ 1039***. A Tribunal is to set out reasons why the 10% uplift referred to in ***Simmons v Castle*** does not apply if, in its view, it is not applicable in any particular case.

101. Interest is payable on awards made in respect of injury to feelings.

102. It is important that if a Tribunal finds that discrimination has occurred, any award of compensation made is reflective of it being a matter of public policy that discrimination does not occur. An award of compensation should not be so low as to bring that principle into disrepute. This is confirmed in the case of ***Nagarajan v London Regional Transport 1999 IRLR 5722 ("Nagarajan")***.

103. In considering whether detriment has occurred, the guidance provided in the EHRC Code of Practice at paragraphs 9.8 to 9.12 is of relevance.

Submissions

Submissions for the claimant

104. Ms Gribbon commenced her submissions by acknowledging the concession now made by the first respondents that there had been a dismissal. She said that in due course, after the Judgment was issued, there will be likely to be an application for costs or expenses by the claimant.

105. Turning to the dismissal, Ms Gribbon said that the claimant maintained that the date of dismissal was 4 May. There had been a meeting on 7 May and the P45 issued to the claimant was dated 7 May. The last day of work however prior to that was 4 May when the conversation with Mr Canavan had happened. The claimant had been paid until 21 May. The conversation however on 4 May constituted dismissal.

106. Ms Gribbon referred to the terms of section 98 of ERA. She highlighted that no procedures had been followed at time of dismissal. The dismissal was automatically unfair she said. It had not been disputed that there was no

procedure. There had been no prior notice of the telephone call or that dismissal was being considered. There had been no investigation, no disciplinary hearing and no right of appeal.

107. Looking at the reason advanced for dismissal, pled on *an esto basis,* it was said by the first respondents that the claimant would have been dismissed in any event due to installation of the phone app by him. It was also said that SOSR existed, that being an irretrievable breakdown of the working relationship.

108. In relation to installation of the app being a reason for dismissal, Mr Canavan had, Ms Gribbon said, vacillated. He had said he would speak to an employee who had the app installed and would ask the employee to remove it. He would circulate a memo to staff. He had said that he would dismiss someone if he found that they had such an app installed. At other times in his evidence, he had said that a warning would be issued. His evidence had failed to establish that the claimant would have been dismissed had the installation of the app been known about by the respondents. There had been some evidence as to the respondents having an awareness of the app. If they had become aware of installation of the app, then there would have been a conversation around the hearing issues which the claimant had. Permitting the app to be used might be a reasonable adjustment. It had to be borne in mind that calls would automatically be deleted. The call with Mr Canavan had to be retrieved after deletion.

109. It also required to be borne in mind that the first respondents said in their pleadings that Mr McCafferty's concerns were as to capability of the claimant not as to his conduct.

110. The first respondents were arguing that there had been an irretrievable breakdown in relationships. That was said to have been the case between quarry staff, senior managers and the claimant. The bar, Ms Gribbon submitted, was pretty high. There clearly had been some type of breakdown in relationships. It was not however irretrievable in the sense that it was something which was impossible to retrieve or could not be put right.

111. Ms Gribbon highlighted that there had been no appraisals carried out and that there were no team meetings held. Mr McCafferty, although the claimant's line manager, did not communicate with him. Issues were relayed by him to Mr Graham and Mr Canavan. Mr McCafferty was therefore part of the problem. It was his responsibility to deal with the claimant and to manage him. There was no evidence that he had made any effort to address the situation. It appeared that he resented the claimant given the claimant's relationship with Mr Canavan and the fact that the claimant had been asked to carry out some duties which Mr McCafferty regarded as being areas of his responsibility.

112. The evidence had illustrated that the culture within the respondents' organisation was bordering on dysfunctional, said Ms Gribbon. It was illustrated by the relationship between Mr Canavan and Mr McCafferty. The issues were in part caused by Mr Canavan. There was also the frustration of Mr McCafferty as Mr Canavan went over his head, instructing the claimant to carry out duties without liaising with Mr McCafferty.

113. It was said by Mr McCafferty in evidence that his view was that the claimant was underperforming. That was not however a view shared by Mr Canavan. The claimant had been employed by the Forestry Commission having dealt with them during his time with the respondents. The Forestry Commission did not therefore regard him as having performance issues. He had retained his job with the Forestry Commission since obtaining it.

114. Mr McCafferty said that the problems with the claimant were acute and had been acute over a five year period. In that five year period however Mr Canavan had given the claimant better terms and conditions and a £5,000 wage increase. When the claimant sought better terms Mr Canavan had not at any time said that the claimant did not have a point. In fact, he said that the claimant had a case. The email from the claimant had set out the effort he was making and the overtime hours he was putting in. It was not a failing of the claimant that Mr Canavan had not informed Mr McCafferty of this improvement in the claimant's terms and conditions.

115. Mr McCafferty had not been impartial. Mr Canavan had caused problems and Mr McCafferty had taken his frustration out on the claimant rather than speaking to Mr Canavan about this. It appeared that Mr McCafferty felt threatened. His reaction when Mr Graham had told him of the claimant's additional duties was instructive.

116. Had the claimant not been dismissed then, it was hard to see a reason as to why he would have been dismissed on any other basis. There were no issues regarding his conduct. Mr McCafferty had confronted Mr Canavan on 3 May because of the claimant's change of duties rather than because of the claimant's performance or conduct.

117. It was true that there had been meetings in March and April 2017. Those were not meetings to consider the performance of the claimant albeit the second meeting had strayed into that area. The claimant had not anticipated that Mr McCafferty would be at the second meeting. He had thought that it was to be a welfare meeting. Mr Canavan said that the claimant was a good employee and that his performance had improved after the meeting. The evidence from Mr McCafferty however that there were acute, substantive and ongoing issues did not chime with that evidence or indeed what had happened in that there were no follow-up meetings by way of review.

118. Ms Gribbon asked that the Tribunal keep in mind that this was a sector involving use of explosives and was one which was highly regulated. If indeed the claimant did not have paperwork which was up to standard, that surely would have been taken up and dealt with by the first respondents given the need for compliance.

119. At the meeting on 3 May, Mr McCafferty had not asked Mr Canavan to sack the claimant. He had said that he was leaving. Mr Canavan had said that he would sort this out. The Tribunal should keep in mind that Mr Canavan on his own evidence had categorically denied changing the claimant's duties. In evidence he denied having said that to Mr McCafferty. His evidence at Tribunal was that there had been no change in the claimant's role by 3 May. Mr McCafferty said in his evidence that Mr Canavan had said to him on 3 May

that the claimant's duties had not changed. The recording of the telephone call however revealed the claimant giving information to Mr Canavan about leads which he was following up. The claimant was clear as to the change in his duties. Mr Graham had passed information to Mr McCafferty in line with that.

120. In saying that he would sort this out, Mr Canavan had a whole range of options open to him. Dismissal should have been a last resort. In fact, it had been Mr Canavan's first resort. Mr McCafferty said in evidence that when Mr Canavan asked him whether he wished him to get rid of the claimant or to pay him off he had said to Mr Canavan that this was not what he was asking him to do. There had been no pressure from Mr McCafferty to sack the claimant.

121. Turning to the question of SOSR, Ms Gribbon referred to a standard type of situation where there might be third party pressure. Here however, there was a relationship difficulty. It was not a performance issue. If it was, it had not been addressed by Mr McCafferty. The relationship had been made difficult by Mr Canavan going over the head of Mr McCafferty. It appeared to be the position that Mr McCafferty might have needed reigned in, Ms Gribbon submitted. His conduct had been unprofessional. The evidence, which he accepted, was that he might have referred to the claimant's paperwork as being "*shite*". That was inappropriate. Mr McCafferty had also discussed his plans and possible departure from the respondents with others. That conduct was questionable.

122. The claimant had approached Mr Canavan with his email narrating the position in respect of back pain. That appeared at page 79. Mr McCafferty knew nothing about this, although he was the claimant's line manager. Mr McCafferty had said that the claimant was lazy. He said the claimant was sitting at home being paid to do nothing. If that was true, it illustrated that there was no communication between Mr McCafferty and the claimant as he was not tackling this. There had however, in summary, been no conduct by the claimant which warranted dismissal.

123. There had been a breakdown in communication and in relationships but that was not irretrievable.

124. It was, Ms Gribbon said, for the employer to show SOSR. There had been no attempt to mend or remedy the situation. ***Turner*** was authority for the view that there was not an irretrievable breakdown of relationship in that circumstance. This all had to be seen in context of the first respondents being a reasonably sized company with a reasonable turnover. They had not paused to take HR advice or to consider the position. They had issued no contract to the claimant. They had made no attempt to try to fix the relationship in the lead-up to dismissal or at time of dismissal. Insofar as anything was raised, it was raised in the context of a return to work meeting. The quite high bar which Ms Gribbon said existed in respect of irretrievable breakdown of relationships had not been cleared.

125. Mr Canavan's conduct in undermining Mr McCafferty required to be kept in mind. He had been duplicitous in some instances. He had adhered in evidence at Tribunal to his view that there had been a resignation by the claimant. That was so notwithstanding what Ms Gribbon said was the overwhelming evidence that there had been a dismissal. Mr Canavan had said in evidence that others would give evidence at Tribunal saying that resignation had occurred. That did not happen. There had been the denial by Mr Canavan to Mr McCafferty prior to the claimant's dismissal and then to the Tribunal in evidence that different duties involving seeking of business had been given to the claimant. Mr Canavan's conduct throughout had fuelled the relationship issues.

126. The respondents had failed to show SOSR. They had not met the requirement in section 98 (1)(b) of ERA.

127. This was an unfair dismissal if section 98 had been met, Ms Gribbon submitted. Although the first respondents were not a huge company and did not have HR support, that did not absolve them from a failure to adhere to the requirements of being fair.

128. Ms Gribbons' position for the claimant was that this was an unfair dismissal and an uplift in compensation was appropriate. There had been no attempt made at all to have a proper procedure.

129. In relation to ***Polkey***, Ms Gribbon said that its application presupposed that there was a valid reason to dismiss. Alteration in the claimant's duties by Mr Canavan was not a valid reason for dismissal even though nothing had been said to Mr McCafferty about that by Mr Canavan. The voice file demonstrated that the claimant was embracing his new duties enthusiastically.

130. Ms Gribbon highlighted ***Software***. In particular, she referred to paragraph 54 of the Judgment which set out principles which a Tribunal should have in mind when assessing compensation.

131. There was no evidence of there being a valid reason to dismiss the claimant. The whole situation was so speculative that no attempt to look into the future should be undertaken by the Tribunal. A reconstruction would be uncertain and no sensible prediction could be made, this being in line with paragraph (3) within paragraph 54 of ***Software***.

132. The claimant's relationship with Mr McCafferty could be resolved with a common sense approach and a willingness for that to occur. If performance issues did exist, which was denied, those could also be resolved. This would, in any event in the case of an employee who had been with the respondents for some 6 ½ years, involve a personal improvement plan and perhaps a 6-9 month period being given to the employee to improve his performance.

133. There had been no contract of employment or statement of employment particulars and an award of four weeks' pay was appropriate, said Ms Gribbon.

134. Turning to credibility, Ms Gribbon submitted that the claimant had been straightforward and honest. Contemporary documents supported his position. The concession had confirmed that the claimant was correct, there had been no resignation by him. The first time resignation was suggested as having taken place was when the respondents' solicitor wrote on their behalf.

The phone records had corroborated the claimant's position as to where he had been on 4 May and indeed on 30 April. His evidence should be believed as against that of Mr Canavan and to an extent Ms Fyfe.

135. Mr Canavan was however wholly lacking in credibility in many parts of his evidence. It might be said that regard should be had to his age and to the fact that he was not familiar with Tribunal proceedings and might therefore be described as *"mistaken"*. That was not however the case said Ms Gribbon. She highlighted that Mr Canavan had said that the claimant had resigned. He knew or ought to have known that was false. This lie had been perpetuated in the face of the voice transcript and Vodafone records. He had said that his own evidence could be corroborated by two colleagues. It was not however. This was therefore what Ms Gribbon referred to as *"manufactured evidence"*.

136. If there was any dispute between the evidence of Mr Canavan and that of the claimant, the claimant's evidence should be accepted as he was far more credible.

137. Ms Gribbon said that she did not consider that Mr McCafferty had been untruthful. He had a clear and particular view of the claimant. That spilled however into dealings with the claimant whilst at work and after the claimant had left the respondents to move on to the Forestry Commission. Mr McCafferty might have benefited from management training. Indeed that might have been prevented the issues arising. He was a manager and was paid to manage. He should be professional. He was not. He was petulant and hot-headed. That was plain from the email which he had sent to the Forestry Commission. The Forestry Commission were a client of the respondents who provided them with work to the value of £1m per annum. To send them this type of email was an instance of poor judgement. Mr McCafferty had clear animosity towards the claimant. That had been shown by the email sent and by his evaluation of the claimant's abilities.

138. Ms Fyfe had not added much to the issue. Ms Gribbon said she did not take any issue with her credibility. Ms Fyfe's evidence did not corroborate there having been a resignation.

139. In relation to the victimisation claim, Ms Gribbon noted that it was agreed that a protected act had been done.

140. As to whether a detriment had occurred, Ms Gribbon referred to the EHRC Code of Practice. At paragraph 9.8 it was stated that *"Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage."*

141. It was not a high burden, Ms Gribbon said, to show detriment.

142. In this case the Tribunal had heard evidence as to the claimant's reaction on seeing the email. He had said that he was shocked and disgusted. He felt panic. He had deleted the email. He had referred to his stomach churning and to being embarrassed. He was in his probationary period at this point. He feared he would lose his job. He had taken medication. He discussed the position with his wife and the following day spoke to Mr McCheyne who had understood. The claimant still had concerns however as he was in his probationary period.

143. The email had been sent as the claimant had raised legal proceedings. The motive for sending the email and therefore committing a potential act of discrimination, was irrelevant. Ms Gribbon also highlighted the case of ***Nagarajan*** as authority for the proposition that motive was irrelevant. The respondents knew that Mr McCheyne was the claimant's line manager, although form ET3 stated otherwise.

144. Whether victimisation had occurred was judged primarily from the role of the *"victim"* rather than the *"discriminator".* Ms Gribbon referred to the case of ***St Helens*** as support for that proposition. In any event, the motivation said by Mr McCafferty to have existed should not be accepted by the Tribunal, Ms Gribbon submitted. There was clearly a lot of animosity on the part of Mr McCafferty towards the claimant.

145. As far as compensation for hurt feelings was concerned, Ms Gribbon referred to ***Vento*** and ***Da'Bell***. She said that the claim was placed in the lower band at £8,000. It was the case that there had been one act. There had been a profound degree of anxiety however caused to the claimant. Awards in respect of discriminatory conduct should not be too low. The Presidential Guidance should be borne in mind.

146. It was noted by Ms Gribbon that the first respondents had not sought to argue that Mr McCafferty was *"on a frolic of his own"*. There was no defence advanced therefore in terms of section 109 of EQA.

147. Ms Gribbon said that she would leave it with the Tribunal as to whether compensation was awarded to be paid by the first respondents or on a joint and several basis.

Submissions for the respondents

148. Mr Rennie confirmed the concession made, that there had been dismissal of the claimant by the first respondents.

149. In assessing the evidence, the Tribunal should bear in mind, he said, that under ERA the size and administrative resources of the employer was relevant. There was a small senior management team with a small base at Mauchline. There was Mr Canavan as the managing director and majority shareholder, Mr Graham as the general manager, Mr McCafferty as the quarries manager and a health and safety manager. There were approximately 30 operatives. The claimant had been a profiler or shot surveyor. Mr McCafferty's evidence was that the claimant did not change his duties and had therefore not become a blast engineer.

150. There had been one senior manager at Mauchline on a permanent basis, Mr Canavan. Men came and went to the premises in Mauchline. There was no HR team.

151. Mr Rennie accepted that the first respondents' approach to HR had not been sophisticated. That reflected there being a small management team. Mr Canavan was responsible for the commercial side, for running the operation

and for client relations. Mr McCafferty had liaised with the quarry managers at the different sites.

152. Mr Canavan's management style had been compassionate, Mr Rennie said. He had tried hard with staff members. He said he had not terminated employment of a staff member over an eighteen year period. He had adopted different management styles with different employees and had been good to the claimant. The claimant himself had acknowledged this in the transcript of the call when he said on two occasions that Mr Canavan had been *"been excellent"* with him.

153. From the transcript of the telephone call on 4 May the claimant recognised Mr Canavan's management style and seemed to be accepting of the situation which had arisen. Mr Canavan had said that the claimant was considered a *"protected species"* by others given his relationship with Mr Canavan. Mr Canavan tended to look out for him. It was clear that he had tried to support the claimant by providing him with a new car or a new computer when he was asked to do that.

154. In relation to credibility, Mr Rennie said that Mr Canavan was a very successful businessman. Coming to the Employment Tribunal had been an eye opener for him however. He had not appreciated the position with regard to the process, documentation, minutes of meetings and the like. His focus had been on clients and running the business. He was a self made man. He had tried to be compassionate and good to staff. Mr Rennie accepted that Mr Canavan did not precisely answer questions at Tribunal when asked. His recollection of the discussion on 30 April had not been precise. His recollection of the timing of meetings and phone calls in general had been less than precise. The Tribunal should not however hold that against him. Ms Fyfe had given evidence that the claimant had been in Mauchline at some point during week commencing 30 April.

155. Mr Rennie recognised that he was in an unusual position. He was characterising his own witness as slightly muddled in his description of events. That did not mean that the witness was entirely lacking in credibility however.

He had a genuine belief in what he had said by way of evidence. He might have been mistaken in that belief. It was not however the case that he had manufactured evidence. If he had then he might have manufactured a better version than he had given in evidence. He had been mistaken as to dates and timings.

156. Mr Canavan had said that he had not terminated the claimant's employment. It appeared that he regarded a negotiated agreement as not amounting to a dismissal. Advice had however led him to accept that dismissal had occurred in this case.

157. Mr McCafferty had given his evidence in a matter of fact fashion. It had been genuinely expressed. He had not provided any gloss on it. He had given good succinct evidence and should be believed. He had not tried to impress the Tribunal or others such as Mr Canavan who was sitting, in effect, next to him. He should be regarded as a credible witness.

158. Mr McCafferty had been able to place himself at the first respondents' premises in Mauchline on 3 May by recalling that he had left site to attend there. He had been very plain in his language as to what he had said that day. He had said *"enough is enough".* He repeated that in evidence at Tribunal on a couple of occasions. He was saying that he could not work with the claimant. This amounted to a statement that he would leave the business if the claimant stayed. That provided compelling evidence of the seriousness of the situation and the urgency with which action was required. Mr McCafferty was responsible for some £4.5m of turnover within the business of the respondents.

159. The evidence of Ms Fyfe had been short and did not add an enormous amount to the information before the Tribunal.

160. Mr Rennie confirmed that the first respondents did not argue that there had been contributory conduct or indeed that conduct was the basis of dismissal. The basis of dismissal was SOSR.

161. It was clear from Mr Canavan's evidence that the claimant's employment had come to an end because of a relationship breakdown. It was accepted by the first respondents that there had not been fair procedure. There was however a substantive reason for dismissal with the failing being a procedural one.

162. Mr McCafferty had brought pressure to bear on Mr Canavan to dismiss the claimant. There could, submitted Mr Rennie, be no clearer demonstration of the breakdown than Mr McCafferty saying that he would rather the claimant stayed at home on full pay than carried out his day to day duties. Mr Rennie accepted that had not been put to the claimant as being the position. He accepted that the claimant's evidence was that he had worked hard, putting in several hours of overtime and that this had been the basis of his approach to Mr Canavan which had resulted in a salary increase and an improvement in terms and conditions. Mr Rennie said that he had been unaware of Mr McCafferty's evidence until it was actually given at Tribunal.

163. Mr Canavan's evidence had been that Mr McCafferty and others within the team leaving would cripple the business. In the plain wording of the statute, there had been SOSR.

164. ***Jefferson*** was authority for the view that the ACAS code did not apply to SOSR dismissals. It would be a mistake of the Tribunal to apply the uplift.

165. The Tribunal should accept that there was pressure brought by Mr McCafferty to end the claimant's employment. That, submitted Mr Rennie, was clear from the transcript of the telephone call between Mr Canavan and the claimant on 4 May. The claimant did not dispute this position being set out for him and being stated again at the meeting on 7 May. The claimant had said that Mr Canavan was embarrassed about the situation. Mr Canavan had said that the men had ganged up on him and that Mr McCafferty had the backing of the men. The claimant said that he had understood that the business would be in a difficult position if Mr McCafferty and the men left. He appeared to understand that Mr Canavan had to make a decision.

166. Mr Canavan had a difficult decision. He had to weigh up the loss of Mr McCafferty and some of his team against the loss of the claimant. He was aware of the sensitivity and financial value of Mr McCafferty and the team. There was simply a stark reality of choice for Mr Canavan.

167. The claimant argued that an alternative approach ought to have been taken.

168. Mediation had been suggested. It had been suggested that the relationship could be restored. Mr McCafferty had been plain however in his description of what he had said to Mr Canavan. He had said that *"enough is enough".* He had given a shopping list of performance issues and relationship issues. There was a history of relationship issues These had been raised with the claimant who appeared to have got back on with it after that. There was clearly however a depth of feeling which was apparent even at Tribunal. There was in reality no way that relationships could be restored. Any reference to performance or capability was a red herring or a tangent said Mr Rennie.

169. There had been two documented meetings in March and April 2017. They were not however of particular significance. The relevant point which emerged from them was the reference to difficulties with communication and working within the team and disagreements at senior staff level. There had been a reference to difficulties with documentation from the claimant and to communication difficulties with the claimant.

170. Whilst interpersonal relationships and issues with teamwork or communication or indeed performance could be often addressed by meetings or mediation, the statement from Mr McCafferty that enough was enough demonstrated that the relationship was at an end. Further, Mr McCafferty said he had spoken to profilers to tell them that he was travelling to see Mr Canavan. They had offered to attend with him. He had declined that offer. He had made his position then clear to Mr Canavan, stating that other colleagues seemed supportive.

171. The claimant had not been following instructions, Mr McCafferty said. He had not been doing his fair share of the work as that had not been given to

him due to difficulties. There was a multi factorial range of issues connected to performance, communication, teamworking and interpersonal skills. There was an irretrievable breakdown in working relationships.

172. It was accepted that Mr McCafferty had not said to Mr Canavan that he required to dismiss the claimant. Mr Canavan had however acted very urgently trying to resolve this. The telephone phone records and the meeting on 7 May showed that Mr Canavan felt that the pressure from Mr McCafferty was real.

173. Whilst ***Software*** cautioned against speculation, it was clear, Mr Rennie said, that if procedures had been followed, given the urgency of the situation and the danger to the business, Mr Canavan would have dismissed the claimant within 2-3 working days of when that had occurred. The claimant would have been given notice amounting to six weeks pay.

174. Looking at ***Polkey*** therefore, there was 100% risk of the claimant being dismissed fairly if proper process had been followed. That would have occurred very close to actual date of dismissal. This was not a situation where performance management was involved requiring a lengthy period to assess the claimant's performance. A senior member of staff was threatening to leave with members of the team likely to follow him. Substantial damage to the business would be caused.

175. Mr Rennie then turned to the evidence about the app. He accepted that Mr Canavan has vacillated. He had not been clear that dismissal would occur for use of the app. He had however been clear, as had Mr McCafferty, that the first respondents did not know of the claimant using this app.

176. The case of ***Turner*** was decided prior to ERA.

177. In relation to victimisation and ***St Helens***, Mr Rennie said that it was not objectively reasonable on the part of the claimant to feel the level of anxiety and injury to feelings reflective of an award in the sum sought. The email had been at 3pm on 9 August. The claimant had met with Mr McCheyne, his manager, the following day. He had said that the matter was private. His

manager had agreed and had said that it was fine. There was no evidence, said Mr Rennie, of any detriment at all.

178. The respondents accepted the public policy position regarding acts of discrimination. In this case the claimant got assurances as to his position within 24 hours. It was not reasonable to take the view that Mr McCafferty was trying to remove the claimant from his new job. Insofar as any reference was made to the terms of form ET3, that had been an honest and reasonable position adopted in the conduct of litigation.

179. In short there was nothing to indicate detriment.

180. The EHRC code referred to something which an individual *"might reasonably consider"* changed their position for the worse or put them at a disadvantage. An objective standard could therefore be applied. In ***St Helens***, paragraph 68 was of importance. That stated that in considering whether the act had caused detriment, the issue was to be viewed from the point of view of the alleged victim. In considering victimisation however it was important to look at why an employer had taken a particular course of action. In this case the conduct of the first respondents had been honest and reasonable. No award ought to be made.

181. In respect of section 38 of the Employment Act 2002, it was accepted that there had been a breach of that. Two weeks' pay was however an appropriate award. This was not an aggravated breach. There had been communication about the claimant's terms and conditions. There had been no deliberate attempt to put him in a difficult position.

182. Mr Rennie maintained that the ACAS code did not apply in cases where the reason for dismissal was SOSR. He referred to ***Stockman*** as being support for the proposition that this was so.

183. It was confirmed by Mr Rennie that any application for costs would be dealt with if and when made.

Brief reply for the claimant

184. In response to Mr Rennie's submissions, Ms Gribbon said that although the respondents were not a huge company, they were not of the character of a one-man business.

185. The fact that Mr Canavan's evidence had been that there was no dismissal by him within an 18 year period supported the claimant's position that he would not have been dismissed if proper consideration had been given to the situation.

186. As far as Ms Fyfe was concerned, it was not her evidence that the claimant had been in Mauchline on 4 May. Her evidence was that he was in the building at some point during week commencing 30 April.

187. Mr McCafferty had said that he had not said to Mr Canavan that he would leave if the claimant stayed. The claimant had not been cross examined about staying at home without work but being paid. This was illustrative of flippant, disparaging remarks made by Mr McCafferty.

188. The managing director was the person who made the decision to alter the duties of the claimant. Mr McCafferty was going to speak to him regarding that change. It was not accepted by the claimant that this situation could not have been resolved.

189. As far as the production at page 89 was concerned, the email from the claimant in the early evening of 8 May, that supported the claimant in his version of the discussion with Mr Canavan. There had been no cross examination of the claimant to say that he was incorrect in that recollection. The submissions of the respondents were, said Ms Gribbon, a classic attempt to blame the victim. The conduct of Mr Canavan had led to the breakdown in relationships and it now appeared to be argued that it was legitimate in that circumstance to dismiss the claimant.

190. There had been no challenge to the evidence of the claimant as to detriment which he suffered. The burden on the claimant was not a high one.

191. There were conflicting authorities, said Ms Gribbon, as to the application of the ACAS code to SOSR dismissals. It was not however said that the code did not apply to those dismissals. It had merely been said that a further meeting would not achieve anything. Ms Gribbon referred to ***Lund v St Edmonds' School Canterbury UKEAT/0514/12*** as authority for the view that the ACAS code applied where employers considered whether an employee was to be dismissed. It ought to apply in this instance.

Discussion and decision

Concession in relation to dismissal

192. The Tribunal had anticipated that it would require to consider the evidence and to make a determination as to whether the claimant had been dismissed or had resigned. There was substantial evidence both from the claimant and from Mr Canavan in relation to this point. It remained a matter of contention until the final morning of the hearing when submissions were to be made. At that point, the first respondents confirmed to the Tribunal that it was conceded that the claimant had been dismissed. It did not appear to the Tribunal that the concession had been prompted by anything new or unexpected which had been come out of evidence.

Reason for dismissal

193. The Tribunal was satisfied on the evidence that the reason for dismissal of the claimant by the first respondents was not capability or conduct of the claimant. The claimant was not redundant. There was no statutory duty or restriction which would have been contravened by his continuing employment. The Tribunal accepted on the evidence that the respondents had shown that the reason for dismissal was SOSR. It was their perception that there had been an irretrievable breakdown in working relationships, in particular between the claimant and Mr McCafferty. A dismissal in those circumstances is potentially fair.

194. The Tribunal concluded that this was the reason for dismissal on the basis of the evidence from Mr Canavan as to what was said to the claimant, supported

by the transcript of the relevant part of the telephone conference between the claimant and Mr Canavan on 4 May 2018, pages 81 and 82 of the bundle.

195. There was an element of evidence from Mr McCafferty as to alleged performance issues existing on the part of the claimant. This element of evidence from Mr McCafferty however had not been raised with the claimant in cross examination for comment or reaction from him. Indeed, the claimant was not challenged on his own evidence as to the extensive hours he had been working. In addition, he had received a substantial pay rise together with an improvement in his terms and conditions. Mr Canavan recognised that the claimant had a case at that point as to being under paid relative to others and as to the extensive hours which he was working. Mr Canavan also recognised in evidence at Tribunal and in the conversation of 4 May 2018 that the claimant was a good employee. Mr Canavan had also agreed on 30 April 2018 to a variation in the duties of the claimant following upon the claimant explaining that he had an issue with his back meaning that physical work was problematic for him. The claimant in his email of 29 April 2018, page 79 of the bundle, had said that he would understand if Mr Canavan wished him to leave. Discussion as to the option of the claimant leaving employment was not said either by the claimant or by Mr Canavan to have taken place when the parties met on 30 April and the variation in duties was agreed.

196. It is appreciated that Mr Canavan denied that there was any such meeting or agreement to vary duties of the claimant on 30 April. The Tribunal did not find that evidence credible. It found it hard to categorise this evidence as anything other than a denial of the truth by Mr Canavan. It was difficult to consider that Mr Canavan had forgotten that this meeting had taken place and what had been agreed at the meeting. He stuck firmly to his evidence, however, that there had been no such meeting.

197. The Tribunal preferred the evidence of the claimant that the meeting had occurred and that agreement had been reached that the claimant's duties would be varied. Not only was the evidence of the claimant credible in itself, his telephone location records showed his phone (and therefore almost

certainly the claimant) as being at the offices of the respondents on 30 April. He said that he had subsequently told Mr Graham of the change in his duties. That was supported by Mr McCafferty's evidence that Mr Graham had told him of the claimant's comments to him explaining that the claimant had new duties. Mr McCafferty was clear that he had reacted with anger to this news and that this had prompted him to go to speak to Mr Canavan on 3 May to register his anger. It was, he said, the "*last straw*" which made him visit Mr Canavan and say that he could no longer work with the claimant. That evidence from Mr McCafferty was credible. In addition, the discussion between the claimant and Mr Canavan at the start of the telephone call on 4 May involved the claimant explaining steps he had taken to contact various parties with a view to meeting with them, introducing himself to them and potentially obtaining new business from them. That simply would not have occurred had there not been a discussion and agreement between Mr Canavan and the claimant on 30 April that the new duties were not to be undertaken by the claimant.

198. If, on the other hand, Mr Canavan's evidence was to be accepted, there was no such discussion or conversation between the claimant and Mr Canavan on 30 April. There would therefore be no basis for Mr Graham to have passed on news as to the claimant's revised duties. There would have been no event to prompt the angry reaction from Mr McCafferty and to lead to his visit to see Mr Canavan to express his great annoyance at this. The claimant might have been challenged by Mr Canavan on the call on 4 May when he narrated approaches he had made regarding obtaining business from potential customers.

199. Mr Canavan, in addition to denying that the conversation had taken place with the claimant on 30 April, also denied (albeit this was a consistent position) that Mr McCafferty had raised this with him when they met on 3 May. Mr McCafferty was clear however that he had asked Mr Canavan at that meeting whether the claimant's job had changed. Mr Canavan told him that nothing had changed.

200. Insofar as there had ever been any discussion in relation to performance issues, that had been of a very generalised nature and in the context of what had been scheduled as a welfare meeting in connection with a return to work in March 2017. There was slightly more discussion on this area in the follow-up to that meeting on 28 April 2017. That was a year prior to dismissal. There had been no follow-up meeting after April 2017. The issues were mainly around communication and appeared to extend to those who communicated with the claimant to an extent and not just to the claimant communicating with others. There was no performance improvement plan put in place. The evidence was that following this meeting things had improved.

201. There was a potentially fair reason for dismissal in that a breakdown in relations between employees can constitute SOSR. It was clear that relations between Mr McCafferty and the claimant were not particularly good. That had been the position for some time. Nothing was said to have been done/not done by the claimant which had made things worse in the period to May 2018, however. Mr McCafferty had said to Mr Canavan that he could not stay with the respondents to work with the claimant. He said to Mr Canavan that others had said they would leave if Mr McCafferty left. Mr Canavan concluded that the claimant and Mr McCafferty could not work together. There had been, in his view, an irretrievable breakdown in the working relationship between them. He decided to dismiss the claimant. SOSR was the reason for the dismissal. The fairness of that dismissal then falls to be considered by the Tribunal.

Fairness of dismissal

202. Dismissal was conceded as unfair on the basis of a failure by the first respondents to follow any proper procedure in the decision making and its intimation.

203. The test to be applied by the Tribunal is that in ERA. The Tribunal requires to look at, but also beyond, procedural aspects in its consideration of the dismissal, its fairness and possible compensation. It requires to consider whether dismissal in the circumstances fell within the range of reasonable

responses of a reasonable employer. It is of course trite law that the Tribunal must not substitute its decision for that of the respondents as employer. It is irrelevant whether the Tribunal itself would have dismissed. The Tribunal kept that in mind during its deliberations.

204. There clearly was an issue within the first respondents' organisation. The claimant was in a very difficult position. For reasons about which the Tribunal did not hear and may, in any event, have been difficult to explain, the claimant had a good link and direct connection with Mr Canavan. They had worked together at an earlier time, which might explain some of that. Mr Canavan would give instructions directly to the claimant as to a task to be carried out. Mr Canavan would not inform Mr McCafferty of that. Both the claimant and Mr McCafferty spoke to this as being a way in which Mr Canavan worked. That led to the claimant being placed in awkward positions with Mr McCafferty as Mr McCafferty's instructions to the claimant were then not carried out by him as he had been told to do something else by Mr Canavan who was the managing director and majority shareholder in, and therefore owner of, the respondents.

205. The Tribunal noted that Mr Canavan denied bypassing Mr McCafferty. When questioned about that, he asked why he would do this as it would cause friction. The evidence from the claimant however and from Mr McCafferty was clear that this did occur. The Tribunal accepted that evidence. The point was demonstrated in practice when Mr Canavan agreed to increase the claimant's salary and improve other terms and conditions without informing Mr McCafferty as the claimant's line manager. It was also demonstrated when Mr Canavan spoke directly with the claimant following upon the claimant's email of 29 April 2018 and gave the claimant an element of revised duties. This was done without reference to Mr McCafferty and without then informing him that it had occurred. Indeed, so dysfunctional was Mr Canavan's management style, that he then denied to Mr McCafferty that he had agreed to alter the claimant's duties.

206. The claimant's evidence, unchallenged, was that he had spoken to Mr Canavan on the one hand and Mr McCafferty on the other to say that they

should speak to each other and try to sort out their differences so that he was not, as he put it, *"piggy in the middle"*. There was no mention in evidence of any dialogue between Mr Canavan and Mr McCafferty having taken place.

207. There was clearly an issue between Mr McCafferty and the claimant. That was caused to a meaningful extent, on the evidence, by Mr Canavan's interventions with and instructions to the claimant and the absence of communication by Mr Canavan to Mr McCafferty about any such instruction. That was a failing on the part of Mr Canavan. It was also however failing on the part of Mr McCafferty. Mr McCafferty said that he expected the claimant, if such a situation arose, to say to Mr Canavan that he could not do a particular task as Mr McCafferty had instructed him to do something else. That would certainly have been one possible response. It would potentially however have placed the claimant in dispute with Mr Canavan on the basis that he was objecting or refusing to carry out an instruction from the owner of the first respondents. It would have been more realistic to expect Mr McCafferty as the claimant's line manager to have taken that matter up with Mr Canavan looking firstly to register the problem and secondly to address lines of instruction and communication for the future.

208. What appears to have happened however is that Mr McCafferty built up a sense of frustration with and resentment of the claimant.

209. The Tribunal found it very hard to accept Mr McCafferty's evidence as to the extent of the difficulty he said existed with the work performance of the claimant. On Mr McCafferty's evidence, the problem had been *"acute*" for all five years of Mr McCafferty working with the claimant. It seemed extraordinary that, if this was accurate, it had not been raised in quite stark terms both with the claimant and with Mr Canavan. Firstly, it was the manager's responsibility to manage someone in his team. It was said to have been the case, although not raised with the claimant and subject of contradictory unchallenged evidence from the claimant, that the claimant was at home with little work to do but receiving full payment. If that was actually happening, then it could and should have been addressed with the claimant by his manager. It was not said in evidence to have been raised with the

claimant. Equally, it would have been a matter appropriately drawn to the attention of Mr Canavan. Neither of those courses were said to have been followed. There was no evidence, other than Mr McCafferty's own evidence, to suggest that the situation was as he described. It was hard to believe that Mr Canavan was so out of touch with the workload of shot profilers or, in the case of the claimant, the blasting engineer, that he was entirely unaware of any disparity in workload. Indeed, any evidence from Mr Canavan was that the claimant was a good employee apart from some issues around communication with Mr McCafferty of which he was aware and which had been raised during the meetings in March and April 2017. From Mr Canavan's evidence, those had been remedied or certainly had not been such that any other meeting was necessary. He had agreed the claimant had a case as to receiving a pay increase in 2016, partly on the basis of the extensive hours worked by him. Mr Canavan had granted him that pay rise. The claimant had said in his letter of 29 April, when saying the physical aspects of his job were too much for him, that he would understand if Mr Canavan wished him to leave. At the meeting the following day, Mr Canavan did not explore that possibility. Instead he adjusted the claimant's duties and retained his services.

210. This was not therefore an instance where a line manager was able to point to specific instances where attempts had been made, for example, to raise matters with an employee with conflict resulting. There were no regular management meetings, team meetings, appraisals, one to ones or even discussions said to have taken place where any issues or difficulties had been raised. Such discussion as there was in the meeting in April 2017 had been general, was not exclusively directed at the claimant and appeared to have seen improvement result. There had certainly been no follow-up.

211. The evidence certainly supported there being issues within the workplace. It was not the case however that steps had been taken to try to resolve those without that proving possible, or indeed with a reaction such that it was clear that working together was impossible. Further, many of those difficulties were, in the view of the Tribunal on the evidence it heard, as a result of the

management style and actions of Mr Canavan and inability or unwillingness on the part of Mr McCafferty to deal with any concerns he might have had. He did not, for example, raise those with the claimant or take them to Mr Canavan. The latter course would have been particularly appropriate given that they related in many instances to Mr Canavan *"cutting across"* the management of the claimant by Mr McCafferty.

212. It was the actions of Mr Canavan which brought matters to a head at the start of May 2018. Mr Canavan and the claimant met on 30 April 2018. Mr Canavan agreed that the claimant's duties would involve, at least to a degree, seeking new work. That was something which lay within the responsibility of Mr McCafferty. Mr Canavan did not speak to Mr McCafferty before taking this step. He did not inform Mr McCafferty after taking it. Mr McCafferty found out about this change in the duties of the claimant through Mr Graham. Mr McCafferty then became in his own words *"most annoyed, very annoyed".* He felt undermined by Mr Canavan. This was why he said it was *"the last straw"*. It led to him travelling to meet Mr Canavan and saying to him that he thought he could no longer work with the claimant and that he had had all he could take. Mr McCafferty gave no evidence of any other specific reason or issue with the claimant which had led him to this point. He was, in general, unhappy with the claimant. This appeared to be due to a build-up over time based on his perception, it appeared, of the relative extent of work carried out by the claimant for the respondents. However, his anger, his visit to see Mr Canavan on 3 May and his comments to Mr Canavan when they met that day were all driven by the information he had been given as to the variation in duties as agreed by Mr Canavan. He said in evidence that he would have eventually gone to see Mr Canavan about the situation with the claimant as he saw it. What compelled him however to travel to meet with Mr Canavan on 3 May and to say what he did to him was the decision by Mr Canavan to vary the claimant's duties.

213. Mr McCafferty said to Mr Canavan that he had enough and could not carry on working with the claimant. He said he had had all he could take. When asked by Mr Canavan if he wanted Mr Canavan to get rid of the claimant, Mr

McCafferty said that this was not what he was asking Mr Canavan to do. He was saying however that it was not worth him staying any longer with the hassle he was getting. Mr McCafferty said to Mr Canavan that others would go if he left. He asked Mr Canavan whether the claimant was to be out looking for jobs for the respondents. Mr Canavan said that was not the case. Mr McCafferty felt relieved. Mr Canavan said to leave things with him and that he would deal with it. He did not say to Mr McCafferty that he would get rid of the claimant. He said to Mr McCafferty that he would sort it out.

214. Had new duties for the claimant not been agreed between Mr Canavan and the claimant without reference to Mr McCafferty and without Mr McCafferty being informed of that, there was no suggestion from the evidence that at the time when it occurred on 3 May Mr McCafferty would have visited Mr Canavan to communicate his apparent inability to stay in the job and indeed to indicate that others would leave if he left. There was no evidence of Mr McCafferty tackling the claimant about any of the issues which he said existed. There was no evidence of Mr McCafferty reporting to Mr Canavan issues he had with the claimant or working with the claimant prior to the meeting on 3 May. Even at that meeting on 3 May, Mr McCafferty did not *"pour his heart out"* to Mr Canavan about any issues between himself and the claimant. The only specific matter he raised was the new duties of the claimant. He said that he could not continue working with the claimant. No details were given to Mr Canavan as to why that was his view. Mr Canavan was quite happy with the work of the claimant.

215. In the view of the Tribunal it was not possible to say that any reasonable employer would, in the circumstances which pertained on 4 May 2018, reasonably conclude that irretrievable breakdown of the relationship between the claimant and the first respondents had occurred.

216. Insofar as there was any immediate issue on 3 or 4 May, that had been caused by Mr Canavan himself when he reached agreement with the claimant, unknown to Mr McCafferty and uncommunicated to him after the event, that the claimant would have new duties. Mr Canavan denied that the claimant had new duties. When Mr McCafferty said that he could no longer

work with the claimant, Mr Canavan said to leave this with him. Mr McCafferty was not asking that the claimant be dismissed in specific terms. He did not explain why it was that he could no longer work with the claimant. He did not say why it was that he had to come to the conclusion that *"enough was enough"*. He was not asked about those matters.

217. The view of the Tribunal was that Mr Canavan had "*dug himself into a hole*" by reaching the agreement which he had with the claimant as to new duties for the claimant, then by denying to Mr McCafferty that he had agreed those new duties for the claimant. He then immediately concluded from Mr McCafferty's statements to him that Mr McCafferty would leave if the claimant was not dismissed. Some members of the team were likely to leave the respondents if Mr McCafferty left, it appeared.

218. Mr Canavan did not enquire as to whether there was any problem beyond the new duties which Mr McCafferty understood the claimant had been assigned and, if there was any such matter, what that problem was. From the evidence, it would have come as a surprise to him if Mr McCafferty had said that the claimant was doing less work than others, and/or was at home being paid but not actually working, as Mr McCafferty claimed was the position. Equally while Mr Canavan had an awareness of there being difficulties with communication in the past, what Mr McCafferty described as the nature and the extent of those would have come as a surprise to Mr Canavan who regarded the claimant as a good employee and as having addressed issues of communication following upon the meeting in April 2017.

219. The Tribunal was quite clear that any reasonable employer would have obtained further details from Mr McCafferty of why it was that the view had been reached by him and apparently some others that "*enough was enough"* and that they could not work with the claimant. It might have been that exploration of these issues would have led to resolution possibly being found. As detailed below, that is considered to have been unlikely. Nevertheless, no steps were taken to obtain further information or to investigate the situation in order to be able to conclude, as Mr Canavan did, that the breakdown was irretrievable. The Tribunal was also clear that dismissing the claimant in

those circumstances without that investigation and in circumstances where the immediate and most fundamental issue had been caused by Mr Canavan himself, was not something which would have led any reasonable employer to dismiss the employee who was *"the innocent"* in this situation.

220. Mr Canavan did not therefore seek further information. He did not suggest a meeting or discussion. He did not suggest mediation. It might have been that Mr McCafferty would have turned down the opportunity to meet. At the very least however he would have been able to explain just why it was that he had come to the view that he could no longer work with the claimant. It might have been that Mr Canavan could, through persuasion or through some other route, have *"patched up"* the relationship between Mr McCafferty and the claimant. In reality however the more dysfunctional relationship was that between Mr Canavan and Mr McCafferty. If discussion had taken place, Mr Canavan's, denial to Mr McCafferty that he had reached an agreement as to the change in duties of the claimant would have been exposed. That would be likely to have led to other problems. Further exploration of the situation might have led, however, to an adjustment in the relationship and working practices as between Mr Canavan and Mr McCafferty. That was regarded as being a possible but not particularly likely outcome.

221. On the information which the employer had at time of dismissal, it was the view of the Tribunal that no reasonable employer would dismissed the claimant. There was no reasonable basis on which a reasonable employer could conclude that there was an irretrievable breakdown in relations. The dismissal is therefore substantively as well as procedurally unfair. There was no other basis on which dismissal would have occurred at the time which it did.

222. Although the first respondents were not a particularly large company, equally they were not a particularly small company. They had few office staff. That however does not, in the view of the Tribunal, mean that having regard to their size and administrative resources, the dismissal was fair. The first respondents have a significant turnover at £10.5m. They have a reasonable number of employees, extending to 35 or thereabouts. They are large

enough and sufficiently sound financially for their size and administrative resources not to be such as to render the dismissal in question in this case fair.

223. Had the first respondents known of the app which the claimant utilised, they would, on the evidence, have instructed him not to use it. Disciplinary action would have followed had he not adhered to that instruction. It might have been that a means of assisting the claimant other than recording calls unknown to the caller, would have been achieved given the claimant's hearing issue. There was no basis on the evidence before the Tribunal in which it could be said that dismissal would have occurred for certain or with any degree of likelihood at all had the first respondents known of use of the app or would have occurred on that footing had knowledge been gained by the first respondents. It seemed distinctly unlikely that the claimant would not follow an instruction in relation to his removal of the app or potentially explore some agreed basis of consent on which he could use a similar type of app, potentially with knowledge of the caller as to recording taking place.

224. The claimant is entitled to a basic award. That is calculated having regard to his length of service (6 complete years), his age at date of termination of employment, 52, and his gross weekly wage at the statutory cap applicable being £508. The sum payable by way of a basic award is £4572.

225. It was agreed that the claimant had mitigated his loss. The financial calculation set out in the schedule of loss at pages 175 and 176 of the bundle was also agreed. The claimant received Jobseekers Allowance. The recoupment provisions therefore apply.

226. The Tribunal considered what would be likely to have happened had the first respondents acted reasonably on Mr McCafferty visiting Mr Canavan.

227. It was the conclusion of the Tribunal that provision of information from Mr McCafferty as to what he said was happening with the claimant's workload as compared to others and as to communication issues with him, then obtaining the claimant's comments would have been distinctly unlikely to see the relationship being patched up or re-established. Similarly, seeking to address

how Mr Canavan and Mr McCafferty dealt with one another and with the claimant would be unlikely, in the view of the Tribunal upon the evidence it heard, to result in Mr McCafferty being able to work with the claimant.

228. The depth of feeling exhibited by Mr McCafferty at the Tribunal hearing and his low opinion of the claimant, with his view on the accuracy of his work and extent of effort which he put in, illustrated just how much antipathy there was between Mr McCafferty and the claimant. That is not to say that Mr McCafferty was right as to the level or quality of the work of the claimant as compared to other profilers. It might be that the resentment Mr McCafferty felt due to the close connection between the claimant and Mr Canavan affected his interpretation of events or information. The Tribunal concluded that it was almost certain that if some discussion took place to attempt to resolve the issue between the claimant and Mr McCafferty, resolution would not occur. In that scenario, Mr McCafferty would be likely to have remained distinctly unhappy and to have confirmed his intention to leave. The Tribunal accepted that Mr McCafferty was clear and firm in his position that he could not work with the claimant. It seemed that at least some members of the team were loyal to Mr McCafferty. They would be likely to repeat their position that if Mr McCafferty left they would also leave. That section of the business accounted for a significant element of the turnover of the respondents, approximately 45%. Faced with that situation and knowing that dismissal of the claimant would resolve the matter, it was the view of the Tribunal that in that scenario, it was almost certain that the first respondents would conclude that dismissal of the claimant was necessary. By this point, in that set of circumstances, they would have explored the reasons for the views Mr McCafferty had and would have tried to effect reconciliation. SOSR would have existed. Dismissal would in those circumstances, in the view of the Tribunal, have been fair, notwithstanding that there did not appear to be fault on the part of the claimant.

229. In the absence of that reconciliation, as seemed almost certain to be the outcome of that process, a reasonable employer faced with departure of the manager and some staff in an area of the business which accounted for such

a large percentage of turnover, would be able, as the Tribunal saw it, to argue successfully that in dismissing the claimant, it was acting reasonably. The ground would be the irreconcilable differences between the employees. It would be possible for the respondents to demonstrate how and why it was that they had come to the view that the differences were irreconcilable.

230. The Tribunal recognised that there was always the possibility that further discussions might see resolution and establishment of a working relationship. It regarded the chances of that occurring as being no higher than 10%.

231. Having weighed up the facts and circumstances, the Tribunal came to the view that a reasonable employer would attempt reconciliation, conducting some form of investigation. Attempts would be made to hold discussions and possibly to mediate. That process would take perhaps 6 weeks in total allowing for other work commitments and in order to ensure that reasonable efforts had been made to try to reconcile the parties in dispute.

232. The Tribunal considered that, after that six week period and taking a view as to what was likely to happen, it was almost certain that dismissal would occur on the basis of the differences being irreconcilable. Faced with a decision as to whether the claimant was dismissed or whether Mr McCafferty and the others were permitted to leave, it was satisfied that the first respondents would have dismissed the claimant and that this would have been a fair dismissal in that scenario.

233. The Tribunal recognised that this involves a degree of speculation. A Tribunal is inevitably involved in a degree of speculation in a case such as this or in a case where ***Polkey*** applies. The fact that there is an element of speculation ought not to discourage the Tribunal from undertaking this exercise. This is not considered to be one of the cases where it is simply not possible to speculate as to what might happen. For the reasons identified, the Tribunal regarded the chances of dismissal after the six week period as being 90%.

234. In those circumstances, the compensation awarded to the claimant is now set out.

235. The claimant was paid by the respondents until 21 May 2018. He started his new job on 14 June 2018. He therefore had three weeks without pay. In respect of those three weeks, he is awarded his full loss of £530 net. That is a total of £1590.

236. On the Tribunal timetable, a further week would have passed before the respondents would potentially have been in a position to take a decision on termination of the claimant's employment. His wage loss for that week is £186, being the wage paid by the respondents under deduction of the wage which he received from his new employers.

237. At that point the claimant would, the Tribunal concluded, be likely to have been dismissed, the percentage chance of his employment continuing being 10%. He would however have received 6 weeks' notice. It appeared that he had received 2 weeks' notice as, although dismissed on 4 May, he had been paid through to 21 May. The balance of his notice entitlement at his gross weekly wage of £710.60 amounts to £4263.60.

238. On an ongoing basis and up to date of Tribunal, loss for a 40 week period is involved. In that time, from the respondents, the claimant would have earned £21,200. He obtained from his new employers, in accordance with the schedule of loss, £15,136.67. His loss is therefore £6,063.33 to date of Tribunal. He would be entitled to 10% of that on the basis that there was a 90% chance of dismissal occurring at the end of the six week period referred to. The sum awarded therefore is £606.33.

239. In respect of future loss, there was no challenge to a further period of 39 weeks being awarded to the claimant. That produces, taken on the basis of there being a loss of £186 per week, a figure of £7254. 10% of that is £725.40. That is the sum awarded to the claimant in respect of future loss.

240. In respect of past pension loss over the 6 week period, the claimant is awarded the sum which he sought, namely £25.50. There is no challenge to that calculation.

241. The claimant is also awarded £300 by way of loss of statutory rights.

242. Given that the claimant received job seeker's allowance, the recoupment provisions apply. The monetary award and prescribed elements are reflected in the Judgment.

ACAS Code of Practice

243. There have been conflicting authorities on the question of whether the ACAS Code of Practice applies to SOSR dismissals and whether therefore, if there is a breach, an uplift is appropriately considered. The issue does appear however to have been resolved in relation to SOSR dismissals for breakdown in the working relationship. The case of ***Stockman*** confirmed that the ACAS code did not apply to such dismissals. The EAT were of the view that good practice was set out in the Code. The Code however did not apply in the circumstances of that case and therefore no sum would be awarded in respect of its breach. That is the case followed by this Tribunal.

Statement of employment particulars

244. The claimant has been successful. He did not have a statement of employment particulars issued to him. An award therefore requires to be made by the Tribunal in terms of section 38 of the Employment Act 2002 unless the Tribunal considers that exceptional circumstances apply. There are, in the view of the Tribunal, no such exceptional circumstances. The remaining question is whether an award is in the minimum amount or the higher amount. The higher amount is to be awarded if the Tribunal considers it just and equitable in all the circumstances.

245. In this case the existence of written particulars of employment had been sought by the claimant. There had been reference by the respondents to terms and conditions being made available, in particular at the time when the increase in the claimant's salary was given to him. Despite that, no contract of employment or written statement of employment particulars ever was sent to the claimant. Issues such as the job title, job description and salary would have been apparent from the employment particulars.

246. In circumstances where the claimant had requested this document and it had not been passed to him and where there was no explanation of any difficulty in that regard or as to why the failure had occurred, the Tribunal regarded it as just and equitable to award the higher amount. That is four weeks salary capped at the maximum level of £508. The sum awarded is therefore £2032.

247. It is appreciated that the respondents had no HR department. That, however, does not excuse the failure to produce a written statement of employment particulars.

Victimisation

248. It was accepted that a protected act had been done by the claimant by bringing of proceedings which included a claim of discrimination where the protected characteristic was disability. It was also accepted in evidence that the content of the email from Mr McCafferty of 9 August 2018 was present because of the raising of the proceedings in question, the protected act.

249. The first respondents were aware of the email prior to it being sent. They did not argue that Mr McCafferty was not authorised to send the email. In fact Mr Canavan had approved its content before it was sent.

250. At time of the email being sent, both the respondents had a solicitor. The claimant also had a solicitor. The respondents were aware that the claimant had a solicitor and of the identity of that solicitor.

251. The respondents were also aware that Mr McCheyne was in a relatively senior position with the Forestry Commission. They were aware that he was senior to the claimant and was likely to be his line manager.

252. The first time the litigation was mentioned was in the chain of emails was in the email of 9 August from Mr McCafferty. Mention of the litigation had no relevance to the business between the respondents and the Forestry Commission, the Forestry Commission acting through the claimant as their employee.

253. The Tribunal considered that detriment had been caused to the claimant through the inclusion of the two sentences in the email of 9 August. It considered that it was reasonable for the claimant to have been upset and worried by the inclusion of those sentences. The claimant was in the probationary period of his employment. Whilst the respondents would not necessarily have known that, they would have been aware that he had relatively recently started with the Forestry Commission.

254. The email chain had not dealt with anything other than business. There was no reason why purely business matters could not be dealt with between the claimant in his role with the Forestry Commission and the respondents. Had Mr McCafferty wished to make the point which he did in the email of 9 August, he could readily have sent a separate email to the claimant. He chose not to do that and to include it within an email which he had copied to Mr McCheyne.

255. The claimant's evidence was very measured in general and specifically in this area. He did not seek to exaggerate or overegg the difficulties and upset caused to him. He described the immediate impact and his decision then to delete the email as a means potentially of removing it from the system. The Tribunal accepted his evidence as to the upset and worry caused to him on the evening of 9 August and in particular that he feared his job might be at stake. It also accepted that worry had continued until the claimant met with Mr McCheyne on the morning of 10 August and for a little time after that. Mr McCheyne had been relaxed about the content of the email and had not mentioned it after that. Clearly the claimant's employment had continued.

256. The claimant had, in his schedule of loss, placed the award sought at the upper end of the lowest level in the ***Vento*** scale as that has been adjusted.

257. The Tribunal had regard to the uplift in the case of ***Da'Bell***. It also had regard to the Presidential Guidance. It accepted that the ***Simmons*** uplift was appropriately included.

258. Having heard the evidence from the claimant, the Tribunal regarded the level of award for injury to feelings as appropriately quantified at £3,000.

259. This was the decision reached by the Tribunal having regard to the evidence heard as to the extent of the impact and, without belittling it, the relatively short time over which that impact had occurred. The Tribunal accepted that this was not a matter which immediately disappeared when Mr McCheyne spoke with the claimant on 10 August. It would however have receded substantially as a source of worry following that conversation and as the days progressed. The immediate impact had however occurred. The Tribunal considered that the sum awarded was set at the appropriate level having regard to the facts before it. Interest is payable on the sum. It is payable at 8% from date of the discrimination, 9 August 2018. That date is 8 months and 17 days prior to this decision being issued.

Employment Judge **Robert Gall**

Date of Judgment **26 April 2019**

Entered in register and copied to parties **29 April 2019**