EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4122638/2018 & 4122645/2018

Held in Glasgow on 18, 19 and 20 March and 16 and 18 April 2019

Employment Judge: Rory McPherson

Mr J Priestley	**First Claimant** **Represented by:** **M Cameron - Solicitor**
Mr J Chalmers	**Second Claimant** **Represented by:** **- see above**
JD Coaches Scotland Ltd	**Respondent** **Represented by:** **C McDowall – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

(1) the claim for unfair dismissal in relation to Mr Priestley, the first claimant, succeeds; and

(2) the respondent is ordered to pay Mr Priestley, the monetary award for unfair dismissal in the sum of **FOUR THOUSAND FOUR HUNDRED AND FIFTY SIX POUNDS AND TWENTY SIX PENCE (£4,456.26).** The prescribed element of this award is **ONE THOUSAND AND SEVENTY FOUR POUNDS AND FOURTY THREE PENCE (£1,074.43)** and as the monetary sum exceeds the prescribed element by **THREE THOUSAND THREE HUNDRED AND EIGHTY THREE PENCE (£3,381.83)** that sum is payable immediately to the first claimant; and

(3) the claim of Breach of Contract (failure to pay notice pay) succeeds and the respondent is ordered to pay to Mr Priestley the sum of **SEVEN HUNDRED AND EIGHTY POUNDS AND TWENTY FOUR PENCE** (£780.24) in respect of this; and

(4) the claim for unfair dismissal in relation to Mr Chalmers, the second claimant, succeeds; and

(5) the respondent is ordered to pay Mr Chalmers, the monetary award for unfair dismissal in the sum of **EIGHT THOUSAND FIVE HUNDRED AND EIGHTY TWO POUNDS AND SIXTY THREE PENCE (£8,582.63).** The prescribed element of this award is **FOUR THOUSAND FOUR HUNDRED AND SEVEN POUNDS AND THIRTY PENCE (£4,407.30)** and as the monetary sum exceeds the prescribed element by **FOUR THOUSAND ONE HUNDRED AND SEVENTY FIVE PENCE AND THIRTY THREE PENCE (£4,175.33)** that sum is payable immediately to the second claimant;

(6) the claim of Breach of Contract (failure to pay notice pay) succeeds and the respondent is ordered to pay to Mr Chalmers the sum of **SEVEN HUNDRED AND EIGHTY POUNDS AND TWENTY FOUR PENCE** (£780.24) in respect of this.

REASONS

Introduction

Preliminary Procedure

1. This hearing was appointed as a final hearing in relation to the claimants' complaints of unfair dismissal and breach of contract. The respondents argued in summary that there was no dismissal nor any breach of contract by the respondents as the claimants had resigned.

Issues for the Tribunal

2. The Tribunal identified the following issues:

    (a) was the termination of Mr Priestley's employment by reason of resignation, or dismissal; and

(b) was the termination of Mr Chalmers's employment by reason of resignation or dismissal; and?

(c) if the reason for either claimant was that dismissal a potentially fair dismissal for either claimant, was that dismissal unfair in terms of section 98(4) of the Employment Rights Act 1996 (ERA 1996)?

(d) would a fair dismissal in either case have resulted from a different procedure, and if so what appropriate reduction in compensations should be made?

(e) was either claimant provided with terms of conditions in terms of section 1 of ERA 1996?

(f) was either claimant provided with a pay slips in accordance with section 8 of ERA 1996?

(g) what, if any, was the extent of the respective claimants' losses?

In addition, the tribunal required to consider what, if any, remedy the claimants were entitled to.

Evidence

3. The Tribunal heard evidence from both Mr Priestley and Mr Chalmers, together Mr Craig Donnelly (Mr Donnelly) and Mrs Margaret (known as Marge) Donnelly (Mrs Donnelly) as directors of JD Coaches Scotland Ltd and Colin Dalziel and Thomas Devlin who are employees of JD Coaches.

4. The Tribunal was also referred to a joint set of documents prepared by the claimants' and respondent's representatives. Both the claimants' and respondent's representatives made closing submissions.

5. Below are the findings in fact

Findings in fact

1. Mr Priestley was employed by the respondent from 28 January 2016.

2. Prior to 28 January 2016, Mr Priestley had been approached by Mr Donnelly acting as a director of JD Coaches Scotland Ltd (JD Coaches) which at the time had been seeking to source qualified bus drivers with experience of driving, though not managerially implementing any Strathclyde Partnership for Transport (SPT) requirements, a MyBus service provided via SPT.

3. Mr Chalmers was employed by the JD Coaches from 26 October 2016. Prior to this date he had been approached by Mr Donnelly acting as a director of JD Coaches Ltd (JD Coaches) which at the time was seeking to source qualified bus drivers with experience of driving, but not managerially implementing any SPT tender requirements, a MyBus service provided via SPT.

4. JD Coaches has been in existence for approximately 15 years. It was formerly been operated by Mr Donnelly's late father and mother Margaret Donnelly (Mrs Donnelly) with no employees other than family members servicing public bus route contracts, secured via tender a process from SPT in North Lanarkshire. Following the death of his father Mr Donnelly, who had worked with the company since he was 16 became a Director approximately 5 years ago. At or about that time the company started to employ additional drivers to servicing public bus route contracts. JD Coaches operates several buses including those owned by the company from its bus yard (the bus yard) which is situated adjacent to Mrs Donnelly's home which is also both the trading address of the company and acts as its operational base. Mr and Mrs Donnelly were the relevant individuals with managerial control of JD Coaches at all material times.

5. Prior to commencing employment with JD Coaches, Mr Priestley had been employed by McGills driving a MyBus service. As an inducement to transfer to JD Coaches, Mr Priestley was advised by Mr Donnelly that his 6 day shifts (Monday to Saturday) would in practice end earlier than the allocated end of the day 6.00 pm with his former employer. In particular the shift would end when the allocated booked MyBus service had no further passengers and that he would receive full daily payment regardless of any such earlier finish. On this basis Mr Priestley agreed to transfer to JD Coaches.

6. Prior to commencing employment with JD Coaches, Mr Chalmers had been employed by McGills driving a MyBus service. As an inducement to transfer to JD Coaches, Mr Chalmers was advised by Mr Donnelly the 6 day shifts (Monday to Saturday) would in practical terms end at or around 4.30pm and earlier than the allocated end of the day 6.00 pm with his former employer. In particular, the shift would end when the allocated booked MyBus service had no further passengers and that he would receive full daily payment regardless of any such earlier finish. Mr Chalmers who has a young family agreed to transfer on this basis as it would accommodate his commitments to his children, including early evening activity clubs attended by his children.

7. No written particulars of employment were provided to Mr Priestley or Mr Chalmers by JD Coaches.

8. There was no written document setting out what periods of availability or drivers' hours the claimants would be expected to work, or days on which the claimants were required to work in order to be paid.

9. There was no policy notifying employees on the frequency of pay, or setting out any arrangements for possible alterations to the frequency of pay.

10. There was no written guidance provided by JD Coaches as the nature of the role held by Mr Priestley or Mr Chalmers role within the Company.

11. There was no staff handbook or equivalent documentation set out process including the basis for the company seeking to implement any changes to working arrangements. No staff handbook or equivalent document setting out any mechanism for an employee submitting a grievance was made available by JD Coaches to employees such as Mr Priestly and Mr Chalmers.

12. There was no documentation available to the claimants setting out arrangements between JD coaches and SPT for the operation of tenders such as the MyBus service or indeed the provision of any buses connected with same.

13. There was no written or other guidance provided by the Company to Mr Priestley and Mr Chalmers as to the arrangements under which the Company

had been provided with a bus for the MyBus service. While both Mr Priestley and Mr Chalmers had previous experience as MyBus drivers and were appropriately qualified drivers, they were not privy to contractual arrangements between the Company and SPT in relation to the MyBus or other services. There was no written guidance as to any mechanism for raising any grievances. There was no guidance on who to submit a grievance to. There were no disciplinary rules giving examples of acts which the respondent regarded as acts of misconduct or of gross misconduct. In particular there was no guidance that using a MyBus vehicle for any other route would amount to gross misconduct.

14. The MyBus service (which is also sometimes referred to as Dial a Bus) is a bookable bus service operated by SPT provided to eligible individuals with limited mobility, commonly, but not exclusively, elderly passengers offering door-to-door transport in a specific area. Although operated by SPT the service is provided by specific bus companies such as JD Coaches. Unlike fixed route public service buses which JD Coaches also operated, the MyBus service does not follow a specific route and can be pre-booked for eligible individuals to attend GP appointments, attending local club, church, pub or other similar destinations. The MyBus service is designed to pick up a passenger from, at, or near their home close and drop the passenger close to the destination and similarly to provide the equivalent return journey from the destination. The vehicles used were not owned by the Company but leased under specific arrangements and included MyBus M90-1 leased to JD Coaches by SPT. The vehicles have tracker devices incorporated into the MDT device which also operates to provide update bookings direct from the SPT central telephone booking service. The vehicles used are shorter buses, with less than half the seats of those used for public service fixed routes. The MyBus service was a preferred service for bus drivers such as the claimants reflecting the variation in the routes, the direct engagement with passengers many of whom became known to the driver, and the frequency of such passengers giving cash tips to the drivers. Drivers on other bus services operated by JD Coaches did not receive tips. Such tips as were provided to drivers on the MyBus service operated by JD Coaches were not centrally

collected and were retained by the driver. The tips received by the drivers were believed by JD Coaches to be significant amounting on occasion to £20 to £30 per day but were not guaranteed and not centrally collected or recorded.

15. The MyBus service would be allocated to transport eligible passengers between 9 am and 6pm who had pre booked via SPT telephone booking service a day or so earlier additional eligible passengers could make bookings during the day, which would be communicated to the driver via a screen device known as an MDT however, the telephone booking facility did not operate after, between, 4.00pm and 4.30pm. The effect was that it was identifiable at the start of each day from the pre-booking information provided by SPT that the last passenger journey would be around no later than 5pm. As such and while the service operated to 6pm, it was common that there would be no allocated journeys from 5pm to 6pm.

16. Since commencing with JD Coaches and until July 2018 both Mr Priestly and Mr Chalmers's usual working day Monday to Saturday had ended at either 4.30pm or 5pm. Until around July 2018 and with the exception of a few occasions where Mr Priestley or Mr Chalmers provided assistance to the JD Coaches to provide absence cover, they would not have been expected to work to 6.00pm. Prior to the commencement of driving duties but within their allocated shift Mr Priestley and Mr Chalmers would carry out appropriate driver safety checks, including to the tyres and hazard lights, on the Mybus bus they would each be driving. These driver safety checks took approximately 30 minutes, and in consequence, Mr Priestley and Mr Chalmers would arrive at the bus yard by 8.00 am in order to complete same before driving.

17. Mr Priestley and Mr Chalmers were paid weekly. Since 2018 weekly payslips were only provided by JD Coaches to Mr Priestley and Mr Chalmers when they specifically requested them. JD Coaches weekly payslips contained generated information common to other employees and confirmed that Basic Pay for both Mr Priestly and Mr Chalmers was £480 gross. The weekly payslips also contained reference to Units: 60 although contained no clear

explanation as to what was meant by this. JD Coaches arranged for payment of the statutory Employer Pension contribution which at the time was 2% equating to £7.28 per week. Mr Priestley's net weekly pay was £382.84. Mr Chalmers' net weekly pay was also £382.84.

18. JD Coaches engages the services of a payroll accountancy firm to deal with and generate pay slips. The annual cost of this service is around £600. The claimants were paid weekly, however in order to reduce the annual cost of the service Mr Donnelly had proposed that the claimants pay should move from weekly to monthly intervals. The claimants had not agreed. JD Coaches continued to receive the payslips from the payroll accountancy firm and until approximately 2018 would have left the weekly pay slips in what is known as the garage area within the bus yard for uplift by the employee. The company formed the view that such pay slips were not being picked up and ceased to provide them unless either of the claimants requested same. Where such a request was made, commonly in order that an employee could provide evidence of pay to a third party such as a lender, the relevant pay slip would be provided. The non provision of the pay slips from in or around 2018 did not generate any cost saving in the engagement of the payroll accountancy firm.

19. In early 2018 JD Coaches had entered into a tender process with SPT to secure, additional to the MyBus contract, a new fixed route public service which combined the existing 343 public bus service route with another public bus service route known as 346. The combined public service was numbered 343 (the new 343 service). JD Coaches was awarded the new 343 service in May 2018 with a start date for 15 July 2018.

20. Neither Mr Donnelly nor Mrs Donnelly engaged with either of claimants on JD Coaches' tender for the new 343 service. Mr and Mrs Donnelly anticipated that the tender would necessitate change in the working arrangements for both Mr Priestley and Mr Chalmers, in that both would be expected to work beyond their effective finish time at the end of the Mybus Service Monday to Saturday from either 4.30 or 5pm extending this to 6pm or 6.30pm in order to operate part of the new 343 service, on alternate dates Monday to Saturday. Mr and Mrs Donnelly envisaged that on the days Mr Priestley or Mr Chalmers

required to work to 6.30pm they would be permitted to start the morning part of their respective shifts 30 minutes later. Mr and Mrs Donnelly did not take steps to set this out to either claimant.

21. Mr Donnelly and Mrs Donnelly relied upon both Mr Priestley and Mr Chalmers becoming aware of the application and successful tender of the new 343 service, and its impact on existing working arrangements, through informal gossip which they believed operated within the local bus driver community both verbally and through online forums.

22. It was both Mr Donnelly and Mrs Donnelly's view that while both Mr Priestley and Mr Chalmers consistently ceased work at between 4.30pm and 5pm Monday to Saturday, Mr Priestley and Mr Chalmers should accept that they were being paid for working 60 hours per week. Further Mr Priestley and Mr Chalmers should agree to their existing working arrangements being changed whereby, at the end of their respective MyBus effective shift at or around 4.30pm and 5.00pm Mr Priestley or Mr Chalmers would, on alternate days, immediately operate the new 343 service (the new arrangements) and work on to either 6pm or 6.30pm Monday to Saturday.

23. Neither Mr Priestley nor Mr Chalmers were advised at any material time prior to the implementation of the new arrangements that they would be required to work 60 hours in any week to secure the regular existing agreed weekly pay.

24. Mr Donnelly approached Mr Priestley and Mr Chalmers in late May, and prior to the launch on 15 July, of the new 343 service, to advise of the new arrangements. Both Mr Priestley and Mr Chalmers were concerned that the new arrangements would impact significantly on their existing working arrangements, as they would be expected, on alternate days, to work beyond the effective regular 4.30pm or 5pm end time and would now require to work to 6.00pm or 6.30pm. Mr Priestley and Mr Chalmers did not willingly agree to this modification. Mr Priestley and Mr Chalmers were not provided with any mechanism to complain or challenge this decision. They had not been

provided with written terms and conditions or written staff handbook setting out any grievance procedure setting out how to raise any concern or objection.

25. Mr and Mrs Donnelly did not discuss or otherwise explain any restrictions relating to the lease of the MyBus from SPT with Mr Priestley or Mr Chalmers.

26. Mr Donnelly advised Mr Priestley and Mr Chalmers that he expected that the new 343 service would be operated on alternate days by either Mr Chalmers or Mr Priestley returning the MyBus to the bus yard after the last booked MyBus customer and then taking out a regular public service bus to carry out the remaining part of the new 343 service thereafter returning that regular public service bus to the bus yard by 6.30pm.

27. JD Coaches imposed the new arrangements. No compensation was offered in relation to the loss of the period from either 4.30pm or 5pm to 6.00 pm or 6.30pm for the days Monday to Saturday when Mr Priestley and Mr Chalmers would have previously been able to leave the bus yard and otherwise be away from work.

28. On Tuesday 7 August 2018 and around 4 to 4.30pm while Mr Chalmers was driving the respondents' MyBus (MyBus M90-1) as part of his regular MyBus shift, he deviated from the MyBus route which was allocated that day in order to pick up passengers who were seeking to use the new 343 service. He did so, as he did not consider that he had sufficient time to return the MyBus M90-1 to the bus yard, and thereafter carryout out such appropriate maintenance checks as he considered would have been appropriate take out the regular public service bus, operate the regular service bus on the new 343 service and return same to the bus yard at the end of the shift. A MyBus passenger who was travelling on the MyBus M90-1 subsequently complained to SPT about the deviation to pick up 343 service passengers.

29. Neither Mr Donnelly nor Mrs Donnelly had authorised Mr Chalmers to operate MyBus M90-1in this manner. Mr and Mrs Donnelly had not advised Mr Chalmers of the lease arrangements between SPT and JD Coaches restricting the leased MyBus M90-1 to the MyBus service. Mr Donnelly and Mrs Donnelly were aware that although the leased MyBus did not operate a

tachograph system it was fitted with an MDT device which in addition to providing updated customer booking information tracked the location of the vehicle. They had not provided any relevant information to Mr Chalmers including the tracking element of the MDT device.

30. On Thursday 9 August 2018 Mr Donnelly sent a text to Mr Priestley which referred to SPT. This text did not refer to Mr Chalmers deviating from the MyBus route to pick up passengers on the new 343 service on Tuesday 7 August. Mr Donnelly was not aware at this time that Mr Chalmers had deviated from the MyBus route on Tuesday 7 August.

31. At the start of the MyBus shift on attending the bus yard on Saturday 11 August 2018 and after Mr Priestley and Mr Chalmers had spoken to a former colleague who had described the new arrangement in broad industrial terms earlier that day, they both approached Mr Donnelly to discuss their continued objections to the imposed new arrangements. Mr Donnelly on hearing the broad industrial terms used by the former colleague called on his mother Mrs Donnelly to join them. Mrs Donnelly on hearing the broad industrial language was distressed and said to both Mr Priestley and Mr Chalmers that *"people have been chapping at my door for your job"* and stated that JD Coaches only required 7 days' notice if they wanted to leave.

32. Mr Priestley was concerned that he may lose his job as a result of the comments by both Mr and Mrs Donnelly. Independently of Mr Chalmers he prepared a written grievance dated Saturday 11 August 2018 (the Priestley Written Grievance) that weekend. The Priestley Witten Grievance was headed "FORMAL GRIEVANCE LETTER" and set out that:

a. it was a formal complaint about unprofessional and aggressive behaviour by Mr and Mrs Donnelly on Saturday 11 August 2018 at the bus yard he had been subject to; and
b. that he had tried to speak to Mr Donnelly about "*our working conditions, as a result of this he started to become very aggressive"* shouting and swearing at them. Mr Donnelly called for his mother who *"also proceeding*

to speak in an aggressive manner" remarking that Mr Priestley's job was in demand and Mr Priestley had no say in his working conditions; and

c. when he was offered the job "*of a MyBus Driver, I was told verbally that I was to do the work on my sheets of pick ups and then I was free to go home and I was to be paid from 8am to 6pm Mon to Sat";* and

d. he had been informed without notice that he was to do the 343 service in addition to the MyBus service. He had 10 years' experience as a MyBus driver and had never known of such a practice and had never been asked to carry out such a role. Mr Priestly repeated the allegation that Mr Donnelly had been aggressive toward him.

He described the main point of his complaints were:

e. threats of dismissal by Mrs Donnelly quoting her words *"people have been chapping my door for your job"* and that she had said that she only required one weeks' notice for him to leave.

f. feeling bullied and harassed and he no longer felt that his employers were approachable;

g. he felt that there had been a "*verbal contract breach*" in that he had been doing the same shift from 8am to 6pm and without consultation the company had changed the shift from 8am to 6.25pm without any adjustment in pay or conditions.

h. He indicated that it had been said to him "*you have to take the good with the bad and you have a good run with early finish times".*

i. He indicated that "*I hope by outlining some of my grievances in a formal way they are acknowledged and can be resolved professionally. This is a copy for your records and I'm also lodging a copy with A.C.A.S"*.

33. Independently of Mr Priestley, Mr Chalmers also prepared a written grievance following the meeting on Saturday 11 August 2018 (the Chalmers Written Grievance) that weekend. The Chalmers Written Grievance (which was headed Formal Grievance Complaint) set out that:

a. it should be accepted as his formal grievance complaint as he had tried to have an "*informal conversation"* with Mr *Donnelly "regarding the issues I am having at work, resulting"* in Mr Donnelly becoming verbally

aggressive, shouting and swearing and calling for Mrs Donnelly to be involved; and

b. an allegation that Mrs Donnelly was also shouting and being verbally aggressive to him and Mr Priestley; and

c. that he felt that this was *"unprofessional behaviour from both the company directors left me feeling intimidated and therefore my grievance being unresolved and I feel that the only course of action available to me is lodging this formal complaint";* and

d. that when he started with the company it had been verbally agreed, there being no written contract, that he would work as *"Dial a Bus driver and it was explained to me that it would be job and finish meaning when my last passenger was dropped of I would be free to finish my shift and go home. This arrangement suited me perfectly and is the main reason I accepted the position as I have a very young family and commitments with them in the early evenings."*

He described his complaints were:

e. he had, had a "*Verbal contract*" which had been "*breached …Since May 2018 I was told that I would now be doing the 343 bus service as well as my Dial a Bus shift resulting in a much later finish in the evenings and a heavier work load. I already work 6 days a week for this company and I feel adding this time on to my shift is detrimental to my home life."*; and

f. there were "*No designated tea breaks"* against a background which he described driving up to 10.5 hours a day; and

g. he felt "*bullied and intimidated"* and stated that "*I am frightened to approach any of the company directors in light of what happened today (11/08/18) through fear of losing my job… I also feel*" Mrs Donnelly demanding *"my resignation because I have some issues with my working conditions in unfair unprofessional and also unlawful"*; and

h. he had suffered "Threats of dismissal". Mrs Donnelly had said to him *"I have people chapping my door for the MyBus, leaving me fearful of being dismissed if I do not comply with these demands. My job description has now changed to Dial a Bus driver and Service Bus driver without any verbal or written contract, I've been told I am doing it, effectively I am now*

working under protest as I have never agreed to this and it was never discussed at the start of my employment with the company".

i. Mr Chalmers stated in conclusion "*I hope that by outlining these grievances in a formal manner they will be acknowledged and we can work together to resolve these issues and work toward a positive and effective workplace".*

34. On their next working day, Monday 13 August 2018, both Mr Priestley and Mr Chalmers attended at the bus yard to commence their shift as MyBus drivers at 8.00 am in order to commence the usual bus safety checks on the MyBus buses.

35. Prior to commencing the usual bus safety checks, Mr Priestley and Mr Chalmers provided the both the Priestley Written Grievance and Chalmers Written Grievance (the written grievances) to Mrs Donnelly who was within her home adjacent to the bus yard. Mr Priestley and Mr Chalmers thereafter went to commence the appropriate bus safety checks with a view to commencing their MyBus shifts that day.

36. Mrs Donnelly read the written grievances, took no specific action but waited for her son and fellow director Mr Donnelly to arrive at the bus yard that morning. Mrs Donnelly did not discuss the written grievances with Mr Priestley or Mr Chalmers at this time.

37. When Mr Donnelly arrived at the bus yard at between 8.30 and 8.45 am, he was called to his mother's home by his mother. She provided him with both written grievances.

38. Mr Donnelly was upset and angered by what he considered to be unfair characterisation of his mother having bullied Mr Priestley and Mr Chalmers and indeed seeing the written allegations regarding his own actions on the preceding Saturday 11 August 2018. Mr Donnelly wrongly concluded that the written grievances were in identical terms. Mr Donnelly considered that the use of the written grievances reflected a conspiracy by Mr Priestley and Mr Chalmers to undermine him, his mother and JD Coaches. He was both angered and upset by the terms of the written grievances.

39. Mr Donnelly approached both Mr Priestley and Mr Chalmers to remonstrate with them on the terms of the written grievances. Mr Priestley was on the MyBus he was due to take out that day for his shift and Mr Chalmers was standing adjacent to that MyBus. Mr Donnelly's response to reading both the Written Priestley Grievance and the Written Chalmers Grievance was that Mr Priestley and Mr Chalmers had to carry out the new 343 service under the new arrangements, with the effect that they would require to work beyond the previous effective shift end at between 4.30 and 5.00pm. Mr Donnelly stated that he had been a fair employer but did not offer any meeting or other form of mediation regarding the allegations including his and his mother actions or indeed the breach of verbal agreements or contracts set out in each. He did not offer any meeting or other form of mediation regarding any of the elements of the Written Priestley Grievance and the Written Chalmers Grievance. Mr Priestley stated that he was minded to report the new arrangements to SPT.

40. Mr Priestley did not say to Mr Donnelly that rather than return the MyBus at between 4.30 to 5.00pm for the new 343 arrangements he would rather wait in a layby and return by 6.00pm.

41. Mr Donnelly shouted to both Mr Priestley and Mr Chalmers that they had both been employed as drivers and not Mybus drivers that there would be no more early finishes and that they were both *"off your shifts".* Mr Chalmers had made no comment at this point. No alternate work instructions were provided by Mr Donnelly. Both Mr Priestley and Mr Chalmers had understood when arriving at work they were due to start their shifts as My Bus drivers commencing driving the respective MyBus buses at around 9 am. In response to the instruction that they were both off their shifts, there being no alternate instruction to Mr Priestley commented that *"this is getting us nowhere"*, collected his personal bag, which he he had placed on the bus for use during his shift and, together with Mr Donnelly, walked out of the bus yard across the gateway. After a brief period, Mr Donnelly pulled the large gate to the bus yard across, closing off the gateway between himself and Mr Priestley and Mr Chalmers. Mr Donnelly's primary reason for pulling the sliding roller gate (the

roller gate) shut at this time was to shut out both Mr Priestley and Mr Chalmers from the bus yard as Mr Donnelly remained upset by the written grievances.

42. Mr Priestley and Mr Donnelly stood for a brief period out with the roller gate to the bus yard. As they each believed that they had just been dismissed, got into their respective cars and drove off.

43. While both Colin Dalziel and Thomas Devlin were in the bus yard there were not involved in the heated discussion between Mr and Mrs Donnelly and did not overhear the full substance of what was said although they did see Mr Priestley and Mr Chalmers depart the bus yard and Mr Donnelly pull the roller gate shut behind them.

44. It is not accepted that Mr Priestly and Mr Chalmers waited or otherwise stood outside the roller gate smoking for any length of time. They however both understood that they were "*off their shifts*" and no alternative instruction was given to them.

45. While the roller gate was not locked against Mr Priestly and Mr Chalmers re-entering, they both took the pulling of the roller gate behind them as significant indicator that they had been dismissed taken together with the words used by Mr Donnelly that they were both "***off***" their shifts.

46. It is not accepted that Mr Donnelly simply closed the roller gate to keep a family pet within the bus yard, had this been his intention he could have sought to communicate this to Mr Priestly and Mr Donnelly. He did not do so.

47. Neither Mr Donnelly nor Mrs Donnelly subsequently addressed matters referred to in the grievances or provided any alternate work instructions to Mr Priestley or Mr Chalmers. No communication was issued by the respondents or their directors Mr and Mrs Donnelly to Mr Priestly and Mr Chalmers until Mr Donnelly wrote to the claimants on 21 August 2019 as set out below.

48. On 14 August 2018 JD Coaches received a written complaint from SPT ("the SPT written complaint") regarding the actions of Mr Chalmers while driving M90-1 MyBus on Tuesday 7 August 2018. The complaint stated "*This warning is for: SPT received a complaint that on Tuesday 7th August 2018 Mybus*

service M90-1 deviated from its assigned route and uplifted 3 unauthorised passengers… This warning has attracted 5 points".

49. JD Coaches and in particular neither Mr Donnelly nor Mrs Donnelly had, at any material time, formed their own genuine view that the claimants had resigned**.**

50. After receiving the written complaint, Mr Donnelly secured a meeting with the author of the SPT complaint letter, Mr John Knox who confirmed that it was open to JD Coaches to issue a written letter of appeal.

51. On 21 August 2018 Mr Donnelly wrote to both Mr Priestley and Mr Chalmers in the following terms "***Confirmation of Resignation.***

I am writing to confirm that position following your decision to resign from your employment with the company with immediate effect.
The following arrangements will therefore apply
Your dismissal took effect immediately and your final day of employment was 13th August 2018. You are not entitled to any period of notice or payment in lieu of notice. Your holiday entitlement for this year calculated pro rate up to your final day of employment, is"
for Mr Priestley:
"23 days."
for Mr Chalmers
"16 days"
*and f*or Mr Priestley
"You have taken 28 days"
and for Mr Chalmers
"You have taken 17 days."
The letter continued for both:
[You therefore have no outstanding holiday entitlement.]
Your final salary payment for the period up to 13 August 2018 will be made on 9 August 2018 subject to normal deductions of tax and National Insurance contributions. We shall forward your P45 to you in due course.

Lastly, I acknowledge receipt of the grievance letter which you submitted on that day of your resignation. I am disappointed that you have chose to resign in circumstance where the company has not been given an opportunity to respond to the terms of your grievance. I will write separately to you in relation to the grievance once I have had a chance to review it in more detail."

52. Neither claimant was paid any notice pay.

53. Neither claimant was advised of any possible appeal in relation to any purported termination. Mr Donnelly did not offer any meeting in respect of Written Priestley Grievance nor the Written Chalmers Grievance. Mr Donnelly did not address these outstanding written grievances in any way. Mr Donnelly made no mention in his letter to Mr Chalmers of 28 August 2018 of the SPT written complaint he had received by that time nor the sanctions imposed on the JD Coaches.

54. Mr Donnelly appealed the SPT written complaint on 28 August 2018.

55. SPT advised the respondents by letter of 11 September 2019 *"I refer to the formal warning letter to you dated 14/08/208 and to your letter of appeal of 28 August in respect of the above contract. The comments made in your letter of appeal against the warning have been considered, and I have to advise that the formal warning stands, as the MDT confirms that the driver deviated from his route."*

56. Mr Donnelly did not subsequently write separately or at all to either Mr Priestley or Mr Chalmers in relation to the written grievance.

57. Mr Priestley received Universal Credit in respect of the period 14 August to 7 September 2019 and secured alternative employment as a bus driver having applied for 2 bus driving jobs after the termination of his employment and that he secured employment with National Express as a bus driver starting on 7 September 2018 with a net income of £365.00 per week.

58. Mr Chalmers subsequently secured alternative employment as a bus driver having applied for 15 jobs with various employers including Royal Mail, Argent Energy, C-operative, Gist, Caledonian Proteins, Parcel Force, GI Group,

MacNair's Bus and Coach, First bus, McGill's Busses, JMB Travel and having registered with agencies including Driver hire and Pertemps after the termination of his employment and that he secured employment working as a Warehouse Worker at DX Distribution Warehouse initially with Connect Appointments on an agency basis from 23 September 2018 to 20 December 2018 with net pay of £282.46 per week which increased from 21 December 2018 to date with net pay of £291.46 per week. This employment while reflecting a lesser paid job accommodated his family commitments and continues to do so.

Submissions

59. The claimant provided oral submissions. The claimant did not refer to reported cases but argued in summary that the respondents had not complied with their obligations to provide written terms and conditions and had not complied with their obligations to provide itemised pay statements at least through 2018. Further and in the significant area or whether there was a resignation or dismissal, the evidence was clear that there was a dismissal. It was argued for the claimants that the actions of Mr Chalmers on 7 August were sanctioned by the respondent and that Mr Donnelly knew that Mr Chalmers was taking the MyBus to complete the new 343 bus route.

60. It was further argued for the claimants that the respondents' evidence including that of Mr and Mrs Donnelly and indeed Colin Dalziel and Thomas Devlin employees of JD Coaches, should be rejected where it differed from the claimants' evidence and that the claimants' evidence on all aspects should be accepted.

61. It was argued for Mr Priestley and Mr Donnelly that they had both sought to minimise their losses and should be awarded both a basic award and a compensatory award with continuing losses for a period of 8 months.

62. For the respondent, the respondent provided partial written submissions supplemented by oral submissions.

63. In relation to the question of whether a party had been dismissed or had resigned the respondent provided copies of case reports together with a list; ***Futty v Brekkes (D& B) Ltd*** [1974] IRLR 130 (***Futty***); ***The Burton Group v M Smith*** [1977] 351 (***Burton Group***); ***Chesham Shipping v Rowe*** [1977] IRLR 391 (***Chesham Shipping***); ***BG Gale v Gilbert*** [1978] IRLR 453 (***BG Gale***); ***Tanner v DT Kean*** [1978] IRLR 110 (***Tanner***); ***Doble v Firestone Tyre and Rubber Co Ltd*** [1981] 300 (***Doble***); ***Sothern v Frank Charlesly*** 1981 [IRLR] 278 (***Sothern***); ***Barclay v Glasgow City Council*** [1983] IRLR 313 (***Barclay***); ***J&J Stern v Simpson*** [1983] IRLR 52(***J&J Stern***); ***Martin v Aggregates*** [1983] 49 (***Martin***); ***Graham Group v Garratt*** EAT/161/97 (***Graham Group***) ; ***Mitie Security (London) Ltd v Ibrahim*** UKEAT/0067/10 (***Mitie***) ; ***Société Générale, London Branch v Gey's*** [2012] UKSC 63 (***Société Générale***) and **East Kent Hospital University NHS Foundation Trust v Levy** UKEATY/020232/17 (***East Kent***).

64. The respondent provided some specific reference within the cases, but broadly invited the Tribunal to conclude while that the authorities "*do not speak with one voice"* the correct approach is not to focus on the intention of the speaker and, where the words argued are ambiguous, not to focus on the genuine understanding of the listener but rather on an objective test of how the words would be understood by a reasonable listener.

65. The respondent argued that the evidence was clear that the employees having argued with Mr Donnelly and walked out of the bus yard there was a clear intention to resign. The claimants had not, as they contended, stopped for 10 to 20 minutes for a cigarette break outside the bus yard. They had indicated their resignation by walking out and it was reasonable in the circumstances for Mr Donnelly to have pulled over the roller gate, he did so as the employees were aggressive and there was dog within the bus yard which could have otherwise escaped. The employees had been consistently unreasonable in their responses to the business needs of the JD Coaches, as shown in their refusal to move from weekly to monthly pay and were again being unreasonable in their response to the new arrangements devised by Mr Donnelly to accommodate the new 343 public bus service, as the claimant

were paid to work to 6pm they should have been willing to take on the role when they were available from the effective end of the Mybus aspect of the shift.

66. In relation to the issue of loss, and while the respondent's primary position that there was no loss as the claimants had resigned, in the alterative if the Tribunal had considered that the employers could have done more or had in fact dismissed the claimants, the respondent argued that s122 (2) ERA 1996 provided the basis to reduce any Basic Award and the Tribunal could take into account conduct which is not discovered until after the dismissal, namely the matter which resulted in the SPT letter. The respondent further referred to s123(6) of the ERA 1996 and with reference to ***Nelson v BBC (No 2)*** [1980] ICR 110 (***Nelson***) identified 3 factors which were required for a reduction of the Compensatory Award to the effect that the claimant's conduct must be culpable or blameworthy, the conduct must have actually cause or contributed to the dismissal and the reduction must be just and equitable.

67. The respondent argued that in assessing reduction for contributory fault the Tribunal should look at the claimant's conduct in isolation and not be influence by the respondent's conduct and referred to ***Sandwell v West Birmingham Hospitals NHS Trust v Westwood*** UKEAT/0032/09 (***Sandwell***).

68. The respondent further referred to ***CK Heating Ltd v Doro*** UKEATS/0029/11(***CK Heating***) and submitted that the Tribunal in that case had been wrong to take into account the fact that they employer was potentially in breach of the implied term of mutual trust and confidence when assessing contributory fault.

69. In addition, the respondent referred to ***Robert Whiting Designs Ltd v Lamb*** [1978] ICR 89 (***Robert Whiting Designs)*** and argued the claimants conduct does not have the principal reason for the dismissal, so long as it was one of the reasons.

70. The respondent argued that while Mr Chalmers had a continued wage loss of £100, he had not secured other better paid employment, and was working

hours which suited his family arrangements which was in effect a life style choice and thus there should be no wage loss.

71. The respondent submitted that the Tribunal ought to take into account the likelihood of either claimants having remained in employment with the respondents if neither was willing to accept the new arrangements.

72. It was accepted by the respondents that they had not complied with their obligations to provide written terms and conditions. It was accepted by the respondents that they had not complied with their obligations under section 8 of ERA 1966 to provide itemised pay statements through 2018.

Relevant Law

Unfair Dismissal

Statutory Framework

73. Section 94(1) of the Employment Rights Act 1996 (ERA 1996) provides

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

74. Section 95 of ERA 1996 provides: "*Circumstances in which an employee is dismissed*

"(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

…

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

75. Section 98 of ERA 1996 provides

"(1) In determining for the purposes of this Part whether the dismissal of an employee if fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it

…

(b) relates to the conduct of the employee"

Relevant Law

ACAS Code of Practice

76. Section 207 of the Trade Union and Labour Relations Consolidation Act 1992 (TULR(C)A) provides that:

"(1) A failure on the part of the any person to observe any provision of a Code of Practice issued under this Chapter shall not of itself render him liable to any proceedings."

77. Section 207A TULR(C)A provides that:

"(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employee has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%

(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes

(5) Where an award falls to be adjusted under this section and under section 38 of the Employment Act 2002, the adjustment under this section shall be made before the adjustment under that section."

78. The ACAS Code of Practice on Disciplinary and Grievance Procedures (***the ACAS Code)*** came into effect in 2015 (replacing the earlier ACAS equivalent code issued in 2009 Code) provides, in relation to Disciplinary Procedures;

1. This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.

- *Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted.*
- *Grievances are concerns, problems or complaints that employees raise with their employers.*

2. Fairness and transparency are promoted by developing and using rules and procedures for handling disciplinary and grievance situations. These should be set down in writing, be specific and clear… It is also important

to help employees and managers understand what the rules and procedures are, where they can be found and how they are to be used.

3. *Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code.*

4. *That said, whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:*

   - *Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.*

   …

   - *Employers should carry out any necessary investigations, to establish the facts of the case.*
   - *Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.*
   - *Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.*
   - *Employers should allow an employee to appeal against any formal decision made.*

32… employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance This should be done in writing and set out the nature of the grievance

33. Employers should arrange a formal meeting to be held without unreasonable delay after a grievance is received.

79. The ACAS Guidance on the Code in relation to Discipline and Grievance Procedure (***The ACAS Guidance***) sets out that a *"Tribunals will be able to adjust any award upto 25% for any unreasonable failure to comply any provision of the Code"*

80. Although not referred to by the parties I have reminded myself that in ***Allma Construction Ltd v Laing*** UKEATS/0041/11 (***Allma***) Lady Smith at para 29 stated that a tribunal should approach an uplift under this section in the following way: *"Does a relevant Code of Practice apply? Has the employer failed to comply with that Code in any respect? If so, in what respect? Do we consider that that failure was unreasonable? If so, why? Do we consider it just and equitable, in all the circumstances, to increase the claimant's award? Why is it just and equitable to do so? If we consider that the award ought to be increased, by how much ought it to be increased? Why do we consider that that increase is appropriate?"*

81. Further and I have reminded myself of the EAT's consideration in ***Cadogan Hotel Partners Ltd v Ozog*** *UKEAT/0001/14* where the focus of the tribunal had been on the acts of discrimination and what it considered to be the Respondent's failure to respond to the Claimant's grievance. The EAT rejected overturned the uplift on the basis that it would require a written grievance. It is considered that the possibility of an uplift is not solely restricted to the disciplinary procedure and can encompass an employers' failure to follow the grievance procedure set out in **ACAS Code.**

Relevant Law

Was there a dismissal by the respondent or resignation by the claimants– Case law?

82. I have reviewed the case law provided by the respondents. It is extensive. In order to give context to the decisions and the relevant quotes I have provided a short summary of each case referred to, listing each decision broadly in date order for ease.

83. In ***Futty*** the EAT noted that claimant, a fish filleter with 4 years' service, had acquired a reputation for turning *'banter into acrimony'*. Following a certain amount of banter as to how a driver could get away quickly, it was described that the foreman who was *'fed up with it and turned to Futty and told him, "If you do not like the job, f… off*".' Futty stated that he had interpreted the foreman's words as *'you are dismissed'.* He left and sought and found another

job. The company thought that Futty would have returned when over his '*huff*' and denied dismissing Futty. The tribunal heard evidence from other fish filleters as to the meaning which should be given to the words used. As the tribunal pointed out, the words had to be interpreted, *'not in isolation—but against a background of the fish dock'*. The filleters, who had heard the incident in question, did not consider that the applicant had been dismissed, and the tribunal agreed, finding that in the fish trade *'once the question of dismissal becomes imminent bad language tends to disappear and an unexpected formality seems to descend upon the parties'*. In the circumstances, the tribunal concluded that the foreman's words were no more than *'a general exhortation to get on with his job'* and that Futty had not been dismissed.

84. In ***Burton Group***, Mr Smith who was seriously ill was provided with an application to be considered for voluntary redundancy. Mr Smith filled in the application and submitted the application which was acknowledged with the company saying that the actual date of termination would be confirmed as soon as possible. Prior to receiving notification Mr Smith died. A Tribunal held that Mr Smith had been given notice to terminate his employment and that the effective date of termination was his date of death. The employer appealed against the finding that Mr Smith had been given notice of dismissal. The EAT held that in determining whether an employee had been dismissed or merely given a prior warning of an intention to dismiss what was said should be construed objectively rather than according to the unexpressed intention of the parties, Mr J Arnold said at para 24 "*construing objectively the language which was used, we are driven to the conclusion that what was passed between the parties down to and including the receipt of the letter… was indeed a prior warning and a prior arrangement as to intended dismissal for redundancy, but not itself a dismissal.*"

85. In ***Chesham Shipping*** the EAT required to consider an appeal against a finding of dismissal. Captain Rowe and two officers had been summarily dismissed by an employer, in what was described as a fit of temper, after some trouble had been found with the operation of a ship which had to return

to dock. According to the company after calming everyone down the 3 officers were reinstated. Captain Rowe argued that he had not agreed to be reinstated and a Tribunal held that he had been dismissed. The EAT noted that certain indicators, such as the Captain having been denoted as being on leave and a letter from the Captain indicating that he and a colleague had agreed to stay for 2 or 3 days to assist the ship in its passage to Rotterdam was handed over just before the ship was due to leave and would have required the Captain, were not wholly consistent with a position that the Captain had simply been dismissed and not agreed to be reinstated. The EAT at para 4 noted that Tribunals "*ought to be careful to ensure what has taken place really is a dismissal, and not merely some words uttered for particular reasons which everybody quite understood were little more than abuse or something of that sort".*

86. In ***Tanner***, the claimant had been had been instructed not to use the company's van outside working hours and had been lent a sum of money to buy a car. On discovering that Mr Tanner still used the company van for doing a part time job as a doorperson at a country club one of the employer directors, Mr Kean, lost his temper and shouted at him *"That's it you're finished with me"*. Mr Tanner's claim that he had been dismissed was rejected by a majority decision of the Tribunal who held the words to be merely spoken in annoyance and they did not amount to dismissal. Mr Tanner appealed to the EAT, the EAT at para 11 to 12 recorded the post utterance history to the including Mr Tanner approaching one of the directors (Mrs Kean) who had advised Mr Tanner that he should collect his wages as usual on the Friday. The EAT concluded that the majority of the Tribunal had reached a decision which was open to it, to the effect that Mr Kean was "*justifiably in a temper, was extremely annoyed, used the language which he used by way of a reprimand and not by way of a dismissal, and , had Mr Tanner thought about it, there was no reason why he should not have so understood.".*

87. At para 3 of ***Tanner*** the EAT noted that *"the matter usually arises out of a loss of temper on one side or the other; the employers say words in temper which may or may not constitute dismissal or employers, also in temper, say words*

which may or may not amount to resignation… No doubt there are some words and acts which as a matter of law could be said only to constitute dismissal or resignation, or of which it could be said that they do not constitute dismissal or resignation. But in many cases, they are in the middle territory where it is uncertain whether or not they do or not, and it is necessary to look at all the circumstances of the case, in particular to see what was the intention with which the words were spoken …"

88. At para 4 of ***Tanner*** the EAT noted*" … Some care, it seems to us, is necessary in regard to later events … unless relied on as themselves constituting a dismissal, are only relevant to the extent that they throw light on the employer's intention; that is to say, we would stress, his intention at the time of the alleged dismissal … later events need to be scrutinised with some care in order to see whether they are genuinely explanatory of the acts alleged to constitute dismissal, or whether they reflect a change of mind. If they are in the former category they may be valuable as showing what was really intended".*

89. In ***BG Gale,*** the EAT consider an appeal against a decision that there had been a resignation where an employee made the statement, *'I am leaving, I want my cards',* in a fit of temper. The statement was treated by the employer as a resignation. The employee claimed he was unfairly dismissed and sought compensation. On the question whether or not the employee had resigned, it was held that where the statement made was ambiguous the test was whether a reasonable employer would have taken the statement as a resignation. Where the statement was clear and unequivocal, as in this case, the test was subjective. Since the employer believed the employee to have resigned, he had not been dismissed in law, as the respondent notes in Arnold J comments in para 4 of that case *"It is of course well known that the undisclosed intention of a person using language whether orally or in writing as to its intended meaning is not proper to be taken into account in concluding what its true meaning is. That has to be decided from the language used and from the circumstances in which it was used. The matter of this sort of interpretation is extensively dealt with in a decision of this Tribunal in Tanner..."*

90. In ***Doble*** the EAT considered an appeal by an employee against the dismissal of his claim. The claimant had been based at the respondent's Brentford plant and had resigned to take up secure employment against a background that he had been notified of the closure of the Brentford plant. The claimant who resigned before he was offered redundancy was not entitled to any payment as there was no actual date of dismissal notified to the claimant. The EAT's consideration in that case does not appear directly applicable to the present circumstances.

91. In ***Sothern*** the claimant was an office manager in a law firm which had recently moved to new premises after having played a substantial role in the move. The claimant's contract provided that she required to give 2 weeks' notice. The relationship between the claimant and the senior partner had deteriorated. The claimant had just returned from a holiday, 2 days after the expected return date. She required to attend a partnership meeting, held in the evening, acting as secretary to the meeting. The claimant's evidence was that she had said that if the partner's attitude remained the same, she would be forced to leave. The Tribunal concluded that she had something to say at the end and then said *"I am resigning".* The partners thanked her for her services. She returned to work the following day and took the view that she was staying on. She considered if the firm wanted her to leave, they would have to dismiss her. The Tribunal held that the words she used were ambiguous and that a reasonable employer would not have interpreted her words as a resignation. On appeal the EAT also held the words to be ambiguous and that she had, subsequently, been dismissed. The Court of Appeal however held that the words were not ambiguous. LJ Fox commented at para 19 that "*when words used by a person are unambiguous words of resignation and so understood by her employer, the question of what a reasonable person might have understood does not arise. The natural meaning of words and the fact that the employers understood them to mean that the employee was resigning cannot be overridden by appeals to what a reasonable employer might have assumed. The non-disclosed intention of a person using language as his intended meaning is not properly to be taken into account in determining what the meaning is*" and at para 21 that *"this is*

not the case of an immature employee, or of a decision taken in the heat of the moment, or of an employee being jostled into a decision by the employers".

92. In ***Barclay*** the EAT required to consider an appeal against a majority decision of Tribunal concerning an individual with learning difficulties using a phrase that he "*wanted to get his books"* as entitling the employer to consider that the employee had resigned. At para 12 the EAT commented that "*It is true that is unequivocal words of resignation are used by an employee in the normal case the employer is entitled immediately to accept the resignation and act accordingly. This has been authoritatively decided by the Court of Appeal in Sothern… It is clear however from observations made in that case that there may be exceptions. … There is therefore a duty on employers, in our view, in an appropriate case to take into account the special circumstances*".

93. In ***J&J Stern*** the claimant was employed as manager of a button manufacture business operated by a mother and son. The EAT identified there had been a heated discussion between the claimant who had returned from a holiday and the son which was overheard by the mother, who was seriously ill and became irate and shouted at the claimant "*Go, get out get out*". The claimant left and when he tried to return that evening the premises were locked, although the respondents had indicated that they had been intending to change the locks for some time.

94. The industrial tribunal in ***J&J Stern*** had held that the claimant had been dismissed. The EAT however confirmed that the appropriate approach was to decide whether or not there had been a dismissal, the proper approach is to construe the words in the facts of the case. The EAT indicated that only where was ambiguity after looking at the words in their context that a further test of whether any reasonable employer or employee might have understood the words to be tantamount to dismissal to dismissal or resignation. The EAT allowed the appeal and referred the case to a different Tribunal to make findings in fact on all the relevant surrounding circumstances preceding and succeeding the words by the employer and to all the circumstances as to meaning of the words "*Go, get out get out*". The EAT at para 12 and 13 notes

that *"It might be that the Tribunal were accepting that the locks were changed but they make no findings of fact, on which there was an issue, as to why the locks were changed. They do not refer to the part of the case when the"* former employee *"wrote asking for his reasons for dismissal".*

95. In ***Martin*** the EAT dismissed an appeal against a decision by a Tribunal that there had been no dismissal in law where it had found that the words were used in the heat of the moment despite the words having been unambiguous and withdrawn almost immediately after. The EAT in this case noted that the employee, a transport manager had become disillusioned with the working arrangements commenting that the claimant had been provided with a "*Mini van instead of a rather handsome saloon car such as a Volvo".* One of the directors had become concerned that the claimant was the cause of a company vehicle breaking down in Germany which had resulted in an exchange of words with the claimant refusing an instruction to get the correct part to repair the car. The director "*forthwith gave him the sack. Within a matter of five minutes*" the director realised he had said things in a fit of temper "*which he was not authorised to do and which were in breach of the agreed procedures*" and told the claimant that he was suspended for 2 days without pay for refusing to obey a lawful order in order to allow time for a rationale decision to be made and the claimant was specifically instructed to report to work as unusual thereafter.

96. In ***Graham Group*** the EAT required to consider an appeal against a decision that a claim had been presented in time, the Tribunal had held that the effective date of employment was 2 May 1996. The claimant had been advised that he had been selected for redundancy but there would be a further 2 meetings over the next 2 weeks when his position would be considered. The claimant was sent home due to ill health and after discussions received a letter stating that the post was to be made redundant, the claimant's last date of employment would be 29 February 1996 and he would be paid 9 weeks' notice which would be paid in lieu. The EAT commented that "*it is clear there was ambiguity about the letter when combined with the oral conversation. Such ambiguity should be construed against those seeking to rely upon it"*

and considered that the Tribunal had asked the correct question "*How would any reasonable employee in the"* claimant's *"position have interpreted the terms of his dismissal when the terms were regarded as a whole, looking to the spoken words of the dismissal and the confirmatory language."*

97. In ***Mitie*** the claimant, a security guard, was removed from a work site, following a third-party request. He was provided with a letter to the effect that if no alternative position was found for him within 4 week the company could have no alternative other than to issues him with notice and terminate his employment. The Tribunal's findings including that that there had been a dismissal were overturned on appeal. The precise language of the letter was the subject of comment by the EAT and at para 16 the Eat comments that there was no ascertainable date of termination, the 4-week period merely triggered the possibility of dismissal.

98. In ***Société Générale*** the Supreme Court considered a common law claim for damages for breach of contract where the entitlement to a termination payment would be higher if the claimant's employment terminated after 31 December 2007, as the claimant argued. Two of those four issues were described by Lord Hope, as par 14 as "*of general public importance*" with the majority finding that:

a) a repudiatory breach of an employment contract does not operate to terminate the contract automatically, and while accepting that in practice normally the employee has little option but to accept because he or she cannot continue working without the cooperation of the employer, the innocent party is required to accept the repudiation to effect termination; and

b) as expressed by Lady Hale at para 58 against the factual matrix of the case an employee should "*not only receives his payment in lieu of notice, but that he receive notification from the employee, in clear and unambiguous terms, that such a payment has been made and that it is made in the exercise of a contractual right to terminate the employment with immediate effect. He should not be required to check his bank account regularly in order to discover whether his is still employed".*

99. In ***East Kent*** J Eady in the EAT upheld a decision of an employment tribunal that the employer had dismissed a worker. The claimant had handed her manager, in the records department of the hospital she worked in, what was an ambiguous notice after receiving a conditional job offer in the radiology department with the same employer. On the facts of the case, she been giving notice of her intention to leave the department itself, rather than her employer, generally. The employer's refusal to retract the notice, once her offer had been withdrawn was a decision that her employment must come to an end, and amounted to a dismissal.

100. Having reviewed the cases referred to, I would observe that where cases have a different factual matrix it is understandable that the focus of a decision appears different. However, I consider that in summary, the correct approach is to consider how the spoken language used and actions taken together would be understood by a reasonable person, not in the abstract, but rather in the full context of the events surrounding those words and actions, and in the present case that includes actions before, and after spoken words were used. Those events include Mr Donnelly's anger and upset at seeing the terms of the written grievances and his decision to pull the roller gate shut.

Discussion and Decision

Was there a dismissal by the respondent or resignation by the claimants?

101. The respondents in their ET3 at para 23 contend that any compensation awarded should be reduced to reflect what the respondent had pled as the claimants' unreasonable failure to follow the ACAS code of Practice on Disciplinary and Grievance Procedures and the claimants contributory conduct. The respondent pled in their ET3 that the claimants submitted a grievance but resigned before the respondent had a reasonable time in which to respond.

102. Mr Donnelly was upset at terms of the written grievances including the characterisation of his mother who is a fellow director in a grievance as being a bully. That may be so, however, the written grievances were in accordance with the ACAS Code, there was no other person beyond Mr and Mrs Donnelly

with managerial responsibility to whom the written grievances could be appropriately submitted to. The respondent ought to have acted in a considered fashion, as set out in the ACAS Code and arrange for a formal meeting without delay. No such meeting was arranged.

103. The majority of cases the respondent has referred to predate the ACAS Code. Mr Donnelly's actions here were in response to receipt of a written grievance from employees who were acting reasonably in following the ACAS Code.

104. Even before the operation of the ACAS Code the correct approach would be been to consider what a reasonable person in the position of Mr Priestley and Mr Chalmers, in all the circumstances would have understood from the words and actions of the Mr Donnelly in the whole context of what happened. This context included the response to the submission of written grievances; Mr Donnelly's anger and upset at seeing the written grievances, his statement that there would be no more early finishes and his use of the phrase "*off your shifts*" referencing the allocation of the MyBus shifts with the various benefits including, the ability of the claimants to end their shifts after the last MyBus customer, the flexibility of the routes, the relationships with passengers and not least the prospect of loss of tips from those customers. No other work was offered and in the absence of any other work the claimants walked through the bus yard roller gate. They did so in the context that they each had already sought to resolve matters with a written grievance and Mr Donnelly's response in being angry and upset was, it is considered, both unreasonable and in any event not in accordance with the ACAS code. Shortly after Mr Priestley and Mr Chalmers had submitted the written grievances and Mr Donnelly had responded with upset and anger including stating that they were off their shifts, Mr Donnelly took the step to close the roller gate behind both Mr Priestley and Mr Chalmers reinforcing their belief that they had been dismissed.

105. Unlike ***Martin*** there was no attempt at retraction, in this case, by Mr Donnelly or indeed Mrs Donnelly. While, in isolation, the reference to the indication of there being no more early finishes and "***shifts"*** could refer to shifts only to be carried out that day, the respondent did not instruct that any other work was

to be carried out that or any other day. The respondent did not suggest that the removal from the Mybus shifts was in any way temporary. The respondent made no effort to contact the claimants in that week. Mr Donnelly could have done so, if his statement was made in the heat of the moment. Mr Donnelly took no action to assert what he subsequently suggests to be the correct analysis, namely that the claimants had resigned, until he sent the identical format letters to Mr Priestley and Mr Chalmers on Tuesday 21 August 2019, after he had received the SPT complaint.

106. Noting the comments of the EAT in ***Sothern,*** it is considered that the actions of Priestly and Chalmers, in walking out of the bus yard were *"taken in the heat of the moment"* having been in effect *"being jostled into a decision by the employers".* Similarly, the immediately preceding words of Mr Priestley to the effect that *"this was getting us nowhere"* are considered to be reasonable, in the circumstances, as an expression of exasperation reflecting Mr Donnelly's angry response to sight of the written grievances.

107. In the present case, there were no unequivocal words of resignation by the claimants. Rather, it was Mr Donnelly who used phrasing which a reasonable employee could understand to mean that they were being dismissed in that their long-standing work arrangements had come to an end.

108. Mr Donnelly deployed the language sequentially after he had read the written grievances. While both may have been considered challenging, in respect that Mr Priestley set out why he felt bullied and harassed and Mr Chalmers described feeling bullied with specific complaints directed at Mr Donnelly and his mother, neither were of an order which a reasonable employer ought to have regarded as grossly and in an unwarranted manner offensive. In those circumstances it is considered that the EAT guidance in ***Barclay*** is useful here and there was a duty on the respondent to take into account the special circumstances including the receipt of the written grievances. In the circumstances it is considered that a reasonable employer would not to have failed to take action and would have proactively contacted the claimants shortly after closing the roller gate to reassure that they would be entitled to

return to work at least by the following Tuesday and indeed that a scheduled meeting would be appointed to consider each the written grievance.

109. Taking the approach in ***Chesham Shipping***, absent the context, including the grievance, the words spoken by Mr Donnelly could have been considered to have been used for particular reasons which, again in a different context, everybody quite understood were little more than abuse or something of that sort. However, the words were used in the context of Mr Donnelly having received a written grievance. After he used the phrase "*you are off your shift"* it is considered that a reasonable employee, or indeed any reasonable person, who heard those words in the whole context would have understood there had been a dismissal by the closing of the roller gate to the bus yard and Mr Donnelly making no subsequent contact with the claimants for the rest of that week and indeed until the letter of Tuesday 21 August 2018.

110. The respondent seeks to rely upon Mr Donnelly their letter of Tuesday 21 August 2018, the caution expressed in ***Tanner*** above is applicable. However, the letter of Tuesday 21 August 2018 is of no assistance as to the respondent's belief and understanding on Monday 13 August. It is considered there is ambiguity as to the language deployed in Mr Donnelly's letter dated Tuesday 21 August. In that letter issued the following week and after receipt of the SPT complaint, Mr Donnelly described that the claimant's *"dismissal"* took place on Monday 13 August 2018. Taking the approach in ***Graham Group*** it is considered that, while much of the letter was couched in language framed by Mr Donnelly to suggest he believed there had been resignation, where there is ambiguity in the language chosen by Mr Donnelly can be relied upon by the claimants.

111. Mr and Mrs Donnelly did not form a view on Monday 13 August that there had been a resignation. Mr Donnelly had received the SPT complaint letter of 14 August 2018 prior to his letter of 21 August 2018. Mr Donnelly was clear in his evidence that he did not form a view that the claimants had resigned at the material time and while he issued the letter of 21 August that letter itself contained ambiguities and is considered to be simply a device to place what the respondents ultimately concluded was a useful characterisation on the

events of Monday 13 August. Mr Donnelly made no reference to the SPT complaint of 14 August in either of his letters of 21 August 2018, despite the SPT complaint being specific to Mr Chalmers actions on 7 August 2018.

112. The departure of Mr Priestley and Mr Chalmers from the bus yard was precipitated by Mr Donnelly's angry response to what a reasonable employer would have accepted as written grievances within the meaning of the ACAS Code. It was Mr Donnelly who chose to respond to sight of the written grievances seeing them as a form of conspiracy by Mr Priestley and Mr Chalmers against himself, his mother and JD Coaches. He considered that that the written grievances were in identical terms. They were not. Had he read them in a considered fashion it would have been apparent to him that they were not identical. Mr Donnelly considered that the written grievances were a form of conspiracy. This was not a reasoned response. The written grievances were similar as Mr Priestley and Mr Chalmers were reflecting their common experience on Saturday 10 August 2018 when they had sought to raise their complaints on the new arrangements with initially Mr Donnelly and subsequently both Mr Donnelly and Mrs Donnelly.

113. It has been suggested, by the respondent, that while the written grievance letters were written contemporaneously between the events of Saturday 10 August and the return to work on Monday 13 August, they should not be given any real evidential value as to the events of Saturday 10 August. In contrast, the respondent has provided no contemporaneous record of what was clearly a heated discussion. The respondent argues, while inviting the Tribunal to disregard the written grievance letters written contemporaneously and provided the next working day, that the Tribunal should accept as accurate the respondent's letters, the only written communication the respondent has provided, written more than 7 days after the events of Monday 13 August. It is considered, however, that Mr Donnelly's letters of 21 August 2018 were constructed to appear to set out an argument which the respondent considered to be helpful to its position. Mr Donnelly's letters of 21 August 2018 did not reflect the genuine belief of Mr or Mrs Donnelly on Monday 13 August 2018 or indeed at any material subsequent point. Neither Mr Donnelly nor

Mrs Donnelly genuinely formed a personal belief that the claimants had resigned.

114. The claimants did not refuse to carry out a reasonable management instruction on Monday 13 August 2018. Mr Donnelly's initial instruction that both claimants would require to work that day under the new arrangements meaning they would have to work to either 6pm or 6.30 pm and was made against the background of having read the Written Priestley Grievance and the Written Chalmers Grievance. Mr Donnelly instructed both claimants that they were off their shifts. No subsequent instruction was given. Mr Donnelly made no offer to have a meeting to consider same in accordance with the ACAS Code. His response was in effect that he was disregarding both written grievances offering no assurance that the concerns raised including around the new arrangements would be considered.

115. Mr Priestly and Mr Chalmers' evidence however that they simply walked out of the bus yard to have an e-cigarette break is not accepted. Mr Priestly and Mr Chalmers' evidence that they waited for some 20 minutes until they got into their respective cars is not accepted.

116. Mr Donnelly spoke the words that they were both *"off your shifts"* directed at Mr Priestley and Mr Chalmers in response to seeing the terms of the written grievance and the heated discussion which resulted from Mr Donnelly's anger and upset at seeing the written grievances setting out the claimants' concerns. While in a different context the words spoken by Mr Donnelly could be taken, on their own, to be at least ambiguous in their meaning, Mr Donnelly amplified the meaning by closing over the bus yard roller gate. Although it is considered that Mr Priestly and Mr Chalmers were unwise to provide Mr Donnelly the opportunity to close the roller gate by walking out of the bus yard equally in the heat of the moment is, on balance, considered to be an acceptable action given Mr Donnelly's response to sight of what were reasonably carefully worded grievances taken together with their being no other instruction of specific work.

117. The respondent did not afford any appeal. It did not so where, at the very least there would have been some ambiguity, in the mind of a reasonable employer, as whether there was a resignation. Neither Mr Donnelly nor Mrs. Donnelly had genuinely formed a belief that there had been a resignation.

118. No reasonable employer would have concluded that there was a resignation. Neither Mr Donnelly nor Mrs. Donnelly formed a genuine belief that there had been a resignation by either Mr Priestly or Mr Chalmers.

119. In the whole circumstances both claimants were dismissed by the respondent and both those dismissals were unfair.

Review of Evidence

Discussion

120. While relevant aspects of evidence have been addressed above it is considered appropriate to make some limited further comment. The weight of evidence including that of the Written Grievances taken together with the evidence of Mr Daziel, and Mr Devlin did not support the evidence of Mr and Mrs Donnelly regarding the events on Saturday 13 August and Monday 15 August 2018. Certain aspects of the evidence of Mr Priestley and Mr Chalmers is not accepted, specifically the suggestion that they waited outside the roller gate for a period smoking such evidence is considered to reflect confused recollections and while there appeared to be contradictions between evidence of Mr and Mrs Donnelly and that of the claimants in relation to the events of Saturday 13 August and Monday 15 August 2018 such inconsistencies in recollection are considered to reflect the heated nature of the events. Evidence to the effect that Mr Donnelly knew, prior to the receipt of the SPT complaint on 14 August, of Mr Chalmers actions on 7 August which led to that SPT complaint is mistaken and inconsistent with the detailed written grievances which made no reference to Mr Donnelly having approved any such action. Mr Donnelly, however was aware of those actions and its impact on the respondents, by the time he wrote the letter of 21 August 2018.

Relevant Law

Were the claimants working under protest?

121. I have reminded myself of the approach outlined by the Court of Appeal in ***Abrahall v Nottingham City Council*** [2018] IRLR 628

> *"Firstly, acceptance cannot be inferred unless such an inference arises unequivocally from the employee's conduct. In other words, employees must be given the benefit of the doubt.*
> *Secondly, protest at collective level may be sufficient to negative any inference that, by continuing to work, individual employees are accepting a reduction in their pay even if they themselves say nothing – especially if collective bargaining is the norm in the workplace.*
> *Thirdly, it might not be right to infer acceptance of a pay cut from the first day it is implemented, as the employee may be taking his or her time to consider the position. Nonetheless, a point may come where this ceases to be a reasonable explanation, so that acceptance may occur 'after a period of time', albeit determining when that point had been reached can be a difficult and somewhat arbitrary decision."*

Discussion and Decision

Were the Claimants working under protest?

122. While the respondents did not seek to argue that the claimants had accepted the new arrangements the Written Chalmers Grievance describes that he had been working under protest. In the circumstances and given the temporal proximately of both written grievance letters to the introduction of the new arrangements I am satisfied that both claimants were at the material time working under protest and had not accepted the new arrangements. The point had not come at which it could be said there was acceptance by the claimants of the new arrangements.

Relevant law

Is the substance of the complaints within the Written Grievances relevant?

123. Both claimants have sufficient qualifying service and thus s104 of ERA 1996 does not require to be engaged. I note that Mr Chalmers made explicit reference to in effect working under protest and I have reminded myself of the EAT's guidance in ***Mennell v Newell and Wright (Transport Contractors Ltd)*** [1997] IRLR 51 and the comments of Mummery LJ in his Judgment at para 21 of

"*(4) ...It is enough that the employee alleges in good faith that his employer has infringed a relevant statutory right. There is no requirement that the employer has actually infringed the statutory right….*
(5). Thus, in this case, if the facts be that the employer sought by threat of dismissal to impose a variation of the contract of employment to incorporate a term which negated the employee's statutory right not to suffer a reduction of wages without his freely given consent, that is, or might be, an infringement of his statutory right at the time when the threat is made… ."

124. If the employee can show that his or her complaint, even if incorrect, was the or the principal reason for dismissal and related to a relevant statutory right then an employee without the appropriate qualifying service can rely upon s 104 of ERA 1996 even if the employee's allegation is actually incorrect. In summary the allegation within the grievance does not require to be correct.

125. Both grievances read fairly raise matters of substance. It is is considered that both the Written Priestley Grievance and the Written Chalmers Grievance set out the respective claimants' genuine substantive concerns and were made in good faith.

Discussion and Decision

Reduction for Subsequent Gross Misconduct.

126. On the issue of gross misconduct, raised by the respondent in the context of the actions of Mr Chalmers on 7 August, it is considered that no reasonable

employer would have dismissed having afforded an opportunity to Mr Chalmers to respond, once the matter was known to the employer. Mr Donnelly had received the SPT letter of 14 August by the date of issue of the respondent's letter of 21 August 2018. While it is accepted that the actions of Mr Chalmers on 7 August 2018 were not known to Mr Donnelly on that date, Mr Donnelly made no mention of the SPT letter or its content including the imposition of 5 warning points in his letter of 21 August 2018. Had Mr Donnelly genuinely considered that the actions of Mr Chalmers on Tuesday 7 August amounted to gross misconduct he would have set that out in his letter of 21 August 2018.

127. The respondent, in their ET3, suggests that Mr Priestly would have also have been subject to gross misconduct dismissal in respect of the subject matter of the SPT complaint. It is understood that this position was not maintained, there being no evidential basis before the Tribunal that Mr Priestley was involved in the events of Tuesday 7 August 2018 which led to the SPT complaint.

128. In any event respondent had not issued any written guidance to Mr Chalmers as to what action would have amounted to Gross Misconduct. The respondent had not provided any guidance as to the nature of the arrangement between the respondent and SPT for the lease of the Mybus. While the respondent was critical of the actions of Mr Chalmers and that his actions amounted to gross misconduct against their failure to set out what was expected of Mr Chalmers they offered no criticism in their letter of 21 August 2018. In the circumstances it is considered that there was no reasonable prospect that that Mr Chalmers action would have resulted in a sanction of dismissal for misconduct or indeed a sanction of gross misconduct without notice. Mr Chalmers' conduct and the SPT sanction against JD Coaches was already known to Mr Donnelly when he issued the letter of 21 August 2018 to Mr Chalmers but makes no reference to those actions in any way considered by them to be reprehensible amounting to any form of misconduct.

Relevant Law

Reduction of the Basic Award

129. Section 122(2) ERA 1996 provides in relation to the issue of any Basic Award that

(1) *Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*."

Discussion and Decision

Reduction of the Basic Award

130. In the context of s122(2) ERA 1996 I do not consider that either of the claimant's conduct was such as to make it just and equitable to reduce any basic award. While there had been heated discussions on Saturday 11 August, the claimants had without the assistance of a Staff Handbook or other equivalent guidance from the employer, reduced their concerns to writing and had presented the grievances thereafter at the start of Monday 13 August 2018 their next working day. While there was a heated discussion on Monday 13 August 2018 that took place after receipt by the respondents of the Written Priestly Grievance and the Written Chalmers Grievance and was in consequence of the respondent's reading of the grievances and their actions.

Relevant Law

Reduction of the Compensatory Award?

131. Section 123(6) ERA 1996 provides in relation to the issue of Compensatory Awards that *"(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

132. In relation referred to by the Respondent to the Court of Appeal decision in ***Nelson***. In ***Nelson*** LJ Brandon stated that *"an award of compensation to a successful complainant can only be reduced on the ground that he contributed to his dismissal by his own conduct if the conduct on his part relied on for this purpose was culpable or blameworthy".*

133. In addition, the respondent referred to ***Sandwell,*** in which the EAT on the question of contributory fault commented -

"*[69] Under s 123(6) of the Employment Rights Act 1996 ... it is the employee's conduct that falls for consideration, not that of the employer"*

134. The respondent also referred to ***CK Heating.*** In that case the claimant had been instructed to sweep a yard, a task which he regarded as demeaning but was not a task which otherwise fell out with any agreed terms of employment. He refused to do the task. He further refused to attend a meeting with the directors. An exchange followed which the respondent treated as a resignation. The Tribunal concluded that the employer was wrong to do so and had misunderstood what the claimant had said and accordingly he had been unfairly dismissed. In ***CK Heating*** the EAT stated at para 9: ***"…*** *we consider that this appeal is well founded. We would refer to the provisions of s 122(2) and s 123(6) of the Employment Rights Act 1996. Those are the two subsections that provide for reduction of awards of compensation and of the basic award on account of a Claimant's conduct. There is nothing in either of them which entitles an Employment Tribunal to look beyond the Claimant's conduct when considering whether or not it is just and equitable to reduce those awards (see: Parker Foundry Ltd). That, however, is precisely what the tribunal have done. The focus of their considerations was the position of the employer and the tribunal's own analysis of how and why the employer was at fault in asking the Claimant to sweep the yard at all. Instead of having regard to the relevant statutory provisions, they have taken account only of their own analysis of where, as a matter of contract, parties' rights and duties lay by 26 November 2008. As a consequence they have had no regard to the nature and quality of the Claimant's own conduct, which was, we accept, that he refused to do what he was being told to do by his employer at a time when*

he knew nothing other than that they had the right to instruct him at work. He was not asserting that they no longer had any right to issue him with instructions. He was, on the picture presented by the findings in fact, simply being stubborn and difficult. Further, the stance adopted by him in persisting in that refusal, despite, on the tribunal's findings in fact, being told that he would be given other work in the afternoon, plainly led to his dismissal."

135. In ***Robert Whiting Designs,*** also referred to by the respondent in support of its position, the claimant had been promoted and admitted that he had improperly arranged for bonus payment to be made to him. He was summarily dismissed. The Tribunal held that the real reason for his dismissal was not dishonesty but rather his incompetence and deducted 10% from the compensation as he had contributed to his own dismissal. The EAT on appeal upheld the finding that the dismissal was unfair. The EAT on the factual matrix of that case concluded that the dismissal, towards which the employee was alleged to have contributed, permitted a broad consideration of the real reason and the alleged reason for dismissal. Thus, the employee's conduct should be considered not only with reference to incompetence, but also with reference to misconduct, as factors contributing to the dismissal. The EAT commented that the employees conduct *"was extremely reprehensible. The employee's conduct certainly contributed to his dismissal in the sense that it was a factor in the minds of the employers. Put another way, the real reason for dismissal was not exclusive of all other matters and a bogus reason does not necessarily shut out the employer completely if there was material to support the reason relied upon"*.

Discussion and Decision

Reduction of the Compensatory Award?

136. In the circumstances of this case I do not consider either claimant's conduct was culpable otherwise blameworthy. They had submitted a grievance. While they walked off the bus yard, I do not consider that the claimants were culpable or otherwise blameworthy in doing so. They had no work to do and understood they had been dismissed. Against the background that the

claimants had earlier that day sought to resolve matters by providing written grievances, I do not consider that it was culpable or otherwise blameworthy for the claimants in the present factual matrix; who had no work to do; and had earlier that day sought to resolve matters with a written grievance which had precipitated the employers' language giving rise to their understanding that they had been dismissed, to leave the workplace.

137. The factual matrix in this case is not on all fours with the position in ***CK Heating***. Mr Priestley and Mr Chalmers had already tried to resolve matters by a grievance and this had failed. They believed, reasonably that they had been dismissed. To expect an employee to stay where they have no work to carry out, where in the course of the same day, they had presented a grievance which, in effect, had the consequence of their understanding that they had been being dismissed, would place an unreasonable construction on the concept of culpable or blameworthy conduct.

What, if any, was the extent of the claimants' losses?

Relevant Law

Mitigation of Loss

138. Section 123(4) ERA 1996 provides that in ascertaining the loss *"… the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland."*

139. I have reminded myself that in ***Cooper Constructing Ltd v Lindsey*** [2016] ICR D3 (***Cooper***) the Honourable Mr Justice Langstaff (President) reviewed the existing authorities on the burden of proof in respect of mitigation of loss and the extent of the duty and set out 9 broad principles:

> (1) The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.
> (2) It is not some broad assessment on which the burden of proof is neutral. ... If evidence as to mitigation is not put before the Employment

Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.

(3) What has to be proved is that the Claimant acted unreasonably; he does not have to show that what he did was reasonable.

(4) There is a difference between acting reasonably and not acting unreasonably.

(5) What is reasonable or unreasonable is a matter of fact.

(6) It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts.

(7) The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer.

(8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.

Discussion

Mitigation of Loss

140. The respondent argued that while Mr Chalmers had a continued wage loss of approximately £100 per week this should be disregarded as he was working, in effect reduced working hours which suited his family arrangements which was in effect a life style choice. However, it is the tribunal’s view that this reinforces the significance of his concerns regarding the respondents attempt to extend his practical working hours. There was no contrary evidence from the respondent of alternate employment which might have been available to Mr Chalmers without such ongoing loss. The Tribunal has had regard to the clear evidence of Mr Chalmers setting out the steps he took to minimise his losses and is satisfied that Mr Chalmers acted reasonably and took appropriate steps to mitigate the loss.

141. While respondent argues that the Tribunal ought to take into account an argument to the effect that was a reduced likelihood of either claimants having

remained in employment with the respondents against the new arrangements, the Tribunal does not consider that that this is the correct application of the approach as set out in ***Cooper***. Mr Priestley had set out at the conclusion of Written Priestley Grievance that he hoped by setting out the "*grievances … they will be acknowledged and we can work together to resolve these issues and work towards a positive and effective workplace*". Mr Chalmers set out in the conclusion of the Written Chalmers Grievance that he hoped *"by outlining my grievances in a formal way they are acknowledged and can be resolved professionally*". Both claimants had sought to address their concerns in an appropriate manner, had the respondent applied the ACAS Code it is considered that it would have been possible for matters to have been resolved. In such circumstances it is not considered that it would be appropriate approach matters on this basis as suggested by the respondent.

142. The Tribunal has had regard to the clear evidence of each claimant setting out the steps they have taken to minimise their respective losses and is satisfied that both Mr Priestly and Mr Chalmers have acted reasonably and taken appropriate steps to minimise their respective losses.

Discussion and Decision

Reduction under Polkey Principle.

143. The next issue is whether it is appropriate to make any deduction under the principle derived from ***Polkey v A E Dayton Services Ltd*** [1988] ICR 142, which requires an assessment of the possibility of their having been a fair dismissal had a fair procedure been adopted. That requires an assessment of whether in all the circumstances a fair dismissal could have been decided upon by a reasonable employer.

144. In all the circumstances a fair dismissal would not have been decided upon by a reasonable employer.

Relevant Law

Basic Award

145. Section 119 of ERA 1996 sets out the provision for a basic award.

Basic Award

Discussion and Decision

146. Mr Priestley the first claimant is entitled to a basic award equating to statutory redundancy payment of **£960**; being 2 full years' service x £480 x 1 having regard to the claimants age x £450 having regard to the relevant statutory cap for a week's wages.

147. Mr Chalmers the second claimant is entitled to a basic award equating to statutory redundancy payment of **£1,440**; being 2 full years' service x 1.5 having regard to the claimants age x £480 having regard to the relevant statutory cap for a week's wages.

Relevant Law

Compensatory Award

148. Section 123(1) of ERA 1996 provides" *... the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".*

Relevant Law

Adjustment of award resulting from failure to comply with Code of Practice

149. Section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that an unreasonable failure by the employer or employee to comply with a relevant Code of Practice may result in the adjustment of an employment tribunal award and s207(2)A provides

"*Effect of failure to comply with Code: adjustment of awards*

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

Discussion and Decision

Adjustment of award resulting from failure to comply with Code of Practice.

150. While the respondent had pled, at para 23 of the ET3 paper apart, that there should have been a reduction in respect of the actions of the claimants, it is considered that it was Mr Donnelly who acted unreasonably in his words and actions on Monday 13 August 2018. While Mr Donnelly was concerned that both he and his fellow director were being accused of bullying that does not excuse his actions. The ACAS guide is clear, Mr Donnelly ought to have operated in accordance with the ACS Code on Grievances. He did not do so.

151. In ***Allma*** the EAT provides guidance as to the appropriate approach which should be taken in considering any uplift.

152. In this regard, it is considered that the relevant code applies, the claimants had submitted written grievances. JD Coaches failed to comply with the code, no meeting was offered, Mr Donnelly reacted angrily to the written grievances culminating in dismissing the claimants by stating that they were off their shifts and closing the roller gate. Neither Mr Donnelly nor Mrs. Donnelly made any subsequent attempt to offer to resolve the grievance.

153. The failure was unreasonable, while Mr and Mrs. Donnelly had wished to secure agreement that Mr Priestley and Mr Chalmers would work beyond the previous effective end of the working shift, it was unreasonable for them to react in the manner they did in response to their receipt of the written grievances and what followed was in consequence of their response.

154. The Tribunal considers it just and equitable, in all the circumstances to increase each of the claimants' award. While JD Coaches is a small employer the ACAS code does not merely apply to large employers, a reasonable response by the respondent would have been to respond to the terms of the written grievances, including the final parts of same, expressing a desire to resolve the issue, as an attempt to resolve to matters to both sides' satisfaction.

155. An increase of 10% is just and equitable, while JD Coaches' failure culminated in the dismissal of both Mr Priestley and Mr Chalmers it is recognised that this is a small employer.

Relevant Law

Loss of Tips as Mybus driver

156. Although not referred to by either party I have reminded myself of the guidance in ***Palmanor Ltd v Credron*** 1978 ICR 1008 that tips received directly from a customer (or passenger) do not form part of an employee's remuneration as they are the property of the employee and not paid by the employer.

Discussion and Decision

Loss of Tips as Mybus driver

157. Appropriately neither claimant sought to argue that tips ought to be calculated as part of the loss of earnings although the tips had formed a distinguishing aspect of the MyBus role distinct from other bus driving role with JD Coaches. Tips received by the claimants in their capacity as MyBus drivers were not collected centrally and were not distributed by the JD Coaches via a pool of

other system and do not fall to be calculated as part of either claimant's loss of earnings.

Relevant Law

Provision of Terms and Conditions and Provision of Itemised Pay Statement.

158. In terms of s1 of ERA 1996 each employee is entitled to receive from his employer not later than two months after the beginning of the employee's employment, a written statement of the major terms upon which he is employed. The Employment Act 2002 (EA 2002) provides at s38 that where the matter is before the Tribunal, it is required to increase an award by at least 2 weeks' pay and the Tribunal may if it is just and equitable increase that award to 4 weeks' pay.

159. Section 8(1) of ERA 1996 provides that:

> *(1) [A worker] has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.*

160. There is however no provision for any award or uplift in respect of a failure to provide the required itemised pay statements at or before the time at which any payment of wages or salary is made. The role of the Tribunal would have been restricted, in terms of s11 of ERA 1996 to ascertaining what information ought to have been included. That issue does not arise here as, when requested, itemised pay statements were provided.

Discussion and Decision

Provision of Terms and Conditions and Provision of Itemised Pay Statement.

161. It was accepted by the respondents that they had not complied with their obligations to provide written terms and conditions. It was accepted by the respondents that they had not complied with their obligations under s11 of ERA 1996 to provide itemised pay statements at least through 2018. It is accepted that the respondents outsourced accountancy payroll company generated the pay statements. Against that background and while Mr

Donnelly suggested that he had wished to secure an agreement to move to monthly rather than weekly pay there was no such agreement. Had the respondents taken the time set out the claimant's respective terms and condition as they were required to do in terms of s1 of ERA 1996, it is conceivable that a process could have been set out to achieve such a change. The responsibility however rested with the respondent to provide the written pay statement without being requested to do so. There is, however, no provision for any compensation payment for such failure.

Discussion and Decision

Provision of terms and conditions

162. It is accepted that neither claimant was provided with a written statement of the terms of their employment. The present statutory basis for such written terms is provided in the ERA 1996 and it is not necessary to consider earlier statutory sources of such rights as such as the Contracts of Employment Act 1963. This statutory right is not recent and in its present form predated the start date of each the claimant's employment. Both claimants are entitled to 2 weeks' pay. In all the circumstances it is considered just and equitable to increase that to 4 weeks' pay in each case.

Relevant Law

Notice Pay

163. Section 86(1) of ERA 1996 provides that that notice must be not less than the statutory minimum and for employee's who have been continuously employed for two years or more (but less than 12 years) they are entitled to one week's notice for each year of continuous employment.

Discussion and Decision

Wrongful dismissal /Notice Pay

164. Mr Priestley is entitled to 2 weeks' notice pay being (£382.84 +employer pension contribution of £7.28) **£780.24**. Mr Chalmers is entitled to 2 weeks' notice pay being **£780.24.**

165. It is considered that there should be no uplift in respect of non payment of notice pay.

Recoupment of benefits

Relevant law

166. Again, and while I was not referred to authority, I have reminded myself that the Employment Protection (Recoupment of Jobseekers Allowance and Income Support Regulations 1996 (the Recoupment Regs 1996) have been considered by the EAT (Judge Pugsley presiding) in ***Homan v Al Bacon Ltd*** [1996] ICR 721 which stated "*In our view the prescribed element deals with the element in the award which is attributable to loss of wages and the only period to which it can apply was the period for which compensation was awarded".*

Compensatory Award

Discussion and Decision Mr Priestley

167. Mr Priestly, the first claimant, is entitled to a Compensatory Award.

168. Mr Priestley's net weekly earnings with JD Coaches were £382.84 per week. I accept Mr Priestley's evidence that he secured alternative employment as a bus driver having applied for 2 bus driving jobs after the termination of his employment and that he secured employment with National Express as a bus driver starting on 7 September 2018 with a net income of £365.00 per week. He received Universal Credit between of 14 August 2018 to 6 September 2018. As set out above he is entitled to 2 weeks' notice and thus would not have suffered loss in that 2 weeks. Applying Mr Priestley's net income figure to his pre termination net of £382.84 gives a weekly net wage loss of £17.84. To the last date of the Tribunal this gives a cumulative weekly loss of (31.6 weeks x £17.84 + 1.3 x £392.84) **£1,074.43.** There was no contrary evidence, such as alternate jobs which Mr Priestley could have applied for but did not which have reduced that loss. I accept that Mr Priestly had taken reasonable efforts to minimise his loss.

169. I consider however that it is just and equitable that no losses be awarded to Mr Priestley from 18 April 2019 being the final day of this Tribunal onwards.

170. Mr Priestley is entitled to the sum of **£250** sought for loss of his statutory rights.

171. Mr Priestley is entitled to pension loss for the period of loss. The respondents made the required 2% employer pension contribution and by reference to the 4th edition (August 2017) of the Principles for Compensating Pension Loss the pension loss arising from the unfair dismissal is (£450 x 0.02 x 6 weeks) **£54.00.**

172. Mr Priestley is entitled to a payment to reflect the failure of the respondent to issue statement of particulars of employment (£4 x £450) **£1,800.**

173. The total Compensatory Award in respect of Mr Priestley excluding any uplift is **£3,178.43.**

174. The ACAS Code sets out the standard of reasonableness and fairness for handling disciplinary issues and grievances. An employer who receives a grievance should act in accordance with the ACAS Code, s 207A TULR(C)A provides that a Tribunal may apply a percentage uplift up to a maximum of 25% to reflect an unreasonable failure to comply with the ACAS grievance procedures**.** In all the circumstances, it is considered just and equitable that an uplift to the compensatory award of 10% be awarded. Applying the 10% increase gives a Compensatory Award of **£3,496.26**

175. I am satisfied that Mr Priestley would have been entitled to receive Universal Credit from 14 August 2018 to 6 September 2018. Universal Credit is a recoupable benefit in terms of Reg 8 of the Recoupment Regs 1996. The Recoupment Regs 1996 apply to the period for which the claimant is awarded compensation. The prescribed period is **14 August to 18 April 2019.** The Prescribed amount is **£1,074.43.** The total compensation award for unfair dismissal (£960 plus £3,496.26) exceeds the prescribed element by **£3,381.83** and this sum is payable immediately.

Compensatory Award

Discussion and Decision Mr Chalmers

176. **Mr Chalmers** the second claimant is entitled to a Compensatory Award.

177. Mr Chalmers's net weekly earnings with JD Coaches were £382.84 per week. He was entitled to 2 weeks' notice and thus would not have suffered loss in that 2 weeks. I accept Mr Chalmers's evidence that he secured alternative employment as a bus driver having applied for at least 15 jobs with various employers including Royal Mail, Argent Energy, C-operative, Gist, Caledonian Proteins, Parcel Force, GI Group, MacNair's Bus and Coach, First bus, McGill's Busses, JMB Travel and having registered with agencies including Driver hire and Pertemps after the termination of his employment and that he secured employment working as a Warehouse Worker at DX Distribution Warehouse initially with Connect Appointments on an agency basis from 23 September 2018 to 20 December 2018 with net pay of £282.46 per week which increased from 21 December 2018 to date with net pay of £291.46 per week. Applying that figure to his pre termination net of £382.84 gives a loss of to the last date of the Tribunal hearing of (3.6 x £382.84 + 12.4 x £100.38 + 17 x £91.38) **£4,407.30.** There was no contrary evidence, such as alternate jobs which Mr Chalmers could have applied for but did not and which would have reduced that loss. I accept that Mr Priestly had taken reasonable efforts to minimise his loss.

178. I consider that it is just and equitable that Mr Chalmers is not awarded any losses beyond 18 April 2019 being the final day of the Tribunal hearing.

179. Mr Chalmers entitled to the sum of **£250** sought for loss of his statutory rights. Mr Chalmers is entitled to pension loss for the period of loss.

180. The respondents made the required 2% employer pension contribution and by reference to the 4th edition (August 2017) of the Principles for Compensating Pension Loss the pension loss arising from the unfair dismissal is (£450 x 0.02 x 4 weeks) **£36.00**

181. Mr Chalmers is entitled to a payment to reflect the failure of the respondent to issue statement of particulars of employment (£450 x 4) **£1,800.**

182. The total Compensatory Award in respect of Mr Chalmers excluding any uplift is **£6,493.30**

183. The ACAS Code sets out the standard of reasonableness and fairness for handling disciplinary issues and grievances. An employer who receives a grievance should act in accordance with the ACAS Code, TULR(C)A s207A provides that a Tribunal may apply a percentage uplift up to a maximum of 25% to reflect an unreasonable failure to comply with the ACAS grievance procedures. In all the circumstances it is considered just and equitable that an uplift to the compensatory award of 10% be awarded. Applying a 10% increase gives a Compensatory Award of **£7,142.63.**

184. I am satisfied that Mr Chalmers would have been entitled to receive Universal Credit from14 August 2018 to 22 September 2018. Universal Credit is a recoupable benefit in terms of Reg 8 of the Recoupment Regs 1996. The Recoupment Regs 1996 apply to the period for which the claimant is awarded compensation. The prescribed period is **14 August 2018** to **18 April 2019.** The Prescribed amount is **£4,407.30.** The total compensation award for unfair dismissal **(£1,440** plus **£7,142.63**) exceeds the prescribed element by **£4,175.33** and this sum is payable immediately.

Supplemental matters

185. If there are further submissions which either party considers it is necessary, in the interests of justice, to address supplemental to their respective existing submissions, they should set out their position in a request for reconsideration in accordance with Rule 71 of the 2013 Rules.

Conclusions

186. There was an unfair dismissal of the first claimant Mr Priestley by the respondent and he is awarded the sums set out above.

187. The respondent failed to pay notice pay to the first claimant Mr Priestley and he is awarded the sum in respect of notice pay set out above.

188. There was an unfair dismissal of the second claimant Mr Chalmers by the respondent and he is awarded the sums set out above.

189. The respondent failed to pay notice pay to the second claimant Mr Chalmers and he is awarded the sum in respect of notice pay set out above.

Employment Judge: Rory McPherson
Date of Judgment: 23 May 2019
Entered in register : 28 May 2019
and copied to parties