EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4123858/2018

Held in Edinburgh on 24, 25 & 26 September 2019

Employment Judge M Sangster
Tribunal Member S Gray
Tribunal Member W Muir

Mr L Anderson	**Claimant** **Represented by** **Ms C Cruickshank-Gray**
Fife Health Board	**Respondent** **Represented by** **Mr A Watson** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

- The claimant was unfairly dismissed. The respondent is ordered to pay to the claimant the sum of ten thousand two hundred and eight pounds and fifty six pence (£10,208.56) by way of compensation.

- The claim of discrimination arising from a disability is dismissed.

The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to this award. The prescribed element is £6,103.90 and relates to the period from 18 July 2018 to 26 September 2019. The monetary award exceeds the prescribed element by £4,104.66.

REASONS

Introduction

1. The claimant presented a complaint of unfair dismissal and discrimination arising from disability, in relation to his dismissal. The respondent admitted the claimant was dismissed, but stated that the reason for dismissal was gross misconduct, which is a potentially fair reason. The respondent maintained that they acted fairly and reasonably in treating misconduct as sufficient reason for dismissal and had acted within the band of reasonable responses.

2. It had been agreed that witness statements would be used at the hearing. These were exchanged in advance and taken as read by the Tribunal. The claimant gave evidence on his own behalf. The respondent led evidence from Janette Wheeler (**JW**), Deputy Support Services Manager, Margaret Lewis (**ML**), Facilities Officer, Jim Rotheram (**JR**), Head of Facilities, and Andy Fairgrieve (**AF**), Director of Estates. A joint set of productions was lodged.

Issues

3. An agreed list of issues was lodged with the Tribunal. At the outset of the hearing the respondent confirmed that it was accepted that the claimant was disabled for the purposes of section 5 of the Equality Act 2010 (**EqA**), as a result of anxiety and depression. The following issues accordingly required to be determined by the Tribunal.

Unfair Dismissal

4. Was the reason for the claimant's dismissal a potentially fair reason, within the meaning of s98(1) or (2) of the Employment Rights Act 1996 (**ERA**)?

5. Was the claimant's dismissal for that reason fair in all the circumstances, in terms of Section 98(4) of the ERA?

6. If the dismissal was unfair, what, if any, remedy should be awarded taking into account:

a. whether, if procedurally unfair, the claimant would have been dismissed in any event (***Polkey v AE Dayton Services Limited*** [1987] 3 All ER 974);

b. whether the respondent failed to comply with the Acas Code of Practice on Discipline and Grievance Procedures (the **Acas Code**);

c. whether the claimant had failed to mitigate his loss; and/or

d. whether, by his conduct, the claimant had contributed to his dismissal.

Discrimination arising from disability

7. Whether the claimant's dismissal was unfavourable treatment by the respondent.

8. Whether the dismissal was due to something arising from the claimant's disability – anxiety and depression. The 'something arising' being the claimant driving while under the influence of alcohol on 2 January 2018.

9. If so, whether the claimant was dismissed to achieve the aims of managing conduct issues, including managing workplace risks and enforcing the respondent's policies, and having a gardener who is able to fulfil the role (including being able to drive).

10. If so, a) whether those aims were legitimate; and b) whether dismissal was a proportionate means of achieving the aims.

Findings in fact

11. The Tribunal made the following findings in fact, relevant to the issues to be determined.

12. The claimant was employed by the respondent as a gardener. His employment commenced on 18 June 2001. His duties included ground maintenance at around 6 hospitals and 23 health centers. This included grass cutting, weedkilling, pruning, hedge cutting and maintenance of equipment and machinery, as well as gritting and snow clearing of car parks and footpaths in the winter months.

13. The claimant reported to the Head Gardener, Simon Nicol (**SN**). SN in turn reported to JW, who was at that time Support Services Manager, West Fife. JW's day to day contact was with SN, rather than with the gardeners directly. She accordingly had very little day to day contact with the claimant. Direct contact between the claimant and JW was restricted to group meetings and formal meetings, such as capability meetings.

14. From the commencement of his employment, the claimant worked six days per week, Monday to Saturday, 8am to 4.30pm, (with 8 hours on Saturday being classed as overtime). In addition, in the period from October to March annually, he participated in an on call rota with the other gardeners. The gardeners would be called out by SN if the temperature was 2 degrees or less, to grit paths and car parks, or if there was snow to be cleared. From 2009 onwards, due to a reduction in the number of gardeners to 3, the claimant was on call for two weeks out of every three in the winter period. During on call periods he was on call 24 hours a day, 7 days a week. In addition, when there was heavy/prolonged snow, the third gardener would also, generally, go out on call outs (even though they were not on call) as it took three people to operate the machinery.

15. Even when called out during the night, the claimant would usually still undertake his full shift the following day. On occasion however the gardeners would be permitted to leave early. There was no formal process of ensuring gardeners took formal rest breaks.

16. The claimant raised with SN and JW repeatedly that the gardeners were overworked and under resourced. JW did raise with her line manager, JR, the possibility of recruiting extra gardeners, but was informed that there was no budget to do so.

17. The claimant latterly received basic salary of £18,903. In addition, he received

    a. an overtime payment of £116 per week, for working every Saturday;

    b. a payment of £19.10 for each night spent on call; and

    c. £14.50 per hour working when called out during an on-call period.

18. In 2010 and 2012 the claimant was absent from work due to anxiety and depression for 3 and 4 months respectively. On each occasion he was referred to occupational health. Reports were provided to JW and she discussed these with the claimant. Both reports indicated that symptoms may reoccur in the future and made it clear that the claimant continued to take medication to manage his symptoms. The second report stated *'Mr Anderson has given me consent to mention that a perceived work related stressor relating to heightened workload may in part relate to his current period of absence. I would recommend you speak with him regarding this managerial matter.'*

19. Over the course of the next 7 years, the claimant had a number of short term absences, but no further absences for anxiety or depression. He continued to take medication for his condition however. Management were aware of this and the fact that, on occasions when his medication was changed/altered, he could struggle with that.

20. On 2 January 2018 the claimant was arrested for driving while under the influence of alcohol. He had been on call that night, but was not called out. He pled guilty to driving while under the influence of alcohol the following day and sentencing was deferred. The sentence thereafter imposed included the revocation of the claimant's driving licence for a two year period.

21. The claimant telephoned SN on 3 January 2018, to inform him of his conviction. SN then contacted ML, as JW was on holiday. ML took advice from the respondent's HR department and it was decided that she should be appointed to conduct an investigation under the respondent's Employment Conduct Policy. The claimant was informed of this by letter dated 4 January 2018 and he was invited to an investigatory meeting on 16 January 2018 with ML and Carrie McKnight (**CM**), HR Advisor. He was also informed that his duties would be restricted pending the outcome of the investigation.

22. ML had no experience of conducting disciplinary investigations and had received no training in relation to how to do so.

23. ML and CM met with the claimant on 16 January 2018. He was accompanied at that meeting by his trade union representative. Notes were taken of the meeting. At the meeting, the claimant confirmed that he had been arrested on 2 January 2018 and pled guilty to a drink driving charge the following day. He confirmed he was on call on 2 January 2018, but was aware he would not be called out, as the weather wasn't bad. The notes record that the claimant stated that he felt the following factors contributed to his actions:

    a. He had had a fall out with his girlfriend that evening, which was unusual;

    b. His workload - he was working too much and never had any down time. He was on call 24 hours per day, 7 days per week and even if called out, he would work the next day. He stated had raised these concerns with management; and

    c. His medical condition of anxiety and depression.

24. It appeared to ML during the investigatory meeting that the claimant was very unwell. At the conclusion of the investigatory meeting, ML advised the claimant to go home and visit his GP. He did so and was signed of work with anxiety and depression thereafter.

25. ML and CM held meetings, as part of the investigation, with JW, SN, Bruce Anderson from HR and a number of individuals in the Estates team. No notes of these meetings, confirming when the meetings took place and what was discussed, were prepared.

26. On 23 January 2018, JW completed a Management Referral Form, referring the claimant for an occupational health assessment. It noted that the claimant had been charged with drink driving and a disciplinary hearing had been arranged. It indicated that the claimant had a history of depression and asked the following specific questions:

    a. 'Is Lorne receiving appropriate support, medication and treatment for his condition?

b. *Is he fit to attend the disciplinary hearing in February? If not, when will he be or what additional supports and measures can we consider to enable him to attend?*

c. *Is Lorne likely to be fit to return to work prior to the disciplinary hearing in February? If so, what supports should we consider during this time?*

d. *Have work pressures contributed to Lorne's ill health, judgement and decision making process in particular around December 2017 (the period being investigated)?'*

27. By letter dated 2 February 2018 from JR, the claimant was invited to a disciplinary hearing on 20 February 2018 *'to consider the allegations of a drink driving charge'*. He was informed that ML and CM would present a report of the investigation, a copy of which would be sent to him in advance of the hearing.

28. ML and CM prepared an investigation report. The 'Date of Report Submission' was stated to be 5 February 2018. The report provided background of the claimant's employment and set out details of the claimant's working hours (45.5 hours per week plus on call time). It narrated the events of 2 January 2018 and the fact that the claimant was on call at the time. The report referred to the investigatory meeting with the claimant (the notes of which were attached as an appendix to the report). The report referenced the investigatory officers making contact with JW and Bruce Anderson, but included no detail of when those discussions took place or what was discussed. No reference was made to ML and CM interviewing SN and members of the Estates team as part of their investigation. The report confirmed ML's conclusion that the claimant's conduct amounted to gross misconduct.

29. The report also confirmed the mitigating factors raised by the claimant as being the domestic dispute, workplace stress and his ill health. In relation to ill health, the report stated *'Lorne disclosed that he suffers from anxiety and depression and is currently on mediation. Management were aware of this but Lorne had not raised any concerns with management specifically around*

his mental health. Investigating officers are aware that a staff wellbeing and safety management referral has since been submitted.'

30. Within the body of the investigation report, it was stated *'Following the investigatory hearing, it was confirmed the case will proceed to a disciplinary hearing and will be presented as gross miss conduct case to a dismissing officer who will decide on the disciplinary sanction up to and including dismissal. The investigating officers also confirmed that secondary data would be obtained to clarify the points raised by Lorne by way of mitigation.'* The report then stated that *'The investigating officer obtained secondary data to support Lorne's assertions that work pressures were present during the winter months when gritting and snow clearing was essential.'* The report then detailed that, during the period from 1 October 2017 to 2 January 2018, the claimant was available for work, on average, for 140.1 hours per week. He was on call for 10 weeks out of 14 in that period. Notwithstanding this, his actual hours of work during that period were, on average, 50.7 per week. Fewer hours were worked, on average, outwith the on call periods. No reference was made to the other points raised by the claimant by way of mitigation.

31. On 14 February 2018, the occupational health report was signed and sent to the respondent. It confirmed the treatment and support the claimant was receiving and stated that he was not fit to attend a disciplinary hearing or return to work. In relation to the final question posed, regarding whether work pressures contributed to the claimant's ill health, judgement and decision making process the report stated *'it is Mr Anderson's perception that he was experiencing some work pressures at that time due to staff shortages and increased on call duties. However, it is not possible retrospectively to say if this contributed to the episode in December 2017 which lead to this current situation.'*

32. On 15 March 2018, the claimant requested documentation from the respondent, such as copies of OH reports, his contract, job description and other information from his personnel file. This request was sent to JW.

33. On 1 April 2018, ML took over management responsibility for the gardeners and became the claimant's line manager. Following her appointment, she conducted a full review of the work undertaken by the gardeners at each site and thereafter introduced changes to the working arrangements to make them more efficient, effect cost savings and improve the work life balance of the gardeners. The changes implemented included changing the gardeners' working hours, so they start and finish earlier in the day, ending Saturday overtime and bringing in external contractors during the winter months, so that the on call requirement is reduced and gardeners only require to be on call from Sunday night to Thursday night, rather than 7 days a week.

34. Further disciplinary hearings were set for 6 April, 1 May & 5 June 2018, but did not proceed due to the claimant's ill health. Occupational health confirmed, in a report signed on 12 April 2018, that the claimant's health was deteriorating and he remained unfit to attend a disciplinary hearing.

35. By letter dated 29 May 2018, the claimant was invited to a further hearing on 19 June 2018 at which ML and CM would present their report of the investigation. It was noted that a copy of that report had already been sent to the claimant. He was informed that if he did not attend, a decision could be taken in his absence. He was informed that, if he wished to provide a written statement in support of his case, he required to do so by 12 June 2018. He was also informed that the meeting could result in his dismissal

36. The claimant attended for further occupational health assessment on 31 May 2018. The report issued on 6 June 2018 following this appointment stated *'On assessment today he demonstrated increased anxiety and I can state that I have not encountered anyone in such a distressed state as I have during all my consultations with Mr Anderson. It is my opinion that he is unfit to attend the proposed meeting and should he attend he would be unlikely to understand/participate in the proceedings due to heightened anxiety.'* The report confirmed that he was not likely to be able to attend a disciplinary hearing in the next three to six months.

37. In light of the fact that the claimant would be unable to attend for at least three months, the respondent decided to proceed with the disciplinary hearing scheduled for 19 June 2018.

38. The disciplinary hearing proceeded in the claimant's absence. JR chaired the meeting and Melanie Jorgensen, HR officer, provided HR support. ML & CM also attended.

39. At the start of the hearing CM introduced an Investigation Update document. That document was not produced to the Tribunal. The minutes of the meeting record the this contained *'information that has come to light since the production of the report of the original investigation'* and that it *'refers to a report received on 11 June from Occupational Health'* JR queried whether the claimant or his union representative had seen that document and it was confirmed that they had not.

40. ML was asked about the gardeners' working hours. She confirmed that she had *'looked at the vehicle logs and tracking on the vehicles and this information would indicate that the gardeners were not working at full capacity at the weekends.'* In relation to the gardeners' workload during the working week, ML indicated that she had stopped all weekend overtime since 1 April 2018 and the gardeners were able to complete their workload and finish at their designated time during the week.

41. CM stated during the meeting *'In recent times there's been comments from colleagues regarding his current state of health and how he is struggling. Nothing prior to this to my knowledge'.* JR did not know the basis for this comment, which colleague(s) provided this information or how CM obtained that information. No explanation of this was sought from CM.

42. The disciplinary hearing was adjourned to allow a further occupational health opinion to be obtained in relation to whether the claimant had a dependence on alcohol at the time of his drink driving offence. It was confirmed by a report dated 2 July 208 that he did not. By letter dated 3 July 2018, the claimant was informed that the hearing would reconvene on 17 July 2018 and that he could

submit a written statement, or his union representative could attend the hearing on his behalf.

43. Also on 3 July 2018 the claimant wrote to ML (who had taken over from JW as Support Services Manager) indicating that he had still not received the documentation he had requested from JW on 15 March 2018. He asked that these be provided as soon as possible. ML arranged for this to be done and the claimant received the documents on or around 12 July 2018.

44. On 9 July 2018 the claimant raised a grievance in relation to a number of issues including:

    a. That he had requested documents to allow him to present his case at the disciplinary hearing, but these were not provided; and

    b. That he felt he had been discriminated against as a result of his disability.

45. The claimant did not attend the reconvened disciplinary hearing on 17 July 2018. His grievance points were however considered.

46. At the reconvened disciplinary hearing, ML and CM stated that the claimant did not make them aware during the investigation interview of any long term disability. They referred to the undocumented investigation interview they had conducted with JW and stated that she had confirmed that she was not aware of any condition. When questioned about whether the gardeners were overworked, ML referred to the undocumented investigatory interview she held with SN. She stated that he had indicated that the gardening team did not work to full capacity every Saturday, often finishing early. She also stated that the van used by the gardeners was seen at McDonalds and burger vans etc regularly. She indicated to the Tribunal that this information came from the investigatory interviews (again undocumented) which she had held with the estate workers.

47. By letter dated 25 July 2018, JR confirmed that he had reached the following conclusions:

a. That the claimant's actions led to him being unable to perform his duties due to the influence of alcohol;

b. That he was convicted of a criminal offence which directly affects his ability to perform his duties (given the requirement for gardeners to have a driving licence); and

c. That his actions constituted a wilful contravention of NHS Fife's policies and procedures.

48. JR stated in his letter that he regarded this to be gross misconduct and it was therefore his decision to terminate the claimant's employment with effect from 17 July 2018.

49. JR discounted the mitigation put forward by the claimant. In relation to the fall out with his girlfriend, JR felt this was not acceptable mitigation. In relation to the assertions regarding being overworked and the claimant's health contributing, JR felt these were disingenuous. He did not believe the gardeners were overworked, given ML's position and the records produced showing actual working hours. In relation to the claimant's position that his ill health contributed in some way he concluded that the claimant's medical condition was historical only and had no impact on the events of 2 January 2018.

50. The claimant appealed against his dismissal by letter dated 6 August 2018.

51. An appeal meeting took place on 30 October 2018. This was chaired by AF. The claimant attended and was represented by Susan Robertson (**SR**), Regional Officer of Unite. During the hearing SR raised on four separate occasions that the issue of the claimant's health contributing to his actions had not been investigated. When AF asked in response if the claimant's colleagues had been interviewed to back up the claimant's concerns, JR indicated *'No witnesses were interviewed by ML and Carrie McKnight (CMcK) during their investigating in relation to LA's health concerns as they were not a significant part of the Investigatory Hearing.'* SR disputed this, stating that LA had made the investigators aware of his anxiety and depression being a

contributing factor. ML was asked whether she considered the claimant's health had an impact on the reasons for his actions on the day of the road traffic accident and she stated that she did not. She also stated *'appropriate questions were asked within the Occupational Health referral for the purposes of the investigation.'*

52. The hearing was adjourned to allow JW to be called as a witness to provide evidence on the claimant's health prior to the drink driving offence. The hearing reconvened on 12 November 2018. JW indicated that she was not aware of any health issues in the lead up to the drink driving incident.

53. AF took what he was told by all management witnesses at face value. He saw no need to challenge the position presented to him and was confident that all matters would have been properly investigated before the appeal stage.

54. AF concluded that that the claimant would reoffend by taking into account his conduct at the appeal meeting and the fact that he felt the claimant had been blasé in not collecting a recorded delivery letter which had been sent to him in the course of the proceedings. He was unable however to say however when that letter was sent or what it was about, but recalled JR mentioning it at one of the meetings.

55. AF wrote to the claimant on 19 November 2018, confirming that he did not uphold the appeal. In relation to workplace stress, AF stated *'You described group meetings where you and your colleagues had been meeting with your managers to raise concerns over the years regarding working patterns and on call commitments. However, I saw no evidence of any individual meetings with your managers regarding the impact any work related stress may have been having on you in the lead up to your conviction in 2018.'*

56. In relation to the claimant's health he stated *'I heard that you have suffered previously in 2010 and 2012 from periods of ill health, where you have had periods of absence relating to anxiety and depression. However, I heard from management that you had not raised any concerns regarding your health potentially deteriorating in the lead up to the incident in January 2018. I also confirmed that managers had not been made aware of any concerns from*

any of your colleagues regarding your behaviours at work to suggest your health was impacted upon again in the lead up to January 2018, as you had suggested.' He concluded *'I am unconvinced, based on the above and my impressions from our meeting, that ill health played a part in the incident of 2 January 2018.'*

57. AF formed the view that the claimant would reoffend, therefore he could not be redeployed to an alternative role.

58. Since the termination of his employment, the claimant has been in receipt of Universal Credit. This has been paid from September 2018 to the date of the Hearing.

Respondent's submissions

59. The respondent produced a detailed written submission, with suggested findings in fact, reference to the relevant law and a suggested analysis of the application of the law to the facts of the case. It was submitted that the respondent acted reasonably in treating the claimant's admitted conduct as gross misconduct and that a fair procedure was followed.

60. If the dismissal was found to be unfair, any compensation awarded should be reduced following the principles laid down in Polkey, to reflect the fact that the claimant would have been dismissed in any event and as a result of the claimant's contribution to his dismissal.

61. In relation to the disability discrimination claim, to be successful the claimant would require to demonstrate that his drink driving (which was the cause of the dismissal) somehow arose from his depression and anxiety. This was a matter for the claimant to prove and no medical evidence had been produced to support such a claim. As there was no such link, the claim should be dismissed.

Claimant's submissions

62. The claimant's representative made submissions by way of response to and with reference to the respondent's written submission, principally the

suggested findings in fact. In relation to the legal arguments, the claimant's representative referred the Tribunal to the case of ***City of York Council v Grosset*** [2018] ICR 1492, CA.

Relevant law

Discrimination arising from disability

63. Section 15(1) EqA states: *"A person (A) discriminates against a disabled person (B) if – (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."*

64. The Court of Appeal in ***City of York Council v Grosset*** [2018] ICR 1492, CA confirmed, at paragraphs 36-38 that:

'On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability? The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something"….The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something".'

Unfair Dismissal

65. Section 94 ERA provides that an employee has the right not to be unfairly dismissed.

66. In cases where the fact of dismissal is admitted, as it is in the present case, the first task of the Tribunal is to consider whether it has been satisfied by the respondent (the burden of proof being upon them in this regard) as to the reason for the dismissal and that it is a potentially fair reason falling within s98(1) or (2) of the ERA.

67. If the Tribunal is so satisfied, it should proceed to determine whether the dismissal was fair or unfair, applying the test within s98(4) of the ERA. The

determination of that question (having regard to the reason shown by the employer):-

"(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

68. Where an employee has been dismissed for misconduct, ***British Home Stores v Burchell*** [1978] IRLR 379, sets out the questions to be addressed by the Tribunal when considering reasonableness as follows:

(i). whether the respondent genuinely believed the individual to be guilty of misconduct;

(ii). whether the respondent had reasonable grounds for believing the individual was guilty of that misconduct; and

(iii). whether, when it formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

69. Where an employee's ill-health may have contributed to behaviour that the employer considers amounts to gross misconduct, a failure to investigate that ill-health before dismissing the employee may render that dismissal unfair (***Governing Body of Hastingsbury School v Clarke*** UKEAT/0373/07, ***The City of Edinburgh Council v Dickson*** UKEATS/0038/09 and ***British Telecommunications plc v Daniels*** UKEAT/0554/11/MAA).

70. In determining whether the employer acted reasonably, it is not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law as the Tribunal would have 'substituted its own view' for that of the employer. Rather, the Tribunal must consider the objective standards of a reasonable employer and bear in mind that there is a range of responses to any given situation available to a reasonable employer. It is only

if, applying that objective standard, the decision to dismiss (and the procedure adopted) is found to be outside that range of reasonable responses, that the dismissal should be found to be unfair (***Iceland Frozen Foods Limited v Jones*** [1982] IRLR 439).

Decision

Discrimination Arising from Disability

71. As the claim was discrimination arising out of disability the Tribunal started by referring to section 15 of the EqA.

72. Section 15(2) states that section 15(1) will not apply if the employer was unaware that the claimant was disabled. The Tribunal concluded that the respondent was aware that the claimant suffered from anxiety and depression. This was brought to their attention as a result of the claimant's absences in 2010 and 2012. The medical reports received at the time stated that the claimant was taking medication for his condition and the respondent was aware that this continued to be the case.

73. The Tribunal considered the questions posed by the Court of Appeal in ***City of York Council v Grosset.***

74. The Tribunal considered whether the claimant was treated unfavourably and, if so, by whom. The EHRC Employment Code indicates that unfavourable treatment is treated synonymously with disadvantage. The Tribunal accepted that claimant's dismissal, by JR, amounted to unfavourable treatment. The Tribunal considered the reason for the unfavourable treatment and accepted this was due to the claimant driving while under the influence of alcohol on 2 January 2018. In relation to the first question posed by the Court of Appeal in ***City of York Council v Grosset***, the Tribunal found therefore that the claimant was treated unfavourably because of an identified 'something', namely driving while under the influence of alcohol.

75. The Tribunal then considered the second question posed by the Court of Appeal in ***City of York Council v Grosset*** - whether that something, namely the claimant driving while under the influence of alcohol, arose in

consequence of the claimant's disability. The Tribunal found that it did not. There was no evidence before the Tribunal to demonstrate any causal link between the claimant's disability and his actions on 2 January 2018, for example in the form of a medical report.

76. For this reason the Tribunal concluded that the claim of discrimination arising from disability does not succeed.

Unfair dismissal

77. The Tribunal referred to s98(1) ERA. It provides that the respondent must show the reason for the dismissal, or if more than one the principal reason, and that it was for one of the potentially fair reasons set out in s98(2). At this stage the Tribunal was not considering the question of reasonableness. The Tribunal had to consider whether the respondent had established a potentially fair reason for dismissal. The Tribunal accepted that the reason for dismissal was the claimant's conduct – a potentially fair reason under s98(2)(b).

78. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason is shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited v Jones*** that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent. There is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another would quite reasonably keep the employee on. If no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable employer might reasonably have dismissed, the dismissal is fair.

79. In relation to the size and administrative resources of the respondent, the Tribunal took into account that the respondent is a large employer, with significant HR support.

80. The Tribunal referred to the case of ***British Home Stores v Burchell***. The Tribunal was mindful that it should not consider whether the claimant had in fact committed the conduct in question, as alleged, but rather whether the respondent genuinely believed he had and whether the respondent had reasonable grounds for that belief, having carried out a reasonable investigation.

Did JR have a genuine belief?

81. The Tribunal concluded that JR did have a genuine belief that the claimant had been guilty of the misconduct.

Did JR have reasonable grounds for his belief?

82. The Tribunal found that JR did have reasonable grounds for his belief that the claimant had driven his car while under the influence of alcohol at a time when he was on call. The claimant accepted that he had done so.

83. The claimant however indicated that there were several factors which had contributed to his actions, namely the fall out with his girlfriend, his workload and his medical condition of anxiety and depression.

84. JR concluded that the claimant's fall out with his girlfriend was not acceptable mitigation for his actions. The Tribunal found that there were reasonable grounds for this conclusion.

85. JR concluded that the claimant was not overworked, based on the evidence of ML and reviewing the records of the number of times he was actually called out while on call. The Tribunal found that were reasonable grounds for this conclusion.

86. JR concluded that the claimant's medical condition was historical only and had no impact on the events of 2 January 2018. The Tribunal found that there were no reasonable grounds for this conclusion: whilst medical reports were

obtained, they did not address whether the claimant's medical condition of anxiety and depression had any impact on the events of 2 January 2018, as the relevant questions were not asked of occupational health.

Was there a reasonable investigation?

87. The Tribunal then considered whether, when JR reached his conclusions, the respondent had carried out as much investigation as was reasonable in the circumstances.

88. The Tribunal concluded that the respondent had carried out as much investigation as was reasonable in the circumstances in respect of all areas other than one, namely in relation to whether the claimant's medical condition of anxiety and depression had any impact on the events of 2 January 2018.

89. The Tribunal noted that no investigation was conducted in relation to whether the claimant's health contributed to his actions on 2 January 2018, as he asserted. Despite the investigating officers requesting an occupational health report on 23 January 2018, no questions were asked as to whether the claimant's medical condition, of anxiety and depression, could have contributed to his conduct, as the claimant asserted. Instead the questions to occupational health focused on whether *'work pressures'* contributed to the claimant's ill health, judgement and decision making process and whether the claimant had a dependency on alcohol.

90. The only indication of the claimant's health immediately prior to 2 January 2018 came from CM who stated to JR during the course of the disciplinary hearing that *'In recent times there's been comments from colleagues regarding his current state of health and how he is struggling. Nothing prior to this to my knowledge'.* JR did not know the basis for this comment, which colleague(s) provided this information or how CM obtained that information. No explanation of this was sought from CM by JR before he reached his decision.

91. In the Tribunal's view a reasonable employer, faced with these circumstances, would have investigated the claimant's assertion that his ill

health contributed to his actions, by obtaining an opinion on this matter from appropriately qualified medical professionals, before forming a belief that the claimant was guilty of gross misconduct. In addition, a reasonable employer, faced with these circumstances, would have sought further information CM, in relation to the basis of her comments made during the course of the disciplinary hearing, before forming the belief that the claimant was guilty of gross misconduct.

92. The Tribunal was accordingly not satisfied that, at the stage JR formed his belief that the Claimant was guilty of gross misconduct, as much investigation as was reasonable in all the circumstances of the case had been carried out.

Procedure

93. In considering the fairness of the dismissal in accordance with s98(4) ERA, the Tribunal also required to have regard to the procedure which was adopted.

94. The Tribunal considered that it was reasonable for the respondent to proceed with the disciplinary hearing in June 2018. By that stage the claimant had been invited to 4 disciplinary hearings. Each was postponed due to the claimant's ill health. The occupational health advice received on 6 June 2018 was that the claimant was not likely to be in a position to attend a disciplinary hearing in the next three to six months. The claimant was informed that he could submit a written statement, or his union representative could attend on his behalf.

95. Whilst it would have been preferable for the documentation which the claimant requested on 15 March 2018 to be provided sooner, the Tribunal did not find that failure to provide these prior to 12 July 2018 undermined the fairness of the procedure adopted. The claimant had the opportunity to comment on these prior to JR reaching his decision and JR took into account the fact that the documents had not been provided timeously in reaching his decision, as the claimant had referred to this in his grievance. The claimant also had the opportunity to raise issues in relation to the documentation received at the appeal hearing.

96. The Tribunal did however have a number of concerns with the procedure adopted by the respondent, as follows:

a. ML and CM held meetings with JW, SN Bruce Anderson and a number of individuals in the Estates team during the course of their investigation, but failed to record when these meetings took place or what was discussed. No detail of what was discussed with these individuals was accordingly provided to the claimant. The meetings with JW and Bruce Anderson were referred to in the investigation report and the content of the discussions with SN and the Estates team were referred to during the course of the disciplinary hearing. Given that the information was relied upon by the respondent in reaching their conclusions, it should have been provided to the claimant.

b. An Investigation Update document was introduced at the commencement of the disciplinary hearing. It was made clear that neither the claimant nor his representative had been provided with a copy of that report. Despite that being confirmed, JR continued with the disciplinary hearing.

c. The notes of the discussions with witnesses and the Investigation Update document were not then provided to the claimant in advance of the appeal hearing, which he attended with his representative.

97. In the Tribunal's view, a reasonable employer faced with these circumstances, particularly one with the administrative resources of the respondent, would have documented the investigation meetings and either appended those notes to the Investigation Report, or provided a clear explanation as to what was discussed with each individual in the body of the report. Similarly, a reasonable employer would have provided the Investigation Update document to the employee who was the subject of the investigation, in advance of a disciplinary hearing. It is not only fundamental that employees should know the case against them, but where there is evidence against them, they should also know what that evidence is. Failure

by the respondent to provide this information to the claimant was inherently unfair.

98. The Tribunal did not feel that the procedural breaches were cured on appeal. The Tribunal noted that the claimant was not provided with any additional documentation in advance of the appeal hearing, such as witness statements or the Investigation Update report. The Tribunal also found that the appeal hearing was no more than a rubber stamping of the original decision: AF accepted in evidence that he took what he was told by management witnesses at face value, believing that they would have properly investigated matters before the appeal stage. Despite it being raised with him on four separate occasions that the issue of the claimant's health contributing to his actions had not been investigated, he took no steps to address this. Instead, he simply concluded that he was unconvinced that ill health played a part in the incident of 2 January 2018. This conclusion was based on the evidence from management (which clearly contradicted the evidence presented to the disciplinary hearing in relation to the claimant's colleagues' perceptions of his behaviour) and AF's impressions of the claimant during the appeal hearing (which were entirely irrelevant).

Conclusions re s98(4)

99. For the reasons stated above the Tribunal concluded that the respondent acted unreasonably in treating the claimant's conduct as a sufficient reason for dismissal. No reasonable employer would have dismissed the claimant in these circumstances. The claimant's dismissal was accordingly unfair.

Calculation of Compensation

Polkey

100. The Tribunal did not consider that any reduction to the compensatory award, on the basis of ***Polkey,*** was appropriate. The Tribunal found that the decision to dismiss the claimant was substantively unfair, given the failure to investigate the claimant's assertion that his medical condition contributed to his actions. Given that no medical evidence was produced to the Tribunal,

the Tribunal was not in a position to assess what the outcome would have been, had the respondent fully investigated this matter.

Acas Code

101. The Tribunal found that the Respondent unreasonably failed to comply with the Acas Code in certain respects, namely the manner in which they conducted the investigation and the failure to provide information to the claimant in relation to that, but noted that in other respects the Acas Code was followed. The Tribunal found that an uplift in compensation by 10% is just and equitable in the circumstances.

Contribution

102. Under s123(6) ERA, the Tribunal required to consider whether the claimant's dismissal was to any extent caused or contributed to by the actions of the claimant. If so, the Tribunal required to reduce the amount of the compensatory award by such proportion as it considered just and equitable having regard to that finding. In reaching a conclusion on this point the Tribunal required to consider whether the claimant's actions were culpable or blameworthy. This required the Tribunal to make findings in relation to what actually happened, rather than whether the respondent reasonably believed that the claimant was guilty of misconduct.

103. The Tribunal found that the claimant did drive while under the influence of alcohol while being paid to be on call. The claimant accepted that he had done so. This resulted in him being unable to drive, which impacted his ability to carry out his duties for the respondent. Based on the evidence presented to the Tribunal, the Tribunal did not find that the claimant's medical condition contributed to his actions – no evidence was produced to the Tribunal to substantiate that assertion. In the absence of any such evidence, the Tribunal found that the claimant's actions were culpable and blameworthy conduct and that they contributed significantly to the claimant's dismissal. The Tribunal found that it was just and equitable to reduce the compensatory and basic award by 75%, as a result.

Claimant's gross/net pay

104. The claimant's basic salary was £18,903, giving a gross weekly wage of £363.52.

105. The Tribunal noted that, if the claimant had returned to work, he would no longer be undertaking weekly overtime and the on call requirement was significantly reduced, to cover 5 nights per week, rather than 7. The claimant previously received, on average, £88.10 per week in relation to working on call. A proportionate reduction of that figure to reflect the reduced on call requirement provides a figure of £62.93 per week.

106. Taking these figures into account, if the claimant had returned to work, his gross wage would have been £426.45 per week. The net figure would have been £358 per week.

Basic Award

107. The Tribunal calculated the basic award taking into account the claimant's age (40) and length of service (17 years) at the termination of his employment and taking into account his gross basic salary only (as this is what he was receiving in the 12 weeks prior to the termination of his employment):

Basic Award	£6,179.84
Reduction for contributory fault – 75%	£4,634.88
Total Basic Award	**£1,544.96**

Compensatory Award

108. The claimant's employment terminated on 17 July 2018. He had not secured alternative employment by the date of the Hearing, a period of 62 complete weeks. The claimant indicated that it would likely be 6 months further before he is able to work. The Tribunal found that there was no immediate prospect of the claimant securing alternative employment and that a future loss period 6 months is reasonable in the circumstances. The Tribunal did not accept that, had his employment not been terminated on the grounds of gross misconduct, the claimant would have been dismissed in any event, on the

basis of capability, as asserted by the respondent. Instead the Tribunal accepted the claimant's evidence that, had he not been dismissed for gross misconduct he would have been in a position to return to work, as working and routine assist with his medical condition. His dismissal however exacerbated his medical condition. The Tribunal calculated the compensatory award as follows:

Loss of Earnings to hearing - 62 weeks at £358	£22,196.00
Future Loss - 26 weeks at £358	£9,308.00
Sub-total before adjustments	£31,504.00
Uplift for breach of Acas Code – 10%	£3,150.40
Sub-total before reduction	£34,654.40
Reduction for contributory fault – 75%	£25,990.80
Total Compensatory Award	**£8,663.60**

Date of Judgment: 22 October 2019
Employment Judge: Mel Sangster
Entered Into the Register: 28 October 2019
And Copied to Parties