EMPLOYMENT TRIBUNALS

Claimant: Mr Paul O'Connor

Respondent: Jaguar Land Rover Ltd

Heard at: Birmingham

On: 17 October, 18 October and 22 November 2019

Before: Employment Judge Meichen, Mr J Wagstaffe, Ms J Keene

Appearances:
For the claimant: Ms S Chan, counsel
For the respondents: Ms S Garner, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the claim of unfair dismissal succeeds. The dismissal was unfair under s.98 Employment Rights Act 1996 as well as automatically unfair under s.100 Employment Rights Act 1996.

REASONS

Introduction

1. It was agreed that there were two claims before the tribunal for us to determine:

   (i) Ordinary unfair dismissal (Employment Rights Act 1996 - "ERA" - s. 98).

   (ii) Automatically unfair dismissal for health and safety reasons (ERA s.100).

2. At the start of the hearing we were provided with:

   (i) An agreed bundle of 347 pages to which a few documents were added by consent during the course of the hearing.

   (ii) A chronology and written opening submissions from the claimant.

   (iii) A list of issues and a chronology from the respondent.

(iv) A witness statement from the claimant.

(v) Five witness statements from the respondent (Nigel Van Ommeren, Steve Mulholland, Ken Carter, Jo Savistio, Michael Davidson).

3. All of the witnesses attended and were cross examined. The two-day time estimate for the hearing turned out to be insufficient. We agreed that we would deal with remedy issues on another occasion if we needed to as this seemed like the most efficient use of time. We agreed that this decision would deal with liability, and issues of Polkey, contribution and breach of the applicable ACAS code if appropriate.

4. At the end of the second day we had only just concluded the evidence. We therefore decided to list the case for a further day so that we could hear submissions and make our decision.

5. On the third day we received substantial written closing submissions from both sides. We spent some time reading these before starting the hearing. We then gave both sides the opportunity to make any supplemental oral submissions. By the time we had concluded that process it was nearly lunchtime and so we decided to reserve our decision. We were able to make our decision on the day, but it has then taken some time to write this judgment.

6. We have taken account of all the evidence and submissions to which we were referred. In our judgment we first set out the applicable law and this section also explains the liability issues which we have to determine. We then make our findings and in this section we record our findings of fact and we explain some of our views on the key matters. We then set out our conclusions on the claim of unfair dismissal, and then we identify the issues and our conclusions on the other matters (i.e. Polkey, contribution, ACAS code).

The law

7. ERA s.98 relevantly provides as follows:

(1) In determining for the purposes of this Part whether the dismissal of an employee is 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,

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

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

8. We therefore have to consider what the reason was for the claimant's dismissal and whether it was for the potentially fair reason relied upon by the respondent - conduct. If we find that the reason was conduct, we must consider whether the respondent acted reasonably or unreasonably in treating it as a sufficient reason to dismiss. In answering that question, it is appropriate to have regard to the test set out in BHS v Burchell [1978] IRLR 379, namely:

   (i) Did the respondent honestly believe the claimant to be guilty of misconduct?

   (ii) Did the respondent have reasonable grounds for believing that that the claimant was guilty of misconduct?

   (iii) At the time it held that belief had the respondent carried out as much investigation as was reasonable?

9. Ultimately, we should consider whether the respondent's decision to dismiss the claimant fell within the range of reasonable response that a reasonable employer in the circumstances might have adopted. We have reminded ourselves that it is not for us to substitute our view; the question is whether the dismissal (and the investigation: see Sainsburys Supermarkets Ltd v Hitt [2003] ICR 111) fell within the range of reasonable responses.

10. In terms of the claim under s.100 ERA Ms Chan made it clear that the claimant was relying on section 100(1) subsections c, d and e, which provide as follows:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

11. We therefore have to determine whether the claimant was dismissed for one of the reasons set out above and if so, was it the principal reason for dismissal if there was more than one reason.

12. In considering the claim under s.100(1)(e) we must have regard to s.100(2) which provides as follows:

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

13. Section 100(3) ERA may also apply to subsection 1(e) but only in circumstances where an employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them. It was not suggested by the respondent that such negligence existed in the circumstances of this case.

14. Guidance as to how to apply s.100(1)(e) was given by the EAT in the case of Oudahar v Esporta Group Ltd [2011] ICR 1406. In that case the claimant, who was a chef, refused his manager's instruction to mop an area of the kitchen as he claimed that wires protruding from the wall made doing so dangerous. He was dismissed for failing to comply with a reasonable request after the employer accepted the maintenance manager's evidence that the area was

safe. The EAT allowed the claimant's appeal against the ET's finding that the claimant had not been dismissed for a reason falling within s.100 but for failing to follow a reasonable instruction. The EAT's guidance was as follows:

24. In our judgment employment tribunals should apply section 100(1)(e) in two stages.

25. Firstly, the tribunal should consider whether the criteria set out in that provision have been met, as a matter of fact. Were there circumstances of danger which the employee reasonably believed to be serious and imminent? Did he take or propose to take appropriate steps to protect himself or other persons from the danger? Or (if the additional words inserted by virtue of Balfour Kilpatrick are relevant) did he take appropriate steps to communicate these circumstances to his employer by appropriate means? If these criteria are not satisfied, section 100(1)(e) is not engaged.

26. Secondly, if the criteria are made out, the tribunal should then ask whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take such steps. If it was, then the dismissal must be regarded as unfair.

27. In our judgment the mere fact that an employer disagreed with an employee as to whether there were (for example) circumstances of danger, or whether the steps were appropriate, is irrelevant. The intention of Parliament was that an employee should be protected from dismissal if he took or proposed to take steps falling within section 100(1)(e).

28. We reach this conclusion for the following reasons.

29. Firstly, it seems to us to be the natural way to read section 100(1)(c)-(e). Each subsection is directed to some activity on the part of the employee: the bringing of matters to the attention of the employer (section 100(1)(c)), leaving or proposing to leave or refusing to return (section 100(1)(d)), or taking or proposing to take steps (section 100(1)(e)). In each case the statutory provision directs the Tribunal to consider the employee's state of mind when he engaged in the activity in question. In no case does it direct the Tribunal to consider whether the employer agreed with the employee.

30. Secondly, it seems to us that this reading gives effect to the protection which Parliament must have intended to afford to an employee, having regard to the provisions of the Framework Directive which we have quoted. Section 100(1)(c)-(e) do not protect an employee unless he behaves honestly and reasonably in respect of matters concerned with health and safety. It serves the interests of health and safety that his employment should be protected so long as he acts honestly and reasonably in the specific circumstances

covered by the statutory provisions. If an employee was liable to dismissal merely because an employer disagreed with his account of the facts or his opinion as to the action required, the statutory provisions would give the employee little protection.

31. Thirdly, we think this conclusion derives some support from the judgment of the Appeal Tribunal in Balfour Kilpatrick Ltd v Acheson [2003] IRLR 683. In that case a group of employees took industrial action and refused to return to work, believing their working conditions to be hazardous to health and safety. The principal ground of the decision was that taking industrial action did not amount to "reasonable means" of raising a health and safety concern.

15. The case of Balfour Kilpatrick described in paragraph 31 of the judgment above is also important. In that case it was argued that the mere fact that the employees were failing to work was the reason why they were dismissed, and they would have been dismissed whatever the reason was for taking the time off. This argument was rejected on the appeal. Elias J said at para. 67:

The fact that the employer was dismissing because of the failure to return to work and was indifferent to the reason why the men were not at work is immaterial. He knew what the employees were asserting the reason to be. Had we found that to have been a protected reason then we would have concluded that the dismissals were for that reason. We consider that the tribunal were right on this aspect of the case. Moreover, we consider it likely that an employer would be equally liable if he had the opportunity to find out the reason for the absence and chosen not to take it. This ought, in our view, to be the position in order to give effective implementation of the Directive. However, we did not hear argument on this point and we do not have to determine it in this case

16. This point was considered in Oudahar and the EAT observed as follows:

36. … we see no difference in principle between the employer who positively disagrees with the employee and the employer who is indifferent or does not bother to find out. In each case it seems to us that the statutory intention is that the employee should be protected if he falls within the scope of section 100(1)(c),(d) or (e).

37. It is also true to say that this aspect of the reasoning in Balfour Kilpatrick was not necessary for the decision; but the matter was fully argued and considered, and we have no doubt that we should follow its approach.

17. We have borne this guidance in mind and we follow the approach identified by the EAT. We also observe that the EAT in Oudahar found that the ET in that case had been wrong to think that they did not need to resolve issues of fact as to the claimant's actions and reasons for refusing to mop the floor. The

case was remitted in order for the ET to make those crucial findings of fact (see paragraphs 39 and 43 of the judgment). We bear that in mind when making our findings in this case, to which we now turn.

Findings - background

18. The respondent is a well-known premium automotive manufacturer and retailer.

19. The claimant commenced employment with the respondent on 1 May 1995. He worked for the respondent for very nearly 23 years until he was dismissed on 24 April 2018. The claimant was employed as a Manufacturing Associate and he worked at the respondent's site at Solihull in the West Midlands.

20. On 13 March 2017 the claimant was issued with a final written warning. This warning could be seen at page 52 of the bundle. This document records that the claimant was issued with a warning for leaving his place of work without permission and refusal to comply with a legitimate instruction. It seems that the claimant accepted that on that occasion he had left a production line early. The claimant has said before us that he left the production line 2 minutes early for the purpose of washing his hands. The claimant was informed that the warning would be disregarded for disciplinary purposes after a period of 52 working weeks. The claimant was given the right to appeal against the final warning but did not do so.

21. On the evidence before us we conclude that the warning was valid; it was issued in good faith and the respondent was entitled to take it into account for disciplinary purposes for a period of 52 working weeks from 13 March 2017.

22. The events which led to the claimant's dismissal occurred on 15 January 2018. Before we set out our findings in relation to the events of that day, we should record that we found the claimant to be an entirely straightforward and honest witness. We had no reason to disbelieve the claimant on any significant matter. In particular we were entirely satisfied that the explanation which the claimant has given for why he acted the way he did on 15 January was genuine. We note that his explanation has been consistent from 15 January 2018 onwards and this is a case which is noteworthy for the distinct lack of evidence presented by the respondent to challenge or undermine the claimant's explanation for why he acted the way he did.

23. In our findings which follow we spend some time identifying relevant evidence which was brought to the respondent's attention from 15 January onwards. The reason why we do that is because we believe that the respondent did not consider or investigate this evidence in a way which we think any reasonable employer would. We refer in our findings to the way in which the relevant evidence was given in the respondent's own documents including their notes of meetings so that there can be no doubt that these were matters of which the respondent was aware.

Findings – 15 January 2018

24. On 15 January the claimant was working as a door wrapper on the respondent's customer acceptance line ("CAL"). At one end of the CAL there is an extraction point. This is the point at which vehicles were supposed to be started up and then driven away. The reason why vehicles were meant to be started up at that particular point was so that the fumes from the vehicles' exhausts were extracted and so workers such as the claimant were not subjected to the exhaust fumes. Plainly, the respondent recognises that exposure to exhaust fumes is dangerous and so it has procedures in place to limit employees' exposure to exhaust fumes and thereby protect their health and safety. One such procedure is that vehicles should only have been driven off the CAL when they reach the extraction point.

25. However, the claimant says that in reality it was common practice for vehicles to be started up to 4 car lengths away from the designated extraction point. As a result, the claimant says that he was often exposed to exhaust fumes when working at that end of the CAL. The claimant says that the inhalation of the exhaust fumes made him feel sick and gave him a sore throat.

26. The claimant also says that he raised his concerns about cars being started up prior to the extraction point and his exposure to exhaust fumes to various different managers. He says that as a result of raising those concerns he had been told that he could work at the other end of the line (i.e. away from the extraction point and away from the area where vehicles were being driven off).This was referred to as the claimant working at the top of the CAL rather than the bottom of it.

27. The claimant was working at the top of the CAL on 15 January. However, this was not the designated area for the claimant to carry out the door wrapping task which he was doing. The designated area for that task was the bottom of the line. At about 7:45 AM on the morning of 15 January Ken Carter (the respondent's shift leader) realised that the claimant was carrying out his process in the wrong place on the CAL. It seems that the claimant's positioning was not causing any specific problem in terms of the operation of the CAL, but Mr Carter was nevertheless concerned that the claimant was operating in the wrong place.

28. Ken Carter spoke to Jo Savistio who was the claimant's group leader and told her to make sure all processes were being done in their designated work areas. After her conversation with Ken Carter Jo Savistio approached the claimant at approximately 8 AM. She relayed the message from Ken Carter and told the claimant and his colleague Paul Williams who he was working alongside that day that they would need to move down the line to the correct station to carry out the task they were doing.

29. In her witness statement prepared for this hearing Jo Savistio recorded the claimant's reaction to that as follows: *"Paul O'Connor was very unhappy and*

quickly explained that he would not move down the line as he felt that the cars were being driven off before the chevroned area. I was aware that Paul had raised this issue before whilst in a different team and area so to put his mind at ease I assured him that the vehicles would be driven off in the correct area and that I will clarify the process with the production leader."

30. We consider that that evidence is significant because it shows that the claimant from the outset of this matter explained that his concern was that cars were being driven off before the chevroned area which included the ventilation system to extract the exhaust fumes. Moreover, it is apparent from Jo Savistio's evidence that she was aware that the claimant had raised that specific issue before.

31. Jo Savistio's witness statement explains that after she spoke to the claimant, she went to speak to the production leader who was Dave Brooks *"to ask for him to clarify the process".* Dave Brooks then *"confirmed that the process was safe".* Jo Savistio did not suggest that she did anything to ensure that vehicles were driven off at the correct point or to check if the claimant was correct in his assertion that they were being driven off at the incorrect point. The claimant's concern it seems clear to us was not that the process was unsafe but that the process was not being followed. We cannot see that the respondent did anything to address that concern and it was not suggested that anything was fed back to the claimant to attempt to assuage his concern. The claimant's position was that he was not prepared to move to an area that he considered was harmful to his health as a result of exposure to exhaust fumes because vehicles were being driven off at the incorrect point. He therefore remained working where he was.

32. At around 9.30 AM on 15 January Ken Carter noticed that the claimant and Mr Williams had not moved. Mr Carter then approached Jo Savistio and told her to ensure that all processes were moved to the correct area *"straight away".* Jo Savistio did not pass on the claimant's concerns about cars moving off at the wrong point and exposure to exhaust fumes to Mr Carter.

33. The claimant was then informed by Jo Savistio that Ken Carter wanted him to move without delay into the area where he considered he would be exposed to exhaust fumes by reason of the cars being driven off at the wrong point. The respondent had not done anything to reassure the claimant about this specific concern (that he had raised to Jo Savistio at approximately 8 am). They had not checked whether cars were being driven off at the wrong point or to ensure they would be driven off at the correct point if the claimant were to move.

34. We accept that the claimant genuinely and reasonably believed that the respondent was asking him to do something which was unsafe by reason of the exposure to exhaust fumes. This is because the claimant had observed, as he had done on previous occasions, that cars were being driven off prior to the extraction point. That was the very reason why he was working at the top

end of the CAL. The claimant's genuine and reasonable belief was that if he went to the bottom end of the CAL he would be exposed to the fumes and this presented a risk to his health and safety.

35. It was not suggested before us that the claimant either fabricated his assertion that cars were being driven off at the wrong point or that he was somehow mistaken about that. It was also not suggested that there was any reason for the claimant to have gone to work at the top end of the CAL other than his concern over exposure to fumes at the bottom end. On the evidence presented to us it seems to be accepted by the respondent that the claimant had a genuine belief that there was an issue with exposure to fumes if he moved to the bottom of the CAL, and the respondent has not presented any evidence to show that that belief was not reasonably held.

36. The claimant was evidently frustrated to the extent of being stressed and anxious about the fact that the respondent was not acting on his concern about cars moving off prior to the extraction point. The claimant told Jo Savistio that he had no option but to leave the line. Jo Savistio urged the claimant to go and speak to Ken Carter, but he did not do so. Instead, the claimant decided to walk off the CAL and in fact he walked straight to the lockers where he took out his bag and coat. The claimant's intention was obviously to go straight home.

37. At that stage Ken Carter saw the claimant and attempted to speak to him. The claimant did not want to engage with Ken Carter; he simply said that the whole scenario was making him ill or words to that effect. The claimant was frustrated, and we find that he spoke with a raised voice. The claimant then left the respondent's site and went home.

38. The claimant felt unwell and went to his GP that same day. The claimant's GP signed him off with "stress at work" for 28 days. We consider that the evidence of the claimant going straight to his GP and his GP signing him off for 28 days indicates that the events which we have outlined above had caused a significant stress reaction in the claimant.

Findings – the investigation

39. The respondent commenced a disciplinary investigation into the claimant's actions on 15 January. The investigating manager was Michael Davidson.

40. It has to be said that the investigation undertaken by Mr Davidson was short and rather limited. Mr Davidson obtained statements from Jo Savistio and Ken Carter about the events of 15 January. Those documents could be seen at pages 58 and 59 of the bundle.

41. It is salient that within Jo Savistio's statement she said this in relation to informing the claimant that he was to move to the bottom of the line: *"I said I know you have expressed issues with this move previously but I have been assured that cars will not be driven off prior to the chevroned area and cars*

will not be started before the vented area". Plainly then she was referring to the fact that the claimant had raised the issue of cars being started before the ventilated area previously and this was his concern about moving to the bottom of the CAL.

42. In his witness statement for the purpose of the disciplinary investigation Ken Carter said that he had had conversations with the claimant in the past because *"the claimant refused to work at the end of the CAL due to him saying that the exhaust fumes from vehicles being started up and driving off the line were affecting his health".* In his oral evidence before the tribunal Mr Carter clarified that the claimant had raised that issue with him approximately three weeks prior to the incident on 15th January. It has to be said that that evidence is not consistent with what Mr Carter said in his witness statement for the tribunal where at paragraph 10 he says this: *"Paul had never before outlined his complaints to me about exhaust fumes on the CAL".* We therefore found that Mr Carter was not a reliable witness and we did not accept what he said in paragraph 13 of his statement about monitoring the drive off area to ensure cars were driven off at the correct point. There was no evidence that such monitoring had taken place other than Mr Carter's assertion. We were not told what the results of such monitoring was, and it was not suggested that any results were ever fed back to the claimant or relayed to Mr Davidson.

43. In his statement prepared for the purpose of the disciplinary investigation Mr Carter also referred to the fact that he subsequently commissioned a toxicology report which measured exhaust emissions on the CAL. That report however was not completed until 19 February. It appears from the report that the exposure to exhaust fumes on the CAL on that day were within reasonable limits. However, the report did not do anything to address the concern which the claimant had raised which was that there was an excess exposure to fumes when the process was not being followed because vehicles were driven off prior to the extraction point. There is no reference in the report to the fact that this was the claimant's concern and it is not suggested that there was any attempt to measure fumes if the correct process was not followed. Instead, the report operated under the assumption that the process was always followed, as it stated: *"there is floor level extraction at the end of the CAL line and vehicles are not started up until the vehicles are over this extraction".* We accept the point made on behalf of the claimant that employees on the CAL would not be likely to work outside of the process on an occasion when they were being monitored for the purpose of the toxicology report.

44. The only other investigation which Michael Davidson undertook was to interview the claimant on 1 March 2018. In this meeting the claimant conveyed several important pieces of information to Mr Davidson. In particular, the claimant made it clear that exposure to exhaust fumes had caused him to have a sore throat and it was causing him stress. The claimant also said that on 15 January he had had a lengthy discussion about why he

couldn't stay in the correct area and that he had escalated that to Andy Cole. However, Andy Cole was never interviewed by the respondent in relation to this matter.

45. The claimant also referred to his previous history of having raised concerns about exposure to fumes and he said that because of that history and the fact that he had already gone through his team leader he felt he had exhausted all other options and had no option but to walk off on 15 January. That point does not appear to have been investigated at all by Mr Davidson.

46. The claimant also specifically told Mr Davidson about his concern that the cars were being driven off where there was no extraction. Again, the point about cars being driven off where there was no extraction does not appear to have been investigated by Mr Davidson. Mr Davidson appears to have been content simply to have established that the claimant had walked off the production line (without really investigating the reason why he had done so) and on that basis he concluded that claimant had a case to answer. Mr Davidson conveyed that view to the claimant at the end of the meeting on 1 March.

47. In our view the investigation conducted by Mr Davidson was inadequate and unreasonable. In short it appears to us that Mr Davidson failed to consider the fundamental question of why it was that the claimant felt he had to walk off the CAL rather than obeying the instruction to work at the bottom of the CAL. That was obviously important as it went both to the reasonableness of the instruction given and the reasonableness of the claimant's actions in not obeying it.

48. The key deficiencies which lead us to find the investigation was outside the reasonable range are as follows:

    (i) Mr Davidson failed to have any regard to the evidence that the claimant was suffering from stress, and he also seems to have ignored the claimant saying he had had a sore throat. In his statement for this tribunal Mr Davison said that the claimant was *"only suffering from stress as a result of the whole situation"* and that the claimant *"gave no indication that he was suffering from any medical condition".* We cannot see any basis on which Mr Davidson could reasonably disbelieve the claimant's evidence that he had had a sore throat, without further investigation. We also think it was unreasonable to ignore the fact that the claimant was signed off for 28 days with stress following this incident. We think a reasonable investigation would have attempted to understand the reasons why the claimant was experiencing such a high level of stress, and considered the impact of this stress level on the claimant's decision making.

    (ii) Mr Davidson did not investigate whether it was correct that cars were being driven off prior to the extraction point. It would in all probability

have been easy to ascertain this by speaking to other employees who were working on the CAL on 15 January and in particular Mr Williams who was working alongside the claimant until the claimant went home.

(iii) Mr Davidson did not investigate the claimant's assertion that he had exhausted all other options by raising the issues with cars driving off and the resultant exposure to fumes previously.

Findings – the disciplinary

49. The claimant was invited to a disciplinary hearing which took place on 15 March 2017. The hearing was conducted by Steve Mulholland.

50. At the disciplinary hearing the claimant was accompanied by his colleague Paul Williams. Mr Mulholland had the benefit of a HR adviser, Sneh Barker, and generally the respondent is a company of significant size and resource. We consider that it should have been obvious to the respondent that Paul Williams was a relevant witness to the events of 15th of January. Mr Williams was working alongside the claimant right up until the point that the claimant left the CAL and he could therefore give relevant evidence as to the events of that day and in particular could have clarified whether the claimant's complaint that cars were being driven off prior to the extraction area was correct or not. The respondent did not however take the opportunity to ask Mr Williams any questions about what had taken place. We found that a surprising and unreasonable omission by the respondent – especially as Mr Williams attended the disciplinary hearing and the claimant mentioned that it was only him and Mr Williams who had been affected by the fumes.

51. In his witness statement the claimant explained that he had chosen Mr Williams to be his companion as he had witnessed the events of 15 January, but the respondent refused to let him speak at the meeting. We accept that evidence, because it is supported by Mr Mulholland's statement where he appears to be critical of Mr Williams for attempting to interject and involve himself in the meeting and by what took place at the start of the next disciplinary meeting (which we explain below). We think the respondent should have permitted Mr Williams to give evidence; either at the disciplinary meeting or in a separate interview if they considered that more appropriate. We take into account that Mr Williams had attended the disciplinary formally in the capacity of a companion rather than a witness, but we think it was unduly restrictive for the respondent to prevent him from giving evidence for that reason. It was relevant that the claimant did not have the benefit of trade union representation and he seems to have been unaware of the correct process for calling a witness. We note that the invitation to the disciplinary had not said that the claimant was entitled to call witnesses, or set out any process for doing so. Instead, the letter only referred to the claimant's right to have a companion to represent him. In all the circumstances we are of the view that the respondent did not give the claimant a reasonable opportunity for his relevant witness, Paul Williams, to give evidence.

52. At the disciplinary hearing on 15 March the claimant again conveyed important information as to the reasons why he had left the line and not obeyed the instruction to work at the end of it. The claimant firstly explained that a previous manager of his, Zahor Iqbal, had given him permission for him to work at the top of the line. There was however no record put before us of the respondent ever having interviewed Mr Iqbal to verify if what the claimant said was correct.

53. During the tribunal hearing Mr Mulholland said that he had in fact spoken to Mr Iqbal and he had denied giving the claimant permission to work in an alternative area. We did not accept that evidence for these reasons. Not only was there no record of any discussion or interview with Mr Iqbal it was not referred to any of the contemporaneous documentation, including the hearing notes and outcome letter. Mr Mulholland only mentioned it for the first time in cross examination – it was not in his witness statement. In fact, Mr Mulholland's witness statement appeared to contradict his oral evidence as he said in his statement that he had decided that he *"did not need to speak to the local supervision".*

54. We find that the failure to interview Mr Iqbal was another example of the respondent failing to obtain relevant evidence which the claimant alerted it to.

55. At the disciplinary hearing on 15 March the claimant developed the point that he had raised his concerns about the fumes with previous managers and he named about 15 managers who he said had all been involved in his complaint about this issue. The claimant then summarised his position in this way*: "I have took it upon myself to escalate the problem with the drive off and extraction I spoke to everybody in connection and didn't know who to go to I had exhausted all options".* The claimant then said: *"I didn't know what to do I've tried everything in my power I got nowhere else to go with this".* Mr Mulholland did not do any investigation with the managers named by the claimant so that the claimant's assertion that he had exhausted other options could be considered. Mr Mulholland appears to have instead focused exclusively on the fact that the claimant had walked off the production line and the negative impact which that may have had on the respondent's production process. The same basic error was therefore made by Mr Mulholland as Mr Davidson as he failed to investigate or consider the reasons why the claimant had walked off the CAL.

56. We had no reason to disbelieve the claimant's evidence that he repeatedly raised his concern about cars driving off early and the resultant exposure to fumes to numerous different managers. We therefore accepted the claimant's evidence on the point, and we find that the claimant was right to say that he felt he had exhausted other options by the time he walked off the CAL. There was no clear evidence put before us that anything had been done to address the claimant's concern, other than Mr Iqbal telling him he could go and work at the top of the CAL.

57. Mr Mulholland adjourned the meeting on 15 March and reconvened on 20 March when the claimant was again represented by Paul Williams. At the very start of that second meeting the notes record that Mr Mulholland said as follows*: "Paul [Williams] is [not] here as a witness you were getting engaged and involved in the last meeting. You cannot do that."*

58. We consider that this was a strange and unfair thing to say, for the following reasons. Reviewing the respondent's own notes of the first meeting on 15 March there is absolutely no indication that Paul Williams had said anything inappropriate or that he had attempted to inappropriately get involved. In fact, according to the notes he said very little indeed – probably because, as we have found, Mr Williams was wrongly prevented from speaking at the first meeting. We accept that it might not be appropriate for a representative to answer all questions on behalf of an employee, but Mr Williams had not done that and he was given an instruction from Mr Mulholland that he was not to be engaged or involved in the meeting at all. We accept that instruction was likely to have inhibited Mr William from participating fully in the meeting. The instruction was wrong and unfair because as the claimant's chosen representative Mr Williams should have been permitted to engage and get involved in the meeting.

59. We also have to say that we found other aspects of Mr Mulholland's involvement troubling. We shall identify the three main issues.

60. The first issue was that during the tribunal hearing Mr Mulholland in answering questions from a panel member said that the decision that the claimant had breached the code of conduct by failing to follow a reasonable instruction had already been made at the investigation stage and he therefore saw his role as simply to decide on an appropriate penalty, rather than determine whether the claimant had a valid reason for not obeying the instruction. This meant the same flaw was made as in the investigation stage; i.e. that there was a failure to consider the reason why the claimant had not followed the instruction.

61. The second issue was that in cross examination Mr Mulholland said that he had not taken the claimant's service into account, and in fact he did not even know that the claimant had 23 years' service. We found this particularly troubling.

62. The third issue concerned an entry in the respondent's concern and countermeasure action report ("CCAR") book. On 14 March 2018 there was an entry in the book which recorded a concern raised by someone other than the claimant that cars were being driven off the CAL early. Plainly this was evidence which tended to support the claimant's assertion that the cars had been driven off the line early on other occasions, including 15 January. In his oral evidence to the tribunal Mr Mulholland said he was aware of that report as he had checked the records - but that was not mentioned in his witness statement. Moreover, Mr Mulholland's oral evidence was contradicted by the note of the meeting on 20 March where he is recorded as saying to the

claimant*: "I have not seen anything that says another person has raised issues".* At that point it was the claimant who brought it to Mr Mulholland's attention that the CCAR had been raised on 14 March.

63. We therefore do not think that Mr Mulholland had checked the CCAR as he claimed. We also think that any reasonable employer would have accepted that the 14 March CCAR was at least capable of demonstrating that the claimant was right that there was an issue with cars driving off the CAL early and therefore further investigation was required (in particular with the claimant's colleagues who worked on the CAL). It was not suggested to us that there was any reason to think that the CCAR raised on 14 March was not reflective of a genuine concern. However, Mr Mulholland appears simply to have ignored it – it was not mentioned in either his dismissal letter, or his handwritten note regarding the rationale for his decision, or, as we have mentioned, his witness statement for this Tribunal.

64. During the meeting on 20 March Mr Mulholland said: "*I know you have had some time off after the incident and its down to stress and not fumes".* The claimant responded: *"stress of the situation nowhere else to go with it".* It was clear then that the claimant was saying that the situation with the fumes and in particular the feeling that he had nowhere else to go with it (the claimant also told Mr Mulholland he felt he had *"exhausted every approach"*) was causing him stress.

65. The claimant also again made it clear to Mr Mulholland that his issue was about cars being driven off earlier than the extraction area. He said as follows: "*the company has put a drive off zone so it is a company thing if the cars had been driven off the area, I wouldn't have had a problem".*

66. Mr Mulholland sent his decision to the claimant by letter dated 30 March 2018. Mr Mulholland found that the claimant had been in breach of the company's code of conduct because of a refusal to comply with a reasonable and authorised instruction. Mr Mulholland took into account the final warning which was issued on 13 March 2017 because that was still live at the time of the incident.

67. Mr Mulholland's only consideration of the reason why the claimant had not obeyed the instruction and had instead left the CAL was as follows: *"the only reason you offered in your statement for taking the action that you did was the issue with the fumes. There is no medical evidence to back this claim up".*

68. That conclusion did not take any account of the complaint which the claimant had raised of cars being driven off earlier than the extraction point which had still not been investigated but which was supported by the 14 March CCAR which Mr Mulholland had been made aware of by the claimant. It also did not take any account of the relevant medical evidence that the claimant had been caused stress at work by the situation on 15 January which the claimant had

expressly told Mr Mulholland about, and which was supported by the fit note submitted to the respondent.

69. There was also no investigation or consideration by Mr Mulholland of the other important matter raised by the claimant to him which was his assertion that he had exhausted all options in repeatedly raising his concerns previously.

Findings – the appeal

70. The claimant appealed the decision to dismiss him and he set out his appeal grounds in writing to the respondent. The claimant's first appeal ground was as follows: *"I do not feel that the investigation conducted which led to my dismissal was thorough and impartial. The whole investigation/disciplinary meeting was based upon me walking off the job but not the reason surrounding this action. In addition, associate Paul Williams was not interviewed as part of the investigation although he witnessed the events on 15 January 2018 nor was he allowed to input at the hearing when he accompanied me. After 23 years of service I would have expected a more thorough investigation."*

71. It is fair to observe that that ground spelt out that the respondent had failed to focus on the reason why the claimant had walked off and specified the importance of Mr Williams as a witness who had not yet been interviewed. In our view, a reasonable appeal would have aimed to remedy those issues first of all. As we shall explain however, this appeal did not.

72. The claimant also emphasised in his appeal grounds the point that his stress was a *"direct result of being asked to work in an area where vehicles are being driven off early where there is no extraction".* He also reiterated again that he had escalated that matter on numerous occasions previously, and he again said that he walked off as he felt like he had *"exhausted all viable options".* He highlighted that had the cars been driven off in the demarcated area he would not have left his place of work, however due to feeling extremely stressed about the situation he just didn't know what else to do.

73. The claimant's appeal hearing took place on 23 April 2018 and was conducted by Nigel Van Ommeren. Despite having been alerted to the issues which we have summarised from the claimant's appeal grounds (which essentially went to the reason why the claimant had walked off the CAL) Mr Van Ommeren did not take the opportunity to investigate or consider them. In particular Mr Van Ommeren did not investigate the extent to which the claimant had raised this issue previously and whether it was correct or not that cars on the day in question had been driven off prior to the extraction point. Mr Van Ommeren also does not appear to have investigated or considered the 14 March CCAR despite that too being expressly referred to in the claimant's appeal grounds.

74. Moreover, despite being explicitly told in the claimant's first appeal ground that Paul Williams was a relevant witness who had not been interviewed Mr

Van Ommeren did not take the opportunity to interview Mr Williams. This was despite the fact that Mr Williams was available as he attended the appeal hearing as the claimant's representative.

75. Mr Van Ommeren's decision was that he upheld the dismissal. His reasons for doing so are summarised in the letter he sent to the claimant on 27 April 2018. In that document Mr Van Ommeren said that the claimant had not presented any new evidence. We find that a surprising conclusion when the claimant had expressly said that Paul Williams was a relevant witness who had not yet been interviewed. Mr Van Ommeren also said that the claimant had not shared any relevant medical information to confirm that the situation was making him ill. Again we find that a surprising conclusion when the respondent was in possession of the relevant medical information that the claimant been signed off with stress and in his appeal grounds the claimant was explicit that it was the situation on 15 January and the fact that his concerns had not been listened to previously which had caused him that stress.

Findings – a summary

76. Our key findings of fact may be summarised as follows:

    a. On 15 January 2018 the claimant was working at the top of the CAL because he was concerned about exposure to exhaust fumes at the bottom of the CAL.

    b. The reason why the claimant was concerned was because he had observed cars being driven off the CAL prior to the extraction point which meant the exhaust fumes were not extracted.

    c. The claimant had raised his concerns about cars being driven off the CAL and the resultant exposure to fumes to numerous different managers on numerous different occasions.

    d. There is no evidence to suggest that the claimant's concerns over cars being driven off early and the resultant exposure to fumes at the bottom of the CAL were anything other than genuinely and reasonably held. The CCAR raised by another member of staff on 14 March supports the claimant's evidence.

    e. On 15 January an instruction was given by Ken Carter and communicated to the claimant through Jo Savistio for the claimant to move to the bottom of the CAL.

    f. The claimant immediately raised to Jo Savistio that he did not wish to move to the bottom of the CAL as cars were being driven off the line early and he would therefore be exposed to exhaust fumes.

g. Nothing was done to check whether the claimant's concern about cars being driven off early was correct and the claimant's concern was not reported back to Ken Carter by Jo Savistio on 15 January.

h. Ken Carter then repeated his instruction for the claimant to move to bottom of the CAL and this was again communicated to the claimant by Jo Savistio in terms that reflected Ken Carter's desire for the claimant to move *"straight away".*

i. The claimant did not obey Ken Carter's instruction and instead he left the CAL and went home. In so doing he declined to speak to Ken Carter directly other than to say he was not feeling well in a raised voice.

j. The claimant was frustrated by the respondent's failure to address his concerns over cars being driven off early and the insistence on him moving to the area where he would be exposed to exhaust fumes caused by the cars driving off early. That frustration led to a significant stress reaction in the claimant which is evidenced by the fact that the claimant's GP signed him off for 28 days from 15 January with *"stress at work".*

k. The process adopted by the respondent to consider the events of 15 January was marred from start to finish by a failure to properly investigate and consider the reasons why the claimant had acted the way he did, despite relevant information being brought to their attention.

Our conclusions on s.100 ERA

77. We turn firstly to the question of whether the claimant was automatically unfairly dismissed, and in particular whether s.100(1)(e) ERA applied in this case.

78. Following Oudahar we consider firstly whether the criteria set out in the provision are met as a matter of fact. We find that there were circumstances of danger which the claimant reasonably believed to be serious and imminent. The circumstances of danger were that the claimant was being told to work in an area where he would be exposed to exhaust fumes as cars were being driven off the CAL prior to the extraction point.

79. The claimant reasonably believed that danger to be imminent because Mr Carter's instruction communicated via Jo Savistio was for the claimant to move to the bottom of the CAL *"straight away".*

80. We consider that the claimant reasonably believed the danger to be serious as he was being asked to work in the area close to where the cars were moving off at the wrong point and would therefore face significant exposure to the fumes. We accept that it is possible to think of more serious dangers in the workplace and this danger was not immediately life threatening. However, we do not think a danger has to be life threatening in order to be serious. On the evidence presented to us it seems obvious that the respondent correctly

regarded exposure to exhaust fumes on a busy production line to be a serious danger and that is why it took steps to have procedures in place (such as cars only driving off over the extraction point) to ensure employees were not exposed to the danger. We think it is a serious matter when those procedures are not adhered to and the claimant was reasonably entitled to believe that working at the bottom of the CAL would put him in serious danger as a result of exposure to the fumes.

81. We consider that the claimant took appropriate steps to protect himself from the danger. The appropriate steps were to walk off the CAL and to disobey Mr Carter's instruction to move to the bottom of the CAL. In making that assessment we bear in mind that the claimant had raised his concerns about cars driving off the CAL at the wrong point to Jo Savistio and Andy Cole on 15 January, and to numerous different managers prior to 15 January. In our judgment nothing had been done to address his concerns other than give the claimant permission to work at the top of the CAL – permission which was now effectively being rescinded by Mr Carter's instruction. He was left feeling stressed that his concerns were not being listened to and he was instead being instructed to go and work – "*straight away"* - in the very area where he would be exposed to the fumes as a result of cars driving off at the wrong point. His level of stress at this point was such that he was subsequently signed off by his GP for 28 days.

82. We find that those are the most relevant circumstances for the purposes of s.100(2) ERA. It is particularly salient in our view that the claimant's knowledge included that he had raised the issue about exposure to fumes caused by cars driving off the CAL at the wrong point but no steps had been taken by the respondent to remedy the situation. We think it would have been relatively straightforward for Ken Carter and/or Jo Savistio to do so on 15 January. For example, by issuing instructions that cars were to only be driven off at the extraction point and demonstrating to the claimant that these instructions were being adhered to. We heard no evidence that anything like that was done and, in the circumstances, we find that walking off the CAL and not obeying the instruction from Mr Carter was an appropriate step for the claimant to protect himself.

83. We have considered the point which was emphasised to us by the respondent which is, in summary, that there were less extreme options open to the claimant which he could have taken rather than walking off the line and disobeying Mr Carter. For example, the respondent says that the claimant could have used his break (which was at 8.30AM) to report his concern by way of raising a CCAR or speaking to a health and safety rep. We accept that the claimant was an experienced employee who would have been aware of those options. However, we do not think this undermines our view that the claimant's actions on the day were appropriate. Our reason for so finding is that the evidence indicates that the claimant had already raised his concern and escalated it to various managers but no remedial action had been taken

by the respondent other than give the claimant permission to work at the top of the line. Nothing was done to actually rectify the problem of cars being driven off the CAL at the wrong point (and we think that point is demonstrated by the CCAR which was raised on 14 March).

84. Put bluntly it seems to us that this was a highly experienced employee who was raising a genuine health and safety concern, but his concern was not taken seriously by the respondent. In our view the claimant was justified in feeling by the time of his actions on 15 January that he had, as he put it, exhausted other options. The claimant could have had no confidence that had he reported the issue again on 15 January that it would have been addressed.

85. The respondent's argument that the claimant should have utilised other options rather than walking off also rather misses the point that the claimant was being told he had to move to the area where he would be exposed to the fumes straight away. There was therefore an urgency to the situation. Our findings of fact demonstrate that the claimant had raised his concerns to Ken Carter, Jo Savistio and Andy Cole either on or shortly before 15 January and there was a list of other managers who the claimant had also raised concerns with on earlier occasions but nothing had been done to resolve the problem of cars driving off the CAL early. Against that background and faced with the stark instruction that he should go to work straight away in the very area where he had repeatedly reported he had been exposed to fumes without corrective action being taken by the respondent, we think the claimant acted appropriately.

86. We find that the employer's reason for dismissal was the claimant's decision not to obey Mr Carter's instruction. This was the breach of the code of conduct which was identified in the dismissal letter of 30 March 2018 and it was confirmed that this was the reason for dismissal in the respondent's letter to the claimant of 13 April 2018. We are therefore satisfied that the reason for dismissal was the step which the claimant took to protect himself from danger. In those circumstances the dismissal must be regarded as automatically unfair by virtue of s.100(1)(e) ERA.

87. In our judgment this is a case where the respondent never investigated whether the circumstances of danger identified by the claimant (i.e. those created by cars moving off the CAL early) were made out. The respondent was therefore not in a position to judge whether the steps taken by the claimant to protect himself were appropriate, although they suggest that in their view the steps were not appropriate. In our view the claimant had a reasonable belief in the danger and the steps he took were appropriate for the reasons we have identified. Following Oudahar it does not matter if the respondent either disagrees with the claimant or did not bother to find out; the claimant is still protected, and he falls within s.100(1)(e).

88. We go on to consider whether this dismissal also fell within the other subsections of s.100(1) ERA relied upon by the claimant.

89. In relation to s.100(1)(c) our finding is that the claimant was not dismissed for bringing to the respondent's attention harmful circumstances connected with his work, but rather the actions he took on 15 January 2018. Those actions went beyond merely bringing matters to the respondent's attention. We therefore do not think the claimant's dismissal could fall within s.100(1)(c).

90. In relation to s.100(1)(d) we again find that the claimant met the criteria in that subsection as a matter of fact. There were circumstances of danger which the claimant reasonably believed to be serious and imminent for the reasons we have explained. As to whether the claimant could reasonably have been expected to avert the danger it is difficult in our judgment to see what else the claimant could do. He had raised his concerns with Jo Savistio and Andy Cole on the day and had raised them with other managers previously but was still faced with an instruction from Mr Carter to move to the bottom of the line straight away. In their closing submissions at paragraph 26 the respondent suggested that the claimant could have had a conversation with Mr Carter to *"explain the whole issue"* and this would have averted the danger. We think that argument does not take account of Mr Carter's own evidence that the claimant had raised the fumes issue with him about 3 weeks beforehand. There is no evidence that on that occasion Mr Carter listened to the claimant and agreed a solution which suited him (which is what he said he would do in his witness statement). We therefore think that in the context we have set out in some detail in this judgment the claimant could not reasonably have been expected to do anything other than refusing to return to the dangerous part of his place of work (i.e. the bottom of the CAL). As we have explained the reason for dismissal was the refusal to obey Mr Carter's instruction to work at the bottom of the CAL and so we find that s.100(1)(d) was also engaged in this case.

91. Our conclusion is therefore that the claimant's dismissal was automatically unfair, because the reason for dismissal fell within both s.100(1)(d) and (e) ERA.

Our conclusions on s.98 ERA

92. We have also considered the question of whether this dismissal was fair or unfair by reference to s.98 ERA (i.e. ordinary unfair dismissal). We are satisfied that the respondent has shown that the reason for dismissal related to the conduct of the claimant. We also think the respondent honestly believed the claimant to be guilty of misconduct. However, we have concluded that the dismissal was unfair by reference to s.98 ERA. Our reasons for so finding are as follows.

93. The investigation in this case fell outside the reasonable range for the reasons we have identified above (see in particular paragraphs 47 - 48). The defects were not rectified at any later stage of the process despite the claimant alerting the respondent to them.

94. The respondent did not hold its belief in the misconduct alleged on reasonable grounds, because it failed to consider the question of whether the instruction issued by Mr Carter was reasonable. This issue is interlinked with the claimant's reason for refusing the instruction as it meant assessing the claimant's evidence that he was being asked to work in an area where he would be exposed to exhaust fumes and that he had raised complaint about that matter on numerous occasions without corrective action being taken. A reasonable consideration of whether the instruction was reasonable would have assessed in particular:

    a. Whether the claimant's concern about exposure to fumes at the bottom of the CAL by reason of cars moving off early on 15 January was well founded, i.e. were the cars moving off early on that day or not.

    b. Whether it was correct that the claimant had raised the issues on many occasions previously such that on 15 January he was right to think he had "exhausted all other options".

95. We cannot see that the respondent properly considered either of those two points at any stage of the process.

96. The decision to dismiss fell outside the range of reasonable responses. In our judgment no reasonable employer would have dismissed the claimant for refusing to comply with an instruction when the claimant genuinely and reasonably believed that complying with it would have placed him at a health and safety risk by reason of exposure to exhaust fumes, in the context of the claimant having raised numerous complaints about the fume issue with seemingly nothing being done to rectify it.

97. We were struck by the fact that the respondent's investigator, Mr Davidson, readily explained to the Tribunal that he thought the claimant did genuinely believe there was an issue with the fumes, and this was why he had walked off the CAL. We think any reasonable employer would have sought to properly assuage this highly experienced employee's genuine concerns rather than issuing the stark instruction for him to go to work straight away in the area where he genuinely believed that he would be exposed to fumes. We therefore think that any reasonable employer would have concluded that the instruction issued by Mr Carter was not reasonable in the circumstances.

98. In terms of whether the claimant's genuine belief that he would be exposed to fumes was reasonably held in our judgment the respondent had no evidence to suggest that the claimant's belief in that risk was not reasonable. It failed to interview witnesses who may well have supported the reason for the claimant's belief even when requested to do so by the claimant (Paul Williams) and it failed to properly consider the independent evidence that the claimant's belief was well founded (the CCAR of 14 March).

99. Mr Mulholland's decision to effectively disbelieve the claimant as there was, as he saw it, a lack of medical evidence to back up the claimant's point about exposure to fumes was in our judgment unreasonable. It appears from the fact that Mr Mulholland disregarded the evidence of stress that he was focused on medical evidence of a physical condition. This in itself is an unduly limited approach as the claimant's stress reaction was a relevant consequence of the events of 15 January. Mr Mulholland also appears to have failed to realise that on 15 January the claimant had gone to work at the top of the CAL outside the area where he would be exposed to fumes so he would not have experienced the sore throat which he says he experienced on other occasions. Finally, we consider that any reasonable employer faced with an employee who had taken action to avoid a health and safety risk (in this case exposure to fumes) would not require evidence to show that the employee had been caused some kind of medical condition or injury before they acted. The whole point of the claimant's actions was to avoid the risk. A reasonable employer would necessarily have considered whether the risk was present rather than focus on whether there was medical evidence of a health condition or injury.

100. There were a series of procedural failings which we find caused serious unfairness to the claimant. The key failings are as follows:

    a. Mr Mulholland's mistaken belief that his function was simply to decide on sanction rather than consider the issue of whether the claimant was actually guilty of the misconduct alleged. In our judgment this error seems to have contributed to the failures to consider whether the instruction issued to the claimant was reasonable and to assess the claimant's reasons for disobeying it.

    b. Mr Mulholland's failure to take into account the claimant's length of service. We must say that we found this to be a particularly egregious failing as the claimant had very nearly 23 years' service, yet Mr Mulholland was not even aware of that.

    c. Paragraph 12 of the ACAS code of practice on disciplinary and grievance procedures ("the ACAS code") states that an employee should be given "*a reasonable opportunity to ask questions, present evidence and call relevant witnesses".* We consider that Paul Williams was a relevant witness who the claimant made it clear he wished the respondent to hear evidence from. The respondent did not do so, and we consider that was unfair and it was a breach of the ACAS code.

    d. Paragraph 17 of the ACAS code states that when an employee is accompanied by a companion at a disciplinary meeting the companion *"should be allowed to address the hearing to put and sum up the worker's case, respond on behalf of the worker to*

any views expressed at the hearing and confer with the worker during the hearing". As we have set out the claimant's chosen companion was Paul Williams, yet he was prevented from speaking at the first disciplinary and told at the start of the reconvened disciplinary meeting on 20 March that he was not to get *"engaged"* or *"involved"* in the meeting. We consider there was no justification for that restriction, it was unfair, and it constituted a breach of the ACAS code.

101. We turn finally to the issue of the final warning. We have already found this was valid and the respondent was in principle entitled to take it into account for disciplinary purposes for a period of 52 working weeks from 13 March 2017. The conduct which the claimant was dismissed for fell within that period.

102. In their witness statements prepared for this hearing both of the decision-makers, Mr Mulholland and Mr Van Ommeren, said that they felt that the claimant's conduct on 15 January was *"identical"* to the conduct which had led to the claimant receiving a warning a year previously. This way of thinking is also apparent from the decisions they made at the time and it seems to have influenced their decisions. We do not think it can reasonably be said that what happened on 15 January was identical to what took place the previous year. The misconduct which led to the imposition of the final warning had nothing to do with the claimant's health and safety concerns. It had not been suggested that in 2017 the claimant had left the line to avoid exposure to exhaust fumes. There had been no suggestion in 2017 that the claimant was faced with a management instruction which was unreasonable in the circumstances.

103. Again, it appears to us that in describing the two incidents of misconduct as identical the respondent was ignoring the evidence as to the reasons why the claimant had acted the way he did on 15 January. We think the characterisation of the two incidents as identical was not one which was open to a reasonable employer and this mischaracterisation contributed to the dismissal falling outside the reasonable range. In light of the particular context for the claimant's conduct on 15 January we do not think any reasonable employer could have dismissed even taking into account the previous warning which it seems to us was issued in completely different circumstances.

104. For those reasons we find that this dismissal was unfair on ordinary grounds under s.98 ERA as well as automatically unfair under s.100 ERA.

Our conclusions on the other matters

105. We deal firstly with the question of an uplift for failure to comply with the ACAS code under s. 207A Trade Union & Labour Relations (Consolidation Act 1992. Under subsection (2) of that section we have to consider whether:

(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.

106. If we find that there were such unreasonable failures to comply with the ACAS code then we may, if we consider it just and equitable in all the circumstances to do so, increase any award we make to the claimant by no more than 25%

107. It was not in dispute that these proceedings concern a matter to which the ACAS code applies. We have identified two failures to comply with the ACAS code in paragraph 100 c and d above. We find that those failures were unreasonable. There was in our view no reasonable justification for failing to call Mr Williams to give evidence as he was plainly a relevant witness and the claimant wished for him to give evidence. Similarly, we see no justification at all for the respondent informing Mr Williams that he was not to get engaged or involved in the disciplinary meeting when he had attended as the claimant's companion.

108. We have considered whether it is just and equitable to uplift the compensatory award in all the circumstances. We have decided that it is. We take into account that the respondent is a large employer with significant resources including a HR function and that the failures are likely to have inhibited the claimant from defending himself as he wished as they unfairly restricted his ability to call witnesses and have his companion participate in the hearing.

109. In determining the appropriate amount of uplift, we bear in mind that this was not a wholesale failure to comply with the code. On the other hand, the failures were not insignificant, and we think they unfairly impacted upon the claimant in the way we have described. In all the circumstances we think a 10% uplift to the compensatory award is appropriate in this case.

110. We turn next to the question of a Polkey reduction. We have to consider the questions of whether the claimant could have been dismissed fairly at a later date, or on a percentage chance if a proper procedure had been followed.

111. We have to bear in mind that we have found that this dismissal was substantively as well as procedurally unfair and indeed that we have found that it was automatically unfair. The respondent has not put forward any other misconduct which the claimant could have been dismissed for outside of the events of 15 January 2018 and we have already expressed our view that no reasonable employer would have dismissed the claimant for refusing to comply with the instruction as the claimant genuinely and reasonably believed that complying with it would have placed him at a health and safety risk by

reason of exposure to exhaust fumes. We emphasise an important reason for that decision was the context of the claimant having raised numerous complaints about the fume issue with seemingly nothing being done to address it. Therefore, although we have identified a number of serious procedural failings fair procedures would not in our judgment have made this dismissal fair.

112. In their closing submissions at paragraph 35 the respondent argued that the claimant's conduct towards his line manager on 15 January meant that a dismissal was inevitable. We do not agree. We would accept that the claimant's conduct was intemperate, but only to the extent that he showed how frustrated he was and he raised his voice. We do not think it can realistically be argued that the claimant behaved so rudely or aggressively to his line manager as to make dismissal inevitable, and it is not possible to see how dismissal could have been a fair sanction for raising his voice after 23 years' service. Moreover, our fundamental finding is that in view of the context of the events of 15 January – essentially the claimant being told to work in an area straight away where he had repeatedly raised concerns about exposure to fumes which had not been acted upon – we think that the claimant's actions on that day and his level of frustration were understandable. We therefore do not think that the claimant could have been fairly dismissed for his behaviour on 15 January.

113. For those reasons we find that a Polkey reduction is not appropriate in this case.

114. We turn finally to the question of whether there should be any deduction from any sum awarded under s. 122(2) or s. 123(6) ERA due to contributory conduct on the part of the claimant. We have reminded ourselves of the wording of those sections and both counsel agreed that the test for us to apply was clearly set out in the case of Nelson v BBC (No 2) [1980] ICR 110 which we have also referred to. In summary, we have to consider whether the conduct of the claimant was culpable or blameworthy in the sense that it was foolish or perverse or unreasonable in the circumstances, and if so whether it caused or contributed to the dismissal and whether it is therefore just and equitable to reduce the assessment of the claimant's loss. It is also appropriate for us to bear in mind that it has recently been confirmed by the EAT that contributory conduct in this context includes conduct which may fall short of gross misconduct and it need not necessarily amount to a breach of contract (Jagex ltd v McCambridge UKEAT/0041/19/LA).

115. We have considered the question of whether we should make a deduction for contributory conduct carefully. We recognise there are factors which could indicate a deduction on this ground is appropriate: the bare fact that the claimant walked off the job, the fact the claimant could have waited until his break and raised his complaint formally (again) and the intemperate nature of some of his behaviour (in particular raising his voice). However, we

have to assess whether the claimant's behaviour was culpable or blameworthy in the circumstances. As we have attempted to explain at some length in this judgment, we think this was a case in which the circumstances and the surrounding context of what took place on 15 January were important and we cannot ignore it. In summary the relevant context was that the claimant was being told to work in an area straight away where he had repeatedly raised concerns about exposure to fumes which had not been acted upon. In those circumstances our judgment is that the claimant's conduct was not foolish or perverse or unreasonable. We therefore do not make any deduction for contributory conduct.

116. In making this decision we emphasise our earlier finding that the claimant took appropriate steps on 15 January to protect himself from the danger of being exposed to exhaust fumes. It is difficult to see how the claimant's conduct could be appropriate in that sense but also foolish, perverse or unreasonable.

117. We have also taken into account our finding that in addition to disobeying the instruction and walking off the claimant raised his voice. It might be said that raising one's voice to a manager is unreasonable in any circumstance. However, as was explained in Nelson, not all unreasonable conduct is necessarily blameworthy or culpable; it depends on the degree of unreasonableness involved. In the circumstances we have described we think the degree of unreasonableness in the claimant raising his voice must be minimal and it falls short of being culpable or blameworthy.

118. We have also reflected on the fact that in Nelson Brandon LJ used the colloquialism "bloody minded" to describe the type of conduct which he thought would constitute contributory conduct in this context. We recognise it can sometimes be inappropriate to stray into colloquial language, but Nelson is still the leading case on this issue, it was relied upon by both counsel before us and it was cited and followed by the EAT as recently as McCambridge. In our view the claimant's conduct on 15 January was the very opposite of what we understand bloody minded to mean. The claimant was not being deliberately difficult or awkward, rather he had a genuine and reasonable belief that if he moved to the bottom of the CAL, he would be exposed to exhaust fumes by cars driving off early. The respondent had not rectified that problem when the claimant had raised it previously. That was what led the claimant to act as he did on 15 January and there was in our view no bloody mindedness on his part. This reinforces our decision that it would be wrong to make a decision for contributory conduct in this case.

Postscript

119. As the parties are aware, we provisionally listed a remedy hearing for this case on 16 March. The parties should inform the Tribunal as soon as possible if that hearing is not necessary.

120. If the remedy hearing is required, we understand from discussions at the liability hearing that the parties will need to consider appropriate directions. As the parties are both professionally represented, we hope directions can be made by agreement. We therefore direct the parties to file with the Tribunal an agreed set of directions for the remedy hearing within 21 days of the date this judgment is sent. If there are any areas of disagreement over the appropriate directions, then these will need to be identified so the Tribunal can make a decision if necessary.

121. The parties are reminded that the remedy directions will need to include provision for the following:

(i) An up to date schedule and counter schedule of loss.

(ii) An agreed list of issues, identifying with precision the issues which are agreed and the issues which require the Tribunal's adjudication with the parties' respective positions recorded.

(iii) A timetable for the remedy hearing, including enough time for the Tribunal to consider and give its decision.

(iv) Exchange of short skeleton arguments.

122. Finally, it was unfortunate that the time estimate for this hearing was unrealistically short and the Tribunal had not been informed of that fact in advance. If the parties think the one-day time estimate for the remedy hearing is likely to be insufficient for the case to be concluded on that day then they should inform the Tribunal as soon as possible so that a longer listing may be obtained if appropriate.

Signed by: Employment Judge Meichen

Signed on: 13 January 2020