EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102972/2019

Held in Glasgow on 1 and 2 October 2019

Employment Judge L Wiseman

Mr C	**Claimant** **Represented by:** **Mr G Bathgate - Solicitor**
West Dunbartonshire Council	**Respondent** **Represented by:** **Mr G Walsh - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided the claimant was unfairly dismissed.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 15 March 2019 alleging he had been unfairly dismissed.

2. The respondent entered a response admitting the claimant had been dismissed for reasons of conduct and/or some other substantial reason, but denying the dismissal was unfair.

3. The claimant's representative, at the commencement of the hearing, made an application for an Order in terms of rule 50 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules) for an anonymisation order and restricted reporting order in respect of the claimant. Mr Bathgate explained the claimant had been charged with a serious offence

but had been released on bail and subsequently no criminal proceedings had been brought against him. Mr Bathgate submitted that the Orders were necessary to protect the claimant's right to privacy. Mr Walsh did not object to the application.

4. I decided to grant the application because I considered it material that no criminal proceedings had been brought against the claimant and he is seeking, if successful, the remedy of reinstatement. I decided it would be appropriate to make an Anonymisation Order in terms of rule 50(3)(b) of the Rules and ordered the claimant would be referred to as Mr C; and that it would also be appropriate to make a Restricted Reporting Order in terms of rule 50(3)(d) of the Rules.

5. This was a hearing on liability only and the issue for the tribunal to determine was whether the decision to dismiss the claimant was fair or unfair in terms of section 98 Employment Rights Act.

6. I heard evidence from Mr Scott McLelland, Co-Ordinator for Housing Operations, who carried out the investigations; Mr Edward Thomas, Housing Operations Manager, who took the decision to dismiss and from the claimant.

7. I was also referred to a jointly produced set of documents, which included a statement of agreed facts. I, on the basis of the evidence before me, made the following material findings of fact.

Findings of fact

8. The claimant commenced employment with the respondent on the 22 August 2005. He was employed as a Mobile Caretaker, responsible for carrying out care taking and cleaning duties in one of the respondent's multi-storey block of flats.

9. The claimant's principal statement of terms and conditions of employment was produced at document 3.

10. Mr McLelland, Co-Ordinator for Housing Operations, was asked to undertake an investigation into allegations the claimant had, on the 2 November 2017,

entered a tenant's flat to drink alcohol during working hours, and that he had subsequently been involved in an incident outwith work involving Police Scotland.

11. Mr McLelland interviewed the tenant involved, the tenant's partner, four other caretakers, the caretaker supervisor and the claimant. He also viewed the Housing Information Systems and the CCTV. Mr McLelland produced an Investigation Report (document 23). He concluded the evidence gathered supported allegation 1, but in respect of allegation 2 the position was that the tenant's partner stated she had reported an alleged rape to the Police but the claimant stated he had not been interviewed by the Police.

12. The Investigation Report was passed to Mr Edward Thomas, Housing Operations Manager, who decided a disciplinary hearing should be arranged.

13. The claimant was invited to attend a disciplinary hearing on the 26 June 2018. The notes of the disciplinary hearing were produced at document 22.

14. The claimant attended the disciplinary hearing and was accompanied by Mr Charlie McDonald, a trade union representative. Mr McLelland also attended the disciplinary hearing to present his report.

15. Mr Thomas decided, in relation to the first allegation (that the claimant had, whilst on duty, entered a tenant's flat and consumed alcohol during working hours) to uphold the allegation on the balance of probabilities. This conclusion took into account the claimant's admission that he had left work early with the tenant's partner, travelled to Cumbernauld with her and spent the night with her.

16. Mr Thomas decided, in relation to the second allegation (that the claimant had been involved in an incident outwith work involving Police Scotland) that there was insufficient information to make a decision. The respondent understood from the tenant's partner that she had reported an alleged rape to the Police and that this matter was being investigated; however the claimant confirmed he had not been spoken to or charged by the Police. Mr Thomas concluded he had no information upon which to consider the implication of the allegation.

17. Mr Thomas decided to take action short of dismissal and to impose a final written warning which was to stay in place for an extended period of two years. Mr Thomas further decided it would be appropriate for the claimant to return to work at a different location.

18. The outcome of the disciplinary hearing was confirmed in a letter dated 12 July 2018 (document 21). The claimant did not appeal against the decision.

19. The claimant, who had been suspended from work since the 29 November 2017, returned to work on or about the 28 July 2018. He returned to caretaker duties at a different location.

20. The claimant was asked to attend the Police station on the 10 September 2018. He was interviewed regarding the allegation of rape, and charged. The claimant appeared on Petition at Court on the 21 September 2018 when he pleaded not guilty and was released on bail.

21. The claimant immediately informed the respondent of the charge. The claimant was suspended from duty on the 12 September 2018 (document 6) to allow an investigation to take place.

22. The claimant was, by letter of the 14 September (document 7) invited to attend an investigation meeting with Mr Scott McLelland. The allegations against the claimant were (i) that *"in light of the charge of Rape brought against you from Police Scotland on 10th September 2018. Having been charged of a crime of this, you are alleged to be in serious breach of trust and confidence required to fulfil your employment contract as an employee of West Dunbartonshire Council" and (ii) furthermore, it is alleged that the nature of the charge has placed the organisation at serious risk of reputational damage."*

23. Mr McLelland carried out the investigation by interviewing the claimant, the caretaker supervisor and the Housing Co-Ordinator to whom the claimant had reported the charge.

24. Mr McLelland prepared an Investigation Report (document 9) in which he noted, amongst other things, that the claimant confirmed he had been

charged with rape on the 10 September and bailed. The claimant further confirmed the charge related to the alleged incident on the 2 November.

25. The claimant was, by letter of the 16 October (document 13) invited to attend a disciplinary hearing to answer the charges which had been the subject of the investigation.

26. The disciplinary hearing took place on the 1 November 2018 and a note of the hearing was produced at document 16. Mr Thomas chaired the hearing. Mr McLelland attended to present his report and the claimant was in attendance with his trade union representative Mr MacDonald.

27. A letter from the claimant's criminal solicitor (document 15) was produced at the start of the disciplinary hearing. The letter confirmed the claimant had co-operated fully with the Police and that he had been charged with rape. The letter also confirmed the claimant's position that anything which occurred on the 2 November 2017 was consensual, and that he was of the view the prosecution may not proceed.

28. The criminal solicitor made reference to the presumption of innocence and submitted it would be premature to come to any decision regarding the claimant's employment status given this presumption.

29. Mr Thomas considered the terms of the letter and sought advice from HR. He concluded an outcome to the charge did not need to be known in order for there to be an outcome to the disciplinary charges and on that basis he decided to proceed with the disciplinary hearing.

30. Mr Thomas decided to uphold both allegations. He concluded, in relation to the first allegation, that as a result of the serious nature of the charge and the intrinsic link to the claimant's employment, he did not reasonably have the trust and confidence to place him back into employment. In relation to the second charge, Mr Thomas considered it was an objective fact that with a charge of this nature and its' association with the claimant's employment it would be of significant public interest and accordingly Mr Thomas believed it would seriously damage the reputation of the Council.

31. Mr Thomas concluded, given the severity of the charge and how it arose, and the lapse of judgment by the claimant, that it was not tenable to return him to his post and that there was no alternative to dismissal.

32. Mr Thomas' decision to dismiss the claimant for reasons of gross misconduct was confirmed in writing by letter of the 20 November 2018 (document 17).

33. The claimant appealed against the decision to dismiss on the basis he had not been found guilty of any crime and all the evidence had been available to the respondent when it took its decision that he could return to work: there was no new evidence upon which to change that decision. The appeals committee heard the appeal on the 7 March 2019.

34. The appeal was not successful and the claimant was notified of this by letter of the 11 March 2019 (document 20).

35. Mr Thomas did not consider he was conflicted in hearing both disciplinary hearings, although he accepted information from the first disciplinary hearing had been relied upon at the second disciplinary hearing.

36. The claimant has been unemployed since the dismissal.

37. A letter dated 25 September 2019 was produced (document 24) from the claimant's criminal solicitor. The letter confirmed no Indictment had been served upon the claimant and in those circumstances criminal proceedings against him were time barred.

Credibility and notes on the evidence

38. The facts of this case were not particularly in dispute. I found the claimant to be a credible witness who gave his evidence in a straightforward manner to the best of his ability. It was clear the claimant thought the second disciplinary hearing was arranged because he had been charged: the claimant maintained his position that he was innocent of the charge. The claimant believed the respondent must have had trust and confidence in him when they allowed him to return to work at a different location and he questioned what had changed.

He also confirmed that he was not aware of any publicity following his appearance in Court to plead not guilty.

39. Mr McLelland was also a credible witness and the agreed statement of facts covered much of what he told the tribunal.

40. I found Mr Thomas to be, on the whole, a credible witness. I say "on the whole" because there were several points in his evidence which lacked credibility either because there was no explanation for his position or because the explanation was not reliable. These points are dealt with in detail below but one example was Mr Thomas' position that if the claimant had met the tenant's partner on a Saturday night and had subsequently been charged with rape, this would have been a different situation to consider insofar as it would not have had an intrinsic link with work, and Mr Thomas may have been persuaded to await the outcome of the criminal proceedings. Mr Thomas did not go on to explain why he would have viewed this situation so differently.

41. I also did not find Mr Thomas' position regarding alternative employment to be reliable. Mr Thomas told the tribunal that in terms of the respondent's disciplinary procedure he was required to consider alternative employment and that he had done so but that no suitable post could be found. Mr Thomas, when questioned further about this, acknowledged there had been no active search for alternative employment.

Respondent's submissions

42. Mr Walsh provided a written submission in which he set out the applicable law and made reference to the following cases: **W Devis & Sons Ltd v Atkins 1977 AC 931; Royal Mail Ltd v Jhuti 2017 EWCA Civ 1632; Boys and Girls Welfare Society v MacDonald 1997 ICR 693; Renfrewshire Council v Boyd 2007 EAT; Iceland Frozen Foods Ltd v Jones 1983 ICR 17; Tayeh v Barchester Healthcare Ltd 2013 EWCA Civ 209; British Waterways Ltd v Smith UKEATS/0004/15; JP Morgan Securities plc v Ktorza UKEAT/0311/16; Thomson v Alloa Motor Co Ltd 1983 IRLR 403; CJD v Royal Bank of Scotland 2014 IRLR 25; Leach v OFCOM 2012 IRLR 839 and A v Z UKEAT/0380/13.**

43. Mr Walsh invited the tribunal to have regard to the ACAS Code of Practice on disciplinary and grievance procedures and in particular to paragraph 31 which provides that *"where an employee is charged (or indeed convicted) of a criminal offence this is not normally in itself a reason for disciplinary action – consideration needs to be given to what effect the charge (or conviction) has on the employee's suitability to do the job and their relationship with their employer, work colleagues and customers."* Mr Walsh also stressed in misconduct cases it was of key importance that the conduct in question involved actings of such a nature whether done in the course of employment or outwith it that reflects in some way on the employer-employee relationship.

44. In the **Leach** case there had been allegations of sexual abuse, based on limited disclosures of the fact of the allegations as provided by the Police, but the employee maintained his innocence. The Court of Appeal accepted that both sides were placed in a difficult position in these circumstances. However the tribunal concluded that misconduct was not established on normal principles, but dismissal came within "some other substantial reason" and was fair; the information in that case came from allegations disclosed by the Police to the employer (short of charging the employee) on which the employer was entitled to rely. The EAT and the Court of Appeal upheld these findings, confirming that the case fell short of a "conduct" reason for dismissal, but involved a clear and substantial breakdown in trust and confidence, as well as protection of the public body's reputation (which overcame the claimant's argument that the respondent was not directly concerned with protecting children).

45. Mr Walsh referred the tribunal to paragraph 3 where Mummery LJ set out that there was a difficult balance to be struck in cases of suspicion of criminal activities. It was said that *"unexpected difficulties are bound to crop up in the course of efforts to reconcile the statutory rights of an employee to procedural and substantive fairness and the legitimate interests of the employer. The trust placed by an employer in an employee is at the core of their relationship, which can break down in a wide spectrum of circumstances. Some cases fall short of a conduct reason for dismissal. The legislation is clear: in order to*

justify dismissal, the breakdown in trust must be for a substantial reason." It was also stated that an employer could not merely state "breakdown of trust" as a mantra in all cases where an employer may face difficulties establishing a more conventional conduct reason for dismissal. Thus, for a dismissal to be fair for breakdown of trust and confidence itself, there must genuinely have been circumstances where, for a substantial reason, trust and confidence has broken down.

46. Mr Walsh acknowledged that in the **A v Z** case the opposite result was reached, when an employer acted on the basis of "shaky evidence" shortly before the completion of a police investigation and was found to have "jumped the gun" and unfairly dismissed the employee. It was said that breakdown of trust and confidence had to be genuine and not an automatic finding.

47. Mr Walsh referred to the evidence of Mr Thomas when he set out the reasons for dismissal which were twofold: firstly, having been charged with a crime of this nature (rape), the claimant was in serious breach of trust and confidence required to fulfil his employment contract and secondly, the nature of the charge had placed the organisation at serious risk of reputational damage. Mr Thomas found that each of these charges amounted to gross misconduct.

48. Mr Thomas had, in his evidence, told the tribunal that it was essential for the respondent to have the trust and confidence of its tenants and the public, and how the risk of reputational damage from the charge of rape in the particular circumstances of this case (that related to the claimant's employment) was considered significant. Mr Thomas referred to and relied upon the following facts: (i) the fact of the charge of rape; (b) the seriousness of this charge; (c) the intrinsic link this had to the claimant's employment (the claimant confirmed in the disciplinary investigation this related to the incident on the 2 November 2017 where he had admitted leaving work early with a tenant's girlfriend to travel to a hotel in Cumbernauld) and (d) the effect of the charge on the claimant's employment, he being a Caretaker with a responsible position in respect of vulnerable clients.

49. Mr Walsh submitted this evidence, in addition to the agreed statement of facts, established that it was fair for the respondent to dismiss the claimant from his employment, as there was a fair reason for dismissal and it was reasonable for the respondent to rely on this. Mr Walsh referred to paragraph 31 of the ACAS Code and submitted these factors were precisely the assessment Mr Thomas made in this case. Mr Walsh invited the tribunal to accept Mr Thomas' evidence that there was a serious breakdown in trust and confidence and, separately, a clear risk of publicity from the case going to Court because of the link to the employment circumstances and the serious nature of the charge.

50. Mr Walsh submitted that by definition, a different case which did not arise from circumstances of employment (for example, if it occurred outside work on a Saturday night) would not necessarily have resulted in the same assessment as this case.

51. Mr Walsh submitted the respondent's approach to the two disciplinary cases was appropriate. In the first disciplinary hearing there were allegations that had been made, but there was no indication of any action having been taken by the Police. In fact the claimant confirmed he had not been contacted by the Police. Accordingly Mr Thomas was limited in making any findings relative to allegation 2 at that time. In the subsequent disciplinary case the charge of rape was a material difference as Mr Thomas explained, because it triggered the requirement to make the above assessment of the circumstances in which the charge had arisen and the effects on the claimant's employment. As such, the respondent was, in the first disciplinary, specifically taking the approach of not seeking to jump the gun before it was known what the Police were going to do in respect of the allegations, whilst in the second disciplinary, the respondent was bound to make an appropriate assessment of the matter once the fact of the serious charge was known. Mr Walsh invited the tribunal to accept Mr Thomas' evidence that it was not necessary for him to know the outcome of the charge in order to determine the disciplinary charges.

52. Mr Walsh submitted Mr Thomas' evidence regarding the reasons for his decision to dismiss had been clear, detailed, credible and reliable. Mr Walsh invited the tribunal to accept this evidence.

53. The respondent's disciplinary policy lists serious breaches of trust and confidence and bringing the organisation into serious disrepute as examples of gross misconduct.

54. Mr Walsh submitted the respondent had followed a fair procedure when dismissing the claimant. The claimant took a point regarding Mr Thomas' involvement in both disciplinary hearings. Mr Walsh invited the tribunal to accept Mr Thomas' evidence that it was in accordance with the respondent's policy for the line manager to deal with disciplinary issues and there were no particular issues requiring a departure from the usual procedure.

55. Mr Walsh submitted the reason for the dismissal was gross misconduct, which related to being charged, which triggered the consideration of the points set out in paragraph 31 of the ACAS Code. Alternatively the reason for the dismissal was some other substantial reason involving a loss of trust and confidence and the risk of reputational damage.

56. Mr Walsh confirmed this was not a case where the respondent relied on the fact of there being a live final written warning to dismiss the claimant. The two allegations upheld by Mr Thomas at the second disciplinary hearing were relied upon as each being an act of gross misconduct entitling the respondent to dismiss the claimant.

Claimant's submissions

57. Mr Bathgate took no issue with the law as set out in the respondent's submission. He also agreed there was little dispute regarding the facts of the case: the issue to be determined was whether the particular circumstances allowed the respondent to dismiss the claimant fairly.

58. Mr Bathgate agreed it was for the respondent to demonstrate the principal reason for the dismissal, and submitted the respondent had failed to do so. He questioned whether there had been misconduct in this case. He submitted

it appeared conduct had been within the mind of Mr Thomas, and this was clear from the notes of the disciplinary hearing (document 16) and the letter of dismissal (document 17). Mr Thomas suggested the act of being charged with rape, and the nature of the charge, could not amount to misconduct: however, the misconduct was the conduct underpinning the charge. It was submitted this did not form any part of the second disciplinary hearing; there was no investigation into it; no specification of it and no opportunity to put forward a response.

59. Mr Bathgate submitted neither of the allegations fell within the respondent's examples of gross misconduct and accordingly were not allegations of misconduct at all.

60. Mr Bathgate next questioned whether the reason was some other substantial reason and submitted the respondent's evidence on this was confused. The documents appeared to suggest that it was the fact of the charge of rape itself which breached trust and confidence and placed the respondent at risk of reputational damage. However, Mr Thomas' evidence focussed on the behaviour behind the charge and the claimant's "lapse of judgment" in getting himself into the position where he exposed himself to the possibility of such a charge.

61. Mr Bathgate submitted the respondent had not shown the principal reason for dismissal, and further submitted that the fact of the charge and the potential for reputational damage did not amount to some other substantial reason.

62. Mr Bathgate referred to the case of **A v Z** for guidance regarding the issue of the reason being conduct and/or some other substantial reason. The judgment acknowledged all cases are fact specific and Mr Bathgate submitted that the particular facts of this case did not support some other substantial reason justifying dismissal.

63. Mr Bathgate argued that if the tribunal were not with him regarding the reason for dismissal, his position was still that the dismissal was unfair for several reasons. There had been a conflation of the two disciplinary processes and the allegations. The claimant could not possibly have known what the case

against him was. The disciplinary charges must be precisely framed (**Strouthos**): the claimant thought the case against him was because he had been charged with rape and the risk of reputational damage, but it transpired it was more than that and involved conduct dealt with at the first disciplinary.

64. The allegation of rape and the claimant's behaviour on the 2 November were considered as part of the first disciplinary process. Mr Thomas dealt with it all at the first disciplinary. Mr Bathgate referred to the underlying principle of equity that a person cannot be expected to respond to allegations more than once. The respondent considered all of the information and gave the claimant a final written warning. The respondent could not revisit and consider that conduct again as part of the conduct/reason for the second disciplinary, but that is exactly what Mr Thomas did.

65. The underlying reasons given by Mr Thomas did not bear scrutiny. The claimant conceded he went to Cumbernauld and spent the night with the tenant's partner. This was the "lapse of judgment" the claimant spoke of. This was a significant factor in Mr Thomas finding there was a breach of trust and confidence and it was core to Mr Thomas finding he could not put the claimant back in his job/duties.

66. Mr Bathgate submitted Mr Thomas had put the claimant back in the workplace after the first disciplinary when he was fully aware of the claimant's admission/concession. Mr Thomas decided not to dismiss, but to issue a final written warning and move him to another location. It was submitted that the only difference at the second disciplinary was the fact the claimant had been charged with rape and Mr Bathgate noted it was a charge, with the allegations being unproven and unsubstantiated. Mr Thomas acknowledged the charge itself was not misconduct. The respondent knew of the behaviour underpinning the charge since the end of 2017, and knowing of the behaviour and the claimant's admission, Mr Thomas did not consider it sufficient to remove the claimant from the workplace permanently.

67. Mr Bathgate reminded the tribunal that he had specifically questioned Mr Thomas regarding his repeated reference to the intrinsic link to the claimant's

employment. Mr Thomas explained this was based on the claimant having met the tenant's partner in the course of his employment and leaving with her. Mr Bathgate submitted there was no intrinsic link to the claimant's employment: rape is a serious charge but that, of itself, is not an intrinsic link to employment.

68. Mr Bathgate referred to the **Leach** case where the employee involved had held a senior position and one key issue was child protection. The Police alleged the employee had committed an indecent assault and had visited brothels. It was submitted that in that case there had been a clear link between the employee's behaviour and his employment. In the claimant's case, for there to be an intrinsic link, he would need to have been employed to work in supporting vulnerable women. The only link was the fact the claimant met the tenant's partner during his employment. It was submitted, in those circumstances, the evidence did not support the respondent's position that there was an intrinsic link.

69. Mr Bathgate submitted there had been no evidence that the charge itself had the potential to affect the reputation of the respondent. Mr Bathgate conceded there was a possibility in Court proceedings there could have been mention of the claimant being an employee of the respondent. However, Mr Thomas' decision was based on there being a public trial and there were no grounds for this to be a reasonable belief.

70. There was no evidence upon which to sustain the belief that the charge put the respondent at risk of reputational damage. The risk of disclosure of the claimant being the respondent's employee was, at best, speculative.

71. Mr Thomas had also been questioned regarding the issue of alternative employment as an alternative to dismissal. Mr Bathgate submitted the evidence supported the conclusion that alternative employment was discounted on the basis of the claimant's conduct and the fact of the charge notwithstanding the respondent returning the claimant to work when fully aware of his conduct. Accordingly, it was submitted, there was no proper basis for saying alternative employment was considered.

72. The claimant had been suspended for 7 months at the time of the first disciplinary and, it was submitted, suspension was an alternative to dismissal. Mr Bathgate submitted that in dismissing the claimant the respondent had acted prematurely given they had allowed him to previously return to work and the only difference was the fact of the charge.

73. Mr Bathgate confirmed he was no longer insisting on the argument that Mr McLelland had been conflicted by investigating both matters. However, he did take this point in relation to Mr Thomas because he had conflated the evidence at the first disciplinary hearing with the second, and this had undermined the integrity of the second disciplinary and clouded Mr Thomas' judgment.

74. Mr Bathgate, in conclusion, submitted the respondent had not established the reason for dismissal, but even if they had, the respondent had not acted reasonably in treating any reason as sufficient for dismissal. The dismissal was unfair.

Discussion and Decision

75. I firstly had regard to the relevant statutory provisions which are set out in section 98 of the Employment Rights Act 1996 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."

76. This section makes clear that it is for the employer to show the reason for the dismissal. In this case the respondent argued that each of the allegations, (that is, (i) in light of the charge of rape brought against you on the 10 September 2018, you are in serious breach of trust and confidence required to fulfil your employment contract and (ii) the nature of the charge has placed the organisation at serious risk of reputational damage) amounted to gross misconduct and/or some other substantial reason (S.O.S.R.) The respondent's position, as set out in paragraph 3A of the amended grounds of response, was that each of the reasons for dismissal was a reason that relates to the conduct of the employee in terms of section 98(2)(b) of the Employment Rights Act and each constituted gross misconduct and some other substantial reason of a kind such as to justify the dismissal of the employee holding the position which the employee held in terms of section 98(1)(b). Mr Walsh, when asked what the misconduct was, stated *"the charge triggered the ACAS paragraph 31 considerations".*

77. I was referred to the case of **Royal Mail Ltd v Jhuti** (above) and it is helpful to set out the extract from that case to which I was referred:

"Section 98 thus requires a two stage enquiry. First, by subsection (1) the employer must show that the reason, or principal reason, for the dismissal is of an admissible kind. Second, by subsection (4), the tribunal must decide whether it was reasonable for the employer to dismiss the employee for that reason.

It is well established that the first stage of the exercise required by section 98 involves a subjective inquiry into the mental processes of the person or persons who took the decision to dismiss. The classic formulation is that of Cairns LJ in Abernethy v Mott Hay and Anderson 1974 ICR 323 approved by the House of Lords in W Devis & Sons Ltd v Atkins 1977 ICR 662. Cairns LJ said at p330 B – C "a reason for the dismissal of the employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee".

In Beat v Croydon Health Services NHS Trust 2017 EWCA Civ 401 it was said "As I observed in Hazel v Manchester College 2014 EWCA Civ 72 Cairns LJ's precise wording was directed to the particular issue before the Court, and it may not be perfectly apt in every case; but the essential point is that the "reason" for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it is sometimes put, what "motivates" them to do so".

78. I next had regard to the case of **Leach v OFCOM** (above) where the Court of Appeal determined that the question for the tribunal was whether the reason for dismissal following an allegation that the employee had been engaged in abuse outside his occupation was one for "some other substantial reason", which was a question for assessment by the Employment Tribunal on the facts as found. In order to determine that, a tribunal had to examine all relevant circumstances. SOSR was not to be used as a convenient label to stick on any situation where the respondent felt let down or felt it could be used as a valid reason whenever a conduct reason was not available or appropriate.

79. The Court of Appeal went on to say that the trust placed by an employer on an employee was at the core of the relationship and that in order to justify dismissal the breakdown in trust had to be for a substantial reason.

80. In the case of **Z v A** (above) the EAT accepted the approach described in the **Leach** case was to be adopted. The EAT noted another case (**B v A UKEATS/0029/06**) which chimed with this reasoning and where the EAT had

stated a dismissal could not be presumed to be fair because it was on grounds of alleged abuse. The EAT confirmed each case was bound to turn on its own facts and circumstances.

81. I next had regard to the evidence of Mr Thomas. He told the tribunal that he *"felt an investigation was necessary due to the seriousness of the charge and the impact on [the claimant's] ability to discharge his duties which are community based and working unsupervised"*. Mr Thomas said he *"had to consider the implications".* Mr Thomas went on to say that he *"upheld both allegations and decided to dismiss for gross misconduct".*

82. Mr Thomas was asked in cross examination how the act of being charged was committing misconduct. Mr Thomas replied that the fact of the charge precipitated the disciplinary process: it was not the act of being charged but the claimant's actions which gave rise to the charge. He acknowledged the allegations did not refer to any conduct underpinning the rape charge but stated the charge was implicitly linked to the earlier circumstances which were taken as a statement of fact from the first disciplinary hearing.

83. I reminded myself that the allegations against the claimant at the first disciplinary hearing were that he had entered a tenant's flat and consumed alcohol during working hours. The claimant, as part of the discussion regarding events that day and the second allegation, admitted he had left work early with the tenant's partner, travelled to Cumbernauld and spent the night with her. Mr Thomas, in upholding the first allegation took cognisance that the claimant admitted to having left work early with the tenant's partner, travelled to Cumbernauld and spent the night with her. He stated that doing so had *"clearly placed [the claimant] in a seriously compromising situation, for which [he had] now expressed regret. As such your conduct falls considerably below that expected of you".*

84. I considered there was a complete lack of clarity regarding the alleged misconduct in this case. I say that because, on the one hand, the allegation against the claimant was framed that *"in light of the charge of rape … you are in serious breach of trust and confidence"* and, Mr Walsh, when asked to

identify the misconduct, replied "*the charge triggered the ACAS paragraph 31 considerations*." On the other hand, Mr Thomas described the misconduct as being the behaviour underpinning the charge, but no reference to this was made in the allegations the claimant had to answer and there was no discussion during the second disciplinary hearing regarding the conduct underpinning the rape charge. I accordingly concluded the respondent had not shown that conduct (in this respect) was the reason for the dismissal.

85. I next considered whether the respondent had shown conduct (in respect of reputational damage) was the reason for the dismissal and decided they had not done so. I say that for all the reasons set out above and because the respondent accepted the charge was not of itself misconduct.

86. I concluded the respondent had not shown the reason for dismissal was misconduct.

87. I next considered whether the respondent had shown the reason for dismissal was some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held. I noted that a breakdown in trust and confidence and preventing damage to reputation could both amount to some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held. I noted the EAT in **A v B 2010 ICR 849** emphasised the importance of identifying why the employer considered it impossible to continue to employ the employee, and also admonished the tendency of employers to assume that loss of trust and confidence automatically brings obligations under an employment contract to an end.

88. I also had regard to **Harper v National Coal Board 1980 IRLR 260** where the EAT held that so long as an employer can show a genuinely held belief that it had a fair reason for dismissal, that reason may be a substantial reason provided it is not whimsical or capricious.

89. I asked whether Mr Thomas genuinely believed trust and confidence had broken down and could not be retrieved, and if he genuinely believed there was a risk of reputational damage. I answered that question in the affirmative.

Mr Thomas did believe that due to the seriousness of the charge, the link to the claimant's employment and the effect on ongoing employment, that he had lost trust and confidence in the claimant. Mr Thomas also had regard to the need for tenants and the public to have trust and confidence not only in the respondent but also its employees. Mr Thomas further believed there would be a trial at which there was a risk of the claimant's employment with the respondent becoming public and this highlighted the risk of reputational damage for the respondent.

90. I considered the issue of whether Mr Thomas had reasonable grounds upon which to sustain his beliefs was a separate matter which I have dealt with below when considering the fairness of a dismissal for those reasons.

91. I, in conclusion, was satisfied the respondent had shown the reason for dismissal was some other substantial reason within section 98(1)(b) Employment Rights Act. This is a potentially fair reason for dismissal. I must now continue to determine whether dismissal for that reason was fair.

92. Mr Bathgate challenged the fairness of the decision for the following reasons: (i) Mr Thomas conflated the two disciplinary processes and this was not only a flaw but clouded his judgment; (ii) the claimant had already answered charges relating to his conduct on the 2 November 2017 and this should not have formed part of the second disciplinary; (iii) the respondent knew of the allegations against the claimant and decided to return him to work: all that subsequently changed was the fact of the charge; (iv) there was no intrinsic link to the claimant's employment; (v) the respondent's decision regarding reputational damage was based on there being a public trial and there were no reasonable grounds to sustain this belief and (vi) the consideration of alternative employment.

93. I considered each of these points, and I started with point (iii). The case law to which I referred above (**Leach** and **Z v A**) emphasised that each case was bound to turn on its own facts and circumstances. The respondent in this case undertook an investigation which started in November 2017 and ended in May 2018. The allegations being investigated related to the 2 November 2017

where it was alleged the claimant had been in a tenant's flat consuming alcohol whilst on duty, and that he had subsequently been involved in an incident out with work involving Police Scotland. The "incident out with work" related to an allegation made by the tenant's partner that the claimant had travelled to Cumbernauld with her and engaged in non-consensual sex with her.

94. Mr McLelland interviewed the tenant's partner as part of that investigation. The respondent knew from this interview that the tenant's partner had been interviewed by the Police and provided a statement to them regarding the allegation of non-consensual sex. The Police were investigating the matter.

95. The respondent also knew, from interviewing the claimant, that he admitted leaving work early with the tenant's partner on the 2 November 2017 and travelling to Cumbernauld with her. The claimant stated, during the investigation, that he had only learned of the rape allegation when interviewed by Mr McLelland. He confirmed he had not been questioned, cautioned or charged by the Police.

96. The claimant, at the first disciplinary hearing, confirmed his admission that he had left work early, travelled to Cumbernauld and spent the night with the tenant's partner.

97. Mr Thomas, at the first disciplinary hearing (document 22) said the following: *"… uphold the first allegation on the balance of probabilities. This takes cognisance that you admit to having thereafter left work early, travelled to Cumbernauld and spent the night with [the tenant's partner]. Whereas I am limited from making findings upon the veracity of the subsequent allegations this gave rise to, doing so clearly placed you in a seriously compromising situation, for which you have now expressed regret. As such your conduct falls considerably below that expected of you."*

98. There was no dispute regarding the fact that Mr Thomas knew, as at June 2018, that the tenant's partner had made an allegation of rape to the Police following the events of the 2 November 2017 and that the claimant had admitted to leaving work early, travelling to Cumbernauld and spending the

night with the tenant's partner. Mr Thomas also identified that doing so had placed the claimant in a seriously compromising situation (this was the lack of judgment referred to by Mr Thomas). Mr Thomas, against that background, decided the claimant could return to work as a Caretaker, but at a different location. Mr Thomas, as at that date, must have had trust and confidence in the claimant to undertake his duties.

99. There was no dispute regarding the fact the claimant did return to work on or about the 28 July 2018, and continued to work until the 10 September 2018, when he was charged by the Police.

100. The claimant attended the second disciplinary hearing on the 1 November 2018. Mr Thomas accepted in cross examination that the only change between the outcome of the first and second disciplinary hearings was the fact of the claimant having been charged. He described that as *"the material difference".* The claimant having been charged was, in fact, the only difference at the second disciplinary hearing because all of the information relating to the events of the 2 November 2017 was already within the knowledge of Mr Thomas, and this included the fact the allegation of rape arose from the events on the 2 November 2017.

101. Mr Thomas told the tribunal that *"the allegation was serious and there was an intrinsic link to his employment. I no longer had trust and confidence to place him back in the workplace. There had been a serious lapse in judgment by the claimant and everything flowed from that. The association with his employment was that he had met her in the course of his duties, consumed alcohol, left early and spent the night with her. The very circumstances giving rise to the charge arose from a serious lapse in judgment. I need to have confidence in employees and recognise the vulnerabilities of tenants. Such a lapse of judgment was of the upmost seriousness and I needed tenants to feel safe with employees. I did not have the trust and confidence required to place him back in the workplace."*

102. Mr Thomas was asked in cross examination, to define the claimant's lapse of judgment. He said *"it started with going into the flat and drinking and worsened*

when he left early with the partner and spent the night with her". Mr Thomas accepted the claimant had admitted this at the first disciplinary hearing in June 2018, following which he had been permitted to return to work.

103. Mr Thomas was asked why, if the lapse of judgment was so serious that it undermined trust and confidence in the claimant, had he been allowed to return to work. Mr Thomas responded that in June 2018 the claimant had not been charged.

104. Mr Thomas was then asked about the charge amounting to misconduct, and responded that *"the act of being charged is not directly misconduct of itself. It is the actions which gave rise to the charge which were the misconduct."* Mr Thomas acknowledged the allegations at the second disciplinary hearing did not refer to any conduct underpinning the rape charge, but explained the charge was implicitly linked to the earlier circumstances, and this conduct was examined at the first disciplinary hearing.

105. I considered Mr Thomas' above explanations were confused and lacked clarity. Mr Thomas accepted the only difference at the second disciplinary hearing was the fact the claimant had been charged, but he struggled to explain why that fact led to a loss of trust and confidence in the claimant. Mr Thomas was clear that the act of being charged was not misconduct of itself, and there was no suggestion the fact of being charged led to the breakdown of trust and confidence. Mr Thomas' reference to conduct underpinning the charge related to the events of the 2 November 2017. The claimant had already received a final written warning for being in a tenant's flat consuming alcohol during working hours; and, the respondent had known since the investigation in 2017/18 that the claimant admitted leaving work early, travelling to Cumbernauld and spending the night with the tenant's partner. If, as suggested, this conduct was so serious as to breach trust and confidence in November 2018, there was no explanation why the respondent had not addressed it a year earlier and why it had not breached trust and confidence a year earlier. Instead, in full knowledge of the events of the 2 November 2017, the respondent returned the claimant to work.

106. I concluded for these reasons, that there was a fundamental flaw in the reasoning of Mr Thomas. I say that because the respondent knew of the events of the 2 November 2017, and knew of the allegation made by the tenant's partner against the claimant when Mr Thomas took the decision to issue a final written warning and return the claimant to work. The subsequent charge was the only change to those circumstances and Mr Thomas accepted that of itself did not amount to misconduct, and there was no suggestion that of itself caused the breakdown of trust and confidence.

107. Mr Walsh argued the fact of the charge led the respondent to give consideration to the points set out in paragraph 31 of the ACAS Code, which provides that *"if an employee is charged (or indeed convicted) of a criminal offence this is not normally in itself a reason for disciplinary action, but consideration needs to be given to what effect the charge (or conviction) has on the employee's suitability to do the job and their relationship with their employer, work colleagues and customers".*

108. I take no issue with that submission, however it leads back to the points set out above. This was not a case where the first the respondent knew of matters was when the claimant was charged. The fact the respondent knew of the circumstances of the 2 November 2017 and the fact an allegation of rape had been made, and had considered those matters at the first disciplinary hearing prior to returning the claimant to work cannot be ignored.

109. I considered the crucial question to be what caused the breakdown of trust and confidence relied upon by the employer. This was the question Mr Thomas could not answer: his reference to conduct underpinning the rape charge could not be correct in circumstances where he had knowledge of that conduct prior to deciding to return the claimant to work, and nothing in relation to that conduct had changed. I decided Mr Thomas had no reasonable basis for sustaining the belief there had been a breakdown of trust and confidence in the claimant.

110. I next considered the argument that Mr Thomas had conflated the two disciplinary processes and that this had clouded his judgment. I concluded,

having had regard to the points set out above, that Mr Thomas did conflate the two disciplinary processes; this is evident from the fact Mr Thomas described the misconduct as the conduct underpinning the charge of rape, and in that he included the issues for which the claimant had already received a final written warning.

111. I further considered this did cloud Mr Thomas' judgment because he sought to have a second bite at the cherry regarding the events of the 2 November 2017 and to conclude those events, which had not previously been a bar to returning the claimant to work, subsequently breached trust and confidence.

112. The respondent relied on there being an *"intrinsic link"* to the claimant's employment. Mr Thomas, when asked about this in cross examination, said *"the intrinsic link is that the circumstances/context in which the allegation was made started in his employment, that is, he met her, went to the flat to drink, left with her and spent the night with her. This was in contrast to meeting someone outside work".* He accepted this, in essence, meant the claimant met her in the course of his duties at work.

113. There was no dispute regarding the fact the claimant met the tenant's partner in the course of his duties at work. The use of the term "intrinsic" was disputed by the claimant's representative because the claimant's duties did not include him working to support vulnerable women. I was however satisfied that even if "intrinsic" was not the correct term to use, the material fact was that the claimant met the tenant's partner in the course of his duties at work.

114. Mr Thomas, in his evidence in chief was asked about waiting for the outcome of the criminal charge, and he told the tribunal that *"if the charge had been wholly detached from the person's duties, I may have had different considerations about whether the person could remain in the role until the criminal outcome. But here the employment role was central to what happened."*

115. Mr Thomas was asked in cross examination (and in relation to the issue of meeting the tenant's partner in the course of his duties") whether the position would have been different if the claimant had met her outside work. Mr

Thomas responded *"on a Saturday night – yes, entirely different circumstances. There would still be an issue of reputational damage although there would be no intrinsic link."* Mr Thomas was asked if he would have dismissed in those circumstances and replied that he would have found it more persuasive to wait for the criminal outcome.

116. I found the logic of Mr Thomas' evidence difficult to understand: he appeared to be saying that he may have been persuaded to let an employee remain in their role and await the outcome of the criminal proceedings before deciding on that employee's future employment if the charge of rape had arisen from meeting someone/the tenant's partner outside work. I acknowledged the fact the claimant's situation was linked with work was an additional factor for the respondent to consider, but I could not understand why the two situations may have been treated so differently by the employer. I also acknowledged Mr Thomas was speaking hypothetically but I considered the distinction he sought to draw undermined his position.

117. I next considered the respondent's position regarding reputational damage. The allegation was framed in terms that *"the nature of the charge has placed the organisation at serious risk of reputational damage"*. I noted the respondent's disciplinary policy includes, as an example of gross misconduct, *"bringing West Dunbartonshire Council into serious disrepute"* and further noted the claimant was not charged with this.

118. The risk of reputational damage was described by Mr Thomas as relating to the nature of the charge and its association with the claimant's employment which, he believed, would be of public interest. Mr Thomas was of the opinion that the manner in which the charge arose would be of particular interest and this would cause reputational damage to the respondent. Mr Thomas rejected the suggestion this was speculative: he considered it was a certainty because if there was a trial, there would be significant public interest and reporting of the Court case.

119. Mr Thomas was asked in cross examination what evidence he had that the nature of the charge had placed the respondent at serious risk of reputational

damage. Mr Thomas replied that *"after the claimant advised us of the charge, it became clear it arose from earlier events. This was sufficient to uphold the decision because it put the respondent at serious risk of reputational damage."*

120. I considered Mr Thomas' response lacked credibility and reliability because it was clear from the first investigation and disciplinary hearing that the allegation of rape arose from the events of the 2 November 2017. Mr Thomas knew that long before the claimant was charged with rape. Mr Thomas' statement that "*after the claimant advised us of the charge, it became clear it arose from earlier events"* was incorrect, because Mr Thomas knew this as at the time of the first disciplinary hearing.

121. Mr Thomas' conclusion regarding the risk to reputation was based on there being a trial and the public interest in such a trial given the nature of the circumstances in which the charge arose. I considered Mr Thomas had reasonable grounds to believe there may be a trial in circumstances where the claimant had been charged with rape. However, I had to balance that with the fact the allegation of rape was made in November 2017; the claimant was not interviewed until 10 September 2018, when he was charged; he appeared in Court on the 21 September 2018 to plead not guilty and as at the 20 November 2018 (disciplinary hearing) he had not been spoken to by the Police again. I concluded that Mr Thomas, as at the date of dismissal, had reasonable grounds to conclude no more than that there may be a trial at some point in the future, and that there may be a risk to reputation at that point.

122. I also balanced the fact that the respondent must have considered there to be little or no risk to reputation arising from having the claimant return to work following an allegation of rape. There was no evidence to suggest risk to reputation was even a consideration for Mr Thomas at the first disciplinary hearing.

123. I concluded, having had regard to all of the above points, that Mr Thomas had reasonable grounds to sustain a belief that the serious nature of the charge

may place the respondent at risk of reputational damage because there may be a trial at some point in the future. I could not accept there were reasonable grounds to sustain the belief the charge had placed the organisation at serious risk of reputational damage given the fact there had not, at the time of the dismissal, been any media coverage of the charge, or any gossip about the allegation and there was no certainty there would be a trial. Mr Thomas' decision regarding reputational damage was premature.

124. I next considered Mr Thomas' evidence that prior to deciding to summarily dismiss the claimant he had considered the issue of alternative employment. Mr Thomas made reference to the respondent's Disciplinary Policy which, he said, directs managers to consider alternative employment when dismissing an employee. I had regard to the Disciplinary Policy and noted that under the heading of "Dismissal with Notice" there is a clause stating that in exceptional circumstances it may be felt that demotion or transfer to another post is a more satisfactory alternative to dismissal. There is no such clause under the heading "Summary Dismissal".

125. I did not find Mr Thomas' evidence regarding his consideration of alternative employment to be credible for two reasons: firstly, because there was no proper basis for saying this had been considered. Mr Thomas did not actively consider vacancies or alternative posts for the claimant: he simply discounted alternative employment as being not suitable in the circumstances. Secondly, Mr Thomas found each allegation against the claimant to be gross misconduct, that is, conduct so serious as to fundamentally undermine the contract of employment. I considered it not credible to suggest in those circumstances that consideration had been given to alternative employment: one simply does not fit with the other.

126. I, having considered all of the above points, now turned to consider whether the dismissal of the claimant was fair or unfair. I was referred to the case of **Iceland Frozen Foods Ltd v Jones** (above) where the EAT summarised the approach to be taken:

"(1) the starting point should always be the words of section 98(4) themselves;

(2) in applying the section a tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct, a tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another and

(5) the function of the tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band it is fair; if the dismissal falls outside the band it is unfair."

127. I reminded myself that the question is not whether I would have dismissed the claimant: the question to be asked is whether the decision made by the employer fell within the band of reasonable responses which a reasonable employer might have adopted. I also reminded myself that, in terms of section 98(4) Employment Rights Act, the fairness of the dismissal depends on whether in the circumstances the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.

128. I decided (above) that the respondent had not shown the reason for dismissal was misconduct: accordingly, the question to be determined is whether, in the circumstances the respondent acted reasonably or unreasonably in treating some other substantial reason as a sufficient reason for dismissing the claimant.

129. I, in considering this issue, had regard to the points set out above where I concluded:-

(i) there was a fundamental flaw in the reasoning of Mr Thomas which resulted in him being unable to identify and explain what caused the breach of trust and confidence. I reached that conclusion because Mr Thomas knew of the events of the 2 November 2017, the allegation made by the tenant's partner, the link between the events of 2 November and the claimant's employment and the claimant's lack of judgment when he decided to return the claimant to work albeit at a different location. There was no breach of trust and confidence at that time and Mr Thomas could not explain what subsequently caused the breach in circumstances where there was no suggestion the charge itself had broken trust and confidence. I concluded Mr Thomas had no reasonable grounds for sustaining his belief there had been a breakdown of trust and confidence.

(ii) Mr Thomas conflated the first and second disciplinary processes and this clouded his judgment.

(iii) There was no dispute the claimant met the tenant's partner in the course of his duties. Mr Thomas' explanation that he may have treated a charge of rape which occurred out of work on a Saturday night differently was not reliable.

(iv) Mr Thomas' decision regarding reputational damage was premature in circumstances where he had reasonable grounds to conclude only that there may be a trial at some point in the future, and there had not (up to the point at which he made his decision) been any publicity or media attention and

(v) Mr Thomas' evidence regarding consideration of alternative employment was not credible or reliable.

130. I also had regard to and accepted the respondent's evidence (which was not in dispute) that the claimant worked as a Caretaker, which involved largely working unsupervised in a multi-storey block of flats. There was a high proportion of vulnerable tenants. It was important for tenants and the public to have confidence in the respondent and its employees.

131. The claimant had 13 years' unblemished service with the respondent.

132. I noted the claimant did not challenge the procedure followed by the respondent other than in terms of point (ii) above.

133. I also noted (from the authorities referred to above) that each case will turn on its particular facts, and I considered the extent of the respondent's knowledge as at the first disciplinary hearing when it decided to return the claimant to work to be crucial in this case.

134. I decided, given the particular facts of this case, that the decision to dismiss the claimant was unfair. I reached that decision having had regard to three key points: firstly, the fact the respondent, in full knowledge of the points set out at (i) above, decided to return the claimant to work. The respondent must, accordingly have had trust and confidence in the claimant. The only thing that changed was the fact the claimant was charged with rape. The respondent accepted this was not, of itself, misconduct and did not suggest the charge broke trust and confidence. I found Mr Thomas' explanation why trust and confidence had been broken related to points he had previously been content to accept when returning the claimant to work. I accordingly found there was no basis for the respondent's position that trust and confidence had broken down.

135. Secondly, the charge against the claimant was that "the nature of the charge has placed the organisation at serious risk of reputational damage". This was premised on Mr Thomas' belief there would be a trial and that there would be public interest in the facts and circumstances of this case given its connection with work. I concluded Mr Thomas had reasonable grounds to sustain the belief there may be a trial at a future date, but it was equally likely/possible there may not be a trial. I accepted that if there was a trial it was more likely than not that there would be publicity.

136. I concluded Mr Thomas' decision regarding reputational damage was premature in circumstances where a trial was only a possibility and where there had been no media attention or publicity as at the date of dismissal.

137. Thirdly, I found Mr Thomas' decision regarding alternative employment to be not reliable. I say that because the evidence suggested the only consideration of alternative employment was to discount it. There was no investigation or consideration of vacancies which the claimant may be able to do in the interim, particularly in circumstances where the claimant had previously been suspended for a period of seven months and had returned to work at a different location.

138. I decided the decision to dismiss was unfair. The remedy to which the claimant is entitled will be determined at a future hearing.

Employment Judge: Lucy Wiseman
Date of Judgement: 29 October 2019

Entered in Register,
Copied to Parties: 06 November 2019