THE EMPLOYMENT TRIBUNALS

Claimant: **Mr J McCauley**

Respondent: **Gardner Aerospace Consett Limited**

Heard at: **Newcastle Hearing Centre (by CVP)** **On: 16, 17 and 18 December 2020**

Before: **Employment Judge Morris (sitting alone)**

Representation:

Claimant: **Mr A Tinnion of Counsel**
Respondent: **Mr S Healy of Counsel**

RESERVED JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The claimant's complaint that his dismissal by the respondent was unfair, being contrary to Section 94 of the Employment Rights Act 1996 by reference to Section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 is not well-founded and is dismissed.

2. The claimant's complaint that his dismissal by the respondent was unfair, being contrary to Section 94 of the Employment Rights Act 1996 by reference to Section 98 of that Act is well-founded.

3. Unless the parties' representatives inform the Tribunal within three weeks of the date upon which this Judgment is sent to the parties as set out below that agreement as to remedy has been achieved, this case will be returned to this Tribunal for the purposes of a remedy hearing.

REASONS

Representation and evidence

1. The claimant was represented by Mr A Tinnion, of Counsel, who called the claimant to give evidence. The respondent was represented by Mr J Healy, of

Counsel, who called four employees of the respondent or its associated group of companies to give evidence on its behalf: namely, Mr Z Skrodzki, Production Manager of the respondent; Mr D Taylor-Allen, Operations Manager of the respondent; Mr P Robson Site Director of the respondent; Miss J Storer, Director of Global Governance and Company Secretary of the Gardner Aerospace Group.

2. The evidence in chief of or on behalf of the parties was given by way of written witness statements, which had been exchanged between them. I also had before me a bundle of agreed documents comprising some 203 pages to which I agreed should be added, first a petition signed by a number of employees of the respondent in support of the claimant to which the respondent did not object, and, secondly, pages 204 to 220; having accepted a submission on behalf of the respondent (despite objections on behalf of the claimant) that they were relevant to my determination of the issues before me. The numbers shown in parenthesis below refer to page numbers or the first page number of a large document in that bundle.

The claimant's complaints

3. The claimant's complaints were as follows:

   3.1 His dismissal by the respondent was unfair being contrary to Section 94 of the Employment Rights Act 1996 ("the 1996 Act") in that, by reference to section 152(1)(b) Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"), the reason for his dismissal (or, if more than one, the principal reason) was that he had taken part in the activities of an independent trade union at an appropriate time.

   3.2 His dismissal by the respondent was unfair being contrary to Section 94 of the 1996 Act in that, by reference to section 98 of that Act (at the risk of over-simplification), he had not been guilty of misconduct as alleged and the respondent had not acted reasonably in relation to his dismissal including as to the investigative and disciplinary processes and the sanction of dismissal, and had refused to consider an appeal that he had submitted.

The issues

4. The list of issues as agreed between the parties is set out in paragraph 5 of the Case Management Summary arising from the Preliminary Hearing conducted on 2 April 2020 (45). Those issues are as follows:

   4.1 Did the claimant take part in the activities of an independent trade union (the GMB) at an appropriate time?

   4.2 Was the reason or principal reason for the claimant's dismissal that he took part in those activities?

   4.3 If so, the claim of unfair dismissal succeeds.

4.4 If the reason or principal reason was not that he took part in trade union activities, was it for the reasons stated by the respondent? [As recorded in paragraph 3 of that Summary, that reason being that the claimant had been found to have bullied and/or intimidated other employees of the respondent.]

4.5 Did that reason relate to conduct?

4.6 If so, did the respondent act reasonably or unreasonably in treating the reason as a sufficient reason for dismissal (section 98(4) of the 1996 Act)?

4.7 If the dismissal is found to be unfair, should the Tribunal make an order for reinstatement under section 113 of the 1996 Act in accordance with section 114?

4.8 If not, should the Tribunal make an order for re-engagement under section 113 in accordance with section 115 of the 1996 Act?

4.9 If the Tribunal makes no order for reinstatement or re-engagement under section 113 it must make an award of compensation calculated in accordance with sections 118 -126 of the 1996 Act.

4.10 If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed/have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825.

4.11 Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to section 122(2) of the 1996 Act; and if so to what extent?

4.12 Did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to section 123(6) of the 1996 Act?

5. I would add that my consideration of issue 4.6 above will include the following:

5.1 Whether (taking account of the Acas Code of Practice: Disciplinary and Grievance Procedures (2015) (the Acas Code) and the guidance in British Home Stores Limited v Burchell [1978] IRLR 379 (as qualified in Boys and Girls Welfare Society v McDonald [1996] IRLR129) a reasonable procedure had been followed by the respondent in connection with the dismissal and whether (in accordance with the guidance in Iceland Frozen Foods Limited v Jones [1982] IRLR 439, Post Office v Foley [2000] IRLR 827) and Graham v The Secretary of State for Work and Pensions (Job Centre Plus) [2012] EWCA Civ 903) the decision to dismiss the claimant

fell within the band of reasonable responses of a reasonable employer in such circumstances.

5.2 In this respect, I would, however, apply the guidance set out in Burchell having regard to the fact that the statutory 'test' of fairness, which is now found in section 98(4) of the 1996 Act, was amended in 1980 such that neither party now has a burden of proof in that regard.

5.3 With regard to the above questions, in accordance with the guidance in Burchell and Graham, I would consider whether at the stage at which the decision was made on behalf of the respondent to dismiss the claimant its managers who made that decision had in mind reasonable grounds, after as much investigation into the matter as was reasonable in all the circumstances of the case, upon which to found a genuine belief that the claimant was guilty of misconduct.

5.4 Whether the parties complied with the Acas Code?

Consideration and findings of fact

6. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the Hearing and the relevant statutory and case law (notwithstanding the fact that, in pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

6.1 The respondent is a private limited company acting as an international manufacturer for aerospace components. It is part of a group of companies together forming the Gardner Aerospace Group, which operates over eight sites in the UK, one in which is at Consett, in addition to other international sites. It is a large employer of 196 employees with significant resources including access to support from the Group Human Resources Department ("HR"). The GMB Union is the recognised trade union at the Consett site.

6.2 The claimant was employed by the respondent at the Consett site. His employment commenced on 1 June 2010 and terminated on 21 November 2019 when he was summarily dismissed for gross misconduct. At the time of his dismissal the claimant worked in the role of Post Numerical Control ("NC") Operative. There were no issues regarding the claimant's performance of his job including as to quality and output.

6.3 In 2017 the claimant was elected as one of three GMB trade union representatives, or shop stewards, at the Consett site; the other two were Mr Horner and Mr Rogan and they reported to a full-time Regional Officer, Mr Wilson. It was considered that the claimant demonstrated an aggressive and inappropriate attitude when performing his trade union role (for example, when attending the monthly meetings between the GMB

representatives and the relevant managers) about which one of the representatives wrote to the then Site Director (78).

6.4 Some time previously the respondent had operated two areas of work (Embraer and Gulfstream) the operatives working within which being paid at Grade 3. Those areas of work came to an end and the operatives moved into Post NC roles but continued to receive Grade 3 pay whereas Post NC operatives' pay was Grade 2. This matter was raised at the GMB monthly meeting in March 2019 at which management proposed that there should be pay parity amongst all the Post NC operatives and to achieve this three months' notice should be given to those affected employees who were receiving Grade 3 that their pay would be reduced to Grade 2 (81). According to the claimant this would result in a reduction of some £5,000 per annum. The trade union representatives accepted the proposal but suggested that the pay protection should be extended from the 3 months proposed by management to the end of the year: i.e. 9 months. It was ultimately agreed that some six months' notice of the reduction in Grade would be given. The respondent then gave notice to the approximately 17 employees who were affected by this reduction (84) one of whom was the claimant.

6.5 It transpired, however, that there were an additional three employees who were now undertaking Post NC work but were receiving Grade 3 pay, who had not been given notice of the pay reduction. This was raised at the GMB monthly meeting in May 2019 (85). Those employees were Mr Clough and Mr Turner, who were members of the GMB, and Mr Sikorski, who was not a member. This issue was again raised by the trade union representatives at the GMB monthly meeting in July 2019 (91) and they were asked for their suggestions as to how this anomaly might be moved forward. In evidence the respondent's witnesses explained that the three employees had achieved Grade 3 pay as a consequence of work that they had previously undertaken on A380 Spars but that had come to an end and there was then no difference between their work and that of the other Post NC operatives.

6.6 In discussion between the claimant, Mr Rogan and Mr Wilson a suggestion emerged that if Mr Clough and Mr Turner would agree to take a pay cut somewhere between Grade 2 and 3 that could soften the pay cut for the others who had received the letters; either by way of extending the period during which they would continue to receive Grade 3 pay or a lesser reduction. It was suggested that Mr Clough and Mr Turner had historic agreements that they would receive Grade 3 pay and Mr Wilson asked the claimant to obtain a copy of such agreement. In evidence the claimant explained that Mr Sikorski was not to be involved in this suggestion because he was not a GMB member. The claimant spoke to Mr Clough about him taking the suggested pay cut but, the following day, after speaking with his partner, he informed the claimant that he did not wish to proceed with the proposal. Mr Turner similarly did not agree to the pay cut.

6.7 On 4 September 2019 the claimant lodged a collective grievance on behalf of a number of GMB members undertaking Post NC work that one individual remained on Grade 3 pay (107). Although not named in the grievance, that one individual was Mr Sikorski.

6.8 Prior to commencing their shift on the evening of 30 September 2019 the claimant, Mr Clough and others were together in the canteen. The claimant asked Mr Clough to bring into work the agreement that he had regarding his Grade 3 pay. Mr Clough replied that he did not want to do that. He added that he was potentially wanting to leave the GMB which prompted the claimant to remark that he was sick of him saying that and comment that if he had such an agreement he would be plastering it up on the walls.

6.9 Mr Clough then went and spoke to his shift manager, Mr Harrison. He told him that he was feeling unwell and had been arguing with his partner after work on 29 September. They went into a private office for a chat when Mr Clough told Mr Harrison that the union shop floor representative had been trying to get him to bring his agreement for level 3 pay into work for him to look at. He informed Mr Harrison that he had told the union representative several times that it was private and confidential and he would not be bringing it in. Additionally, he said that the representative had tried to get him to sign a grievance about operators on level 3 having their money dropped but he had refused. He went on to say that this constant hassling from the union trying to get his money dropped was now causing problems at home between him and his partner. Mr Harrison asked if he wanted to make an official complaint but he did not want to do that. He continued that he enjoyed working on that shift and got on with most people really well and enjoyed working for Mr Harrison but he was sick of coming into work for the union to get at him about his money. During the 20:00 break Mr Clough returned to the office and informed Mr Harrison that he was going home as he was not right to work. He had not slept on the Sunday night, which he put down to worry and stress regarding his money. According to Mr Harrison, Mr Clough clearly did not look right and he had shown Mr Harrison his hands, which were shaking. He was visibly upset. Mr Harrison told him to go home and get a good night's rest, which he had done (129).

6.10 Mr Harrison spoke about the incident to Mr McEvoy who agreed that it should be escalated, which Mr Harrison did on 1 October by telephoning Mr Taylor-Allen and explaining what had happened.

6.11 Having been made aware of the incident, Mr Robson nominated Mr Skrodzki to investigate the allegations against the claimant and ring-fenced Mr Taylor-Allen to conduct any disciplinary hearing that became necessary. Mr Skrodzki explained in evidence that the scope of the investigation was that he was asked to investigate the complaint by Mr Clough as to what had occurred on 30 September 2019 as set out in the statement of Mr Harrison.

6.12 Mr Skrodzki was already aware of issues relating to the claimant including as follows: a few informal complaints had been made against him; he generally had a reputation as a bit of a bully (an example of which had involved Mr Sikorski who had informally disclosed being physically pushed by the claimant and feeling bullied by him); he was known to have an aggressive nature when carrying out his role as GMB representative; Mr Skrodzki had had to take action in the past in respect of the claimant's very aggressive behaviour; he was known to treat non-union members differently to members, which created a divide on the shift; he knew that some employees feared to take action in respect of the claimant. Despite this existing knowledge of the claimant the oral evidence of Mr Skrodzki was that he went into the investigation without a predetermined mind and confirmed that he had an open mind.

6.13 Due to the seriousness of the allegations and the claimant's reputation for intimidating others Mr Skrodzki and HR decided that the claimant should be suspended as the only way to ensure that the investigation could be conducted without his interference. Mr Skrodzki met the claimant on 1 October to inform him that an allegation had been raised that he had bullied colleagues and to explain his suspension and the reasons for it (123). A letter confirming the claimant's suspension and the allegation of bullying colleagues was sent to him by HR that day (122).

6.14 Before commencing his investigation Mr Skrodzki was provided with a report from Mr Harrison dated 2 October 2019 (129) and a report from Mr McEvoy dated 7 October 2019 (130). Mr Harrison's report recounted Mr Clough having come to see him both at the beginning of and during the nightshift on 30 September, which is addressed above. He also recorded another incident that occurred on Friday 27 September when the claimant had approached him to tell him that an employee, Mr Henry, was not allowed to carry out certain work due to the recent redundancies in that area of work. Mr Henry had been taken off that work and placed on other duties that day and on the Saturday and Sunday but on the Sunday had approached Mr Harrison asking for a half-day holiday as he was annoyed with the union as he had gone back to not having a job within the factory.

6.15 Mr McEvoy's report was prompted by Mr Harrison having spoken to him about the incident on 30 September. His report was about an incident in which he had been involved on 21 September. He had asked Mr Clough to operate a crane in a particular unit, which he had agreed to do. Approximately 15 minutes later, however, Mr Clough returned to say that he had been approached by the claimant who had told him that he should not be loading/unloading in that unit as that position had been made redundant. Mr McEvoy had reassured Mr Clough that he would not be loading/unloading and he was only required to operate the crane. Mr Clough again agreed to do what had been asked of him but returned some 15 minutes later raising concerns that he was worried that if he was working in the area in question people would put a grievance complaint in against him as that position had been made redundant. In the circumstances, Mr McEvoy had had to make alternative arrangements.

6.16 Mr Skrodzki decided that he should interview all those who were mentioned in the reports of Mr Harrison and Mr McEvoy. He also considered that he should interview Mr Sikorski as that could provide information regarding the claimant's bullying notwithstanding that the particular incident in which he had been involved had not triggered the investigation. Although Mr Sikorski could not provide evidence directly relevant to the incident that had occurred on 30 September 2019, Mr Skrodzki explained in evidence that he had decided to interview him so as to try to understand all the picture of the situation, which he considered to be relevant. Thus while, in interviewing Mr Sikorski, Mr Skrodzki went beyond the initial scope of the investigation I find his explanation for having done so to be understandable and that there was nothing untoward in him having done so.

6.17 Mr Skrodzki also reviewed the respondent's disciplinary policy (69) and anti-harassment and bullying policy (66) from the latter of which he noted, for example, that bullying would include intimidating behaviour and misuse of power, and examples included coercion and intrusion by pestering.

6.18 Mr Skrodzki first interviewed Mr Sikorski who wished to remain anonymous (132). Arising from that interview Mr Skrodzki noted the following: the claimant had sought to have Mr Sikorski join the union and he had been told that the claimant had told union members to keep away from him; when Mr Sikorski had refused the claimant had told him the he would sort it out another way, which Mr Sikorski interpreted as meaning he would do something against him; because he felt threatened he had stopped doing overtime on the claimant's shift; the claimant had wished everyone in the canteen except him a Merry Christmas; the claimant had shouted at him to get out of the canteen as they were having a meeting, Mr Sikorski commenting that it was not what the claimant had said but how he had said it; Mr Sikorski had mentioned it to a shift supervisor but did not want to complain because he knew he would have more people against him.

6.19 Mr Skrodzki was of the view that Mr Sikorski's information was credible and was corroborated by the fact that he had not worked on the claimant's shift for a long time. He considered that while it was reasonable for the claimant to ask Mr Sikorski to join the union there should not have been consequences when he declined, which Mr Skrodzki considered amounted to bullying. Similarly, the claimant had been asking union members to sign the collective grievance to have Mr Sikorski's pay reduced despite there being two other employees on the same paygrade. Mr Skrodzki confirmed in evidence that he had believed everything that Mr Sikorski had said to him before he spoke to the claimant; his explanation being that Mr Sikorski is a very quiet character, a calm person. In this respect he considered the fact that Mr Sikorski had stopped working on the claimant's shift to be corroborative evidence; it told him that something must have happened on that shift.

6.20 Mr Skrodzki next interviewed Mr Clough on 7 October (133). As mentioned above, he already had the reports of Mr Harrison and Mr McEvoy. He had also received an email from Mr Harrison dated 2 October 2019 (131) in which he had referred to Mr Clough stating that he was finding it hard to approach the company and make a formal complaint for obvious reasons and was very relieved that the company had taken a strong stance on the situation, as would be his partner.

6.21 Mr Skrodzki found Mr Clough to be anxious and reluctant to discuss in detail what had happened. He found Mr Clough's demeanour to be very withdrawn and he got the impression that he was scared to say anything against the claimant. Points arising from this interview included as follows: it had begun in July when Mr Robson spoke to him about the union wanted to drop his wages; the claimant had approached Mr Clough to ask him to take a pay cut so that others could have a rise; Mr Robson had the email [*which I take to mean the collected grievance*] about Mr Sikorski, it did not name him but it was pinpointed at him; the claimant had asked him to sign a grievance but he had refused he also asked him to provide a copy of his agreement so he could display it but Mr Clough refused; on 30 September he again asked Mr Clough to bring the agreement in and he had again refused; Mr Clough commented that he thought the power had gone to the claimant's mind and that he was bitter over the fact that he was losing his grade; as to the incident reported by Mr McEvoy, Mr Clough was worried, feeling uncomfortable and did not want to get called off the loaders; the pressure he felt under from the claimant was a contributing factor to him feeling sick/ill/wanting to leave and that he would not have felt the same if it had been a different person such as Mr Horner. Mr Skrodzki commented that Mr Clough had mentioned that the claimant was gentle and kind when he spoke and asked what the concern was to which Mr Clough responded that it was what the claimant was asking for, the agreement, and he should not be asking: it was fair enough to ask once but he had asked twice, the Friday and the Monday.

6.22 Mr Skrodzki interviewed Mr Henry on 9 October 2019 (138) in the context of him having gone home the previous week following a conversation with the claimant. Mr Henry explained that it was not just the claimant; he was frustrated as he was not getting answers about his job. The claimant kept saying there were redundancies and he felt like 'piggy in the middle'. Mr Taylor-Allen had told him to work over there and another supervisor told him to come back.

6.23 Mr Skrodzki next interviewed Mr Harrison on 9 October 2019 (139). He confirmed the content of his report of 2 October adding that with regard to the agreement Mr Clough had said "every shift he's at me, he's wanting to post it up on the factory" and that he was sick of the claimant harassing him about the agreement and to take a pay cut but he was also stressed because the company wasn't letting him know what was going on. When Mr Clough had returned to see him at 20.00 he was shaking and close to tears. That was when Mr Harrison decided to escalate it. He did not think Mr Clough wanted him to do that but he understood his duty of care. He

knew that this had been going on since before Mr Harrison had gone on holiday and Mr Clough had been saying that the claimant was bugging him. Mr Harrison kept an eye on it but could not ignore it any more.

6.24 Finally on 9 October Mr Skrodzki interviewed Mr McEvoy (140) who repeated the information contained in his report of 7 October. He informed Mr Skrodzki that the second time Mr Clough returned he had the impression that there had been a second conversation between him and the claimant as what Mr Clough said sounded pre-scripted as if someone had put words in his mouth. Further, that when Mr Clough returned the third time to express concern that a grievance would be put in against him if he continued working, Mr McEvoy felt that the claimant had threatened him that if he did not refuse to do the work allocated to him he would be subject to a grievance submitted by trade union members. In evidence, Mr Skrodzki accepted that if would not be bullying, in itself, for the claimant as a trade union representative to say to Mr Clough that he should not do a particular job because of redundancy but regard had to be had to the effect on Mr Clough. Mr Skrodzki's concern was the way it had been said, and that when Mr McEvoy had reassured him Mr Clough had gone to do the work but had then returned worried as to what would happen if he did; something had triggered that fear and he had asked his supervisor three times what he should do. If the claimant wanted to raise the issue he should have done so with the shift manager but instead he had spoken directly to Mr Clough and made him stressed and ill. Mr Skrodzki considered this to be a misuse of the claimant's role: it was not about trade union activities, he was telling Mr Clough what to do and he was not allowed to do that although he could give advice.

6.25 On 10 October 2019 Mr Skrodzki interviewed the claimant who was accompanied by Mr Gilmore his GMB full-time official (141 and 146). Matters that are relevant to the issues in this case that arose at this interview included as follows: GMB members had asked him to submit a grievance about one individual who was not under an agreement; on 29 September he had asked Mr Clough about a conversation he had had with Mr Robson and Mr Clough said that Mr Robson had told him that the union representatives were demanding money from Mr Clough's wages, which made him angry as the union had been misrepresented; on 30 September he again asked Mr Clough to tell him exactly what had been said and for a copy of his agreement, which he said he would be putting up on the wall, but Mr Clough had said that it was private and confidential; the claimant had stated that he was sick of Mr Clough saying he was thinking of coming out of the union; he had asked Mr Clough to bring in his paygrade agreement twice at most, once on 30 September, the purpose being to show Mr Robson that he could not take money from Mr Clough; in relation to enlisting members into the union the claimant had conducted himself appropriately and had not threatened anyone, had never encouraged union members to keep away from a non-union member and did not single anyone out; on being asked if there was anyone the claimant thought Mr Skrodzki should speak to, he replied that he should speak to Mr Gore and Mr Ewart.

6.26 Mr Skrodzki did not interview either of those men even though they had been present during the interaction between the claimant and Mr Clough in the canteen on 30 September as he knew they were close friends of the claimant and was concerned that they would be unable to provide impartial witness evidence.

6.27 In his witness statement Mr Skrodzki accepted that looking through his notes afterwards he felt that he had not confronted the claimant with the detail in the allegations that would perhaps have made it clear that the investigation was not to do with his GMB activities and was focused on whether his conduct amounted to bullying. In oral evidence he also accepted that he had not explored with the claimant the information that he had received from Mr Sikorski that he had shouted at him to get out of the canteen where a union meeting was taking place or that, on another occasion, the claimant had pushed Mr Sikorski causing him to feel bullied. Despite that he accepted that that was one of the matters that had led him to refer the claimant to a disciplinary hearing.

6.28 Having concluded the investigative interviews Mr Skrodzki felt unsure about how to proceed. He was satisfied that the information originally provided by Mr Harrison was accurate but the information he had gained from Mr Sikorski and Mr Clough did not substantiate the seriousness of the incidents in which they have been involved. The claimant had denied that he had done anything other than his trade union activities but Mr Skrodzki was satisfied that the incidents fell outside the scope of such activities: for example, it was acceptable to ask someone to join the union but not to instruct other colleagues to exclude them if they declined. In these circumstances Mr Skrodzki sought advice from HR. They were satisfied that they had reports of the claimant hassling and pestering Mr Clough to the point where he felt physically ill and was shaking while Mr Sikorski had reported feeling isolated by the claimant and those whom he told to stay away from him, and being shouted at to leave the room where he was holding a meeting. They were also satisfied that the claimant's motivation behind the pay cut issues and the events reported by Mr Clough was his own anger at receiving a pay cut and that in this respect, as Mr Clough had said, the claimant was misusing his role as GMB representative. Importantly the witnesses had made comments about being scared to report the claimant and/or holding back information. This being so it was concluded, first, that the allegations against the claimant, if proven, amounted to bullying and, secondly, there was sufficient evidence on the whole that there was a case to be answered.

6.29 Mr Skrodzki compiled an investigation report (152). He found that three incidents involving the claimant had caused his colleagues to feel threatened or harassed and led to two of them taking time off work to avoid him while a third had taken steps to avoid working with him. Mr Skrodzki felt that there was a probability that the statements given by the individuals during the disciplinary interviews had been diluted as they seemed to clam-up, had minimised what had happened and did not want to speak out against the claimant. Mr Clough had suggested that the

situation had little to do with claimant yet he had gone to his supervisor at the start of and during the shift on 30 September saying that he was hassled, stressed and wanted to leave. In contrast, he found the statements made by management who reported the issues to be credible and expressive of the true nature of the issues. There was a potential misdirection of the claimant's scope as a trade union representative which was possibly causing employees to feel intimidated and the company (and the GMB) should consider the impact upon union members and employees because of the manner in which the claimant conducted his trade union business, not that business itself. Mr Skrodzki explained in evidence that his assessment was that the claimant was performing his trade union activities and there was nothing wrong with that but it was the way in which he had done so. He was satisfied that the claimant had been constantly asking Mr Clough for his agreement and to sign the collective grievance, which had caused him a lot of stress; so much so that he wanted time off. The fact that Mr Clough did not wish to raise a formal complaint demonstrated to Mr Skrodzki that he was scared. He recommended that formal disciplinary action was required.

6.30 After the investigation concluded the claimant submitted a written statement (179) in which he set out further information regarding his employment and the allegations that he faced. He concluded that he would not be in the position he was in if he was not performing his role as a GMB representative and that his being victimised for that very reason, "is the definition of a witchhunt".

6.31 By letter of 21 October 2019 the claimant was requested to attend a disciplinary hearing on 30 October, the allegation being, "Bullying work colleagues" (165). The letter informed the claimant that Mr Taylor-Allen had been appointed as chair of the hearing and Mr McCullough, HR Manager, would be in attendance.

6.32 Mr Taylor-Allen accepted in evidence that the reference in the letter to "colleagues" was inaccurate as the allegation related solely to the incident on 30 September involving one colleague, Mr Clough. In the context of paragraph 9 of the Acas Code (which provides that the notification should contain sufficient information about the alleged misconduct to enable the employee to prepare to answer the case) Mr Taylor-Allen also accepted that the letter did not provide the claimant with minimum information such as the dates of the bullying, who had been bullied and how. He now realised that the letter was inadequate. He agreed that such inadequacy could have been remedied by telling the claimant at the outset of the disciplinary hearing the allegation that he was to face but that when his representative asked, "What are the allegations", the HR representative had simply replied, "We will cover that as we go through the meeting" and therefore there had been no clarity which, he accepted, was a serious failing on his part. That said, in cross examination the claimant confirmed that he had received the investigation report prior to the disciplinary hearing from which it was clear that the issue in question related to Mr

Clough and the manner in which the claimant had carried out his trade union business.

6.33 Mr Taylor-Allen had prior knowledge of the claimant. He had been his shift manager until November 2019 and never had any issues regarding his work. In carrying out his role of GMB representative, however, he knew the claimant to be rather aggressive in nature. He was aware of incidents where the claimant had acted in an aggressive manner including one occasion when he stormed into the management office and verbally attacked Mr Taylor-Allen in relation to what he considered to be a small shift matter, and he had later apologised. Mr Taylor-Allen was also aware of the ostracising stance the claimant took against non-union members.

6.34 By email of 23 October the claimant requested a change in the chair of the disciplinary hearing due to the close relationship Mr Taylor-Allen had with Mr Robson who was directly/indirectly involved in the allegations against him (167). That request was not acceded to (168).

6.35 The disciplinary hearing took place on 14 November 2019 (184). The claimant was accompanied by Mr Wilson. In preparation for the hearing the claimant submitted, in addition to his written statement referred to above (179), statements from colleagues Mr Gore (163), Mr McNally (166), Mr Monaghan (172) and Mr Ewart (178), and Mr Gilmore a GMB caseworker (174). He also submitted a statement from Mr Henry that he did not wish any part of his private conversation with management to be used in an investigation concerning the conduct of the claimant (173).

6.36 The disciplinary hearing lasted 2½ hours. In oral evidence, having been referred to in paragraph 12 of the Acas Code, Mr Taylor-Allen agreed that he had not explained the complaint to the claimant or gone through the evidence that had been gathered but had only asked the claimant five questions, and had not raised any issues regarding Mr Sikorski or the content of the reports from Mr Harrison or Mr McEvoy. The claimant answered Mr Taylor-Allen's questions regarding his conversation with Mr Clough in the canteen on 30 September, previously having asked him if he would take a pay cut and having spoken to him about his agreement regarding his rate of pay; the claimant explaining that he had approached Mr Clough twice for the agreement and Mr Wilson adding that the sole intention was to help Mr Clough's case regarding his rate of pay. The claimant also clarified having been approached by GMB members to put in a collective grievance about reducing pay rates and Mr Clough having complained to him that he was being asked to do a job where the previous incumbent had been made redundant to which he had replied that he should go and see his line manager. The claimant was categorical in denying that he had caused Mr Clough to be upset at any time that could be classed as bullying; he became a union representative and would not accept any form of bullying.

6.37 The claimant's witnesses then gave evidence in turn on which they were not questioned by Mr Taylor-Allen. In his opinion all the statements they

had provided in support of the claimant said the same thing and looked as if they had been tailored or coaxed to do so. He did not, however, pursue his concern with any of the witnesses.

6.38 In the disciplinary hearing Mr Taylor-Allen focused mainly on the incident between Mr Clough and the claimant as there was witness evidence from more than one individual. In contrast, it was difficult to question the claimant about Mr Henry, who wanted his original disclosures to be kept confidential, and Mr Sikorski wanted to remain anonymous.

6.39 Mr Taylor-Allen found the claimant's demeanour during the hearing to be defensive and he was not behaving like himself but was trying to portray a calm and meek persona and give the impression that he was utterly shocked to be accused of bullying. This was completely at odds with his usual experience of the claimant. The claimant had stressed that he was conducting legitimate trade union activities and denied most of the allegations against him. He and his representative focused strongly on the fact that the incident reported by Mr Clough did not involve shouting or swearing so it could not amount to bullying but Mr Taylor-Allen thought that bullying comes in a wide range of forms and, most importantly, regard needs to be had to the impact the behaviour is having on the recipient. Mr Clough had said that the claimant was always at him regarding the issue and it was affecting his personal life. The claimant and witnesses had referred to the one occasion in the canteen where it was stated that the claimant looked frustrated and Mr Clough was answering in a manner in which he was uncomfortable. This did not lead Mr Taylor-Allen to believe that the claimant's evidence was credible as it would be very unlikely that his version of events could have led to Mr Clough feeling the way he did; this was an important factor for him.

6.40 Mr Taylor-Allen did not call any witnesses at the hearing because Mr Skrodzki had explained to him that the individuals barely felt comfortable discussing the issues when they were not in the same room as the claimant and it was very unlikely that they would be comfortable giving evidence in front of him particularly as their statements could be challenged by the claimant and his representative; although he did accept in oral evidence that that could have been beneficial. Additionally, Mr Henry had asked to withdraw from the process and Mr Sikorski had asked to remain anonymous.

6.41 At the close of the meeting Mr Taylor-Allen was torn as to how to proceed. It was his view from the incident reports and parts of Mr Clough's and Mr Sikorski's statements that the conduct being reported amounted to bullying. He considered that the statement from Mr Harrison was probably closest to what had actually happened; it was credible evidence. As mentioned above, however, Mr Taylor-Allen did not raise any aspect of Mr Harrison's statement with the claimant during the disciplinary hearing, which he accepted in oral evidence amounted to a major flaw. In Mr Taylor-Allen's opinion, the claimant had placed unwanted and unnecessary pressure on his colleagues amounting to intimidation

creating an environment which led his colleague to go home sick and actively avoid him, and he had attempted to corral union members and the union actively to isolate individuals who did not cooperate with him. None of those allegations could reasonably be considered to be trade union activities even if the events that triggered the allegations had been rooted in trade union activities to begin with. Mr Taylor-Allen's concerns lay with the evidence they had collected as he felt the witness evidence did not strongly support what they knew to be the case.

6.42 Mr Taylor-Allen had heard from others of incidents of the claimant acting like a bully and knowing this lent weight to the initial allegation and made the claimant's strong denials less plausible. He was also conscious that the witnesses had commented about being afraid to report the claimant and seemed very reluctant to come forward despite initially expressing relief that the respondent was dealing with the matter. Mr Taylor-Allen did not, however, put to the claimant what he had heard about other incidents or about colleagues being afraid of him, and accepted in oral evidence that with hindsight he should have done so.

6.43 Mr Taylor-Allen took into account that the claimant had not been warned previously and his length of service and general level of performance but they were not sufficient to mitigate the serious nature of his conduct. It was clear from Mr Taylor-Allen's oral evidence that he was also influenced by the reaction of employees whom he said were relieved when the claimant had been suspended and that the respondent had initiated action and was dealing with the matter, which he considered showed the weight of what was happening at the time. The HR team advised Mr Taylor-Allen that there was sufficient evidence to proceed with the dismissal. Mr Taylor-Allen genuinely believed that the claimant had misused his position and his actions amounted to bullying: I accept that he had that genuine belief. Mr Taylor-Allen explained that the claimant was dismissed for his conduct involving Mr Clough on 30 September but that he also took account of the pattern that had built up before then including the incident on the 21 September. He did not dispute that in his conversations the claimant was acting in his capacity of a trade union representative but he did dispute the manner in which he had done that.

6.44 The decision to dismiss the claimant was communicated to him by letter of 21 November 2019 (192). Mr Taylor-Allen was unclear in his evidence as to who had actually made the decision to dismiss the claimant. He first replied that it was a joint decision made by him and HR, then that he made the decision and sought HR advice, then that he collaborated with HR; the decision was what he thought but he got HR advice, their role being to support him. In light of Mr Taylor-Allen's evidence I find that it was a joint decision, which was his first answer; that finding being reinforced by the fact that the letter of dismissal was written by the HR team and sent to the claimant on behalf of Mr Taylor-Allen without him having seen it.

6.45 In essence, the decision was "to uphold the allegation of bullying and summarily dismiss you without notice on the grounds of gross misconduct

for bullying at work of a colleague." Mr Taylor-Allen accepted in oral evidence that the letter had not provided any reasons for the dismissal and that this was contrary to paragraph 22 of the Acas Code.

6.46 The Disciplinary Policy that applies to the Gardner Aerospace group of companies (69) contains what is described as an "Additional policy point for Consett" in the following terms: "No sanction will be imposed on a trade union official without the matter first being discussed with a senior or full-time official of the trade union" (75). Mr Taylor-Allen confirmed that there had been no such discussion prior to the claimant's dismissal. He could not explain why.

6.47 The claimant was offered a right of appeal, which he exercised (195). His appeal was not, however, progressed by the respondent. Ms Storer explained that this was her decision, on solicitors' advice. The reason was that it had been decided at the hearing of the interim relief application before the Employment Tribunal on 12 December 2019 that the claimant should be reinstated and, therefore, it had been decided that there should be no appeal. In Ms Storer's letter to the claimant of 15 January 2020 it is explained, "as we are now in litigation on the matter the company will no longer support your request for an appeal" (200).

6.48 I interject at this point that in making the above criticisms of the investigation conducted by Mr Skrodzski, the disciplinary process conducted by Mr Taylor-Allen and Ms Storer's decision in respect of the appeal I consider it appropriate to record that those individuals were not operating in a vacuum; on the contrary they were supported throughout by members of the respondent's group's HR Department whom it is reasonable to assume were appropriately qualified yet the advice and guidance that they gave (especially to the two essentially operational managers) appears to have been distinctly lacking.

6.49 Apart from the above matter of the appeal, Ms Storer's evidence primarily related to the question of remedy, particularly the remedy of reinstatement that the claimant had indicated was his preference. She first explained the effect of the Covid-19 pandemic on the business of the respondent's group, in relation to which her evidence went unchallenged. In summary, the Group's business is dependent on the requirements of Airbus which had produced some 70% of the Group's revenue. The forecasted sales turnover in January 2020 for the Group had been in excess of £236 million; the most recent forecast is £122 million. Airbus had announced a sizeable reduction in production rates amounting to between 50% and 60% and that this would continue for 3 to 4 years. Consequent restructuring of the business saw a reduction in the UK headcount in excess of 400, leaving about 450 employees, the closure of two UK sites and a halving of the headcount in the remaining sites including at Consett, which had become a satellite of the Derby site effectively removing a layer of management.

6.50 The claimant had been involved in this redundancy process during the Summer of 2019 (206) when his score against the selection criteria had resulted in him not being selected for redundancy.

6.51 In June 2020 there had been plans for redundancies of around 103 (with a maximum 110 being recorded in the Insolvency Service form HR1) out of 205 employees at Consett but, through collective consultation, an alternative shift pattern was proposed and voted upon which had saved 38 of those roles. In agreeing the significant reduction of hours and shift pattern to achieve this the employees had demonstrated a significant sacrifice for colleagues and friends. Without the redundancies and the altered shift patterns the respondent would have been closed by the Group. It was hoped but could not be guaranteed that there would not be further headcount reductions in the coming months or years.

6.52 The recent round of redundancies undertaken by the respondent (210) between June and September 2020 had seen a reduction in headcount within the pool of Post NC Operator (within which the claimant had worked) from 31 to 18. In this regard the claimant accepted in evidence that had he still been at work at this time he could have been one of the employees selected for redundancy but said that he believed that he would have retained his employment.

6.53 In the circumstances, the respondent can forecast its headcount and, therefore, headcount costs. It knows what would be sustainable and therefore knows that if the claimant were to be reinstated there would need to be further redundancies. A minimum of one redundancy would be required if the claimant were to be reinstated or re-engaged on the current salary structure but reinstatement on the claimant's previous salary structure would result in a headcount reduction of three.

6.54 All four of the respondent's witnesses gave equivalent evidence as to the positive impact at the Consett site that has resulted from the claimant's dismissal: generally in terms such as less disruption, aggression and negativity; upon Mr Clough in particular; and in an improved relationship with the GMB, the representatives of which have become more open and endeavour to resolve issues rather than submitting grievances. Indeed it was Ms Storer's evidence that one of the GMB representatives at Consett has wholly supported the decision to dismiss the claimant although he has questioned the process leading to the dismissal. Against that, the claimant submitted a petition dated 23 November 2020 signed by approximately 50 employees at Consett (none of whom were managers) in support of him who, it was said, had "served us well during his spell as our union representative" and, "We never witnessed anything that would constitute as bullying from John as he always dealt with matters that affected the members in an informed and professional manner." I accept that petition at face value but also accept the comment made by Ms Storer that in seeking to give any great weight to the petition much would depend on how the signatures were canvassed. In that regard no one attended the hearing (whether a GMB union official, member or otherwise) to give

evidence akin to the wording of the petition. On balance, I prefer the evidence of the respondent's witnesses in which the evidence of the one was corroborated by the evidence of the others. Although I am obviously alert to the possibility of witnesses 'getting their heads together' to concoct a story for the purposes of this Tribunal, their evidence was consistent although not elaborately so and I am satisfied that there was no suggestion of duplicity in this case; neither was it suggested by the claimant's representative. I particularly note and accept the evidence from Ms Storer that her evidence that reinstating the claimant, "would have significant negative impact on the workforce" had been drawn from the investigation report but also on the interaction that she had had with the workforce during the recent redundancy process when lots of people had raised this.

6.55 As a result of the Judgment of the Employment Tribunal at the interim relief hearing on 12 December 2019 the claimant's contract of employment had been continued and he had continued to receive full pay. He had not looked for alternative employment because he would need a reference and, in his opinion, that was not going to happen; also he had struggled with anxiety and depression.

6.56 The claimant confirmed that as a result of these matters there was no trust between him and the respondent but that was not his fault; the breakdown of trust had been from the respondent. He also confirmed, however, that Mr Harrison and Mr McEvoy had left the respondent's employment and Mr Robson was leaving at the end of the year. Additionally, Ms Storer confirmed that Mr Taylor-Allen was also leaving at the end of the year. It was the claimant's evidence that there was "very little trust between me and Mr Skrodzski" (whom he confirmed was still working at the respondent and would manage him if he returned to work) or between him and Ms Storer. As to the workforce at Consett he had no enemies and the vast majority were still close colleagues and mostly friends.

Submissions

7. After the evidence had been concluded the parties' representatives made submissions, both oral and written, for which I was grateful, which painstakingly addressed in detail the matters that had been identified as the issues in this case in the context of relevant statutory and case law. It is not necessary for me to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below. Suffice it to say that I fully considered all the submissions made and the parties can be assured that they were all taken into account into coming to my decision.

8. That said, the key points made by Mr Tinnion on behalf of the claimant included as follows:

Reason for dismissal

8.1 The respondent had been unable to state who actually made the decision to dismiss the claimant and whether that was because he had bullied one or more than one colleague; there was no contemporaneous evidence of Mr Taylor-Allen's findings of fact after the disciplinary hearing and no evidence of how many times the claimant is said to have pressured Mr Clough to reduce his pay and provide a copy of his agreement, in respect of the latter Mr Clough's evidence at the investigation interview that the claimant had asked him for his agreement only twice (once on 27 and once on 30 September 2019) matched the claimant's evidence. The decision to dismiss was therefore outside the range of reasonable responses.

Automatic unfair dismissal

8.2 The claimant was a GMB trade union representative; Mr Taylor-Allen accepted that he had dismissed the claimant because of his conduct on 30 September 2019 and that that was trade union activity; Mr Taylor-Allen had taken into account the claimant's conduct when speaking to Mr Clough on 21 September 2019 as it demonstrated a pattern of behaviour and accepted that on that occasion the claimant was acting in his capacity as trade union representative; the claimant's conduct on 30 September related to trying to get Mr Clough to bring his agreement into work and to sign the collective grievance both of which were trade union activities.

8.3 In relation to the final point, the decision in Morris v Metrolink RATP DEV Ltd [2018] EWCA Civ 1358 is the current statement of the law and not the decision in Lyon relied upon by Mr Healy. In Morris, Lord Justice Underhill had stated at paragraph 20, "An employee should not lose that protection simply because something which he or she does in the course of trade union activities could be said to be ill-judged or unreasonable." The claimant's conduct on 30 September could not be considered either ill-judged or unreasonable and even if arguendo it was, his conduct remains 'core' trade union activity which section 152(1)(b) is designed to protect.

Ordinary unfair dismissal

8.4 The claimant's dismissal fell outwith the range of reasonable responses open to the respondent and was hence unfair. In support of this contention:

8.4.1 The respondent had failed to produce satisfactory evidence as to the reason for dismissal (see above).

8.4.2 In respect of the investigation, Mr Skrodzky had demonstrated bias in that he already thought the claimant was a bully; had unilaterally extended the scope of the investigation beyond the terms of reference given by Mr Robson to include the incident two years prior in respect of Mr Sikorski; had demonstrated failures in the

conduct of the investigatory interviews with Mr Clough, the claimant and Mr Sikorski; had produced a flawed investigation report. Regard had been had to Mr Harrison's report regarding the demeanour of Mr Clough but he had not slept between shifts, had argued with his partner, and came to work in a bad place on account of stress over money as the reality was that his post was level 2 work for which he was receiving level 3 pay, and Mr Robson had said he would reduce the pay of all three operatives in that position. This was not of the claimant's making.

8.4.3 Mr Taylor-Allen was also biased given his pre-existing beliefs about the claimant; had failed to meet paragraph 9 of the Acas Code by not giving sufficient information about the alleged misconduct; had conducted the disciplinary hearing unreasonably (including, contrary to paragraph 12 of the Acas Code, not clarifying the allegations at the outset and not going through the evidence that had been gathered); had not engaged with the claimant's rebuttal evidence; had not made specific findings of fact; had made a decision to dismiss that was flawed and perverse (including taking account of matters that did not form part of the evidence before him, not complying with the respondent's disciplinary policy that no sanction should be imposed on a trade union official without prior discussion with a senior or full-time official and recognising that the allegation was not strongly supported by the witness evidence).

8.4.4 The respondent had failed to allow the claimant to have an effective appeal against his dismissal. This is not a trivial point and is especially important as there is no dispute that the claimant's acts were within his trade union activities. It was plainly unreasonable to deny the claimant's appeal, which might have found that he was not guilty of misconduct or, even if he was, he should not be dismissed. It is routine for an appeal to be conducted after Employment Tribunal proceedings have begun, which is good industrial relations practice and, if successful, the dismissal is nullified.

8.5 With reference to the decision in Burchell, if Mr Taylor-Allen held a genuine belief that the claimant was guilty of misconduct that was an unreasonable belief in light of the inadequate, unreasonable investigation.

8.6 As to Polkey, if a fair dismissal procedure had been applied there is 0% chance that the claimant would have been fairly dismissed. That was not a reasonable or proportionate outcome to the alleged wrongdoing. In determining compensation the Tribunal is to deal with the world as it is and in this case the real-world facts include that the claimant avoided the June 2020 redundancy round and his still an employee. He is not seeking losses between the date of his dismissal to the date of the hearing because there were none; only future loss

8.7 The claimant had not contributed to his dismissal by engaging in what were no more than legally permissible trade union activities.

8.8 Reinstatement, which is what the claimant wants, is a practical remedy in this case: the claimant had furnished evidence which shows he still enjoys a great deal of support among many workers at Consett; Mr Skrodzky apart, every person with whom the claimant had difficulties in the past has left the respondent's employment or is about to; it is wrong for the claimant to be kept out of his old job simply because the respondent does not want him back and is glad to see him gone; it is pure speculation that the respondent would have to initiate a further mini-redundancy exercise if the claimant was reinstated but even if that was to happen, reinstatement would give the claimant a fair opportunity to be one of those who keeps his job after a fair redundancy selection exercise.

8.9 In the absence of reinstatement, the claimant seeks a basic award and a compensatory award set at the maximum of 52 weeks' pay.

8.10 If the Tribunal were to decide that there should not be an order for reinstatement it does not need to do the maths regarding compensation; provided findings are made in respect of Polkey and contribution the parties can work it out.

9. The key points made by Mr Healy on behalf of the respondent included as follows:

Reason for dismissal and automatic unfair dismissal

9.1 The reason for dismissal is genuinely conduct and is properly separable from the trade union activities of the claimant. The respondent was satisfied that he had bullied a work colleague, Mr Clough, by repeatedly asking him to consider a reduction in his pay and asking him to bring into work a copy of his agreement. The claimant was involved in trade union activities but had crossed the line into bullying and intimidating behaviour, to the extent of making his colleague unwell and unwilling to attend work, which was unacceptable; this against a backdrop of a pattern of similar behaviour by the claimant in the past.

9.2 No issue was taken with the claimant's representative's reliance upon the decision in Morris but the decision in Lyon v St. James Press Ltd [1976] ICR 413 remains good law:

> *"the special protection…must not be allowed to operate as a cloak or an excuse for conduct which ordinarily would justify dismissal; equally, the right to take part in the affairs of a trade union must not be obstructed by too easily finding acts done for that purpose to be a justification for dismissal"*.

9.3 It was the manner in which the claimant carried out his duty that was the principal reason for the investigation and his dismissal. There is nothing to suggest that any of those involved in the disciplinary process were motivated by the fact that the claimant was a trade union representative.

Ordinary unfair dismissal

9.4 In terms of Burchell, the respondent genuinely believed that the claimant had bullied or harassed Mr Clough, and there were reasonable grounds for that belief taking account of all the evidence before the respondent including the initial accounts from Mr Harrison and Mr McEvoy alongside the interviews given later as part of the investigation. The contemporaneous account is often more accurate and compelling as it is done generally in confidence to the employee's superior. Weight can be put on that. Additionally, it was permissible to consider the extent to which other employees had complained about the claimant's behaviour and the reluctance they may have in giving evidence as part of a formal process. The statements subsequently produced by the claimant did not really address the key issue of his conduct towards Mr Clough over a number of weeks/months. Mr Taylor-Allen viewed the claimant's conduct as bullying and explain why. It is not the Tribunal's job to interfere with that if there are rational grounds. The claimant says that he spoke to Mr Clough once, maybe twice, at the end of September but the issue had been on the table since July and it is improbable that the claimant would sit on his hands for two months and not pester Mr Clough.

9.5 The sanction of dismissal fell within the band of reasonable responses. The respondent was entitled to take bullying and harassment of a colleague seriously in light of the claimant's evidence that he had asked Mr Clough no more than twice about his agreement (which evidence the respondent rejected) and his lack of insight or contrition in respect of his actions.

9.6 In terms of process, the respondent properly separated the investigator and disciplinary functions and there is a band of reasonable responses as to how an employer may investigate matters: Sainsbury's Supermarkets Ltd v Hitt [2003] ICR 111. Mr Skrodzki was a compelling witness and was entitled to work around the edges and do what he did.

9.7 The key principles in the Acas Code had been complied with: establishing the facts; giving sufficient information about the alleged misconduct (as is borne out by the claimant's five page statement (179)); holding a meeting reasonably promptly yet allowing sufficient time for the claimant to present his case and call witnesses; ensuring that the claimant could be accompanied to the meeting.

9.8 With hindsight there were aspects of the disciplinary hearing that could have been handled differently but the claimant admitted that he knew the case he had to answer and was able to do so. The evidence from witnesses may not have been interrogated or given's consideration by Mr Taylor-Allen but that was because they did not touch upon the core allegations against the claimant.

9.9 As to the absence of an appeal, the effect of the Continuation Order was that the claimant's contract of employment continued in force and, as such, the respondent was entitled to take the view that the process was now sub judice. It erred on the side of caution and did not want to be criticised by the Employment Tribunal.

9.10 The claimant had engaged in culpable and blameworthy conduct. He pestered and harassed Mr Clough without justification about specifically not signing the collective grievance, not bringing in his copy of the agreement in respect of his paygrade and the suggestion that he should agree to reduce his own contractual rate of pay. Sufficiently so as to make Mr Clough ill such that he needed to leave work early. The claimant's actions were foolhardy, reprehensible and caused or at least contributed to his dismissal such as to merit a reduction in compensation.

9.11 If the claimant was unfairly dismissed there is every prospect that his employment would have ended fairly in any event if not in November 2019 then in June 2020 when more than half of those doing his role were made redundant. If the claimant would have been one of those he should receive no compensatory award although he would still be entitled to a basic award. The claimant escaped redundancy in 2019 but it is likely that he would have been made redundant in 2020. Additionally, looking forward, there still seems the prospect of further redundancies, which the Tribunal is entitled to take into account, and reduce any compensatory award by 40/30%. Polkey feeds into this case in three ways of considering:

9.11.1 what is likely to have happened had any defects being cured;

9.11.2 what losses properly flow from the dismissal on 21 November 2019 bearing in mind the possibility that dismissal would have occurred anyway in Autumn 2020;

9.11.3 what is likely to happen in the future.

Additionally, the guidance given in decision in Andrews v Software 2000 is part of the assessment of just and equitable compensation; and see also Ministry of Justice v Parry [2013] ICR 311.

9.12 The Tribunal has a broad discretion when considering whether to order re-employment, which is rare in conduct cases such as this and rarer still in section 152 claims given the bad feeling and mistrust that such cases tend to involve. The dominant factor is that of practicability with the extent to which the claimant caused or contributed to his dismissal also being taken into account (section 116(3)(c)). "Practicable" means more than impossible but "capable of being carried into effect with success": (Coleman v Magnet Joinery Ltd [1975] ICR 46, CA). There is no statutory presumption of practicability that the employer is required to displace (Lincolnshire CC v Lupton [2016] IRLR 576).

9.13 It is also clear that reinstating a dismissed employee should never necessitate redundancies or significant overstaffing. See Cold Drawn Tubes Ltd v Middleton [1992] ICR 318 at 324B: *"It is very difficult to see how reinstatement could become a practicable option, because it would result either in a redundancy process or in significant overmanning. It would be contrary to the spirt of the legislation to compel redundancies, and it would be contrary to common sense and to justice to enforce overmanning."* In the current climate, re-employment is even less practicable than before the pandemic. One needs to point to the employer hiring staff or engaging agency workers and the respondent is a world away from that.

9.14 Re-employment is manifestly unsuited to the facts of this case. It is hard to imagine a case less suited; it would damage industrial relations and there is a clear loss of trust and confidence between the parties. It is not uncommon for an employer to say that there is no trust (Asda Stores v. Raymond UKEAT/0268/17/DA at paragraph 59) but it is unusual for the employee also to say that. The claimant says that he has real problems with Mr. Skrodzki, against whom he has made a lot of allegations and says that he has no trust in Ms Storer. Regardless of the fact that several managers of the respondent have left, it seems very unlikely that there is an employment relationship that can be rebuilt given the distrust the claimant has towards his employers. The petition is a dubious evidential document: how was it sourced and who produced it? It shows a possibility of 'them and us' and gives rise to real concern that if the claimant returned there would be greater division between the workforce and supervisors

The Law

10. The principal statutory provisions that are relevant to the issues in this case are to be found are as follows:

The 1996 Act

"94 The right.

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

The 1992 Act

"152 Dismissal of employee on grounds related to union membership or activities.

(1) For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee —

(a) was, or proposed to become, a member of an independent trade union,

(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time,

……..

(2) In subsection (1) "an appropriate time" means —

(a) a time outside the employee's working hours, or

(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services;

and for this purpose "working hours", in relation to an employee, means any time when, in accordance with his contract of employment, he is required to be at work."

The 1996 Act

"98 General.

(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 —

.....

(c) 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."

Application of the facts and the law to determine the issues

11. The above are the salient facts relevant to and upon which I based my judgment. I considered those facts and submissions in the light of the relevant law and the case precedents in this area of law upon several of which I was addressed by the representatives in submissions.

12. As indicated above, the claimant has brought a single complaint of unfair dismissal. The issues arising from the statutory and case law referred to above that are relevant to the determination of that complaint are summarised at paragraphs 4 and 5 of these Reasons.

13. The claimant has advanced his complaint of unfair dismissal on two bases: first, what is commonly referred to as being 'automatic' unfair dismissal in that the reason for his dismissal (or, if more than one, the principal reason) was that he had taken part in the activities of an independent trade union at an appropriate time; secondly, what is commonly referred to as being 'ordinary' unfair dismissal in relation to which he challenges both the reason for his dismissal and whether the respondent acted reasonably in that connection. I shall address each of these bases in turn.

The reason for dismissal

14. In this case, the claimant has sufficient qualifying service under section 108 of the 1996 Act to enable him to present a complaint of 'ordinary' unfair dismissal. That being so, the burden of proving the reason for dismissal is on the respondent in respect of the complaints of both 'ordinary' and 'automatic' unfair dismissal: Maund v Penwith District Council [1984] ICR 143, CA.

15. That said, it is for the claimant to show, without having to prove, that there is an issue which is capable of establishing the automatically unfair reason: i.e. referring to section 152(1)(b) of the 1992 Act, that the reason or principal reason for his dismissal was that he had taken part in the activities of an independent trade union at an appropriate time.

16. I am satisfied that the claimant has shown that to be the case. There is no dispute between the parties as to context of the claim before this Tribunal that the claimant was a representative of the GMB, which is an independent trade union that is recognised by the respondent and that, as such, in relation to the relevant events that have been addressed above he was taking part in the activities of that trade union at an appropriate time; this being relevant to the first issue before this Tribunal.

17. As in any claim of unfair dismissal, therefore, the reason for the dismissal comes into play and is particularly important in a case such as this.

18. By reference to the long-established guidance in Abernethy v Mott Hay and Anderson [1974] IRLR 213, the reason for dismissal is the facts and beliefs known to and held by the respondent at the time of its dismissal of the claimant.

19. In that context, I consider first the claim of 'automatic' unfair dismissal.

'Automatic' unfair dismissal

20. Although the evidence of the respondent's witnesses, Mr Skrodzki and Mr Taylor-Allen, was not as clear as perhaps it might have been, I am nevertheless satisfied that the event giving rise to the claimant's dismissal was limited to his approach to Mr Clough before the start of the late shift on 30 September 2019; albeit, as Mr Taylor-Allen said, he also took account of the pattern that had built up before then including the incident involving the claimant and Mr Clough on 21 September.

21. Neither Mr Skrodzki nor Mr Taylor-Allen disputed that in his conversation with Mr Clough on 30 September the claimant was acting in his capacity as a trade union representative when, first, he asked Mr Clough to bring his agreement into work and, secondly, he asked Mr Clough to sign the collective grievance. Likewise, there was no dispute that the claimant was also acting in that capacity during his involvement with Mr Clough on 21 September and with Mr Henry on 27 September, and in relation to lodging the collective grievance on 4 September 2019.

22. The issue, however, (again as both Mr Skrodzki and Mr Taylor-Allen said) was the manner in which the claimant had conducted himself in the course of those trade union activities. Mr Skrodzki was satisfied that the claimant had been constantly asking Mr Clough to bring his agreement into work and to sign the collective grievance, which had caused him stress to the extent that he wanted time off work. It was on this basis that, first, Mr Skrodzki recommended that formal disciplinary action be taken and, secondly, Mr Taylor-Allen decided jointly with the HR representative that the claimant should be dismissed.

23. In these circumstances, the decision of the Court of Appeal in Morris is clearly relevant. An excerpt from paragraph 20 of that decision was relied upon by Mr Tinnion in submissions and is set out above. Such is the importance of this caselaw to my decision, however, it justifies setting out a longer extract from both paragraphs 19 and 20 where Lord Justice Underhill said as follows:

> *"…. there will be cases where it is right to treat a dismissal for things done or said by an employee in the course of trade union activities as falling outside the terms of section 152(1), because the things in question can fairly be regarded as a distinct reason for the dismissal notwithstanding the context in which they occurred; and [*Phillips J's*] reference to acts which are "wholly unreasonable, extraneous or malicious" seems to me to capture the flavour of the distinction. That precise phraseology should not be treated as definitive …. but the point which it encapsulates is that in such a case it can fairly be said that it is not the trade union activities themselves which are the (principal) reason for the dismissal but some feature of them which is*

genuinely separable. Azam is a good illustration of such a case: the employee's deliberate breach of confidence could fairly and sensibly be treated as a reason for dismissal distinct from the fact that it occurred in the context of trade union activities

20. However, as Phillips J points out, this distinction should not be allowed to undermine the important protection which the statute is intended to confer. An employee should not lose that protection simply because something which he or she does in the course of trade union activities could be said to be ill-judged or unreasonable. (NB that Phillips J, I am sure deliberately, says "wholly unreasonable"). Bass Taverns is a good illustration of this: the employee was held to fall within the scope of the section even though he had gone "over the top"."

24. I also note that Underhill LJ quoted with approval from the decision of Phillips J in Lyon as follows:

> "Phillips J ac*knowledged the possibility of distinguishing between a dismissal for carrying out trade union activities and a dismissal for misconduct occurring in the context of such activities. He said, at p. 418 B-D:*
>
> > *"The marks within which the decision must be made are clear: the special protection afforded by paragraph 6 (4) to trade union activities must not be allowed to operate as a cloak or an excuse for conduct which ordinarily would justify dismissal; equally, the right to take part in the affairs of a trade union must not be obstructed by too easily finding acts done for that purpose to be a justification for dismissal. The marks are easy to describe, but the channel between them is difficult to navigate."*
>
> *He went on to say that on the facts of the instant case the employees could not be said to have been guilty of any misconduct. He concluded, at p. 419C:*
>
> > *"We do not say that every such act is protected. For example, wholly unreasonable, extraneous or malicious acts done in support of trade union activities might be a ground for a dismissal which would not be unfair."*

25. Finally in this respect I record, for completeness, that I have reminded myself of the examples to be drawn from the decisions in Azam v Ofqual [2015] UKEAT/0407/14 (where an employee who was dismissed for breach of confidentiality of information supplied to her as branch chair of a trade union in the course of negotiations was held not to have been dismissed for taking part in trade union activities) and, in contrast, Bass Taverns v Burgess [1995] IRLR 596 (where a shop steward who, during the course of a presentation, made highly-coloured critical remarks about the management's attitude to health and safety, which he later accepted had been "over the top", for which he was demoted and claimed constructive dismissal, was held to have been dismissed for taking part in trade union activities). These decisions also being quoted with apparent approval in Morris.

26. The point is balanced. The respondent has accepted that the context in which the events of 30 September occurred was the claimant carrying out trade union activities. As referred to in the second agreed issue in this case the question for

me, however, is whether it was the claimant taking part in those activities themselves which was the reason or principal reason for his dismissal (in which case his complaint succeeds) or whether, as the respondent has maintained, it was the manner in which the claimant carried out those activities that was the reason for his dismissal and that is "genuinely separable" from his participation in the legitimate trade union activities.

27. One of several difficulties in this case is that the respondent, in the shape of Mr Skrodzki and Mr Taylor-Allen, seems to have put greater weight upon the information provided by Mr Harrison in the Investigation Report statement that he produced on 2 October 2019 regarding, amongst other things, his discussions with Mr Clough on 30 September (129) (the information in which he essentially restated during his investigation meeting on 9 October 2019 (139)) than on the information provided by Mr Clough himself during the course of his investigation meeting on 7 October 2019 (133). Mr Tinnion is understandably critical of that. I can understand that criticism because, as a general rule, one would expect the investigating officer and the decision-making officer to give greater weight to the information provided during the course of the investigation by the supposed 'victim' of unacceptable conduct. I am satisfied, however, that it was reasonable for Mr Skrodzki and Mr Taylor-Allen to adopt the approach that they did. I accept that Mr Harrison was not a witness to what occurred between the claimant and Mr Clough on 30 September but his Report, while not being wholly contemporaneous, was produced within two days of the event and contains what I am satisfied is a factual account of his discussion with Mr Clough on 30 September. There has been no suggestion that in producing his Report Mr Harrison was improperly motivated or provided other than what he considered to be an accurate account of events. In his Report Mr Harrison refers to Mr Clough having told him that the union shop floor representative (and in this regard there is no suggestion that that was other than the claimant) had been trying to get him to bring his agreement for level 3 pay into work to look at. It is accepted that that was a trade union activity on the part of the claimant and that there was nothing wrong with him making that request but Mr Harrison's Report continues that Mr Clough had responded to the claimant "several times that it is private and confidential and he would not be bringing it in". It is reasonable to infer from that that the claimant continued to make his request despite Mr Clough's negative response. Mr Harrison's Report continues that the claimant had also tried to get Mr Clough to sign a grievance, which he had refused to sign. Once more it is accepted that that was a trade union activity and there was nothing wrong with the claimant making that request. Again the Report continues, however, that Mr Clough told Mr Harrison, "that this constant hassling from the union trying to get his money dropped was now causing problems at home between him and his partner" and that although Mr Clough had said that he enjoyed working on the shift, got on with most people really well and enjoyed working with Mr Harrison, he "was sick of coming into work for the union to get at him about his money". Mr Harrison's assessment of Mr Clough when he returned to speak to him during the 20:00 break was that, "he clearly didn't look right and he showed me his hands which were shaking. Paul was visibly upset and I told him to go home and get a good night's rest which he did." I am satisfied that the relevant elements in Mr Harrison Report include that Mr Clough told the claimant "several times" that he would not bring his agreement into work, that the union trying to get his money

dropped amounted to "constant hassling" and in this respect he was "sick of coming into work".

28. I find it is significant that, as mentioned above, the information Mr Harrison provided during his investigation meeting on 9 October 2019 (139) was consistent with that in his report from five days earlier. Indeed, in respect of Mr Clough having referred to "several times" and "constant hassling", Mr Harrison added at his investigation meeting that Mr Clough had said "every shift he's at me, he's wanting to post it up on the factory", that his wife had told him "it was bullying" and that he was mainly sick of the claimant "harassing him about the agreement and to take a pay cut" but was also stressed because the respondent was not letting him know what was going on. At the investigation meeting Mr Harrison reiterated that at the 20:00 break Mr Clough "was shaking and close to tears". In this respect it is also of relevance that at his investigation interview Mr Clough stated that the pressure he felt under from the claimant was a contributing factor to him feeling sick/ill/wanting to leave work.

29. I am satisfied that the matters I have identified in the preceding two paragraphs are key elements to be considered in the context of the whole of Mr Harrison's Report, which suggest that in relation to these two matters of Mr Clough's level 3 pay (and the agreement in respect of that) and persuading him to sign the collective agreement, the claimant's conduct constituted unreasonable and persistent pressure amounting to harassment, which caused Mr Clough worry and distress.

30. I find support for that finding in the content of the email from Mr Harrison dated 2 October 2019 (131) in which he records that he had spoken to Mr Clough when he came into work that night when he had told Mr Harrison that although he was finding it hard to approach the respondent to make a formal complaint for obvious reasons he was "very relieved that the company has taken a strong stance on the situation". Once more, there has been no suggestion that in writing this email Mr Harrison was improperly motivated or provided other than what he considered to be an accurate account of events that night.

31. I have considered very carefully whether that conduct of the claimant on 30 September, which it is accepted was within the course of his trade union activities, could be said to have been merely ill-judged or unreasonable and in that respect have also had in mind the phrase "wholly unreasonable, extraneous or malicious"; albeit noting the observation of Underhill LJ that that precise phraseology should not be treated as definitive.

32. Having done so, I am satisfied that the claimant's conduct was not such that could be categorised as being ill-judged or unreasonable but was in fact "wholly unreasonable". In these circumstances (referring to the decision in Lyon) I am satisfied that in relying upon section 152 of the 1992 Act the claimant is seeking to cloak or excuse conduct which ordinarily would justify dismissal. That is a sufficient finding for these purposes but I record, for completeness, that additionally I am satisfied that the claimant's conduct was possibly also "extraneous" in the sense that, despite his assertions to the contrary, on the evidence before me it does seem more likely than not that his conduct in his

exchanges with Mr Clough was also motivated by a personal interest in seeking to avoid or reduce the reduction in his own pay from level 3 to level 2.

33. In conclusion on this point, with reference to the fourth and fifth of the agreed issues, on the evidence before me I am satisfied that the respondent has discharged the burden of proof to show that the reason for the claimant's dismissal was related to his conduct (that being a potentially fair reason in accordance with section 98(1) of the 1996 Act) and was not that the claimant had taken part in the activities of an independent trade union.

34. As such, I turn to consider the claim of 'ordinary' unfair dismissal.

'Ordinary' unfair dismissal

35. The issues in such a complaint typically fall into two principal parts, the first of which is what was the reason for the dismissal and was it a potentially fair reason. I have just addressed that aspect.

36. Having thus been satisfied as to the reason for the dismissal, I move on to consider the second aspect of whether the dismissal of the claimant was fair or unfair under section 98(4) of the 1996 Act, which requires consideration of three overlapping elements, each of which I must bring into account:

    36.1 first, whether, in the circumstances, the respondent acted reasonably or unreasonably;

    36.2 secondly, the size and administrative resources of the respondent;

    36.3 thirdly, the question "shall be determined in accordance with equity and the substantive merits of the case".

37. In this regard I remind myself of the following important considerations:

    37.1 Neither party now has a burden of proof in this respect.

    37.2 My focus is to assess the reasonableness of the respondent and not the unfairness or injustice to the claimant, although not completely ignoring the latter.

    37.3 I must not substitute my own view for that of the respondent. This principle has been maintained over the years in decisions including Iceland Frozen Foods (re-confirmed in Midland Bank v Madden [2000] IRLR 288) and J Sainsbury plc v Hitt [2003] ICR 111. In UCATT v Brain [1981] IRLR 224 it was put thus:

> "*Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking*

themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not."

37.4 The decision in Polkey firmly establishes procedural fairness as an integral part of the issue of reasonableness.

37.5 My consideration of whether the claimant's dismissal was fair or unfair is a single issue involving the substantive and procedural elements of the dismissal decision.

37.6 The 'range of reasonable responses test' (referred to in the guidance in Iceland Frozen Foods and Foley), which will apply to my decision as to whether the decision of the respondent to dismiss the claimant fell within the band of reasonable responses of a reasonable employer acting reasonably, applies equally to the procedure that was followed in reaching that decision: see Hitt.

38. The issues in this claim of 'ordinary' unfair dismissal are fairly standard in a case of this nature and arise from law that is relatively settled. In that regard while bringing into my consideration the decision of the EAT in Burchell (which has obviously stood the test of time for over forty years) I also took into account more recent decisions of the Court of Appeal, which reviewed and indorsed the relevant authorities: ie. Fuller v The London Borough of Brent [2011] EWCA Civ 267, Tayeh v Barchester Healthcare Limited [2013] EWCA Civ 29 and Graham, particularly at paragraphs 35 and 36 where Aikens L.J. stated as follows:

"In Orr v Milton Keynes Council [2011] ICR 704, all three members of this court concluded that, on the construction given to section 98(4) and its statutory predecessors in many cases in the Court of Appeal, section 98(4)(b) did not permit any second consideration by an ET in addition to the exercise that it had to perform under section 98(4)(a). In that case I attempted to summarise the present state of the law applicable in a case where an employer alleges that an employee had engaged in misconduct and has dismissed the employee as a result. I said that once it is established that the employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.

If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's

decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice. An appeal from the ET to the EAT lies only in respect of a question of law arising from the ET's decision: see section 21(1) of the Employment Tribunals 1996 Act 1996."

39. I have brought the principles arising from the above case law into account in making my decision. From the above excerpt taken from Graham it will be apparent that the Court of Appeal takes as the first consideration the question of whether the respondent carried out an investigation into the allegations that was reasonable in the circumstances of the case. That reverses the order of these considerations as set out in Burchell and, with respect, has always appeared to me to be the more appropriate order to adopt as without a reasonable investigation, any grounds might be baseless and any belief might not be well-founded.

40. Thus the first element or question that I considered is whether at the stage that Mr Taylor-Allen came to his decision to dismiss the claimant the respondent had carried out "an investigation into the matter that was reasonable in the circumstances of the case".

41. My first concern as to the reasonableness of the investigation is the extent of the prior knowledge and opinion that Mr Skrodzki had of the claimant, which I have set out in paragraph 6.12 above, including his reputation as a bit of a bully, his aggressive nature when carrying out his trade union role, Mr Skrodzki himself having had to take action in the past regarding his aggressive behaviour, the claimant's divisiveness as between union and non-union members and Mr Skrodzki's knowledge that some employees feared to take action in respect of him. I have recorded in that paragraph that in cross-examination Mr Skrodzki stated that he went into the investigation without a predetermined mind and I accept that that was genuinely his belief and intention but I simply do not find that credible in light of the extent and detail that he gave of his existing knowledge of the claimant, which clearly carried forward into the opinion that he had of him. In those circumstances I consider it inevitable that Mr Skrodzki would have been disposed to accept that in approaching Mr Clough on 30 September the claimant behaved in accordance with the opinion Mr Skrodzki had of him as a bully with an aggressive nature. In the circumstances while I am satisfied that Mr Skrodzki genuinely sought to discharge fairly the function that had been assigned to him, I am not satisfied that it was reasonable that he should have had conduct of the investigation.

42. Next, there is the actual conduct of that investigation. Given Mr Skrodzki's reliance upon Mr Harrison's Report it is of concern that he did not pursue the content of that Report with Mr Clough; for example, as to him having told the claimant "several times" that his agreement was private and confidential, what exactly he meant by "constant hassling" and precisely why he was "sick of coming into work". Likewise, Mr Skrodzki did not put these points directly to the claimant; neither (as he accepted in cross examination) did he explore with the claimant any of the matters relating to Mr Sikorski, despite those matters contributing to his decision to refer the claimant to a disciplinary hearing, or his opinion that the claimant's motivation was his own anger at receiving a pay cut. Mr Skrodzki himself accepted that he had not confronted the claimant with the detail in the allegations. He did, however, rightly ask the claimant if there was anyone to whom he should speak. The claimant identified Mr Gore and Mr Ewart but Mr Skrodzki did not interview them. I find to be unreasonable his explanation that he knew they were close friends and was concerned that they would be unable to provide impartial evidence. If Mr Skrodzki had interviewed the two men he might have been able to discount their evidence on that basis but I am not satisfied that that was a reasonable basis for him to decide not to interview them at all. For each of the above reasons I am not satisfied that at this stage the investigation into these matters was reasonable.

43. What is said at and explored during a disciplinary hearing before a decision is taken with regard to the imposition of a disciplinary sanction can also form part of an investigation. I have noted above my concern that given his previous knowledge and opinion of the claimant Mr Skrodzki was predisposed to accept the allegations made against him. I am satisfied that Mr Taylor-Allen also had pre-existing beliefs about the claimant. It was his own evidence that he "knew" the claimant to be rather aggressive in nature, was aware of incidents where he had acted aggressively (including verbally attacking Mr Taylor-Allen himself) and was aware that he ostracised non-union members. That Mr Taylor-Allen was predisposed against the claimant in this way is borne out by his own evidence that during the course of the disciplinary hearing Mr Taylor-Allen, rather than accepting the claimant's demeanour at face value, was of the opinion that he was not behaving like himself but was trying to portray a calm and meek persona and give the impression that he was utterly shocked to be accused of bullying. Likewise, in coming to his decision to dismiss the claimant it was Mr Taylor-Allen's evidence that he had heard from others of incidents of the claimant acting like a bully and knowing this lent weight to the initial allegation and made the claimant's strong denials less plausible. As I have found in relation to Mr Skrodzki I am satisfied that Mr Taylor-Allen also genuinely sought to discharge fairly the function that had been assigned to him but for the above reasons I am satisfied that for him to have had conduct of the disciplinary hearing was unreasonable.

44. In respect of the involvement of both Mr Skrodzki and Mr Taylor-Allen in these matters, I accept the evidence of Mr Robson that this accorded with the respondent's usual practice whereby the reporting manager of the person who had raised the allegation would conduct the investigation and his reporting manager would conduct the disciplinary hearing. Despite that, such a practice is always capable of being departed from where that is justified by the

circumstances and I repeat that for the above reasons, I find for the respondent not to have departed from that practice in this case was unreasonable.

45. As to the arrangements for and the conduct of the disciplinary hearing, Mr Taylor-Allen's own evidence in cross examination was fairly damning. Dealing first with the arrangements, Mr Taylor-Allen accepted (in the context of paragraph 9 of the Acas Code) that the claimant had not been given sufficient information about the alleged misconduct to enable him to prepare to answer the case against him and that the invitation letter (which incorrectly referred to colleagues rather than a colleague) did not provide key information such as the dates of the alleged bullying, who had been bullied and in what way. Mr Taylor-Allen accepted that the letter was inadequate and that the failure of him and the HR representative to answer directly the question of what were the allegations amounted to a serious failing on his part. That said, I do acknowledge as accurate the submission made by Mr Healy that in cross examination the claimant confirmed that he had received the investigation report prior to the disciplinary hearing from which it was clear that the issue in question related to Mr Clough and the manner in which the claimant had carried out his trade union business.

46. As to the hearing itself, Mr Taylor-Allen agreed, with reference to paragraph 12 of the Acas Code, that he had not explained the complaint to the claimant or gone through the evidence that had been gathered, had only asked the claimant five questions, and had not raised any issues regarding Mr Sikorski or the content of the reports from Mr Harrison or Mr McEvoy. I find this last point of Mr Taylor-Allen not raising Mr Harrison's Report with the claimant to be particularly significant given the weight that he attached to that Report in coming to his decision and note that even he accepted in oral evidence that this amounted to a major flaw. Mr Taylor-Allen also accepted in oral evidence that he had not put to the claimant what he had heard about other incidents or about colleagues being afraid of him, and with hindsight he should have done so. Additionally, Mr Taylor-Allen was fairly dismissive of the witness evidence provided by the claimant on the basis that all the statements said the same thing and it looked as if the witnesses had been tailored or coaxed in providing their statements but he did not pursue his reservations with any of the witnesses so as to allow them to comment. I also found somewhat surprising Mr Taylor-Allen's explanation that one of the reasons he had not called any witnesses at the hearing was that their statements could be challenged by the claimant and his representative, which one would have thought might be regarded as the very essence of a reasonable procedure, even Mr Taylor-Allen accepting in oral evidence that that could have been beneficial. That said, as recorded above, I am satisfied that Mr Taylor-Allen did explore with the claimant relevant matters including his conversation with Mr Clough in the canteen on 30 September, previously having asked him if he would take a pay cut and having spoken to him about his agreement regarding his rate of pay, putting in the collective grievance about reducing pay rates and Mr Clough having complained to him that he was being asked to do a job where the previous incumbent had been made redundant.

47. Thus the arrangements for and the conduct of the disciplinary hearing were not entirely negative but I am satisfied that I cannot ignore the above evidence of and concessions made by Mr Taylor-Allen, being the manager who had conduct of

the disciplinary hearing and took the decision to dismiss the claimant, as to the failings that he now appreciated there had been in this process. I am satisfied that the arrangements for and the conduct of the disciplinary hearing fell outwith the range of reasonable responses available to the respondent in these circumstances.

48. Mr Taylor-Allen explained in his witness statement that in coming to the decision to dismiss the claimant his "concerns lay with the evidence we had collected as I felt that the witness evidence did not strongly support what we knew to be the case". I find that to be a quite extraordinary statement. When, in cross examination, Mr Taylor-Allen was asked how he could know that except based upon evidence he answered that it was "a poor choice of words" and that maybe "reasonably believed" might have been more accurate. It is reasonable to assume that Mr Taylor-Allen prepared his witness statement in a considered fashion and with the benefit of legal advice. His evidence in that statement is clear.

49. As to the decision itself, Mr Taylor-Allen accepted in cross examination that the decision letter had not provided any reasons for the dismissal, which was contrary to paragraph 22 of the Acas Code, and further that contrary to the Disciplinary Policy of the Gardner Aerospace group of companies there had been no discussion "with a senior or full-time official of the trade union" prior to the sanction of dismissal being imposed upon the claimant.

50. In a typical case a tribunal's consideration of whether the process adopted by the employer was reasonable would involve an examination of the appeal against dismissal. In this case the claimant lodged an appeal but that was not progressed by the respondent. It has long been established by cases such as West Midlands Cooperative Society Ltd v Tipton [1986] IRLR 112 HL that the opportunity to appeal is an important part of any reasonable process and the Acas Code is clear that an employee should be allowed to appeal if he or she feels that disciplinary action is wrong or unjust. I accept the evidence of Ms Storer that not allowing the claimant to appeal was her decision acting on solicitor's advice. I do not know and am not entitled to know the content of that advice or the context in which it was given but, in light of the case law and the Acas Code referred to, I do not find reasonable the explanation given in Ms Storer's letter of 15 January 2020 that the respondent would no longer allow the claimant to appeal "as we are now in litigation on the matter". It is not uncommon for appeals to be conducted (sometimes successfully so) even after litigation has been commenced.

51. To begin to draw matters to a conclusion, for the above reasons, I am not satisfied as to this first element in Graham (the third element in Burchell) that at the stage that Mr Taylor-Allen and the HR representative made the decision to dismiss the claimant the respondent had carried out "an investigation into the matter that was reasonable in the circumstances of the case".

52. I therefore turn to consider the second and third questions in Graham of the belief that the claimant was guilty of the misconduct complained of and whether the respondent had reasonable grounds for that belief.

53. As I have found above, I am satisfied that at the time Mr Taylor-Allen came to his decision (albeit a joint decision with the HR representative) he held a genuine belief that the claimant was guilty of the misconduct complained of. The difficulty is, however, that that belief arose from what I have found to have been an unreasonable investigation and it follows that I am not satisfied that in making the decision Mr Taylor-Allen had in mind or, given the inadequate investigation, could have had in mind reasonable grounds upon which to base his belief.

54. In summary (and now by reference to the more traditional approach to the order of the elements in Burchell) on the evidence available to me and on the basis of the findings of fact set out above:

    54.1 I accept that the respondent, in the shape of Mr Taylor-Allen and the HR representative "did believe" that the claimant was guilty of misconduct; but

    54.2 they did not have in their minds reasonable grounds upon which to sustain their belief that the claimant was guilty of misconduct; and

    54.3 at the stage at which they formed that belief on those grounds the respondent had not carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

55. The final issue is the reasonableness or otherwise of the sanction of dismissal. Referring to established case law such as Iceland Frozen Foods (again as indorsed in Graham) there is, in many cases, a range or band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. My function is to determine in the circumstances of this case whether the decision of this respondent fell within the band of reasonable responses that a reasonable employer might have adopted.

56. In this case, given my findings relating to the failings in the disciplinary process and the Burchell considerations, which are addressed above, I am not satisfied that in the circumstances the dismissal of the claimant was a sanction that fell within the band of reasonable responses of a reasonable employer in these circumstances.

57. In conclusion of this aspect the question for me, as set out in the sixth of the agreed issues, is whether the respondent acted reasonably or unreasonably in treating the reason of conduct as a sufficient reason for dismissal with reference to section 98(4) of the 1996 Act. I remind myself that the consideration of a range of reasonable responses applies equally to this issue but even with that in mind I am not satisfied that the respondent did act reasonably in this regard.

Remedy

58. My Judgment on liability and the reasons for it is as set out above. I have not addressed the remedy to which the claimant will be entitled in accordance with section 112 of the 1996 Act. The parties' representatives were agreed, however, that if I were to make findings such as I have made below in respect of

reinstatement/re-engagement, Polkey and contributory fault they would be able to agree any necessary calculation of the figures, which should avoid a future remedy hearing. I stress, however, that such findings have been made in response to this invitation by the representatives and this does not preclude either of the parties from deciding not to enter into discussions with the other and/or not agreeing final figures. In such circumstances this case will return to this Tribunal for a further hearing to finalise remedy at which the findings made below in relation to the calculation of compensation (but not in relation to reinstatement or re-engagement) might be reconsidered.

59. The remedy opted for by the claimant is reinstatement, which I consider first along with the remedy of re-engagement given that, in this particular case, each of those remedies gives rise to similar considerations. I have also adopted the term "re-employment" that was used by counsel at the hearing to cover these two remedies although recognising, of course, that that is a misnomer as the effect of the order made at the hearing of the application for interim relief on 12 December 2019 ("the Continuation Order") is that the claimant's employment is continuing and, therefore, any order of reinstatement or re-engagement would not actually constitute re-employment.

60. In exercising my discretion under section 113 of the 1996 Act whether or not to make such order I am required by section 116 of that Act to consider first whether to make an order for reinstatement and, in so doing, to take into account whether the claimant wishes to be reinstated, whether it is practicable for the respondent to comply with such an order and, where the claimant caused or contributed to some extent to the dismissal, whether it would be just and equitable to order his reinstatement. That said, my decision is not limited to these considerations as I have a general discretion to take other factors into account.

61. Of the factors listed in section 116 that of practicability is clearly important. As set out above, in Coleman it was stated that practicable means "capable of being carried into effect with success". An important consideration, therefore, is whether the necessary trust and confidence between employer and employee has broken down. In this case the claimant was very clear in cross examination that as a result of these matters there was no trust between him and the respondent; albeit explaining that that was not his fault and that the breakdown of trust had been from the respondent. In truth, of course, who is responsible for a breakdown of trust is of less relevance than whether such a breakdown has occurred. A related point is that it was clear from the claimant's evidence that he considered himself to been very badly done to by the respondent and, as the Court of Appeal said in its decision in Nothman v London Borough of Barnet (No.2) [1978] ICR 336, CA, "anyone who believes that they are a victim of conspiracy and particularly by their employers is not likely to be a satisfactory employee in any circumstances if reinstated or re-engaged". In respect of each of the above points I note that many of the respondent's managers who have been involved in this case (Mr Harrison, Mr McEvoy, Mr Robson and Mr Taylor-Allen) are no longer employed by the respondent but it was the claimant's own evidence that there was "very little trust between me and Mr Skrodzski". That is important as the claimant confirmed that Mr Skrodzski was still working at the respondent and would manage him if he returned to work. It is also highly

relevant in that connection that the claimant has made quite serious allegations against Mr Skrodzski in relation to his conduct of the investigation including referring to "a witchhunt" and him having "deliberately gone out looking for skewed evidence that is derogatory". The claimant also confirmed that there was little trust between him and Ms Storer whom I am satisfied, given her role, would also have an important part to play in the future employment of the claimant if he were to be re-employed. Beyond that, I am also satisfied that the question of trust and confidence in relationships needs to be considered more broadly than by reference to individuals and must be considered as between the claimant and the respondent. Even on the basis of the claimant's own evidence I am satisfied that that important relationship has soured. Against that I accept that the claimant has submitted a petition signed by approximately 50 employees but repeat that I had no evidence as to how that petition was organised and, importantly, that no one attended the hearing (whether a GMB union official, member or otherwise) to give equivalent evidence.

62. As I have found above, I preferred the evidence of the respondent's witnesses as to the positive impact at the Consett site that has resulted from the claimant's dismissal and accepted the evidence of Ms Storer that reinstating the claimant, "would have significant negative impact on the workforce". A final factor in relation to trust and confidence is that, as I have found above I am satisfied that the respondent's managers, including Mr Skrodzski who will manage the claimant, genuinely believe that the claimant committed misconduct, which is a further element that I am satisfied would render the claimant's re-employment incapable of being carried into effect with success.

63. A second important consideration in relation to practicability is the effect on the respondent's business if it had to re-employ the claimant. The evidence of Ms Storer was clear and credible. It is summarised at paragraphs 6.48 to 6.52 above. There have been significant redundancies within the respondent during the Summers of 2019 and 2020, the latter exercise resulting in a reduction in headcount within the pool of Post NC Operator (within which the claimant had worked) from 31 to 18. Importantly, the respondent knows what will be sustainable at least in the immediate future and knows that if the claimant were to be reinstated there would need to be further redundancies: a minimum of one if the claimant were to be reinstated or re-engaged on the current salary structure or three if reinstatement were to be on the claimant's previous salary structure. In this regard I remind myself that in Port of London Authority v Payne [1994] ICR 555, CA it was said that a tribunal should give due weight to the commercial judgment of the employer and, importantly, as was said in Cold Drawn Tubes Ltd, "it would be contrary to the spirit of the legislation to compel redundancies, and it would be contrary to common sense and justice to enforce over-manning". In this respect, I do not accept the point put to Ms Storer by Mr Tinnion in cross examination that the respondent could be expected to carry the cost of an additional employee if the claimant were to be reinstated.

64. The third factor in section 116(1)(c) and 116(2)(c) of the 1996 Act is whether, if the claimant caused or contributed to some extent to the dismissal, it would be just and equitable to order his reinstatement or re-engagement. I am satisfied that this factor does come into play in this case. I have explained above why I

consider that it was reasonable for the respondent's managers to give weight to the statement of Mr Harrison as to the content and nature of his discussions with Mr Clough on 30 September 2019 regarding the claimant's conduct towards him and his observations as to the effect of that conduct upon him, my findings in respect of which I have summarised at paragraphs 27 and 28 above. Within that narrative I have identified what I have referred to as being key relevant elements including that Mr Clough told the claimant "several times" that he would not bring his agreement into work, that the union trying to get his money dropped amounted to "constant hassling" and in this respect he was "sick of coming into work"; and, from Mr Harrison's account during his investigation meeting, Mr Clough having stated, "every shift he's at me, he's wanting to post it up on the factory", that his wife had told him "it was bullying" and that he was mainly sick of the claimant "harassing him about the agreement and to take a pay cut".

65. In light of this, I am satisfied that it can be said that "the claimant caused or contributed to some extent to the dismissal" and, in these circumstances I find that it would not be just and equitable to order his reinstatement or re-engagement.

66. Addressing directly the seventh and eighth of the agreed issues, I do not make an order for reinstatement or re-engagement under section 113 of the 1996 Act.

67. Given that decision, section 112(4) of the 1996 Act provides (as set out in the ninth of the agreed issues) that I must make an award of compensation calculated in accordance with sections 118 to 126 of that Act. In that regard, however, I first record a preliminary point that the parties are agreed that any award of compensation will consist of a basic award and a compensatory award limited to future loss only given that the effect of the Continuation Order is that the claimant has continued to receive his usual pay since the date of his dismissal notwithstanding that he has not been required to attend at work.

68. As recorded above, I do not have the figures required to make any calculation of compensation but counsel invited me to set out my considerations as to certain parameters.

69. As to the basic award, it is provided in section 122(2) of the 1996 Act that where the tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent it shall reduce that amount accordingly. It is established that "any conduct" for these purposes means any blameworthy or culpable conduct: see Langston v Department for Business, Enterprise and Regulatory Reform EAT 0534/09. For essentially the same reasons as I have set out above in relation to the third factor contained in section 116 of the 1996 Act I am satisfied that the claimant's conduct before his dismissal was such that it would be just and equitable to reduce the amount of the basic award. On the basis of the evidence before me as summarised above, I assess the just and equitable reduction to be 60%. This addresses the eleventh of the agreed issues**.**

70. In accordance with the long-standing guidance given in the case of Norton Tool Co v Tewson [1972] IR LR 86 NIRC (given the absence of any immediate loss of

wages) any assessment of the compensatory award should include, future loss of wages, loss arising from the manner of dismissal and loss of protection in respect of unfair dismissal. There are several elements to be brought into account in calculating the compensatory award and the order of any adjustments that are to be made to that award, which should be applied following the guidance of the Court of Appeal in its decision in Digital Equipment Co Ltd v Clements (No 2) [1998] IRLR 134.

71. The first task is to assess the claimant's loss in accordance with section 123(1) of the 1996 Act. I repeat that I do not have the necessary figures to make a financial assessment but I can assess what I consider to be the period of that loss, which includes a consideration of whether the claimant has taken reasonable steps to mitigate his loss, essentially by obtaining alternative employment. In that regard, the claimant's evidence was that he had not looked for alternative employment because he would need a reference and, in his opinion, that was not going to happen; to which he added that he had struggled with anxiety and depression. In a more typical case it is unlikely that I would have found such evidence from a claimant to be persuasive but in this case, as a result of the Continuation Order, the claimant's employment was continuing and an Employment Judge had decided that his claim of 'automatic' unfair dismissal was "likely to succeed". Additionally, it has long been established that where a party seeks to allege that the other has failed to mitigate a loss, the burden of proof is on the party making that allegation: see, for example, Bessenden Properties Ltd v Corness [1974] IRLR 338 CA. As it was put in Fyfe v Scientific Furnishing Ltd [1989] IRLR 331 EAT, "The wording of [*section 123(4)*] is merely to direct that the common law rules on mitigation are to apply and it has long been settled under those rules that the onus is on the defendant". No evidence was presented to me on behalf of the respondent to establish that the claimant had failed to mitigate his loss. Considering all these circumstances in the round I do not make any finding that the claimant has failed to mitigate his loss.

72. More generally, it is far from easy to answer this question of the likely length of the period of the claimant's loss especially given the impact of the current pandemic, the third 'lockdown', the hoped-for beneficial effects of the vaccines, the government's Job Retention Scheme (or furlough) and the reduced opportunities in my fairly limited knowledge of the local job market. There is also the possibility that the claimant would have been made redundant during the 2020 redundancy exercise but I have discounted that on the basis that, in the absence of any clear evidence on the point from the respondent, I consider that would be stretching too far the necessary speculation that I have to undertake. My task is to attempt to assess a period of time that I consider would produce an amount that would be just and equitable in all the circumstances having regard to the loss sustained by the claimant "in consequence of the dismissal insofar as that loss is attributable to action taken by the employer". With that in mind, I find that the claimant's future loss will continue until the end of the most recent extension of the Job Retention Scheme on 30 April 2021 but that the claimant will then be able to find equally well-remunerated employment within three months thereafter. Thus I assess the period of loss to be until 31 July 2021. During that period the claimant's loss is to be calculated by reference to 80% of his normal pay during the period commencing with the termination of his continued

employment under the Continuation Order until 30 April and his normal pay thereafter.

73. Having made that assessment my second task is to consider any reduction in light of the decisions in Polkey and Software 2000; albeit taking account of the fact that that latter case relates to the former statutory disciplinary and dismissal procedures (the "DDP"). I acknowledge that recent decisions of the appellate courts have moved away from what has been said to be the somewhat artificial distinction as to whether the unfairness of a dismissal arises from a substantive or procedural failing. That said, it is relevant that in this case I am satisfied that the reason for the claimant's dismissal was the potentially fair reason of conduct and that his dismissal was unfair purely on procedural grounds. Thus I have a more straightforward task of considering what chance there would have been of the claimant being fairly dismissed if the respondent had followed a fair procedure in connection with dealing with his conduct.

74. I need not restate here my criticisms of the process adopted by the respondent including that it was inappropriate for either Mr Skrodzski or Mr Taylor-Allen to undertake the roles assigned to them, the inadequacies in the investigation conducted by Mr Skrodzski and the failings in the disciplinary process conducted by Mr Taylor-Allen, many of which he conceded. At this stage, however, my function is to attempt to assess, having regard to all the relevant evidence that has been placed before me, whether had the respondent adopted a fair procedure the claimant's employment would have ended in any event, and if so when: this reflecting the tenth of the agreed issues. This inevitably involves a degree of speculation on my part as was recognised by the Employment Appeal Tribunal in Software 2000. That was echoed by the EAT in Contract Bottling Ltd v Cave [2015] ICR 146 when the President said that the appropriate amount of any Polkey reduction would "necessarily involve a number of imponderables".

75. In this regard, it is important that I am satisfied for the reasons expanded upon above that the reason for the claimant's dismissal for conduct is made out. As such, I consider what the outcome of the disciplinary process might have been had a fair process been followed: this would include different managers of the respondent being assigned to undertake the investigatory and disciplinary roles and bringing to those roles genuinely open minds without any predisposition as to the guilt or otherwise of the claimant. I also factor into my creation of that hypothetical situation the important matter that such managers would have been entitled to and would have received competent advice. I have twice referred above to what I am satisfied amount to the relevant or key elements in Mr Harrison's Report of his discussions with Mr Clough on 30 September and his investigation interview on 9 October 2019. I am satisfied that those elements hold good in establishing the misconduct of the claimant regardless of the procedural inadequacies. Further, I am satisfied that having adopted a fair procedure any employer considering such unreasonable and persistent pressure amounting to harassment (that I have found in this case) which caused a fellow employee worry and distress to the extent of needing time away from work would have taken an extremely dim view of that conduct.

76. Also of relevance in this regard is the nature of the procedural inadequacies that I have identified. They are far from technicalities but it is important that the

claimant accepted that prior to and at the disciplinary hearing he had received the investigation report and knew the case that he had to answer in the sense that it was clear that the issue in question related to Mr Clough and the manner in which the claimant had carried out his trade union business; sufficiently so that he had prepared and submitted in advance of that hearing the document that is referred to in the Bundle Index as being, "Claimant's Disciplinary Statement" (179). That is a very detailed statement running to 5 pages of typing utilising a small font within which the claimant has clearly set out everything that he wishes to have brought into account. I am satisfied that the statement would have played an important part in the hypothetical disciplinary process that I am considering.

77. In such a situation Mr Tinnion submitted that there would be a 0% chance that the claimant would have been fairly dismissed as the facts, even taken at their absolute height, simply do not make the claimant's dismissal a reasonable or proportionate outcome to the wrongdoing alleged. I do not accept that submission. To the contrary, repeating that any assessment of the outcome of that process is speculative, I am satisfied on the evidence before me for the reasons summarised above, particularly in the two preceding paragraphs, that if a fair procedure were to have been applied there is a 65% chance that the outcome of such disciplinary process, which I estimate would have taken no more than two weeks, would have been the fair dismissal of the claimant.

78. The next potential adjustment that I need to consider is the parties' compliance with the requirements of the Acas Code. In this respect, the failings are set out above having been identified by Mr Tinnion and accepted by Mr Taylor-Allen.

79. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that if, in the case of proceedings such as this, the employer has failed to comply with the Acas Code and that failure was unreasonable, an employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%. In accordance with Section 124A of the 1996 Act that increase is to be applied to the compensatory award. Guidance in this respect was given by the Employment Appeal Tribunal in relation to the former DDP in the case of Lawless v Print Plus EAT 0333/09, which I consider to be equally applicable in relation to the Acas Code. That guidance includes that regard should be had to whether the procedures were applied to some extent or were ignored altogether, whether the failure to comply was deliberate or inadvertent and whether there were circumstances that mitigated the blameworthiness of the failure to comply. In this case it has been conceded on behalf of the respondent that it did fail to comply with the Code as set out above. I am satisfied that that failure was unreasonable and that in all the circumstances of this case it is just and equitable to increase the award to the claimant by 15%.

80. The final adjustment that that I address is to consider section 123(6) of the Act, which provides that where a tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable. In this respect the principles set out by the Court of Appeal in the decision in Nelson v BBC (No. 2) [1980] ICR 110 are to be applied: namely, the

relevant action must be culpable or blameworthy, it must have actually caused or contributed to the dismissal and it must be just and equitable to reduce the award by the proportion specified. For the same reasons as I have given in relation to the percentage reduction of the basic award, I consider that it would be just and equitable to reduce the compensatory award by that same percentage of 60%; the EAT in University of Sunderland v Drossou UKEAT/0341/16 indicating that that is appropriate.

Conclusion

81. In conclusion, my judgment in respect of the claimant's complaints is as follows:

81.1 The reason for dismissal of the claimant was conduct that being a potentially fair reason referred to in section 98(1) of the 1996 Act.

81.2 That being so, the claimant's complaint under section 111 of the 1996 Act that his dismissal by the respondent was unfair, contrary to section 94 of that Act in that, by reference to section 152(1)(b) of the 1992 Act, the reason for his dismissal (or, if more than one, the principal reason) was that he had taken part in the activities of an independent trade union at an appropriate time, is not well-founded and is dismissed.

81.3 The claimant's complaint under section 111 of the 1996 Act that his dismissal by the respondent was unfair, contrary to Section 94 of the 1996 Act in that the respondent did not act reasonably in accordance with section 98(4) of the 1996 Act is well-founded. In that respect I have to be satisfied that there was a reasonable investigation, reasonable grounds and a reasonable belief allowing the respondent's managers, on the evidence available to them at the time, to form a decision to dismiss which fell within the range of reasonable responses. While I am so satisfied in relation to the element of belief I am not so satisfied in relation to the other two elements.

81.4 The parties' representatives were satisfied that if I were to make findings as set out above they would be able to agree figures in respect of the remedy of compensation. They are required to inform the Tribunal within three weeks of the date upon which this Judgment is sent to the parties as set out below whether agreement has been reached. If not, this case will be returned to this Tribunal for the purposes of a remedy hearing.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENTJUDGE ON 13 January 2021

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