

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4105290/2016

Held in Glasgow on 20, 21 and 22 November 2017

Employment Judge: Claire McManus

Mr Douglas Ritchie

Claimant  
Represented by:-  
Mr Paul Deans  
(Solicitor)

WC Willis & Co Ltd

Respondent  
Represented by  
Ms Julie Barnett  
(Consultant)

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that:-

- The claimant's dismissal by the respondent was an unfair dismissal and his claim under section 98 of the Employment Rights Act 1996 succeeds.
- The claimant was not dismissed by the respondent by reason of his membership of a trade union and his claim under section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 is dismissed.
- Having been unfairly dismissed by the respondent, the claimant is entitled to an unfair dismissal award of £3,210.24 and a compensatory award of £24,592.48 and the respondent is ordered to pay to the claimant the total sum of £27,802.72 (TWENTY SEVEN THOUSAND

**E.T.Z4 (WR)**

EIGHT HUNDRED AND TWO POUNDS AND SEVENTY TWO PENCE), subject to the effect of the Recoupment Regulations, as set out below.

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## REASONS

### 10 Background

1. An ET1 application was made by Usdaw (Union of Shop, Distributive and Allied Workers) on behalf of the claimant against W C Willis and Co Ltd and received by the Glasgow Employment Tribunal Office on 10 October 2016. The claim was for unfair dismissal. The claimant had complied with the requirement under the Employment Tribunals Act 1996 s18A to contact ACAS before instituting these proceedings. The claim was acknowledged and the ET1 form sent by the Employment Tribunal office to the respondent on 8 November 2016. An ET3 was received by the Employment Tribunal Office in response to this from Holly Blue Employment Law on behalf of W C Willis & Co Ltd on 5 December 2016.

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2. The claimant's then Usdaw representative wrote to the Employment Tribunal office on 12 December 2016, seeking to amend the claim to include a claim under section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRA'). The claimant's representative notified the Employment Tribunal Office that he had copied that letter to the respondent's representative. No objection was received from the respondent's representative and this amendment was therefore granted. Parties' representatives were notified of this by correspondence from the Employment Tribunal Office of 9 January 2017. Correspondence then followed from the respondent's representative, whose position was that they had not received the claimant's representative's letter of 12 December seeking this amendment and that they did wish to object to this amendment. The claimant's representative in the meantime requested an Order for Disclosure of Documents and for Further and Better Particulars. An Order for Information  

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was issued by the Tribunal Office in respect of that request on 16 February 2017.

3. A hearing in this case had been scheduled to take place on 6, 7 and 8 March 2017. On the application of the claimant's representative, a postponement of that hearing was granted, on the grounds that the respondent was permitted to reply to the amended ET1 by 15 February 2017.
4. The claimant's then Usdaw representative wrote to the Tribunal on 20 March 2017 requesting an Order under Rule 76 for expenses in preparation time, a strike out of the whole response ET3 under Rule 37 and a Default Judgment, relying on the respondent having failed to comply with the Order to provide information of 16 February. A Preliminary Hearing ('PH') was arranged to take place on 5 May 2017 to consider the claimant's application for (1) expenses and (2) strike out of the response. That date was postponed due to the unavailability of the respondent's representative. The PH was re-scheduled for 2 June 2017. That PH was then cancelled, on the joint application of the claimant's new representative and the respondent's representative that the PH be 'set aside'. Neither party's representative made any submissions on any outstanding issue in respect of expenses or strike out at the Hearing in November.
5. The claimant's new representative (Thompsons Solicitors) wrote to the Tribunal on 3 August 2017 seeking an amendment to change the claim of detriment under section 146 of TULRA to a claim for automatic unfair dismissal under section 152 of that Act, on the basis that the reason or principal reason for dismissal was that the claimant had become a member of an independent trade union. The respondent's representative wrote to the Tribunal office on 4 August 2017 advising that the respondent had no objection to this. The amendment was allowed and parties' representatives were notified of this by letter from the Tribunal of 11 August 2017.
6. The Hearing was then scheduled to take place from 20 to 24 November 2017, but was completed by 22 November.

Proceedings

- 5 7. The respondent was represented before this Tribunal by Ms Barnett of Holly Blue Employment Law. Ms Barnett had been involved in advising the respondent in the disciplinary process which led to the claimant's dismissal and her initials appeared as being one of the individuals present at the claimant's Disciplinary Hearing. Mr Deans from Thompsons Solicitors represented the claimant. Both parties' representatives had been contacted 10 by the Tribunal office on the Friday preceding the first day of the hearing, advising them that Employment Judge Claire McManus had been allocated to hear this case and that she wished both parties' representatives to be informed that she had been carried out her traineeship at Thompsons Solicitors. Neither party had any objection to EJ McManus hearing this case 15 in these circumstances. This was confirmed by both parties' representatives at the commencement of the hearing on 20th November.
8. Parties relied on documents contained in a Joint Bundle, with items 1 to 24 numbered consecutively with pages (1) to (90). A supplementary bundle was also produced, with pages numbered (1) to (84) and containing documents in 20 respect of the claimant's mitigation of loss and the claimant's schedule of loss. The respondent did not take any issue with the steps taken by the claimant in mitigation of his loss. The numbers in brackets in this Decision refer to the page numbers in these bundles.
9. The respondent's representative's position in respect of the Order for 25 Information of 16 February 2017 was that the respondent had complied with that Order in so far as it was able by production of the documents contained within the joint bundle and that any other information or documents requested in that Order do not exist.
10. Prior to evidence being commenced, it was confirmed by the respondent's 30 representative that the dismissal was admitted and the respondent's position was that the dismissal was a fair dismissal on the grounds of the claimant's conduct and in terms of the Employment Rights Act 1996 ('the ERA') section 98(4). The respondent's representative clear position throughout the hearing

was that the only ground relied on in respect of the fairness of the dismissal was conduct.

11. The Respondent's representative confirmed that the correct designation of the respondent is W C Willis & Co Ltd.

5 12. It was agreed that the Tribunal would hear the respondent's case first. Evidence was heard on oath or affirmation from all witnesses. For the respondent evidence was heard from Ms Nicola McDevitt (an HR adviser from Holly Blue Employment Law who spoke to her involvement in the investigation), Mr Stuart Boyd (who spoke to the decision to dismiss) and Mr  
10 Peter Callender (who spoke to the appeal). For the claimant's case, evidence was heard from the claimant himself.

#### **Issues for the Tribunal's Determination**

15 13. The Tribunal required to establish the reason for the claimant's dismissal, whether that reason or principal reason was the claimant's membership of a trade union, and if not for that reason, whether the dismissal was a fair dismissal in terms of the Employment Rights Act 1998 ('ERA') section 98, in  
20 consideration of the respondent's reliance on the reason for dismissal being the claimant's conduct, which is a potentially fair reason for dismissal under section 98(2)(b). In the event of the Tribunal's determination that the claimant's dismissal was an unfair dismissal, the Tribunal would require to determine the amount of any award to be paid by the respondent to the  
25 claimant in respect of that unfair dismissal.

#### **Findings in Fact**

30 14. The following facts were admitted or found by the Tribunal to be proven:  
(a) The Respondent's business is in the supply and distribution of Personal Protective Equipment ('PPE'). They operate out of premises in Hillington, with 25 employees working in a number of departments, being Warehouse, Sales, Customer Services, Purchasing, Accounts  
35 and Quality. The company was purchased by Stuart Boyd & Peter

5 Callender in 2001 . They sold the business in May 2017 and no longer have a financial interest in the business, although still have some involvement. Prior to that sale, Stuart Boyd was Director of Operations and Peter Callender was Director of Sales. They owned the business on a 50 / 50 basis.

10 (b) The claimant was employed by the Respondent as Warehouse Manager from March 2010 until 27 July 2016, when his employment was terminated without notice or payment in lieu of notice. At the time of his dismissal the claimant's net weekly pay with the respondent was £398.29. His gross weekly wage was £456.73. The claimants date of birth is 3/7/71 .

15 (c) The claimant has approximately 25 years of experience of working in a warehouse. Prior to his employment with the respondent, the claimant was employed by DHL as Team Leader for 3 years, where he had responsibility for managing a team of 40 warehouse employees in his shift. Prior to that, the claimant was employed as a Warehouse Manager by Morrison's supermarkets for 5 years, where he had responsibility for managing 5 employees, and by their predecessor  
20 Safeway where he worked as a packer, then supervisor, then night shift supervisor. All training the claimant received for his roles was 'on the job', apart from one half day course he received from Morrisons on disciplinary procedures. From that course, the claimant understood  
25 that in a disciplinary investigatory procedure in respect of allegations of misconduct, it is important to establish who was involved, what was done, where it took place and when it took place. Prior to the disciplinary action taken against the claimant which led to his dismissal by the respondent the claimant had never been the subject of any  
30 disciplinary proceedings or any grievance procedure.

(d) As Warehouse Manager for the respondent, the claimant had line manager responsibility for the warehouse team, namely Scott Winterbottom, Darren, Mark, Janice Hamilton, Douglas, Stevie

Keevins and Liam. The claimant's employment as Warehouse Manager came about as part of the development of the business. Prior to the claimant being employed by the respondent as Warehouse Manager, Mr Boyd considered that the employees in the warehouse 'managed themselves'. The respondent did not give any guidance to the claimant as to appropriate management style.

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(e) An incident occurred between the claimant and Stevie Keevins in January 2016, when a heated exchange took place between them in the respondent's car park ('the car park incident'). The claimant brought this incident to the attention of Mr Boyd. Mr Boyd spoke to both the claimant and Mr Keevins about this incident. Mr Boyd's understanding of the claimant and Mr Keevins' position in respect of this incident is as set out in his e-mail to 'hr\*' of 'independent glass' on 1 February 2016 (at (82)). On his understanding of both individual's accounts, both used foul language in a 'heated exchange'. No disciplinary process was initiated or disciplinary action taken by the respondent in respect of either employee involved in this heated exchange. Mr Boyd 'closed off this incident by a file note that 'violent behaviour amongst employees was not acceptable'. There was no communication to either the claimant or Mr Keevins of this note or that violent behaviour among employees was considered to not be acceptable. Mr Boyd did not take any disciplinary action in respect of the car park incident because he felt that it was a case of one person's word against another.

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(f) The claimant felt let down by what he considered to be Mr Boyd's lack of investigation and failure to reasonably deal with the car park incident. Mr Boyd's position to the claimant had been that having spoken to the claimant and Mr Keevins, he had 'two different sides of the story'<sup>1</sup>, he 'couldn't work out what happened' and that they 'both had to just get on with it'. The claimant was aggrieved that he had told Mr Boyd that Mr Keevins had said to the claimant that he was going to tell Mr Boyd that the claimant had threatened to head butt him. The

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claimant understood Mr Boyd's position to be one of 'never mind, let's forget about the allegation that Stevie made against you, I can't decide what happened so let's forget about it and get on with work'. The claimant believed that on previous occasions when he had tried to manage Mr Keevins and had 'called him out' on his performance or attendance, that had led to Mr Keevins putting allegations against the to Mr Boyd. The claimant was anxious that other employees had seen Mr Keevins being aggressive and swearing at him.

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10 (g) The claimant was absent from work due to ill-health from 8 February to 29 February 2016. After an absence of 3 days, Mr Boyd took the decision to cancel payment of the claimant child care vouchers, on the basis that the employees would only be paid SSP during ill-health absences. That cancellation of childcare vouchers led to an issue with the claimant's child's funded nursery place no longer being secured. 15 The claimant was aggrieved that that action had been taken, although he did not believe that the issue with the nursery place was an intended consequence of Mr Boyd's actions.

20 (h) Mr Boyd wrote to the claimant inviting him to a meeting during his absence in February 2016. At this meeting, Mr Boyd asked the claimant why he was absent. The claimant gave him his sick note stating the reason for absence as 'work related stress'. The claimant told Mr Boyd that because he had no support from management and he had been spoken to in such a way by Mr Keevins he found it hard 25 to continue in his current role and he would be seeking alternative employment. The claimant told Mr Boyd that he didn't think it was fair to ask him to continue to manage Mr Keegan. The claimant felt that he did not come into work to take abuse like that which had been given 30 to him by Mr Keevins. The claimant returned to work as Warehouse Manager after this absence. The claimant felt that he had been undermined by Stuart Boyd in respect of the car park incident and that that had an effect on the atmosphere within the warehouse, which had become negative.



(i) Mr Boyd was absent from work due to ill health for a 9 week period, returning to work in late May 2016. Mr Boyd was aggrieved that on his return to work the claimant did not shake his hand, as other staff members had done. Following his return to work, Janice Hamilton told Mr Boyd that she had overheard the claimant saying to another employee that he was 'gunning for 2 people'. Mr Boyd knew that Janice Hamilton is a friend of Mr Keevins. Mr Boyd spoke to Janice Hamilton, Stevie Keevins, Scott Winterbottom, Darren, Mark, Douglas, Liam and Vicki McDonald about the claimant. Some of those employees did not want to make a statement commenting about the claimant. The view expressed to Mr Boyd by Stevie Keevins is as set out in his statement at (29). The views expressed to Mr Boyd by Janice Hamilton is as set out in her statement at (30). The view expressed to Mr Boyd by Vicki Macdonald is as set out in the final paragraph of the document as (31).

(j) In late May 2016, Mr Boyd asked the claimant to come to a meeting in the boardroom. Mr Boyd asked the claimant if it was true that he had joined a trade union. The claimant's reply was that he didn't think that Mr Boyd was allowed to ask that question. Mr Boyd replied that as his employer he had a right to know whether the claimant was in a union or not. The claimant told Mr Boyd that he was in a union and the reason he had joined a trade union was because his child care vouchers had been cancelled and sick pay hadn't been paid and that he felt he needed 'a bit of protection'. Mr Boyd produced some papers showing alarm log in times and accused the claimant of not fulfilling the hours he was supposed to be doing with the respondent. The claimant's position was that the alarm log was an insufficient document to show the hours worked by him. Mr Boyd then told the claimant that he had heard that the claimant had made a comment that he was 'gunning for people'. The claimant denied making that comment.

(k) Mr Boyd instructed Holly Blue Employment Law to provide external HR advice in respect of this matter. The claimant was invited to attend an investigatory hearing by letter dated 15 June 2016 at (25). This letter states that 'This meeting has been arranged because we are in the process of investigating allegations relating to your conduct in the workplace.' and that 'The allegations include abusing your position as a manager, falsification of working hours and displaying threatening behaviour towards an employee\*'. The letter informed the claimant that he was entitled to bring a work colleague or trade union representative with him to this meeting as his chosen companion. The claimant attended an investigation meeting on 22 June 2016 at the respondent's premises. This meeting was conducted by Nicola McDevitt of Holly Blue Employment Law. Notes were taken by Gordon Neilson. Minutes of this investigation meeting are shown at (26) to (28). There are three subheadings in these minutes, being 'Allegation of Falsifying Hours', 'Allegation of incident with SK' and 'Allegation of 'gunning for people''. Under the heading 'Allegation of incident with SK', the minutes state:- 'NM (Nicola McDevitt) explained that she was aware the incident had been investigated and dealt with by Stuart Boyd and she was looking to gain background knowledge of the issues.' The claimant was not advised of any conduct by him which may be regarded by the respondent as gross misconduct. The claimant was not asked his position in respect of the allegations set out at (29), (30) and (31).

(l) The minutes of the investigation meeting state at the foot of (27):-

'DR (the claimant) said that SK (Stevie Keevins) had made allegations in the past where his own conduct or performance when questioned. He would react by making allegations against DR, none of which have ever been substantiated'.

No clarity or examples of this were sought and this position was not investigated by or on behalf of the respondent.

5 (m) After this investigatory meeting, Nicola McDevitt took a statement from Stevie Keevins (at (29) and dated 27 June 2016), Janice Hamilton (at (30) and dated 27 June 2016). She also took statements from other employees, including Scott Winterbottom and Vicki MacDonald. These statements or extracts from these statements are set out at (31) ,

10 (n) The claimant was invited to attend a disciplinary hearing. The letter from Nicola McDevitt inviting him to this disciplinary hearing is dated 30 June 2016 and is at (32) - (33). This letter states that 'The purpose of the hearing is to consider allegations of gross misconduct against you.' There is no specification of the particular conduct alleged to have been done by the claimant which was regarded as gross misconduct.  
15 The letter states:-

20 'As you will be aware from the investigation meeting on Wednesday 22 June, there have been allegations made against you regarding your conduct in the workplace. Following the investigation, I have decided that there is a case to answer in respect of the following allegations, which have been expanded upon as appropriate in light of the investigation:

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- that you have been abusing your position as Manager in that you frequently behave in an intimidating and unacceptable manner towards your colleagues, including handling general management issues in a way that is unbecoming of a manager and making inappropriate /threatening comments to, and /or about your colleagues. Your behaviour in this regard has ultimately created an uncomfortable working environment for your colleagues to the extent that they feel threatened by your behaviour.
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- That you have falsified your working hours in that during the earlier part of this year and the latter part of 2015 you had not been fully making up your required working hours as per your flexible working arrangement with the company.'

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- (o) The claimant was provided with this letter a copy of the documents now at (29), (30) and (31). The document at (29) is a statement from Stevie Keevins dated 27 June 2016. That statement begins :-
- 10 'Explanation of the incident involving Dougie Ritchie'. Most of that statement concerns the car park incident. The document at (30) is a statement from Janice Hamilton in respect of the claimant. The document now at (31) is headed 'Statements from other employees'. It is set out in 5 five separate paragraphs with no attribution of any
- 15 paragraph to any particular employee and no indication of the number of employees statements have been taken from. This states:-

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'For the last few months the situation in the warehouse is a mess. Nobody wants to work there at the moment.'

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'Dougie is causing an atmosphere by constantly harassing staff when they know what they are doing.'

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'I have been informed that he has spoken about me behind my back and accused me of walking about and doing nothing.'

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'When I wake up in the morning I no longer feel like I want to go to work. I feel that this attitude is shared among my fellow co-workers in the warehouse.'

'I confirm that in a casual conversation with Dougie Ritchie he told me that he was gunning for a couple of members of staff in the warehouse. While I did feel that he might have felt he was

being funny, I did share his comment with another member of staff.'

5 (p) The disciplinary hearing took place on 15 July 2016. Present at this hearing were the claimant, his trade union representative from Usdaw, (Craig Smith), Stuart Boyd and Julie Barnett (external consultant from Holly Blue Employment Law). The document at (34) to (40) is produced by the respondent as the minutes of that meeting, although is not accepted by the claimant as a complete reflection of the matters  
10 discussed. The disciplinary hearing began with discussion about the allegations against the claimant in relation to working hours. These allegations were not part of the reason for dismissal.

15 (q) The claimant's position during the disciplinary process in respect of the allegations other than those re his working hours was that the allegations were vague in that they did not detail enough information for him to be clear so that he could provide an appropriate response. In respect of these allegations, (at (29) and dated 27 June 2016), The minutes record at (36) the claimant's position being:-

20 'What does it look like? Falling out with Stevie, think you want rid of me. Stevie and Janice have colluded together to make their statements. It is clear they have colluded, the statements are vague, there is nothing specific. Don't know what to say.'

25 (r) The allegations of misconduct put to the claimant at the disciplinary hearing were:-

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- On the day after the car park incident, the claimant worked in the 'Goods in' side of the warehouse and when questioned about this by Stevie Keevins had replied 'Because I can'. The claimant denied this.

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- On an occasion, the claimant had said to Janice Hamilton 'Look at me whilst I am talking to you.' The minutes record the claimant's position as being that he did not recall shouting at her, that he did not think she would allow him to shout at her, and that there had been an incident when he 'took a stand' and asked her to stop working and engage in conversation with him and that 'in managing Janice it was necessary to bring it down rather than crank it up' and the comment may have been said but it was out of context.

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- That the claimant had said that he was 'gunning for two people'. The claimant denied this.

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- That Janice Hamilton had said that the claimant bullied younger members of staff. The claimant denied this and asked that the younger members of staff be spoken to find out their position. In particular he requested that Scott be asked for his position in respect of his dealings with the claimant when requesting time off.

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- (s) The claimant's position at the disciplinary hearing was that the respondent had not dealt with the car park incident correctly, that Stevie Keevins 'should not have got away with it' and that the atmosphere in the warehouse was damaged following that incident. This position is recorded in the minutes at (37). The claimant said that there had been a witness to the car park incident (at (38)). The minutes record Craig Smith asking how many statements had been taken and this being seven in total (at (39) and (40)).

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- (t) The claimant's allegations of collusion between Mr Keevins and Ms Hamilton were not investigated. The respondent did not investigate or establish the cause of the negative atmosphere in the workplace. The respondent did not seek to establish or establish what particular

conduct by the claimant was being relied on by Janice Hamilton and Stevie Keevins in their statements. The respondent did not establish all of the particular conduct alleged to have been done by the claimant which was being relied on in the disciplinary process as potentially being misconduct. The respondent did not make findings as to what had occurred which was considered to have been misconduct on the part of the claimant. The respondent did investigate the claimant's position that Mr Keevins made allegations against the claimant when the claimant criticised his conduct or performance. Following the claimant's position at the disciplinary hearing, the respondent did not seek or establish Scott Winterbottom's position on his interactions with the claimant when asking for time off. The respondent made no findings as to the particular conduct by the claimant which was considered to be bullying. The respondent made no findings as to what particular conduct by the claimant was considered to be gross misconduct. The respondent failed to take into account when dismissing the claimant that the root of the problem was the car park incident, and the way in which that incident had been handled by Mr Boyd. The investigation and disciplinary process was not transparent to the claimant because he did not know what he was alleged to have done which was considered to be misconduct and did not know what investigations had been carried out by the respondent.

- (u) The claimant was summarily dismissed. The decision to dismiss was taken by Stuart Boyd. Mr Boyd's letter of dismissal is at (41) - (44) and states:- It has been decided that in light of the seriousness of this matter your employment with Willis Safety should be terminated for gross misconduct without notice and without any warnings.' The letter confirms that the allegations in respect of working hours are not part of the reason for dismissal. The letter does not state the specific conduct which was found to be gross misconduct. The letter states:-

'In relation to the allegation of abusing your position as a manager, I find this allegation to be well founded. At the

5 hearing, you say that it was your belief that the witnesses had colluded together to get you out of the business, that the documents did not flow and that they did not make sense to you. However, you did say that for all your subordinates that you felt it necessary in varying degrees to 'effectively manage' each and every one of them. You also agreed that if the behaviour alleged against you was true then it was correct for the company to investigate matters and to take the appropriate action to ensure no such action occurred or continued.

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I do not believe that your colleagues have colluded together in any way and I am inclined to believe their version of events over yours. My view on this has been compounded by the fact that it has been reported to me that since your disciplinary hearing and whilst I was still making my decision on the outcome of your hearing, that you approached a member of staff and aggressively said 'you will show me respect'. The member of staff involved in this incident was very upset and shaken by your actions. I am appalled by this report and I will not tolerate such behaviour in the workplace.

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Furthermore, I do not accept your union representative's position that for the company to find that your actions amount to gross misconduct that there must have been intent on your part. To be clear, there is no legal definition of what constitutes gross misconduct and therefore whether or not your actions were wilful. The fact of the matter is that I believe that you have been behaving inappropriately to your subordinates and that your behaviour has ultimately created an uncomfortable working environment where the staff feel bullied and threatened by your behaviour. That said, even if I consider that you were not explicitly aware that your conduct in how you have been treating your subordinates was inappropriate or could be considered as gross misconduct, I believe that you are a very

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5 well aware of what is right and wrong on basic level, and therefore I believe that you must have known that your behaviour was distressing to your subordinates yet you have continued to behave in this manner, even after your disciplinary hearing.

10 Ultimately I have a duty of care to all employees of the company to ensure a fair and safe working environment, free from bullying and threatening behaviour. When taking everything into consideration, I feel that your actions have caused me to lose my trust and confidence in you and I equally believe that I would not be fulfilling my duty of care to the rest of the warehouse staff at Willis Safety if I were to allow you to continue working there, I therefore have no alternative but to dismiss you  
15 for gross misconduct'

15. The claimant was not suspended from his position as Warehouse Manager any time prior to his dismissal. At no time during the disciplinary proceedings was it put to the claimant how or from what date he ought reasonably to have  
20 known that his behaviour was distressing to anyone within his team. The claimant was not given the opportunity to comment on any allegations of his misconduct said to have occurred following the disciplinary hearing.

16. Stuart Boyd made his decision to dismiss the claimant because of a  
25 breakdown in the relationship between the claimant and Stuart Boyd. Both the claimant and Mr Boyd believed that their relationship had broken down. From the claimant's point of view, that relationship had broken down because he felt undermined by Stuart Boyd's lack of management support in failing to properly investigate and reasonably deal with the car park incident and  
30 because of Mr Boyd's decision to cancel payment of the claimant's childcare vouchers after a 3 day absence. From Mr Boyd's point of view, their relationship had broken down because the claimant had not shaken his hand when he returned to work following a 9 week period of absence due to ill health and he blamed the claimant for the negative atmosphere in the

warehouse. In making the decision to dismiss, Mr Boyd took into account his own negative opinion of dealing with the claimant. At no time during the disciplinary proceedings was any conduct shown by the claimant towards Stuart Boyd put to the claimant, either as part of the allegations, as part of the investigation, or mentioned in the letter confirming dismissal.

17. The claimant appealed against his dismissal by letter dated 5 August 2016 at (45). This states:-

'I am writing to appeal against my dismissal on the grounds of the allegations being unsubstantiated and the dismissal unfair.'

Peter Callender wrote to the claimant on 17 August 2016 (at (46)) stating:-

'Following your letter of 'appeal' against dismissal from WC Willis and Co Ltd, we note the contents of your letter. However we consider your comment as a statement and not a reason.

Therefore would you please respond with detail on which parts of the decision making process you disagree with and why you do so. This detail is required prior to any attendance at an appeal hearing as investigations may need to be undertaken.'

The claimant replied with letter dated 22 August 2016 (at (47)) stating:-

'With reference to your letter of 17/8/16. My reasons for appealing my dismissal are that the investigation was flawed, allegations unsubstantiated and dismissal unfair, full details I will present at my hearing.'

18. The appeal hearing took place on 7 September 2016. The document at (51) shows the notes taken on behalf of the respondent at that appeal hearing. Present at the appeal hearing were Peter Callender, a note taker, the claimant and Craig Smith from Usdaw. Peter Callender made the decision to

uphold the claimant's dismissal. Mr Callender had had little involvement with the claimant during his employment with the respondent because Mr Callender had responsibility for Sales rather than Operations and was often out of the premises in Hillington. Prior to the appeal hearing Peter Callender spoke to Stuart Boyd and a number of the respondent's employees about the claimant, being Vicki McDonald, Natalie Gregory, Janice Hamilton, Frank Burn, Stevie Keevins and Andy Malcolmson. Those discussions influenced his decision to uphold the claimant's dismissal. Peter Callender believed that the claimant had been dismissed for 'goings on over the years' with 'bullying involved\*'. Peter Callender had no experience of dealing with appeal of a disciplinary matter. He believed that he should approach dealing with this appeal using 'natural instinct', 'telling the truth' and his belief that he was being a 'caring employee, looking after staff. The appeal hearing lasted approximately 10 minutes. After Mr Callender making the introductions, the claimant's trade union representative made his representations on behalf of the claimant. Mr Callender did not seek any clarification of the claimant's position. In making his decision to uphold the decision to dismiss, Mr Callender took into consideration and found to be relevant matters which were not part of the original decision to dismiss and / or in respect of which the claimant was not given the opportunity to comment on. These were :-

- Mr Callender understood that there were incidents when the claimant had claimed to be at work when he wasn't at work.
- Mr Callender understood that there were times when some members of staff chose to spend their lunch in the office and not in the company of the claimant in the canteen.
- Mr Callender had approached the claimant when the claimant had made a workbench out of pallets, which Mr Callender considered to be unsuitable and unsafe, when the claimant didn't disagree and moved.

- The claimant had not spoken for himself at his appeal hearing and 'let his recently appointed union rep do all the talking for him.'
- 5 • Mr Callender had spoken to staff before the appeal hearing and 'heard their stories', without the claimant being told of the fact that these discussions having taken place or the content of the discussions being put to the claimant.
- 10 • Mr Callender understood that Janice Hamilton would not talk to the claimant.
- Mr Callender could recall having seen Janice Hamilton visibly upset on more than one occasion and Mr Callender attributed that to the claimant, without establishing that fact in the course of a disciplinary investigation process or giving the claimant the opportunity to comment on whether he had caused or contributed to her upset.
- 15 • Mr Callender believed that on one occasion the claimant had 'just dumped' boxes at Janice Hamilton's workstation saying only 'they've to be done.'
- Mr Callender had never seen the claimant visibly upset.
- 25 • The claimant's trade union representative had suggested to Mr Callender that it would be better for the issue to be resolved privately rather than through an Employment Tribunal and Mr Callender didn't agree with that.
- 30 • Mr Callender believed that the staff had a much more positive attitude since the claimant's dismissal.

19. Peter Callender's letter to the claimant setting out the outcome of the appeal hearing is dated 20 September 2016 and is at (49) and (50). His decision was to uphold the decision to dismiss. The claimant was dismissed with effect from 27 July 2016, without notice or payment in lieu of notice.

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20. The claimant has taken considerable steps to search for alternative employment since his dismissal by the respondent, as shown in the supplementary bundle at (1) - (83). The claimant received Job Seekers Allowance of £73.10 per week from 15 August 2016 until 20 February 2016. Since 26 March 2017 the claimant has been employed by Wm Morrisons Supermarkets. His net weekly wage since then has been £161.54.

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#### Respondents Submissions

15 21. The respondent's representative's position was that the claimant was fairly dismissed by reason of the claimant's conduct. In respect of the claim that the dismissal was by reason of the claimant's trade union membership, the respondent's representative relied upon that reason not being relied upon by the claimant at the disciplinary hearing or appeal hearing, when the claimant had the benefit of a trade union representative at both hearings. It was submitted that the real reason for dismissal was the belief held by the disciplining officer that the claimant had abused his position as manager and that his attitude was causing staff discontent. This was relied on as being a dismissal for the potentially fair reason of conduct under ERA section 98(2)(b).

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22. Reference was made to **British Home Stores -v- Burchell 1978 IRLR 397**. It was submitted that the respondent genuinely believed the claimant was guilty of misconduct, had reasonable grounds upon which to sustain that belief and at the date on which it formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances of the case. Reliance was placed on Stuart Boyd's evidence that he had returned to work after 9 week absence in late May and was informed that the claimant had said that he was 'gunning for people', he was

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concerned at that statement and he spoke informally to the claimant's team and, having spoken to them, he concluded that he 'had a real problem on his hands' but that he was not qualified to deal with the matter without support and therefore instructed external assistance. It was submitted that the external investigating officer, Nicola McDevitt, found that there was a case to answer. It was submitted that by the claimant accepting that Janice Hamilton's statement (at (30)) was a good starting point for an investigation, the claimant accepted that the respondent was entitled to investigate the allegations that he may be guilty of gross misconduct.

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23. It was submitted that there is evidence to support the respondent's belief in the claimant's guilt. Reliance was placed on (29), (30) and (31) as showing a number of examples of the claimant's behaviour that was viewed as unwelcome and intimidating. Reliance was placed on the dismissal outcome letter, particularly paragraphs 2, 3 and 4 at (40). Reliance was placed on Stuart Boyd preferring the evidence of other individuals over that of the claimant because he had talked to the staff and that based on this and on his own opinion of dealing with the claimant, he had 'sufficient feeling' that the claimant's attitude was causing staff discontent, that the company was a good and decent place to work and he believed that dismissal was in order.

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24. It was recognised by the respondent's representative that when dismissing an employee for a conduct reason, the employer must be satisfied on the balance of probabilities that the employee had actually done what he or she was alleged to have done. Reference was made to **Salford Royal NHS Foundation Trust -v- Roldon 2010 EWCA Civ. 522** and the reference therein to **A -v- B 2003 IRLR 405** to 'genuine belief on reasonable grounds'. The respondent's representative relied on 'every subordinate of the claimant' being invited for interview and it was submitted that although some of those employees chose not to provide a formal written statement that there was 'enough formal information obtained for a case to be presented to the claimant.' and that this was not a case of 'one person's word against another's'. It was submitted that the investigation concluded that two employees were prepared to put their names to a written statement, within

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5 which they asserted that there were behaviours displayed by the claimant that caused them to feel threatened or intimidated. Reliance was placed on the alleged incident of the claimant is saying 'because I can' and that at least three other people had provided a statement of 'how the claimant made them feel'.

10 25. It was submitted that the version of events in (29) - (31) were consistent and showed 'a realistic picture of the points of concern'. It was acknowledged that the claimant's position during the disciplinary process was that the allegations were vague in that they did not detail enough information for him to be clear so that he could provide an appropriate response. The respondent's representative relied on Stuart Boyd's position in relation to the allegations being 'you can get the measure'. It was submitted that a reasonable investigation had been carried out in all the circumstances.

15 26. Reference was made to **Iceland Frozen Foods Ltd -v- Jones 1983 ICR 17, Foley -v- Post Office , Midland Bank pic -v- Madden 2000 IRLR 82 and Sainsbury's Supermarkets Ltd -v- Hitt 2003 IRLR 23** in respect of the band or range of reasonable responses and that the Tribunal must not substitute its view for that of the employer. No criticism was made of the claimant's evidence but the Tribunal was asked to prefer the evidence of the respondent's witnesses. The Tribunal was asked to conclude that the respondent was 'entitled to form their belief in the claimant's guilt and therefore acted reasonably in dismissing the claimant in accordance with section 98(4) ERA'. The Tribunal was asked to conclude that the dismissal 'was within the range of reasonable responses on the basis that the belief of misconduct was based on reasonable investigation'.

30 27. In respect of remedy, it was submitted that in the event of the Tribunal finding in favour of the claimant, then the Tribunal should consider reductions. In respect of a **Pol key** reduction, it was submitted that in assessing compensation the Tribunal should assess the loss flowing from the dismissal and if on the balance of probabilities it is more likely than not that the employee would have been dismissed when he was in any event within the

correct assessment is that no compensation should be awarded (**Software 2000 Ltd -v- Andrews 2007 IRLR 568**).

5 28. It was submitted that the claimant's conduct prior to his dismissal had caused or contributed to his dismissal to the extent that it would be just and equitable to make a reduction of 100% to any basic and / or compensatory award.

10 29. The Tribunal asked the respondent's representative to specify the particular conduct which is relied upon by the respondent as being the conduct leading to the claimant's dismissal. The respondent's representative's position was that 'the claimant had abused his position as a manager in a manner deemed to be threatening and intimidating or in a manner abusive to his subordinates'. The Tribunal pressed the respondent's representative to specify the particular conduct which was relied upon. The respondent's representative relied on  
15 the following conduct of the claimant :-

(a) responding 'Because I can' when moving pallets in a warehouse (as set out in Stevie Keegan's statement at (29)

20 (b) saying that he was 'gunning for two people', as being set out in Janice Hamilton's statement as being overheard by her (30)

(c) speaking in an unacceptable manner and creating a terrible atmosphere in the warehouse by

25 (i) shouting 'Look at me while I am talking to you.' to Janice Hamilton which was perceived by her as being unnecessary, rude and not professional.

(ii) the 'majority of times' when approached by Janice Hamilton for work related issues not wanting to listen and being uninterested and raising his hand abruptly, leaving Janice Hamilton feeling uneasy.



(iii) Standing and staring at Janice Hamilton and making her feel uncomfortable, although speaking no words.

(iv) saying 'Don't get me in a bad mood or everyone will be in a bad mood' as allegedly overheard by Janice Hamilton

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(d) in respect of the positions set out at (31), the claimant's overall demeanour and attitude in the way he addressed and spoke to his subordinates with inefficient levels of communication and aggression and creating an unwelcome working environment.

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(e) The claimant's attitude in creating an atmosphere which was to the detriment of the business.

30. The Tribunal asked the respondent's representative for her position in respect of consistency of approach in respect of the respondent not having instituted any disciplinary proceedings in respect of the car park incident between the claimant and Stevie Keegan in January 2016 and the dismissal of the claimant for conduct reasons. The respondent's position was that no disciplinary process had been initiated in respect of the January 2016 car park incident because Stuart Boyd 'could not favour one person over another\*' and there were no other witnesses and so he made the decision to 'get on with it'. Her position was that at that time the respondent had not sought external assistance. Her position was that on Stuart Boyd's return from work after his period of ill-health it was brought to his attention that the claimant had been overheard saying that he was 'gunning for two people', which caused Stuart Boyd to speak to staff in the warehouse and then form the view that he had a problem which required external help. The respondent's representative relied on the respondent having then sought external assistance as explaining the difference in consistency of action taken.

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### Claimants Submissions

31. The claimant's representative submitted that the claimant's dismissal was automatically unfair under section 152 of TULRA, on the basis of the reason

or principal reason for dismissal being that the claimant was a member of an independent trade union and / or that the claimant's dismissal was unfair in terms of section 98 ERA.

- 5 32. The claimant's representative relied on the claimant being an experienced warehouse manager who had never been subject to any disciplinary proceedings or had any grievances raised against him the claimant's representative relied on to claimant's position during the disciplinary process as being that the allegations against him were vague and unsubstantiated. Reference was made to the grounds of an appeal.
- 10 33. The claimant's representative referred to the guidance in **British Home Stores -v- Burchell 1978 IRLR 397, Iceland Frozen Foods Ltd -v- Jones 1982 IRLR 439 and Sainsbury's Supermarkets Ltd -v- Hitt 2003 IRLR 23** being the approach the Tribunal should follow in assessing the fairness of the claimant's dismissal.
- 15 34. It was noted that the respondent has the burden of proving, on the balance of probabilities, that the claimant was dismissed for misconduct, being the potentially fair reason for dismissal set out at section 98(2)2 ERA which is relied on by the respondent. It was submitted that if the Tribunal is satisfied as to the respondent's reason for dismissal, in determining whether or not the  
20 dismissal is fair or unfair the Tribunal must then consider whether, having regard to the reason of conduct, in the circumstances of the case, 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 that in so determining, the Tribunal  
25 must have regard to equity and the substantial merits of the case. It was submitted that following **Burchell**, the Tribunal must assess whether (a) the respondent had a reasonable belief in misconduct (b) that belief was based on reasonable grounds and (c) that it was based upon an investigation which was reasonable in all the circumstances. It was submitted that the claimant  
30 was not guilty of the alleged misconduct and that the investigation, disciplinary and appeal process carried out by the respondent was inadequate.

35. The claimant's representative relied on it not being in dispute that there were  
was an incident between the claimant and Mr Keevins in late January 2016,  
when a heated exchange had occurred. He relied on the claimant's evidence  
that he had felt 'let down' by Mr Boyd's handling of the matter and that from  
his perspective that was when his relationship with Mr Boyd began to  
deteriorate. The claimant's representative relied on it being unclear why  
Nicola McDevitt had re-investigated that incident between Mr Keevins and  
the claimant. He relied on the claimant having told Nicola McDevitt about  
Stevie Keevins' threat i.e. Stevie Keevins' threat that he would alleged that  
the claimant had threatened to head butt him, and that the claimant had  
advised Nicola McDevitt that Stevie Keevins had previously made allegations  
against the claimant in circumstances where Stevie Keevins conduct or  
performance had been criticised by the claimant. The claimant's  
representative relied upon the claimant allegations against Stevie Keevins  
not being investigated by the respondent.

36. The claimant's representative submitted that it was unclear how Stevie  
Keevins statement came about and whether he had been asked any  
questions or the content of his statement was his choice. He relied on the  
majority of this statement concerning the incident between the claimant and  
Mr Keevins in January 2016 and that Mr Keevins was not asked for any detail,  
specifics or further clarity in relation to any of his statement or asked to give  
any examples to substantiate the allegations made, and that Mr Keegan  
statement was and that the claimant was not asked about Mr Keevins  
statement at his disciplinary hearing.

37. It was submitted that the claimant's consistent position throughout the  
disciplinary process and the Tribunal hearing was that he denied that he had  
intimidated staff or had demonstrated bullying behaviour, and that his position  
was that he found it difficult to respond to the vague, unspecified and undated  
allegations.

38. In respect of Janice Hamilton's statement, it was submitted that it was unclear  
why or how she had come to give a statement and that her statement was

unclear, with no dates as to when the alleged incidents had occurred. The claimant's representative relied on Ms Hamilton not being asked for any further clarity in relation to any of her statement, not being asked to explain where the incident occurred, whether there were any witnesses, and if so who these were, or to explain the context as to how the incidents came about or what occurred before or after them.

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39. The claimant's representative relied on the claimant's position during the disciplinary process being that he denied bullying younger members of staff and he encouraged the respondent to speak with those staff to ask for their views and encouraged the respondent to speak to Scott Winterbottom to seek his recollection of the claimant having made a comment 'don't get me in a bad mood or everyone will be in a bad mood'.

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40. The Tribunal noted the claimant's representative's position in respect of the claimant's evidence before the Tribunal on the allegations, but noted that the Tribunal must consider what was in the knowledge of the person making the decision to dismiss, at the time of the dismissal.

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41. The claimant's representative relied on it being unclear as to exactly what the document produced at (31) was. It was noted by the claimant's representative that Ms McDevitt's evidence was that that document consists of a statement by Scott Winterbottom and a statement from Vicki McDonald and that her position was that she had signed statements but that these were not produced. He noted that Mr Boyd's evidence was that (31) consisted of statements from three members of staff and that he couldn't remember whether he had taken them or not. This was contrasted with Mr Boyd's noted position in the disciplinary hearing minutes that the document now at (31) consisted of statements from five members of staff. The claimant's representative relied on two statements referring to a negative atmosphere in the warehouse, but neither attributing this to the claimant and the claimant agreeing with that sentiment on the basis that that negative atmosphere was due to the breakdown of his relationship with Mr Boyd.

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42. The claimant's representative relied on there being no explanation given as to what was meant by the allegation that the claimant "constantly harassed" staff and Mr Boyd accepting that he did not seek any further detail about that allegation. The claimant's representative relied on Mr Boyd's response to why he believed the allegations against the claimant were well founded being that there 'was sufficient feeling from staff that dismissal was in order'. It was submitted that Mr Boyd made no findings in fact as to what did or didn't happen but appeared to have concluded that some staff felt strongly about the claimant and that this substantiated the findings against him.
- 10 43. In respect of the appeal hearing it was submitted that there was no prospect of Mr Callender overturning the original decision to dismiss. It was submitted that Mr Callender had absolutely no understanding of the purpose of an appeal hearing, nor how to hold one. The claimant's representative relied on Mr Callender's response to how he knew what to do at the appeal hearing in  
15 circumstances where he had never heard one before being that he relied on 'natural instinct' and 'telling the truth'. Reliance was placed on Mr Callender's evidence that he had spoken with a number of staff members and Mr Boyd about the claimant, his confirmation that he took no statements and did not disclose these discussions with the claimant or ask the claimant for his  
20 perspective on anything that had been said, and that he did all this as a 'caring employer'. Reliance was placed on Mr Callender's evidence that the claimant had been dismissed for bullying and the matters he gave as being relevant to his decision to uphold the dismissal following the appeal hearing being (a) an instance when the claimant had allegedly created an unsafe work area (b)  
25 falsification of hours (c) some staff not sitting with the claimant at lunchtime (d) the claimant not speaking for himself at the appeal hearing (e) the claimant having given work to the embroidery member of staff with the words 'they've to be done' and (f) the attitude of staff and the claimant was on sick leave, which were not the reasons given for dismissal. It was submitted that Mr  
30 Callender's handling of the appeal was fatally flawed and that it could in no way be considered a fair hearing. Reliance was placed on Mr Callender having strongly refuted the suggestion put to him that it might have helped

him understand the claimant's appeal grounds to have asked the claimant's questions about his appeal.

5 44. It was submitted that there was no potentially fair reason for dismissal here that the respondent had failed to establish that there existed a potentially fair reason for dismissal. In respect of the purported reason for dismissal of conduct, it was submitted that the respondent did not make one single finding in fact as to what comments they believed the claimant had made, nor whether any of the alleged acts had been carried out. It was submitted that the dismissal letter is unclear as to what the claimant had done wrong and 10 that the accusations against the claimant were so vague as to be unanswerable. Rather it was submitted there are 'rumblings about minor management issues from an unspecified number of the employees on unspecified dates, none of which employees previously flagged to the claimant or the respondent as being a concern'. The claimant's representative 15 relied on the respondent not identifying a single date upon which the alleged acts of misconduct occurred (apart from the exchange with Mr Keevins). It was submitted that the respondent had not identified where the exchanges happened, nor any other context which would have allowed the claimant to meaningfully respond, despite having plenty opportunity to seek further clarity 20 from the alleged witnesses and failing to do so and despite having advice from an external professional HR company. It was submitted that given the severity of the outcome of the disciplinary process (dismissal) and the vague and unsubstantiated nature of the allegations, in all the circumstances a significantly more thorough investigation was required and the investigation 25 carried out could not be considered to be reasonable in the circumstances.

30 45. It was submitted that the respondent did not genuinely believe the claimant to be guilty of misconduct but that his relationship with Mr Boyd deteriorated and that the respondent sought to dismiss him as a result of that deterioration. It was noted that in their evidence both the claimant and Mr Boyd agreed that their relationship had deteriorated, although their position in respect of when this occurred was not the same. It was submitted that the decision to dismiss appears to have been personal, with Mr Boyd taking great offence to the

claimant not shaking his hand upon his return to work after a period of ill-health absence. It was submitted that in his evidence Mr Boyd was unable to clearly articulate what the reason(s) for the claimant's dismissal were and was unable to explain which act(s) of misconduct he concluded the claimant was guilty of. It was submitted that the respondent failed to make a single finding in fact in relation to which incident(s) had happened. It was submitted that although the dismissal letter confirms that the allegation of abusing the position of manager is well founded, the respondent does not explain any rationale for this, nor explain on what basis this has been made. It was submitted that the investigating and disciplinary process was inadequate. It was submitted that the respondent's conclusion 'I do not believe that your colleagues have colluded together in any way and I am inclined to believe their version of events over yours' fails to provide a single reason as to why the colleagues' version was preferred.

46. The claimant's representative relied on the claimant not having been suspended at any point prior to his dismissal and that being contrary to their position that they genuinely believed that the claimant was systematically abusing his position as manager and bullying staff.

47. It was submitted that if the Tribunal determines that the respondent genuinely believed that the claimant was guilty of misconduct, the Tribunal must then consider the general reasonableness of the dismissal in accordance with section 98(4) ERA.

48. It was submitted that the decision to dismiss fell outwith the band of reasonable responses open to the respondent when the objective standards of the hypothetical reasonable employer are considered. The claimant's representative relied on:-

- The claimant having worked with the respondent was six years with no previous disciplinary action being taken against him
- no grievance having been raised about the claimant's behaviour

- the claimant not having been suspended prior to the termination of his employment with the respondent
- the respondent having never come raise any concerns about the claimant's management style previously and the respondent's 'hands-off' approach
- no management training having been provided
- concerns about the claimant's management style ought to have been addressed by way of training

10 49. In respect of the claim of automatic unfair dismissal, the claimant's representative relied on the claimant's evidence of his conversation with Mr Boyd on 26h May 2016, when Mr Boyd 'pressed him' in respect of whether he had joined a union. It was submitted that when Mr Boyd was asked in cross-examination why he had felt it necessary to ask the claimant this, his explanation was unconvincing and that he had simply confirmed that he felt that this was something he wanted to know. It was submitted that Mr Boyd gave no plausible reason as to why he would ask an employee about his trade union status. The claimant's representative relied on a wide investigation been then commenced into the claimant's behaviour, over an unspecified period of time and including a reinvestigation of the January car park incident, despite some 17 weeks having elapsed since that incident. The claimant's representative relied on Mr Boyd's position in his evidence that the respondent 'had never had a need for unions'. It was submitted that the reason or principal reason for the claimant's dismissal was that he had become a member of an independent trade union and that that his dismissal was automatically unfair in terms of section 152 TULRA.

50. The claimant sought basic award and compensatory award as set out at (83) and (84) of the supplementary bundle, the calculations of which did not appear to be disputed by the respondent. In respect of future loss, the claimant's representative relied on the claimant now being employed on a



part-time temporary contract. Future loss was claimed for a period of six months, on the basis that it would take the claimant between 18 months and two years from the date his employment was terminated to gain employment at a salary broadly equivalent to that he had earned with the respondent. The Tribunal was referred to the evidence of his extensive job searches provided in the supplementary bundle. It was noted that the respondent act sets that the claimant has taken adequate steps to mitigate his loss.

51. It was submitted that there should be no reduction in terms of *Polkey* and no reduction for contributory conduct. It was submitted that the claimant was not guilty of misconduct and could not have been fairly dismissed at any other point.

**Fairness of the Dismissal**

52. The law relating to unfair dismissal is set out in the Employment Rights Act 1996 ('the ERA'), in particular Section 98 with regard to the fairness of the dismissal and Sections 118 - 122 with regard to compensation in terms of Section 98(1) for the purposes of determining whether the dismissal 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.

Section 98(2) sets out that a reason falls within this category if it -

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee, [(ba) is retirement of the employee]

(c) is that the employee was redundant,

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(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

10 53. Where the dismissal is by reason of the employee's conduct, consideration requires to be made of the three stage test set out in **British Home Stores - v- Burchell 1980 ICR 303**, i.e. that in order for an employer to rely on misconduct as the reason for the dismissal there are three questions which the Tribunal must answer in the affirmative, namely, as at the time of the dismissal:-

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i. Did the respondent believe that the claimant was guilty of the misconduct alleged?

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ii. If so, were there reasonable grounds for that belief?

iii. At the time it formed that belief, had it carried out as much investigation into the matter as was reasonable in the circumstances?

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54. What has to be assessed is whether the employer acted reasonably in treating the misconduct that he believed to have taken place as a reason for dismissal. Tribunals must not substitute their own view for the view of the employer and must not consider an employer to have acted unreasonably merely because the Tribunal would not have acted in the same way. Following **Iceland Frozen Foods Ltd -v- Jones 1983 ICR 17** the Tribunal should consider the 'band of reasonable responses' to a situation and consider whether the respondent's decision to dismiss, including any

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procedure prior to the dismissal, falls within the band of reasonable responses for an employer to make.

5 55. Section 98(4) of the ERA sets out that where the employer has fulfilled the requirements of subsection 98(1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

10 (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

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

This determination includes a consideration of the procedure carried out prior to the dismissal and an assessment as to whether or not that procedure was fair.

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### Compensation

25 56. Where the Tribunal makes a finding of unfair dismissal it can order reinstatement or in the alternative award compensation. In this case the claimant seeks compensation. This is made up of a basic award and a compensatory award.

30 57. The basic award is calculated as set out in the ERA Section 119, with reference to the employee's number of complete years of service with the employer, the gross weekly wage and the appropriate amount with reference to the employee's age. Section 227 sets out the maximum amount of a week's pay to be used in this calculation.

58. The basic award may be reduced in circumstances where the Tribunal considers that such a reduction would be just and equitable, in light of the claimant's conduct (ERA Section 122 (2)).

5 59. In terms of the ERA Section 123(1) the compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. In terms of Section 123(6) where the Tribunal finds that the dismissal was to  
10 any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

15 60. In assessing the contributory award, where the dismissal is held to be unfair on grounds of (lack of proper) procedure, and where the Tribunal considers that had a fair procedure been applied the claimant may have been dismissed fairly following such procedure, the compensatory award may be reduced by an appropriate percentage to reflect this (following the principle set out in **Polkey -v- AE Dayton Services Ltd 1988 AC 344**. This is known as the  
20 **Polkey** reduction.

#### Effect of Failure to Comply With the ACAS Code

25 61. With regard to dismissals after 6 April 2009, section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRA') provides that if the ACAS Code of Practice entitled 'Disciplinary and Grievance Procedures' ('the Code') applies and it appears to the Tribunal that :-

30 (a) the claim to which the proceedings relate concerns a matter to which the Code applies,

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

(c) the failure was unreasonable,

The 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%.  
5 There is a similar provision for a reduction if the employee has failed to comply with the Code and that failure was unreasonable.

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**Comments on evidence**

62 Evidence was heard on oath or affirmation from all witnesses. On behalf of  
the respondent evidence was heard from Ms Nicola McDevitt of Holly Blue  
15 Employment Law, Mr Stuart Boyd & Mr Peter Callender.

63. There was no real dispute in facts between the witnesses and the witnesses  
were found to be generally credible and plausible in their account, with the  
exception of the position in respect of statements being taken in the  
20 investigatory stage of the process and Mr Boyd's position on the reason for  
dismissal. It was clear that both Mr Boyd and Nicola McDevitt had spoken  
to employees as part of the investigation. It was not clear who or when the  
statements at (29), (30) and (31) had been taken. Mr Boyd and Ms McDevitt  
were not consistent in their evidence in respect of these statements and not  
25 consistent in their evidence as to how many people had given 'statements;' set  
out in (31). It was clear that Mr Boyd had obtained the views set out at  
(31) prior to instructing Holly Blue Employment Law.

64. The evidence of both Mr Boyd and the claimant was that the relationship  
between them had broken down. From the claimant's point of view, the  
30 relationship between him and Mr Boyd broke down as a result of Mr Boyd's  
failure to deal with the car park incident between the claimant and Mr Keevins  
in January 2016. The claimant's position was that that lack of management  
support led the claimant to be absent from work due to work related stress

and was compounded by Stuart Boyd's decision to withdraw payment to the claimant for his child care vouchers after the claimant had been absent from work for three days. The claimant was aggrieved that that action led to an issue with withdrawal of funding for his child's nursery place, although he did not believe that that had been an intended consequence of Stuart Boyd's actions.

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65. Mr Boyd's position before the Tribunal was that the claimant was dismissed because Mr Boyd had made the 'sound finding or belief that the claimant 'had abused his position as a manger\* and that that 'came to light' when Mr Boyd had come back to work after a period of illness. His clear evidence was that he had formed that belief because a number of people, namely Stevie Keevins, Janice Hamilton and Scott Winterbottom, were of that opinion. Mr Boyd's evidence was that his decision to believe them was based on him talking to them and his own opinion of the claimant's behaviour and his belief that the claimant was 'not the easiest person to approach'. From Stuart Boyd's evidence it was clear was that he was upset and annoyed that the claimant had not shaken his hand on Mr Boyd's return to work after a nine week absence due to ill-health reason. Mr Boyd accepted under cross examination that he wanted his staff to be effectively managed. Mr Boyd accepted under cross examination that a number of the allegations were not put to the claimant at the disciplinary hearing eg. that the claimant had not been asked for his position on Janice Hamilton's statement that he had delayed in dealing with her holiday request or that he had stared at her. He accepted that examples of behaviour were not asked for. His position in re-examination was that there had been an 'open discussion' with plenty of time for the claimant to expand on his answers. His position in re-examination was that he had made the decision to dismiss the claimant because he 'felt in all the circumstances and for the good of the business it was the appropriate thing to do because the situation had become quite inharmonious' and that was 'not what we want'. Stuart Boyd accepted in his evidence that the relationship between him and the claimant had broken down.

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66. There were some aspects of the claimant's position in evidence which were not put to the respondent's witnesses, such as that he had had a conversation with Mr Boyd that the policy of only payment of SSP on ill health absence would not apply to him. No findings in fact were made in respect of matters where the respondent was not given the opportunity to give their position.

67. Peter Callender's evidence was notable for him being candid in his position as to what he understood to be the reasons for dismissal, who he had spoken to about the claimant prior to the appeal hearing, that what they had said influenced his decision to uphold the decision to dismiss and was not put to the claimant, the matters he took into account in making his decision to uphold the dismissal, that those matters were not put to the claimant, that the claimant was not asked any questions about his appeal, that the claimant was not asked for his 'side of the story'<sup>1</sup> and that the appeal hearing had lasted 10 minutes.

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#### Discussion and decision

68. It was admitted that the claimant was dismissed. The first issue for the Tribunal in determining whether the dismissal is fair or unfair was to consider under Section 98(1) ERA whether the respondent had shown the reason for dismissal. The respondent relied only on that reason being related to the claimant's conduct, in terms of section 98(2)(b) and that the claimant was dismissed for gross misconduct. There was no *esto or* alternative case put forward by the respondent that there was or could have been a fair dismissal of the claimant in terms of section 98(1)(b) on the basis of there being some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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69. During the investigation and disciplinary procedure there was no specification of the particular conduct relied upon by the respondent which was considered to be gross misconduct. Although there was reference to a Disciplinary Procedure in the document setting out the terms and conditions of the claimant's contract of employment with the respondent (at (22) - (24)), the

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Tribunal did not have sight of any disciplinary procedure of the respondent, or any other policy setting out standards of behaviour or the type of conduct which would normally be regarded by them as a gross misconduct leading to summary dismissal. The Tribunal took into account the particular conduct  
5 relied upon by the respondent as being gross misconduct as set out by in the respondent's representative's submissions.

70. The Tribunal attached weight to Mr Boyd's position in evidence as to the reasons for his decision to dismiss the claimant, as set out under 'Comments on Evidence' above. The Tribunal attached particular weight to Mr Boyd's  
10 position in re-examination that he had made the decision to dismiss the claimant because he 'felt in all the circumstances and for the good of the business it was the appropriate thing to do because the situation had become quite inharmonious' and that was 'not what we want'. There was recognition by Mr Boyd under cross examination that as Warehouse Manager the  
15 claimant would be expected to 'effectively manage' his team. It was unclear why in the letter of dismissal the claimant's position that he had to 'effectively manage each and every member of his team', in varying degrees was taken as a factor against the claimant's position that Janice Hamilton and Stevie Keevins had colluded, and in Mr Boyd believing them rather than the claimant.  
20 It was unclear what issue Mr Boyd had with the Warehouse Manager believing he had to effectively manage his team. On Mr Boyd's own evidence, his own perception of the claimant affected his decision to dismiss. The Tribunal found that the reason for the claimant's dismissal was the breakdown of the relationship between the claimant and Stuart Boyd. In making this  
25 determination the Tribunal attached weight to conduct relied upon not being specified throughout the internal proceeding, other than as set out in the findings in fact.

71. In determining the reason for dismissal, the Tribunal considered it to be  
30 relevant and important that although the reason for dismissal was given as gross misconduct, the claimant was not suspended at any time prior to his dismissal. The Tribunal attached particular weight to the respondent's lack specification and detail throughout the internal process as to the allegations



of bullying behaviour and the failure by the respondent to seek detail or the point of view of the individuals who Janice Hamilton had accused the claimant of bullying, despite the claimant asking them to do this. If the claimant's conduct had been the reason for his dismissal, the Tribunal would have expected the particular conduct relied upon to be specified during the internal disciplinary process. The respondent did not show that the reason (or, if more than one, the principal reason) for the claimant's dismissal related to conduct in terms of section 98(2)(b).

72. The Tribunal's conclusion as to the reason for dismissal was consistent with the evidence of both the claimant and Mr Boyd, although each had a different belief as to the reason why their relationship had broken down, as set out in the findings in fact.

73. In respect of the claimant's claim that his dismissal was an automatically unfair dismissal by reason of his trade union membership, although it was clear from the manner in which he gave his evidence that Mr Boyd did not like the fact that the claimant had joined a trade union, the Tribunal did not find that that was the reason or principal reason for the claimant's dismissal. It was not the claimant's position in evidence that his dismissal was because he had joined a trade union. The claimant was not dismissed by reason of his conduct. The claimant was dismissed because of the breakdown of the relationship between the claimant and Mr Boyd. The starting point of the breakdown of that relationship was Mr Boyd's failure to deal with the car park incident in January 2016 as a reasonable employer. That failure was unreasonable with regard to the band or range or reasonable responses for an employer to take, having regard to the implied term of trust and confidence in every contract of employment, and that the incident involved a heated dispute between an employee and their line manager. Part of this implied term of trust and confidence is that an employer has a duty to deal with such incidents, however hard it may be for an employer to come to a decision. No reasonable employer would in those circumstances have failed to communicate its employees that a heated exchange between them in the car park was unacceptable behaviour. No reasonable employer would have

failed to consider the implications of an employee being in a heated exchange with his line manager in the car park and no disciplinary action being initiated against either of those involved. The claimant reasonably felt undermined by Mr Boyd's failure to reasonably deal with the car park incident. Mr Boyd's failure to reasonably deal with that incident was the root cause of the unhappy atmosphere in the warehouse, which was the situation which led to the claimant's dismissal.

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74. The Respondent did not establish that the claimant's dismissal was for a reason relating to the claimant's conduct. The claimant's dismissal was an unfair dismissal under section 98(1). The remaining provisions of section 98 of the ERA, including section 98(4) on the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer, only apply where the employer has fulfilled the requirements of subsection 98(1), which the respondent has not done in this case. Although it did not then require to do so, the Tribunal considered the fairness of the claimant's dismissal in terms of the approach addressed by the parties' representatives in their submissions and in terms of ERA section 98(4).

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75. The Respondent did not have internal HR support but instructed an external agency to provide them with advice and assistance during the disciplinary process which led to the claimant's dismissal. The respondent failed to conduct an adequate investigation, causing unfairness to the claimant. A reasonable employer would have sought to establish what particular conduct by the claimant was being relied on by Janice Hamilton and Stevie Keevins in their statements. A reasonable employer would have established all of the particular conduct which was being relied on in the disciplinary process as potentially being misconduct by the claimant. A reasonable employer would have made findings as to what had occurred which was considered to have been misconduct on the part of the claimant. A reasonable employer would have investigated the claimant's allegations of collusion. A reasonable employer would have investigated the claimant's position that Mr Keevins made allegations against the claimant when the claimant criticised his conduct or performance. Following the claimant's position at the disciplinary

hearing, a reasonable employer would have sought Scott Winterbottom's position on his interactions with the claimant when asking for time off and then made findings in fact as to what had occurred on those occasion and whether the claimant's conduct in that regard was considered to be misconduct. A reasonable employer would have taken into consideration the claimant's position at the disciplinary hearing that the root of the problem was the car park incident. A reasonable employer would have investigated the claimant's allegation of collusion between Mr Keevins and Ms Hamilton. A reasonable employer would have ensured there was transparency in the investigation and disciplinary procedure. A reasonable employer would not have accepted general allegations made by two individuals, together with general statements as to the negative atmosphere in the workplace without establishing what had occurred. The statements at (31) cannot reasonably be considered as establishing misconduct on the part of the claimant. The document at (31) is not a statement of how the claimant made at least 3 other people feel, as submitted by the respondent's representative. Aside from it being unclear how many individuals' point of view are reflected in (31), during the disciplinary process the claimant agreed with the view (or views) expressed at (31) that the atmosphere in the Warehouse was negative. A reasonable employer would have established the cause of the negative atmosphere in the workplace. The respondent unreasonably failed to investigate or establish the reason(s) for the negative atmosphere in the workplace and instead accepted the general allegations made against the claimant without reasonable investigations.

76. By these failures, the respondent failed to conduct an adequate investigation and so caused unfairness, so as to make the claimant's dismissal an unfair dismissal. The investigation carried out by or on behalf of the respondent was inadequate when judged by the standards of the reasonable employer and with regard to the band and range of reasonable responses. The investigation could not be regarded as sufficient in the circumstances. The failure of the investigation was relevant to the decision to dismiss because it resulted in an absence of proper information at the time of the decision to dismiss. The failures in the investigation led to a prejudice to the claimant in

terms of him not being able to address allegations as to particular conduct by him which was regarded to be (gross) misconduct. There was a lack of transparency about the process in regard to what conduct was alleged or considered to be gross misconduct and what investigations had been carried out. These procedural defects had a bearing on the decision to dismiss.

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77. There was no evidence before the Tribunal of any indication from the respondent to the claimant as to what type of conduct would be likely to be considered by them to be gross misconduct. Mr Boyd's clear position in respect of the car park incident between the claimant and Mr Keevins in  
10 January 2016, when no disciplinary action was taken against either the claimant or Mr Keevins, was that the matter was 'closed off' by a note being placed 'on file' but that there was no communication of that to either the claimant or Mr Keevins and no dismissal or disciplinary proceedings for a conduct reason initiated in respect of either individual involved. Mr Boyd's  
15 reasons for no disciplinary action being taken was that he could not determine whether to believe the claimant or Mr Keevins' version of events. Both versions of events (as set out in Mr Boyd's understanding at the time at (82)) give the picture of a heated exchange between an employee and their line manager.

20 78. The respondent's representative's position in respect of any issue of inconsistency with regard to how the respondent dealt with the car park incident and in respect of the conduct relied on by the respondent as being the reason for the claimant's dismissal was not to deny that the respondent's approach in these two matters was inconsistent. The respondent's  
25 representative's position was that the reason for the inconsistency was that the respondent had then appointed external advisers. That is not a reasonable reason for an employer's inconsistency of treatment of issues of misconduct among its employees.

79. It is important that an employee is aware of the type of conduct which will be  
30 likely to be considered by his employer as being misconduct. It is particularly important that an employee is made aware of the type of conduct which is

likely to be considered to be gross misconduct justifying summary dismissal. That is the reason why some examples of conduct likely to be considered to be misconduct and gross misconduct are normally given in an employer's disciplinary policy.

5 80. There were no findings as to what conduct by the claimant was considered by Mr Boyd to be gross misconduct justifying his summary dismissal. Mr Boyd did not have a reasonably held and genuine belief in the claimant's misconduct. Mr Boyd believed that there was a negative atmosphere in the workplace and that the claimant contributed to that. That is not the same as  
10 a belief that the claimant had engaged in conduct which was misconduct. In making the decision to dismiss, and in all the relevant circumstances, Mr Boyd did not act within the band or range of responses by:-

(a) Failing to take into consideration the impact of him having dealt with the car park incident involving a heated exchange between the  
15 claimant and Mr Keevins without any communication to either individual involved about the appropriateness of their conduct in that incident.

(b) Failing to establish the conduct by the claimant which was relied upon as being gross misconduct justifying summary dismissal.

20 (c) Failing to establish what had occurred in respect of the conduct being relied upon as gross misconduct justifying dismissal.

(d) Failing to ensure that the investigation had been adequate in ascertaining what had occurred.

(e) Taking into account in the decision to dismiss matters which were  
25 not put to the claimant, being (a) the claimant's interactions with Stuart Boyd (b) his understanding of matters said to have occurred after the disciplinary hearing (as referred to in the dismissal letter).

81. In respect of the appeal process, there were considerable procedural defects to that appeal procedure, to the extent that it was fatally flawed and unfair. The appeal process was unfair because Mr Callender took into account in the decision to uphold the dismissal at appeal matters which were not part of the reason for dismissal, as set out in the findings in fact.

82. The Tribunal's conclusion was that the reason for the claimant's dismissal was the breakdown in the relationship between the claimant and Stuart Boyd. It was not the respondent's position that the claimant's dismissal could have been a fair dismissal in terms of section 98(1), as being 'some other substantial reason'. The Tribunal sought clarification on a number of occasions that the only reason relied upon by the respondent was conduct and this was confirmed. The claimant's dismissal was not by reason of his conduct. The claimant's dismissal was an unfair dismissal. Although it did not then require to do so, in considering the fairness of the dismissal in terms of section 98(4),, taking into account the size and administrative resources of the respondent, and determining in accordance with equity and the substantial merits of the case and in consideration of the procedure carried out prior to the dismissal and assessing whether or not that procedure was fair, the Tribunal concludes that it was not and that the dismissal is an unfair dismissal.

83. The claimant sought compensation as his remedy for unfair dismissal. The Tribunal determined in terms of section 123(1) ERA the amount of compensation it considered to be just and equitable in all the circumstances and having regard to the loss sustained by the claimant in consequence of his dismissal in so far as that loss is attributable to action taken by the respondent. In all the circumstances, the claimant suffered an injustice by being unfairly dismissed and it is just and equitable for him to be compensated for his loss flowing from that dismissal. The *Polkey* principle applies to limit compensation where the employer shows on the evidence either that the employee would or might have been dismissed for the reason they were dismissed, whether at the time of the actual dismissal or soon thereafter, had a fair procedure been followed, or that, independently of the circumstances leading to the actual

dismissal, the employee would or might have been fairly dismissed, or have resigned, at some point for some other reason.

5 84. In the present case, it could not be said that the lack of fair procedure made no practical difference to the decision to dismiss on grounds of conduct. It could not be said in this case that it was inevitable on the facts found that the claimant would be dismissed for his conduct. The procedural defects in this case led to substantial unfairness. The failure of the respondent to properly specify the allegations and seek the position of the claimant and the other individuals involved as to the what was alleged to have occurred, the failure to investigate or address the claimant's position, the lack of transparency and the failure by 10 to establish what had occurred was prejudicial to the claimant. The procedural defects were sufficiently serious as to render the process unfair. It could not be said that in sufficiently investigating the claimant's alleged conduct, dismissal would have then occurred at some later date.

15 85. The Tribunal took into account the principles set out by Mr Justice Elias in **Software 2000 Ltd -v- Andrews and others 2007 ICR 825**, EAT, including that 'the Tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what 20 might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact of speculation is not a reason for refusing to have regard to the evidence.' On this basis, in applying the requirements of section 123(1) ERA in awarding what is just and equitable having regard to the loss sustained by the claimant, the Tribunal took into 25 account the evidence of the breakdown in the relationship between the claimant and Mr Boyd and that dismissal might have occurred for that reason. It could not be said with any certainty that the inevitable result of the breakdown of that relationship was the termination of the claimant's employment. Had it not been for the procedural defects, Mr Boyd may have established the real 30 reason for the negative atmosphere in the workplace and may have dealt with that situation in a way other than dismissing the claimant. This exercise inevitably involves the Tribunal entering into a world of speculation.

86. Following the guidance in **Software 2000 Ltd -v- Andrews and others**, the Tribunal sought to make an assessment of what is likely to have happened, using its common sense, experience and a sense of justice. The Tribunal had regard to justice and the root cause of the breakdown in relationship being Mr Boyd's failure to reasonably deal with the car park incident, which was Mr Boyd's failure to effectively deal with management of the company's employees. The Tribunal did not accept the respondent's representative's submission that the conduct relied on by the respondent would have inevitably led to the claimant's dismissal. The Tribunal considered that a potentially fair reason for dismissal (being the breakdown of the relationship between the claimant and Mr Boyd) might have emerged as a result of a proper investigation and disciplinary process. The Tribunal considered whether a future hypothetical dismissal for that reason would be a fair dismissal. Taking into account its findings as to Mr Boyd's failures which were the root cause of that breakdown in relationship, the Tribunal concluded that such a future dismissal for that reason would not be fair. In these circumstances it was not just and equitable for a **Polkey** reduction to be made. Given the extent of the procedural failures, the Tribunal could not say with any precision whether the respondent would, on the balance of probabilities, have dismissed the claimant on the basis of there having been a breakdown in the relationship between the claimant and Mr Boyd and that being a fair dismissal for 'some other substantial reason in terms of section 98(1) ERA).

87. The Tribunal considered whether any deduction should be applied to reflect contributory fault under s123(6), where the dismissal was caused or contributed to by any extent by any action of the claimant. The Tribunal considered whether the claimant had engaged in culpable or blameworthy conduct which had actually caused or contributed to his dismissal and if so whether it was just and equitable to reduce the award under section 123(6) ERA. The Tribunal took into account its conclusion that the claimant's dismissal was because of the breakdown in the relationship between the claimant and Mr Boyd after the car park incident. The car park incident was the root of the breakdown in their relationship. There was conduct on the part of the claimant which contributed to his dismissal to the extent that the claimant



was blameworthy to some extent in the car park incident. The claimant had been involved in a heated exchange with someone over whom he had line management responsibilities. That conduct had contributed to the claimant's dismissal (although was not recognised in the dismissal letter as having done so). That blameworthy conduct would have contributed to the claimant's hypothetical future dismissal by reason of a breakdown in the relationship between the claimant and Mr Boyd.

88. In all the circumstances, the Tribunal considered it was just and equitable to make a deduction of 20% to both the unfair dismissal basic award and the contributory award in reflection of this blameworthy conduct. In doing so, the Tribunal took into account the conduct relied upon by the respondent as being the reason for the claimant's dismissal. The Tribunal took into account the claimant's evidence that he may have said words to the effect of 'because I can' and 'Look at me while I am talking to you.'. In circumstances of the respondent's lack of guidance as to appropriate management style, the Tribunal did not consider this to be blameworthy conduct such that it was just and equitable to further limit the extent of any award to the claimant. The Tribunal could not conclude that after a reasonable investigation in respect of the other allegations set out in (29) (30) or (31) the claimant would be found to have engaged in conduct 'blameworthy' so as to merit deduction of more than 20% in respect of his contribution to his dismissal.

89. The Tribunal took into account that the respondent's stated reason for dismissing the claimant had been gross misconduct and that that would have an effect on the claimant's search for alternative employment. The claimant received no notice or payment in lieu of notice. The Tribunal took all these circumstances into account when assessing the extent of the compensatory award in this case and made its assessment of the compensatory award with regard to the general application of the requirements of section 123(1) ERA in awarding what is just and equitable having regard to the loss sustained by the claimant.

90. For the same reasons as in respect of the compensatory award, the Tribunal applied a deduction of 20% to the basic award under section 122(2) ERA.

91. No uplift was sought by the claimant's representative in respect of unreasonable failure to comply with the ACAS Code. The Tribunal considered whether it was just and equitable to adjust the compensatory award in terms of the TULRA Section 207A as a result of failure to comply with the ACAS Code. The respondent had on the face of it complied with the Code in that there was an investigatory hearing, disciplinary hearing and appeal hearing. The procedures were then complied with to some extent. There were defects in the procedures, which impacted on the decision to dismiss and the dismissal was an unfair dismissal. The appeal process was flawed to the extent that it was ineffective because of the reasons taken into account by Mr Callender as being his reasons for upholding the decision to dismiss, as set out in the findings in fact. The Tribunal took into account the size and administrative resources of the respondent, that the respondent is a small business and had taken external HR advice on the matter. Although there was an appeal hearing, the approach of Mr Callender at the appeal hearing showed no regard for the proper approach to be taken in hearing disciplinary appeals. Mr Callender was candid in his evidence as to the matters he took into account in his decision to uphold the appeal and that these were not matters which were put to the claimant. This was not an appeal which could be said to be a fair appeal hearing. Although an appeal hearing took place, in taking into account in his decision to uphold the appeal the matters set out in the findings in fact and without seeking the claimant's position in respect of those matters, Mr Callender did not conduct a review of the decision to dismiss and instead acted completely unreasonably and contrary to principles of natural justice.

92. The ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 ('the Code') applies to the claim to which these proceedings relate. The respondent has failed to comply with the Code in respect of :-

- failing to establish the facts in respect of the conduct which was relied on as being the reasons for dismissal (part 5 of the Code).

- failing to provide the claimant with sufficient information about the alleged misconduct and its possible consequences to enable the claimant to prepare to answer the case at a disciplinary meeting (part 9 of the Code)
- 5 • failing to explain the complaint against the claimant and to go through the evidence that had been gathered (part 12 of the Code)
- failing to deal with the claimant's appeal impartially (part 27 of the Code)

10 These failures were unreasonable and in the circumstances, because of these failures the Tribunal considers it just and equitable to increase the unfair dismissal award and the compensatory award it makes to the employee by 10% in terms of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRA'). In making this level of uplift, the Tribunal  
15 takes into account that the Respondent had instructed external HR support. This uplift is made because the respondent failed to follow a fair and appropriate disciplinary procedure in respect of the way in which it dealt with the investigation, the disciplinary hearing and the appeal hearing.

20 93. The claimant was unfairly dismissed by the respondent and is entitled to an unfair dismissal basic award. The effective date of termination of employment is 27 July 2016. The relevant level of cap on weekly wage for the purposes of the calculation of the unfair dismissal basic award is £479 (which is the increase effective from 6 April 2016). The undisputed figures in respect of  
25 the claimant's earnings with the respondent are £456.73 gross weekly pay and £398.29 net weekly pay. The claimant was aged 45 at the effective date of termination of his employment with the Respondent, after 6 complete years' service. This calculates to an unfair dismissal basic award of £3,648. A 20% reduction is applied to this calculation in terms of ERA s123(6), for the  
30 reasons set out above. This is a reduction of (20% x £3,648) £729.60. The application of this deduction reduces the unfair dismissal basic award figure to (£3,648 - £729.60) £2,918.40.

94. The Tribunal applied a 10% uplift to this figure under s207A TULR(C) Act 1992. This equated to an uplift of  $(10\% \times \pounds 2,918.40) \pounds 291.84$ . Application of this uplift led to a figure of  $(\pounds 2,918.40 + \pounds 291.84) = \pounds 3,210.24$ . The claimant is awarded a basic award of  $\pounds 3,210.24$  (THREE THOUSAND TWO HUNDRED AND TEN POUNDS AND TWENTY FOUR PENCE).

95. No issue was taken by the respondent in respect of the claimant's mitigation of his loss. The Tribunal considered that the claimant had taken reasonable steps to mitigate his loss. The Tribunal calculated the claimant's loss sustained which was attributable to his unfair dismissal. The respondent did not dispute the calculations or period of loss set out in the claimant's Schedule of Loss at (83) and (84) in the Supplementary Bundle. The Tribunal considered that this Schedule of Loss set out the loss sustained by the claimant which was attributable to his dismissal, that the claimant had made reasonable efforts to mitigate his loss and there was a reasonable assumption as to the length of time it will take for the claimant to obtain work at a similar level of remuneration to that received from his employment with the respondent. The Tribunal accepted in the circumstances the undisputed position of the claimant's representative that a period of future loss of 6 months was appropriate to reflect a just and equitable amount with regard to the period within which the claimant is likely to achieve a level of remuneration similar to that received from the respondent. The Tribunal calculated the claimant's loss attributable to his dismissal as :-

(1) Loss of net wages of  $\pounds 398.29$  from 27 July 2016 to 26 March 2017 (34.5 weeks) =  $(398.29 \times 34.5) \pounds 13,741.01$ .

(2) Loss of net wages of  $(\pounds 398.29 - \pounds 161.54) \pounds 236.75$  from 26 March to 20 November 2017 (34 weeks) =  $(\pounds 236.75 \times 34) \pounds 8,049.50$

(3) Future Loss of net wages of 26 weeks  $(236.75 \times 26) \pounds 6,155.50$ .

Total =  $(\pounds 13,741.01 + \pounds 8,049.50 + \pounds 6,155.50)$   
 $\pounds 27,946$

96. There was no limitation applied in consequence of the application of *Polkey*. The Tribunal applied a 20% deduction to the attributable loss to reflect the claimant's blameworthy conduct in terms of s123(6) ERA. This equates to a reduction of  $(20\% \times £27,946)$  £5,589.20. This 20% deduction reduced the figure to  $(£27,946 - £5,589.20)$  £22,356.80.
97. The Tribunal applied a 10% uplift to this figure under s207A TULR(C) Act 1992. This equated to an uplift of  $(10\% \times £22,356.80)$  £2,235.68. Application of this uplift led to a figure of  $(£22,356.80 + £2,235.68) = £24,592.48$ . The claimant is awarded a compensatory award of £24,592.48 (TWENTY FOUR THOUSAND FIVE HUNDRED AND NINETY TWO POUNDS AND FORTY EIGHT PENCE).
98. There was no period of notice or redundancy payment to take into account. There was no need to gross up the loss to compensate for any tax payable on sums in excess of £30,000 paid in connection with the termination of employment.

### Recoupment Regulations

99. The claimant was in receipt of Job Seekers Allowance for part of the period in respect of which the compensatory award relates. To avoid double payment, the relevant government department will seek to recover the amount of benefit or Job Seekers Allowance which the claimant received during this period. This will be recovered from the respondent before the relevant part of the award is paid to the claimant. The prescribed element of this award, to which the Recoupment Regulations apply relates to the period from 15<sup>th</sup> August 2016 until 20<sup>th</sup> February 2017. The prescribed element in respect of this period is  $(27 \text{ weeks} \times £73.10)$  £1,973.70. The monetary award  $(£3,210.24 + £24,592.48 = £27,802.72)$  exceeds the prescribed element by  $(£27,802.72 - £1,973.70)$  £25,829.02. The prescribed element of £1,973.70 should not be paid to the claimant by the respondent until the relevant government department serves a recoupment notice on the respondent

advising of the amount of benefit paid to the employee, or notification is given that there will be no recoupment. On service of a recoupment notice, the specified amount will then fall to be paid by the respondent to the relevant government department. Any balance falls to be paid by the respondent to the claimant once the respondent has received this recoupment notice or notice that there will be no recoupment, a copy of which will be sent to the claimant.

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Employment Judge: Claire McManus  
Date of Judgment: 12 December 2017  
Entered in register: 12 December 2017  
and copied to parties

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