EMPLOYMENT TRIBUNALS

Claimant:	**Mr M. Headley**
Respondent:	**London Fire Commissioner**
Heard at:	**East London Hearing Centre**
On:	**3-5 November 2021; and** **18 November 2021 (in chambers)**
Before:	**Employment Judge Massarella** **Mrs B. Saund** **Mr T. Burrows**

Representation
Claimant: Mr D. Panton (Solicitor)
Respondent: Ms S. King (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **by consent, the name of the Respondent in these proceedings is amended to 'London Fire Commissioner'.**

In relation to Case No. 3200756/2018:

2. **having regard to the two complaints of victimisation which the Tribunal upheld, the Claimant is entitled to a combined award for injury to feelings of £8,600:**

3. **the Tribunal awards £2,580 in interest on that sum;**

4. **the Tribunal awards an ACAS uplift of 25% on the element of the injury to feelings award which relates to the first act of victimisation: £860.**

In relation to Case No 3200312/2019:

5. the claims of victimisation are not well-founded and are dismissed;

6. the Claimant was unfairly dismissed;

7. there is a 100% chance that the Respondent would have fairly dismissed the Claimant by 9 January 2019; any financial loss is confined to that period;

8. the Claimant contributed to the dismissal by his own blameworthy conduct; the basic award will be reduced by 75% to reflect the Claimant's contributory fault; no further reduction will be made to the compensatory award on this ground;

9. the claim of wrongful dismissal is not well-founded and is dismissed;

10. the Tribunal will determine the calculation of the award on written submissions, unless the parties can agree the sums.

REASONS

This has been a remote hearing, conducted by video (CVP), which has not been objected to by the parties.

Procedural history

1. The Claimant brought three cases:

   1.1. Case No. 3201597/2017 was presented on 24 November 2017, after an ACAS early conciliation period between 11 and 26 October 2017 ('Case 1').

   1.2. Case No. 3200756/2018 was presented on 9 April 2018, after an ACAS early conciliation period between 26 February and 13 March 2018 ('Case 2').

   1.3. Case No. 3200312/2019 was presented on 6 February 2019, after an ACAS early conciliation period between 31 December 2018 and 15 January 2019 ('Case 3').

2. Cases 1 and 2 were brought while the Claimant was still in the Respondent's employment. Case 3 was brought after the employment was terminated and contains a claim of unfair dismissal. The first two cases were consolidated in May 2018, the third in May 2019.

3. The first hearing, listed for January/February 2019, was postponed because the Claimant was unwell and because he intended to issue Case 3. The second hearing, which was listed in April/May 2021, was postponed because of the Covid-19 pandemic.

4. A hearing was listed in June 2021 to deal with all three cases, the Respondent's main witness in Case 3 (DAC Philpott, who took the decision to dismiss) was unable to attend because of illness. EJ Jones ordered that Case 3 be heard

separately. She considered it important that Cases 1 and 2 proceed, given that they related to events in 2017/2018.

5. Cases 1 and 2 were heard over five days in late June/early July 2021. Judgment was sent to the parties on 4 October 2021. The Tribunal upheld two of the Claimant's victimisation claims: in relation to SM McCallum's decision not to recuse himself from dealing with the Claimant's grievance about a decision he had taken himself; and in relation to the Respondent's refusal to disclose documents relating to the Local Management Investigation into an incident involving the Claimant. All other claims were dismissed.

6. This hearing dealt solely with Case 3. Because the only remedy pursued in relation to the successful claims in Case 2 was an award for injury to feelings, we also heard evidence and submissions about that issue.

The hearing

7. We spent some time clarifying the issues at the beginning of the hearing. The final version of the agreed list of issues is in the appendix to this judgment. Mr Panton took instructions and confirmed that the allegation of victimisation relating to the length of time it took to arrange an appeal hearing was solely made against Ms Durand.

8. We had an agreed bundle running to some 1345 pages. We read into the case on the morning of the first day. We then heard evidence from:

    8.1. the Claimant;

    for the Respondent, we heard from:

    8.2. Ms Josie Durand (HR Adviser, North West Area), who conducted the disciplinary investigation;

    8.3. Asssistant Comissioner (AC) Jane Philipott, who was a Deputy Assistant Commissioner (DAC) at the material time, and the dismissing officer.

9. We had helpful written submissions from both advocates, which they supplemented orally. We do not summarise them in what is already a long judgment, but refer to certain submissions below; we are grateful to them both for their assistance throughout these hearings. We apologise to the parties for the delay in sending out this judgment, which was caused by pressure on judicial resources.

Findings of fact

<u>The Respondent's policies</u>

10. The Respondent's disciplinary policy at Appendix 1 contains a non-exhaustive list of offences regarded as gross misconduct, which includes:

> 'serious incapacity at work brought on by misuse of alcohol or illegal drugs'.

Para 20 provides:

> 'The timing and location of the hearing should where practicable be agreed with the employee and/or their representative. The length of time between the written notification and the hearing should be long enough to allow the employee and/or their representative to prepare and shall in any event be not less than:
>
> - seven days for the first formal stage;
> - ten days for the second stage;
> - twenty-one days for the third stage.'

With regard to the appeal process, the policy provides:

> 'Normally the Appeal Manager will conduct the appeal hearing as a rehearing (in full or in part), where this is required. Otherwise the appeal hearing will be conducted as a review. A rehearing would normally be required in the following instances (this is not necessarily an exhaustive list):
>
> - There was a procedural defect at the original hearing such that the hearing was unfair.
> - New evidence has come to light which needs to be heard in full.
> - There is a dispute about evidence given by one or more witnesses at the original hearing. In these cases it may be necessary to rehear the witness evidence at the appeal.
>
> […]

Para 67 provides:

> 'In the course of a disciplinary process, an employee might raise a grievance that is related to the case. If this happens, the manager should consider suspending the disciplinary procedure for a short period while the grievance is dealt with. Depending on the nature of the grievance, the manager may need to consider bringing in another manager to deal with the disciplinary process (see ACAS code).'

Para 23 App 1 provides:

> 'An employee and/or their representative who cannot attend a hearing should inform the manager in advance, as soon as possible. If the employee fails to attend through circumstances outside their control, and unforeseeable at the time the hearing was arranged (e.g. illness), the manager should arrange another hearing. A decision may be taken at a hearing in the employee's absence if they fail to attend the rearranged hearing without good reason. An employee's representative may attend on their behalf, if the employee is unable to attend. If an employee's representative cannot attend on a proposed date, the employee has a statutory right to suggest another date, so long as it is reasonable, and is

not more than seven days after the date originally proposed by the employer. This seven day time limit may be extended by mutual agreement.'

11. There is a separate policy containing 'Disciplinary Rules'. It identifies gross misconduct offences, which include:

> 'Serious breaches of health and safety regulations and/or endangering others.
>
> Unfit for work through influence of alcohol or illegal drugs.'

12. There is then an Alcohol and Drugs Policy, which provides at para 3.2:

> 'Drugs
>
> No employee should report for work with traces of illegal drugs in their body systems. The London Fire Brigade has zero tolerance of illegal drug consumption.'

Para 11.3 provides:

> 'Routine Periodic Medicals (RPM) – alcohol and drugs screening will form part of the required medical assessments of individuals.'

Para 12.1 provides:

> 'Employees will normally be subject to disciplinary procedures which may lead to dismissal, if they:
>
> - Fail an alcohol test with 30 milligrams (mg) or more per 100 millilitres (ml) of blood, or the equivalent in urine or breath.
> - Fail a drugs test.'

Para 21 provides:

> 'A positive result from the laboratory will be referred to an independent occupational health physician (the 'medical review officer' (MRO)) who will conduct a medical review of the result. The MRO may then report a negative outcome to HML, e.g. taking into account medication. The MRO may or may not wish to speak to the individual before reporting the outcome to HML. Where the MRO wishes to speak to the individual, the individual will be provided with an opportunity to speak to the MRO […] Where the MRO does not wish to speak to the individual, the MRO will notify HML of the outcome directly.'

HML (Health Management Limited) was the Respondent's Occupational Health Service.

<u>The drugs test on 4 July 2018</u>

13. The Respondent carried out Routine Period Medicals (RPMs) on firefighters every three years. They were given 28 days' notice. The drug and alcohol test formed part of the RPM. The Claimant had had these tests in the past; he was

familiar with the procedure; he had advance notice of the test, which took the form of a urine test; and he had consented to it in writing. The consent form included the following passage:

> 'I understand that any positive result may result in me being placed 'unfit' for work and may render me liable to disciplinary action by the LFB. A positive result means the detection of drugs in the urine or of an excess breath alcohol level.'

14. On 4 July 2018 the Claimant tested 'non-negative' for drugs. He was told of the results immediately and was excused attendance from work, on full pay, pending an independent examination of his urine sample. The Respondent sent the sample for analysis, which was provided by Alere Toxicology (which later changed its name to Abbotts).

15. The Claimant went to his GP on 6 July 2018 and explained what had happened. He also told her about the events of the past fifteen months. He told the GP that he had never taken illegal drugs of any sort. The GP diagnosed him with depression, prescribed antidepressants and referred him to a mental health clinic. She also suggested that she do some blood and urine tests.

16. On 11 July 2018, Mr David Amis (Head of Well-Being) was contacted by Alere, which confirmed the presence of cocaine metabolite in the Claimant's sample. A metabolite is a chemical produced when the body breaks down substances. Alere tested his sample and found that he had a concentration of 470 nanograms of benzoylecgonine per millilitre in his urine. Alere set its testing thresholds so as to rule out the possibility of accidental contamination, passive inhalation or historic drug use. The threshold for cocaine used by Alere was 150 nanograms per millilitre; the level of cocaine in the Claimant's system represented more than three times that level. The Claimant was suspended from duty.

17. The results had been reviewed (before 11 July 2018), in accordance with the Respondent's own policy, by an Independent Medical Review Officer (MRO), Dr Maggie Samuel. Her conclusion was stated briefly in the report:

> 'Final Outcome: Positive/Fail – Positive for drugs and/or alcohol
>
> This specimen was reported POSITIVE and NOT CONSISTENT with ANY PRESCRIBED OR OVER-THE-COUNTER MEDICATION for at least one substance as listed above. This result should therefore be treated as a FAIL with regard to a Drug and Alcohol Testing Programme.'

18. We note that at this stage there had been no suggestion by the Claimant that the drug test result might have been caused by a medical condition; he did not discover that he had diabetes/kidney problems until 26 July 2018 (para 21).

19. On 19 July 2018 Ms Josie Durand (HR) invited the Claimant to an investigatory meeting on 30 July 2018.

<u>The Canford drug test</u>

20. On 25 July 2018, the Claimant arranged to undergo a private hair test with Canford Laboratories, a laboratory accredited by UKAS (the national accreditation body for the UK, appointed by government to assess organisations that provide certification, testing, inspection and calibration services). This also returned a positive result for cocaine. The relevant period, to which the result applied was 21 June to 18 July 2018, which covers the date on which the Claimant took the Respondent's test.

21. On 26 July 2018 the Claimant had a discussion with his GP, who told him that he had type II diabetes and that his kidney function was deteriorating. He asked the GP whether his newly-diagnosed medical conditions might have caused a false-positive.

22. On 28 July 2018, the Claimant's solicitor, Mr Panton, emailed Ms Yvette McEntee, the Respondent's solicitor, stating that the Claimant 'denies knowingly using this prohibited substance'. He also disclosed the fact of the Canford test and the positive result, as well as the recent diagnosis of type II diabetes and renal failure. Mr Panton wrote that the Claimant's GP had advised that these conditions were 'likely to have adversely affected the two drug tests... which resulted in a positive find for cocaine'. Mr Panton invited the Respondent to seek medical files held by the GP and asserted that it should be self-evident that the Claimant had 'no case to answer'.

23. In fact, on 27 July 2018, the Claimant's GP had written a 'To Whom It May Concern' letter in the following terms:

> 'The above named patient of mine undertook a blood test on 18.07.2018 which has shown a new diagnosis of type II diabetes; Mr Headley will now be referred to our diabetic expert programme.'

24. There was no mention in the letter of any potential link between the positive drugs tests diabetes.

<u>The disciplinary investigation interview</u>

25. On 30 July 2018, Ms Durand interviewed the Claimant. In cross-examination, she denied knowing at that point that the Claimant had issued tribunal proceedings. However, in her report of 3 August 2018, she referred in passing to the fact that the Claimant 'has a pending tribunal case.'

26. At the meeting the Claimant raised concerns about the way in which the drugs test had been administered. The Respondent looked into those concerns and was satisfied that there was no impropriety. This matter was not relied on by the Claimant in these proceedings as a ground of unfairness.

27. The Claimant told Ms Durand about the GP's opinion, but acknowledged that he did not have a letter from the GP confirming any link between his medical conditions and the drugs test result. He said that he was happy for the Respondent to contact his GP. The Claimant discussed his test results with his GP on 4, 6, 18 and 25 July 2018, yet the GP never confirmed in writing any connection between the diagnoses and the test results. The most the GP did was to provide the letter set out above and the blood test results confirming the diagnosis.

28. The Claimant also provided a copy of an article dated 3 February 2017, with the title: 'Can Disease or Illness Show a False Positive on Drug Tests?' The article suggested that a number of conditions, including kidney disease and diabetes, might give rise to a false positive for a number of drugs, including cocaine. The article went on:

> 'That's not because of medication; the false positive comes from the body chemistry stemming from these diseases and you may not even know you have it …Some people may find out they have a life-threatening illness, such as multiple sclerosis, may after getting [*sic*] a "false positive" urine drug test simply because there are similar chemicals in the body that test positive for cocaine, opiates and heroin.'

29. Other than the fact that it was downloaded from the internet, no further information was provided as to the origin of the article; there was no indication as to the status, or qualifications, of the (unnamed) person who wrote it.

Further enquiries made by the Respondent

30. On 30 July 2018, Ms Durand wrote to Mr David Amis (Head of Wellbeing), asking that HML address the questions the Claimant had raised about the testing process, and whether type II diabetes or renal problems could have led to false negative results for cocaine. She included copies of the medical documents the Claimant had provided (the results of the GP's blood test and the Cransford hair test) and asked that they be placed with his records.

31. On the same day Ms Durand sent an email to Ms Gibbs (Head of HR):

> 'Following an interview today with CM+ Headley, he stated that he had a recent blood test at his GP showed type II diabetes and also renal problems. He had discussed this with his GP in terms of whether any of these conditions could show a false positive test and he stated that his GP had said yes. If possible could you clarify if this would be the case.'

32. On 2 August 2018, the Claimant's solicitor sent copies of two links to articles about false positive results to Ms McEntee, who replied that the Respondent's solicitors were not instructed in the Claimant's case and that the Claimant was free to submit any evidence he wished to rely on to Ms Durand.

33. On 3 August 2018, Ms Paula Bailey forwarded Ms Durand's questions, both about the testing process (about which the Claimant had raised concerns) and the possibility of false negatives to Dr ElNagieb of HML, along with the medical records the Claimant had provided.

34. On the same day, Ms Gibbs wrote separately to Mr Aaron Brown of Alere, forwarding on the query which Ms Durand had sent to her on 30 July 2018 (para 30), which expressly referred to type II diabetes and renal problems, and asking him to pass it onto the laboratory for a response.

35. Later the same day Ms Bindi Dodhia, Alere's Authorising Scientist, replied to the query which Mr Browne had evidently forwarded to her, copying in Ms Gibbs. She wrote:

> 'Our urine confirmation testing for cocaine would not give any false positive results. We look for a specific metabolite of cocaine called benzoylecgonine which we would only find if someone had ingested cocaine.
>
> If you have the barcode number of the sample handy I can look into it and possibly give you further information.'

36. The barcode was duly provided to Ms Dodhia

37. On 3 August 2018 Ms Durand forwarded her 'subjective report' to Ms Gibbs of HR. She did not wait for a response from HML before doing so. She considered that, even with the outstanding queries, the case needed to be heard at a Stage 3 disciplinary hearing. In our judgement, that was a reasonable conclusion: even if evidence had emerged to support the Claimant's defence, it would still need to be assessed by a decision-maker. In any event, no such evidence emerged.

38. On 8 August 2018 Ms Dodhia wrote to Ms Gibbs and Mr Browne:

> 'Sample 65492687 was found to contain Benzoylecgonine at a level of 470 ng/ml. Benzoylecgonine (desmethylcocaine) is the main urinary metabolite of cocaine. The cut-off applied for confirmation is 150 ng/ml. Benzoylecgonine is usually detectable in urine for 2-3 days following cocaine use. There are no medications or medical conditions that would account for the presence of Benzoylecgonine, including the omeprazole medication declared.'

39. When Ms Dodhia answered these questions, she knew what medical conditions the Claimant was relying on, because they were referred to earlier in the thread. In any event, she was clear that there were no medical conditions which would account for the presence of Benzoylecgonine.

40. On 9 August 2018 Ms Durand informed the Claimant that she had completed her investigation, and that he was required to attend a disciplinary hearing on 13 September 2018. She invited the Claimant to provide any documents, witness statements and written submissions by five days before the hearing.

41. The disciplinary charges were as follows:

> 'The purpose of this hearing is to discuss your alleged breach of conduct in that:
>
> 1. You tested positive for cocaine at your routine periodic medical on 4 July 2018 and that laboratory analysis has confirmed the presence of cocaine metabolite.
>
> 2. Therefore, you reported for duty on 4 July 2018 with traces of an illegal drug in your body-system contrary to the Authority's Alcohol and Drugs Policy (Policy No. 550).'

42. It was clear that the standards relied on by the Respondent were those set out in the alcohol and drugs policy. Essentially, the Respondent's case was that, by attending work with cocaine in his system, he was, by definition, unfit for work.

43. On 14 August 2018, Ms Marie Gerard, Senior Occupational Health Adviser, responded to Ms Bailey's email of 3 August 2018. She dealt with the issues the Claimant had raised about the testing process, but not the issues about the possibility of a false positive, which she appears to have overlooked. By this point, however, Ms Durand had already received Ms Dodhia's opinion.

44. On 24 August 2018, Advanced Nurse Practitioner Bailey of the Claimant's GP practice (the GP's daughter) wrote a letter for the Claimant to forward to the Respondent:

> 'Thank you for your recent letter in regard to the above-named patient I note that I missed out question 4. I apologise for this and in answer to question 4 I can confirm that at the time of the positive drug test Marcus had also been diagnosed type 2 diabetes and this may have influenced the positive drug test. However, to investigate this possibility further I would recommend seeking expert opinion perhaps through a toxicologist.'

45. The Claimant did not submit this letter to the Respondent until the disciplinary hearing.

Requests for postponement of the disciplinary hearing

46. On 29 August 2018, the Claimant submitted a fit note, confirming that he was unfit for work because of anxiety and depression. He was signed off until 30 September 2018.

47. Meanwhile he had been corresponding with an individual online, Mr Greg Moon, whose email address describes him as the 'flying doctor'. Mr Moon emailed the Claimant on 3 September 2018, the last paragraph of which read:

> 'I would also contact Canford to see if the medication and the diabetes could have an affect [*sic*] on the results.'

48. The Claimant told the Tribunal that he did not contact Canford because 'my mental state was all over the place'. The Tribunal asked the Claimant at the end of cross-examination whether he took any steps, at any stage, to get any medical/expert evidence which might have helped him to prove a link between his medical conditions and the drugs test results, either before the disciplinary hearing or before the appeal (by which time the Claimant was ostensibly well enough to attend the hearing). The Claimant said that he had not and that, although he and his solicitor discussed doing so, 'that was as far as it went'. No medical evidence was led before the Tribunal in support of the existence of a link.

49. On 6 September 2018, the Claimant emailed Ms Durand and asked for a postponement of the hearing until such time as he was well enough to attend. Ms Durand replied that she would forward the Claimant's email to the presiding officer (DAC Philpott).

50. On the same day, the Respondent referred the Claimant to OH, asking whether he was fit to attend the hearing or, if not whether he was well enough to instruct an FBU representative to attend on his behalf.

51. On 9 September 2018, the Claimant asked for confirmation that the disciplinary hearing would be postponed.

52. On 10 September 2018, Ms Durand informed the Claimant that she had contacted the presiding manager, DAC Philpott, and that the hearing would be postponed. The Claimant would be informed of a new date in due course.

53. On 12 September 2018, Dr El-Nagieb of OH advised that the disciplinary hearing be postponed for six to eight weeks. He wrote:

> 'Unfortunately he is quite unwell with a combination of significant physical and mental health problems. He has just been commenced on antidepressant medications and referred for psychological counselling. His symptoms are quite significant with anxiety, panic attacks, sleep disturbance and low mood. These are having serious impact on all aspects of his life. It is not only his suspension and the coming investigations, but his wife has been quite unwell with MS and has just been put on a clinical trial. He has also been diagnosed with diabetes two weeks ago and commenced on medications. He was told his kidney functions have significantly deteriorated. His blood pressure has also been very high and he has been put on medications for this as well. Marcus is due to undergo extensive investigations for these physical conditions and his mental state needs to stabilise. He is currently not fit for work. He is not fit to attend any meetings or engage in any discussions at the time. He is not likely to be physically or psychologically well to instruct a representative. I advise any investigations should be put back for 6-8 weeks until his condition is brought under better control.'

54. Ms Durand wrote to the Claimant on 12 September 2018, acknowledging that the Claimant had asked that the hearing be postponed 'until such time as you are well enough to attend. Your request was considered by DAC Philpott and your request was agreed'. The hearing was rescheduled for 26 October 2018, which was six weeks after the date on which OH provided its advice.

55. In the last paragraph of the letter, Ms Durand wrote:

> 'Please note, as we normally permit an employee to reschedule the hearing on one occasion, if you are unable to attend the rescheduled hearing, it is likely that the hearing will proceed in your absence. You can submit written representations or liaise with your trade union representative or a work colleague to attend in your absence, if necessary.'

56. When Ms Durand wrote this letter, she could not know whether the Claimant would be fit enough to attend on that date. On 14 October 2018, Mr Panton asked why the hearing had been rescheduled to 26 October 2018 and why the invitation referred to the hearing proceeding in the Claimant's absence if the Claimant did not attend.

57. On 24 October 2018, the Claimant was reviewed by Dr El-Nagieb of OH, who wrote:

> 'I am glad to see that he has now engaged with counselling and well-being services and is having regular therapeutic input. He remains under regular review by his GP to monitor his health with regards to his diabetes and blood pressure. He is having monthly blood tests to monitor his kidney function. Marcus remains unfit for work. He requires further stability in his mental health in particular to allow return to work, which I trust with his current medications and therapy can occur in 6-8 weeks period. I have today discussed with him the importance of resolving the work issues with his employer as this is likely to remain a major source of stress for him. I will review Marcus in four weeks.'

58. On 25 October 2018, Mr David Amis (Head of Well-Being) sought clarification from OH as to when the Claimant would be fit to meet with the Respondent. OH replied:

> 'I have discussed with Mr Headley the importance of attending meetings to resolve the work issues. He felt he is not yet fit to do so. I have explained to him and in the medical outcome report that the work issues are going to be a constant source of stress for Mr Headley until resolve[d]. He is however on medications and undergoing counselling and attending such meetings can set his recovery back. I cannot advise when this is likely to change and give you clear timescales as to when he can recover to a degree that allows him to participate in these meetings without effects on his recovery. On the other hand he should be fit to instruct an individual to represent.'

59. There is no other way of reading this other than that the Claimant was not fit to attend meetings, but was fit to instruct his representative to attend on his part.

60. On the same day the Claimant asked Ms Durand to confirm that the meeting would not go ahead on 26 October 2018. Later that day, Ms Durand replied that it was not possible to postpone the hearing indefinitely, and that the meeting would go ahead. She told the Claimant that he could submit written representations or liaise with the trade union representative or work colleague to attend in his absence.

61. Later the same day, the Claimant informed Ms Durand that his colleague/representative, Mr Matthew Hearne, had told him that he could not attend a meeting on 26 October 2018. He asked for the meeting to be rescheduled to 4 p.m. on 1 November 2018. Ms Durand replied that the disciplinary officer would not be available until 7 November 2018 and, if the Claimant was unable to attend on 7 November 2018, the hearing would proceed without him. She advised the Claimant to make other arrangements if Mr Hearne was not available.

<u>The grievance</u>

62. On 29 October 2018, the Claimant raised a grievance about the decision to hold a disciplinary hearing in his absence while he was signed off work and was unfit to attend the meeting. In fact, it was DAC Philpott's decision not to adjourn the meeting.

63. On 30 October 2018, Ms Durand informed the Claimant that the issue of whether it was appropriate for the disciplinary hearing to go ahead would be considered on 7 November 2018. The Claimant and his representative should be prepared to deal with the disciplinary hearing in the event that the presiding manager (DAC Philpott) decided that it was. DAC Philpott's evidence as to why it was appropriate for her to deal with a grievance about that decision was that: 'I'm just governed by our policies and I think I am capable of reviewing something at the level of a grievance in a fair and open process to determine the outcome.'

The disciplinary hearing

64. On 7 November 2018, the Claimant attended the disciplinary hearing, chaired by DAC Philpott. He attended alone because the only person he trusted, Mr Hearne, was on leave. He said that he was attending 'under duress'. That was implicit in the fact that he had raised a grievance about the requirement to attend.

65. DAC Philpott began by dealing with the Claimant's grievance. The Claimant initially said that he did not want the grievance to be dealt with on that day. However, DAC Philpott went on to hear it and rejected it. Part of her reason for doing so was as follows:

> 'I believe a reasonable adjustment has been applied by delaying this hearing. Today you say you don't know when you'll be well enough, but you were also able to instruct a representative. The HML Dr is unable to provide a timescale for your recovery and believes resolving work issues will be beneficial to your health and therefore [t]his can't be a never-ending cycle.'

66. She went on to conduct the disciplinary hearing. There was an exchange about the alleged link between the test results and the Claimant's medical conditions. DAC Philpott observed that the Claimant had provided no further evidence to establish the link.

67. At the meeting the Claimant said he had no idea how cocaine had entered his system, and queried whether someone might have put it in a drink. He did not identify an occasion when this could have happened.

68. DAC Philpott gave her decision on the day, which was that the Claimant was summarily dismissed.

The dismissal letter

69. The dismissal letter was sent to the Claimant on 14 November 2018. It dealt firstly with the decision about the grievance: the advice from OH was that the Claimant was not currently fit to attend the stage 3 hearing, and there was no indication as to when he would be fit to do so; the Claimant been advised that he could submit written representations, or arrange for a representative to attend in his absence; the hearing had been rescheduled from 12 September 2018 to 26 October 2018 at the Claimant's request and rescheduled again from 1 November 2018 to 7 November 2018, because his representative was not available. She concluded: 'given the serious nature of the disciplinary

allegations, I did not consider it appropriate to postpone the stage 3 hearing indefinitely'.

70. As for the decision to dismiss, DAC Philpott wrote that, on the balance of probabilities, she believed that the Claimant had reported for duty on 4 July 2018 with traces of cocaine in his body, contrary to the alcohol and drugs policy. She concluded that his actions amounted to gross misconduct, and that summary dismissal was the appropriate sanction. His last day of service with the Respondent would be 7 November 2018. She informed him of his right to appeal.

The appeal against dismissal

71. On 19 November 2018, Mr Panton informed Ms Durand that the Claimant wished to appeal against his dismissal on the ground that the sanction was unreasonable and was influenced by his previous complaints of discrimination. Mr Panton asked for copies of the hearing notes, which were provided.

72. Ms Durand's involvement in the appeal process ended at this point. The subsequent arrangements for the appeal hearing were dealt with by other members of the HR team.

73. On 7 December 2018, Assistant Commissioner (AC) Richard Mills invited the Claimant to an appeal hearing on 24 January 2019. The Respondent's policy provided that the appeal had to be conducted by a manager senior to the dismissing officer, so someone at least of AC Mills' rank.

74. On 14 January 2019, the Claimant informed AC Mills that he would be accompanied at the hearing by Mr Hearne. On 22 January 2019, Ms Imogen Wilkes (Employee Relations Assistant) informed the Claimant that the appeal hearing would be postponed because of the ill-health of DAC Philpott.

75. The Claimant started a new job as a bus driver on 28 January 2019. The first few weeks consisted of training.

76. On 1 February 2019, Ms Wilkes informed the Claimant that his appeal hearing had been rescheduled to 1 March 2019, some sixteen weeks after the dismissal. She explained that this was the earliest time the relevant people would be available.

77. On 26 February 2019, the Claimant wrote saying that he would not attend the appeal hearing because of the unreasonable delay. By then he had lost confidence in the process. He asked HR to process him as a leaver, which they did.

Findings of fact relevant to contribution, wrongful dismissal and *Polkey* in Case 3

78. The unanimous findings of fact set out below are the Tribunal's own, reached on the balance probabilities, relevant to the issues of whether the Claimant contributed to his dismissal by his own blameworthy conduct (contribution), whether he committed a repudiatory breach of contract, such that the Respondent was entitled to dismiss him without notice (wrongful dismissal) and whether, if the dismissal was tainted by unfairness, there was a chance that the

Respondent would have fairly dismissed him in any event (*Polkey*). There is considerable overlap between the factual issues relating to these three questions.

79. While it is highly regrettable that the Claimant's distinguished career in the fire service ended in these circumstances, we must base our findings on the evidence before us, not on speculation. The principal evidence before us consisted of the two positive drug tests for cocaine, one of which the Claimant had commissioned himself, independently of the Respondent. They disclosed levels of cocaine substantially over the respective threshold levels.

80. The Claimant's defence to the charge was that the tests were false positives which had been caused by recently diagnosed medical conditions. The evidence led by him to support that the was scant. First there was the suggestion by his GP's advanced nurse practitioner that there *might* be a link, and that enquiries should be made of a toxicologist. Then there was the evidence sourced from the internet, including the observations of the 'flying doctor', who also suggested consulting a toxicologist; however, there was nothing to show the qualification of the authors of those documents to give authoritative opinions on these matters.

81. The Claimant was ably represented throughout the internal procedure and these proceedings. At no stage did he or his solicitor seek to secure and provide relevant, authoritative medical evidence which could have made good his case that this was a false positive results caused by diabetes. Instead, he put the onus on to the Respondent to make those enquiries. It is striking that both the advanced nurse practitioner and the 'flying doctor' suggested that the enquiries be made of a toxicologist. That is precisely what the Respondent did; the answer they received did not support the Claimant's defence.

82. We were satisfied that we could give little weight to the evidence relied on by the Claimant. By far the most probative evidence before us was the evidence of the two positive tests themselves, read together with the confirmatory evidence of Ms Dodhia, a reputable toxicologist, that they could not be accounted for by reference to any medical conditions. There was no medical evidence before us to suggest that the presence of the metabolites in the Claimant's system, both in his hair and in his urine, was (or even could be) the result of anything other than the ingestion of cocaine.

83. Insofar as the Claimant has suggested that he might have unknowingly ingested cocaine, he has never given details of when or how this might have happened, let alone in the amounts necessary to give the readings from both sets of test results. It was also submitted on the Claimant's behalf that it was inherently unlikely that he would take cocaine when he knew he was facing a drugs test soon afterwards; and that his voluntary disclosure of the Canford test showed openness and transparency. Those submissions gave us pause for thought; we accept that a person facing a drugs test would be foolish to take drugs in the period leading up to it; and a person who knew he had taken cocaine might be unlikely to submit to a further test, and then disclose the positive result. We weighed that (purely circumstantial) evidence in the balance, but concluded that it could not outweigh the objective evidence of two positive tests. On the balance of probabilities, we have concluded that the tests were positive because the

Claimant had taken cocaine. We are satisfied that a firefighter/temporary watch manager attending work with those levels of cocaine in his system presented an unacceptable level of risk for the Respondent, given the Claimant's responsibility for his own safety, that of his colleagues and the public.

The law

The burden of proof

84. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

85. The effect of these provisions was conveniently summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

> **'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[1] He explained the two stages of the process required by the statute as follows:**
>
> **(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**
>
> > **"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.**
> >
> > **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**
>
> **(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**
>
> > **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**
>
> **He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'**

86. In *Royal Mail Group v Efobi* [2021] ICR 1263, the Supreme Court held that, at the first stage all the evidence had to be considered, from whatever source it had come, not just the evidence adduced by the Claimant. So far as possible,

[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

Tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense; that whether any positive significance should be attached to the fact that a person had not given evidence depended entirely on the context and particular circumstances. Where it was said that an adverse inference ought to have been drawn from a particular matter, the first step had to be to identify the precise inference which allegedly should have been drawn. Even if the inference is drawn, the question then arises as to whether it would, without more, have enabled the Tribunal properly to conclude that the burden of proof had shifted to the employer.

87. In *Hewage v Grampian Health Board* [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Victimisation

88. S.27 Equality Act 2010 ('EqA') provides as follows:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
>
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act—**
>
> **(a) bringing proceedings under this Act;**
> **(b) giving evidence or information in connection with proceedings under this Act;**
> **(c) doing any other thing for the purposes of or in connection with this Act;**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **…**

89. The test of causation in a victimisation complaint is whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test, it is a subjective test. The focus is on the 'reason why' the alleged discriminator acted as he did (*West Yorkshire Police v Khan* [2001] IRLR 830).

90. As with other forms of discrimination, it is sufficient if the protected act was a material influence on the treatment.

Unfair dismissal

91. S.94 Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

92. S.98 ERA provides so far as relevant:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it— ...**
>
> **(b) relates to the conduct of the employee ... ...**
>
> **(4) ... where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

93. In *Orr v Milton Keynes Council* [2011] ICR 704 at [78], Aikens LJ summarised the correct approach to the application of s.98 in misconduct cases:

> **'(1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss an employee.**
>
> **(2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the "real reason" for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.**
>
> **(3) Once the employer has established before an employment Tribunal that the "real reason" for dismissing the employee is one within what is now section 98(1)(b), ie that it was a "valid reason", the Tribunal has to decide whether the dismissal was fair or unfair. That requires, first and foremost, the application of the statutory test set out in section 98(4)(a).**
>
> **(4) In applying that subsection, the employment Tribunal must decide on the reasonableness of the employer's decision to dismiss for the 'real reason'. That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of; and, thirdly, did the employer have reasonable grounds for that belief."**
>
> **If the answer to each of those questions is 'yes', the employment Tribunal must then decide on the reasonableness of the response of the employer.**
>
> **(5) In doing the exercise set out at (4), the employment Tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.**

> **(6) The employment Tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted'.**
>
> **(7) A particular application of (5) and (6) is that an employment Tribunal may not substitute their own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances.**
>
> **(8) An employment Tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice.'**

94. At (4) above, Aikens LJ was summarising the well-known test in *British Homes Stores Ltd v Burchell* [1980] ICR 303 at p.304.

95. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at paras 16–17) cited paragraphs (4) to (8) from that extract in Aikens LJ's judgment in *Orr* and added:

> **'As that extract makes clear, the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see *J Sainsbury plc v Hitt* [2003] ICR 111.**

96. It is impermissible for a Tribunal to substitute its own findings of fact for those of the decision-maker (*London Ambulance Service NHS Trust v Small* [2009] IRLR 563 at [40-43]). Nor is it for the Tribunal to make its own assessment of the credibility of witnesses on the basis of evidence given before it (*Linfood Cash and Carry Ltd v Thomson* [1989] ICR 518). The relevant question is whether an employer acting reasonably and fairly in the circumstances could properly have accepted the facts and opinions which he did.

97. Even if the dismissal decision falls within the band of reasonable responses, it may still be unfair, if the Respondent has not followed a fair procedure. The Tribunal must evaluate the significance of the procedural failing, because 'it will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process' (*Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW at [26]).

98. When considering whether the employer acted reasonably, the Tribunal has to look at the question in the round and without regard to a lawyer's technicalities (*Taylor v OCS Group Limited* [2006] ICR 1602 at [48]). This need for a holistic approach has been reiterated in later cases, notably *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW and *NHS 24 v Pillar* UKEATS/005/16/JW.

99. In *Sainsbury v Hitt* [2003] IRLR 23 at paras 30-34, the Court of Appeal held that:

> **'The investigation carried out by Sainsbury's was not for the purposes of determining, as one would in a court of law, whether Mr Hitt was guilty or not guilty of the theft of the razor blades. The purpose of the investigation was to establish whether there were reasonable grounds for the belief that they had formed, from the circumstances in which the razor blades were found in his locker, that there had been misconduct on his part, to which a reasonable response was a decision**

> **to dismiss him. … In my judgment, Sainsbury's were reasonably entitled to conclude, on the basis of such an investigation, that Mr Hitt's explanation was improbable. The objective standard of the reasonable employer did not require them to carry out yet further investigations of the kind which the majority in the employment Tribunal in their view considered ought to have been carried out.**
>
> **In suggesting further investigations of the kind set out in paragraph 6 of the extended reasons, the majority of the employment Tribunal were, in my judgment, substituting their own standards of what was an adequate investigation for the standard that could be objectively expected of a reasonable employer. On the decision of this Court in Madden, that is not the correct approach to the question of the reasonableness of an investigation.'**

100. Circumstances will dictate how extensive an investigation is required. In *Shrestha v Genesis Housing Association Ltd* [2015] IRLR 399 at [23], the Court of Appeal held (*per* Richards LJ):

> **'To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole.'**

101. In determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effects upon the employee (*A v B* [2003] IRLR 405).

102. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the Tribunal's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses. The fact that other employers might reasonably have been more lenient is irrelevant (*British Leyland (UK) Ltd v Swift* [1981] IRLR 91).

103. The denial of a right of appeal is capable of rendering a dismissal unfair and equally a failure to apply the appeal process fairly and fully may have the same result. If dismissal would be likely to have occurred in any event, then that will affect compensation, but not the finding of unfairness itself (*Tarbuck v Sainsbury's Supermarkets Limited* [2006] IRLR 664 at [80].

Polkey

104. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness (the *Polkey* issue).

105. Guidance as to the enquiry the Tribunal must undertake was provided in *Whitehead v Robertson Partnership* UKEAT [2002] 7 WLUK 539 at [22].

> **'[…] it is, we think, incumbent upon the Employment Tribunal to demonstrate their analysis of the hypothetical question by explaining their conclusions on the following sub-questions:**

> **1. what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process. Was it conduct? Was it some other substantial reason, that is a loss of trust and confidence in the employee? Was it capability?**
>
> **2. depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the reason, would or might the Respondent have reasonable grounds for their belief in such misconduct even although the Employment Tribunal found as a fact that misconduct was not made out for the purposes of the contribution argument; alternatively, if for some other substantial reason, was that a sufficient reason for dismissal: similarly, capability.**
>
> **3. even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?'**

Contribution

106. S. 123(6) ERA provides, in relation to the compensatory award:

> **Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding**

107. In order for a deduction to be made, the conduct in question must be culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish or perverse or unreasonable in the circumstances (*Nelson v BBC (No.2)* [1980] ICR 110.

108. S.122(2) ERA provides, in relation to the basic award:

> **Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce that amount accordingly.**

109. The EAT in *Langston v Department for Business, Enterprise and Regulatory Reform*, EAT 0534/09 confirmed that the same criteria ('culpable or blameworthy') apply to deductions from the basic award.

110. In *Steen v ASP Packaging Ltd* [2014] ICR 56 the EAT held (at [10-18]) that it is for the Tribunal to:

110.1. identify the conduct which is said to give rise to possible contributory fault;

110.2. decide whether that conduct is culpable or blameworthy;

110.3. ask for the purposes of s.123(6) if that blameworthy conduct caused or contributed to the dismissal to any extent. If it did not do so to any extent there can be no reduction on the footing of s.123(6), no matter how blameworthy in other respects the tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent, then the tribunal moves to the next question;

110.4. to what extent the award should be reduced and to what extent it is just and equitable to reduce it;

110.5. a separate question arises in respect of s.122(2), where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so.

111. A reduction to nil should be an unusual finding. As Langstaff P. put it in *Lemonious v Church Commissioners*, EAT 0253/12:

> **'even if the conduct were wholly responsible for the dismissal, it might still not be just and equitable to reduce compensation to nil. Though there might be cases where conduct is so egregious that that is the case, it calls for a spelling out by the tribunal of its reasons for taking what is undoubtedly a rare course.'**

112. In *Allen v Queen Mary University of London*, EAT 0265/15, HHJ Richardson held at [26]:

> **'… a finding of 100 per cent contribution under section 123(6) is permissible only where the Claimant's conduct was wholly responsible for the dismissal. Even then, it does not follow that the finding must be 100 per cent (see *Steen* at paragraph 21). But if the Employment Tribunal concludes that the Claimant's conduct was not entirely responsible for the dismissal and that the Respondent shares responsibility for it, then a finding of 100 per cent contribution is not permissible. This question of causation is not to be addressed in a narrow or technical manner. The Employment Tribunal's task is to apply standards of justice and fairness in reaching its conclusion.'**

113. The Court of Appeal in *Rao v Civil Aviation Authority* [1994] ICR 495 (at 502F) held that the deduction from the basic award for contribution may not be the same as the deduction from the compensatory award for contribution, if there has already been a deduction by reason of the Tribunal's conclusion as to the likelihood of the employee remaining in employment (the *Polkey* issue).

114. The EAT in *Lenlyn UK Ltd v Kular* EAT 0108/16 at [81] confirmed that, where there is a significant overlap between the factors taken into account when making a *Polkey* deduction, and when making a deduction for contributory conduct:

> **'the ET should have considered expressly, and did not, whether, in the light of that overlap, it was just and equitable to make a finding of contributory fault, and if so, what its amount should be. That overlap means that there is a real risk, which, I consider again, the ET did not take into account, that the Claimant was being penalised twice for the same conduct. I allow the cross-appeal on this point and remit this case for the ET to consider again, after it has reconsidered the *Polkey* issue, what deduction, if any, for contributory fault is just and equitable, in the light of that overlap.'**

115. However, the principal of moderating a reduction for contribution in the light of a reduction already made for *Polkey* cannot apply to the basic award, which is not affected by the *Polkey* principle: *Granchester Construction (Eastern) Ltd v Attrill*, EAT 0327/12, *per* Langstaff P at [19].

Wrongful dismissal

116. A complaint of wrongful dismissal is a common law action based on breach of contract and is quite different from a statutory complaint of unfair dismissal. The EAT considered the distinction in *Enable Care and Home Support Ltd v Pearson* EAT 0366/09, where both were claimed. In a wrongful dismissal claim the Tribunal was concerned not with the reasonableness of the employer's decision to dismiss but with the factual question: was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment, entitling the employer to summarily terminate the contract?

117. In *Neary v Westminster* [1999] IRLR 288 at [33], Lord Jauncey reviewed the authorities on the question of when summary dismissal is justified:

> **'What degree of misconduct justifies summary dismissal? I have already referred to the statement by Lord James of Hereford in *Clouston & Co Ltd v Corry*. That case was applied in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698, where Lord Evershed MR, at p.700, said: 'It follows that the question must be – if summary dismissal is claimed to be justified – whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.' In *Sinclair v Neighbour*, Sellers LJ, at p.287F, said: 'The whole question is whether that conduct was of such a type that it was inconsistent, in a grave way – incompatible – with the employment in which he had been engaged as a manager.' Sachs LJ referred to the 'well established law that a servant can be instantly dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his master but is also inconsistent with the continuance of confidence between them'. In *Lewis v Motorworld Garages Ltd* [1985]** IRLR **465, Glidewell LJ, at 469, 38, stated the question as whether the conduct of the employer 'constituted a breach of the implied obligation of trust and confidence of sufficient gravity to justify the employee in leaving his employment ... and claiming that he had been dismissed.' This test could equally be applied to a breach by an employee. There are no doubt many other cases which could be cited on the matter, but the above four cases demonstrate clearly that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.'**

118. In determining these issues Tribunal may make findings of fact by evaluating the hearsay evidence of the statements gathered in the internal investigation (*Hovis Ltd v Louton*, EA/2020/000973/LA). In that case, the Judge erred by proceeding on the that, in the absence of direct evidence in person from at least one of the witnesses, she could not make a find that the misconduct had occurred.

Injury to feelings

119. The matters compensated for by an injury to feelings award include subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (*Vento v Chief Constable of West Yorkshire Police (No2)* [2003] IRLR 102).

120. In *Vento* the Court of Appeal gave the following guidance as to the level of awards for injury to feelings:

> **'Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.**
>
> **i. The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. … Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.**
>
> **ii. The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.**
>
> **iii. Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.**
>
> **There is, of course, within each band considerable flexibility, allowing Tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.'**

121. The injury to feelings award relates to Case No. 3200756/2018, which was presented on 9 April 2018. For claims presented between 6 April 2018 and 5 April 2019, the *Vento* bands are as follows:

    121.1. lower band: £900 – £8,600;

    121.2. middle band: £8,600 - £25,700;

    121.3. ipper band: £25,700-£42,900.

122. Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award. Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation: society has condemned discrimination, and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches (*Prison Service v Johnson* [1997] IRLR 162, EAT at [27]).

123. The focus of the Tribunal's assessment must be on the impact of the discrimination on the individual concerned; unlawful discrimination affects different individuals differently (*Essa v Lang* [2004] IRLR 313).

<u>Interest</u>

124. The Tribunal must consider whether to award interest on the sums awarded in a discrimination claim without the need for any application by a party, but an award of interest is not mandatory: reg 2, Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ('ET(IADC) Regs').[2]

125. Interest is calculated as simple interest accruing from day to day (reg 3(1)). For claims presented on or after 29 July 2013 the relevant interest rate is that specified in s.17 of the Judgments Act 1838: see The Employment Tribunals

[2] SI 1006/2803

(Interest on Awards in Discrimination Cases) (Amendment) Regulations 1996.[3] The interest rate now to be applied is 8%.

126. As for the period of calculation, for awards of injury to feelings interest is awarded from the date of the act of discrimination complained of until the date on which the Tribunal calculates the compensation (reg 6(1)(a) ET(IADC) Regs).

Conclusions: Case 3

Victimisation: protected act

127. The Respondent accepts that the Claimant's grievance of 24 April 2017 was a protected act.

Issue 6A: 'Ms Durand and DAC Philpott refused to postpone C's disciplinary hearing on 7 November 2019 (R will say the hearing had already been postponed on more than one occasion)'

128. We have already found that the decision not to postpone the disciplinary hearing on 7 November 2019 was DAC Philpott's decision alone (para 62). Insofar as the allegation is made against Ms Durand, it fails on its facts.

129. Turning to DAC Philpott, the Tribunal considers that we are in a position to make a positive finding as to the reason why she refused to postpone the hearing. We accept Ms King's submission that her sole reason for doing so was because she thought it important to deal with a very serious case of misconduct without further delay.

130. We cross-checked our conclusions by reference to the burden of proof provisions. The only matter relied on by Mr Panton to raise a *prima facie* case of victimisation against DAC Philpott was that she was of the same rank as Mr Perez, who had had some involvement in the procedures arising out of the Claimant's altercation with SM Cook. We agree with Ms King that does not begin to amount to facts from which we could conclude that DAC Philpott did an act of unlawful victimisation. We also had regard to our conclusions (set out below) as to the unreasonableness of the decision not to postpone the hearing. However, it is trite law that unreasonable treatment does not, in itself, suffice to justify an inference of unlawful discrimination to satisfy stage one of the burden of proof provisions. The Tribunal declines to draw an inference from those circumstances that the protected act materially influenced DAC Philpott.

131. We have concluded that the Claimant has not discharged the burden on him to prove facts from which the Tribunal could reasonably conclude that DAC Philpott's decision not to postpone the disciplinary hearing was an act of victimisation. Consequently, the burden of proof would not have passed to the Respondent.

Issue 6B: 'DAC Philpott's decision to dismiss C (R will say C was dismissed because he was found to have failed a drugs test and attended work with traces of cocaine in his system)'

[3] SI 1996/2803

132. The Tribunal has concluded that the sole reason for DAC Philpott's decision to dismiss the Claimant was because she believed, on the evidence available to her, that he had attended work with cocaine in his system, and she regarded that as gross misconduct. For the reasons already given, we are not satisfied that the Claimant had proved facts from which we could reasonably conclude that his protected act played any part in DAC Philpott's decision to dismiss.

Issue 6C: 'Ms Durand failed to ensure that C's appeal against dismissal took place within a reasonable timeframe (R will say that the appeal was rescheduled due to the ill-health of the disciplinary officer)'

133. Mr Panton confirmed that the allegation of victimisation in relation to the timing of the appeal was only pursued against Ms Durand. We have already found (para 72) that Ms Durand had no responsibility for the delay in arranging the appeal hearing. This claim fails on its facts. In any event, the only matter relied on by Mr Panton in support of a submission that the burden should shift, was the minor inconsistency in Ms Durand's evidence about her knowledge of the protected act (para 25). We would not have considered this as sufficient, by itself, to raise a *prima facie* case of victimisation.

Conclusions: unfair dismissal

134. Dealing first with the reason for the dismissal, we have already rejected the Claimant's submission that victimisation formed part of the reason for dismissal. We are satisfied that the sole reason was the Claimant's conduct.

135. Turning to the investigation, in cross-examination the Claimant accepted that being under the influence of drugs posed a risk to him, to colleagues and the public, he said that he was anti-drugs because he had seen the way in which they impaired people. He had been to road traffic accidents and seen devastating results. In his witness statement (paragraph 159) he acknowledged that 'the Respondent was not wrong to instigate disciplinary procedures, given that I had tested positive for a banned substance.'

136. We reminded ourselves that the relevant circumstances included the fact that a dismissal for gross misconduct in these circumstances would have a serious reputational impact on the Claimant. However, the Respondent had the results of two independent tests, which were consistent with each other. When the Claimant suggested a possible link between the results and his diabetes, which may have raised a defence, Ms Durand promptly sought advice, which was provided by a toxicologist, Ms Dodhia, the authorising scientist at Alere. Ms Dodhia unambiguously rejected the possibility of a connection between the results and any medical condition.

137. Mr Panton argued that the Respondent ought to have further involved the MRO and/or followed through with its attempt to secure a further medical opinion from OH. We reminded ourselves of the warning in *Hitt* against substituting our own standards of what was an adequate investigation for the standard that could be objectively expected of a reasonable employer. We are satisfied that the Respondent acted reasonably in not seeking further medical advice: consulting a specialist toxicologist about the point the Claimant raised was the very course proposed by his GP's own nurse practitioner (para 44); the fact that Ms Dodhia

did not have access to the Claimant's full medical records is immaterial, since she ruled out a possible connection between the results and any medical condition; the Respondent was entitled to conclude that she, as a specialist, was better placed to advise on this issue than an MRO or an OH practitioner.

138. Ms Dodhia's opinion was provided to the Claimant. He could have challenged it by obtaining his own evidence, including but not limited to a letter from his GP, establishing that there was likely to be a link, but he did not do so. Nor did he revert to Canford to seek an opinion from them. Instead he effectively put the onus on the Respondent to make good his defence for him. Mr Panton criticised the Respondent for not approaching the Claimant's GP directly. Although another employer might have taken that step, we do not think the Respondent acted unreasonably in not doing so, given the unequivocal advice it had received from Ms Dodhia.

139. We are satisfied that the Respondent's investigation of the Claimant's defence fell within the band of reasonable responses. Indeed we are satisfied that the Respondent's investigation overall was reasonable.

140. We have no doubt that DAC Philpott believed in the guilt of the Claimant at the material time. She concluded that he had taken cocaine, and had illegal drugs in his system when he attended work on 4 July 2018. This was a clear breach of the alcohol and drugs policy, a critical safety issue and, in her view, gross misconduct. Mr Panton sought to persuade us that there was a qualitative difference between attending with illegal drugs in the system, and attending work obviously impaired by those drugs, we find that the reference in the Respondent's policy to zero tolerance meant what it said. The Respondent was entitled to conclude that a finding of illegal drugs in the employee's system was a finding that he was unfit for duty.

141. We are also satisfied that DAC Philpott had reasonable grounds for her belief in the Claimant's guilt: he failed two drugs tests, one of which he commissioned himself; he provided no reliable evidence in support of his defence. We are also satisfied that that the sanction of dismissal was reasonably open to her, given the terms of the Respondent's policies.

142. However, notwithstanding our conclusions as to the substantive fairness of the dismissal, we consider that there were significant flaws in the Respondent's disciplinary procedure.

143. First we considered the fairness of the decision to proceed with the disciplinary hearing, in circumstances where the Respondent's own OH adviser was clear that the Claimant continued to suffer from serious ill-health. Ms King submitted that the Claimant was 'unwilling' to give a date by which he would be well enough to attend the hearing. That is not an accurate statement of the position: the Respondent's own OH adviser was unable to give a date.

144. In her letter of 12 September 2018, Ms Durand told the Claimant that his request for a postponement had been considered by Ms Phillpott and agreed. In evidence both Ms Durand and Ms Philpott confirmed that this meant that the rescheduled hearing would only take place when the Claimant was well enough to attend. We accept Mr Panton's submission that rescheduling the meeting for

26 October 2018 (six weeks later), when OH advice was that the Claimant was unlikely to be fit for between six to eight weeks, was not consistent with that undertaking: Ms Durand simply could not know whether the Claimant would be fit by that date.

145. The Respondent relied on the fact that the hearing had already been postponed twice, and OH considered that the Claimant was well enough to instruct a representative to attend on his behalf. The Respondent's policy (para 10) provides that the hearing might go ahead in the employee's absence 'if they fail to attend without good reason.' The Claimant did have good reason. Although the policy also provides that a representative 'may attend on their behalf', the language is permissive, rather than mandatory. It is difficult to see how a representative could have represented the Claimant effectively in these circumstances. The positive drugs tests were a matter of record. Absent any medical evidence of his own, the Claimant could only defend himself by his own testimony. A representative could not give evidence on his behalf; he could only make submissions.

146. There was further unfairness in proceeding with the disciplinary hearing, when the Claimant had raised a grievance, challenging the decision not to adjourn the hearing. That was a decision of DAC Philpott. Her decision to hear that grievance herself at the beginning of the disciplinary hearing gave rise to two obvious, and serious, anomalies: to pursue his grievance, the Claimant had to attend the very meeting which OH had advised he was unfit to attend (which was the basis of the grievance); and, in determining the grievance, DAC Philpott determined the fairness of her own decision. There was an obvious conflict, which is alluded to in the Respondent's policy at para 67 (para 10 above); no reasonable employer would have concluded that the right person to make that decision was DAC Philpott. We find an echo here of the Respondent's earlier failure to recognise that SM McCallum should not sit in judgement on a challenge to one of his own decisions (see our judgment on liability at paras 174-183).

147. The Respondent might have cured the unfairness by holding a timely appeal when the Claimant was well, which he must have been by January 2019 (by then he had started new employment). We accept that the Respondent acted reasonably in scheduling the appeal on 24 January 2019, to enable it to be heard by a senior officer. However, we have concluded that the Respondent acted unreasonably in postponing it from 24 January to 1 March 201. It was not necessary to do so: the Respondent's own policy (para 10) provided that an appeal could be dealt with by way of a rehearing, which would not have required the involvement of DAC Philpott. The delay to accommodate her health difficulties was all the more unreasonable against the background of the Respondent's insistence at the dismissal stage that any further delay to the process was unacceptable.

148. For these reasons, viewed separately and cumulatively, we have concluded that the process followed by the Respondent fell outside the band of reasonable responses, and the dismissal was procedurally unfair.

Polkey

149. We went on to consider what would have happened, had a fair procedure been followed. Given that the Claimant was well enough to begin new employment in January 2019 (and must have been for some weeks before, in order to apply for and secure that employment) we find, on the balance of probabilities, that an adjourned disciplinary hearing would have occurred no later than 9 January 2019.

150. It was crucial to the Claimant's defence that he establish a link between the positive drug test results and his newly-discovered medical conditions. Mr Panton's submission was that the Claimant would have provided authoritative evidence of that link. We disagree. The Claimant still had not obtained that evidence by the time the appeal hearing was postponed. Nor had he obtained it in time for the Tribunal hearing, when it would have been relevant to his wrongful dismissal claim. Indeed, there was no basis on which the Tribunal could reasonably conclude that such evidence exists, let alone that the Claimant would have obtained it by the date of an adjourned disciplinary hearing, or a timely appeal hearing.

151. We are certain that the position would have remained the same, had the disciplinary hearing been postponed, and a timely appeal convened: the Claimant would not have made good his defence, and the Respondent would have reached the same conclusion. There was a 100% chance that it would have dismissed for gross misconduct on 9 January 2019, and upheld the decision on appeal; that dismissal would have been a fair dismissal for conduct reasons.

152. Consequently, any compensation for financial loss must be confined to the period of eight weeks between the original dismissal and 9 January 2019, when we have a concluded a fair dismissal would have occurred.

Contribution

153. The conduct which gives rise to the potential for contributory fault is the Claimant's attendance at work with high levels of cocaine in his system. It follows from our findings of fact above (paras 78-83) that we are satisfied that this amounted to blameworthy conduct. Nor can there be any doubt that the conduct led directly to his dismissal.

154. We went on to consider the extent to which it would be just and equitable to reduce the compensatory award for contribution, having already reduced it under the *Polkey* principle. We had regard to the guidance in *Rao* and *Kular* and concluded that the conduct which has led us to our *Polkey* conclusion was the same conduct we are considering through the lens of contribution. We take into account that, if we were further to reduce the (already reduced) compensatory award, the Claimant would be penalised twice for the same conduct. For these reasons we have concluded that it is not just and equitable to reduce the compensatory award to any extent.

155. The position is different when it comes to the basic award: the *Rao* and *Kular* principle does not apply, because *Polkey* does not apply to the basic award. We have concluded that the Claimant's conduct was wholly responsible for the dismissal. Notwithstanding this, we reminded ourselves that a 100% reduction

is an exceptional finding, and concluded that a 75% reduction would be proportionate and would fairly reflect the Respondent's procedural failures.

Conclusions: wrongful dismissal

156. In the light of our findings and conclusions above, in particular our finding that the Claimant attended work with cocaine in his system, we are satisfied that his conduct amounted to a repudiatory breach of contract: viewed objectively, it was likely to destroy, or seriously to damage, the relationship of trust and confidence between employer and employee, and the Respondent was entitled to dismiss him without notice. The wrongful dismissal claim must fail.

Remedy in Case 2: injury to feelings

157. The Tribunal found, in its earlier judgment on liability, that two acts of unlawful victimisation occurred:

157.1. the failure by Mr McCallum to recuse himself from hearing the Claimant's grievance against his decision to issue a performance management plan (which occurred on 24 January 2018);

157.2. the refusal of James Sivell to release information relating to the Claimant following his subject access request in February 2018 (which occurred on 27 March 2018).

Findings of fact

158. The Claimant set out his evidence about the injury to his feelings in a supplementary statement. The Tribunal did not accept everything contained in that statement: it seemed to us that some of the matters he described did not arise directly from the specific acts of victimisation we had upheld, but related to his general dissatisfaction with the matters which had arisen in the first two cases. We focused on those parts of his evidence which we thought flowed specifically from the unlawful acts.

159. We find that Mr McCallum's refusal to recuse himself had a significant impact on the Claimant. It undermined his confidence in the organisation, and made him feel that he could no longer rely on it to act fairly and impartially when dealing with his concerns. He felt that he was being stonewalled, and that his legitimate concerns about the fairness of the process were being brushed aside.

160. As for the refusal to release information to him which he rightly believed he was entitled to, we find that this deepened his sense of mistrust. He felt misled and let down by the organisation, and that he was being deliberately left in the dark. It caused him to be suspicious as to whether his employer was trying to hide something from him. It also caused him to feel insecure around his colleagues. Had he seen the statements they had made about him, he might have been reassured that almost none of them expressed strong criticism of him, indeed most of them had little to say about the altercation in question. Because he could not see them, he could only speculate as to what they had said about him, and we accept his evidence that he feared the worst: that he had gone down in their estimation; that they might no longer trust him; indeed that he might be regarded as someone to avoid. For an experienced professional, who had always been

well liked by his colleagues, that must have been a deeply unnerving experience.

161. The Claimant was already in a state of considerable anxiety before these two acts occurred; we have no doubt that they further deepened that anxiety, which led to a lowering of his mood. He knew this was obvious to his family; that knowledge in turn caused him further distress.

162. As is often the case, the parties were far apart in their estimation of the appropriate level of the award. Mr Panton argued that each act should attract a separate award of £8,400, i.e. two awards at the bottom of the middle *Vento* band. Ms King argued that both acts were relatively minor, one-off acts, and that the combined award should be no more than £4000.

163. We have concluded that the compensation for each act should be in the lower *Vento* band: they were one-off acts. On the other hand we did not consider either of them to have had minor consequences, and we concluded that each belonged in the in the mid- to upper-range of the lower band. Having regard to our findings above, we concluded that the failure to disclose the statements had the greater impact, in particular on his confidence in his colleagues' attitude to him. Had they occurred in isolation, we would have awarded £4,000 for the first act and £6,000 for the second. However, we concluded that that would give rise to some double counting, as there was overlap between the impact of the two acts on the Claimant (see in particular para 161). Standing back, and considering the justice of the overall award, we concluded that a global award of £8,600, at the top of the lower band, would be proportionate. For the purposes of the ACAS uplift, we identify £3,440 of that overall award as relating to the first act (to reflect our assessment of the relative impact of the two acts).

Interest

164. The Tribunal has decided to award interest in accordance with the usual principles. We have considered whether a serious injustice would be done to the Respondent by our calculation of interest including the period of delay caused by Covid-19 and/or because the Judgment Act rate of 8% no longer reflects financial reality. The Respondent did not submit that we should alter our approach from the normal calculation of interest in this case. We have concluded that the delay has been one of the uncertainties of litigation, for which the Claimant should not be penalised. For these reasons we award interest at the rate of 8% for the period set out in the Regulations.

165. To simplify the calculation of interest, we have taken the midpoint between the two acts, which is 21 February 2018.

166. Simple interest on £8,600 at a rate of 8% from 21 February 2018 to 18 November 2021 (a period of 1,367 days) is £2,580 (1367 ÷ 365 x 8% = 30% x £8,600).

ACAS uplift

167. Ms King accepted that, in the light of our findings on liability about the handling of the grievance, an ACAS uplift would be appropriate. Both she and Mr Panton

agreed that it could only apply to the injury to feelings arising out of the McCallum incident (£3,440).

168. Ms King argued that the uplift should be no more than 10%. She submitted that any uplift should be reduced to reflect the fact that the Claimant withdrew his grievance, instead of meeting and appealing to a more senior decision maker. We reject that submission: it is unrealistic to expect an employee to submit to a process which he (rightly, in our view) regarded as fundamentally unfair from the outset, in the hope that the unfairness might later be cured, especially in circumstances when everything pointed to the fact that the organisation as a whole was blind to the unfairness (see GM Jenkins' refusal to intervene at para 118 of our judgment on liability), an attitude which persisted up to the Tribunal hearing itself.

169. In all the circumstances, we considered that the procedural breach was so egregious (it effectively derailed the Claimant's grievance) that it merited an uplift of 25% (£860). We stood back and considered whether that gave rise to an excessive, or distorted, overall award and concluded that it did not.

Remedy calculation in Case 3

170. We consider that the parties ought to be able to agree the other sums (in Case 3) without the intervention of the Tribunal, and we urge them to cooperate in doing so. If agreement cannot be reached, we propose to deal with any disputes on paper.

171. The parties must write to the Tribunal within 28 days of the date on which this judgment is sent to them. They must either confirm the agreed sums, in which case the Tribunal will record them in a consent order, or set out an agreed timetable for written submissions.

Employment Judge Massarella
Date: 23 February 2022

Case No. 3200312/2019

UNFAIR DISMISSAL

1. What was the reason for C's dismissal?

2. Was that reason a potentially fair reason? R will rely on conduct.

3. If the reason was conduct, did R hold a genuine belief that the Claimant had committed the misconduct?

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

5. At the time the belief was formed, had R carried out a reasonable investigation?

6. Did R act in a procedurally fair manner? C relies on the following:

   (a) R's refusal to adjourn the disciplinary hearing arranged for 7 November 2019 (R admits it did not agree to adjourn the disciplinary hearing, having already adjourned the hearing on two occasions)

   (b) R's failure to hold the appeal hearing in a reasonable time frame (R will say the timing was reasonable in the circumstances of securing the availability of the relevant personnel and the need to reschedule the hearing due to DAC Philpott's ill health).

7. Was the sanction of dismissal within the range of reasonable responses?

8. If the dismissal was unfair:

   (a) was there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason (*Polkey*)?

   (b) Did C cause or contribute to dismissal by his own blameworthy conduct?

WRONGFUL DISMISSAL

9. What was the Claimant's notice period?

10. Was the Claimant paid for that notice period?

11. If not, was the Claimant guilty of gross misconduct / did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

VICTIMISATION

12. R accepts that C's grievance of 24 April 2017, appeal of 17 July 2017 and employment Tribunal claims 3201597/2017 and 3200756/2018 are protected acts.

13. Was C subject to the following treatment, in part at least, because C had done one or more of the protected acts:

    (c) Ms Durand and DAC Philpott refused to postpone C's disciplinary hearing on 7 November 2019 (R will say the hearing had already been postponed on more than one occasion);

    (d) DAC Philpott's decision to dismiss C (R will say C was dismissed because he was found to have failed a drugs test and attended work with traces of cocaine in his system);

    (e) Ms Durand failed to ensure that C's appeal against dismissal took place within a reasonable timeframe (R will say that the appeal was rescheduled due to the ill-health of the disciplinary officer).