EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos.: 4105678/2016 & 4100241/2017

Held in Glasgow on 11, 12, 13 & 14 December 2017

Employment Judge: Claire McManus

Mr John Orr — **Claimant**
Represented by:-
Mr M O'Carroll
(Advocate)

South Lanarkshire Council — **Respondent**
Represented by:-
Mr Stewart
(Solicitor)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

- The reason or principle reason for the claimant's dismissal by the respondent was not that the claimant had made a protected disclosure and his claim under Section 103A of the Employment Rights Act 1996 is dismissed.

- The claimant's dismissal by the respondent was an unfair dismissal under Section 98 of the Employment Rights Act 1996 and the Employment Tribunal Orders that:-

(1) The claimant be re-instated by the respondent (South Lanarkshire Council) to be employed by the respondent in the position of Road Operative Worker which he worked prior to his dismissal by them and be treated by the respondent in all respects as if he had not been dismissed, including being employed under the same terms and conditions of employment, with the same remuneration and benefits as pre-dismissal, and with continuity of employment and entitlement to holidays, such re-instatement to take place no later than 1 March 2018;

(2) The respondent shall pay to the claimant the sum of £532.86, in respect of the benefits, (including arrears of pay) which the claimant would have had but for the dismissal, taking into account the claimant's mitigation of his loss.

(3) The claimant shall be restored to the respondent's pension scheme and the respondent shall pay any employer's contributions necessary to ensure that the claimant is in the position he would have been in had he not been dismissed (subject to the claimant making any contributions he would have made had he not been dismissed).

REASONS

Background

1. An ET1 application claiming unfair dismissal was made on behalf of the claimant against the Respondent on 10 December 2017. The claimant had complied with the requirement under the Employment Tribunals Act 1996 Section 18A to contact ACAS before instituting these proceedings. The claim was acknowledged, the ET1 form sent by the Employment Tribunal office to the respondent and an ET3 form was lodged in response to that complaint on 9 January 2017. On 10 February 2017 an additional claim

was made on behalf of the claimant against the Respondent and an ET3 response was lodged in respect of that claim.

2. A Preliminary Hearing ('PH') for the purposes of case management took place on 18/04/2017. Both parties' representatives completed Agenda forms prior to that PH. The Note of that PH sets out that the claimant's then representative was directed to provide further specification and information, as set out in that PH note. Further and better particulars of the claim were then submitted on behalf of the claimant on 17 May 2017. The respondent responded to those further and better particulars on 14 June 2017.

3. There were discussions for the purposes of case management at the commencement of the hearing on 11 December. It was confirmed that the claimant's dismissal is admitted and that it is the Respondent's position that the dismissal was a fair dismissal on grounds of the claimant's conduct. The claimant's representative advised that it is the claimant's position that the claim includes a separate claim of detriment arising from the claimant having made a public interest disclosure, as well as it being the claimant's position that his dismissal was for that reason. It was the respondent's representative's position was that there is no separate claim made for detriment arising out of having made a protected disclosure. The respondent's representative's position was that on that basis it was accepted that a protected disclosure had been made by the claimant.

4. The case had been scheduled to be heard by an Employment Judge sitting alone. If the case included a separate claim that a detriment had been suffered separate to dismissal by reason of the claimant having made a protected disclosure, then the case would require to be heard by a full Tribunal. Arrangements were made by the Tribunal staff to identify if members could be available for this hearing. Members were identified who would be available from the afternoon of 11 December 2017. Parties' representatives then addressed EJ McManus on whether there was a separate detriment claim included.

5. The claimant's representative's position was that in addition to the claim under Section 103A of the Employment Rights Act ('the ERA) there was a separate claim for detriment under Section 47 of the ERA arising out of the claimant being falsely accused of a criminal act, being the alleged vandalism of property. The claimant's representative relied upon the terms of the original ET1. It was accepted that nowhere in either ET1 or in the specification provided is there any specific mention of a claim being made under Section 47.

6. The respondent's representative relied upon the claims being of alleged automatic unfair dismissal under Section 103A or unfair dismissal in terms of Section 98 and a breach of contract claim but no separate cl im for detriment arising out of having made a protected disclosure. The respondent's representative relied upon no separate claim being made out under Section 47B and there being no specification of a claim under Section 47B. He relied on the terms of the pleadings in the paper apart to both ET1s and the terms of the note following the PH on 13 April 2017. He relied on there being no mention of a separate detriment claim under Section 47B in either ET1, in the specification provided in response to the call at the PH and that the note of the PH, which was sent to both parties' then representatives clearly states the claims as being under Section 98 and Section 103A of the Employment Rights Act.

7. The Tribunal accepted the respondent's representative's submissions. The Tribunal was not satisfied that a separate claim for detriment arising out of having made a protected disclosure had been made. The claimant's representative was asked whether he was seeking to make an amendment to specify such a claim. He did not wish to do so. On that basis the hearing proceeded with EJ McManus sitting alone.

8. It then having been accepted that the claimant had made a protected disclosure, the issues for the hearing were identified as being:-

(1) What was the reason for the claimant's dismissal?

(2) If the reason or principle reason for the claimant's dismissal was not that the claimant had made a protected disclosure and was instead by reason of the claimant's conduct, then was the claimant's dismissal a fair dismissal in terms of Section 98(2)(b) of the Employment Rights Act 2006?

(3) Did the respondent act in breach of any implied term of their contract of employment with the claimant?

(4) In the event of the claimant's dismissal being an unfair dismissal, should a reinstatement order be made?

(5) If reinstatement or re-engagement is not appropriate, is the claimant entitled to any other remedy?

(6) What is the amount of any financial award to be made to the claimant?

9. The respondent's representative confirmed that a witness would be able to speak to the issue of remedy. It was confirmed that the witnesses for the respondent will be Amanda Morrison (fact-finding officer) and Graham Milne (disciplinary officer). The claimant's representative had expected William Hamilton to also be a witness for the respondent. It was the respondent's representative's position that Mr Hamilton would not be called on the basis that it was accepted that the claimant had made a protected disclosure. It was confirmed that for the claimant evidence would be heard from the claimant himself, David Burnside and Richard Newall. Witness orders had been issued in respect of both of the claimant's witnesses' attendance at the

Tribunal. It was agreed that the respondent's case would be heard first, on the understanding that anything the claimant would seek to rely on would be put to the respondent's witnesses.

10. The claimant's representative agreed that a updated schedule of loss would be provided to the Tribunal by 13 December 2017, including an actuarial calculation of pension loss. Both parties were asked to ensure that in their submissions they address any issues in respect of any reduction of award based on ***Polkey,*** contribution or mitigation. It was the respondent's representatives position that there were no issues in respect of mitigation of loss as it was understood that the claimant had now had secured alternative employment.

11. The claimant's representative confirmed that the breach of contract claim is based on the same factual circumstances as the claims under Section 98 and Section 103A. The claimant's representative was asked to ensure that in his submissions he identified the particular contractual term, whether express or implied, which it is alleged had been breached by the respondent.

12. Parties' representatives had helpfully liaised to prepare a Joint Bundle. This was set out in three volumes with consecutively numbered pages. The numbers in brackets in this Decision refer to the page numbers in these bundles. Evidence was heard on oath or affirmation from all witnesses.

Findings in Fact

13. The following facts were admitted or found by the Tribunal to be proven:

(a) The Respondent is a local authority with approximately 14,000 employees. The claimant was employed by the Respondent as a Roads Operative Worker from 4 May 2006 until his dismissal on 4 October 2016, when his employment was terminated without notice

or payment in lieu of notice. At the time of his dismissal the claimant's net weekly pay with the respondent was £333.14. His gross weekly wage was £397.01. The claimant's date of birth is 13/12/63.

(b) The claimant was based in the respondent's Hawbank Roads Depot in East Kilbride. The Depot Manager there is Mr William Hamilton.

(c) On 9 June 2016 an incident occurred between the claimant and another Roads Operative worker, Mark Watt at the entrance to the Hawbank Depot. That incident *("the 9 June incident')* was captured by the respondent's CCTV cameras and partly overheard by Jennie Nodwell (Depot Assistant). Jennie Nodwell reported the incident to the Depot Manager, William Hamilton. William Hamilton informed the respondent's personnel department about the incident. He did this by sending an email to the respondent's personnel department, which was dealt with by Gail Robertson (Personnel Assistant). That communication by William Hamilton led to an investigation that the claimant had engaged in alleged aggressive and threatening behaviour towards a colleague on 9 June, 2016. William Hamilton could have taken the decision to deal with the 9 June incident at a management level but did not do so.

(d) The Respondent has written Disciplinary Procedures for Local Government Employees and Craft Operatives (Production 11). Conditions of Service - Disciplinary Procedures (Production 12), Disciplinary procedures - A Handbook for Managers (Production 13), an Employee Code of Conduct (Production 14) and a Confidential Procedure for Reporting Concerns at Work (Production 15). In terms of the Disciplinary procedures, investigations should normally commence within 14 days. That time period was not adhered to in respect of the 9 June incident. The normal process applied by the respondent when a manager highlights an employee's potential

breach of the Code of Conduct is that there is a manager allocated and a member of the Employee Relations team is appointed to carry out an investigation. That appointed member of the Employee Relations team meets with the allocated manager to determine the scope of the investigation, the detail of the breach and any relevant risk assessments of health and safety policy beyond the scope of the Disciplinary Policy.

(e) Gail Robertson appointed Martin Muir (Area Manager) as the Nominated Manager, because William Hamilton was the claimant's direct line manager and a potential witness to the 9 June incident. Amanda Morrison (Personnel Assistant working in the Respondent's Employee Relations Team) was appointed as Fact Finding Officer to investigate the claimant's alleged aggressive and threatening behaviour towards a colleague on 9 June, 2016. Amanda Morrison met with Martin Muir to discuss the allegation. Martin Muir understood that the investigation had been initiated because a member of support staff (Jennie Nodwell) had witnessed on the CCTV monitor an incident between the claimant and Mark Watt on 9 June and she alleged that she had heard what was said by the claimant over the voice monitor and through an open window. The investigation was not an investigation of what had occurred in the incident on 9 June but an investigation of the claimant's alleged aggressive and threatening behaviour towards a colleague on 9 June, 2016. Martin Muir asked Amanda Morrison to view the CCTV footage of the incident and to give the claimant the opportunity to respond to the allegation. Amanda Morrison arranged for the CCTV Manager (Ian Porteous) to put the CCTV footage of the 9 June incident on a disk so that she could view the footage and identify those who appeared on that footage. It was agreed that Amanda Morrison would then interview those identified as being on the footage and Jennie Nodwell, who had said that she heard a threat take place. Amanda Morrison understood at that time that Jennie

Nodwell had alleged that the claimant had used threatening terminology towards Mark Watt.

(f) Amanda Morrison viewed the CCTV footage of the 9 June incident with William Hamilton. William Hamilton identified to her the individuals shown in the footage. Between 27 June and 27 July, 2016, Amanda Morrison carried out a fact finding investigation into the allegation that the claimant had engaged in aggressive and abusive behaviour against a fellow worker on 9 June, 201 6. Amanda Morrison carried out an interview with the claimant on 27 June, 2016. Amanda Morrison then interviewed the individuals listed in the Fact Finding Report at 216 and prepared her Fact Finding Report which is set out at Production 15 (215 - 244) and includes typewritten notes of the statements taken (with the typed version of the claimant's fact finding interview separately at 274 - 280). The CCTV footage was viewed by the individuals during the course of their interview. The statements were sent to the individuals interviewed, for signing and return. Mark Watt made substantial handwritten amendments to his typed statements. These amendments were included in the version of the statements in the Fact Finding Report. Mark Watt was not asked for the reason(s) why he has made these substantial amendments.

(g) It was the claimant's position at his investigatory interview that he had been provoked by Mark Watt. It was put to the claimant that he had made the comment *"Do you think you're stab proof'.* The claimant denied making that comment. Point 407 of the findings in the Fact Finding Report states :-

> *"John Orr was asked what happened on each occasion he approached Mark Watt. John had stated that it was all in relation to the comment that Mark had made concerning his girlfriend'.*

No investigation was made or disciplinary proceedings initiated in respect of Mark Watt's conduct in the 9 June incident or on the allegations made by the claimant about Mark Watt. The claimant's statement was included as part of the fact finding report.

(h) The findings of the fact finding report are set out at 216 - 218. These findings do not record the following material facts:-

- Mr. Watt did not report the issue
- Jenny Nodwell was the only person of nine interviewed who spoke of the offensive phrase 'do you think you're stab proof being used, despite five other employees being closer to the incident than Jenny Nodwell.
- Jenny Nodwell's recollection of what she overheard of the conversation between the claimant and Mr Watt is inconsistent with other statements e.g. in respect of her assertion that pay was discussed, against Mr Watt's position that there was no discussion about pay.
- The claimant and Mr. Watt continued to work together without any further issue the day after the incident, the following Monday and in the entire time until the claimant's dismissal on 4th October.
- The history and provocation which led to the 9 June incident.

(i) The claimant continued to work with Mark Watt in the period from the 9 June incident up to his dismissal on 4 October, 2016. No incidents occurred between these individuals during that period. No issue was raised by Mark Watt in respect of him working with the claimant. Their contact included Mark Watt assisting the claimant's operation of vehicles e.g. guiding when reversing. No issue was raised with

the respondent by Mark Watt in respect of his continuing contact with the claimant or in respect of the claimant's conduct toward him in the 9 June incident. The claimant's continuing working contact with Mark Watt is material to the investigation and was not stated in the Fact Finding Report.

(l) The claimant was not suspended from his position as Roads Operative at any time prior to his dismissal. That fact is material and is not mentioned in the fact finding report.

(m) Prior to 9 June 2016, the claimant had made protected disclosures to William Hamilton in respect of raising concerns about the health and safety implication of practices carried out by the Respondent. The claimant believed that Mr Hamilton did not take appropriate action following these disclosures. The claimant believed that Mr Hamilton held a prejudice against him because he had made these protected disclosures. The claimant believed that Mr Hamilton used the 9th June incident as a means to *'get rid of him'* i.e. the claimant's employment with the respondent being terminated. That belief was not raised by or on behalf of the claimant in the course of the disciplinary procedure taken against the claimant in respect of the 9th June incidence.

(n) A separate incident occurred between two of the respondent's employees in the Hawbank depot on 25 August 2016. That incident occurred between Steve McCourt (Road Operative Chargehand) and David Burnside (Road Operative Worker). Steve McCourt has a supervisory position in relation to David Burnside. On that occasion Steve McCourt was aggressive and threatening towards David Burnside. Both used foul language. Two individuals intervened in order to prevent that incident escalating to physical violence. That incident lasted at least 10 minutes, taking place in two locations within the Hawbank Depot. That incident was within the range of the

respondent's CCTV cameras. That incident was brought to William Hamilton's attention by David Burnside, the claimant, Robert Newall (Trade Union Representative) and others. When David Burnside reported this incident to William Hamilton, Mr Hamilton's response was "*Leave it with me and HI get to the bottom of it."* No investigatory or disciplinary process took place in respect of either employee involved in that incident. No-one involved was interviewed for the purposes of a formal investigation. Mr Hamilton dealt with that incident by initially moving Mr Burnside from Mr McCourt's team, which had financial consequences for Mr Bumside in respect of loss of overtime opportunities. After a period of around 2 weeks, Mr Burnside was called into Mr Hamilton's office and it was proposed that the incident be closed off with a handshake from Mr McCourt. Mr Burnside was not asked prior to that meeting whether he would be agreeable to that incident being resolved in this way.

(o) Mr Hamilton was inconsistent in his dealings with that incident on 25 August 2016 in comparison with his dealings in respect of the claimant following the 9 June incident. There was no opportunity given by William Morrison or anyone within the respondent's organisation to allow the 9 June incident to be resolved at management level by way of a handshake or otherwise. Both incidents involved aggressive and threatening behaviour by an employee of the respondent in the Hawbank Depot towards a colleague. Both incidents were within the range of the respondent's CCTV cameras. The incident on 25 August 2016 between Mr McCourt and Mr Burnside was more serious because Steve McCourt was being aggressive and insulting towards a person over whom he had a supervisory role, because individuals intervened in order to prevent the incident escalating to physical violence and because the incident had not been provoked by anything derogatory said by David Burnside.

(o) Richard Newell (Trade Union Shop Steward) sent an email to Richard Hamilton on 26 August 2016 requesting that an immediate investigation takes place into alleged aggressive and threatening act towards a road worker in Hawbank Depot on 25 August 2016. That email and subsequent replies is at 248. On 12 September 2016 William Hamilton emailed Richard Newell in respect of this matter stating *'Richard this case is now closed as it was dealt with at Management Level the two guys have settled their differences.'*

(p) The claimant raised a grievance in respect of how the incident between Mr McCourt and Mr Burnside had been treated by Mr Hamilton in comparison to his treatment of the incident between himself and Mr Watt on 9 June 2016. This grievance notification form is at 246 - 247 and is dated 31/08/16. A meeting was arranged in respect of the grievance. The letter inviting the claimant to the grievance meeting is at 249. The outcome of the grievance is set out in letter from Kenny McAnally (Operations Team Leader) to the claimant of 20 September 2016. This states :-

> *"At this meeting you stated that you feel that you have been treated differently as you are currently being taken through the disciplinary process for a situation which is similar to another case you witnessed and reported and that you understand is not being investigated.*
>
> *Whilst I informed you that you cannot raise a grievance in respect of matters concerning disciplinary issues, I was able to confirm that due process has been followed in your disciplinary process.*
>
> *I also explained to you that I was not in a position to discuss the other case to which you were referring to, however informed you that it had been dealt with accordingly*

I consider this matter closed, however in the meantime if you require further clarification, please do not hesitate to contact Elaine Melrose on (phone number stated)."

(q) The claimant attended a disciplinary hearing on the same day as and immediately after his grievance meeting. The Disciplining Officer appointed to hear the claimant's disciplinary hearing was Graham Milne (Team Leader). Graham Milne was the only person who took the decision to dismiss the claimant. The initial disciplinary hearing on 20 September was part-heard and rescheduled, because of lack of time, it having taken place after the claimant's grievance hearing, and on a day when the claimant had a half day holiday and because following discussions at the disciplinary hearing Graham Milne considered that further investigation required to be carried out in respect of the intercom. The respondent's typed notes of the disciplinary hearing on 20 September and the reconvened disciplinary hearing on 29 September are at 260-272.

(r) The disciplinary hearing was again reconvened on 4 October 2016 for the purposes of Graham Milne presenting his decision. Graham Milne took the decision to dismiss the claimant for gross misconduct, being aggressive and threatening behaviour towards a colleague on 9 June 2016. The information taken into account by Graeme Milne in reaching his decision to dismiss was: the CCTV footage showing aggressive behaviour between the claimant and Mr. Watt, which he concluded showed the claimant being the aggressor on seven occasions within a ten minute period of time, his belief that Jennie Nodwell had overheard the claimant saying to Mark Watt "Do *you think you're stab proof."* And his belief that the claimant was threat to Mark Watt's health and safety. Graham Milne's position on 4 October 2016, is set out in 271 and 272. This records Graham Milne's position in relation to Jennie Nodwell having overhead the

claimant saying *"Do you think you're stab proof."* as *"I have no reason to disbelieve her statement".* On the basis of that evidence, Mr Milne believed that the claimant had engaged in aggressive behaviour of a serious nature and considered that mitigation or provocation issues could not outweigh the serious nature of that behaviour in the workplace. Mr Milne concluded that because the 9 June incident showed a safety risk to Mark Watt from the claimant in those circumstances the only option was summary dismissal of the claimant for gross misconduct.

(s) Graham Milne is experienced in dealing with disciplinary procedures. He believes that consistency in the respondent's treatment of its employees is very important. Graham Milne believes that issues outside the workplace should not be brought into the work environment. He did not consider whether any disciplinary process should be initiated in respect of any conduct by Mark Watt. No-one within the respondent's organisation considered whether any disciplinary proceedings should be initiated against Mark Watt in respect of the 9 June incident or in respect of the allegations made by the claimant about Mark Watt. Graham Milne decided that the claimant's position that he had been provoked by Mark Watt making a comment about his girlfriend did not mitigate the claimant's conduct because he believe that the claimant posed a risk to Mark Watt's health and safety. Had Graham Milne known that the claimant and Mark Watt had continued to work beside each other without incident in the period from 9 June that would have materially affected his decision to dismiss. Had Graham Milne known about the incident on 25 August and how that had been dealt with by Mr Hamilton, because of the importance Mr Milne places on consistency of treatment, that would have materially affected his decision to summarily dismiss the claimant.

(t) The claimant was aggressive towards Mark Watt on 9 June on 2 two of the seven occasions shown on the CCTV footage of the incident and relied upon by Mr Milne.

(u) Graham Milne's decision to summarily dismiss the claimant for gross misconduct without notice or payment in lieu of notice was confirmed in his letter to the claimant of 4 October 2016 (at 273). The claimant contacted his trade union in respect of making an appeal and understood that an appeal was being lodged on his behalf. No appeal was made to the respondent in respect of the claimant's dismissal.

(v) The claimant has mitigated his loss in respect of his dismissal by obtaining alternative employment via agency work. The claimant's net loss to the date of the conclusion of the Tribunal Hearing is agreed as being £532.86.

Respondents Submissions

14. The respondent's representative's spoke to his written submissions lodged with the Tribunal, which are summarised here. The respondent's position was that the claimant was fairly dismissed by reason of the claimant's conduct. It was accepted that the burden of proving the reason or principal reason for the dismissal of the employee lies with the employer. The Tribunal was invited to accept the evidence of Amanda Morrison and Graeme Milne as clear and consistent. It was submitted that the factual evidence of those witnesses had not been challenged in any meaningful way. It was denied that the reason or principal reason for the claimant's dismissal was that he had made a protected disclosure. Reliance was placed upon that reason not being relied upon by the claimant at the investigatory or disciplinary hearing when the claimant had the benefit of a trade union representative at both hearings. Reliance was placed on no appeal having been made by the claimant. It was submitted that the reason

for dismissal was the claimant's aggressive behaviour towards Mr Watt on 9 June 2016. This was relied on as being a dismissal for the potentially fair reason of conduct under ERA Section 98(2)(b). Reliance was placed on Graeme Milne's evidence of the various information which he took into account when reaching his decision to dismiss, including the CCTV footage showing aggressive behaviour between the claimant and Mr Watt, with the claimant being the aggressor on seven occasions within a ten minute period of time, and the claimant admitting before the Tribunal that he had been aggressive on at least two of these occasions. Reliance was placed on Mr Milne's evidence that he had accepted that Jenny Nodwell had overheard the claimant use the phrase "Do *you think you're stab proof?"* and his reasons given for doing so. Reliance was placed on the Investigation conducted by Amanda Morrison, including the statements taken.

15. It was submitted that Mr Milne had appropriately carried out his function to assess the evidence presented to him and to form a view based on this evidence. Reliance was placed on Mr. Milne's evidence that he had considered possible provocation but did not consider that any mitigation or provocation issues could outweigh the serious nature of the behaviour by the claimant.

16. It was submitted that there was no evidence before the Tribunal to suggest that the decision taken by Mr Milne was for any reason other than the claimant's conduct on 9 June 2016. It was submitted that it was reasonable for Mr Milne to categorise the claimant's behaviour on that day as gross misconduct and that summary dismissal by reason of the claimant's aggressive and threatening behaviour towards a colleague was within the band of reasonable responses.

17. In respect of the claimant's position that that the respondent was inconsistent in their treatment of him compared to their treatment of the incident between Mr Burnside and Mr McCourt, but it was submitted that the circumstances of that incident were substantially different to the

circumstances in the claimant's case. Reliance was placed on the incident between Mr Bumside and Mr McConnell on 25 August, 2016 lasting around 2 minutes, the two men involved being separated by others, the incident being immediately reported to the Depot Manager and that within two weeks of that incident the men shook hands and an apology was offered by Mr McCourt. It was submitted that the duration of the incident between the claimant and Mr. Watt was "far *longer",* that there were two points at which Mr McCourt and Mr Burnside clashed, whereas there were seven involving the claimant approaching Mr Watt and that a witness had expressed concern for the welfare of Mr Watt. Reliance was placed on the words reported in connection with the incident not being the same and there being no evidence that Mr Watt would have accepted an apology and a handshake to end matters. It was submitted that the two incidents were not sufficiently similar in the circumstances to allow the Tribunal to reach any adverse finding regarding the fairness of the claimant's dismissal on the basis of inconsistent treatment.

18. It was submitted that the investigation carried out by Armanda Morrison had been extensive. Reliance was placed on her having identified the individuals on the CCTV footage and taking statements from them, presenting the facts to the claimant and giving him the opportunity to respond to the matters alleged against him. It was submitted that the claimant had been given the opportunity to respond to each of the incidences. It was denied that Amanda Morrison was not impartial, had had an agenda or had adopted a position in her investigation. It was submitted that she had investigated the incident on 9 June, 2016 and that it was not function of Amanda Morrison to present information which was not in the witness statements. Reliance was placed on the claimant not mentioning in his statement that he had been working together with Mr Watt since the incident. It was submitted that the fact finding report and the witness statements had to be read in conjunction.

19. In respect of the claimant not having been suspended prior to his dismissal for gross misconduct, reliance was placed on that being the decision of the

nominated manager and the respondent's procedure being that suspension should be avoided if at all possible. It was submitted that the claimant had acted in the particular way at a particular point in time and he was dismissed for that conduct but there was *"very little to be achieved'* by suspending him and that the tribunal should not draw any adverse inference from the respondent's failure to suspend.

20. It was submitted that the period of time between the incident on 9 June 2016 and the claimant's dismissal in October was not unreasonable for the investigation and conclusion of proceedings as time required to be given in advance of the meetings with the claimant, diaries had to be coordinated and Jenny Nodwell had been unwell, which had delayed her statement being taken

21. The respondent's position in respect of remedy was *esto* the Tribunal finds that the claimant was unfairly dismissed by the respondent it was noted that the primary remedy sought by the claimant is reinstatement to his role and it was accepted that such a remedy can be accommodated by the respondent. The figure of £5,955.15 was accepted as being the calculation of the full basic award the claimant would be entitled to in accordance with Section 118(1) of the Employment Rights Act 1996. It was submitted that any basic award and compensatory award to the claimant should be reduced under Section 122(2) and 123(6) of the 1996 Act on the basis that the claimant and accepts that he acted aggressively towards Mr Watt and that the evidence before Mr Milne showed that to be the case. Reliance was also placed on the claimant seeking to rely on factors, including comparative treatment and lack of reliability of a witness before the disciplinary hearing (that Jenny Nodwell could not have properly overheard the claimant), which were not specifically relied upon in the course of the disciplinary hearing. Reliance was placed on the claimant having had the opportunity to appeal the decision to dismiss him to a panel of elected members of South Lanarkshire Council but failing to exercise that appeal. In the circumstances it was submitted that any basic award and

compensatory award should be reduced by 100%, on a just and equitable basis.

Claimant's Submissions

22. The claimant's representative submitted that the claimant's dismissal was automatically unfair under Section 103A of the Employment Rights Act 1996. Reliance was placed on the respondent's admission that the claimant had made protected disclosures. It was submitted that the claimant only then requires to demonstrate or at least put in issue that the reason for his dismissal was because or principally because he made those protected disclosures. It was submitted that the claimant had done so and is entitled to succeed in his automatic unfair dismissal claim.

23. Reliance was placed on the claimant's evidence that he was *"in and out"* of Mr Hamilton's Office *"like a yo yo"* in relation to health and safety issues and his evidence that he was brought into Mr Hamilton's Office to answer false allegations of vandalism in order to *"scunner him"* and that Mr Hamilton was *'putting him under pressure in order to squeeze him out* because of the constant health and safety complaints made by the claimant. Reliance was placed on that evidence of the claimant being uncontested because the respondent had chosen not to call Mr Hamilton as a witness. The Tribunal was asked to draw a negative inference from that. It was accepted that Mr Milne had made the decision to dismiss the claimant but reliance was placed on Mr Hamilton being the *"causal connection"* to the claimant's dismissal because of the claimant having made the protected disclosures to Mr Hamilton. The Tribunal was asked to accept the claimant's evidence that Mr Hamilton was using the incident between the claimant and Mr Watt as an opportunity to *"get rid of him"* and because of the claimant raising issues with about health and safety and hazards at work.

24. It was submitted that the incident between Mr McCourt and Mr Burnside are comparable to that between the claimant and Mr. Watt. It was submitted

that it was a reasonable inference for the Tribunal to draw that the difference in treatment by Mr Hamilton in moving matters forward with personnel to a disciplinary hearing was by reason of the protected disclosures having been made by the claimant. It was submitted that that inference provides additional support to the direct evidence of the claimant that his dismissal was by reason of him having made protected disclosures and is therefore an automatically unfair dismissal.

25. Reliance was placed on there being no attempt in cross-examination by the respondent to differentiate the incidents between Mr McCourt and Mr Burnside to that between the claimant and Mr. Watt. It was submitted that if any if there was any differentiation between the McCourt/Burnside incident and that between the claimant and Mr Watt, then the McCourt/Burnside incident was more serious because it was unprovoked and required the intervention of 2 fellow workers to prevent an escalation to physical violence. It was submitted that there was no evidence to support the respondent's representative submission that the McCourt/Burnside incident had lasted only 2 minutes and it was submitted that the McCourt/Burnside incident had lasted at least as long as the10 minute incident between the claimant and Mr Watt. Reliance was placed on the evidence that the McCourt/Burnside was in two parts of the Depot and that only the first part had lasted 2 minutes.

26. Reliance was placed on the incident involving the claimant and Mr Watt giving rise to a *"full blown"* investigation involving examination of CCTV footage, witness statements being taken from nine employees, a disciplinary hearing and ultimately dismissal while no such procedures were put in place in respect of the McCourt/Burnside incident, even thought there was CCTV footage available (on the unchallenged evidence of the claimant that the CCTV camera was always running and the incident took place in the same location of the one involving him) there were witnesses present and aggressive and threatening behaviour and language were used. Reliance was placed on Mr. Burnside's evidence that when he reported the

matter to Mr Hamilton he was to *'leave it with me and HI get to the bottom of this'* and nothing more there was done other than Mr Bumside being moved squad to separate him from Mr McCourt and three weeks later being called into Mr. Hamilton's Office for Mr. McCourt to apologise to him and the two men shook hands. Reliance was placed on there being no opportunity presented to the claimant to give an apology to Mr Watt. Reliance was placed on the claimant having raised a grievance about the disposal of the McCourt/Burnside incident and Mr Newell's evidence about that incident having been reported to him by six or seven workers and him seeking and chasing a response from Mr Hamilton in respect of how that incident was being dealt with.

27. It was submitted that the only matter differentiating the position of the claimant was that of Mr McCourt was that the claimant had made what has been accepted as protected disclosures on at least four separate occasions. It was submitted that no alternative explanation has been offered in evidence or suggested in cross as to why Mr Hamilton took the matter forward to a formal disciplinary process in relation to the claimant's incident but was content to deal with matters at an informal management level as far as Mr McCourt was concerned. It was accepted that Mr Hamilton was not the disciplining officer to dismissed the claimant but submitted that had before Mr Hamilton had treated Mr McCourt the same way as the claimant and initiated the formal investigation then Mr McCourt would have been dismissed. On this basis it was submitted that the claimant's dismissal is causally connected with his protected disclosures.

28. Reliance was again placed on the non-appearance of William Hamilton before the Tribunal. The Tribunal was asked to draw a further adverse inference from the respondent's decision not to call Mr. Hamilton to give evidence on his reasons for treating the McCourt/Burnside incident differently to the incident between the claimant and Mr Watt.

29. It was submitted that if the dismissal is found not to have been automatically unfair, then the dismissal was unfair in terms of Section 98(4) of the Employment Rights Act 1996 and that the submissions on that are necessarily interlinked with those in respect of the dismissal being automatically unfair. Reference was made to the test in *British Home Stores* **-v-** *Burchell [1978] IRLR 397* being the approach the Tribunal should follow in assessing the fairness of the claimant's dismissal in terms of Section 98. In respect of *"genuine belief* it was submitted that the allegation that the claimant was guilty of aggressive and threatening behaviour towards a colleague on 9 June 2016 is an overstatement of what actually occurred and that the resultant actions of the respondent were an overreaction to what admittedly occurred. Reliance was placed on Mr Watt never raising a grievance about the incident or any procedure further to the respondent's Dignity at Work Policy. In respect of there being reasonable grounds for such belief, it was accepted that it had never been contested by the claimant that he had had an altercation with Mr Watt on 9 June, 2016. It was submitted that the procedures which then followed, while being in accordance with the ACAS Code, were flawed in substance, rendering the dismissal unfair. It was submitted that the procedure was fundamentally flawed in having been instigated in the first place when the McCourt/Burnside incident was dealt with informally. Reliance was placed on Mr Milne's evidence that consistency in applying procedure and sanction was *'very important indeed'.*

30. It was submitted that the investigation carried out by Armanda Morrison was flawed in that it was incomplete but because it failed to record any issues which might counter balance the allegation. In particular, reliance was placed on the investigation report failing to record that -

- Mr Watt did not report the issue

- Jenny Nodwell was the only person of nine interviewed who spoke of the offensive phrase 'do you think you're stab proof

being used, despite five other employees being closer to the incident than Jenny Nodwell.

- Jenny Nodwell's recollection of some of the conversation between the claimant and Mr Watt is incorrect when tested against the other statements e.g. in respect of her assertion that pay was discussed, against Mr Watt's position that there was no discussion about pay. It was submitted that this might have cast further doubt regarding her hearing the offensive phrase correctly.

- The claimant and Mr Watt continued to work together without any further incident the day after the incident, the following Monday and in the entire time until the claimant's dismissal on h October.

- The provocation which led to the incident

31. It was submitted that the interviews carried out by Armanda Morrison were consciously or unconsciously subject to a narrative or agenda constructed by Amanda Morrison whereby Mr Watt was the victim being intimidated and requiring protection. Reliance was placed on Mr. Watt not being disciplined for prolonged, repeated and provocative comments he made to the claimant. It was submitted that the investigation was contrary to the respondent's Disciplinary Procedures Handbook for Managers as it was not neutral or fair and committed the *"cardinal sin"* of setting out to verify the allegation rather than establishing unvarnished facts. Reliance was placed on the Handbook suggesting a 14 day time limit for interviews to be carried out and Mrs Morrison being unaware of that. Reliance was placed on the incident being on 9 June 2016 and the interviews commencing on 27 June, with the only complainant, Jenny Nodwell being interviewed on 26 July, 2016. It was submitted that there was no good reason for the delay given that the incident was reported almost as it was happening and the two main parties at least (the claimant and Mr Orr) were present at work the following

day and the following week. It was submitted that the time spent in the investigation casts doubt on the reliability of witnesses, as memories fade with time.

32. Reliance was placed on Mr Milne being surprised to learn that the claimant and Mr. Watt continued to work together following the incident, on Mr Milne not seeking to establish the length of the claimant service, only noting that it had been "a *few years"* and not seeking to establish the claimant's clean service record. Reliance was placed on Mr Milne's evidence that he decided he had no option to dismiss because of (1) the offensive phrase used and (2) the fact that the claimant had approached Mr Watt on seven occasions within 10 minutes.

33. It was submitted that in his decision to dismiss, Mr Milne had failed to properly consider mitigating factors, in particular -

- The claimant's length of service
- The claimant's unblemished service recurrent and positive assessments
- The provocation the claimant received from Mr Watt
- The fact of the 9 June incident being a one off, never repeated incident, with Mr Watt and the claimant working side by side for the four month period until the claimant's dismissal.
- The McCourt incident, which was arguably more serious, being dealt with informally and not being subject to any investigation or disciplinary procedure.

It was submitted that the failure to consider these matters rendered the final sanction of summary dismissal as unfair.

34. It was accepted that Mr Milne did not know about Mr Hamilton's dealing with the incident involving Mr McCourt and Mr Burnside and accepted that the claimant did not rely at the disciplinary hearing on having made a protected disclosures. It was noted that it had not been put to the claimant in cross examination that he had not mentioned having made a protected disclosures at his disciplinary hearing. Reliance was placed on the claimant having raised a grievance about the way in which Mr McCourt had been dealt with and the claimant having made protected disclosures. It was submitted that the respondent as a collective body knew about the incident involving Mr McCourt and Mr Burnside and knew that the claimant had made protected disclosures. It was submitted that the respondent should not benefit from their failure to follow procedure.

35. It was submitted that the claimant's dismissal without notice was in breach of an *"express wage/work bargain"* term in the claimant's contract of employment with the respondent.

36. In respect of remedy, reliance was placed on the evidence of both the claimant and Mr Milne that there was no reason why the remedy of reinstatement should not be granted. It was submitted that in the event of reinstatement the claimant seeks a payment towards his pension which will result in no detriment to it. It was submitted that any award made by the Tribunal to the claimant should not be subject to any deduction for contribution.

37. It was submitted that the claimant's failure to exercise an internal right of appeal against his dismissal was not unreasonable and that separately it would not be just and equitable for the Tribunal to reduce any award made if it was minded to so. It was noted that the deduction of up to 25% in terms of Section 207A of the Employment Rights Act 1996 is not compulsory but only if the Tribunal is minded to do so. Reliance was placed on the claimant's evidence that he had left matters in relation to that appeal in the hands of his union representative but that 'for reasons which it is now

impossible to ascertain' the appeal was not taken forward. It was submitted that the claimant acted reasonably and it would not be just and equitable to reduce his award for a failure which was no fault of his own. It was submitted that, separately, given *"the approach of management within the respondent"* and the circumstances leading to the claimant's dismissal it would be reasonable to infer that any appeal against dismissal would have been futile because it would not have led to a rehearing and would have been based upon *"the same flawed investigation report presented to Mr Milne".*

38. The Tribunal was invited to uphold the claimant's application under Section 103A of the Employment Rights Act, failing which to find unfair dismissal and/or breach of contract and thereafter to order reinstatement with any additional monetary award which would place the claimant in the same position as if his unfair dismissal had not occurred. Reliance was placed on the amended submitted Schedule of Loss, showing full Basic Award as £5,955.15 and it being accepted that because of the claimant's mitigation of his loss in securing alternative employment via agency work, the claimant had suffered net loss of only 10 days, calculating to £532.86. Pension loss of £15,565.96 was said to be calculated at an employee's contribution of 5.8% of gross salary to date of retirement.

Fairness of the Dismissal

39. The law relating to unfair dismissal is set out in the Employment Rights Act 1996 *("the ERA"),* in particular Section 98 with regard to the fairness of the dismissal and Sections 118-122 with regard to compensation in terms of Section 98(1) for the purposes of determining whether the dismissal is fair or unfair it is for the employer to show -

(a) the reason (or if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

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

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

(c) is that the employee was redundant,

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

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

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

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

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

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

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

(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.

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

Comments on evidence

43. Evidence was heard on oath or affirmation from all witnesses. On behalf of the respondent evidence was heard from Mrs Amanda Morrison (Personnel Officer, who prepared the Investigation report) and Mr Graeme Milne, Team Leader and Disciplining Officer. For the claimant, evidence was heard from the claimant himself, from Mr Newell (and Trade Union Shop Steward) and David Burnside (Road Operative worker).

44. Amanda Morrison had a tendency to accept a position put to her and then retract on that position upon further cross examination. She was found to be credible but not entirely reliable. The evidence of Robert Newell and David Burnside was not contested in cross-examination and they were found to be entirely credible and reliable in their evidence, which was by way of examination in chief only. Graham Milne was candid and entirely reliable and credible in his evidence. The claimant was consistent in his position throughout his evidence and presented in a straightforward way, without seeking to exaggerate. He was found to be credible and reliable. The claimant accepted that on 9 June he had been aggressive towards Mark Watt on two occasions shown in the CCTV footage of the incident, under explanation that he was provoked by Mark Watt's comments about the claimant's former girlfriend.

Discussion and decision

45. It was admitted that the claimant was dismissed. The first issue for the Tribunal to determine was what was the reason for the claimant's dismissal. The respondent relied only on that reason being related to the claimant's conduct, in terms of Section 98(2)(b) and that the claimant was dismissed for gross misconduct. The claimant's position was that the reason for his dismissal was that he had made protected disclosures.

46. In circumstances where it was accepted that Graham Milne made the decision to dismiss the claimant and accepted that Graham Milne did not

know that the claimant made protected disclosures, the reason or principle reason for the claimant's dismissal could not be that the claimant had made protected disclosures. The Tribunal accepted that William Hamilton had the managerial authority to resolve the situation in the workplace similarly to the way in which he dealt with the incident between Mr McCourt and Mr Burnside. The Tribunal accepted that the incidents between Mr McCourt and Mr Burnside and between the claimant and Mr Watt were comparative: both incidents involved aggressive and threatening behaviour towards a colleague in the workplace (both incidents being the Hawbank Depot). The Tribunal considered that the incident involving Mr McCourt and Mr Bumside was more serious than that between the claimant and Mr. Watt on 9 June. The incident between Mr McCourt and Mr Burnside was more serious because of Mr McCourt's supervisory position in relation to Mr Burnside, because individuals had to intervene to prevent the aggressive incident becoming physical and because the incident had not been provoked by anything derogatory said by Mr Burnside. The Tribunal did not accept the submission made on behalf of the respondent that there was a significant difference in the timescale of the incidents which meant that the incidents were not comparable. Although the first part of the incident between Mr McCourt and Mr Burnside was said to have lasted two minutes, there was then another part, at a different location within the depot. The Tribunal then accepted that that entire incident lasted at least 10 minutes, which was the length of the 9 June incident.

48. In circumstances where it was accepted that the claimant had made protected disclosures to William Hamilton, where William Hamilton could decide whether an incident should proceed to a formal disciplinary investigation or not, where Mr Hamilton decided that the McCourt/Burnside incident should not proceed to a disciplinary investigation but instead should be resolved at management level, where William Hamilton did not give any opportunity to resolve the incident between the claimant and Mr Orr by way of a handshake but did afford this opportunity to Mr McCourt, where the 9 June incident was dealt with by way of an investigation about the claimant's

alleged aggressive and threatening behaviour rather than an investigation about both individual's conduct in the incident, and where Mr Hamilton was not called to give his explanation for his difference in treatment of 9 June and the incident between Mr McCourt and Mr Burnside, the Tribunal accepted that an adverse inference should be drawn from the respondent's decision not to call Mr Hamilton to give evidence as to his reasons for dealing with the incident between Mr McCourt and Mr Burnside informally, while not giving the opportunity for the incident between the claimant and Mr Watt to be dealt with informally. In all these circumstances, in the absence of any evidence from Mr Hamilton on this reasons for dealing with the two incidents differently, and given the findings that both incidents were similar and were not dealt with consistently, and the uncontested evidence of the claimant that he had made protected disclosures to Mr Hamilton which were not dealt with and that Mr Hamilton considered held a prejudice against him because of having raised those concerns, and used the 9 June incident as a way of *'getting rid of him'* the Tribunal drew an adverse inference from the respondent's decision not to call Mr Hamilton to give evidence on his reasons for dealing with the incident involving Mr Burnside and Mr McCourt *"at management level"* and not doing so in respect of the 9 June incident involving the claimant. The Tribunal concluded that in all these circumstances the reason why Mr Hamilton had dealt with the 9 June incident by contacting personnel and informing them of the allegation that the claimant had engaged in aggressive and threatening behaviour towards a colleague in the workplace was because the claimant had made protected disclosures.

49. It was noted that the Tribunal did not have sight of Mr Hamilton's email informing the respondent's personnel department about the 9 June incident. It was Mr Hamilton's decision to initiate the disciplinary process against the claimant by informing personnel. He could have chosen not to do so, and had he not chosen to do so, and had instead dealt with that situation informally *"at management level"* as he did with the incident between Mr McCourt and Mr Bumside, then the claimant would not have been

dismissed. To that extent, the Tribunal accepted that there was a causal connection between the protected disclosures made by the claimant and the claimant's dismissal. However, that causal connection between Mr Hamilton and the claimant's dismissal is not enough to establish that the reason or principal reason for the claimant's dismissal was that the claimant had made protected disclosures. The only person who made the decision to dismiss the claimant was Mr Milne. Mr Milne did not know that the claimant had made any protected disclosure. The reason or principal reason for the claimant's dismissal could not then have been that the claimant had made protected disclosures.

50. The evidence from David Burnside and Richard Newall that there had been no investigation of the incident between Mr McCourt and Mr Bumside was not contested. It was not the respondent's position that anyone other than Mr Hamilton had taken the decision that there should be no investigation or disciplinary procedure in respect of that incident. It was not disputed by the respondent that anyone other than Mr Hamilton decided that that incident could be resolved at 'management level'.

51. The Tribunal found that in these circumstances, the reason for that inconsistency by Mr Hamilton was that the claimant had made protected disclosures to Mr Hamilton. The respondent did not dispute that the incident involving Mr McCourt and Mr Burnside was an incident of aggressive and threatening behaviour towards a colleague which had taken place at Hawbank Depot. The evidence on what had occurred in that incident was undisputed. The Tribunal did not accept that there was a significant difference in the time period of the incident involving those individuals and the 9 June incident. The evidence was that the first part of the incident involving Mr McCourt and Mr Burnside had lasted "2 *minutes"* but that there had been another part of that incident shortly after, at the other side of the Depot. The Tribunal concluded that that incident had lasted at least 10 minutes, which was the duration of the 9 June incident.

52. To that extent, the Tribunal then accepted then that there was a causal connection between the claimant having made protected disclosures and formal disciplinary procedures being initiated against him. However, in circumstances where the person who made the decision to dismiss did not know that the claimant had made protected disclosures, the reason or principle reason for the dismissal I could not be that the claimant had made protected disclosures. A causal connection is not the same as the reason or principle reason for the dismissal, which is what the Tribunal requires to determine in terms of Section 103A. The claimant's dismissal was not an unfair dismissal under Section 103A because the person making the decision to dismiss did not know that the claimant had made protected disclosures.

53. Having determined that the claimant's dismissal was not an automatically unfair dismissal under Section 103A ERA, the Tribunal considered the fairness of the claimant's dismissal in terms of Section 98 ERA. The respondent has the burden of proving, on the balance of probabilities, that the claimant was dismissed for misconduct, being the potentially fair reason for dismissal set out at Section 98(2)2 ERA which is relied on by the respondent.

54. The Tribunal was satisfied on the evidence that Mr Milne took the decision to dismiss the claimant and that that decision was taken for a conduct reason. The Tribunal was then satisfied as to the respondent's reason for dismissal. In then determining whether or not the dismissal was fair or unfair, the Tribunal considered whether, having regard to the reason of conduct, in the circumstances of the case, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. In so determining, the Tribunal had regard to equity and the substantial merits of the case. Following ***Burchell,*** the Tribunal assessed whether (a) the respondent had a reasonable belief in misconduct (b) that belief was based on reasonable grounds and (c) that it

was based upon an investigation which was reasonable in all the circumstances.

55. The Tribunal was satisfied on the evidence that Mr Milne believed that the claimant had engaged in conduct justifying dismissal, which was the reason for the claimant's dismissal. The Tribunal was not satisfied that that belief was based upon an investigation which was reasonable in all the circumstances.

56. The investigation was flawed in its failure to mention material points which would have had an effect on the outcome. These were :-

(i) that the claimant had not been suspended or moved team and had continued to work alongside Mr Watt without issue arising in the period from 9 June 2016.

(ii) That another incident of aggressive and threatening behaviour between colleagues within the Hawbank Roads Depot had been dealt with at management level, by way of an apology and a handshake.

(iii) That there were inconsistencies between Jennie Nodwell and others interviewed in respect of what had been said between the claimant and Mark Watt.

In these circumstances the Tribunal concluded that the investigation was not reasonable.

57. The claimant was not well served by his trade union representative's failure to mention in the course of the disciplinary hearing that he had not been suspended or moved to work in a different squad and that he had continued to work alongside Mark Watt in the period since the incident on 9 June and their failure to mention that the inconsistency of treatment by Willie Hamilton

between the 9 June incident involving the claimant and Mark Watt worked and the incident involving Mr McCourt and Mr Burnside. Given Mr Milne's clear position in his evidence that he considered that the 9 June incident showed a safety risk to Mark Watt from the claimant and his position that consistency in the respondent's treatment of its employees was very important, had Mr Milne known of these matters that would have made a material difference to his conclusion that the only outcome was summary dismissal. Given Mr Milne's clear position in evidence, the Tribunal concluded that had Mr Milne been aware of these two facts, then that would have materially affected the outcome and Mr Milne would not have made the decision to dismiss the claimant.

58. The failures in the investigation were relevant to the decision to dismiss because it resulted in an absence of material information at the time of the decision to dismiss which had a bearing on the decision to dismiss. For these reasons, the Tribunal concluded that the investigation was not reasonable in all the circumstances.

59. In its consideration of the reasonableness of the investigation in all the circumstances, the Tribunal considered it to be important that although Mr Milne's position was that it was not appropriate to bring matters into the workplace, and it was clearly the claimant's position at the investigatory meeting that he had been provoked by Mr Watt's comments about his ex-girlfriend and that there was relevant history and a background to the incident, there was no investigation into Mark Watt's conduct in respect of the 9 June incident or otherwise. There was no investigation into the allegations made by the claimant in respect of Mr Watt. In these circumstances, the Tribunal accepted the claimant's representative's submissions that the investigation did seek to verify the allegation made against the claimant that he had engaged in aggressive and threatening behaviour towards Mr Watt, rather than to establish the facts as to what had occurred in the incident between the claimant and Mr Watt on 9 June.

60. In its consideration of the fairness of the claimant's dismissal in terms of Section 98(4) ERA, the Tribunal considered the issue of the respondent's alleged inconsistency with regard to Mr Hamilton's dealing with the 9 June incident and the incident between Mr McCourt and Mr Burnside. This issue is relevant with regard to equity in terms of Section 98(4)(b) of the ERA.

61. There were differences between the incident involving the claimant and Mr Wat on 9 June and that involving Mr McCourt and Mr Burnside, but those differences were such that the incident involving Mr McCourt and Mr Burnside was more serious because there was no provocation of the aggressive behaviour, Mr McCourt had a supervisory position in respect of Mr Burnside and two other individuals became involved to prevent physical violence. The evidence of Mr Burnside as to what had occurred was unchallenged. On his evidence of the incident between him and Mr McCourt and on the evidence before the Tribunal in respect of the 9 June incident, it was apparent that both incidents were of aggressive and threatening behaviour towards a colleague in the workplace, being at the Hawbank Roads Depot. Mr Bumside's evidence on the way in which the incident between him and Mr McCourt was dealt with was uncontested and is set out in the findings in fact. On those facts, Mr Hamilton was clearly inconsistent in the way in which he dealt with the 9 June incident in comparison with the way in which he dealt with Mr McCourt's aggressive and threatening behaviour towards Mr Burnside. It was accepted by the Tribunal that the two incidents were sufficiently similar in the circumstances to entitle the Tribunal to reach an adverse finding regarding the fairness of the claimant's dismissal on the basis of inconsistent treatment. Inconsistency in the respondent's treatment of its employees is not condoned by Mr Milne, who considers consistency of treatment by the respondent of its employees to be very important.

62. In all these circumstances, the claimant's dismissal for conduct was an unfair dismissal in terms of Section 98(4) of the ERA. In all the circumstances, as set out above, and in particular where the decision to

dismiss did not take into account the fact that the claimant had not been suspended and had continued to work with Mr Watt without incident in the entire period from 9 June until his dismissal and where there was material inconsistency in the way in which Mr Hamilton dealt with a similar incident of aggressive and threating behaviour of an employee of the respondent towards a colleague at the Hawbank Roads Depot, the employer did not act reasonably in treating the claimant's conduct on 9 June as a sufficient reason for dismissing the employee determined in terms of Section 98(4) of the ERA in accordance with equity and the substantial merits of the case.

63. The Tribunal accepted that it was material that the claimant had not exercised his right of appeal in respect of his dismissal. The reasons for this were not before the Tribunal other than that the claimant believed that this was in the hands of his Trade Union. The Tribunal did not accept the submission made on behalf of the claimant that the appeal would have had no effect. The Tribunal considered that had the appeal being made on the basis of Mr Hamilton's inconsistency of treatment in respect of 9 June incident and the incident involving Mr McCourt and Mr Bumside and on the basis that the claimant had not been suspended and had continued to work with Mr. Watt without incident in the entire period between 9 June and his dismissal on 4 October, that that appeal is likely to have been successful. The appeal would have been to an independent panel in terms of the respondent's disciplinary policy.

64. The claimant sought reinstatement as his remedy for unfair dismissal. It was accepted by the respondent, on the basis of the clear evidence of Mr Milne, that there was no barrier to the claimant's reinstatement. The Tribunal exercised its discretion under Section 113 of the Employment Rights Act 1996 *("ERA")* in terms of Section 116 and took into account that the claimant wishes to be reinstated and that the respondent accepts that there is no barrier to reinstatement being practicable. Although contribution by the claimant to his dismissal was not relied upon by the respondent in the context of a Reinstatement Order, the Tribunal took into account the terms

of Section 116(1)(c), and took into account that where the claimant caused or contributed to his dismissal account should be taken of whether it would be just to order his reinstatement.

65. The Tribunal considered whether the dismissal was caused or contributed to by any extent by any action of the claimant. In doing so, the Tribunal considered whether the claimant had engaged in culpable or blameworthy conduct which had actually caused or contributed to his dismissal and if so. The Tribunal accepted that there was contributory conduct on the part of the claimant. The claimant had engaged in conduct which had contributed to his dismissal. The claimant accepted that on two out of the seven incidences of him approaching Mr Watt he had been aggressive towards Mr Watt. There was conduct on the part of the claimant which contributed to his dismissal to the extent that the claimant was blameworthy to some extent in the 9 June incident. The claimant had been aggressive and threatening towards a colleague. That conduct was the reason for the claimant's dismissal.

67. In all the circumstances, the Tribunal considered that the claimant had contributed to his dismissal by his conduct to the extent of 20%, on the basis of acceptance of the claimant's position that he had been aggressive towards Mark Watt on 2 of the 7 alleged occasions on 9 June. In circumstances where there was no dismissal arising from a similar but more serious incident between Mr McCourt and Mr Burnside at the same depot the Tribunal concluded that despite the extent to which the complainant had caused or contributed to his dismissal it was just to order his reinstatement.

68. In considering whether it was just to Order reinstatement, the Tribunal took into account the respondent's representative's submissions in respect of seeking a deduction from any compensatory award in respect of the claimant's unreasonable failure to comply with the ACAS Code. The Tribunal considered whether it was just to order reinstatement in these circumstances. The Tribunal took into account that the claimant may have

been successful at the appeal, which would have been to an independent panel. The Tribunal took into account that the claimant had understood that his Trade Union was dealing with the appeal but that that was not actioned. The reasons for that failure on the part of the Trade Union were not before the Tribunal.

69. An Order for reinstatement is made under section 114 of the Employment Rights Act 1996 *("the ERA").* In terms of Section 118 ERA an award for compensation of unfair dismissal consisting of a basic award and a compensatory award is made where an award is made under Section 112(4) or 117(3)(a) ERA. No award of compensation is made under Section 112(4) or 117(3)(a) of the Employment Rights Act 1996 because an Order for reinstatement is made under Section 114.

70. No issue was taken by the respondent in respect of the claimant's mitigation of his loss. The Tribunal considered that the claimant had taken reasonable steps to mitigate his loss. The Tribunal calculated the claimant's loss sustained which was attributable to his unfair dismissal. The respondent did not dispute the calculations or period of loss set out in the claimant's Schedule of Loss at (83) and (84) in the Supplementary Bundle. The Tribunal considered that this Schedule of Loss set out the loss sustained by the claimant which was attributable to his dismissal, that the claimant had made reasonable efforts to mitigate his loss and there was a reasonable assumption as to the length of time it will take for the claimant to obtain work at a similar level of remuneration to that received from his employment with the respondent. The Tribunal took that mitigation into account in calculating the amount to be paid by the respondent to the claimant under Section 114(4). The Tribunal considered that amount should be the sum of £532.86, reflecting the claimant's net loss arising from his dismissal. There was no payment in respect of period of notice to taken into account. There was no evidence before the Tribunal of continuing wage loss after the Tribunal hearing.

71. It is noted by the Tribunal that there was not enough information before it to enable a properly calculated award in respect of pension loss (i.e. calculated with regard to the relevant Presidential Guidance) to have been made, should a Compensatory Award have been made instead of a Reinstatement Order.

72. The claimant's representative relied upon breach of an 'express wage / work bargain' term in the claimant's contract of employment with the respondent. There was no evidence of any occasion when the claimant had worked and was not properly paid due wages for that work. There was then no evidence of breach of any such *"wage/work"* contractual term. In any event, had the Tribunal made a finding in respect of breach of contract, there would have been no additional award that made above that made in respect of the successful unfair dismissal claim, on the basis of the application of the principle that there should be no *"double recovery'* and in recognition of the claimant's mitigation of his loss.

Recoupment Regulations

73. The claimant has not been in receipt of any benefits since his dismissal and the Recoupment Regulations therefore do not apply.

Employment Judge: C McManus
Date of Judgment: 19 January 2018
Entered in register: 24 January 2018
and copied to parties