RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms J Davidson**

Respondent: **National Express Limited**

Heard at: **East London Hearing Centre (by CVP)**

On: **11, 12 and 13 October 2023**

Before: **Employment Judge Illing**

Representation
Claimant: **Ms Katherine Hampshire (Counsel)**
Respondent: **Mr Chris Reily (Solicitor)**

JUDGMENT

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

2. There is a 75% chance that the claimant would have been fairly dismissed in any event.

3. The respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 and it is just and equitable to increase the compensatory award payable to the claimant by 10% in accordance with s 207A Trade Union & Labour Relations (Consolidation) Act 1992.

4. The claimant caused or contributed to the dismissal by blameworthy conduct and it is just and equitable to reduce the compensatory award payable to the claimant by 75 %.

5. It is just and equitable to reduce the basic award payable to the claimant by 75% because of the claimant's conduct before the dismissal.

6. The complaint of breach of contract / wrongful dismissal is not well-founded and is dismissed.

7. The respondent shall pay the claimant the following sums:

7.1. A basic award of £**1016.82**

7.2. The total compensatory award amounts to **£2,664.70 net**. This is to be grossed up and the respondent is to be responsible for any tax or national insurance payable on these sums and includes:

7.2.1. A compensatory award of **£2,383.56 net**

7.2.2. An award of **£34.38** for loss of statutory rights

7.2.3. An award of **£246.76** for loss of pension rights

8. Note that these are the net actual sums payable to the claimant after any deductions or uplifts have been applied.

JUDGMENT having been given orally to the parties on **13 October 2023** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Procedural history

1. This claim was issued on 28 October 2021 and was originally listed for a 1-day full merits hearing on 19 April 2022. This was adjourned following an application by the respondent for a longer hearing.

The hearing

2. I had a bundle of 318 pages.

3. I heard evidence from:

3.1 The claimant – Mrs Jacqueline Davidson
3.2 Graham Tanswell
3.3 Michael Fisher
3.4 Peter Hales
3.5 Wesley Tierney

In Summary

4 The Respondent is a passenger carrying coach operator, operating coaches both across the country and airside at Stansted Airport.

5 The Claimant commenced employment on 4 January 2016 as a PCV driver from the Stansted Airport depot and worked until her dismissal on 14 July 2021. She was a highly qualified professional driver who was licensed to operate vehicles airside at the airport.

6 The respondent admits that the claimant was summarily dismissed and states that the potentially lawful reason for her dismissal was her conduct.

7 The claimant submits that the reason for her dismissal was because of the financial difficulties being suffered by the respondent at that time.

Findings of fact

Company policies and procedures

8 During 2020 and into 2021 the claimant worked intermittently as a driver, being furloughed when not required to work. She returned to work fully at the end of May 2021.

9 The respondent operates a number of policies to manage its responsibilities with regards to alcohol in the workplace. All policies and procedures are agreed with the recognised Union, being Unite, and this is not disputed by the claimant.

10 Within the Drugs, Psychoactive Substances and Alcohol policy, which I will refer to as the D&A policy, the guidance expressly provides levels of breath alcohol readings that are unacceptable to the company.

11 With regards to breath alcohol, this refers to tests from a wall mounted alcolock or a handheld breathalyser machine, the unacceptable level for alcohol is defined within the D&A policy as a sample equal to or above 8 micrograms in 100 millilitres of breath (8mg/100ml). This is significantly below the national drink driving limit of 35mg/100ml. The respondent asserts that this low level is required to meet its obligations to the health and safety of passengers, employees and other colleagues in and around the airport and to minimise risk to all. All drivers are required to provide a breath test at a wall mounted alcolock machine before they are permitted to start work.

12 S.7 of the D&A policy provides for a procedure should an employee blow a reading of 8mg/100ml or above. It provides that the employee will be retested between 5 – 10 minutes later and if still over this limit, they will be suspended from duty and the Disciplinary Procedure will be initiated, which will result in dismissal on grounds of gross misconduct. I find that this section of the policy provides for the employee to fail a test and then be retested, that is a total of 2 tests between 5 – 20 minutes apart.

13 S.13 of this policy provides further details as to how a sample will be collected and it provides that where there is cause for a test, such as a test being failed, a further test will be undertaken with a company witness present. The colleague may also be accompanied. This test will be carried out by a manager / supervisor or approved agency trained in the use of the test device. This again provides that if the second alcohol breath test is above the limit, the appropriate disciplinary action will be taken.

14 S.14 of the D&A policy summarises and repeats the limits and procedures as detailed above.

15 If an employee fails the breath test at the start of their shift, an alcohol test form is completed. This sets out the test process as detailed in the D & A

policy. This also sets out the acceptable levels of alcohol in a breath sample and provides that a fail at a second test will result in the employee being suspended and being referred to the Disciplinary procedure. This also provides that this will result in dismissal on the grounds of gross misconduct unless there are exceptional circumstances.

16 The Respondent has a Disciplinary Policy and Procedure that sets out its process and examples of misconduct and gross misconduct.

17 The Policy provides the following examples of misconduct as raised during submissions, including pleadings and evidence:

17.1 Unsatisfactory standard of work, appearance or driving standards (where applicable).

18 The Policy provides the following examples of gross misconduct as raised during submissions, including pleadings and evidence:

18.1 Deliberately or grossly negligent contravention of Company rules or procedures.

18.2 Fundamental breach of confidence.

18.3 Action likely to threaten the Health and Safety of yourself, fellow employees, customers or members of the public.

18.4 Reporting for duty under the influence of alcohol.

19 The Policy provides for a disciplinary process that includes:

19.1 An investigation where an employee is entitled to put forward their case.

19.2 Suspension where the allegation is of serious misconduct. Suspension is on full pay.

20 The disciplinary hearing; this provides for the potential outcome of Summary Dismissal for gross misconduct only. This states that in some instances the seriousness of the matter may mean the Company has no alternative but to summarily dismiss an employee in the interests of the Company, the interests of others and due to the seriousness of the matter.

21 An Appeal process; this provides that it is important for the manager hearing the appeal to understand the reasons for the appeal and the employee will have the opportunity to state the grounds / reasons for their appeal.

22 It is an accepted fact that the respondent carried out a process of redundancies in October 2020 to reduce headcount of drivers because of the pandemic. From the evidence of Mr Tanswell, I find that this process had been completed by the end of 2020.

23 It is also an accepted fact that the claimant was an experienced, qualified and highly performing colleague. There were no concerns or issues with

her performance and she had scored highly on a recent Driver Evaluation Rating.

The 25 – 26 June 2021

24 On 25 June 2021 the claimant received a diagnosis of a kidney infection for which she was prescribed antibiotics, specifically Amoxicillin 500mg.

25 On the morning of 26 June 2021, the claimant arrived at work and took the daily breath test. The first result from the wall mounted alcolock machine at 0350 was 13 mg per 100ml, which is below the national limit of 35mg per 100ml, but above the acceptable limit as given in the D&A policy.

26 The claimant reported the fail to her supervising manager, Mr Michael Fisher. Mr Fisher asked the claimant to wait in his office as she would need to take further tests.

27 At this time, Mr Fisher states that he informed the claimant not to eat, drink or smoke anything. The claimant disputes this.

28 In evidence, Mr Fisher explained that he permitted the claimant to take another breath test from a handheld machine to ease her mind that this was simply an error or false reading. He states that this provided another fail. The Claimant has accepted in evidence that there was this additional test. As this result was not recorded the respondent disregarded this test.

29 In the period between the first and second test, the claimant asked to go to the toilet. She was permitted to do so. On returning, she was drinking from a bottle of water. It is Mr Fisher's evidence that he then reminded the claimant not to eat or drink and that the claimant slammed the bottle down onto the table. It is the claimant's evidence that she was not aware that she was not permitted to drink.

30 Prior to the second test, there was a delay as Mr Fisher was required to ask a colleague to attend as a witness. Mr Euan Alexander was that witness.

31 The claimant took a second test from a handheld machine, in accordance with the policy, at 0410 which gave a result of 10mg per 100ml.

32 In the period between the second and third test, the claimant asked to go to the toilet again. Mr Fisher asked why so soon, and the claimant informed him that she had a kidney infection. Again, she was permitted to go to the toilet and was not accompanied. Upon her return, Mr Fisher says that the claimant was eating a mint. The claimant states that she was sat next to Mr Fisher when she put the mint in her mouth. I find that Mr Fisher told her she was not permitted to eat or drink and the claimant spat the mint out.

33 On balance, I prefer the evidence of Mr Fisher, which is supported by his contemporaneous statement. I find that the claimant was told immediately upon failing the first breath test that she should not eat, drink or smoke whilst further tests were taken.

34 Mr Fisher then allowed the claimant to take a third test at 0425, which gave a reading of 8mg per 100ml.

35 It is accepted by the claimant that all of these breath samples are above the respondent's acceptable limits.

36 During the time in Mr Fisher's office, it is Mr Fisher's evidence that the claimant informed him that she had been drinking the night before. He says that she told him that she had had 3 or 4 drinks the night before and had had some vodka and a mixer. Mr Fisher's contemporaneous statement states that the claimant had said that she had been drinking the night before. It does not refer to vodka.

37 This was an interview immediately following a failed alcohol breath test. I find that in admitting to Mr Fisher that she had been drinking the night before, she was admitting to having drunk an alcoholic drink.

38 Mr Fisher also states that the claimant told him that she had washed her hair, sanitised her hands and used Listerine before leaving home. In evidence the claimant confirmed that washing her hair is part of her usual routine and that she regularly used Listerine at home, usually 2-hours before attending work. Mr Fisher states that he told the claimant that if they could affect the test, this would have dissipated within 5 – 10 minutes, which is why the company allows for longer between the re-tests.

39 Following the failure of the third test, Mr Fisher sent the claimant home. I find that this was in accordance with the company policy. He also telephoned Mr Graham Tanswell to inform him that the claimant had failed the test and been sent home. The claimant believes that Mr Fisher told Mr Tanswell that he believed that the claimant had been drinking vodka. It is Mr Fisher and Mr Tanswell's evidence that they did not discuss what the claimant had drunk but the call had been in accordance with operational procedures. I find that this call was in line with operational procedures in that the claimant had failed the breath test and had been sent home.

40 Mr Fisher immediately prepared an investigation statement. He states that the claimant told him during his meeting with her that she had had 3 or 4 drinks the night before. He also stated that he believed that she was trying to influence the results by taking mints and visiting the toilet.

<u>The investigation meeting</u>

41 The claimant was invited to an investigation interview on 30 June 2021. The investigation manager was Mr Peter Hales (Duty Manager, Stansted City Depot) and the allegation was that the claimant had supplied a positive alcohol breath sample when signing on for duty on 26 June 2021.

42 Mr Hales confirmed that this was not a disciplinary meeting but an investigation meeting. The claimant had available the test rests, the D&A policy and Mr Fisher's statement.

43 The claimant confirmed that she was happy with the way the tests had been

conducted. She explained to Mr Hale the events of the morning including her breakfast, the use of the hand gel and the use of the Listerine, as she was taking tablets that left a horrible taste in her mouth.

44 During this interview the claimant denied telling Mr Fisher that she had had a drink the night before and that she had only drunk water. The claimant suggested that the reason for the failed tests were the Listerine and the antibiotics.

45 The claimant admitted that she had had alcohol, vodka, on the 24 June and came into work and had passed the breath test. She explained that if there had been alcohol in her system she would have stayed at home and called in sick or come in late.

46 The claimant confirmed that she had been diagnosed with a kidney infection on 25 June 2021 and was on antibiotics and couldn't drink. She further confirmed that she had just started the course of antibiotics and the last tablet, before coming in to work, was on the evening of the 25 June.

47 As part of the investigation, Mr Hales offered to test the effect of Listerine and the hand gel in relation to a breath test. The claimant did not wish to participate.

48 Mr Hales used the mouthwash and then blew a test. He recorded a score of 46mg/100ml.

49 The claimant then asked to conduct the test. She recorded a score of 44mg/100ml.

50 Both retested after 10-minutes and the score was recorded as 0mg/100ml. The claimant accepted this as the result during this meeting.

51 Mr Hales then redid the test with the carex hand gel and scored 6mg/100ml.

52 Mr Hales discussed the scores with the claimant and she accepted that the results of the tests during this meeting were different from the results on 26 June.

53 The claimant submitted that she was on antibiotics and that she always uses Listerine at home 2-hours before her duty. She further stated that she had not drunk alcohol the night before coming into work and that she would drink on rest days, either vodka or southern comfort, mixed.

54 Mr Hales was satisfied that there was a case to answer under the disciplinary policy in that the claimant had supplied a positive alcohol breath sample when signing on for work on 26 June 2021. The claimant was suspended on full pay.

55 A disciplinary investigation report was prepared by Mr Hales on 30 June 2021, which confirmed that Listerine had been considered as a possible cause but upon testing was shown not to be the case.

The disciplinary hearing

56 The claimant was invited to a disciplinary hearing by letter dated 5 July 2021. The letter raised the following allegation:

56.1 Breach of National Express Drugs, Psychoactive substances and Alcohol Policy by supplying a positive alcohol breath sample of 26 June 2021 leading to a management-imposed suspension.

57 The letter invited the claimant to be accompanied and warned her that one outcome may be gross misconduct with a possible outcome of dismissal, with or without notice. It confirmed that no decision would be made until she had had a full opportunity to put forward her version of events and any mitigation.

58 Mr Graham Tanswell, Operations Manager, was appointed as the disciplinary manager and a disciplinary hearing took place on 14 July 2021. He had received and reviewed the documents from Mr Fisher, Mr Hales, the test results and the D&A policy.

59 The claimant was accompanied and confirmed that the notes of the meeting of the 30 June 2021 were an accurate reflection of the meeting with Mr Hales.

60 Mr Tanswell asked the claimant why she had alcohol in her system and she stated that she had Listerine in her car just before she came into work.

61 Mr Tanswell and the claimant reviewed the CCTV footage of her arrival at work and the claimant confirmed that she used the Listerine at the back of the car. I find that it is not possible to see whether the claimant did or did not use Listerine inside the car or at the rear.

62 The claimant denied drinking alcohol the night before attending work and stated that she drinks on her days off. She confirmed that her go to drink is vodka.

63 Mr Tanswell asked the claimant to explain how the alcohol got into her system and she stated that it could have been the night before, it has to have been the night before, I can't remember. Furthermore, she said, I must have had something.

64 On being asked how much, the claimant admitted to having only a couple.

65 Mr Tanswell discussed the Listerine test with the claimant, which Mr Hales had conducted. The claimant confirmed that the outcome of the test was that it was gone after 10-minutes.

66 The claimant was asked if there was anything else she wanted to add and she stated that "this was the first time it has happened as I say, it is possibly a mistake."

67 The claimant's companion was asked if they had anything to ask and he

(Clive March) confirmed that he had never been in his car intoxicated and apart from on a flight, he had never seen her drunk.

68 The disciplinary hearing was then adjourned.

69 Mr Tanswell confirmed that he had decided that there was a case to answer and that he was taking into account the claimant's length of service, clean record, the seriousness of the office and any extenuating circumstances, which he believed to be none. The claimant was asked if she wanted to give any mitigation.

70 In mitigation the claimant confirmed that she was having problems at home and that she had financial difficulties.

71 Mr Tanswell gave the claimant his decision. In explanation he confirmed the following:

71.1 that the claimant had failed the breath test on 3 occasions on 26 June 2021. This is not contested by the claimant.

71.2 He had concerns as to how her evidence had changed in relation to drinking the night before, or not.

71.3 That he believed that she had told Mr Fisher that she had had 3 or 4 vodkas the night before. Vodka is first recorded in the investigation meeting notes between the claimant and Mr Hales when the claimant admits to drinking vodka 2-days before the 26th June. I find that this decision supports the claimant's belief that there was a conversation between Mr Fisher and Mr Tanswell prior to the disciplinary meeting where Mr Fisher's concerns regarding vodka were discussed. I also find that Mr Tanswell would have been made aware of vodka being the claimant's drink from Mr Hale's meeting notes.

71.4 That the control test with Listerine by her and Mr Hales showed that the results were different to those of the 26 June. The claimant accepted this result during the meeting with Mr Hales and with Mr Tanswell.

71.5 That she was inconsistent during the disciplinary hearing as to whether she had had a drink or not and contrary to rule 2 of Driving Out Harm another company policy.

71.6 That this was not about her being drunk, but about supplying a sample over the company's acceptable level.

71.7 That an accident whilst under the influence could have serious consequences to her and the Company.

72 Mr Tanswell determined that the claimant's conduct amounted to gross misconduct and decided to summarily dismiss her.

73 The claimant was given the opportunity to appeal.

74 I find that Mr Tanswell was not unfairly influenced by any prior conversation with Mr Fisher or Mr Hales in the making of his decisions and that he maintained an open mind during the hearing to listen to the claimant and consider her position.

75 The claimant received a letter confirming her dismissal dated 14 July 2021. This did not include Mr Tanswell's detailed findings but did include a copy of the meeting notes providing those details.

76 The claimant has asserted in evidence that Mr Tanswell was aggressive in his questions. I find that he was not aggressive but concerned that the claimant's answers were changing.

The appeal against dismissal

77 The claimant submitted her appeal which is undated**.** Her grounds of appeal were:

77.1 That she had not drunk alcohol the night before the fail.
77.2 That she had used Listerine as she got out of the car.
77.3 That she had not failed a test before.
77.4 That she would have passed a blood test.
77.5 That every body is different.
77.6 That she had a kidney infection and was taking antibiotics.

78 With her letter of appeal, the claimant provided evidence that Listerine can "fool" some breathalysers.

79 By letter dated 29 July 2021 the claimant was invited to an appeal hearing that was to be chaired by Wesley Tierney, Operations Development Manager. She was invited to bring a companion.

80 The claimant submitted a further letter of appeal dated 2 August 2021. This letter of appeal raised provided further details of the above grounds, raised concerns regarding Mr Tanswell's adversarial approach and highlighted grounds of mitigation including her never having previously failing a test, her length of service and that she had an unblemished record.

81 The claimant also stated that the level of alcohol in her system was below the national levels and that the third test was within the company's acceptable limit.

82 The claimant attended the appeal meeting on 5 August 2021 with her companion, Clive Marsh.

83 Mr Tierney explained to the claimant that the appeal was an opportunity to consider the further information that she had brought to light and not a repeat of the disciplinary. The claimant understood this.

84 In evidence Mr Tierney accepted that the meeting notes were not an accurate reflection of the meeting. I find that given that 2 years have

passed, the notes will still be more reliable than a memory as they are contemporaneous. The meeting lasted 2 hours and there are 4 pages of notes.

85 I find that Mr Tierney reviewed the meeting notes of the investigation meeting by Mr Hales and the disciplinary meeting with Mr Tanswell and limited his outcome to the following:

85.1 Taking into account the drink drive limited in England.
85.2 National Express's Alcohol Policy.
85.3 Never Previously Failed an Alcohol Test.

86 In evidence Mr Tierney confirmed that the Listerine would have no bearing. The claimant blew a fail 3-times, it was black and white. For Mr Tierney, in evidence, the key issue was the Listerine, which he stated would not have any bearing on the levels of the failed tests and the time taken between the tests.

87 The notes support that Mr Tierney offered to repeat the Listerine test, but the claimant refused.

Findings of fact on contribution, wrongful dismissal and *Polkey*

88 The findings of fact set out below are the Tribunal's own, reached on the balance of probabilities, relevant to the issues of whether the Claimant contributed to her dismissal by her own blameworthy conduct (contribution), whether she committed a repudiatory breach of contract, such that the Respondent was entitled to dismiss her without notice (wrongful dismissal) and whether, if the dismissal was tainted by unfairness, there was a chance that the respondent would have fairly dismissed her in any event (*Polkey*). There is considerable overlap between the factual issues relating to these three questions.

89 The claimant had 6-years of service with the respondent. My findings are based on the evidence before me, the principal evidence being the following:

89.1 Three positive breath tests over the course of 35-minutes.
89.2 The Listerine breath tests during the investigation with Mr Hales.

90 There is also additional evidence in the form of a random breath test the claimant was required to take in 2018 when she was also taking a course of Amoxicillin. The claimant passed this breath test.

91 The claimant has submitted that she did not drink on the night of 25 June 2021 as she was taking antibiotics. She also submits that the breath alcohol test was affected by her use of Listerine, either during her morning routine or a small mouthful in the car park as she walked in and / or the antibiotic she was taking. I will take each submission in turn.

Listerine

92 I have considered two elements to the Listerine submission. Firstly, when the Listerine was taken and secondly, the effect of the Listerine on the breathalyser.

93 The claimant originally informed Mr Fisher that she had taken Listerine as part of her morning routine, some hours before attending work. In subsequent interviews, the claimant submitted that she had taken Listerine in the car park only moments before using the breathalyser. This was a very small quantity but immediately before the test.

94 During the investigation meeting, the claimant and Mr Hales took large amounts of Listerine and used the breathalyser. Both scored readings of +40mg/ml, which reduced to 0mg/ml in ten minutes.

95 I find that I accept that Listerine can influence the result of an alcohol breath test, but that this influence is limited to 10-minutes or less.

Amoxicillin

96 It was raised in evidence that the claimant had had a random breath test 13 December 2018 when she was also taking Amoxicillin. The claimant accepted in her statement that she passed this breath test. I find that Amoxicillin did not influence the alcohol breath tests.

97 Additionally, I find that during the course of the interviews, the claimant's answers change. This is notable in the disciplinary interview and I find that the claimant's answers change from her "last alcoholic drink being the night before", to "I may have had a drink", to "I can't remember".

98 On the balance of probabilities, I conclude that the breath tests were positive because the claimant had consumed alcohol and that the most plausible reason is that she did consume alcohol on the evening before attending work.

99 The respondent operates a D&A Policy which provides that the level of alcohol in a breath test of 8mg/100ml is unacceptable. This is significantly below the national drink driving limit of 35mg/100ml. The respondent asserts that this low level is required to meet its obligations to the health and safety of passengers, employees and other colleagues in and around the airport and to minimise risk to all. All drivers are required to provide a breath test at a wall mounted alcolock machine before they are permitted to start work. I find that this is a reasonable course of action in the circumstances.

100 The respondent's D&A policy and disciplinary policy both provide that the provision of a breath test that is positive for alcohol is gross misconduct, for which the sanction is summary dismissal. The disciplinary policy provides that the sanction will be dismissal on the grounds of gross misconduct unless there are exceptional circumstances.

101 I am satisfied that the provision of three positive breath tests by the claimant

did amount to gross misconduct. Taking the claimants case at its highest, neither the use of the Listerine in the car park or the taking of Amoxicillin the night before amount to exceptional circumstances.

102 Turning to the procedure utilised by the respondent; I am satisfied that the initial meeting, the investigation and the disciplinary were in accordance with the respondent's disciplinary policy. However, I find that for the appeal, the meeting notes are lacking support to Mr Tierney's witness evidence and as detailed above, I find that Mr Tierney did not fully consider the claimant's grounds of appeal as detailed within her two letters of appeal. I find that the appeal meeting was flawed.

The law

Unfair Dismissal

103 An employee has the right not to be unfairly dismissed, s. 94(1) of the Employment Rights Act 1996 (ERA). The relevant test is at s.s.98(1), (2) and (4) are relevant to this case. This states:

98. General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

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

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

(2) A reason falls within this subsection if it— …
(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."

104 The question of fairness in a conduct dismissal is ***British Home Stores Ltd v Burchell*** [1980] ICR 303 (EAT) which held that a dismissal on the grounds of conduct will be fair where, at the time of dismissal, a) that the employer must have a genuine belief in the misconduct; b) reasonable grounds for that belief; and c) the employer carried out as much investigation as was reasonable in the circumstances. I remind myself that I can only take account of those facts or beliefs that were known to those who took the actual decision to dismiss at the time of dismissal.

105 The test as to whether the dismissal fell within the band of a reasonable response

are summarised within the judgment of Brown-Wilkinson J in ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17, which states:

(1) the starting point should always be the words of S.98(4) themselves;

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

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

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

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

106 In considering the "band of reasonable responses" I also direct myself to consider the question as to whether the respondent has acted reasonably or unreasonably in deciding to dismiss in accordance with equity and the substantial merits of the case, s.98(4) ERA. ***Newbound v Thames Water Utilities Limited*** [2015] I.R.I.R. 734.

107 I am also directed to consider ***Ball v First Essex Buses Limited*** (Case No: 3201435/2017). In contrast to ***Ball v First Essex Buses Ltd***, the breath test carried out by the respondent was neither a random test nor a test carried out with cause. The first test was a routine test carried out before every shift. The second and third tests, were tests with cause. The ***Ball v First Essex Buses Limited*** case is with regard to the presence of cocaine, whereas this case is in relation to alcohol, a legal and readily obtainable substance. Did the disciplinary process fail to follow the evidence, and did it include a degree of common sense? I find that the respondent took into account the evidence provided in the claimant's breath tests and the Listerine test. The respondent did apply common sense to the tests before it in that the respondent undertook a very strict and serious approach towards health and safety and its obligations towards employees, passengers and third parties. It considered the possibility that Listerine may have triggered a false positive, which the claimant had accepted at the time of her dismissal, and only then made its' decision.

Procedure

108 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****.*

109 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.

110 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]).

111 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.**

112 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.'

113 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.'

114 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).***

Wrongful dismissal

115 Wrongful dismissal is a claim of breach of contract by the employee against the employer for the unpaid notice pay.

116 The question of what level of misconduct is required for an employee's behaviour to amount to a repudiatory breach is a question of fact for the court or tribunal. The question is whether the conduct "so undermine[s] the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment" (***Neary v Dean of Westminster*** [1999] IRLR 288, approved by the Court of Appeal in ***Briscoe v Lubrizol Ltd*** [2002] IRLR 607 and by the Privy Council in ***Jervis v Skinner*** [2011] UKPC 2).

Submissions

117 Both representatives provided an agreed list of issues, helpful skeleton arguments and authority bundles, which have been taken into consideration.

Conclusions

118 The representatives provided an agreed list of issues.

Unfair Dismissal

119 In reaching my conclusions. I will answer the questions raised in the this agreed list. This list has been prepared on the principles identified in ***BHS v Burchell***.

120 I remind myself that I can only take account of those facts or beliefs that were known to those who took the actual decision to dismiss at the time of dismissal.

What was the reason for the dismissal?

121 I find that the reason for the dismissal was the conduct of the claimant in that on the morning of the 26 June 2021 she arrived at work and failed 3 breath tests contrary to the respondents D&A policy.

122 Conduct is a potentially fair reason for dismissal.

In accordance with the equity and substantial merits of the case did the Respondent act reasonably in all of the circumstances in treating this as sufficient reason for dismissing the claimant?

123 I outline the circumstances of this case:

123.1 The respondent is a national coach operator, operating coaches across the country but also within the perimeter of Stansted Airport.

123.2 The respondent operates a strict D&A policy that is supported by the disciplinary policy.

123.3 The company D&A policy and disciplinary policy expressly provide strict acceptable alcohol limits and that breaches will be considered as gross misconduct.

123.4 The respondent requires its employee drivers to pass a breath test, to its own acceptable levels, before every shift.

123.5 The breath alcohol level that is considered unsatisfactory is below the level provided for a legal breath alcohol level. I have found that this is reasonable and evidence has been provided that other companies do likewise.

123.6 The claimant was a professional driver licenced to operate airside, that is within the perimeter of the airport.

123.7 The claimant attended work on time at 0350 for her shift and failed 3 breath tests over the course of 35 minutes.

123.8 That the effect of Listerine on the alcolock and other devices was considered and in a separate test was shown to affect the breathalyser immediately, and that the effect reduced to zero within 10-minutes. This effect was accepted by the claimant during the investigation and at the start of the disciplinary.

123.9 The respondent is a large company with a professional HR department.

123.10 The claimant's points of mitigation which include:

123.10.1 That she was taking antibiotics
123.10.2 That the Listerine in the car park influenced the alcolock and other breathalysers
123.10.3 That she had 5-years' service with an exemplary record.

124 In considering this question, the decision as to whether the dismissal was fair, requires the consideration of four further questions.

Had the employer reached this belief on reasonable grounds?

125 Taking the claimant's position at its highest, so accepting that the Listerine was used in the car park, the evidence against her includes:

125.1 The 3 failed breath tests, which were accepted by the claimant.

125.2 The Listerine test as performed by Mr Hales and as accepted by her in subsequent meetings.

126 I have found that I accept Mr Fisher's evidence in that the claimant admitted to drinking vodka before attending work on the 26 June 2021. I find that I accept Mr Fisher's evidence which was in the context of a conversation following the failure of three breath tests, which is supported in part by his contemporaneous statement. I conclude that there were reasonable grounds for the respondent to believe that the claimant had acted as alleged, the allegation being that she provided a positive breath test for alcohol.

Did the respondent have a genuine and honest held belief in the misconduct?

127 The breath tests show that the claimant blew over the company's acceptable limit 3-times in 35 minutes. I have found that these readings have been accepted by the claimant and by the respondent. There was no assertion at the time that the breathalysers were faulty. The primary position put forward by the claimant is that she took a small mouthful of Listerine moments before taking the first breath test and that this affected the results.

128 I have found that the results of the Listerine test as conducted by Mr Hales with the claimant were accepted by the claimant, in that they showed a drop from a reading of +40mg/100ml to 0mg/100ml in 10 minutes. The claimant also accepted that this was different to the readings from the breathalyzer on 26 June, which a drop from 13mg/100ml to 10mg/100ml to 8mg/100ml across 35 minutes.

129 I conclude that the respondent held a genuine and honest belief in the misconduct.

Was the belief reached following a reasonable investigation?

130 The investigation required was an immediate evaluation of the breath alcohol levels as provided by the claimant on 26 June 2021 when she attended work. In accordance with the respondent's policy, having blown a failed result, the claimant was permitted to provide 2 further samples of breath within the proscribed time frames. All 3 samples failed.

131 At the first meeting, the claimant referred to her use of Listerine at home. Subsequently, she has contended that the failures were because of her use of Listerine in the car park and / or her taking antibiotics. Taking the claimant's case at its highest, which includes acceptance that she did use Listerine in the car park, the investigation by Mr Hales into the effects of Listerine was reasonable. Additionally, the claimant accepted those results and that it showed a different pattern to the failed tests.

132 I find that the respondent's belief was reached following a reasonable investigation.

Was the dismissal within the range of reasonable responses?

133 My starting point to consider this question is s.98(4) and I remind myself that this question is in relation to the reasonableness of the respondent's conduct and not what I consider to be fair. Additionally, I may not substitute the employer's decision with my decision as to what was the right course of action to adopt. I am to consider whether, in all of the circumstances, a reasonable employer would consider that the actions of the claimant were sufficient to warrant a dismissal.

134 In considering this I take into account all of the circumstances of the case as detailed above. I have found that the respondent formed a genuine belief that the claimant acted in the manner alleged and that this was a

reasonable belief to hold.

135 In considering the "band of reasonable responses" I also direct myself to consider the question as to whether the respondent has acted reasonably or unreasonably in deciding to dismiss in accordance with equity and the substantial merits of the case.

136 Equity refers to fairness and justice and the question is whether the sanction by the respondent was fair and just in all of the circumstances. The conduct of the claimant is evidenced in 3 failed breath tests. I have found that the respondent reasonably and genuinely believed that the tests were correct and there has been no contention that the equipment was faulty. I have also found that it was reasonable for the respondent to reject the contention by the claimant that the Listerine used in the car park affected the result of the breath tests.

137 The claimant has referred to ***Ball v First Essex Buses Limited***. The test carried out by the respondent was neither a random test nor a test carried out with cause. The first test was a routine test carried out before every shift. The second and third tests, were tests with cause. The ***Ball v First Essex Buses Limited*** case is with regard to the presence of cocaine, whereas this case is in relation to alcohol, a legal and readily obtainable substance. Did the disciplinary process fail to follow the evidence, and did it include a degree of common sense? I find that the respondent took into account the evidence provided in the claimant's breath tests and the Listerine test. The respondent did apply common sense to the tests before it in that the respondent undertook a very strict and serious approach towards health and safety and its obligations towards employees, passengers and third parties. It considered the possibility that Listerine may have triggered a false positive, which the claimant had accepted at the time of her dismissal, and only then made its' decision.

138 In considering the substantial merits of the case, this case is about the strict adherence to policy and procedures pertaining to the consumption of alcohol by the respondent's employees. The respondent operates in a high-risk sector and it is imperative that all employees adhere to the strict alcohol limits as provided by the D&A policy.

139 However, I find that the procedure by the respondent was flawed at the appeal stage in that the appeal manager closed his mind to the claimant's assertions and did not address her points of appeal within his outcome.

140 I have found as a finding of fact that the appeal hearing was flawed. I therefore conclude that the respondent did not act in a procedurally fair manner.

141 I find that in all of the circumstances of the case, I conclude that the dismissal falls outside of the band of a reasonable response by a reasonable employer.

Polkey

142 I have found that the claimant was unfairly dismissed for procedural reasons as at the date of the appeal. The appeal was unfair because the appeal officer did not keep an open mind and he did not address the claimant's points of appeal. I am satisfied that had the appeal manager addressed his mind, openly, to the points raised by the claimant, there was a small possibility that he would have allowed the appeal. I have found that the claimant did consume alcohol leading to the positive tests and I have found that there were no exceptional circumstances to take into account, I therefore find that the likely conclusion of a fair procedure would still have been the claimant's dismissal, but this is not a certainty. Therefore, I conclude that there was a 75% chance that had a full and fair procedure been followed, she would have been dismissed in any event.

Contribution

143 I have found that the most plausible reason for the positive alcohol breath tests was that the claimant had consumed alcohol the evening before attending work.

144 I also find that the claimant has contributed to her dismissal by consuming alcohol and providing a positive breath alcohol test. It is solely the claimant's actions that have led to failure of the three breath tests.

145 The claimant's breath alcohol readings fell from 13mg/100ml to 10mg/ml to 8mg/ml over the course of 35-minutes. I accept that whilst these readings are contrary to the respondent's policies, these readings are only just over the respondent's acceptable levels and therefore conclude that any award should be reduced by 75% to reflect the claimant's contributory conduct.

Acas Code

146 I have found that the procedure followed by the respondent was flawed, specifically at the appeal stage. The appeal manager failed to address the claimant's points of appeal in any reasonable manner and that his mind was closed to the points of appeal raised by her. I find that the respondent has unreasonably failed to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures in relation to the appeal and that a 10% uplift should be applied to the award.

Wrongful Dismissal

147 It is common ground that the claimant was dismissed without notice.

148 The claimant started with the respondent on 4 January 2016 until her dismissal on 14 July 2021**.** The contract provides for 2-weeks' notice, so statutory notice will apply. The claimant had 5-year's continuous service as at the date of dismissal.

149 The respondent's D&A Policy and Disciplinary Policy and procedure expressly identifies that the provision of a breath test that is positive for alcohol will be considered as gross misconduct. I have found that it is a reasonable requirement of the respondent to operate strict limitations for its

employees with regard to what is an acceptable level of alcohol. The limitation set by the respondent is that any reading at 8mg/100ml or above is unsatisfactory. Whilst the readings were 13mg/100ml, 10mg/100ml and 8mg/100ml, they were all failures. Given the importance placed by the respondent to its obligations towards health and safety and the seriousness of the failure of three breath tests, I find that the misconduct of the claimant is sufficient to amount to a breach of contract amounting to gross misconduct warranting summary dismissal and as set out in the respondent's D&A Policy and Disciplinary Policy. On this basis the claim for notice pay fails and is dismissed.

Remedy

150 Following her dismissal from the respondent, the claimant gained new employment almost immediately with Stephenson's of Essex Ltd.

151 After 3-weeks, the claimant left this employment to work for FlagFinders Limited at a lower level of earnings. The claimant stated that she left because she did not like the way Stephenson's treated her and other colleagues in relation to the provision of facilities during rest periods and delays in returning to the main base. The respondent submitted that it was unreasonable for the claimant to leave this employment to work at a lower level of earnings.

152 I accept the claimant's evidence and find that it was not unreasonable for her to change employer for the reasons she has given.

153 There are several different time periods to be considered, which have different levels of earnings attached to them.

154 The key dates are as follows:

Event	Date	Period to next date
Dismissal	14 July 2021	
Appeal	5 August 2021	3-weeks
Start Work at Stephenson's of Essex Ltd	30 July 2021	NB overlap of 6-days
Leave work at Stephenson's	21 Aug 21	3-weeks
Start work At Flag Finders	30 Aug 21 to date of hearing 11 Oct 23	110-weeks
To 65 birthday	11 Oct 23 – 2 Feb 2025	68-weeks
To 70 birthday	3 Feb 2025 – 2 Feb 2030	260 weeks

155 The claimant's average rate of pay would have increased in accordance with the evidence provided. For the dates above, the average rate of pay has been calculated with reasons. The amounts are summarised in the calculation table annexed to this judgment. The following time periods are

used:

Period	Dates	Rate of pay (gross) per hour
1	14 Jul 21 4 August 21	£11
2	5 Aug 21 – 31 Dec 21	£11
3	1 Jan 22 – 31 Dec 22	£12.25
4	1 Jan 23 – 31 Dec 23	£14
5	1 Jan 24 – 31 Dec 24	£14
6	1 Jan 25 – 2 Feb 25	£14

Basic Award

156 Calculating average weekly pay at the respondent: The claimant asserts that the Tribunal should use the single pay slip dated February 2020 as this gives the pre-pandemic average earnings, including overtime. This provides a gross weekly wage of £737.11.

157 The respondent asserts that the Tribunal should use the payslips from November 2020 to June 2021. At this time, the claimant received furlough pay, which was topped up to 100% of average earnings. It is notable that during this period average pay could be paid at 80% of the average earnings of the employee based on the same month in the previous year, using the payslips for Nov 2020 – Jun 2021 i.e., the look back principle applied. The calculation for average weekly pay is as follows:

157.1 Total earnings gross = £18,434.06 over 34-weeks, giving an average gross weekly wage of £542.18.

158 In considering what the average weekly wage is for the claimant's award, I find that it is just and equitable to use the payslips from November 2020 to June 2021 and the average weekly pay, which includes furlough. The respondent would have been required to pay 80% of the higher of the monthly average earnings or to look back to the average earnings of the employee in the same month of the previous year and pay 80% based on the higher of the two.

159 I accept that the respondent topped up this pay to 100% of average earnings.

160 The amount of work / overtime will have changed for the claimant during and after the pandemic. It is not reasonable to assume that it would stay any particular level and I find that reflecting back on the previous year of earnings provides a fair representation of the claimant's average earnings, which is what the furlough scheme did at this time.

161 I will apply the average gross weekly wage of £542.18. This is just under the cap of £544.

162 The claimant had 5 years of service and she was 61 at dismissal.

163 The basic award is 5 x 1.5 x 542.18 = £4,066.37 subject to deductions for contribution.

164 The total awarded is **£1016.82**

165 The process of deductions and uplifts is shown in the table annexed to this judgment.

Compensatory Award

166 Again, using the same payslips at 223 – 230 of the bundle, the total net pay was £14,291.08 over 34-weeks, giving an average of £420.33 per week.

167 Calculating the average hours per week. It is submitted that at this time, the claimant was being paid £11 per hour (gross). Taking the average weekly gross pay of £542.18 as determined above, this equates to an average of 49.3 hours per week.

168 The net pay at Stephensons, where she was paid weekly, is £1,459.98 over 3-weeks, which gives an average of £486.66 per week

169 The net pay for Flag finders is £409.48 throughout. No pay rise for this employer has been taken into account. I accept that there would be a rise in time.

Period 1

170 This is the period from the date of dismissal to the date of appeal. During this period, the claimant worked for Stephensons.

171 There is no deduction or uplift to apply as the dismissal process was not yet found to be unfair.

172 The claimant would have earned from the respondent £1,260.98 during this period.

173 The claimant did earn £31.20 from Stephensons.

174 The claimant's net loss is period 1 is **£1,229.78**.

Period 2

175 This is the period from the date of the appeal to the 31 December 2021. This includes the change of employment from Stephensons to Flagfinders.

176 The initial period equates to 3-weeks. (5 August 2021 – 21 August 2021) where the claimant was employed by Stephensons. During this time:

176.1 The claimant would have earned £1,260.99 from the respondent.

176.2 The claimant did earn £1,459.90 from Stephensons.

176.3 There is no loss of earnings for this period.

177 From the 22 August 2021 to 29 August 2021, the claimant was unemployed. Her net loss in this period was £420.83.

178 From 30 August 2021 – 31 December 2021 is 17-weeks. During this time:

178.1 The claimant would have earned £7,145.61 from the respondent.

178.2 The claimant did earn £6,961.16 from Flagfinders.

178.3 The claimant had a net loss of £605.28

179 Applying a Polkey deduction of 75%, followed by an Acas uplift of 10%, then a contribution deduction of 75%, this gives an award of **£41.61** for period 2.

Period 3

180 This is the period from 1 January 2022 to 31 December 2022.

181 The claimant submits that if she had remained with her employer her salary would have increased on 1 Jan 2022 to £12.25 per hour gross. Retaining the average hours at 49.3, this gives an average gross weekly earnings of £603.79

182 To determine net figures, I have considered the gross salary to be 52 x £603.79 = £31,397.15

183 Reviewing Table 11 of 2021 – 2022 Income Tax and NI Gross to Net Salaries 2021 – 22, gives net annual salary of £24,062.16, giving a net average weekly earnings at £462.73

184 From 1 January 2022 – 31 December 2022 is 52-weeks. During this time:

184.1 The claimant would have earned £24,062.16 from the respondent.

184.2 The claimant did earn £21,292.96 from Flagfinders.

184.3 The claimant had a net loss of £2,769.20

185 Applying a Polkey deduction of 75%, followed by an Acas uplift of 10%, then a contribution deduction of 75%, this gives an award of **£190.48** for period 3.

Period 4

186 Period 4 is the period 1 January 2023 to 31 December 2023.

187 Repeating this for the 2023 payrise. For 2023 the claimant's gross weekly pay would be 49.3 x 14 = £690.20, giving a gross annual salary of £35,890.40.

188 Reviewing Table 11 of 2022 – 23 Income Tax, gross to net salaries, this gives a net annual salary of £27,542.02. This gives an average net weekly wage of £529.65.

189 From 1 January 2023 – 31 December 2023 is 52-weeks. During this time:

189.1 The claimant would have earned £27,542.02 from the respondent.

189.2 The claimant did earn £21,292.96 from Flagfinders.

189.3 The claimant had a net loss of £1,562.26

190 Applying a Polkey deduction of 75%, followed by an Acas uplift of 10%, then a contribution deduction of 75%, this gives an award of **£429.62** for period 4.

Period 5

191 This is 1 Jan 2024 – 31 Dec 2024. There is no indicated pay rise, but the tax will change. This provides for a net annual salary of £27,822.40, giving a net weekly wage of £535.05.

192 From 1 January 2024 – 31 December 2024 is 52-weeks. During this time:

192.1 The claimant would have earned £27,822.40 from the respondent.

192.2 The claimant did earn £21,292.96 from Flagfinders.

192.3 The claimant had a net loss of £1,632.36.

193 Applying a Polkey deduction of 75%, followed by an Acas uplift of 10%, then a contribution deduction of 75%, this gives an award of **£448.90** for period 5.

Period 6

194 This is from 1 January 2025 to the claimants 65th birthday. I am unable to take into account any potential pay rises from the claimant's current employer. I find that it is just and equitable in the circumstances to limit the award of future losses to this date. If the claimant's gross average salary is unchanged, the tax position will also be unchanged giving a weekly average net wage of £535.05, for a period of 5-weeks.

195 This is 1 Jan 2024 – 31 Dec 2024. There is no indicated pay rise, but the tax will change. This provides for a net annual salary of £27,822.40, giving a net weekly wage of £535.05.

196 From 1 January 2025 – 2 February 2025 is 5-weeks. During this time:

196.1 The claimant would have earned £2,675.25 from the respondent.

196.2 The claimant did earn £2,047.40 from Flagfinders.

196.3 The claimant had a net loss of £627.85.

197 Applying a Polkey deduction of 75%, followed by an Acas uplift of 10%, then a contribution deduction of 75%, this gives an award of **£43.17** for period 6.

198 The total compensatory awards for periods 1 – 6 is **£2,383.56.**

Non-prescribed element

199 Loss of Statutory Rights awarded at £500 subject to reductions and uplift. The total award for loss of Statutory Rights is **£34.38.**

200 Pension loss has been considered at 3% of gross earnings over the period as calculated above, with the required reductions and uplifts applied. Overall gross compensatory award per year:

Year	Gross earnings awarded	3%
2021	£13,012.32	£390.37
2022	£31,397.15	£941.91
2023	£35,890.40	£1,076.71
2024	£35,890.40	£1,076.71
2025	£3,451.00	£103.53

201 Where reductions and uplifts apply, I have followed the process of calculating the whole sum, reducing by any earnings received, applying the Polkey reduction, the Acas uplift and then the Contributory reduction. The total award for pension loss is **£246.76.**

Employment Judge Illing

11 December 2023

Annex: Calculation Table

		Amount	Subtotal	Subtotal	Subtotal	Sub-total	Totals
Basic Award							
Gross weekly pay	542.18						
Award		£4,066.57	£4,066.57				
Reduction Contrib 75%			(£3049.75)	£1,016.82			
						A	**£1016.82**
Compensatory Award							
Net average weekly pay at R	£420.33						
Prescribed element							
Period 1							

From ETD to appeal (14 Jul 21 – 5 Aug 21)	3-weeks	£1,260.98					
Less earnings (30 – Jul 21 – 4 Aug 21)	Total net earnings 30 Jul – 6 Aug 21	(31.20)	£1,229.78			**£1,229.78**	
	No further reduction or increase						
Period 2							
Stephensons Av weekly pay £486.66							
From 5 Aug to 21 Aug 21	3-weeks						
Award		£1260.99					
Less earnings	3 x 486.66	(£1459.90)				**£0**	
Award 22 Aug – 29 Aug 21	1 wk at £420.83	£420.83					
30 Aug 21 – 31 Dec 21							
Award	17-weeks @ £420.33	£7145.61					
Earnings @ FF (av weekly net pay of £409.48	17-weeks @ £409.48	(£6,961.16)	£605.28				
Polkey reduction @ 75%			(£453.96)	£151.32			
Uplift at 10%				£15.13	£166.45		
Contrib reduction @ 75%					(£124.84)	**£41.61**	
Period 3							
1 – Jan 22 – 31 Dec 22							
Av weekly net pay £462.73							
Award	52 weeks @ £462.73	24,062.16					
Earnings at FF	52 weeks @ £409.48	(21,292.96)	£2,769.20				
Polkey red @ 75%			(£2,076.90)	£692.30			
Acas Uplift @ 10%				£69.23	£761.63		
Contrib reduction @ 75%					(£571.15)	**£190.48**	
Period 4							
1 Jan 23 – 31 Dec 23							
Av net pay £529.65							
Award	52 weeks at £529.65	27,542.02					
Earnings at FF	52 weeks @	(21,292.96)	£6,249.06				

	£409.48						
Poley red @ 75%			(£4,686.80)	£1,562.26			
Acas uplift @ 10%				£156.23	£1718.49		
Contrib red @ 75%					(£1,288.87)	**£429.62**	
Period 5							
1 Jan 24 – 31 Dec 24							
Av net pay £535.05							
Award	52 weeks at £535.05	27,822.40					
Earnings at FF	52 weeks @ £409.48	(21,292.96)	£6529.44				
Poley red @ 75%			(£4,897.08)	£1,632.36			
Acas uplift @ 10%				£163.24	£1,795.60		
Contrib red @ 75%					(£1,346.70)	**£448.90**	
Period 6							
1 Jan 2025 – 2 Feb 2025							
Av net pay £535.05							
Award	5-weeks @ £535.05	£2,675.25					
Earnings at FF	5 weeks @ £409.48	(£2,047.40)	£627.85				
Polkey red @ 75%			(470.89)	£156.96			
Acas Uplift				£15.70	£172.66		
Red for contrib @ 75%					(£129.49)	**£43.17**	
						B	**£2,383.56**
Non-prescribed element							
Statutory rights	£500						
Polkey @ 75%	(£375)	£125					
Uplift @ 10%		£12.50	£137.50				
Contrib @ 75%			(£103.12)			**£34.38**	
Pension							
2021	£390.37						
2022	£941.91						
2023	£1076.71						
2024	£1076.71						
2025	£103.53						
Total		£3,589.23					
Red for Polkey @		((£2,691.92)	£897.31				

75%							
Acas uplift 10%			89.73	£987.04			
Red for contrib @ 75%				(£740.28)	£246.76	**£246.76**	
						C	**£281.14**
						A+B+C	**£3,681.52**