EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Anthony Mark Brown	v	AB Agri Limited

Heard at: Cambridge (via CVP)

On: 13-15 January 2026

Before: Employment Judge Grahame Anderson
Dr. C. Whitehouse
Dr. B. Von Maydell-Koch

Appearances
For the Claimant: Mr. A. Thompson (Claimant's Friend)
For the Respondent: Mr. D. Sands (Solicitor)

RESERVED JUDGMENT

(1) The Respondent unfairly dismissed the Claimant;

(2) There will be no adjustments to any compensatory award which may be awarded to the Claimant to reflect the principle in *Polkey v AE Dayton Services Ltd* [1988] ICR 142;

(3) There will be no adjustments to any basic award or compensatory award to reflect the conduct of the Claimant, applying ss. 122(2) and 123(6) of the Employment Rights Act 1996.

REASONS

I Introduction

1 This is the unanimous reserved judgment of the Tribunal (EJ G. Anderson, Dr. C. Whitehouse and Dr. B. von Moydell-Koch) to which all members have contributed

following a three-day hearing on 13-15 January 2026 conducted remotely from the Employment Tribunal in Cambridge.

IA The Claimant's claim

2 The claimant was dismissed on 15 February 2024.

3 The ACAS Early Conciliation Certificate at [**4**] shows that ACAS received early conciliation notification on 22 April 2024 and issued a certificate on 14 May 2024. The Claim Form ET1 was presented on 24 June 2024. The Respondent presented its ET3 Response Form on 19 November 2024 (Bundle page 19, with the Grounds of Resistance following at Bundle pages 28–33).

4 A Preliminary Hearing before Employment Judge Bradford took place on 30 May 2025. The issue of limitation was dealt with and the Claimant was permitted to continue with his claim [**34**]. The PHCM Order at [**39-48**], sets out the case management directions and, at [**47**], a list of the issues the Tribunal would determine at the final hearing.

IB The issues

5 The Claimant's only claim is one of ordinary unfair dismissal. Dismissal is admitted. Accordingly, the ET has to decide the following, which we have taken from EJ Bradford's list of issues:

5.1 What was the reason or principal reason for dismissal? The respondent says the reason was "conduct". The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

5.2 If the reason was misconduct, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:

5.2.1 there were reasonable grounds for that belief;

5.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

5.2.3 the respondent otherwise acted in a procedurally fair manner;

5.2.4 dismissal was within the range of reasonable responses.

6 Pausing there, some nuance is required. It is common for respondents to say that the "*reason was conduct*". But "*conduct*" *per se* is not a reason. Conduct is one of the statutory labels that can be applied to the reason. The reason for a dismissal is, as the cases explain, the set of "*facts and beliefs*" known to an employer which cause it to dismiss. We analyse that question in detail below.

IC Documents and evidence

7 The Tribunal had before it a refreshingly short and relevant bundle of documents. This expanded slightly on day one because the Respondent applied to adduce additional documents. The Tribunal permitted that application for reasons given at the time. References to the bundle in these Reasons are in square brackets. References to witness statements are in the form (Initials/paragraph number)

8 The Claimant had served a witness statement; he swore to the truth of that statement and was cross-examined by Mr. Sands. Other witness statements were produced on his behalf from certain of his former colleagues Perry Turner, Gary Knight, Colian Brain and Daniel Andrews. Broadly these individuals were colleagues of the Claimant's present on 27 January 2024 which is when the key incident in this case took place. The Tribunal explained to Mr. Thompson that, since those witnesses were not present at the Tribunal and thus could not swear to the truth of the statements and could not be tendered for cross-examination, the Tribunal could place only limited weight on what they said.

9 The Respondent's witnesses were Alison Campbell (Operations Manager – Enstone and Cullompton), Andrew Malone (Operations Manager) and Daniel Jamieson (Operations Manager). They each gave sworn evidence and were cross-examined by Mr. Thompson.

10 The Tribunal asked questions of the witnesses

II Findings of fact

11 In the following section we set out our findings of fact. We arrived at these findings of fact on the balance of probabilities, taking into account the evidence before us and, in particular, the contemporaneous documentation. These Reasons set out our key findings and the basis for them but are not exhaustive: the Tribunal considered in detail all of the relevant evidence even if it is not all recited in these Reasons.

II A Background

12 The Respondent is an agricultural foods and supplements production company, operating across the entire agri-food industry supply chain, producing and supplying compound animal feed, feed enzymes, specialised feed ingredients, as well as a range of additional value-added services to farmers, feed and food manufacturers, processors and retailers. It is a large employer with significant administrative resources.

13 The Claimant commenced employment with the Respondent on 1 December 1999 as a Mill Operative and progressed to Shift Leader over time. Therefore, by the time of his dismissal he had over 24 years' service. He was employed at the Respondent's Enstone site near Chipping Norton.

14 His responsibilities included shunting trucks, training staff and forklift operation. His witness statement said that he had responsibility for "*pest control*", something the Respondent denies. The Claimant said in evidence that he had been sent on a course for dealing with pests like insects; there is no dispute that dealing with wild animal incursions (as is at the heart of this case) was not part of his role.

15 He frequently undertook overtime and lived close to the Enstone site. He says he intended to remain with the company until retirement (**AB/1**). It is relevant to note that, prior to his working at the Respondent, the Claimant had had a role which involved the slaughter of animals: he worked for a hunt, and was routinely called out to, for example, humanely kill animals which had been injured on the roads. He was what is called a 'knackerman'.

16 Weekend shifts operated without senior managers or office staff on site. The Claimant was effectively responsible for running the mill during these periods. He states that

when he sought guidance on previous weekend incidents, management typically responded that decisions were his responsibility. He notes that the duty manager phone often went unanswered, and unless there was a fire or serious accident, decisions were left to him (**AB/2**). In evidence, the Respondent's witnesses said that there was always someone who could be contacted.

17 The Claimant also refers to site security. An electric coded gate installed around 2020 ceased functioning after three to four months and was not repaired, leaving the site open to animals and members of the public. He links this to potential disease and biosecurity concerns relevant to an animal feed business (**AB/3**). The Respondent's witnesses accepted that at the time of the main incident described below, the gate was and had for some time been broken. On any view, it appears to be the case that as a result of the broken gate animals like deer did sometimes gain access to the site.

II B 27 January 2024: the Claimant killed a deer

18 On the afternoon of Saturday 27 January 2024, the Claimant was working an overtime shift. He was the most senior person at the site.

19 A deer was observed within the Enstone compound. Significant time was devoted to raking over which members of the workforce had had what interactions with the deer early in the day. Ultimately nothing turns on it.

20 The Claimant's account of subsequent events is as follows.

21 In the mid-afternoon, the Claimant encountered the deer lying near a fence. He observed that its head was not fully upright, there was visible facial damage, and it was gasping for breath. Mr. Turner was present. The Claimant states that he assessed the situation, concluded that the deer was in significant distress and near to the end of its life. He decided to mercifully kill the animal and thus to prevent further suffering. Mr. Turner suggested the Claimant remove his high-vis jacket to avoid alarming the deer. The Claimant was able to approach the deer easily and, when he touched it with his foot, it rolled over: the Claimant suggests that an ordinarily healthy deer would not have allowed him to approach so easily. He pinned the deer against the fence with his right foot on its stomach, held its head, and cut its throat with his work Stanley knife. The deer died immediately.

22 The Claimant was pressed, in cross-examination, on his assessment of the situation. Accounting for the fact that the Claimant does not have formal veterinary qualifications, he said that he suspected that the deer had been hit by a vehicle but accepted that he could not be sure. He was adamant that the deer was in a bad state. There is no dispute that the Claimant did not (i) seek to call anyone in senior management to seek instruction about what to do about the deer or (ii) contact an external body like the RSPCA, the police, or a vet.

23 After the animal bled out, the Claimant and Mr. Turner moved the body and placed it on an intermediate bulk container (IBC) used for rubbish disposal. We have seen pictures of the deer's body at the top of the IBC. The Claimant then resumed his duties (**AB/5**).

II C 28 January – 1 February 2024: senior management becomes aware

24 The Claimant started his regular night shift on Sunday 28 January 2024 at 18:00 and worked that pattern through to Friday 1 February 2024 (**AB/6**).

25 Ms. Campbell, the Operations Manager, received an email from Ben East on 30 January 2024 forwarding an email from John Hill sharing images of a dead deer left in the intermediate bulk container (**AC/3**). Those pictures are at [**90**]. Later that day, Mr. East visited her office to discuss the incident; they understood that a deer had been killed on site and placed in the IBC, but they did not yet know who had killed it (**AC/4**).

26 On 1 February 2024, Ms. Campbell and Mr. East visited the Enstone site, reviewed CCTV (finding no footage of the incident itself but footage of a deer walking and grazing on site), checked the area where the incident was thought to have occurred (they saw no blood or other evidence relating to the incident), and looked at the carcass, observing a cut throat and no other visible damage (**AC/5**). Ms. Campbell has past experience in relation to animal welfare and told the Tribunal she had inspected the deer and did not see any visible external damage; she accepted in evidence that there may have been internal injury. They also reviewed CCTV showing the Claimant dragging the deer toward the waste area (**AC/6**). We have also seen that footage and did not find it particularly enlightening.

II D 1 February 2024: Interview and Suspension

27 Ms. Campbell interviewed the Claimant the same day. Manuscript notes appear at [**100**]. The Claimant confirmed he had been on shift on 27 January 2024, had seen a "*half-dead*" deer, and had killed it. He said the deer was staggering, with a puffy face, looked hit by a car, and that when he put his foot on its ribcage and pressed, the deer did not attempt to get up. He said he killed the deer by slitting its throat with his Stanley knife and added that he had experience as a knackerman. He confirmed the knife was a company knife used for opening bags. He said he and Mr. Turner tried to put the deer in the landfill skip but it was too high.

28 The Claimant referred to two previous similar incidents. On one occasion, the Claimant had killed a dying deer on site after a colleague had hit it with his car and brought it in. Ms. Campbell noted that the Claimant also described another incident involving a cat that had been severely maimed when it was hiding within a lorry that was then started; he said he killed it because he did not like to see animals suffer (**AC/9**). In evidence the Claimant described this incident in graphic terms.

29 Ms. Campbell asked the Claimant about awareness of the Deer Act 1991 ("**the Deer Act**"); he said he was not aware. The notes record that she explained her "*understanding*" of the Act. Pausing there, there is no note of what Ms. Campbell's understanding of the Deer Act was. It was clear on any view that Ms. Campbell took the view that the Claimant may have committed a criminal offence.

30 When Ms. Campbell was pressed on what the illegal act she was considering was, she was very unclear. She referred to s. 1(2) of the Act which is a section dealing with poaching. This was a section which, arguably, could cover the facts of this case (because it deals with the killing of deer without the landowner's permission, although clearly the issue in this case was not really one of landowner permission *per se*). This was not in her witness statement or in any communication sent to the Claimant.

31 She also told us (although, again, this had never been articulated to the Claimant or set out in her witness statement) that she had concluded that there was somewhere in the Deer Act a list of permitted implements that might be used to kill deer and that a Stanley knife was not among them and so that was another illegal act the Claimant could be

said to have committed. On review, there was no such section in the Deer Act. The first time this came up was in her evidence to the Tribunal.

32 Ms. Campbell suspended the Claimant on full pay pending investigation (**AC/13**) [**109**]. The suspension referred to an "*alleged illegal act*".

33 She also interviewed other staff on 1 February 2024, including Mr. Knight (**AC/14.1**), Piotr Chookiewicz (**AC/14.2**), Alex France (**AC/14.3**), Ian Pyne (**AC/14.4**), Neil McNaught (**AC/14.5**), and Mr. Andrews (**AC/14.6**). The main point of note from these investigations is that there was at least some evidence in the interviews to support the Claimant's view that the deer was suffering: Mr. Knight told Ms. Campbell that it appeared to have some facial damage. Others said that the Claimant had, at the time, said that he did what he did because the deer was injured (see, eg, the notes of Mr. Chookiewicz's interview at [**104**]).

34 She interviewed Mr. Turner too [**107**]; he confirmed the deer seemed unwell, described the killing, and reflected that they should have rung management instead (**AC/15**).

35 On 2 February 2024, Ms. Campbell wrote to the Claimant confirming suspension and the allegations under investigation: The disciplinary charge was: "*illegal act against policy/procedure potentially bringing the company into disrepute*". That broadly reflects the wording of the Respondent's disciplinary policy which gives "*any breakage of law which could bring or potentially bring the business into disrepute*" as an example of conduct potentially justifying summary dismissal [**62**].

II E Investigation Report

36 On 3 February 2024, Mr. East provided a witness statement, opining that the deer showed no obvious injury apart from the slashed throat and no visible signs of impact consistent with a vehicle collision (**AC/17** and **[110]**). He suggested any distress on the part of the deer may be attributable to it being trapped on the site. Ms. Campbell accepted that Mr. East had no special qualification to be opining on the matter.

37 Ms. Campbell prepared an investigation report [**112**] enclosing notes of the interviews she had conducted, CCTV footage, photographs, the Respondent's policies, and two pieces of legislation: the Deer Act [**119**] and the Hunting Act 2004 [**130**] ("**the Hunting**

Act"). No explanation has at any stage been given for the relevance of the Hunting Act and we do not understand it to have been taken into account subsequently. However, its inclusion is indicative, to our minds, of a peremptory approach to this disciplinary process: put short, the Respondent was convinced from the outset that the Claimant must have done something illegal and did not much trouble itself to work out if that was true or in what way it was true.

38 Ms. Campbell assessed the Claimant's actions as contrary to the Respondent's Animal Health & Welfare Policy [**85**] ("**the Animal Welfare Policy**"). She recorded that CCTV showed the deer freely roaming and grazing and that photos showed no other damage beyond the neck wound (**AC/22**). She concluded there was evidence to support the allegation and recommended proceeding to a disciplinary hearing (**AC/23–24**). She now says that she understands the actions were likely not illegal but maintains the conduct was wholly inappropriate (**AC/26**).

39 Beyond the assertion, there was no particularisation of how the Respondent's Animal Welfare Policy was breached. The tenor of the Respondent's position, as we understand it, is that (i) it is in favour of animal welfare and (ii) by definition, killing an animal is contrary to its welfare and so the policy must have been breached.

II F Disciplinary Hearing

40 On 6 February 2024, Claire Whittlingum (People and Performance Policy Advisor) invited the Claimant to a disciplinary hearing scheduled for 9 February 2024 [**147**]. The allegation to be discussed was "On 27 January 2024 you performed an illegal act which is against company policy/procedure that potentially brings the company in to disrepute". There was no further detail as to the way in which the act was said to be "illegal" nor as to what company "policy/procedure" had been breached. The Claimant was certainly not told the nature of any criminal offence he was said to have committed.

41 On 9 February 2024, Mr. Andy Malone chaired the hearing, supported by Ms. Whittlingum. The Claimant attended without a companion.

42 The notes of the meeting are at [**149**]. They are in pro forma and include an introductory section in which certain details were inserted, not by Mr. Malone but by Ms. Whittlingum. One section reads "*Make sure the colleague understands the seriousness*

of the hearing and potential outcome". Next to that Ms. Whittlingum wrote "*Dismissal level, what you've done is an illegal act under the deer act 1991, can bring company into disrepute. We're an animal feed manufacturer, focus on animal welfare*." There has been no explanation of Ms. Whittlingum's qualifications to opine on the applicability of the Deer Act. There is also a strong impression, to our mind, of pre-judgement of both (i) the fact of an 'illegal act' having been committed and (ii) what the sanction should be.

43 During the meeting, the Claimant explained that he judged the deer to be in significant distress and believed a quick dispatch was the most humane course of action—a mercy killing. He said he had had training and past experience in the humane killing of animals [**150**]. He indicated he would consider resigning if necessary (**AM/9–12**).

44 It is evident to the Tribunal that Mr. Malone had already arrived at a firm view, by the start of the hearing, that the Claimant had broken the law. Thus, Mr. Malone is recorded as having said the following in the notes:

- "*Clearly a question of training, that's where it comes to breaking the law, it's not part of your job*" [**153**].
- "*There are boundaries, bound by the law, roles we're employed in*" [**152**].
- "*If I witnessed it…would probably feel the same as you … It would be horrible to see the animal suffer, but it's not what I'm employed to do*" [**153**].
- "*Issue here is around the legal implications of this, acting outside the boundaries of your role, vigilantism*" [**154**].
- "*Breaking the law is what worries me the most*". And "*My understanding is that unless you are a trained professional you are not entitled to dispatch an animal. By default you're breaking the law*" [**154**].
- "*Based on your statement, [it is] fair to conclude you have experience in this matter, that no-one likes to see an animal in distress, but the capacity you aced in wasn't in scope of your role. Equally, with your prior experience, on a public road, based on the advice given by the deer society you still wouldn't be qualified to perform the same act that you did here*" [**153**].
- "*You did what you thought was the right thing, which we're clear now is breaking the law*" [**155**].

45 It is important to note three things arising out of this:

45.1 At no stage was it ever explained to the Claimant what specific part of the Deer Act was being said to constitute the basis of any 'illegal act'. The Respondent has now referred to a breach of s. 1(2) of that Act which, on its face, under a section entitled "*Poaching of deer*" outlaws the killing of deer on land without the permission of the owner or "*occupier*" – nothing of that sort was explained to the Claimant prior to or during the disciplinary hearing. As we have said above, it was not very clear to us that Ms. Campbell had that in mind when framing the disciplinary allegation. It was obvious that Mr. Malone did not have this in mind.

45.2 Mr. Malone had come to a firm conclusion by the time of the meeting that the only people permitted in law to dispatch suffering animals are "*trained professionals*" or people licensed to do so and that "*by default*" the Claimant was breaking the law: "*The theme around all of it is a trained, competent specialist, you might have been in a previous role, I believe there's no malice here, you have the welfare of the animal at the forefront of your mind, but it doesn't mean it's not negligence.*" His view, which suffuses the entirety of the disciplinary notes and in particular the extracts set out above, was simply that he understood it to be a legal requirement that a properly accredited / licensed person kill the deer, rather than someone who was not employed for that specific purpose. Indeed, he appears to have accepted that the Claimant had requisite *experience* in killing animals, but not the requisite accreditation/licence: it was, for Mr. Malone, an administrative matter of the role he was employed to do. That is reflected, for example, in the fact that when discussing the Claimant's prior experience in mercy killing animals with VWH Foxhounds, Mr. Malone distinguished that on the basis that the Claimant would have been "*operating under the licence of the hunt*" [**152**].

45.3 Despite Mr. Malone saying in the meeting that "*we're clear now*" that what the Claimant did was breaking the law (by which he meant an imagined legal requirement that a person with accreditation perform the killing of the animal),

that was not at all clear. No basis for such clarity was articulated beyond Mr. Malone's unsubstantiated "*understanding*" to that effect.

46 There are two other important aspects of the disciplinary meeting:

46.1 First, it is plain that Mr. Malone accepted – he said so expressly – that the Claimant had not acted out of malice but out of mercy [**153**]. He accepted as much in his evidence. He said that, had he been in the Claimant's position, he would likely have wanted to do the same thing, but would not have done so because it was not part of his job.

46.2 Second, in the hearing, the Claimant told Mr. Malone about the two instances in the past where he had also, out of mercy, put animals out of their suffering: one related to a cat and the other to a deer (as referenced above) [**150-151**]. There was then the following exchange:

> *"AB: Polly hit a deer coming to work so he brought it into work. By opening his boot I saw the signs, brain damage, the whites of its eyes showing, so putting it out was the best thing. I did this on site, most of them were aware, can't remember the people on site, but several managers, Michael more [sic] could have been Simon March. They were aware at the time I'd done it. [the Claimant then described a severely injured feral cat]…*
>
> *AM: based on the statement where you said management were aware of it, when Polly bought [sic] the deer to site, were management aware of what you planned to do, fully informed.*
>
> *AB: No.*
>
> *AM: So <u>they were told after the event, what did they say.</u>*
>
> *AB: <u>that's fine, maybe not those words</u>*" (emphasis added).

46.3 The point made clearly to Mr. Malone was that in the past something similar had happened and that management had either expressly approved the

Claimant's actions in mercifully dispatching a deer or (and this is true on any view) did not sanction or reprimand the Claimant for doing so. The Claimant had identified either Michael Moore (which is who the Claimant named in his evidence to us) or Simon March as managers who had said it was "*fine*" or words to that effect.

46.4 Mr. Malone plainly understood the significance of what the Claimant had told him: "*it's difficult with the change in management to follow that back, if we're saying now it's a dismissible offence but in the past it was acceptable, there's conflict there, we would need appropriate facts and witnesses to back that up*" [**150**]. And later he said [**158**]: "*You've referenced an incident before, is there a cultural issue about people doing the right thing, think we've moved on from the past, proactive management team, all about doing the right thing. Smallest risk we mitigate. I understand part of it in mitigation, but you've acted irresponsibly, it's not like you don't have enough education on the matter, you've been around this, in a different industry*."

46.5 Surprisingly, the Respondent's witnesses did not refer at all to this exchange in their witness statements. In submissions, Mr. Sands attempted to suggest that (i) it was the Claimant who had failed to provide sufficient information for these matters to be investigated; that (ii) the claim was so inherently extraordinary that there was no obligation on the Respondent to look into the matter any further; and that (iii) the passage of time meant relevant people would necessarily be uncontactable. Since the Respondent failed to either (i) look into this point and (ii) lead any evidence on it, the Tribunal was initially left with the impression that these managers were indeed no longer available. We suspect Mr. Sands thought so too; we make no criticism of him. However, in the final moments of the hearing Mr. Thompson told us that Mr. March – one of the managers the Claimant named – was in fact still working at the Respondent at the point of the Claimant's dismissal. Initially, Mr. Sands protested that this amounted to Mr. Thompson giving evidence: that was not a fair complaint in circumstances where (a) the Respondent knew whether or not it was true, (b) it was obviously important information, and (c) the only reason the Tribunal was in the dark about the question was the Respondent's failure

> to deal with it in its witness statements. Mr. Sands then confirmed on instruction that, as Mr. Thompson said, Mr. March had been working at the Respondent at the point when the Claimant was dismissed.

47 The disciplinary hearing reconvened on 15 February 2024 (c. a week later) with Mr. Thompson accompanying the Claimant. Mr. Malone informed the Claimant of the decision to summarily dismiss him. The contents of the discussion are noted as being as follows [**159**]:

> *"Cannot confirm breakage of the law.*
> *Agree that Anthony thought he was acting in the deer's best interests to put it out of its suffering.*
> *Acknowledgement that Anthony had been trained previously but not at ABN, not within the remit of his duties.*
> *Potential of bringing the company into disrepute, if this had been filmed the consequences could have been severe to us as a company focusing on animal welfare"*
> *No escalation to management or any suitable authority".*

48 The Tribunal considered Mr. Malone's ostensible change in position surprising. It was not explained in his witness statement. In evidence he referred to an unknown "*witness who muddied the waters*". The Tribunal asked about this, albeit tentatively because at first we thought it might be that the Respondent had simply taken specialist legal advice on the point and we were anxious not to stray into privileged matters. But that was not what happened. We were told, for the first time in questions at the end of Mr. Malone's evidence that, in fact, Mr. Malone had also been responsible for conducting the disciplinary hearing of Mr. Turner. Mr. Turner had been accompanied at that meeting by someone Mr. Malone could not name and who appeared, to Mr. Malone, to have some expertise or knowledge on the matter and who caused him to doubt that a crime had been committed in these circumstances. The name of this witness remains a mystery. We were given a name on instruction by Mr. Sands. Mr. Thompson said that, in fact, it was someone else. In circumstances where this only came out at the eleventh hour and it is not in the Respondent's witness statements, this person's identity remains a mystery.

49 This is what brought Mr. Malone to conclude that he could not "*confirm breakage of the law*". A number of points:

49.1 It is surprising – and we put this mildly – that this only came out in questions from the Tribunal. This is a second instance in which the Respondent's evidence did not cover an important element of the case (along with the failure to deal with the Claimant's suggestion that he had been told by former managers that what he had done in the past was "*fine*"). The Claimant was represented by his friend not by a lawyer: had the Tribunal not pushed the point, this important piece of information would not have come out at all. We do not suggest that there was a deliberate effort by Mr. Malone to lie about matters or to hide matters from the Tribunal, but it seems. to us self-evident that there was a failure to ensure that all of the relevant evidence was put into the witness statements. We have a strong sense that the witness statements were designed to "fight the case" rather than to give the unvarnished truth.

49.2 There was no disclosure of any of the minutes of Mr. Malone's meeting with the mystery witness, even after Mr. Malone mentioned the unknown witness on day one of the hearing and the point was pressed by the Tribunal on day two.

49.3 As we develop further below, and contrary to the submission from the Respondent that we ought to treat the Claimant's evidence with caution, this wholesale omission of an important piece of evidence, in combination with our judgment, as set out below, that the Respondent has sought to retrofit its justification for the dismissal after it was surprised to discover that what the Claimant had done may not have been illegal, has caused us to be considerably more cautious in accepting the Respondent's evidence and, in particular, that of Mr. Malone.

50 The Claimant accepted in the disciplinary meeting that he had done wrong, had learnt from the experience that he ought to seek advice and not take matters into his own hands; he acknowledged that what he had done could "*give the company a bad name*" [**158**].

51 Mr. Malone confirmed his decision in writing on 15 February 2024 (**AM/28–29**) [**162**]. Of note were the following points: (1) the letter simply repeats the disciplinary allegation of the Claimant having "*performed an illegal act which is against company policy/procedure that potentially brings the company into disrepute*". It did not say anything about Mr. Malone's interactions with the mystery witness or that he had come to the conclusion that the Claimant had not or may not have performed an illegal act; (2) it said that "*we were not able to find any mitigating factors for a lesser sanction*".

II G Appeal

52 The Claimant appealed on 16 February 2024. On 27 February 2024, the Claimant was invited to an appeal hearing (**DJ/7**). David Jamieson chaired the appeal on 11 March 2024, supported by Danielle Delderfield (Senior People and Performance Business Partner).

53 Mr. Jamieson considered the Claimant's assessment of the deer's health speculative and noted that other options were available to the Claimant (**DJ/15–18**). On 15 March 2024, he upheld the dismissal.

54 There were some notable elements to the appeal and to Mr. Jamieson's evidence:

54.1 In light of the disciplinary outcome letter at [**162**] he said in evidence that his understanding was that Mr. Malone *had* concluded that the Claimant had committed an illegal act and that *that* was the reason for the dismissal. Moreover, despite the fact that the Claimant continued to contest that assessment, and despite the fact that he would have searched in vain for any explanation as to what the illegality was said to be, he upheld what he believed Mr. Malone's conclusion to have been. We were troubled by the fact that Mr. Jamieson said that he simply accepted at face value his colleague's conclusions that there had been an illegal act (despite the fact that, if he had read the notes of the disciplinary meeting carefully he would have seen that Mr. Malone said that he could not confirm either way). However, and in fairness to Mr. Jamieson, the appeal form at [**168**] (which immediately precedes the notes of the appeal meeting) says that the reason for the Claimant's dismissal is that he

had "*performed an illegal act which is against company policy/procedure that potentially brings the company into disrepute*".

54.2 A very substantial portion of the appeal meeting was taken up with discussing the validity or otherwise of the Claimant's assessment of the deer's health and, again, the question of illegality. Thus, at [**172**], the notes of the meeting record a Danielle Delderfield insisting that "*The information we have (from deer act) states that there is specific rules around despatching animals]*". This appears to reflect Mr. Malone's understanding that only certain accredited people could kill suffering animals. Again, we have seen nothing to support that conclusion and have no idea what the "*information we have (from deer act)*" Ms. Delderfield - who was not a witness - can have been referring to.

54.3 Nowhere in the appeal hearing is Mr. Jamieson or anyone else recorded as having referred to (a) Mr. Malone's conclusion that the Claimant had killed the deer out of mercy or (b) any issue of bringing the company into disrepute.

54.4 In Mr. Jamieson's witness statement, he decisively parts ways with Mr. Malone on his conclusion that the Claimant had acted out of mercy. He was asked about this in his evidence and said that he thought the Claimant had killed the deer "*because he wanted to*". It is unclear to us on what basis Mr. Jamieson came to that conclusion.

54.5 Mr. Jamieson's witness statement is at pains to distance the Respondent from the suggestion that the Claimant's conduct was unlawful. He says at (**DJ/22**) "*I acknowledge that the disciplinary outcome letter and my own disciplinary appeal outcome letter reference Anthony having performed an illegal act. I now understand and accept that Anthony's actions were likely not illegal under the circumstances. Nevertheless, my decision to uphold the dismissal was not solely based on the assumption of illegality.*" He goes on "*Even if I were to discount the consideration of whether Anthony's conduct amounted to an unlawful act or not, I still would have arrived at the same conclusion because there was a wholesale failure on his part to follow company procedure before killing the deer, nor did he seek advice or guidance from anyone before he took the decision to kill the deer, and we may never know whether or not it*

was appropriate or humane to kill the deer, which does create serious reputational risk for [the Respondent]." The Tribunal asked questions about what this "*wholesale failure…to follow company procedure before killing the deer*" related to. It was accepted that, in fact, there is no company procedure governing the situation the Claimant was in (aside from the broad precepts of the Respondent's animal welfare policy, discussed below). Mr. Jamieson said that a better way of putting it was that he "*would have expected*" the Claimant to call someone about the deer but accepted that there was a qualitative difference between "*would have expected*" and "*wholesale failure to follow company procedure*".

54.6 Mr. Jamieson said that part of the reason for him upholding the dismissal was that he thought there was a significant risk of the Claimant doing the same thing again.

III The Law

IIIA Ordinary unfair dismissal

55 Employment Rights Act 1996, section 98(1) is a well-trodden path. It provides:

"*(1) …it is for the employer to show:*
*(a) the reason (or, if more than one, the principal reason) for the dismissal ["**the Reason Question**"], and*
*(b) that it is either a reason failing 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 ["**the Potentially Fair Reason Question**"].*
(2) A reason falls within this subsection if it –
(a) …
(b) relates to the conduct of the employee …"

56 The burden as to the fairness of the dismissal having regard to the reason shown by the employer is neutral and:

"*(4)…*

(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 ["**the Fairness Question**"].*"

57 As to the Reason Question, the "*reason*" for a dismissal is the set of facts known to or beliefs held by the employer that causes it to dismiss the employee: *Abernethy v Mott, Hay and Anderson* [1974] ICR 323. It is not the label applied: "conduct" "capability" "redundancy" "statutory ban" or "SOSR". That is the Potentially Fair Reason question. It is for the Tribunal to identify, as a matter of fact, what the reason for the Claimant's dismissal was, i.e., the facts or beliefs operating on the decision maker's mind that caused him to decide to dismiss the Claimant.

58 As to the Fairness Question, we have had in mind the familiar Burchell test set out in *British Home Stores v Burchell* [1978] IRLR 379. The Tribunal's job is to determine whether the Respondent has acted in a manner which a reasonable employer might have acted, even although the Tribunal, left to itself, may have acted differently (i.e., the range of reasonable responses test): see *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439, as approved by the Court of Appeal in HSBC v Madden [2000] ICR 1283. These cases are often cited but it is useful to go back to what the EAT / Court of Appeal in fact said in them. In *Jones*, the EAT held that the tribunal had misdirected itself by substituting its own opinion for the objective test of the band of reasonable responses. Mr. Justice Browne-Wilkinson summarised the law:

"*We consider that the authorities establish that in law the correct approach for the… tribunal to adopt in answering the question posed by [S.98(4)] is as follows:*

- *(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.*"

59 This range of reasonable responses principle applies equally to the procedure it adopts: *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 (CA).

60 The Tribunal is not bound to hold that any or any particular procedural failure by an employer renders the dismissal unfair: it is one of the factors to be weighed by the tribunal in deciding whether or not the dismissal was reasonable within the meaning of ERA 1996, s. 98(4) (*Polkey v AE Dayton Services Ltd* [1988] ICR 142 (HL)). The weight to be attached to any procedural failure will depend on the circumstances known to the employer at the time of dismissal, not on the actual consequence of such failure.

61 In relation to "*equity*" in this context, Lord Simon of Glaisdale stated in *W Devis and Sons Ltd v Atkins* [1977] ICR 662 (HL), that 'the reference to "*equity and the substantial merits of the case*" merely shows that the word "*reasonably*" is to be widely construed'.

62 First and foremost, we remind ourselves that we must assess the reasonableness of the decision according to the facts known to the decision-marker at the time the decision was made. It follows that the reasonableness test applies at the time of the decision and we will fall into error if we take into account matters that have only come to light with hindsight.

63 One sort of case in which the question of equity will arise are cases in which it is said that an employer's past approach to a form of conduct renders it unreasonable to treat a later instance of the same or similar conduct as something warranting discipline: in *Sarkar v West London Mental Health NHS Trust* [2010] IRLR 508, for example, the Court of Appeal upheld a tribunal's decision that the respondent had unfairly dismissed the claimant for gross misconduct under its formal disciplinary procedure when it had initially taken the view that the misconduct could be dealt with under its 'Fair Blame

Policy' ("**the FBP**"), a dispute resolution procedure designed to deal with less serious matters. The Employment Tribunal was entitled to regard the initial use of the FBP as an indication of the respondent's view that the misconduct was relatively minor and that it was prepared to deal with it under a procedure that could not result in the claimant's dismissal. The tribunal did not err in law in concluding that it was inconsistent of the Trust to then charge the claimant with gross misconduct based on the same matters.

64 Dismissal does not have to be the 'last resort' before it can fall within the range of reasonable responses. In *Quadrant Catering Ltd v Smith* EAT 0362/10, the tribunal directed itself that an employer should view dismissal as a last rather than a first resort and that it will only be in serious cases of misconduct supported by no doubt as to the facts that a dismissal will be justified. In other circumstances, a warning would be the appropriate sanction. The EAT overturned the tribunal's finding of unfair dismissal: it had erred in directing itself that dismissal had to be a last resort.

65 Mr. Sands brought to our attention the case of *L v K* [2021] IRLR 790 (a decision of the Inner House of the Court of Session in Scotland) as "*authority on the reasonableness of an employer relying on potential reputational risk as a reasonable justification for dismissal*". That was an SOSR dismissal: indecent images of children were found on a computer in the home of a teacher; it was a computer to which others had access. It could not be said with any certainty that the claimant himself was responsible for the presence of those images but the CSIH upheld the ET's decision that the dismissal was for SOSR given the potential for reputational damage to the respondent.

III B Remedy matters: "*Polkey*" and contribution

66 We agreed with the parties that we would consider, on the basis of our findings and their submissions, the question of reductions to any compensation due to the Claimant (noting as an aside that he seeks reinstatement which is a prior question we may need to address at a later date). A point that applies to both questions is that, in this instance, unlike with primary liability in relation to unfair dismissal, we must make our own assessment of events on the balance of probabilities and are not bound by what the Respondent knew / believed.

III B.1 "*Polkey*"

67 The Polkey principle derives from the decision of the House of Lords *in Polkey v A E Dayton Services Ltd* (cited above). The House of Lords held that, once a dismissal is found to be unfair, the tribunal must go on to consider what loss has in fact been caused by that unfairness. Procedural unfairness does not of itself entitle an employee to full compensation for loss flowing from the dismissal. The tribunal must assess, as a matter of causation, whether and to what extent the employee would have remained in employment had a fair procedure been followed. If the tribunal concludes that the employee would have been dismissed in any event, or would probably have been dismissed after a short period, the compensatory award may be reduced accordingly, potentially to nil.

68 The statutory basis for this exercise lies in s. 123(1) of the Employment Rights Act 1996, which provides that the compensatory award shall be such amount as the tribunal considers just and equitable having regard to the loss sustained by the complainant in consequence of the dismissal. The tribunal is required to make a realistic assessment of what would have happened had a fair procedure been adopted (although the principle is not restricted to strictly procedural errors), even where that assessment necessarily involves a degree of prediction or estimation.

69 Guidance on the proper approach to that predictive exercise is commonly taken from *Software 2000 Ltd v Andrews* [2007] ICR 825 (EAT), which emphasises that tribunals should avoid an all-or-nothing approach and may assess the chance of dismissal occurring by reference to percentages or limited periods of continued employment.

70 The authorities emphasise that *Polkey* reductions should not be applied mechanically, particularly where the employer's process was seriously or fundamentally unfair. In *Chloride Ltd v Cain and another* EAT 564/94, a tribunal found a complete absence of consultation, no objective selection criteria and no consideration of alternative employment. The EAT rejected the employer's submission that compensation should nevertheless be reduced to reflect the chance of a fair dismissal, expressing clear reluctance to allow an employer who had relied on unfair criteria to argue, with hindsight, that a different and fair process might have produced the same outcome. A similar point was made in *Eclipse Blinds Ltd v Bill* EAT 818/92, where the EAT stressed

that the tribunal's task is to assess all the circumstances in the round, rather than to isolate a single factor such as whether consultation would have made a difference.

71 In *King and others v Eaton Ltd* (No.2) [1998] IRLR 686 (CSIH), the Court of Session observed that a distinction between merely procedural unfairness and more fundamental defects may often be helpful when addressing the hypothetical question of what would have happened had the unfairness not occurred. Where the lapse is purely procedural, it may be possible to envisage the likely outcome had matters been handled properly. Where the unfairness goes to the heart of the dismissal, the tribunal cannot reasonably be expected to embark on speculative reconstruction of a wholly different process.

72 Subsequent authority has, however, downplayed any rigid procedural or substantive divide. In *O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615 (CA) the Court of Appeal held that, even where a dismissal is substantively unfair, it remains open to a tribunal to conclude that the employee would in any event have been fairly dismissed within a limited period and to assess compensation accordingly. Later cases have reinforced that the focus is not on categorisation but on whether the evidence justifies a finding that a fair dismissal would probably have occurred, and that tribunals must at least consider that question where it arises.

73 At the same time, the appellate courts have intervened where Polkey reductions have been made despite unfairness so extreme that any assessment of hypothetical outcomes was unsustainable. In *Davidson v Industrial and Marine Engineering Services Ltd* EAT 0071/03 and *Manzie v Optos plc* EATS 0029/04, Polkey reductions were quashed because the employers' processes were so fundamentally unfair that there was no proper basis on which to assess the likelihood of a fair dismissal at all.

74 Fundamentally, in our judgment, our task is to take a common-sense approach to assessing what might have happened had the employer not behaved unlawfully, doing the best we can. It may not be possible to do so. Fundamentally our task is to apply s. 123(1) of the ERA 1996.

III B.2 Contribution

75 Contributory conduct is a separate concept, governed expressly by statute. S. 122(2) of the Employment Rights Act 1996 provides that the basic award shall be reduced to such

extent as the tribunal considers just and equitable where the dismissal was to any extent caused or contributed to by any conduct of the complainant. S. 123(6) makes parallel provision in respect of the compensatory award, requiring a reduction where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant. These provisions are concerned not with hypothetical outcomes in a fair process, but with the extent to which the employee's own blameworthy conduct caused or materially contributed to the dismissal that in fact occurred.

76 The focus in a contribution analysis is therefore on the claimant's conduct and culpability, and on the causal link between that conduct and the decision to dismiss. The tribunal must identify the relevant conduct, explain why it amounts to contributory fault, and assess the extent to which it caused or contributed to the dismissal. While a reduction of up to 100 per cent is legally permissible, such a conclusion requires clear reasoning. The need for proper identification of the conduct relied upon and for a reasoned explanation of the percentage reduction applied was emphasised by the EAT in *Steen v ASP Packaging Ltd* UKEAT/0023/13/LA.

IV Analysis and Conclusions

77 We take the various matters we must address in turn.

IV A The Reason Question

78 In its Grounds of Resistance, the Respondent says that the reason for the Claimant's dismissal was "*because the Respondent believed the Claimant had committed an act of gross misconduct*" (para. 25) [**32**]. As set out above, that is not a particularly sound pleading legally because it elides the question of reason with the question of the statutory label to be applied to it. Paragraph 27 of the Grounds of Resistance refers to the "*Claimant's conduct in killing a deer on site*".

79 In his closing submissions Mr. Sands says (para. 61) that the reason was something of a composite. He said that Mr. Malone had terminated the Claimant's employment for:

- "*Killing a deer with his bare hands and a Stanley knife;*
- *Without contacting any authorities, vets, or the RSPCA;*
- *Without notifying senior management;*

- *Due to the potential risk to the company's reputation, in light of the nature of its business as an ethical animal feed manufacturer.*"

80 After careful deliberation, the Tribunal has concluded that the principal reason for the dismissal was different. It was, as the Respondent repeatedly told the Claimant it was, that Mr. Malone believed that the Claimant had done an "*illegal act*". The reason for the dismissal was that the Claimant had killed the deer and had, in doing so, breached a rule Mr. Malone believed applied that only accredited or licensed individuals could dispatch suffering animals.

81 Our reason for that conclusion are as follows:

81.1 As set out above, that was the consistent message in correspondence from the Respondent to the Claimant. The investigatory pack proceeded on the basis that the issue was one of "*illegal act*"; the disciplinary form made clear that the issue under consideration was one of "*illegal act*"; the outcome letter set that out as the charge; the appeal form set that out as the charge; the appeal outcome letter said that that was the reason for the Claimant's dismissal;

81.2 For the reasons set out in detail above, it is clear that in the disciplinary meeting Mr. Malone had already come to a firm conclusion that (i) there was a legal requirement for accreditation before one could dispatch an animal (i.e., only certain people could do it as part of their roles) and (ii) the Claimant was in breach of that rule, whatever his motivations. He was in breach of the law "*by default*" no matter the sympathy that Mr. Malone might have had with the course the Claimant chose to take. That was the key thread in the disciplinary hearing.

81.3 At no stage did Mr. Malone communicate to anyone else (not the Claimant, not Mr. Jamieson, not the Tribunal) that he had received information from the mystery witness that there was reason to believe that the Claimant may not have acted illegally. Instead, he said to the Claimant that he could not "*confirm illegality*". In his cross-examination, Mr. Malone was very unclear on the point. He appeared at first to accept without reservation that the reason for the dismissal was that the Claimant had done something illegal. He then said that

that was not the case, but that he nevertheless thought the Claimant had *probably* done something illegal.

81.4 In an exchange with Mr. Sands during day one of the hearing, Mr. Sands said that the Respondent's position was that although Mr. Malone had been given some pause for thought, illegality was indeed the reason for the dismissal and it was in any event relevant to the question of bringing the Respondent into disrepute. The Tribunal said that that was surprising in circumstances in which both Mr. Malone's and Mr. Jamieson's witness statements attempted to distance the decision to dismiss from the question of illegality, but was told that it was part of it and that, in any event, the Respondent was seeking a positive finding that the Claimant had done something illegal. Mr. Sands then cross-examined the Claimant on the Deer Act itself. It was only on reflection overnight, as we understand it, that Mr. Sands decided he was not going to put forward the submission that illegality formed part of the reason for dismissal. He confirmed that expressly when the Judge took him to paragraph 61 of his written submissions and noted the absence of any suggestion that illegality was part of the reason for dismissal.

81.5 Relatedly, we note that Mr. Jamieson, too, formed the impression that Mr. Malone's reason for dismissal was that the Claimant had done an illegal act. Whatever Mr. Malone was told by the mystery witness, this did not prevent Ms. Delderfield from insisting in the appeal meeting that "*The information we have (from deer act) states that there is specific rules around despatching animals*" [**172**]. That apprehension was plainly something which had taken a strong foothold within the Respondent's organisation.

82 Our reading of the situation is this: as evidenced by the notes of the disciplinary meeting, Mr. Malone was firmly persuaded that without a licence / accreditation, it was illegal for the Claimant to have done what he had done. In those circumstances, its disciplinary policy necessarily kicked in: that referred to, like the disciplinary charge, a "*breakage of law which could or potentially bring the business into disrepute* [*sic*]" [**62**]. Given that it was "clear" to Mr. Malone that there was a "breakage of law", the assessment of the case appeared straightforward. However, on meeting the mystery witness he was

given cause to reflect that there might be some doubt about it. In our judgment, this surprised Mr. Malone for whom it had been "*clear*" that the Claimant must have done something illegal. Accordingly, and while he said he could not confirm that the law had been broken, fundamentally he clung on to his view that the Claimant had acted illegally. That in our judgment was the true reason for the dismissal.

83 We consider that, in the subsequent months, there has been an attempt by the Respondent to rewrite history in relation to the Claimant's dismissal. It has appeared convenient to a Respondent who, leaving aside Mr. Sands's attempts, discussed below, to pivot towards a suggestion that its real concern was its public image. After careful consideration, we were not persuaded.

84 The question of 'bringing the Respondent into disrepute' is not something that featured at all prominently in the disciplinary meeting. While the Claimant acknowledged that what he had done "*could give the company a bad name*" this was in the context of him having been told repeatedly that it was clear he had done something illegal as were the sporadic and unparticularised references to 'company disrepute' in the notes.

85 When Mr. Malone reconvened the meeting and explained his decision, he did not say that the key factor in his decision was the ongoing potential for the public to become aware and for, to use Mr. Sands's word, "*catastrophic*" consequences to the business. On the contrary, Mr. Malone said that the consequences "*could have been*" severe if the incident had been filmed. It was not filmed.

86 One further point in the context of the suggestion that Mr. Malone's true motivation was the potential for disrepute to the company is that that does not sit easily with the fact that he accepted that the Claimant was at all times acting in the animal's best interests. He did not consider, contrary to Mr. Sands's rather overblown submissions, that what the claimant had done was "*Utterly Barbaric and Extreme*"; on the contrary he expressed at one point the thought that he might have been tempted to do the same. That must, in our judgment, have coloured his impression as to what the outside world might have thought.

87 As we noted above, the appeal meeting did not discuss disrepute -- it was not mentioned once -- but instead focussed on the Claimant's assessment of the deer and resorted to further discussion about the legality of the situation.

88 Aside from bare assertion that if people found out what the Claimant had done there could have been negative consequences, there is precious little by way of particulars of exactly what, in the real world, the Respondent says it anticipates or anticipated happening. Our impression is that this was a retrofitted reason and something of a catch-all in circumstances where the question of illegality was not, or was perceived not to be, sustainable.

89 Another element of this case is Mr. Sands's suggestion that, in fact, the criminal offence the Claimant was guilty of was an offence under s. 1(2) of the Deer Act. As we have noted above, at one point in the hearing it appeared to be the Respondent's case that that criminal offence was the reason for the Claimant's dismissal (although this was jettisoned between day 2 and day 3).

90 Our overall conclusion is that we reject the Respondent's case as to the reason for the dismissal and find that the reason for the dismissal was that the Claimant was believed to have committed an "*illegal act*" by killing the deer without the licence Mr. Malone perceived he required.

IV B The Potentially Fair Reason Question

91 The reason, as we have found it, plainly relates to the Claimant's conduct and so is a potentially fair reason.

IV B The Fairness Question

IV B.1 Reasonable belief

92 As we have said above, Mr. Malone genuinely believed that the Claimant had acted in breach of a rule he thought existed that only people with licences / accreditation could dispatch suffering animals.

93 We do not think that Mr. Malone had a reasonable belief in that misconduct. Nothing has been shown to us to substantiate the existence of any such rule. We suspect that this is why the Respondent has sought to move away from the question of illegality towards disrepute.

94 To the extent that the Respondent prayed in aid any support for its allegation that the Claimant had done an illegal act it was the Deer Act. That Act, so far as we can see and so far as was pointed out to us, contains no support for the belief that Mr. Malone held.

95 His was an "*understanding*" of entirely unknown provenance. He said in the disciplinary meeting that he was "*not an expert*" on the point. It was incumbent upon him to test whether or not his understanding was right, in particular in circumstances where the employment of an employee of 24 years' good standing was in the balance. He did not do so. Reading the Deer Act and Hunting Act, which Ms. Campbell had included in the pack, would at least have alerted him to the fact that his understanding found no basis in them, or did not obviously do so. The Respondent has very significant administrative resources: it was obviously in a position to undertake research and/or to seek advice about the accuracy of Mr. Malone's understanding.

96 It was only by chance that Mr. Turner, at his disciplinary meeting, was accompanied by the mystery witness and that Mr. Malone was also the disciplining manager for Mr. Turner. That mystery witness, on Mr. Malone's own evidence, caused him to think that he might not be right about his understanding. But he undertook no further investigation into the question. Although he said he could not "*confirm illegality*" we have found that that was nevertheless the true and principal reason for the decision to dismiss. But it was not a reason based on a reasonable belief.

97 It follows from that conclusion that the dismissal was unfair.

98 However, we go on to consider the other elements of the test for the purposes of setting out our findings which may be relevant to remedy.

IV B.2 The Respondent's process

99 By and large the Respondent's process followed the ordinary administrative pattern of fair conduct dismissal.

100 However, certain features of it require closer consideration:

100.1 First, the mystery witness. Mr. Malone learned important information from this individual, the precise content of which is unknown. It was not relayed to the Claimant, Mr. Jamieson or to the Tribunal. All that can be said with certainty is that it caused Mr. Malone to have reason to think that what the Claimant had done may not have been illegal. What form of illegality was being discussed is unknown. What if any effect that information would have had on what the Claimant might have said, is unknown. There is an inherent issue with an employer relying on information that is not made clear to the employee it is considering dismissing; it was obviously important information

in the context of a dismissing manager who had conceived a strong view that the Claimant had done something unlawful.

100.2 Our view is that, generally speaking, no reasonable employer would have operated in this manner. More specifically, we consider it plausible that the information relayed by the mystery witness may also have been relevant to the question of the seriousness of what the Claimant had done, in particular in circumstances where the Respondent continues to say that the fact (on its case) that the Claimant had committed a criminal offence goes to the question of the potential risk to its reputation.

100.3 Second, and even more serious in our judgment, was the wholesale failure to take any steps at all to investigate the Claimant's clear contention that a previous manager had said on a previous occasion that the mercy killing of a deer was "fine". Mr. Sands – unrealistically in our view – suggested that the fault was the Claimant's for failing to provide the relevant evidence or that there were reasons why it was reasonable for Mr. Malone to fail to look into the point. We reject that. Mr. Malone was given ample information to go on. Mr. Sands said that Mr. Malone's statement to the effect that they "*would need*" evidence was an invitation to the Claimant to say more, which he declined. That is not at all supported on the evidence. We consider it telling, in fact, that Mr. Malone says nothing at all about this in his witness statement. Mr. Jamieson appeared to have only the vaguest notion that this was something that had been said in the disciplinary process. He took no steps to investigate either. As above, we had been under the impression that the managers the Claimant referred to may have been long retired or, in any event, no longer with the Respondent. The failure of the Respondent to grapple with the question at all, including in their witness statements meant, that, had Mr. Thompson not in submissions alerted our attention to the fact that Mr. March had still been employed by the Respondent at the time of the dismissal, we would have remained under that mistaken impression. In fact Mr. March was easily available to speak to.

100.4 This, too, took the process adopted by the Respondent well outside the range of reasonable responses. It had an employee of 24 years' good standing telling it that the conduct of which he was accused was something a previous manager had told him was fine. Mr. Malone understood the important of this and referred to the "*conflict*" it would generate if he were dismissed for it. And yet no steps at all were taken to verify what the Claimant was saying.

100.5 In fact, there was no explanation, so far as we could see, why the Claimant was not taken at his word. There was nothing extraordinary in his story. The Claimant had no history of dishonesty.

101 The Respondent's closed-mindedness / dismissiveness was unreasonable, in our judgment, but chimes with our view that there was an early conclusion that the Claimant had done something illegal and that that was the beginning and the end of the matter.

102 That closed-mindedness is further demonstrated in the fact that the outcome letter stated that the Respondent could "*not find any*" mitigating factors. That was an irrational assertion: even if they were not determinative, there were obvious mitigating factors (like length of service and the fact that the Claimant apologised), including the fact that he may have been told in the past that this conduct was acceptable.

103 Neither of these defects came anywhere close to being remedied on appeal. Mr. Jamieson was similarly closed-minded and devoted his attentions to questioning whether the Claimant's assessment of the deer's health had been accurate. He did not know anything about the mystery witness and took at face value that an unlawful act had been committed (although he now seeks to distance himself from that conclusion). He took no steps to look into whether the Claimant had been told that the previous act of mercy killing was fine. In fact, Mr. Jamieson concluded – without any rational basis so far as we can see – that Mr. Malone was wrong to conclude that this was an act of mercy killing (*i.e.*, that the Claimant believed, even if wrongly, that he was acting in the animal's best interests) and told us that he thought the Claimant had killed the deer because he wanted to. That was an entirely baseless suggestion.

104 The Respondent's procedure was outside the range of reasonable responses and would have rendered the dismissal unfair if the lack of reasonable belief underpinning the reason for dismissal had not already done so.

IV B.3 Sanction: the Range of Reasonable Responses

105 We have had at the forefront of our minds the need to ensure that we do not inappropriately usurp the Respondent's decision-making function by substituting what we would have done in its shoes. We must focus on the information available to the Respondent at the time.

106 With all of that in mind, even if the Respondent had succeeded in showing that it had a reasonable belief that the Claimant had committed an illegal act and that its procedure

was fair, it is clear to us that the sanction of summary dismissal falls well outside the range of reasonable responses open to an employer in its position acting reasonably.

107 The Claimant was an employee of 24 years' good standing. He had a clean disciplinary record. He was someone trusted to be the most senior person on site during shifts when more senior managers were not present. The Respondent accepted at the time of the dismissal that the Claimant's actions were intended by him to minimise the suffering of a dying animal. It was something they knew he was capable of doing from his previous employment.

108 It was possible that he was wrong in his assessment of the deer's health; the Tribunal is in no position to say either way and neither was the Respondent. Ms. Campbell and Mr. Jamieson may have had their doubts; the Claimant himself was confident that the animal was suffering and there was at least some basis to support his view. But all of that is superfluous in circumstances where Mr. Malone accepted that he was motivated by mercy.

109 The Respondent would have preferred it if he had left the deer to the RSPCA, a vet or the police, and if he had raised the issue internally both before and after the event. But Mr. Jamieson climbed down from the suggestion that the Claimant had committed a "*wholesale breach of the Respondent's procedures*": there were no procedures for a situation such as this. In truth, the height of it was that he "*would have expected*" the Claimant to do something else. Why that was his expectation was unknown.

110 Mr. Sands said that the Respondent had a "*very public*" stance on animal welfare. The height of this is that their animal welfare policy, which sets out the well-known 'five freedoms' for animals is available publicly. This did not move the dial particularly since, as a submission, it depended on an assumption that what the Claimant had done was inherently contrary to that policy and to animal welfare in general. But it was not *inherently* contrary to that policy. In fact, again, Mr. Malone had concluded that the Claimant *was* motivated by the animal's welfare.

111 The Respondent relied on the potential to bring it into disrepute.

112 It is relevant to note here that the Respondent's disciplinary policy does not include in its examples of gross misconduct just *any* conduct capable of bringing the company

into disrepute. The example given is of (i) any "*breakage of law*" which (ii) "*could bring or potentially bring"* the company into disrepute. It had formed an early but irrational view that that element (i) was present, but latterly attempted to retrofit the facts to one in which the mere presence of (ii) was sufficient.

113 We accept, of course, that the disciplinary policy is not legislation by which the Respondent is bound: we have to assess its response to the information it had before it in the round. However, the sort of conduct the Respondent had announced in advance as conduct justifying summary dismissal is of course relevant to whether it was reasonable to dismiss for a form of conduct that does not meet that threshold.

114 We do not think that the Respondent, at the time of the dismissal, had very serious fears about their reputation. There is nothing whatsoever in the Respondent's witness statements to support Mr. Sands's ambitious submissions that the consequences of the Claimant's conduct being more widely known could be potentially "*catastrophic*" or that there is any regulatory risk. The references to reputational risk are generalised; it is clear to us that the extent of Mr. Malone's concern in this regard was that *if* the incident had been filmed that *could* have caused potential problems. But it was not filmed. Mr. Jamieson did not mention the potential for disrepute once in the appeal meeting; our very strong impression is that the term is being used as a catch all to justify a dismissal that the Respondent assumed could be justified by reference to an illegal act.

115 The sanction is not made more justifiable by reference to an after the event allegation that the Claimant is in fact guilty of a criminal offence (i.e., Mr. Sands's submission that, in fact, s. 1(2) of the Deer Act *does* incriminate the Claimant). That was simply not the Respondent's thinking at the time – to the extent that they thought an illegal act had been done it was because the Claimant was not licensed.

116 For the avoidance of doubt, however, we are not drawing any conclusions about whether or not the Claimant did do something illegal. It would be a stark and surprising conclusion if that *was* the law when it is accepted that the Claimant was acting to put a dying animal out of its suffering. S. 1(2) appears, on its face, to be targeted at protecting the property rights of the owners of land on which deer graze. There may, for example, be arguments that the Claimant, as the person to whom responsibility for the site was deputed was, for these purposes, in the position of the 'occupier' of the land; it may be

that Acts of Parliament subsequent to the Deer Act (the Hunting Act, the Animal Welfare Act 2006 *etc*) have something to say on the point: we simply do not know. Neither does the Respondent. In any event, as above, this was simply not within the frame of the Respondent's thinking at the time.

IV B.4 Overall conclusion

117 Our overall conclusion is that the Respondent did not have a reasonable belief in the reason for which it dismissed the Claimant. In any event, the procedure it adopted was outwith the range of reasonable responses and the sanction was outwith the range of reasonable responses.

118 The Claimant's claim of unfair dismissal is well-founded.

V Remedy matters

119 We agreed with the parties that we would consider, as is common, the questions of "*Polkey*" and contribution at this stage.

V A *Polkey*

120 This is a case where, on our findings and conclusions, the dismissal was unfair at each stage. The Respondent did not have a reasonable belief in the misconduct. Its procedure was unfair. The sanction was too harsh. It is difficult to see how, having reflected on the authorities cited above, we are in a position to make any Polkey reduction without, in effect, rewriting the history of the case.

121 At this stage we are required to ask ourselves in a hypothetical world what would have happened and in doing so to do the best we can with the information we have in order to construct that hypothetical world. One point that is clear to us, on the balance of probabilities, is that the Claimant was telling the truth when he said he had been told in the past that the mercy killing of a suffering deer was "*fine*". So if the Respondent had taken the Claimant at his word on the point it would have known that. Similarly, if it had made proper enquiries, including by asking former managers who still worked there, it would have either had corroboration of the Claimant's position or would have been left with an ambiguity (but it would not have had cause to think the Claimant might have been lying).

122 The facts then are clear: the Claimant, who had experience of doing so, conducted a mercy killing. He had been employed with good standing for 24 years. He had been told that mercy killing a deer in the past was "*fine*". There had been no subsequent instruction to the contrary; the procedures do not expressly or clearly cover the point.

123 However the cards are reshuffled (reframing the reason for dismissal, or improving the investigation / procedure) we do not believe there is any realistic prospect that this Claimant would have been dismissed fairly. We therefore make no Polkey reduction.

V B Contribution

124 We are permitted in this context to assess the Claimant's conduct for ourselves.

125 We accept, as Mr. Malone did, that the Claimant was acting out of mercy. It is obvious to us that he is a man who cares very deeply about the humane treatment of animals. We accept his evidence that he has experience of the sad but necessary task of putting animals out of their misery. He believed that the deer was suffering. He did what he felt he had to do. No instruction or policy of the Respondent's suggested otherwise. He formed the rational judgment that to wait for the RSPCA, a vet or the police would simply prolong the inevitable. We do not consider he is culpable of blameworthy conduct and therefore do not make a reduction to reflect any such conduct.

VI Conclusions

126 The Claimant was unfairly dismissed.

127 If the appropriate remedy is compensation (as opposed to reinstatement or reengagement) there will be no reductions either (i) to the basic award applying s. 122(2) of the ERA 1996 or (ii) to the compensatory award applying the (a) principles in *Polkey* / s. 123(1) ERA 1996 or (b) s. 123(6) of that Act.

128 We have not heard submissions on the question of an Acas adjustment and so that question remains open. We will hear any other submissions on remedy at a hearing we have listed for 17 April 2026.

CASE MANAGEMENT ORDERS

129 We make the following case management orders:

(1) The parties must (i) give disclosure of any documents they intend to rely on for the purposes of the 17 April 2026 Remedy Hearing and (ii) exchange any witness statements they intend to rely on at that hearing by no later than 3 April 2026.

Approved by:

Employment Judge Grahame Anderson
Date: 22 January 2026

Sent to the parties on: 30 January 2026

For the Tribunal Office.

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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Recording and Transcription

Please note that if a Tribunal Hearing has been recorded you may request a transcript of the recording, for which a charge is likely to be payable in most but not all circumstances. If a transcript is produced it will not include any oral Judgment or reasons given at the Hearing. The transcript will not be checked, approved or verified by a Judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/