



In the Employment Tribunals (Scotland) at Edinburgh, Judgment of the Employment Tribunal in Case No: 8000576/2026, held at Edinburgh via Cloud Video Platform on 28 July 2026 at 10am

Employment Judge J G d'Inverno

Mr K Manson

**Claimant
In Person**

JLcom Ltd

**Respondent
Represented by:
Mr G McArthur -
Managing Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:

(First) That the claimant's complaint of unfair dismissal fails and is dismissed.

REASONS

1. This case called for Final Hearing at Edinburgh via Cloud Video Platform on 28 July 2026.
2. The claimant, Mr K Manson, appeared in person. The respondent company was represented by its managing director, Mr G McArthur.
3. In the course of case management discussion conducted at the outset of the hearing, the Employment Judge outlined to parties the procedure to be followed in the eliciting of evidence on oath or on affirmation, including explaining the purposes of Evidence in Chief, Cross Examination, the importance of putting to witnesses in cross examination matters in respect of which a party had given evidence or, intended to give evidence which was contradictory to that of the witness on any particular point, and the potential consequences of failing to do so namely, that they may be taken to have accepted witnesses version of events.
4. The Tribunal records parties confirmation:-

- (a) that they were agreed that the reason for dismissal was that of asserted gross misconduct; and, for the purposes of remedy:
 - (i) that it was agreed that the claimant worked a 37.5 hour week;
 - (ii) that the claimant's gross weekly wage was £590 and the claimant's net weekly wage was £500; and,
 - (iii) that the claimant's date of employment with the respondent were from 10-06-2020 to 25-09-2025

The Issue

5. The parties each confirmed their agreement that the issue requiring investigation and determination by the Tribunal at the Final Hearing was:

“Whether, in dismissing the claimant with or without notice, on 25 September 2025, which was the Effective Date of Termination of the claimant's employment, for the asserted reason of gross misconduct, which is a potentially fair reason in terms of section 98 (2) (a) of the Employment Rights Act 1996 (“ERA”), did the respondent in the circumstances (including the size and administrative resources of the employer's undertaking) act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the claimant and thus, does the dismissal fall to be regarded as fair or unfair in terms of section 98 (4) of the ERA.”

6. By way of remedy, the claimant sought;
- (a) a basic award and a compensatory award in terms of a schedule of loss and a sum of £500 in compensation for loss of statutory rights.
 - (b) the claimant, additionally sought a 25% increase in any award made, in terms of section 207A of the Trade Union and Labour Relations Consolidation Act 1992, by reason of what was the respondent's asserted failure to follow the ACAS Code of Practice in relation to disciplinary proceedings.

Sources of oral and documentary evidence

7. Both the claimant and the respondent's managing director gave evidence on oath or on affirmation.
8. Each party placed and referred to several documents before the tribunal in the course of the hearing, in the case of the claimant these being appendixes to his particulars of claim.

9. Each of the claimant and the respondent's managing director answered questions put in cross examination by the other, together with questions put by the Tribunal.
10. While the claimant accepted, as he was bound to do given the contemporaneous evidence of the communications passing between himself and his work colleague, that he had used inappropriate language in the course of that exchange, his evidence and that of the respondent's managing director was directly in conflict regarding what the claimant did or didn't say to his managing director in the course of his subsequent meeting with him including, in particular, whether the claimant also used inappropriate language of the same or similar type in addressing his employer, Mr McArthur the respondent's managing director, at that meeting, and regarding the manner in which the claimant conducted himself during the meeting including in particular whether he brought the meeting to an end by walking out.

Findings in fact

11. On the oral and documentary evidence presented, the tribunal made the following essential findings in fact restricted to those relevant and necessary to the determination of the issues both as to the merits and as to remedy.
12. The claimant was employed by the respondent in the capacity of electrician's mate (assistant), in the period 10-06-2020 until 25-09-2025, on which latter date he was summarily dismissed by the respondent for reason of gross misconduct. The claimant's last day of work was 25-09-2025 which date was the effective date of termination of his employment.
13. As at the date of his employment, and in the preceding three months, the claimant worked an average of 37.5 hours in each week.
14. The claimant's gross weekly wage was £590.
15. The claimant's net weekly wage was £500.
16. As at the effective date of termination, the claimant had not received any prior written warnings as to conduct.
17. The respondent's company operates a small business of approximately 9/10 employees including its Managing Director Mr McArthur.
18. The respondent's representative and managing director, Mr McArthur, is actively involved in the day to day running of the business. He is the senior person in the business.
19. The business employs a number of skilled and qualified tradesmen and a number of non-tradesmen whose role is to assist tradesmen as required and

some of whom have experience in particular areas of work and in addition hold particular qualifications.

20. The claimant had particular experience in telephonic and general wiring.
21. The claimant's principal duties consisted of assisting the qualified tradesmen in the carrying out of tasks as required. He was not required to carry out tasks which required trade qualifications which he did not possess.
22. The claimant was qualified and from time to time was called upon to erect scaffold.
23. When the respondent contracts with a customer to carry out work, a risk assessment is carried out in accordance with the customer's requirements and the requirements of the job. The job is then allocated to a suitably qualified skilled tradesmen within the respondent's small workforce.
24. In the case of jobs which require two pairs of hands, the skilled tradesman to whom the job has been allocated identifies within the available workforce an assistant, such as the claimant, to assist the tradesmen in the execution of the work.
25. On 23 September 2025, Darren King, one of the respondent's skilled tradesmen, was allocated a customer job at Stirling which required two pairs of hands and **the erection of** a scaffold.
26. The claimant, who was certified and qualified to erect scaffold, was available.
27. On 23 September 2025, Darren King accordingly made contact with the claimant, by Whatsapp message, to advise him of the job and make arrangements to pick him up on the following day in order that he might travel with him Darren King, to Stirling and assist him in carrying out the work.
28. There followed an exchange of Whatsapp messages and voice messages between the claimant and Darren King stretching across 23 and 24 September 2025.
29. The claimant asked Darren King to describe the work. Darren King did so indicating that the work involved him fitting some plasterboard while protecting it but that the location to which the board was to be fitted was "quite high up" hence the requirement to have built a scaffold.
30. The claimant responded by stating that:- *"I am no fire protector or sheeter? I can build a normal scaffold high but get tae fuck with the rest of it..."*.
31. Darren King described the work assuring the claimant that, beyond erecting the scaffolding, the job was not an onerous one for either himself or the claimant.

32. In a message timed at 10.34, the claimant responded saying *"couldnae give a fuck Darren I will build a scaffold but anything else is not happening."*
33. At 10.37, the claimant added: *"I am elec/telecoms nothing else apart from having my PASMA to build scaffold. I don't get paid for anything other than this."*
34. At 10.38, the claimant added: *"Not got a problem building the scaffold for you but all that other shite is on your watch mate not mines."*
35. The respondent's Darren King responded at 10.43 stating: *"I will meet you wherever suits."*
36. The claimant responded again: *"I am no fire protector or sheeter? I can build a normal scaffold high but get tae fuck with the rest of it. Couldnae give a fuck Darren I will build a scaffold but anything else is not happening."*
37. The claimant failed to make arrangements for pickup on the following day and the job was unable to proceed as planned for the customer.
38. Darren King found the language used by the claimant and the claimant's position of stating effectively that he would determine what he would do and what he would not do to be unacceptable.
39. He complained to the respondent's managing director Gary McArthur, forwarding the exchange of messages to him.
40. Mr McArthur contacted the claimant by message stating: "Keith just received these messages. That's unacceptable. Come in to see me at the office 3pm today to discuss."
41. The claimant responded by stating: *"I wont make it to the office for 3pm either as I am in Glasgow and my bus home isn't until after 4pm."*
42. The scheduled job was unable to proceed on the following day for the customer in consequence of the claimant's refusal to assist Darren King and to agree a pickup place and time. In light of the claimant's indication that he would be unavailable to meet with the managing director that day, the meeting was rearranged to the following day.
43. The claimant met with the respondent's managing director on the following day. Prior to the meeting, the respondent's managing director did not have in contemplation summarily dismissing the claimant. Rather, he wished to understand the claimant's reasons for communicating with the language that he had done and for refusing to assist Mr King in the execution, by Mr King, of work which had been allocated to him and for which, in the respondent's managing director's consideration, the claimant was employed to do.

44. He wanted to give the claimant an opportunity to explain and apologise for his use of language and be reassured that going forward, the claimant would not repeat his behaviour.
45. At the meeting, the respondent's managing director stated that use of the language of the type the claimant had used was unacceptable, that he had not been asked by Mr King to carry out any work that he was not employed and that the matters, beyond the erection of scaffolding, that the claimant was being asked to assist Mr King with, were matters in respect of which, the claimant, required specific training or qualification, e.g. helping to hold the plaster board in place while Mr King fixed.
46. In the meeting, the respondent's Managing Director considered that the claimant showed no remorse for the language used by him or for the attitude which he had adopted towards Mr King and through him towards his employer.
47. At the meeting, the claimant was shown a copy of the transcripts and screenshots of the exchange of communication and was told that Mr King had complained about both his attitude and his use of language and was further informed that the customer job was unable to proceed as planned because of the same.
48. The respondent's managing director explained that all the jobs which employees were asked to carry out, including the job in question, were risk assessed and that the claimant's conduct was such that disciplinary action could be taken against him.
49. The respondent's Managing Director considered that in response, the claimant showed no remorse nor regret for the manner in which he had conducted himself or for the language used, but rather reiterated that the job was "*not part of my remit*" and that he would only do work that in his view, he was employed to do.
50. The Respondent's Managing Director understood the claimant to be telling him that he, the claimant, would determine what work he carried out in the course of his employment rather than his employer directing him in those matters.
51. It was Mr McArthur's position in evidence that during the course of the meeting and after the above exchange, the claimant used and directed language towards himself, Mr McArthur, of the same type as he had used in his exchanges with Mr King and then got up and walked out of the meeting.
52. It was the claimant's position in evidence that he had not used such language directly to the managing director but rather had explained that the use of such

language was normal in the construction industry and, that he did not walk out of the meeting but rather that the meeting terminated with both he and Mr McArthur leaving together.

53. Following the meeting, the Respondent's Managing Director discussed the claimant's conduct with Deborah Charmia, the respondent's Commercial Manager. He went over the messages with her and reflected on what the claimant had said and how he had conducted himself at the meeting.
54. Although going into the meeting he had not had in contemplation summarily dismissing the claimant, he and Deborah Charmia concluded that the claimant's conduct, including his indication that he would in effect only do what he chose to do as an employee and not what his employers directed him to do, amounted to gross misconduct such that it destroyed the mutual confidence and trust which was essential to the continuation of the employer/employee relationship.
55. The respondent's managing director told the claimant that he would be expected to apologise to his colleague Mr King and to carry out the work which his employer directed him to carry out going forward, to which the claimant responded by saying "*get tae fuck I'll not be doing that, I'll be doing this*" and walked out.
56. The Respondent's Managing Director concluded that he could not have confidence and trust in the claimant going forward, not continue to behave in the manner which he had, and not to refuse to carry out work allocated to him by his employers,
57. Having so concluded Mr McArthur determined to dismiss the claimant for gross misconduct.
58. By letter dated 25 September, the Respondent wrote to the Claimant advising and confirming;
 - (a) that following his meeting with the Respondent's Managing Director, he was dismissed for gross misconduct,
 - (b) advising that the respondent reserved the right, in the circumstances, to bring the employment to an end immediately without notice or payment in lieu of notice,
 - (c) that the respondent would pay to the claimant his one week's "lying time" in his final payslip due on Thursday 2 October 2025;
 - (d) that by the respondent's calculation, he had accrued 22.5 days of annual leave of which he had taken 15 and that he would

therefore be paid 7.5 days of holiday pay in his final pay remittance and,

(e) finally, that a P45 would be sent to him as soon as possible.

59. The respondent's managing director considered that standing the reasons for and circumstances in which the claimant had been dismissed, that the decision to dismiss was a final one and that there were no circumstances in which the necessary trust and confidence could be restored such as to result in a reconsideration of the decision to dismiss. The respondent's commercial director agreed with that assessment. In consequence, when writing to the claimant and confirming his dismissal, the respondent did not offer him a right of appeal against the decision.

60. By email dated 10 October 2025 addressed to Deborah Charmia, the claimant wrote: *"I am writing to formally appeal against the disciplinary penalty you imposed on me on Thursday 25 September 2025.*

My reasons for appeal are as follows.

I disagree with the way the disciplinary action was taken.

I also feel that the action taken was too harsh.

I will be grateful if you would let me know when and where we can meet to discuss my appeal if this is at all possible.

I would like to be accompanied at the meeting by my union rep.

Yours sincerely, Keith Mason."

61. By letter dated 14 October 2025, Deborah Charmia sent the claimant his P45 and responded to his request for an appeal hearing. Her letter was in the following terms:

"Hi Keith,

Thank you for your letter dated 10 October. The evidence provided to JLcom's was very clear that this had taken place, and is completely unacceptable behaviour for anyone at JLcom. Please find attached your P45.

Many thanks.

Kind regards,

Deborah Charmia"

62. Deborah Charmia copied her reply to the respondent's managing director, Gary McArthur.

63. Mr McArthur's position in evidence was that although he was not aware of the claimant's email of 10 October 25 requesting an appeal hearing, when it was received, Ms Charman had the authority to so respond and that he was content with the response when it was copied to him as it accorded with his view that the decision to dismiss the claimant was a final decision.
64. Absent the respondent incurring the cost of employing an external process for the conduct of the appeal that any appeal against the decision would require to have been heard by and determined by Mr McArthur who was the most senior person within the respondent's organisation.
65. The grounds of appeal that the sanction of dismissal was too harsh in the face of the conduct which the claimant had not denied was a ground which Mr McArthur fundamentally disagreed with, particularly bearing in mind the claimant's conduct towards himself at the meeting. He considered that there was no prospect of an appeal against the decision to dismiss being upheld on such a ground on which the claimant subsequently sought to advance.
66. Following his dismissal, the claimant obtained alternative employment within 2 or 3 days and, with the exception of two short periods during which he was laid off, continued, and as at the date of the hearing was continuing, in that employment on a permanent basis.
67. The claimant's alternative employment remunerated and remunerates him at a rate higher than that which he was earning with the respondent prior to his dismissal.
68. In the 13 month period which had elapsed between the date of the claimant's dismissal and the date of the hearing, the claimant had earned approximately £2,500 more than he would have earned had he remained in the respondent's employment.
69. The claimant sustained no loss of earnings and no financial loss in consequence of the respondent's act of dismissing him.

Summary of submissions

70. It is not the function of the tribunal to set out the submissions of parties at length. The claimant's and the respondent's submissions are accordingly summarised below.

Submissions for the claimant

71. In submission, the claimant confirmed that while he accepted that he had been dismissed for reason of gross misconduct, he did not accept that the

use of language aspect of his conduct should be regarded as gross misconduct. Rather in his submission it was normal language in the industry and secondly and in any event that even if it was gross misconduct, the sanction of dismissal was too harsh given that he had received no prior written warnings in the course of his five years of employment with the respondent.

72. Finally, the claimant submitted that the respondents had not followed the ACAS Code of Practice because they had not given him an opportunity to appeal against the decision to dismiss him.

Submissions for the respondent

73. In submission, the respondent's managing director stated that while in advance of the meeting with the claimant, he had not had in contemplation his dismissal, the claimant's attitude towards his misconduct displayed in the meeting including his lack of remorse and attempt to justify the language used as normal, coupled with his conduct towards himself, his employer, in the course of the meeting and failure to confirm that going forward, he would not refuse to carry out work for which he was employed and which in his employer's assessment, fell within his remit, had resulted, in his assessment in complete destruction of the trust and confidence necessary to sustain the employer/employee relationship.
74. He had concluded that the claimant's conduct was gross misconduct for which he should be dismissed.
75. That decision, once taken by him, was a final decision.
76. Although accepting that the claimant had not been offered the opportunity to appeal against the decision to dismiss him, the respondents were a small company of only 11 personnel of which he, the decision taker, was the most senior and that any such appeal would require to have been heard by himself.
77. He did not agree with the claimant's assertion that the sanction of dismissal was too severe in circumstances where trust and confidence had been destroyed by his conduct and that trying to view the matter objectively, he could not conceive of circumstances in which upon appeal, the decision to dismiss would be reserved on grounds such as those subsequently advanced by the claimant namely, that in the circumstances, it was too severe a penalty.

The Applicable Law

78. It was a matter of agreement between the parties binding on the tribunal for the purposes of the hearing that the claimant was dismissed for a reason relating to his conduct which, in terms of section 98 (1) and (2) (b) of the Employment Rights Act 1996 ("ERA"), is a potentially fair reason. In these circumstances, the question of whether the dismissal falls to be regarded as

Fair and Unfair falls to be determined in accordance with the provisions of section 98 (4) (a) and (b) of the ERA.

79. Section 98 of the 1996 Act is in the following terms:

“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—*

 - (a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
 - (b) *relates to the conduct of the employee,*
 - (c) *is that the employee was redundant, or*
 - (d) *is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*
- (3) *In subsection (2)(a)—*

 - (a) *“capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*
 - (b) *“qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*
- (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.*
- (6) *Subsection (4) [is] subject to—*
- (a) *sections [98A] to 107 of this Act, and*
 - (b) *sections 152, 153 [238 and 238A] of the M1Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action)."*

Discussion and Decision

80. As set out in the issue recorded at paragraph 5 above, the question to be asked and answered by the Tribunal is whether in the circumstances, the respondent acted reasonably or unreasonably in treating the reason for dismissal, in this case the claimant's gross misconduct, as a sufficient reason for dismissing him.
81. The circumstances to be considered include amongst others the size and administrative resources of the employer's undertaking and, whether the employer followed a fair procedure.
82. In the case of ***British Home Stores v Burchell*** [1978] IRLR 379, the higher courts set out a three part test which an employer must meet if a conduct dismissal is to be regarded as fair ("the Burchell test"):
 - (1) Genuine belief – did the employer, as at the point of deciding to dismiss hold a genuine belief in the employee's guilt as to the conduct in question?
 - (2) Reasonable grounds – at the time of forming that belief, did the employer have reasonable grounds upon which to form it?
 - (3) Was a reasonable investigation carried out?
83. If an employer satisfies the Burchell test, a dismissal can still be unfair if it falls outside the range of reasonable responses identified by the Employment

Appeal Tribunal decision in *Iceland Frozen Foods v Jones* [1982] IRLR 439. Thus, the question to be asked, in relation, for example to the issue of whether or not the sanction of dismissal was an appropriate sanction or, on the other hand, was too severe in the circumstances, is, does the decision, in the circumstances, fall within the band of reasonable responses open to a reasonable employer acting reasonably?

84. A decision will fall out with the band of reasonable responses if and only if it can be said and the Tribunal can be satisfied that no reasonable employer acting reasonably in the circumstances would have decided to dismiss. If the reality is that whilst some reasonable employers acting reasonably in the circumstances would not have dismissed but it cannot be said that no reasonable employer so acting would have dismissed, then the decision will fall within the band of reasonable resources.
85. Gross misconduct is conduct which is so serious that it fundamentally destroys the trust and confidence at the heart of the employment relationship. When an employer concludes that an employee has committed gross misconduct, it may be entitled to dismiss that employee immediately without giving notice. The practical consequences of a gross misconduct finding by an employer is significant. Unlike ordinary misconduct which typically requires a series of warnings before dismissal is justified, gross misconduct can justify immediate dismissal at a first hearing. Common examples of gross misconduct include a serious insubordination (refusing to follow a lawful and reasonable instruction).

Was there gross misconduct properly established?

86. The Tribunal was unclear from the claimant's evidence whether he disputed that his admitted conduct, in the manner and in the language with which he communicated with Darren King one of the skilled tradesmen whom he was employed to assist, in fact amounted to gross misconduct, or whether his position was that while he accepted that it did amount to gross misconduct, he nevertheless maintained the sanction of dismissal was too severe. The Tribunal was however satisfied on the evidence presented that the claimant's conduct both in relation to his work colleague Darren King and in relation to his managing director and employer at his subsequent meeting with him did, in the circumstances of the case, constitute gross misconduct, that is to say conduct which was so serious that it fundamentally destroyed the trust and confidence at the heart of the employment relationship. In respect of the language used, the tribunal did not accept the claimant's submission that because such language might be encountered in many places within the industry, it was permissible to use it in the manner and circumstances in which he did. The Tribunal rejected the claimant's contention that he was not directing his language against Mr King. The communications in which he

used the language were sent by him to Mr King and were intended by to be for Mr King.

87. In relation to his conduct towards Mr McArthur, his employer, at their meeting, the Tribunal was satisfied that regardless of whether or not the claimant used similar language, a point upon which his evidence and that of Mr McArthur was in direct conflict, the position that he adopted being one in terms of which he effectively communicated to Mr McArthur that he the claimant, rather than his employer, would determine what work he undertook in the course of his employment, was conduct destructive of the trust and confidence essential to the continued sustainment of the employment relationship and thus, constituted gross misconduct in the circumstances.

The Burchell test

A genuine belief

88. The Tribunal was satisfied on the evidence presented that as at both the point of conclusion of his meeting with the claimant and at the point at which he took the decision to dismiss the claimant and communicated the same to him, the respondent's managing director (Mr McArthur) held a genuine belief in the claimant's guilt of the misconduct in question.
89. The fact of the language used by the claimant in his communications with Mr King was not in dispute and was evidenced at the meeting in the copies of the Whatsapp messages and transcript of the tele messages which were looked at and commented on during the meeting.
90. In relation to the claimant's conduct towards Mr McArthur, Mr McArthur himself was the subject of that conduct and the Tribunal was satisfied upon his evidence which it accepted as both credible and reliable on the point that he genuinely believed that that conduct was gross misconduct in the circumstances.

Reasonable grounds

91. The Tribunal was satisfied for the reasons set out above that the respondent had reasonable grounds upon which to form the belief.

Reasonable investigation – was a reasonable investigation carried out?

92. Gross misconduct can justify immediate dismissal at a first hearing. The tribunal was satisfied on the evidence presented that in relation to the claimant's conduct towards his colleague Mr King, sufficient investigation had occurred. Mr McArthur had already heard Mr King's side of the story when

Mr King complained about the claimant's conduct. The fact of what was communicated by Mr Manson to Mr King was not in dispute and was established and, at the meeting with Mr Manson, he Mr Manson had the opportunity to communicate and had communicated his explanation of his conduct.

93. In relation to the claimant's conduct vis a vis Mr McArthur at the meeting, both the claimant and Mr McArthur were present and were the only persons present at the meeting.
94. The Tribunal was accordingly satisfied that the respondent had, in the circumstances, carried out a reasonable investigation and thus had satisfied the three part Burchell test.

The band of reasonable responses

95. While accepting that some employers acting reasonably in the particular circumstances of this case might have opted not to dismiss the claimant summarily but rather to have applied some lesser sanction, the Tribunal was unable to hold on the evidence that no reasonable employer acting reasonably in the circumstances would have opted to dismiss the claimant.
96. The Tribunal accordingly holds that the respondent's decision to dismiss the claimant fell within the band of reasonable responses available to a reasonable employer acting reasonably in the circumstances and that the respondent had acted reasonably in treating the claimant's established gross misconduct as a sufficient reason for dismissing him.
97. Turning to the question of procedural fairness and in particular, whether the respondent's failure to facilitate an appeal hearing into the grounds upon which the claimant sought to appeal against the decision to dismiss namely that the sanction of dismissal was too severe in the circumstances, was a failure which tainted the dismissal with procedural unfairness.
98. While there is no strict legal requirement that an employer must always offer an employee the right to appeal against a decision to dismiss, it is generally the case that where an employer fails to do so, an employer is likely to be regarded as failing to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures and their doing so can make a dismissal unfair in terms of section 98 (4) of the ERA 1996. The code advises that in order to comply with it, employers will generally require to:
 - carry out a thorough investigation before any decision is taken;
 - notify the employee of the allegations and provide copies of any evidence;

- hold a disciplinary hearing at which the employee has an opportunity to respond;
 - allow the employee to be accompanied by a trade union representative or a colleague;
 - communicate the outcome in writing with reasons; and
 - offer the employee a right of appeal against the decision.
99. The Tribunal was satisfied in relation to the first five of the above bulletpoints that the respondent had either complied with them or in the circumstances did not reasonably require to comply with them. Standing the last bullet point the offer of a right of appeal against the decision, one of the factors to be considered in terms of section 98 (4) in determining whether an employer in the particular circumstances of each case has acted reasonably is the “*size and administrative resources of the employer’s undertaking*”. The respondent is a small business of some 11 employees only of which the decision taker, the respondent’s Managing Director Mr McArthur was the most senior. The Tribunal considered, in the circumstances that the respondent fell within the small employer exception which would permit in respect of any appeal that the appeal be heard by Mr McArthur, the decision maker. If doing so Mr McArthur would require to strive to consider matters objectively on appeal notwithstanding the fact that he had been the decision maker and there being no one more senior within the organisation before whom an appeal could be heard.
100. It was not argued by the claimant that the respondent should have incurred the cost of engaging an outside agency to provide and administer an appeal process. The Tribunal would not have considered that to be a proportionate requirement in the circumstances had such an argument been advanced.
101. The claimant in fact submitted a letter of appeal in which he set out as the principle ground of appeal being the proposition that the sanction of dismissal was, in the circumstances, too severe. He did not address that letter of appeal to the respondent’s Managing Director Mr McArthur (the Dismissing Officers), nor did he copy it to him. Rather, he addressed it to the respondent’s Commercial Manager Deborah Charmia who, although not the decision maker in respect of the claimant’s dismissal, was someone with whom the decision maker Mr McArthur had discussed the claimant’s conduct in the course of his reaching the decision to dismiss. Ms Charmia did acknowledge and consider the claimant’s appeal letter, communicating to him what was in effect a refusal to change the decision to dismiss. Ms Charmia copied that reply to the respondent’s Managing Director, the decision maker, who, for his part, agreed with it, he being satisfied, in the circumstances, that the

claimant's conduct had been destructive of the trust and confidence necessary to sustaining the employment relationship and that the same could not be repaired or restored effectively precluding the possibility of the decision being changed, not least on the ground advanced with which he fundamentally disagreed namely that the sanction of dismissal had been too severe in the circumstances.

102. While recognising that the respondent had not proactively offered the claimant the option of an appeal hearing, the Tribunal was satisfied that the respondent had not failed to acknowledge and consider the claimant's stated ground of appeal when he submitted the same but rather, that the respondent's Commercial Manager had considered the ground upon which the appeal was advanced refused the appeal, copying that decision to the respondent's Managing Director who had agreed with it.
103. In the particular circumstances of the case as the Tribunal has found established on the evidence presented, including the size and administrative resources of the respondent, the Tribunal determined, in accordance with equity and the substantial merits of the case, that the procedure followed by the respondent, was not such as to taint the dismissal with unfairness and that the respondent had acted reasonably in the circumstances in treating the claimant's established gross misconduct as a sufficient reason for dismissing him.
104. The Tribunal holds that the claimant's complaint of unfair dismissal fails and falls to be dismissed.