EMPLOYMENT TRIBUNALS

Claimant: Mr E P Sodje

Respondent: Macclesfield Town Football Club Limited

HELD AT: Manchester **ON:** 19,20 & 21 December 2016
8 February 2017 (In Chambers)

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: Mr M Bestley , Solicitor
Respondent: Mr R Fletcher, Solicitor

RESERVED JUDGMENT

It is the Judgment of the Tribunal that:

1. The claimant was unfairly dismissed.

2. The claimant is entitled to compensation for unfair dismissal.

3. The tribunal makes no reduction in the basic or compensatory awards on the basis of any contribution by the claimant.

4. The tribunal makes no reduction to the compensatory award on the basis that a fair procedure would have made no, or some, difference pursuant to ***Polkey***.

5. The tribunal proposes to award a basic award of **£865.38,** and compensation on the basis of loss of earnings for 6 months from the date of dismissal , 14 September 2016 , and hence he would be entitled to a compensatory award based on 6 months loss of earnings, plus loss of statutory rights.

6. The claimant was wrongfully dismissed, in breach of contract.

7. The claimant is entitled to damages for breach of contract in the form of notice pay. The tribunal finds that the appropriate notice period was 3 months , and proposes to award the net loss of earnings sustained by the claimant in that period, less benefits received , the sum of **£2,924.53.**

8. The parties are invited to seek to agree the relevant awards in respect of these claims. In default, either party may ask the tribunal to determine remedy either at a hearing, or, if the parties agree, on the basis of written submissions, and any further documents. Any such application for a further hearing , or for determination of the award due, or any element thereof, shall be made by **26 May 2017.**

REASONS

1. The claimant was employed as an Assistant Manager by the respondent until his dismissal on 14 March 2016. He complains of unfair dismissal, and also breach of contract , his dismissal being summary. The respondent admits the claimant was dismissed, and contends that it had a fair reason for dismissal, namely the claimant's conduct, and that the dismissal was fair in all the circumstances. The respondent further denies wrongful dismissal, contending that the claimant was guilty of conduct which entitled it to dismiss the claimant without notice.

2. The hearing was commenced on 19 December 2016, and continued on to 20 and 21 December 2016. As closing submissions could not be made within the hearing , the parties agreed , and the Employment Judge considered that this was an appropriate case for, written submissions to be made. These were received, and the tribunal considered them in Chambers on 8 February 2017. Further disclosure was given as well, but neither party wanted any witness recalled, or to reconvene an oral hearing, to deal with this additional material.

3. The tribunal has deliberated in chambers on 8 February 2017, and now promulgates this judgment. The tribunal apologies for the delay in promulgation, occasioned by pressure of judicial business.

4. The respondent called Alan Cash, Colin Garlick, Mark Blower, James Beckett,and Steve Watson . Additionally, witness statements from Byron Jenkins and Stewart Joseph were adduced on behalf of the respondent, but they were not called to give live evidence. The claimant gave evidence, and called Richard Jobson, Garry Doolan and Leonard McGarry. The claimant also adduced a statement from Karibo Lawson, but he was not called. There were two Bundles, the original Bundle, and a Supplementary Bundle produced by the respondent during the adjournment, comprising mostly of minutes of Management Committee meetings from 12 August 2015 to 25 April 2016, and a letter to John Askey dated 1 July 2016. Having heard and read the evidence, and considered the documents in the agreed Bundles , and having considered the submissions of both parties, the tribunal finds the following relevant facts:

4.1 The claimant was a professional footballer, and played for the respondent club between 1997 and 1999. On 1 July 2013 he was employed by the respondent as an Assistant Manager , initially for a 12 month period from 1 July 2013 . His salary for the 2013/14 Season was £31,000 per annum. The Manager at the time, and throughout the period relating to the claims, was John Askey.

4.2 The claimant's employment was subsequently made subject to the terms of the Football League and League Managers Association Standard Contract of Employment for Managers (pages 50a to 50m , and 57 to 69 , of the Bundle).The second of these is dated 22 June 2015, and the relevant provisions as to its duration are at Clause 2 "Term" (page 58 of the Bundle), where it is provided :

"2.1 This Agreement shall commence on 1 July 2015 and shall be a one year contract and remain in force until it is terminated as provided for in this Agreement or substituted by a revised agreement."

4.3 The relevant termination provisions are at Clause 11 (pages 62 to 63 of the Bundle). By the provisions of Clause 11.1 the respondent was entitled to dismiss the claimant with immediate effect if he committed an act of gross misconduct , a non – exhaustive list of examples of which was then set out at Clauses 11.1(a)(i) to (v). The last example is:

"(v) is guilty of serious insubordination or conduct that has brought the Club or the game into serious disrepute;"

4.4 The provisions of Clause 11.5(A) (page 63 of the Bundle) deal with notice of termination. They provide:

"(A) In the event that the Club wishes to terminate this Agreement, otherwise than under clause 11.1 to 11.4, it must:

(a) give written notice of termination to the Assistant Manager with three months notice period; and

(b) pay to the Assistant Manager an amount of compensation equal to the 3 months of his salary less deductions for income tax and National Insurance Contributions (as appropriate) , and not being subject to any duty of the Assistant Manager to mitigate any loss which the Assistant Manager may have suffered as a result of the termination of this Agreement pursuant to this Clause 11.5 , such amount to be paid monthly in line with Schedule 1(a) over a 3 month period."

4.5 The provisions of Clause 19.4 of the Agreement are:

"The failure by either party to require strict performance by the other party of any obligation under this Agreement or failure to exercise any of its rights under the Agreement shall not waive or diminish that party's rights to require strict performance of such obligation or to exercise such rights."

4.6 In or about July 2014 Mark Blower became Chairman of the respondent club. Stewart Joseph was the Welfare Officer, and Martin McKevitt was the General Manager. Andy Scott was a Director, and Helen Bona was the Catering and Events Manager. The day to day management of the club was carried out at that time by a Management Committee comprising of Mark Blower, Andy Scott, Martin McKevvitt, Helen Bona, Barrie Darcey, Julie Briggs and Jon Mail.

4.7 For the 2014/15 Season the claimant's salary was reduced to £15,000 per annum. He reluctantly accepted this, but negotiated an agreement whereby he would be entitled to the first £3,000 of, plus 10% commission on, any funds he raised for the club through sponsorship or other events.

4.8 In November 2014 the claimant was disciplined over remarks that he made about a player's girlfriend. This led to him being issued with a "First and Final Written Warning" dated 12 November 2014 (pages 112 to 113 of the Bundle) . The warning was expressed to be for 12 months, and the claimant was required to complete online diversity and equality training, and expected to treat all members of the club , and any relatives or friends of anyone associated with the club, with the respect they were due.

4.9 The claimant underwent the training required, and did not appeal this warning.

4.10 Shortly thereafter the claimant was involved in a fundraising event in November 2014. It was alleged that he had inappropriately taken some £3,000 in cash as what he regarded as his entitlement to an agreed payment for his involvement in the event, and had not arranged for it to be processed and accounted for in the appropriate way. He was written to by Kevin McKevitt , the General Manager, about this on 19 November 2014 (page 114 of the Bundle), but no formal action was taken.

4.11 Thereafter, however, a further issue arose in relation to an auction item which had been donated to raise funds at a Sportsman's Evening with Sammy McIlroy. Martin McKevitt spoke to the claimant about this, on 19 December 2014. he followed this up with a letter of 9 January 2015 (page 125a of the Bundle) in which the claimant was given a final written warning. Despite reference being made in that letter to a "disciplinary panel", there is no evidence any such panel was ever convened, and there is no evidence of any disciplinary hearing being held with the claimant.

4.12 The claimant appealed this warning by letter , addressed to "the Director", of 15 January 2015 (pages 126 to 127 of the Bundle). He explained his actions, and demanded that the final warning be withdrawn.

4.13 Mark Blower, the Chairman, responded to the claimant's appeal letter by letter of 23 January 2015 (page 128 of the Bundle). He informed the claimant that it had been decided to allow his appeal. No hearing had been held, He stated that no further action would be taken, and the final written warning issued on 9 January 2015 would be withdrawn. He ended the letter by reminding the claimant that the final written warning issued on 12 November 2014 remained in force.

4.14 On 23 July 2015 there was a pre – season match against Bury. The claimant was at the ground that day , as were Danny Walker, Head Groundsman, Gerard Coyne, Assistant Groundsman, and Lewis Stanton, Assistant Groundsman. The ground staff had put up practice nets on the pitch, on the left side of the official goal net. There was an issue about this, the claimant , or John Askey, raising with the ground staff why they had put the practice net in that position. The claimant

put cones out for practice, and there was a discussion with Gerard Coyne about him doing this.

4.15 No one spoke to the claimant at or around this time about any issue being raised by the ground staff concerning the manner in which the claimant spoke to them on this occasion.

4.16 On 13 October 2015 the respondent had a home game against Gateshead. A players' agent, Clive Evans was at the game, and the claimant knew him from previous association. At the end of the game there was a discussion between Clive Evans and Danny Whitehead, a player for the respondent.

4.17 This contact between an existing player and a players' agent was noted by a number of people, and subsequently there was further contact between Clive Evans and Danny Whitehead, though nothing came of it.

4.18 By 29 October 2015 the matter had been brought to the attention of Robert Stirling, then the General Manager. He called the claimant to a meeting, with Stewart Joseph, at which he suspended the claimant pending further investigation into the allegation that he had "touted" Danny Whitehead to an external agent. The suspension was on full pay, and was confirmed by letter dated 29 October 2015 (page 129 of the Bundle). The claimant replied to this letter by letter of 2 November 2015 saying that his suspension was wrong, and that the allegation was false (page 131 of the Bundle).

4.19 Enquiries were carried out, and statements relating solely to this issue taken from Mark Blower, Paul Turnbull (the Team Captain) John Askey, Danny Whitehead and Andy Scott . The statements were taken around 3 November 2015.

4.20 On or about 10 November 2015 statements were also taken from Gerard Coyne, and Lewis Stanton (wrongly described as Lewis Stanlow). These statements (pages 153 and 154 of the Bundle) related solely to an alleged incident on 23 July 2015, before the Bury game.

4.21 Precisely how and why these statements came to be taken about this earlier incident is unclear, but it is probable that around this time whilst looking into the touting allegation Stewart Joseph overheard Helen Bona talking about an alleged incident of this nature , was thus clearly aware of it, and had not previously raised it.

4.22 The claimant remained suspended, but no action in relation to the alleged incident on 23 July 2015 was taken, nor was it mentioned in any communications with him or his lawyers.

4.23 Following the claimant's suspension, another meeting was held with him on 5 November 2015, to which the claimant brought a friend, also a solicitor, Karibo Lawson. The meeting ended with the claimant being told that the investigation would be continued, and he would be informed of the next step.

4.24 The claimant instructed solicitors, Messrs. Thorneycrofts, who wrote to the respondent on 15 December 2015 , complaining (in the open parts of the letter, for certain parts have been redacted as being without prejudice) about his suspension , which was unjustified, and damaging. The letter also made reference to the respondent's failure to provide any copy statements to the claimant, and to this being seen by the claimant as the latest in a series of actions in a determined effort to remove him from his position in the Club. The letter went on to allege harassment and race discrimination, and to contend that the respondent had fundamentally breached the implied term of trust and confidence, in respect of which the claimant reserved his position. Finally, the letter sought the provision of copy documents and evidence in relation to the allegations made in the letter of 29 October 2015 (i.e those of touting a player). The letter also stated how the claimant wished to use the internal grievance procedure.

4.25 The respondent , in the person of Robert Stirling, replied to the claimant directly (page 140 of the Bundle), and to his solicitors (pages 141 of the Bundle) on 24 December 2015. In both letters it was stated that the investigation was ongoing. In the latter, this was amplified, but the respondent still refused to provide any copies of any statements , which it said would do once it was decided whether there was a case to answer. The respondent refuted allegations of harassment or discrimination, and noted that the claimant had had plenty of time to raise any grievance. Nonetheless , it went on to say that any grievance would be addressed under the procedure. No mention was made in either this letter, or that to the claimant directly, or any allegation relating to any incident on 23 July 2015.

4.26 The claimant's solicitor did raise a formal grievance by letter of 31 December 2015 (page 143 of the Bundle). The respondent replied by letter of 7 January 2016 (page 145 of the Bundle), suggesting a date for a grievance meeting.

4.27 The claimant's grievance was heard on 12 January 2016 by Robert Stirling.

4.28 By letter of 21 January 2016 Robert Stirling required the claimant to attend a disciplinary meeting on 27 January 2016 (or 3February 2016) , the purpose of which was to consider whether disciplinary action should be taken in respect of alleged gross misconduct, the allegations being:

"1. On 13 October 2015 at the Gateshead match , without any authority, you called a contracted player, Danny Whitehead, out of the dressing room and introduced him to an external agent, Clive Evans , with the aim of persuading him to leave the club. You then persistently enquired whether Danny Whitehead had made contact with Clive Evans, a further form of unauthorised persuasion.

2.On 23 July 2015 you verbally abused members of the ground staff – Danny Walker (Head Groundsman) , Gerard Coyne (Assistant Groundsman) and Lewis Stanlow (Assistant Groundsman) . The verbal abuse consisted of:

a) Swearing at Danny Walker, Gerard Coyne and Lewis Stanlow.
b) Making the following comments to Gerard Coyne:

> *"I fucking told you, you cunt not to put those goals on that side. Who the fuck do you think you are?*
> *"Your (sic) fucking nobody. You're only grounds staff. We are a lot higher than you. We tell you what to do you don't tell us."*

4.29 The letter enclosed the 7 statements referred to above, plus one from Robert Stirling dealing with the touting allegation. There was no statement from Danny Walker. The claimant was advised of his right to be accompanied, of the risk of dismissal, without notice, and of the fact that the hearing would be chaired by Alan Cash, Life President, with Barrie Darcey, Management Committee member taking notes.

4.30 By letter of 29 January 2016 Richard Stirling dismissed the claimant's grievances, having sought the views of Mark Blower upon the claimant's allegations (page 207 of the Bundle).

4.31 By letter of 3 February 2016 the claimant's solicitor appealed the grievance outcome (pages 219 to 220 of the Bundle).

4.32 The disciplinary hearing was held on 3 February 2016. Alan Cash chaired it. The claimant was represented by Richard Jobson of the Professional Footballers' Association ("PFA"). The claimant prepared a written statement for it, which is dated that day (pages 156 to 158 of the Bundle). He also prepared a number of points to raise at the meeting (page 159 of the Bundle), which he did. This was handed to Alan Cash in the hearing. E-mail communications with Clive Evans were also presented as part of the claimant's case.

4.33 The respondent's notes of this meeting are at page 160 of the Bundle. The claimant read his statement, and raised the points he had set out in his other document. Amongst the points he raised was why the earlier allegation going back to July 2015 had only been raised in January 2016. Stewart Joseph joined the meeting, and explained that this had been mentioned by Helen Bona during a conversation in November 2015. he had not been aware of it, and had followed it up by talking to the grounds staff.

4.34 Alan Cash did not make any decision at the end of the meeting, and was under the impression that he was to report to the Management Committee. He sent an e-mail to Mark Blower at 18.47 enclosing the claimant's statement. He replied to Alan Cash at 19.05 raising a number of questions in relation to the touting allegation. Alan Cash then replied with some further queries at 21.04, and Mark Blower replied at 21.10 (see pages 160b to 160b of the Bundle). On 4 February 2016 at 21.25 Alan Cash sent Mark Blower by e-mail a report (pages 162 to 163 of the Bundle) on the hearing. In that document he refers to the touting allegation, for which he considered a charge of misconduct would appear appropriate. In relation to the July incident with the grounds staff he said this:

"IN RESPECT OF THE SECOND CHARGE OF VERBALLY ABUSE OF GROUND STAFF, THE SITUATION IS CLOUDED BY THE TIME FACTOR, AND

ALSO THE ABSENCE OF ANY WRITTEN STATEMENT FROM GROUNDSMAN DANNY WALKER.

IT WAS SUGGESTED THAT THE SUBJECT HAD BEEN RAISED BY A THIRD PARTY, RATHER THAN DIRECT COMPLAINT FROM GROUNDSTAFF MEMBERS.

THE STATEMENT BY MR SODJE SUGGESTS THAT THE GROUNDSTAFF WERE NOT FOLLOWING INSTRUCTIONS GIVEN BY JOHN ASKEY REGARDING THE PLACING OF WARM – UP EQUIPMENT. DISAGREEMENT ENSUED , TEMPERS FLARED AND STRONG VERBAL LNAGUAGE WAS EXCHANGED BY THOSE INVOLVED . MR SODJE ADMITTING RESPONDING BY SWEARING. HE ALSO STATES THAT JAMIE RYAN WAS PRESENT ON FIELD WITH HIM.

IT WOULD APPEAR THAT ALL INVOLVED WERE IGNORING THOSE PARTS OF CLUB RULES REGARDING EQUALITY & DIVERSITY, WHICH REFER TO TREATING ALL WITH RESPECT."

4.35 Other than to say he would look at it the following day, Mark Blower made no e-mail response.

4.36 Around this time Alan Cash and Mark Blower had a discussion as to Alan Cash's role. Whilst he had believed that his function was to report to the Management Committee who would then take the decision, he was advised by Mark Blower that this was not so, he would be taking the decision on the claimant's disciplinary.

4.37 Consequently, Alan Cash obtained statements from Jamie Ryan and Danny Walker, which were taken by Stewart Joseph. He considered that he needed to hear the evidence of the witnesses for himself, and hence re-convene the disciplinary hearing for 17 February 2016, for the purpose of hearing evidence from Danny Walker, Lewis Stanton (still referred to as "Stanlow") , Gerard Coyne and Jamie Ryan. He wrote to the claimant on 9 February 2016 to inform him of this, and provide him with copies of the additional statements (page 164 of the Bundle, the statements being at pages 165 and 166).

4.38 The hearing of 17 February 2016 could not proceed due to the claimant being ill, and it was re-arranged for 9 March 2016. On 17 February 2016 the claimant's solicitors wrote further, commenting upon the minutes received, and asking about recording of future hearings.

4.39 Alan Cash replied by letter of 24 February 2016 (page 169 of the Bundle). As Helen Bona had been referred to as the source of the allegation in the hearing on 3 February , on 3 March 2016 the claimant's solicitors asked that she be present at the re-convened hearing.

4.40 By letter of 4 March 2016 to the claimant's solicitors, Alan Cash supplied updated and corrected minutes (pages 175 to 177 of the Bundle) of the previous meeting.

4.41 The re-convened hearing was held on 9 March 2016. It was recorded and a transcript appears at pages 180 to 193 of the Bundle. Alan Cash again chaired the meeting, with Carole Griffiths taking minutes and operating the recording equipment. Richard Jobson again represented the claimant.

4.42 Alan Cash had by this time reviewed the information, and had come to the view that the allegations as to touting of a player were not proven, and he was not proceeding with that allegation. He informed the meeting of this saying that a letter to that effect had been sent to the claimant's solicitors, though no such letter is in the Bundle.

4.43 There was an initial discussion of why Helen Bona was required, which Richard Jobson explained. She was then, in fact called, as the first witness.

4.44 In her questioning by Richard Jobson, Helen Bona confirmed that she had not been asked to give a statement, and had been made aware of the incident shortly after it happened on 23 July 2015. She had not heard the incident, and had not taken any action about it. She had been talking about it when Stewart Joseph overheard her , but she was not sure when this had occurred.

4.45 Danny Walker then gave evidence and was questioned by Richard Jobson and Alan Cash, followed by Gerard Coyne, Lewis Stanton, and Jamie Ryan.

4.46 In his questioning, Danny Walker said he had reported the incident to Robert Stirling at the time. He referred to it being "just a hissy fit", and he had "been there before with managers", and he just got on with it. He accepted that he had sworn, and that it was not the right thing for both of them to have done. He agreed that it was "6 of one and half a dozen of another". He also said that John Askey had come out swearing on another occasion. Alan Cash stopped this line of questioning, saying that anything beforehand did not enter into the matter. He did confirm that John Askey had sworn at him.

4.47 In Gerard Coyne's questioning he said he had not reported the matter at the time, but had first been asked about it in October/November. He stood by his account, and said he was "a little bit upset on the day". He had since left the Club in December 2015.

4.48 Lewis Stanton in his questioning also said he had not reported it at first because he did not see it as "a big deal". He maintained that the claimant had sworn at him and Gerard, as they were standing together.

4.49 Jamie Ryan was then questioned. He confirmed the account in his statement, and how there was "a slanging match". The claimant denied that he had sworn at Gerard Coyne, but Jamie Ryan said he had done so.

4.50 At the end of the hearing Richard Jobson made three main points in summary. The first was the timescale. The respondent had statements from the two of the groundstaff, but had sat on them for 2 months. The claimant was only told of the allegation on 21 January 2016, 6 months after the event, which was

unacceptable. Secondly, none of the four witnesses considered it serious enough to report at the time. Those involved wanted to draw a line under it. Thirdly he mentioned the final written warning on 12 November 2014, which had now expired, although it was current in July. The claimant himself raised the fact that he had not been interviewed or asked for a statement, but the other witnesses had been. Alan Cash ended the meeting, and said he would consider his decision.

4.51 Alan Cash considered the matter, and by letter of 14 March 2016 (page 193 of the Bundle) he informed the claimant of his decision. He found that the claimant had verbally abused Danny Walker , but as he also found that he too had conducted himself in an unacceptable manner, and they both gave as good as they got, no sanction would be applied to either of them. He also found that the claimant had verbally abused Gerard Coyne and Lewis Stanton. He found that the claimant had used the "F" word and had put them down in their status as groundstaff. He also referred to the facts that Gerard Coyne was a volunteer and Lewis Stanton was under 18 at the time. He found this to be gross misconduct. The letter also made reference to the claimant's final written warning of 12 November 2014. The claimant's employment was terminated with immediate effect from 14 March 2016 and without pay in lieu of notice. The claimant was advised of his right of appeal.

4.52 The claimant did appeal, by his solicitors sending a letter of appeal, dated 16 March 2016 (pages 194 to 195 of the Bundle). The letter set out the main (but not only) grounds of appeal as being the delay, the absence of a fair and reasonable investigation, the allegation being brought in bad faith (because none of the victims made any complaint or regarded the incident as serious) , procedural unfairness , the decision being that of the management Committee, inconsistency in the treatment of Danny Walker and John Askey, and the categorisation of gross misconduct.

4.53 The appeal was acknowledged by Stewart Joseph on 5 April 2016, and arrangements made for it to be heard by Colin Garlick, a Life Vice President. At the same time arrangements were made for the claimant's grievance appeal to be heard by Stephen Poynton (page 196 of the Bundle).

4.54 The claimant's appeal against his dismissal was heard on 13 April 2016 by Colin Garlick with Carole Griffiths as note taker. The claimant was again represented by Richard Jobson. The minutes of this meeting are at pages 197 to 201 of the Bundle. Richard Jobson went through the points in the appeal letter, in that order. He amplified the points made, and added (page 200 of the Bundle) that he felt the club wanted to get rid of the claimant and was looking for something else because the first allegation about touting had been dropped. He also questioned how the allegation had made reference to the use of the "c" word, when no one had said that.

4.55 Colin Garlick did not make a decision at that time, but said, at the end of the meeting that he wanted to clarify some points with Stewart Joseph, Mark Blower and Alan Cash. The claimant himself (page 201 of the Bundle) made reference to John Askey having sworn at Danny Walker, but nothing had been done.

4.56 Colin Garlick adjourned to consider his decision. His remit was to consider the appeal by way of review, and not to re-hear the disciplinary hearing. He spoke with Alan Cash and Stewart Joseph during the adjournment. The former confirmed that the decision to dismiss was his and his alone, and the latter explained how he had overheard a conversation involving Helen Bona, and he had needed to follow this up.

4.57 Colin Garlick made his decision and wrote to the claimant on 20 April 2016 (page 202 of the Bundle). He dismissed the appeal, saying that he could not find any reason to overturn the decision of Alan Cash. In giving his reasons, adopting the enumeration of the appeal letter , he said the following:

"1. We did agree that the allegation did not come to light until after the 29th October meeting, which was the meeting where only the touting matter was discussed, and there were a number of reasons for the delay. I don't feel any delay has rendered the process unfair.

2. Statements were obtained in November 2015 by Stewart Joseph in a reasonable time once he became aware of the incident. I do believe that you have had the opportunity to put forward your side of the story about the incident.

3. I do not believe the allegation was brought about in bad faith.

4. I do acknowledge that there was a misunderstanding as to who would be making the decision regarding the incident and this caused some of the delay, but I believe that this was clarified to you and having looked into this matter I believe that the decision was down to Alan Cash and him alone.

5. I do not believe that the decision was a management committee decision and as stated in 4 above, was that of Alan Cash and him alone.

6. I understand your remark with regard to inconsistency but I also understand Alan's decision that no sanction should be taken with regard to this matter.

7. I do not think it is wrong of Alan Cash to categorise your verbal abuse of Gerard Coyne and Lewis Stanton as gross misconduct. At the time of the incident you were aware that you were under a final written warning issued on the 12th November 2014.

8. In the circumstances I do not believe it was unreasonable of Alan Cash to dismiss you."

4.58 By letter of 28 April 2016 Stephen Poynton wrote to the claimant's solicitors with the outcome of the grievance appeal, which he dismissed (pages 249 to 251 of the Bundle).

4.59 The respondent, during the adjournment after the hearing concluded on 21 December 2016, gave further disclosure in a supplemental bundle, numbered pages 1 to 46. The first 45 pages are minutes of the respondent's management

committee meetings from 12 August 2015 to 25 April 2016. They therefore cover the period from just after the alleged incident on 23 July 2015 to the claimant's dismissal on 14 March 2016, and the dismissal of his appeal on 20 April 2016.

4.60 Mark Blower, Helen Bona, and Robert Stirling are present at virtually every one of those meetings. "Groundstaff" appears as a regular item in each meeting. In the minutes of the meeting on 7 October 2015 (pages 15 and 16 of the supplemental bundle) there appears this entry:

*"**GROUNDSTAFF –** RS to meet regularly with Danny to keep updated with ground maintenance plans, Further to the incident with the manger* (sic) *before the Boreham game, Stewart Joseph to arrange a meeting with them both."*

4.61 This is referred to subsequently in the next meeting on 14 October 2015 (pages 17 and 18 of the supplemental bundle) where it is noted that Stewart Joseph will have this meeting on 16 October 2015. As noted subsequently, however, this meeting did not take place as arranged, and, in fact , seems never to have occurred.

4.62 No mention is made in any of the minutes of these meetings of the claimant's suspension and disciplinary proceedings. His position is not discussed at all, no mention is made of the disciplinary hearing held by Alan Cash, nor his dismissal. There is no discussion of any replacement, nor of the subsequent appeal to Colin Garlick.

4.63 The final document in the supplemental bundle (page 46) is a copy of a letter addressed to John Askey from Stewart Joseph. It is dated 1 July 2016. It refers to an alleged complaint from Danny Walker that John Askey used "foul and abusive language" towards him in an incident which took place on "February 23 2016" regarding the condition of the pitch. The letter goes on to refer to signed statements being received from Danny Walker and Andy Scott (a director) , and one "S. Watson". In this letter Stewart Joseph finds that foul and abusive language was used, although it was unclear whether this was directed at Danny Walker, or was simply an "outcry" about the state of the pitch. The letter continues:

"Furthermore, it has become apparent exchanges between you and Mr D. Walker have taken place previously and the responsibility for these resides with both you and Mr D. Walker.

My recommendation to the General Manager and the Chairman is that I feel there is no need to proceed to a formal disciplinary hearing based on the evidence and they are in agreement with this conclusion.

I would like to remind you that all members of staff are to be treated with respect and that we do have formal procedures for reporting concerns about staff performance."

4.64 The letter concludes by telling John Askey that a log of the complaint would be kept by the club, and inviting him to discuss any aspect of the letter should he wish to do so.

5. Those, then, are the relevant facts. In terms of credibility, save for the issue as to the degree to which the decision to dismiss was not in fact taken by Alan Cash, not much really turned upon the credibility of the parties and the witnesses. In overall terms, however, the lack of contemporary documents from the respondent, and in particular the total absence of discussion of these matters in any minutes of the Management Committee is surprising, and leads to a feeling of lack of transparency on the part of the respondent. This is compounded by the absence of live evidence from two key witnesses, Steward Joseph, and Robert Stirling. Whilst the latter may have left the Club, that is no reason for his not giving evidence. As a major actor in the events in question, the tribunal has not been able to explore key issues with him. Similarly, whilst Stewart Joseph made a witness statement, which the tribunal has read, and given such weight as it properly can, he was not called. His statement is, with respect to him and the respondent's solicitors, short on crucial detail from para. 7 to para. 9 as to the circumstances in which he became aware of the allegation, and why it was not put to the claimant until 21 January 2016. Indeed, in short, none of the respondent's witnesses were able to explain that delay.

The Submissions.

6. The parties made submissions. Both representatives prepared written closing submissions, which are on the tribunal file. It is not intended to repeat them in this judgment.

The Law.

7. The relevant statutory provisions are in the Annexe to this judgment. The law was not in dispute. In terms of caselaw, the following is applicable. In terms of dismissals for conduct , the test to be applied to determine whether dismissal for misconduct is fair in circumstances where the employer suspects that a particular employee has committed the misconduct in question, is set out in the judgment of the EAT in ***British Home Stores Ltd v Burchell [1978] IRLR 379***, as follows:

"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further.

It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before him, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure" as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt". The test, and the test all the way through, is reasonableness, and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstances be a reasonable conclusion'.'

8. Further, in reaching its conclusions the Tribunal must not substitute its own views, but must consider whether the decision of the employer fell within the band of reasonable responses, procedurally and substantively, open to a reasonable employer in the circumstances (see ***Foley v. Post Office; HSBC Bank v Madden 2000 ICR 1283.)***

9. Additionally, the Tribunal has been referred to, and has considered, cases on the effect of delay in disciplinary proceedings, in particular, ***Royal Society for the Prevention of Cruelty to Animals v Cruden [1986] IRLR 83*** , ***A v B [2003] IRLR 405*** , and ***Christou v London Borough of Haringey [2012] IRLR 622***.

Discussion and findings: (i) Unfair Dismissal.

10. The tribunal's first task is to establish whether there was a potentially fair reason for dismissal. The burden of establishing such a reason lies upon the respondent, but once such a reason is established, the burden of establishing fairness is neutral. In this case the respondent relies firmly and squarely on one reason only, and that is "conduct", one of the potentially fair reasons within s.98. That reason specifically is the claimant's conduct in allegedly verbally abusing Gerard Coyne and Lewis Stanton on 23 July 2015.

11. The next issue therefore is whether, that reason having been established, it was in fact fair to dismiss for that reason in all the circumstances. The burden of establishing fairness is neutral, and in deciding whether the dismissal was fair, in both procedural and substantive terms, the tribunal does not substitute its own view, but considers instead whether the decision to dismiss fell within the band of reasonable responses.

12. Dealing first with the claimant's contention that the decision to dismiss him was effectively taken by Mark Blower, who had a hostility towards him and wanted him out of the club, which was the real reason for the dismissal, the tribunal has no hesitation in dismissing that assertion as not being borne out by the evidence. Firstly, and most crucially, the dismissal was carried out by Alan Cash, not Mark Blower. Whilst the suggestion was made, and indeed Mr Cash was recalled for it to be put specifically to him, that he was merely carrying out Mark Blower's wishes in dismissing the claimant, or was heavily influenced by Mr Blower's animosity towards the claimant, he denied this and insisted that the decision was his, and his alone. The tribunal accepts this. Alan Cash, who has himself been Chairman in his time at

the club, as well as holding several other senior positions, and who has been involved in football for 46 years did not strike the tribunal as someone who was readily influenced by anyone. He was a man who knew his own mind, had seen Chairmen, including himself, "come and go", and was to be believed when he said that the decision was his, and his alone. Whilst he had been put in a difficult position, and was initially under a misapprehension as to his role, the tribunal accepts that once this was clarified Alan Cash took the decision to dismiss based on what was placed before him. That alone is sufficient to discount the claimant's case that the dismissal was at the behest of, or influenced by, Mark Blower.

14. Further to that, however, the claimant's premise that Mark Blower wanted him out , and seized this opportunity to dismiss him, is further undermined by an examination of his employment history under Mark Blower's Chaimanship. It is to be borne in mind that the claimant would not have protection from unfair dismissal until July 2015. Thus, when the incident that led to the written warning in November 2014 occurred, it would have been an easy matter for Mark Blower to have sought his dismissal then. So too, of course, would it also have been even more attractive to seek his dismissal when, within weeks, and during the currency of that warning, further issues arose in connection with the fundraising event which led to a further warning. Two golden opportunities to dismiss the claimant thus presented themselves, but were not taken. Against that, however, are all the matters raised by the claimant in his grievance, and the history of his employment with the Club, which, of course, involved a reduction in salary, and issues as to use of a company car.

15. The tribunal, however, is satisfied that the initial decision to dismiss was taken by Alan Cash. It is for that reason that the tribunal has not made any findings as to the merits or otherwise of the claimant's grievances against Mark Blower, and the various instances that he has alleged that Mark Blower treated badly or expressed any desire to be rid of him. Similarly, whilst there is evidence that Steve Watson was a potential replacement assistant manager "waiting in the wings", the tribunal is quite satisfied that the decision to dismiss was taken by Alan Cash, and he was not in any way , shape or form influenced, consciously or otherwise , by any pressure from Mark Blower, or any desire to replace the claimant with Steve Watson. It is for this reason that the tribunal has not made any findings as to the circumstances surrounding Steve Watson's appearance at the Club.

15. The tribunal has therefore focussed on the decision taken by Alan Cash, on its own merits, regardless of any alleged extraneous factors and motives. The tribunal must examine the decision to dismiss as a whole to see if it was in fact fair. The tribunal has no hesitation in finding that the reason for the dismissal was indeed the claimant's conduct, and that Alan Cash had a genuine belief that the claimant had been guilty of misconduct in the manner in which he spoke to the grounds staff on 23 July 2015. The question then is whether to dismiss in those circumstances was reasonable, in the sense of falling within the band of reasonable responses open to the employer, the tribunal, of course, being conscious that it must not substitute its views for those of the employer as established in the cases of ***Foley v. Post Office; HSBC Bank v Madden 2000 ICR 1283.***

16. There is a major factor in this case which leads the tribunal to find that the decision to dismiss was outside the band of reasonable responses, and that is delay.

The incident giving rise to the dismissal occurred on 23 July 2015. It was not raised with the claimant until 21 January 2016, almost exactly 6 months later. This was, of course, after he had been suspended on 29 October 2015 for an alleged incident on 13 October 2015 at the Gateshead match, for which he was to have been disciplined, but which was ultimately dismissed. From mid - December 2015 the claimant's solicitors were writing to the respondent, protesting at his treatment, but there was no suggestion at all until 21 January 2016 that this additional, and older, allegation was also to be put to the claimant. This is despite the evidence that, at the very latest, the respondent became aware of this allegation in early November 2015. The statements from those involved are dated 10 November 2015. The respondent was thus aware of the allegation, and in possession of the evidence relating to it. It had gone to the trouble of obtaining statements about the incident, at around the same time that it was investigating the allegations in connection with the more recent Gateshead game. Why , then, was the 23 July allegation not included from the very outset, and why was it not raised until 21 January 2016? Unfortunately, the tribunal has not heard from the two people who could probably provide answers to those questions. The first is Robert Stirling, the General Manager, who is the author of the initial letter suspending the claimant on 29 October 2015, the reply to his solicitors' letter of 24 December 2015, and the letter of 21 January 2016 convening the disciplinary meeting , who could possibly have explained the omission of the allegation relating to 23 July 2015, and why it was added as an allegation so late in the process. He is no longer employed by the respondent, but that is an irrelevant consideration. The tribunal simply has no explanation from him before it. The second person is Stewart Joseph. Unlike Robert Stirling from whom there is no evidence at all, the tribunal does at least have a witness statement from him. He was not, however, called to give live evidence. Again the reasons for this are of no consequence, the respondent has to decide how to run its case, and what witnesses to call. His statement is tantalisingly vague in relation to these issues. Paragraphs 7 and 8 are the totality of his evidence on this point, and they are wholly lacking in crucial detail, such as dates. The implication is that he first became aware of the allegations relating to the July incident around November 2015. This would seem borne out by the fact that statements were taken from two (but not all) of those involved which are dated 10 November 2015, which Mr Joseph refers to in his statement. What he does not explain, however, is why it was that this allegation was not included in the disciplinary allegations against the claimant until 21 January 2016, over two months later. There is no information from him either as to whether he questioned Helen Bona, who reported the issue to him, as to when she had first known about it, or whether he told Robert Stirling about it at the time, so that it could have formed part of the disciplinary allegations at the time.

17. Whatever the position, there was, on any view, serious and unexplained delay between Stewart Joseph becoming aware of the allegation, and it being raised with the claimant. That delay itself follows on almost four months after the alleged incident. It transpires from Danny Walker's statement (page 165 of the Bundle) that he told Robert Stirling and Mark Blower about it at the time, which, if correct, suggests that the respondent knew about it for even longer. That too is the implication of the evidence, given to the hearing before Alan Cash, that Helen Bona was aware of it earlier, as it was she who told Stewart Joseph about it. Both Mark Blower and Helen Bona sat on the Management Committee. The tribunal takes the point made on behalf of the claimant that both Alan Cash and Colin Garlick on

appeal did not feel it necessary to look into the reasons for the delay, and did not consider it a relevant factor in the decision to dismiss.

18. What, then, is the significance of this delay? Mr Fletcher for the respondent invites the tribunal to disregard it. There was a full investigation, statements were taken, and supplied to the claimant. No prejudice arises from the delay, and it has no bearing upon the decision to dismiss, if the tribunal concludes that the respondent was entitled to believe that there had been such an incident. If that was a reasonable conclusion, then it was reasonable to dismiss for that conduct, regardless of the staleness of the allegation.

19. Of the caselaw to which the tribunal has been referred ***Royal Society for the Prevention of Cruelty to Animals v Cruden [1986] IRLR 83*** is the most apposite. There the EAT upheld a finding by a tribunal that deplorable and unexplained delay on the part of the employer in taking disciplinary action rendered the dismissal unfair. That was notwithstanding a finding that the claimant's conduct entirely merited dismissal. It was not in accordance with equity or the substantial merits of the case to dismiss him when the employer did. An essential finding of the EAT was that this was so, even if there was in fact no actual prejudice to the employee. Thus, the delay in this case would, in the view of the tribunal, be sufficient in itself to warrant a finding that the dismissal was unfair. The tribunal, however, considers that the issue of delay bears further examination on the facts of this case. Whilst on the facts of ***Cruden*** there was found to be no actual prejudice, the tribunal in this instance is not satisfied that this can truly be said to be the case here. Firstly, the witnesses to the incident were not asked to make statements until over three months later. That must prejudice the potential fairness of any investigation. Secondly, and perhaps more importantly, the claimant was not interviewed about the allegation, nor was it even put to him, until after 21 January 2016. Thus the employer's witnesses had been asked to recall events at least three months earlier than the employee was, and they made statements at that time. The delay in even asking the employee about the matter until three months after the other witnesses had been given a chance to give their accounts, in the view of the tribunal, does cause prejudice to the employee.

20. The tribunal considers a significant feature of the delay in this context therefore relates to the issue of whether there has been a reasonable investigation. A delayed investigation, particularly when there is no explanation for that delay, will not usually be a reasonable investigation. When the two parts of that investigation – the employer's evidence, and the employee's response - are then separated by a further three months, again with no explanation, the tribunal cannot regard such an investigation as being a reasonable one.

21. Finally, there is another aspect to delay, in terms of the reasonableness of the decision to dismiss. Whilst an argument at first instance in ***Cruden*** that , by analogy with waiver and affirmation in contract law, an employer who delays dismissal can lose the right to contend that a dismissal was fair was held by the EAT to have been rightfully rejected, this tribunal does consider that delay is highly relevant to any consideration of whether, regardless of any effect upon the reasonableness of the investigation, to dismiss for the conduct in question was a reasonable response. The fact that the conduct was known of, at possibly the highest level, and certainly at Committee level, at or around the time that it occurred, but not acted upon is, in the

view of the tribunal, a highly relevant factor in the assessment of whether it was reasonable, 7 months later, to dismiss for that conduct. Given that disciplinary procedures are intended to be corrective, and not punitive, given that this was a one off incident, which the "victims" did not want to pursue, and following which it appears the antagonists thereafter worked together with no further issue, a relevant enquiry would have been how the parties had got on since, and whether there had been any repetition. Those issues were not addressed, and the approach of Alan Cash, and , on appeal Colin Garlick , was that if the conduct was made out, dismissal was the appropriate sanction. The passage of time between the incident and the disciplinary proceedings appears not to have influenced the decision makers at all.

22. That is not to be unduly critical of Alan Cash, in particular, who, the tribunal considers was doing a difficult job in difficult circumstances, with little support. The delay, particularly the last period from November to January was and remains wholly unexplained. It was, the tribunal considers a highly relevant factor to which any reasonable employer would have addressed his mind. At the very least, some explanation for the delay may have mitigated the position. The alternative, of course, is the claimant's suggestion that the real explanation is that the charges for which he was ultimately dismissed were an afterthought to replace the more serious allegation of touting, which the respondent had been forced to abandon. The tribunal does not so find, though it must be a possibility, but the lack of enquiry into the reasons for the delay in informing the claimant of the allegation from early November to late January is serious flaw in Alan Cash's decision making, which was not corrected on appeal.

22. One further aspect of reasonableness also comes into play, and that is consistency. Whilst each case is to be judged on its own acts, an employer is under as duty to act consistently, and it will be hard for an employer to claim that it was fair to dismiss one employee for a particular form of misconduct, when another, guilty of the same misconduct , is not dismissed. The evidence , before the respondent, at the disciplinary hearing, and the appeal , was both Danny Walker and John Askey had used bad language towards other members of staff. Danny Walker admitted he had sworn at the claimant, and alleged that John Askey had sworn at him. Neither was dismissed, or , up until July 2016, even disciplined.

23. The respondent's further disclosure during the adjournment raises further issues. The management committee meeting minutes of 7 October 2015 (pages 15 and 16 of the supplemental bundle) make reference to "an incident" between the manager , presumably John Askey, and Danny Walker, the groundsman, before a match with Boreham. The action noted is for Stewart Joseph, who is the Welfare Officer, to arrange a meeting with them both. No further evidence was called or is available about what this entry refers to, but in the absence of any further evidence or explanation, the tribunal considers that it most likely refers to an incident between John Askey and Danny Walker, which necessitated the involvement of Stewart Joseph. Quite what occurred is unclear, but Danny Walker's evidence to the disciplinary hearing was that John Askey had sworn at him in the past.

24. The letter to John Askey dated 1 July 2016 disclosed by the respondent during the adjournment, but without any further evidence being heard about it, is of note. It is dated 1 July 2016, and relates, on its face, to an incident on 23 February

2016 in which Danny Walker complained that John Askey had used foul and abusive language in an incident about the state of the pitch. Taking this letter at face value, and assuming that the date of the incident is correct, this is not, of course, the July 2015 incident, in which the claimant was involved, but another one. It occurred, it seems around the very time that the claimant was being taken through the disciplinary process. Alan Cash was not asked about it when giving evidence, and it may well be that he was unaware of it. Stewart Joseph, however, clearly was. The letter is consistent with there having been previous incidents between Danny Walker and John Askey, as alluded to in the minutes in October 2015. It is of note that despite this being the second or third time that there had been such an incident, John Askey is not taken through the disciplinary process at all, he is merely reminded of the need to treat members of staff with respect.

25. It is hard not to see this as further evidence of a degree of inconsistency of treatment which adds further to the unfairness of the treatment of the claimant.

26. There was, of course, an appeal to Colin Garlick. This was capable of remedying any defects in the previous procedure, and could make a previously unfair dismissal a fair one (see ***Taylor v OCS Group Ltd [2006] ICR 1602***). Whilst the tribunal should not over-focus on the distinction between re-hearing and review type appeals, this was clearly the latter type. Colin Garlick too, the tribunal accepts , did his honest best , and did at least make some enquiries into two aspects raised before him. He checked and was entitled to accept , as the tribunal has done, that the decision was Alan Cash's alone. His enquiries into Stewart Joseph's awareness of the allegation, however, did not go anywhere far enough. What he did not do, and indeed no – one from the respondent has, was ascertain why the allegation was only added and put to the claimant for the first time on 21 January 2016. All this was despite the claimant's solicitors and his trade union representative making it crystal clear that this period of delay was a major flaw in the process. Furthermore, whilst Colin Garlick addressed the inconsistency between the claimant's treatment and that of Danny Walker for the same incident, he did not address the position in relation to John Askey, which was expressly raised.

27. Thus, for those reasons, the tribunal is quite satisfied that the decision to dismiss, whilst genuinely and honestly taken by Alan Cash, was an unreasonable one, and the dismissal was unfair.

(ii)Contribution.

28. Mr Fletcher, in his submissions, argues in the alternative, for a reduction in any compensatory award on the basis that the claimant contributed to his own dismissal, by as much as 100%, or, if the tribunal does not so find, some lesser per centage. In support of that contention he relies upon the claimant's conduct on 23 July 2015. In support of that he refers the tribunal to the claimant's history with the club, and invites it to find that the claimant was guilty of such conduct, and, accordingly, has grounds for making a reduction for contribution.

29. A number of difficulties arise for the respondent in advancing this argument. The first, and paramount, is that the respondent has adduced no direct evidence of the incident on 23 July. No witnesses actually present have given evidence to the

tribunal, save , of course, for the claimant. A party seeking to argue for a reduction for contribution, has to establish the factual basis for the tribunal doing so, so that the tribunal can find as a fact what conduct the claimant committed so as to entitle the issue to be considered. In this instance, as against the sworn evidence of the claimant, the tribunal has the accounts of the witnesses given to the respondent in the course of the disciplinary process. They are, of course, second hand, and have not been tested before the tribunal. Whilst it may have been reasonable for the respondent to accept those accounts, that is not the test for establishing contribution, where the tribunal itself must find as fact what conduct actually occurred. Whilst appreciating that the witnesses were questioned in the course of the disciplinary process, and stood by their accounts, the tribunal is not prepared to find, without hearing from them, that the claimant's account, in which he largely denies the allegations, can safely be rejected. The best the tribunal can conclude is that he may have used the language alleged towards Gerard Coyne and Lewis Stanton, but he equally may not have done. The burden is upon the respondent to establish contributory fault, and it has not satisfied the tribunal, on the balance of probabilities that the claimant was guilty of the conduct alleged.

30. That , in effect, is sufficient to dispose of the respondent's contentions, but, in the alternative, in any event, had the tribunal been satisfied that the claimant had in fact been guilty of the conduct alleged, it would then have been obliged to consider whether to make any reduction, this being a discretionary matter, and not an automatic consequence of a finding that the claimant had been guilty of such conduct. The tribunal would not have exercised its discretion to make any reduction for contribution, even if satisfied of the claimant's conduct as alleged on the day in question. The test in s. 123(6) of the ERA is whether it would be "just and equitable" to make any reduction. In this case the main factor militating against the making of any such reduction is again the delay between the incident and the dismissal. Whilst there may be cases where it would be just and equitable to reduce compensation on the basis of the employee's conduct, notwithstanding that the conduct in question is somewhat stale, such as where that conduct had been deliberately concealed by the employee, or had only recently come to the attention of the employer for good reason, neither of those situations pertain here.

31. In the tribunal's view the respondent's failure to take action within the initial three month period after the incident, and then for a further 3 months, would not make it just and equitable to reduce any award, even if the conduct in question was established. Given that there are also issues as to consistency of treatment in terms of the fairness of the dismissal, especially in the light of what seems to have been a yet further instance of similar conduct by John Askey, these are further grounds for making no reduction for contribution. Finally, whilst appreciating that substitution, at the stage of assessing reasonableness of the decision to dismiss, is prohibited, no such restriction applies in the exercise of its discretion for these purposes, and the tribunal would also be heavily influenced by the accounts given in the disciplinary hearing by the "victims", and their apparent lack of concern at the incident at the time. Whilst doubtless , if proven, conduct not to be applauded, it is hard not to view it as a minor flare up, a "hissy fit" as it was described, and, if nipped in the bud, not deserving of summary dismissal.

Polkey.

32. The respondent argues in the further alternative for a reduction to the compensatory award on the basis of ***Polkey*** . The law on ***Polkey*** reductions is well established, and was comprehensively reviewed by the judgment of the EAT in ***Software 2000 Ltd v Andrews [2007]IRLR 568.*** That judgment has more recently been reviewed by the EAT in ***Grayson v Paycare (A Company Ltd by Guarantee) UKEAT/0248/15/DA*** . In his judgment Kerr J., reviewed the judgment of Elias J (as he then was) in that case, and (stripping it of its now redundant references to the repealed Dispute Resolution regulations and associated legislation), he summarises the principles to be applied when considering whether to make a ***Polkey*** reduction, as follows, at para. 21 of his judgment:

"21. Elias J's summary provides a useful reminder that Tribunals need to disentangle in their minds distinct questions that may need to be addressed in particular cases. The following are possible formulations of the questions that may arise in particular cases:

(1) How long the employee would have continued working for the employer, but for the dismissal; this is the question that in ordinary cases must be answered on the balance of probabilities, to assess loss;

(2) Whether either party has adduced evidence entitling the Tribunal to conclude (the burden of satisfying the Tribunal being on the employer) that the employee would or might have ceased to be employed in any event had fair procedures been followed;

*(3) Is the evidence relied on to support a **Polkey** reduction in compensation too unreliable or vague to be useful, and is the exercise of seeking to reconstruct what would have happened too uncertain to ground any sensible prediction based on it?*

(4) If not, what is the chance - not the probability or likelihood - that that would have happened at a time in the future, and if so at what point in the future might that chance have produced the relevant event, namely the end of the employment?

(5) Has the employer satisfied the Tribunal that there was a chance of the employment terminating in the future, and if so how great or small was that chance? This is commonly expressed as a percentage.[1]

(6) Has the employer satisfied the Tribunal that employment would have continued, but only for a limited fixed period, whether or not for reasons wholly unrelated to the circumstances relating to the dismissal itself?

*22. In redundancy cases where dismissal is unfair due to inadequate or no consultation, a compensatory award may sometimes comprise loss of earnings in full for a certain period, followed by loss of earnings reduced by a **Polkey** percentage for a further consecutive period thereafter. This may be the just result where the first period (of recovery in full) represents the time subsequent to the*

actual dismissal date which fair consultation would have taken; while the second period (recovery in part only) represents the continuing loss of earnings reduced by the percentage chance that the employee would have been fairly selected for redundancy if fair procedures had been followed.

*[1] The percentage expresses the likelihood that the event to which the chance is relevant (dismissal) would have happened in the scenario envisaged by the employer of what would have happened had fair procedures been followed. This should not be confused with the "51%" formulation sometimes used to describe the standard of proof on the balance of probabilities. As Browne-Wilkinson J famously said, there is no need for an all or nothing decision (**Sillifant v Powell Duffryn Timber Ltd [1983] IRLR 91**, approved in **Polkey**)."*

32. The respondent's argument on ***Polkey*** is twofold . The first relates to the procedure itself, in relation to the disciplinary allegation against he claimant. To the extent that the claimant contends that the dismissal was procedurally unfair because he was not interviewed about it , and the delay in general , the respondent argues that these defects made no difference. In relation to the former, it is said that the claimant would have denied the allegations anyway, and would have mentioned Jamie Ryan, who was interviewed in any event, and whose account did not help the claimant. In relation to the latter, the delay made no difference. The tribunal does not see any basis for making a ***Polkey*** reduction on this basis. The tribunal's finding is not that the dismissal was merely procedurally unfair, it was substantively unfair. The delay rendered the investigation an unreasonable one, and the staleness of the allegation, with no explanation for the inactivity rendered the decision to dismiss for the alleged conduct unreasonable. Additionally, there was inconsistency in the manner in which the claimant was dealt with, when John Askey had committed similar misconduct on two or three occasions and was not taken through any disciplinary process. The tribunal accordingly makes no reduction on this basis.

33. The second basis upon which a ***Polkey*** reduction is sought is that there would have been a fair dismissal at the end of the 2015/16 season, for the reasons set out in paragraphs 20(b)(i) to (iii) of Mr Fletcher's written submissions. The first of these is that the claimant's relationship with the players had deteriorated, making his position untenable. The only evidence of this was the witness statements from Danny Rowe and Byron Jenkins, whose evidence was not tested before the tribunal, as they were not called. The point is made on behalf of the claimant, however, that Mr Blower in evidence said that the claimant's continued employment would have been a matter for John Askey, the manager, to decide. There is no evidence from him before the tribunal. The tribunal is not persuaded on the evidence presented that it is likely that the claimant's employment would have been fairly terminated at the end of the season for that reason.

34. Similarly, the two remaining grounds advanced by the respondent are that the claimant's employment would have been terminated either because he would have been likely to have committed some further acts of misconduct, or he would have pursued an argument that there was a racially motivated conspiracy to oust him, which would have made his position untenable.

35. The tribunal finds both these propositions groundless. Firstly, in order to succeed, the respondent would have to show that the claimant would have been fairly dismissed at some point in the future. In terms of the evidence for this, the respondent relies upon his previous conduct. On examination, however, if one discounts the allegation that he had touted a player in October 2015, which was expressly dropped as an allegation, as at the time of his dismissal for the alleged incident in July 2015 there was no further proven act of misconduct between July 2015 and March 2016. That is not to say that there would not have been allegations, but it is actual, not alleged, conduct that matters. This is, in the tribunal's view, pure speculation. In relation to Mr Blower, the tribunal does not see where, until his suspension and disciplinary proceedings, the claimant had previously alleged that Mr Blower was involved in some racially motivated conspiracy . True it is that he made reference in his grievance in January 2016 (page 204 of the Bundle) to Mr Blower making a racist reference to the club's owners. He also complained that there was a protracted campaign by Mr Blower to bring about the termination of his employment , but he makes no other reference to race in this document. In the grievance meeting on 12 January 2016 , there is no further mention of race. In short, whilst the claimant clearly, by January 2016, when he had been suspended and charged (only, at that time) with touting, and issues had previously been raised about his dealings with the funds from an event, believed and stated that he thought that Mr Blower was treating him unfairly, wanting him out, he did not do so, in terms, that Mr Blower's actions were racially motivated. Be that as it may, the fact that an employee genuinely believes that a senior officer of his employer is against him , and wants him out, does not mean that his employment will end in the near future, or, more particularly, will end fairly. The suggestion therefore that the claimant's employment was likely to end, at the end of the 2016/16 , and end fairly because of the alleged breakdown in the relationship between the two men is, again, the tribunal considers a highly speculative one, particularly given Mr Blower's evidence that in matters relating to the assistant manager post, John Askey's views were highly important. No evidence from John Askey has been put before the tribunal. Thus the tribunal is not persuaded that this can, or should, form the basis for any ***Polkey*** reduction.

36. That does not mean, however, that the tribunal will not have to make some assessment of the period for which the claimant should be awarded compensation for loss of earnings. That is an issue of loss, and goes to what it would be just and equitable to award. That is not, however, the same as making a specific ***Polkey*** reduction, which the tribunal declines to do.

Breach of Contract – the notice pay claim.

37. The tribunal turns now to the breach of contract claim. The claimant was dismissed without notice, so the burden is upon the respondent to prove, on the balance of probabilities, as a matter of fact, that the claimant was guilty of conduct which was of such a nature that it entitled the respondent to dismiss the claimant for that conduct, that it did so, and that it did not lose its entitlement to do so.

38. The first issue, then, is a factual one – what did the claimant do? The problem for the respondent is that it has called no witness who was involved in the incident on 23 July 2015. Thus, in terms of first hand evidence, the tribunal has the evidence of the claimant only. The tribunal has also, of course, the account given by

the witnesses to the employer, and in the disciplinary hearing, but has not seen those witnesses for itself. That said, the claimant, curiously to say the least, did not deal with the incident at all in his witness statements (he made two). His evidence in this regard also came out in the disciplinary hearing, and in his questioning before the tribunal.

39. The claimant's account in evidence to the tribunal was largely to dispute the statements put to him. He denied the allegations, but in his account prepared for the meeting on 3 February 2016 (pages 157 to 158 of the Bundle) he did say that Danny Walker approached him about the cones, and swore at him, whereupon he accepted that he responded by swearing, and using "the F word". He went on to say that the use of such language was commonplace at the club and amongst footballers generally.

40. In terms of other accounts, the tribunal notes that in the disciplinary hearing, Danny Walker (page 184 of the Bundle) agreed to a suggestion by the claimant's representative that these were part and parcel of a football club environment. He also agreed that they were both in the wrong, both were swearing. He also made reference to John Askey ("the gaffer") swearing on another occasion.

41. It is true to say that Gerard Coyne , Lewis Stanton and Jamie Ryan gave accounts in the disciplinary hearing which said that the claimant had used bad language, and this was maintained . An unexplained element of the case, however, is how the allegation, when formally made, referred to the claimant using the "C" word, when none of the witnesses had ever said that he did.

42. The position that the tribunal is left with, however, is that none of these witnesses were called before the tribunal. It may well have been reasonable for the respondent to accept their evidence, but that does not mean that the tribunal would have done so, especially as it would have been subject to cross – examination by the claimant's solicitor. That is no disrespect to Richard Jobson, the claimant's PFA representative, who did question them in the disciplinary hearing, but who is not a qualified lawyer. The tribunal is faced therefore with the claimant denying the more serious, and challenged, evidence about what he said to Gerard Coyne and Lewis Stanton, but there being a measure of agreement between his account and Danny Walker's about their interaction. In these circumstances the issue is finely balanced. The claimant may have used the language alleged, or he may not. The burden of proving that he did lies on the respondent. The tribunal considers that the respondent has not satisfied that burden, and has not proved, on a balance of probabilities, particularly by calling first hand evidence, that he did so behave.

43. There are, however, further issues. If the tribunal were wrong, and the respondent has established the factual basis for its summary dismissal, there remain legal issues as to whether the respondent was entitled to dismiss for that conduct when it did. That raises two issues, firstly, was the conduct serious enough to warrant summary dismissal. The initial question is whether there has been a breach of any express term. The tribunal cannot see that there has, even if the factual allegations were proven. Clause 11.1(a) is relied upon, but the tribunal cannot see the conduct falling within any of these express provisions, even (v) , as for their to be

serious disrepute, there has to be some element of externality about the conduct, and this was purely internal.

44. The test therefore is the contractual test for gross misconduct, as set out in the common law rules for determining what degree of misconduct (the epithet gross adds nothing – ***Wilson v Brett [1843] 11 M and W 113, Court of Exchequer*** per Rolfe B) would justify a summary dismissal. The law on this topic has been considered by the Court of Appeal in ***Briscoe v Lubrizol Ltd. [2002] IRLR 607*** . In his judgment Ward L J considered the earlier caselaw, and in particular ***Neary and Neary v Dean of Westminster [1999] IRLR 288*** . He says, at para. 108 of his judgment in the Court of Appeal:

"To draw a distinction between gross misconduct and repudiatory conduct evincing an intention no longer to be bound by the contract is in my judgment to make a distinction without a real difference. It may be more common in employment cases to deal with gross misconduct, but that is essentially a form of repudiatory conduct. The two propositions appear to have been so treated by Lord Jauncey of Tullichettle in ***Neary and Neary v Dean of Westminster [1999] IRLR 288*** *when he said at paragraph 20:*

'The question of whether there has been a repudiatory breach of that duty justifying instant dismissal must now be addressed. Whether misconduct justifies summary dismissal of a servant is a question of fact.'

The question turns upon what degree of misconduct justifies summary dismissal or amounts to repudiation.In ***Laws v London Chronicle (Indicator Newspapers) Ltd 1959 I WLR 698*** *700 – 701 Lord Evershed MR analysed the authorities and stated that the proper conclusion to be drawn from them was this:*

'.. since a contract of service is but an example of contracts in general, so that the general law of contract would be applicable, it follows that the question must be – if summary dismissal is claimed to be just viable – whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.'

Ward L J continues to cite from this passage, which is concerned with disobedience, and single acts of that nature, before resuming his citation of Lord Jauncey as follows:

'There are no doubt other cases which could be cited on the matter, but the above four cases demonstrate clearly that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment'

Ward L J ends this passage of his judgment with:

"I take that to be the test."

45. He then goes on to consider whether the test is a subjective or an objective one – i.e does the employee have to intend to renunciate the contract, or is it enough

that his conduct, objectively viewed , would be so viewed by a reasonable person – and holds that it is the latter. So that is the test this tribunal must apply to the facts as found or alleged .

46. The claimant in support of the argument that the conduct did not warrant summary dismissal relies also on the fact that neither Danny Walker nor John Askey were dismissed for the same conduct. Whilst consistency may be relevant to fairness, it is not of itself relevant to whether there has been fundamental breach. It is, however, a legitimate test to apply in evaluating whether the alleged conduct was sufficiently serious to merit summary dismissal to see if the respondent always treated it as such. In this instance it clearly did not, as evidenced by the later treatment of John Askey for similar conduct. The tribunal also notes the term "trust and confidence which is inherent in the particular contract of employment" in the judgment cited above. It is legitimate , the tribunal considers therefore to have regard to the particular contract, which in this case is assistant manager at a lower league football club. Language which may constitute such misconduct in, say, a dress shop , may be less likely to be so considered in this context. The tribunal would not hold that this conduct, if proven, was of such a character as to entitle the respondent to dismiss without notice.

47. The claimant's final argument, in the alternative, on this topic is that in any event the respondent, in waiting 6 months before raising the allegation and then not dismissing until 14 March 2016, waived any breach , or affirmed the contract. The principles of affirmation for an employer are just the same as for an employee seeking to argue constructive dismissal (see, for example ***Cook v MSHK Ltd [2009] IRLR 838*** see paras. 52 to 60). Each must act with sufficient speed in response to the breach, once aware of it, or they will be taken to have affirmed the contract. In this instance, the evidence is that the respondent , as an entity, at a senior level , was aware of the breach as long ago as late July 2015. Even if that is wrong, it knew by 10 November 2015. No action was taken until 21 January 2016. As discussed above in a different context there is no explanation for either of those periods of delay, the second period being particularly important. The claimant was not even suspended in relation to the second, but older, allegation. The tribunal considers that by this delay, in full knowledge of the facts, the respondent did affirm the contract.

48. Mr Fletcher for the respondent, in answer to this point, relies upon clause 19.4 of the contract which provides:

"The failure by either party to require strict performance by the other party of any obligation under this Agreement or failure to exercise any of its rights under the Agreement shall not waive or diminish that party's rights to require strict performance of such obligation or to exercise such rights."

49. This he submits, precludes any finding of waiver, or presumably, affirmation on the basis of the alleged delay between the conduct entitling the respondent to dismiss without notice , and the dismissal. The tribunal disagrees. In the case of ***Tele2 International v Post Office Limited [2009] EWCA Civ 9*** the Court of Appeal considered the effect of a similarly worded (if anything more relevantly worded in the context of waiver or affirmation) clause, and held that it was not to prevent such an affirmation or waiver taking place (see paras. 49 to 56 of the judgment of Aikens LJ).

What is the notice period?

50. Having succeeded in establishing that he was wrongfully dismissed, the final question is what is the notice period to which the claimant was entitled ? The claimant contends for a total of 6 months, the respondent for 3. The basis of the claimant's contention is Clause 11.5 (A) of the claimant's contract which provides:

"(A) In the event that the Club wishes to terminate this Agreement, otherwise than under clause 11.1 to 11.4, it must:

(a) give written notice of termination to the Assistant Manager with three months notice period; and

(b) pay to the Assistant Manager an amount of compensation equal to the 3 months of his salary less deductions for income tax and National Insurance Contributions (as appropriate) , and not being subject to any duty of the Assistant Manager to mitigate any loss which the Assistant Manager may have suffered as a result of the termination of this Agreement pursuant to this Clause 11.5 , such amount to be paid monthly in line with Schedule 1(a) over a 3 month period."

The claimant submits that this clause means that the claimant is entitled to both three months' notice, and a payment the equivalent of three months' notice. The claimant places much reliance upon the use of the word "and" at the end of sub - clause (a). The respondent contends that the clause does not bear that construction, and is for only three months' notice.

51. This is an issue of construction. The clause is, with all due respect to the draftsman, not well worded. It appears to be a slightly clumsy attempt at a pay in lieu of notice ("PILON") provision, whereby a contract can be terminated either by notice, or by making a payment the equivalent of the notice period. Such terms are usually better expressed, and make it clear that it is the making of the payment, usually in one lump sum, but permissible by instalments, that operates to terminate the contract. This is in lieu of notice being given. Such payments in lieu are not usually subject to mitigation, as they are the means by which the employer brings the contract to a premature end, the benefit to the employee being receipt of the PILON payment, without reduction for mitigation. This clause appears to conflate the two concepts of notice and pay in lieu of notice. Whilst it could have been much better worded, the tribunal cannot construe the clause as the claimant seeks. To read it as he argues is to deprive it of commercial sense. Whilst the word "and" would normally connote some additional entitlement, the tribunal considers the only sensible way to read the word is "or". The clue, the tribunal considers is in the use of the word "the" in the term in sub – clause (b) "equal to <u>the</u> 3 months of his salary..". Without that word, the argument that this is an additional entitlement to the three months notice referred to in the preceding sub – clause would have greater force, but it is clear to the tribunal that this is a reference to the same three month notice period referred to in sub – clause (a) which precedes it. The claimant's entitlement was therefore to 3 months' notice (which, be it noted, is how the matter was put in the claimant's Remedy Statement) .

Remedy.

52. The parties have not expressly addressed remedy, and there is no counter statement of loss, so the tribunal does not know whether any of the figures given by the claimant are disputed as not being accurate. The tribunal accordingly does not at this stage make any awards, but will given an indication of the awards that it is contemplating making on the basis of the figures put forward by the claimant. The parties can thereafter either agree remedy, or seek a determination of any award (or partial determination, if they agree other aspects) in due course. For the present, therefore, the tribunal's provisional views are as follows.

i)Breach of Contract.

53. The first, and simplest, item of remedy is the notice period. The claimant, it is now clear, was entitled to three months notice. He is therefore entitled to the net pay he would have earned during that notice period, subject to any mitigation or benefits. From his remedy statement (pages 28 to 30 of the Bundle) his net weekly wage was £261.11. 3 months , 13 weeks , would produce a figure of £3,394.43. Benefits, however, fall to be deducted, and the claimant received :

Initial payment – 11 May 2016	£31.33
Thereafter £73.10 per week to the end of the notice period 14 June 2016 6 weeks in total	£438.60
Total benefits received	£469.90
Damages for breach of contract £3,394.43 less £469.90	**£2,924.53**

ii)Unfair dismissal.

54. The first entitlement will be to a basic award. As the claimant was employed for two full years at age at termination was 43 , with both full years of service over the age of 41, giving him an entitlement to 3 weeks, his basic award is therefore:

3 x £288.46	**£865.38**

55. The compensatory award requires the tribunal to make an assessment of the appropriate period over which to award the claimant loss of earnings. The first part of the period, of course, is taken up by the notice pay award, which takes the claimant up to 14 June 2016. The respondent's case is that the tribunal should not make any award beyond the end of the claimant's contract, which was due for renewal on 1 July , two weeks after the end of the notice period. The tribunal notes that the DWP permitted the claimant to restrict his job seeking activities to the type of role he had held with the respondent , or previously, until 19 July 2016. Thereafter, he like all other jobseekers , could not be so restrictive, and would be expected actively to pursue any other job for which he was fit.

56. Whilst the tribunal has rejected the respondent's contentions in relation to any ***Polkey*** reduction on the basis that the employment was likely to end at a certain

date in any event, that does not preclude it from having to make an assessment of the period over which it is just and equitable to award loss of earnings. This is not the same as a ***Polkey*** reduction, but still involves a degree of speculation on the part of the tribunal. There are two extremes. The one contended for by the respondent is that there be a cut off at 1 July 2016, as the claimant's employment may well have ended then for all sorts of reasons, even if he were not to be dismissed. The other extreme, contended for by the claimant, is for ongoing loss, taking his losses to date, and beyond, indeed , in the remedy statement for 18 months from July 2016 (or October 2016, the remedy statement is unclear when this is taken from.

57. This is not an easy assessment to make. The claimant's employment history with the respondent, even allowing for the fact that he may well have been unduly scrutinised , was not entirely smooth (given his written warning for a very serious incident in November 2014), and the tribunal can perhaps take judicial notice of the fact that the transition from player to manager in professional football at any level is not always a successful one, and this was the claimant's first managerial role. Further, the salary the claimant was earning at the time of his dismissal , £15,000 per annum, is hardly, with all due respect to him a substantial one, and one would have thought the claimant had an earning capacity, perhaps outside football, but possibly still associated with the sport, or sport in general, that was higher than that. One has to question how much longer he himself would have stayed at the Club in those circumstances. He had, when all is considered, only been in his position with the respondent for less than three years. The tribunal therefore does not see that his continued employment was a given, and was probably somewhat precarious, as is probably the norm for the industry. Doing the best it can, therefore, the tribunal considers that the award of loss of earnings should cover the period from the date of dismissal to 6 months after it, i.e to mid September 2016. The first three months, of course, are accounted for by the notice period, and hence the award would be for a further three months loss of earnings. Thus, the claimant would be entitled to an award of:

13 x £261.11 £3,394.43

This would, of course, be subject to recoupment , for the period of 15 June 2016 to 14 September 2016, the previous period being accounted for by the notice pay award (to which recoupment does not apply, and hence the benefits fall to be deducted as mitigation). Additionally, the tribunal would make an award for loss of statutory rights. This has been put in the remedy statement at £1000, which the tribunal, subject to further argument, would consider too high. Given the claimant's weekly wage of £288.46, the tribunal would consider £600 a more appropriate figure.

58. There is a suggestion in the remedy statement that the tribunal should apply an uplift for failure to follow the ACAS Code of Practice. The tribunal has not heard any argument on this . At first blush it is hard to see how such an uplift can be sought – the respondent followed a procedure, at both dismissal and appeal stages, even if it unfairly dismissed the claimant in the end. The tribunal notes, however, that in the claimant's submissions, reference is made (para. 2.19) to breaches of the ACAS Code of Practice in relation to delay, reasonable investigation, and suspension. It is unclear whether the claimant is seeking to argue that these (which, of course, have been relevant to the fairness of the dismissal) are relied upon as also entitling the

claimant to an uplift pursuant to s.207A of the 1992 Act. Whilst it is more usual for such an uplift to be sought where the relevant breach has been to fail to follow any, or any proper procedure, the tribunal accepts that the wording of the section is not so limited. Without more specific argument, the tribunal cannot give any further view at this stage, and if the claimant wishes to advance this argument, and no agreement on remedy is reached, a further hearing may be required.

59. There may be other elements – it is noted that the loss of employer's pension contributions is claimed, but unclear if this is agreed as a recoverable head of loss, and if so, how it should be quantified. Further, if tribunal fees have been paid, they may be sought as well. For the present, it is hoped that the above assists the parties to resolve remedy by agreement, but if they cannot, a further hearing will be held to determine any outstanding issues.

Employment Judge Holmes

Dated: 24 April 2017

RESERVED JUDGMENT SENT TO THE PARTIES ON

27 April 2017

FOR THE SECRETARY OF THE TRIBUNALS

ANNEXE

THE RELEVANT STATUTORY PROVISIONS

s. 98 of the Employment Rights Act 1996:

(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) In any other case 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.

s.123 Compensatory award

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

and, in particular:

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

Trade Union and Labour Relations (Consolidation Act 1992

s.207A Effect of failure to comply with Code: adjustment of awards

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employee has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

(5) Where an award falls to be adjusted under this section and under section 38 of the Employment Act 2002, the adjustment under this section shall be made before the adjustment under that section.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: 2401718/2016

Name of case: Mr EP Sodje v Macclesfield Town Football Club Ltd

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 27 April 2017

"the calculation day" is: 28 April 2017

"the stipulated rate of interest" is: 8%

MR S ARTINGSTALL
For the Employment Tribunal Office