



EMPLOYMENT TRIBUNALS

Claimant: Mr Michal Cabovsky
Respondent: ASDA Stores Limited

Heard at: East London Employment Tribunal
Before: Employment Judge John Crosfill
On: 16 October 2020 & 6 November 2020

Representation

Claimant: In person
Respondent: Paul Wilson of Counsel instructed by Addleshaw Goddard LLP

JUDGMENT

1. The Claimant's claim for unfair dismissal brought under Part X of the Employment Rights Act 1996 is well founded.
2. Under Section 123 of the Employment Rights Act 1996 it would be just and equitable to reduce the Claimant's compensatory award by 50% to reflect the possibility that he would have been fairly dismissed by the Respondent.
3. Under Section 122 (2) it would be just and equitable to reduce the basic award to the Claimant by 25% to reflect the Claimant's conduct.
4. The Claimant's claim for accrued but untaken holiday pay brought either as a claim under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 or (in part) under Regulations 14 and 30 of the Working Time Regulations 1998 is well founded and the Claimant is entitled to be paid for 10.45 days accrued but untaken holiday.

5. The Claimant's claim that the Respondent made unlawful deductions of wages from his pay is well founded. The Respondent unlawfully deducted the Claimant's salary for 2 and 9 January 2020 from his pay and unlawfully deducted contractual sick pay for the period 3 to 8 January 2020 from his wages.

6. The sums due to the Claimant as a consequence of these decisions will be calculated at a separate remedy hearing.

REASONS

1. The Claimant was employed by the Respondent from 1 September 2008 until 9 January 2020 when his employment ended following his summary dismissal. At the time of his dismissal the Claimant was working as a Night Trading Manager. Following a period of ACAS Early Conciliation, the Claimant presented an ET1 on 8 April 2020. He has brought the following claims:

- 1.1. A claim of unfair dismissal under Part X of the Employment Rights Act 1996; and
- 1.2. A claim for accrued but untaken annual leave under Regulation 30 of the Working Time Regulations 1998 or under Part II of the Employment Rights Act 1996; and
- 1.3. A claim for contractual sick pay brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 or under Part II of the Employment Rights Act 1996.

2. The case was listed for one day via CVP. Minor difficulties with CVP contributed to the hearing overrunning and the matter was listed for a further half day. There was insufficient time at the conclusion of the hearing to give judgment and reasons which were formally reserved.

The Issues

3. The issues in the case were not in dispute and were as follows:

3.1. Unfair dismissal

3.1.1. It was admitted that:

- 3.1.1.1. The Claimant had sufficient continuity of service to present a claim of unfair dismissal without needing to show any automatically unfair reason for the dismissal; and

- 3.1.1.2. There was no dispute that the Claimant had been expressly dismissed by the Respondent; so
 - 3.1.1.3. The first contentious issue was whether the Respondent could show that the dismissal was for a potentially fair reason. The Respondent says that the reason for the dismissal was conduct namely;
 - 3.1.1.3.1. That the Claimant had intentionally claimed for travel expenses he was not entitled to; and
 - 3.1.1.3.2. That he had spent 34.5 hours in the office when on duty not carrying out anything work related.
 - 3.1.1.4. The Tribunal needed to decide whether:
 - 3.1.1.5. There were reasonable grounds for the Respondent's conclusions which were;
 - 3.1.1.6. formed following a reasonable investigation; and
 - 3.1.1.7. whether the Respondent followed a reasonable procedure; and
 - 3.1.1.8. taking these matters into account whether the dismissal was fair or unfair applying the test in sub section 98(4) of the Employment Rights Act 1996?
 - 3.1.1.9. If the dismissal was unfair should any compensatory award be reduced to reflect any possibility that, had the Respondent acted fairly, the Claimant could or would have been dismissed in any event? and/or
 - 3.1.1.10. Whether any basic award and/or compensatory award should be reduced under sections 122(2) and/or 123(6) of the Employment Rights Act 1996 because of any conduct by the Claimant.
- 3.2. Accrued but untaken Holiday Pay
- 3.2.1. How many days annual leave was the Claimant entitled to take in each holiday year?
 - 3.2.2. It was agreed that the Respondent's holiday year started on 1 April
 - 3.2.3. How much leave did the Claimant actually take in the final holiday year?

3.2.4. What if any leave did the Claimant have accrued but untaken at the date of his dismissal?

3.2.5. What rate of pay is attributable to any accrued but untaken holiday?

3.3. Sick Pay

3.3.1. At the point of final submissions there was no dispute that the Claimant was not paid for the period 3 to 9 January 2020?

3.3.2. What were the terms governing the contractual entitlement to sick pay? In particular:

3.3.2.1. Was the Respondent entitled to withhold sick pay as a matter of discretion; and

3.3.2.2. Could it do so if the Claimant was 'absent without leave' in the sense that he had not provided a statement of fitness for work.

3.3.3. If the Respondent breached the Claimant's contract of employment by not paying sick pay and/or unlawfully deducted sums from the Claimant's wages what sums are due to the Claimant.

The hearing

4. In advance of the hearing the parties had, in accordance with the directions of the tribunal, prepared an agreed bundle of documents running to some 375 pages. They had also prepared and exchanged witness statements from the following people:

4.1. the Claimant; and

4.2. Gary Pottle, the General Store Manager of the ASDA store in Dagenham where the Claimant worked and the person who took the decision to dismiss the Claimant; and

4.3. Michael Achilleos, the General Store Manager of the Beckton Superstore and the person who heard the Claimant's appeal against his dismissal.

5. In advance of the hearing the Respondent's solicitor had sent the Tribunal a DVD containing CCTV footage said to have supported the Respondent's conclusion that the Claimant had not been working whilst on duty. I explained to the parties that I had been unable to view that CCTV as the security in place on my judicial laptop, and the desktop computers in the tribunal centre would not permit me to load files from an unknown drive. As the CCTV footage covered six entire night shifts it would have been entirely impracticable to attempt to do that in advance of the hearing.

6. Mr Wilson on behalf of the Respondent told me that unless I wished to do so he did not intend to show the CCTV footage as part of the Respondent's case. I asked the Claimant whether he sought to rely on the CCTV footage. He told me that he thought it was impracticable to do so. He had been offered the opportunity to view the CCTV during the disciplinary process but had declined to do so. The Respondent had included in the agreed bundle a handwritten summary of what the CCTV was said to show. With neither party asking me to review the CCTV I agreed to proceed on the basis of what the witnesses were able to tell me about what they had viewed or not viewed during the disciplinary process.

7. At the conclusion of the evidence both parties made oral submissions. I shall not set out those submissions in full but address the most important points within my discussions and conclusions set out below.

Findings of fact – the unfair dismissal claim

8. In this section I set out my initial findings of fact drawn from the evidence I have heard and read. I shall not set out the entirety of the evidence but shall include only the evidence I considered sufficiently important to inform my decisions. In my discussions and conclusions set out below I draw on these primary findings of fact and may make secondary findings such as drawing inferences of reaching a conclusion on whether any act was reasonable. Where I do so I make it clear that these too are findings of fact.

9. By the time of his dismissal the Claimant was working as a Night Trading Manager. The terms of the Claimant's most recent contract of employment are set out in a letter dated 12 September 2016. These provided that he would normally be expected to work 45 hours per week, working four out of seven shifts. His contract went on to say that he would be expected to work such other hours as deemed necessary to enable his duties to be carried out satisfactorily and that over busy trading periods he might be asked to work five shorter shifts out of seven.

10. Gary Pottle was the General Store Manager he joined the store in October 2019. He was assisted by a Mr Reece Burton who was a Deputy Store Manager. The Claimant reported to both of these individuals. Generally, when working the Claimant was the most senior employee at the Dagenham store.

11. Up until the events that led to the Claimant's dismissal there do not appear to have been any particular concerns about his performance. The Claimant says, and I accept, that he frequently worked very long hours. There was little evidence in the agreed bundle about the number of hours the Claimant actually worked. However, I can see from the CCTV summary which covers six nights between 18 December 2019 and 25 December 2019 the Claimant was at work for 75 hours. That is an average of more than 12 hours a night. On 21 December 2019 the Claimant was at work at 8:23 and did not leave until 10:36 on the morning of 22 December 2019 he then started work again at 20:02 on the same day. That left him only 9 ½ hours to go

home and get some sleep. The Claimant says in his witness statement, and I accept, that working beyond 9 o'clock in the morning became commonplace.

12. The Claimant had a difficult relationship with Mr Reece Burton. That is evidenced by text messages that go back as far as 22 November 2019 which showed the Claimant complaining about Reece Burton telling others that he was responsible for discrepancies in their wages. The Claimant says, and he was not contradicted on this, that he had first made a complaint about Reece Burton to Gary Pottle on 30 November 2020. He says that he had told Gary Pottle that Reece Burton had refused to take a handover which meant that he was late for a birthday party.

13. On Sunday, 15 December 2019 the Claimant sent Gary Pottle a text message in the following terms (which clearly references a work meal out):

'Rees told me this morning that no one likes me from the management team and I don't even like being around me and I'm on borrowed time. I have never in my entire career or personal life been told anything close to this I know it's all prepaid but if that's how all you guys are feeling then there's no point me coming.'

14. The Claimant told me in his witness statement that he had spoken to Gary Pottle who had said that he would speak to Reece Burton and put this in a general file note. When Gary Pottle was asked what steps he took to follow up that message he said that he took it as no big issue as it had not been raised formally. He went on to say that because of this took no other action. He denied making any file note (or receiving one from the Claimant). There is no real conflict between the two accounts and I accept that the Claimant was given some verbal reassurance by Gary Pottle and that there was a mention or anticipation of the complaint being noted. In fact, Gary Pottle did nothing at all.

15. When the Claimant later raised this during his appeal Michael Achilleos said that he spoke to Reece Burton and reached the conclusion that what had been said was *"honest feedback regarding the Claimant's relationship dynamic and the wider management team"*. There was no finding that the Claimant was inaccurate about being told that he was not liked and was on borrowed time. I accept the Claimant's account of what Reece Burton said. The report in the text message was contemporaneous. In the later disciplinary investigation the time of the meeting notes would suggest that there was no love lost between the two. The conclusions drawn by Reece Burton were as I find partially without any reasonable foundation. All three matters point to animosity consistent with the Claimant's account.

16. Whilst it is common ground that an investigation was commenced into the Claimant's behavior at work it is not clear how any concerns were first raised or by whom.

17. At paragraph 17 of his witness statement Garry Pottle says that at the end of November 2019 'the Store' started to look into the concerns raised by reviewing the CCTV footage. He does not say who commissioned any

investigation or how any review of the CCTV footage was undertaken.

18. The Respondent has a policy in relation to the use of CCTV. It sensibly sets out the fact that CCTV footage may be used as evidence in disciplinary or grievance investigations. However, it states that CCTV is not to be used to monitor the performance of employees as a matter of routine. The policy states that monitoring might be authorised in 'exceptional circumstances'.

19. Within the bundle I was provided with hand written summaries of CCTV footage for dates between 18 and 25 December 2019. In addition, there is a summary of those documents that spans the same dates. During the investigation that followed in January an Employee, George Collins was interviewed he described a conversation with the Claimant on 26 December 2019 in which he says that the Claimant complained of being watched. He says that the Claimant had found a piece of paper in a drawer which had times written on it. In the agreed bundle at page 305 there was a photograph apparently disclosed by the Claimant and taken on 26 December 2019 which shows one of the CCTV summaries referring to his movements on 21 December 2019. From that I infer that the Claimant had discovered that his movements were being monitored on 26 December 2019. During the investigation meeting that took place on 2 January 2020 Reece Burton refers to that piece of paper as being located in 'Gary's drawer' which was later locked.

20. In Gary Pottle's statement he refers to allegations coming to light regarding the Claimant's conduct. He goes on to say that a new manager spoke to him as he was doing all the shop floor work by himself. He says that as a result *'the Store started to look into the concerns'*. On 30 December 2019 Aeron Lincoln, who was a New Manager, was interviewed or made a statement. In his statement he talks only about the 21st December 2019. He said that the Claimant had been in a bad mood and having raised errors told Aeron Lincoln that he would be doing everything by himself. In cross examination Gary Pottle confirmed that Aeron Lincoln had spoken to him about the Claimant and that he had asked him to put it down on paper. Later on Gary Pottle said that Aeron Lincoln had telephoned Reece Burton and then had made his statement. I accept that both these statements were correct and that both Gary Pottle and Reece Burton had spoken to Aeron Lincoln and that Gary Pottle had asked him to put it in writing.

21. Gary Pottle adopted his witness statement without making any changes. Paragraph 18 of that statement states that on 2 January 2020 the Claimant was suspended on full pay pending an investigation. In fact, a proforma completed by Reece Burton on 2 January 2020 showed that the Claimant had not been suspended at all (an assessment showing that he posed a low risk to the business). This was perhaps a small inaccuracy but coupled with other matters gave me concerns about the accuracy and completeness of Gary Pottle's evidence. I do not suggest that he was dishonest but do find that he instinctively supported 'the company line'.

22. I am not satisfied that the investigation into the amount of work the Claimant did started any earlier than 18 December 2019 which is the date

that the first notes are made of what is shown on the CCTV. Had it been earlier I would have expected the Respondent to be able to tell me exactly when and why an investigation was started. I had no evidence from Reece Butler who conducted the investigation.

23. Observations were recorded about what the Claimant was doing on 18, 19, 21, 22, 23 and 25 December 2019. I do not know who made those notes nor was I told the methodology. It appears that there is more than one camera in the store. The notes suggest that the Claimant was moving around the store. Compiling the summaries that I have been provided with would have involves watching many hours of CCTV.

24. I find that Gary Pottle was closely involved in the decision to investigate the Claimant. I find that when Gary Pottle refers to *'the Store'* commencing an investigation he is trying to distance himself from the investigation. By 26 December 2020 he had commissioned, authorised or undertaken a study of the CCTV and had in his possession the summary sheets that were in the bundle. He had spoken to Aeron Lincoln and asked him to make a statement about specific events that were said to have taken place on 21 December 2019.

The expenses policy

25. The Respondent has an expenses policy which is a global document. It also has a local policy which is entitled the *'Asda Travel and Expenses Policy Toolkit'*. There did not appear to be any material differences in the relevant parts of the policies. It includes a section entitled 'Compliance'. In that section employees are reminded that they must ensure that any expenses submitted are in compliance with the policy. Expenses claimed through petty cash needed approval. There was some confusion before me whether the Dagenham Store was classed as a Superstore or a Supermarket. The policy says that where there is a Superstore approval may be sought from the 'GSM' or 'Duty Leadership Team'. For a Supermarket approval may be sought from the 'Store Manager' or the 'Duty Leadership Team'.

26. The expenses policy has a definition of an employee's *'normal place of work'*. That is the place that they are required to attend regularly. In the Claimant's case that would have been the Dagenham Store. The policy makes it clear that rail fares cannot be claimed for travel between a person's home and their normal place of work.

27. The policy includes a section on staying with family or friends. It says: *'Colleagues staying with family or friends when travelling on company business are able to claim a fixed allowance of £21.60 per night through Concur'*. The Asda Policy does recognise that an employee might stay in a hotel near their normal place of work in 'exceptional circumstances'. However, the policy provides that this would be allowed only with the manager's prior approval. Hotel bookings must be made through an approved travel agent. The approval process for hotel bookings is shown in a flow chart. It illustrates exceptional circumstances with a reference to late evening

work. The section dealing with staying with family and friends near a normal place of work is silent on the circumstances other than the requirement that it must be on 'company business'. There is no reference to prior approval.

The Claimant's expenses claim

28. In the week commencing Monday 23 December 2019 the Claimant was rostered to work on 23, 25, 26, 27 and 28 December 2019. At the material time the Claimant lived in Leicester Road in Tilbury. Ordinarily he had a straightforward journey to and from work. He would catch the C2C train at Tilbury Town Station and get off at Dagenham Dock a short walk from the store.

29. It is not disputed that over the Christmas period the Claimant's normal train service was disrupted. I shall deal below with the Respondent's conclusion that there were possible alternatives. Suffice to say the Claimant decided that over Christmas he would stay with his girlfriend who lived just over 3 miles from the Dagenham store.

30. On 29 December 2019 the Claimant completed a claims expenses form. The Claimant told me that he accepted that he completed a hand-written form which was later typed up. That is consistent with a statement taken during the investigation from Laura Butler an 'Admin Manager' who is the employee responsible for expenses claims. I have only the typed-up version but the Claimant did not suggest that there was any material discrepancy. The claim that was made was for three nightly allowances of £21.60. The reason for making the claim was given as '*I travel to work no public transport RM8 3JB*'. The postcode is where the Claimant's girlfriend lives with her family.

31. Having completed the expenses form the Claimant needed to seek approval. It is clear from the record of an investigatory interview that was later conducted by Reece Burton that the Claimant initially approached Reece Burton seeking authorisation for the expenses. It was common ground that he had not dealt with it but had referred the Claimant to Laura Butler. I find that under the expenses policy the Claimant was entirely correct to seek authorisation from the Duty Manager who, on that day, was Reece Burton.

32. The Claimant did as he had been directed to do and sought authorisation from Laura Butler. When she was interviewed she said that the Claimant had a hand-written form and she told him it needed to be typed up. She typed it up and then authorised the payment to the Claimant. When payment was later made the form was checked again to ensure that the payment had been properly authorised. The Claimant accepted that when he had sought payment of these expenses he had read the expenses policy.

33. In her witness statement Laura Butler says that having authorised the payment she then became concerned as the address declared was close to the store. She says that she went to speak to '*her deputy*' who I infer was Reece Burton. She says that he suggested that she should speak to Gary Pottle and the '*People Manager*' and says that that is what she did.

The investigation and meeting with Reece Burton

34. At some point a decision taken by somebody to investigate both the expenses and the issue of the Claimant's activities when working. Garry Pottle does not say in his statement that he spoke to Laura Butler before the investigation commenced but I infer that he must have done and that he instructed or at least was a party to a decision to commence an investigation coupled with the investigation of the Claimant's activities at work which was already underway.

35. The Respondent has a policy on how investigations should be carried out. The material parts of that policy provide as follows:

- 35.1. That an investigation should take place as soon as possible; and
- 35.2. There should be an offer of representation at any investigation meeting; and
- 35.3. Witnesses should be interviewed in person if possible, so that the investigating manager can observe their behavior and ask questions to probe a bit further; and
- 35.4. Notes must be taken of all formal meetings including setting out the reason for the meeting and who requested it.
- 35.5. Anonymity is only offered to a witness in 'exceptional circumstances'.

36. The Respondent's disciplinary policy provides that where a disciplinary investigation takes place: *'the manager holding the investigation mustn't have been involved in the alleged issue or in any way linked to the allegations (for example a colleague who may be a potential witness must not carry out the investigation)'*.

37. On 30 December 2020 Aeron Lincoln signed a statement. He refers only to the events of 21 December 2019. The Respondent's policy sets out in some detail a suggested methodology for taking a statement using a question and answer format. The policy acknowledges that this may not be appropriate in every case (the example given is of a customer complaint). In this case it is impossible to see what Aeron Lincoln was told about the investigation or its scope. The statement is said to be *'in relation to: Michal and his performance on the 21/12/19'*. Aeron Lincoln is recorded as saying that the Claimant had said *'..he refused to work that day and that he would sit in the office and I would do everything by myself working and finishing the shift. He sat in the office for hours.'* He also included a suggestion that the Claimant's constant criticism had made him and others feel uncomfortable.

38. At some point prior to 2 January 2020 Laura Butler made a statement. During the investigation interview with the Claimant on 2 January 2020 he is shown a copy of that statement. During the meeting Reece Burton told the

Claimant that he had not procured the statement but that it was simply handed to him. That begs the question why Laura Burton provided a statement at all. I infer that somebody must have asked her to do so.

39. On 2 January 2020 the Claimant was invited to a disciplinary meeting. The meeting took place starting at 20:16 and finishing at 23:58 at night. He had no advanced warning of the meeting or of what would be discussed. The Claimant was asked whether he wanted a representative at the meeting but he declined that offer. I have read the notes of that meeting and I find that it rapidly descended into an argument. Both parties took an argumentative stance. That is unsurprising given the relationship between the Claimant and Reece Burton.

40. The first issue covered was the expenses claim. That was described as a breach of the petty cash procedure at the outset of the meeting. The Claimant was asked what he was claiming for and answered that he was claiming for staying with relatives when there was no public transport. It was then suggested by Reece Burton that prior authorisation would be required. The Claimant put forward his position that he had approached Reece Burton himself and sought his authorisation before presenting the expenses claim. Reece Burton pushed back and, whilst he accepted that the Claimant had approached him, he denied having given any authorisation or reading the claim in any detail. No reference is apparently made to the relevant policies or at least no reference to any specific provision is found in the notes.

41. The issue was then raised about which days the Claimant worked. Reece Burton then asked the Claimant why he had claimed for accommodation on 27 December 2019 because he had swapped shifts and had not worked on the night of 27 December 2019. The Claimant agreed that was the case but said that he had finished work on 27 December 2019 and was unable to travel home.

42. The meeting then turned to the issue of the time the Claimant spent away from the shop floor. The Claimant did not dispute that he might have spent the suggested 34.5 hours in the office. He said that if he had he was completing planning. He did go on to say that planning would not have been the only task he was doing. The issue of whether the Claimant could have spent such time on the tasks he identified was discussed. The Claimant was asked about commenting that he was being watched. He agreed that he had said that he was being watched. Reece Burton refers to the sheets with time in then having been kept in Gary Pottle's drawers. From that I infer that Garry Pottle was closely concerned in or at least very much aware of the investigation.

43. During the investigatory meeting the Claimant is offered the opportunity to view the CCTV but did not accept that invitation. At the conclusion of the meeting, and after an adjournment of just over one hour, Reece Burton announced his decision that there was a case to answer and that the matter would proceed to a disciplinary hearing. The Claimant was not suspended pending that hearing.

44. The notes of the investigation meeting have an 'adjournment summary'. In that section a manager is expected to set out the rationale for any decision. In respect of the expenses issue it is recorded that Reece Burton accepted that there had been no public transport on 25 and 26 December. His records that there had been no prior authorisation in the sense that the Claimant had not told his managers he might need to stay at his girlfriend's house. In respect of 27 December 2019 it is apparent that Reece Burton had done some further investigation as he records that there were trains and replacement bus services running on that day. In respect of the issue of the Claimant's work activities observed on CCTV, the conclusion given was that the Claimant's explanations of what he was doing did not satisfy Reece Burton.

45. On 3 January 2020 the Claimant did not attend work but contacted the workplace to say he was unwell suffering from 'stress'.

46. By a letter dated 4 January 2020 the Claimant was invited to a disciplinary meeting to take place on 9 January 2020. The letter informed the Claimant of his right to be accompanied at the meeting. The first charge was that the Claimant had '*intentionally claimed for travel expenses he was not entitled to*'. The basis for that is not said to be the absence of any prior authorization but that on 27 December 2019 it was possible for the Claimant to have travelled home by public transport. The second charge was that the Claimant had spent 34.5 hours in the office and that '*this time was not spent doing work or anything productive to improve the night operation*'.

47. The invitation letter contains the following passage:

'Breach of the petty cash or travel expense policy, and intent to defraud the company by spending 34 hours in the office when during those six days your break entitlement was only nine hours is deemed to be a gross misconduct offence and if proven may result in your summary dismissal'

48. The Respondent's disciplinary policy has non-exhaustive examples of conduct that are 'deemed to be' gross misconduct. Fraud or attempted fraud is cited as an example of gross misconduct. In addition, the list includes 'Making an unauthorised/false financial claim'.

49. The letter included the following documents:

- 49.1. The minutes of the investigation meeting,
- 49.2. The expense claim; and
- 49.3. The statement of Laura Butler; and
- 49.4. A copy of the management rota; and
- 49.5. A C2C journey planner for 27 December 2019; and

49.6. George Collins witness statement; and

49.7. Aeron Lincoln's witness statement

49.8. And what was described as a breakdown minute by minute of the CCTV footage but in fact was the hand-written summaries that were in my bundle.

50. The Respondent's disciplinary policy requires a manager hearing a disciplinary to be impartial and to have had 'no prior involvement in the case'.

51. The Claimant attended the disciplinary meeting. He had asked the Respondent to find a trade union representative and they had done so. The meeting started at 20:00 and finished at 21:18. Notes were taken and neither party suggested that there were significant inaccuracies.

52. The first topic covered was the issue of the expenses. Gary Pottle suggested to the Claimant that some part of the policy required him to obtain prior authorisation from himself. The Claimant responded by saying that he had sought authorisation from Reece Burton and then Laura Butler. The Claimant is asked whether it had cost him to stay with his friends. The Claimant indicated that he had contributed to food and washing costs. The Claimant is then asked about the days he has claimed for. The meeting then discusses when the Claimant worked. The Claimant accepted that he had not worked on the night of 27 December but said that that was the day he was sleeping (having worked on 26 December 2019). It is put to the Claimant that he must have put the wrong dates on the expenses form and the Claimant is recorded as agreeing to that. There was no discussion at all about whether the Claimant could or could not have been expected to travel by any alternative means on 27 December 2019 or on any of the other days. The C2C document is not referred to during the discussion at least according to the notes.

53. The meeting then discussed the issue of the Claimants activities shown on CCTV. The Claimant is again offered the opportunity to look at the CCTV. He declined. Gary Pottle then suggested to the Claimant that he spent 34 hours in the office, training room, the canteen and smoking. The Claimant did not dispute that breakdown. The Claimant repeated his explanation that he was planning and doing 'other stuff'. Garry Pottle suggests that the CCTV shows the Claimant with his feet up and watching a program on his phone. The Claimant did not dispute that he might have been doing that and suggested that it would be part of his break time.

54. Garry Pottle asked the Claimant for explanations of the number of cigarette breaks he took, the fact that he was observed, and had accepting during the investigatory meeting, sleeping on two occasions for 22 minutes. At that stage Gary Pottle produced a further statement from an anonymous person. This had not been disclosed in advance of the meeting. The Claimant however did not object to it. The statement referred to an occasion when the Claimant had been observed sleeping in late October or early November. The Claimant did not deny this might be the case. He explained that he had been

taking Naproxen at the time which made him drowsy.

55. The discussions concluded after 40 minutes. There was then a 35-minute adjournment during which Gary Pottle reached his conclusions. He recorded those on the 'adjournment summary'. After setting out a number of findings under bullet points he concluded that it was his 'reasonable belief' that the Claimant had intentionally claimed more than he was entitled to and that he understood the policy. His findings included a conclusion that there was a replacement bus route that would have got the Claimant home on 27 December 2019. This was not a matter raised with the Claimant during the hearing. He further concluded that the Claimant had intentionally tried to defraud the company by getting paid his salary but not carrying out his duties as a NTM.

56. No reasoning is set out in the adjournment summary as to why dismissal was the appropriate sanction. No distinction is made between the first and second charges at the point where a sanction is considered. The decision was then set out in a letter dated 10 January 2020. That letter simply takes the bullet points from the adjournment summary and repeats them. There is no analysis of why dismissal was the appropriate sanction. There is little such analysis in Gary Pottle's witness statement.

57. When I asked him some questions about his evidence Gary Pottle told me that the notes of the CCTV footage had been compiled by a security guard. He had not watched the entirety of the footage for himself but had looked at some of the parts highlighted in the notes. He said that for him the most important part of the NTM role was to be present on the shop floor supporting the staff. He considered that watching a program on a mobile telephone in the office was unacceptable. He drew attention to the fact that the Claimant was seen going in to the training room and the movement sensitive lights were off for 4 hours.

58. The dismissal letter set out that the Claimant had a right to appeal against his dismissal. The Claimant did appeal setting out detailed grounds of appeal over 5 pages. An appeal hearing took place on 13 February 2020 and was conducted by Michael Achilleos.

59. During the appeal meeting all the Claimant's grounds of appeal were discussed. I consider the following matters to be of importance:

59.1. The Claimant is asked about his expenses claim and in particular why he had claimed accommodation for 25, 26 and 27 December 2019. Michael Achilleos was able to identify that the Claimant had claimed for 25 December 2019 because he had slept at his girlfriend's house as he was starting a nightshift that evening and there was no public transport to get him there. He appears to have recognised that the Claimant's position was that the same was true for 26 December 2019. Finally, he is recorded as recognising that the Claimant had claimed for 27 December 2019 as he said that there was no public transport home from work. This was clearly explained in the Claimant's

letter of appeal.

59.2. There was no discussion about whether the alternative of taking a bus was reasonably practicable or indeed whether the Claimant had known of that possibility. Michael Achilleos had the bus maps that had been produced and were included in the disciplinary pack. The Claimant had stated in his appeal letter that the replacement buses did not pass through Tilbury. The veracity of this was not explored during the appeal meeting.

60. By a letter dated 20 February 2020 Michael Achilleos informed the Claimant that none of his grounds were accepted and that the decision was upheld. In particular:

60.1. A complaint that Reece Burton was an inappropriate investigations manager was rejected on the basis that:

60.1.1. Asking a manager from another store to investigate was not possible; and

60.1.2. That the complaint made by the Claimant by text in December was unjustified and that Reece Burton was giving 'honest feedback'; and

60.1.3. Reece Burton was not directly involved in the Claimant's expenses claim.

60.2. In responding to a point that the disciplinary officer had prior involvement (which it is not clear was a point actually made by the Claimant) that is rejected with a conclusion that Gary Pottle was not involved in the incident or in the investigation.

60.3. The failure to take statements using a note taker and interviewer is rejected on the basis that it is not a requirement.

60.4. The Claimant's argument that the replacement bus routes would not have got him home on 27 December 2019 is rejected on the basis that the information provided refers expressly to Dagenham Dock the station where the Claimant would have started his journey home.

Unfair dismissal

61. The right not to be unfairly dismissed is conferred by Section 94 of the Employment Rights Act 1996. Where, as here, there is no dispute that an employee was dismissed the question of whether any such dismissal was unfair turns upon the application of the test in Section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

98 General.

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

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

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

(2) *A reason falls within this subsection if it—*

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

(b) *relates to the conduct of the employee*

(c) *is that the employee was redundant, or*

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

(3) *.....*

(4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

(a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

(b) *shall be determined in accordance with equity and the substantial merits of the case.*

62. For the purposes of Section 98(2) ERA 1996 'conduct' means actions 'of such a nature whether done in the course of employment or outwith it that reflect in some way upon the employer/employee relationship': **Thomson v Alloa Motor Co Ltd [1983] IRLR 403**, EAT. It is not necessary that the conduct is culpable **JP Morgan Securities plc v Ktorza UKEAT/0311/16**.

63. Where the reason, or principal reason, for the dismissal is established as conduct then it will usually, but not invariably, be necessary to have regard for the guidance set out in **British Home Stores Ltd v Burchell [1978] IRLR 379**, which lays down a three-stage test: (i) the employer must establish that he genuinely did believe that the employee was guilty of the misconduct; (ii) that belief must have been formed on reasonable grounds; and (iii) the

employer must have investigated the matter reasonably. Following amendments to the statutory scheme the burden of proof is on the employer on point (i) (which goes to the reason for the dismissal) but it is neutral on the other two points **Boys and Girls Welfare Society v McDonald [1996] IRLR 129**.

64. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions but both of those decisions might be reasonable.

65. The range of reasonable responses test applies as much to any investigation and the procedure followed as it does to the substantive decision to impose dismissal as a penalty **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**.

66. In terms of the reasonableness of the investigation and the procedure that was followed, the "relevant circumstances" referred to in Section 98(4) include the gravity of the charge and their potential effect upon the employee **A v B [2003] IRLR 405**. **A v B** also provides authority for the proposition that a fair investigation requires that the investigator examines not only the evidence that leads to a conclusion that the employee is guilty of misconduct but also that which tends to show that they are not. However, where during any disciplinary process an employee makes admissions a reasonable employer might normally be expected to proceed on the basis of those admissions **CRO Ports London Ltd v Mr P Wiltshire UKEAT/0344/14/DM**.

67. Where an employer dismisses an employee for more than one act of misconduct the Tribunal need to consider whether the employer had composite or separate reasons for the dismissal. In **Barchester Healthcare Limited v Tayeh UKEAT/0281/11/LA** the EAT explained the position (the decision being upheld on appeal) as follows:

34. Where, as here, there was more than one charge, a Tribunal should keep in mind the question whether the charges were regarded by the employer as cumulative or stood on their own.

35. If the charges were cumulative, in the sense that all of them together formed the principal reason for dismissal, it would be fatal to the fairness of the dismissal if any significant charge were found to have been taken into account without reasonable grounds: see Smith v City of Glasgow DC (1987) IRLR 326. In that case an employee was dismissed for unsatisfactory performance of his duties. Three main allegations were relied on cumulatively when reaching the decision to dismiss. One of those was not established. The Tribunal nevertheless held the dismissal to be fair. The employee's appeal was allowed. Giving the leading speech in the House of Lords, Lord Mackay said –

"To accept as a reasonably sufficient reason for dismissal a reason which, at least, in respect of an important part was neither established in fact nor believed to be true on reasonable grounds is, in my opinion, an error of law. The Industrial Tribunal fell into this error in this case."

36. If, however, each charge stood on its own, for example independent instances of gross misconduct such that the employer would have dismissed for any of them without the other, then they would require separate consideration in determining whether it was reasonable to dismiss.

37. Take an example. Suppose that an employer dismissed an employee for two charges of theft, committed on different occasions, and each independently considered by the employer to amount to gross misconduct. The Tribunal would have to consider each separately. It might be reasonable (applying section 98(4)) to dismiss for one of the charges of theft even if it were not reasonable to dismiss for the other (if for example one had been properly investigated but not the other).

68. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

"any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."

The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

69. Unless the employee seeks reinstatement or re-engagement the Tribunal must consider making both a basic and compensatory award. ***Polkey v A E Dayton Services Ltd [1987] IRLR 503*** is authority for the proposition that in assessing what compensation is 'just and equitable' an employment tribunal is entitled to have regard to the possibility that had the employer acted fairly there might or would have been a dismissal in any event. The proper approach to hypothetical as opposed to real events is that set out in ***Software 2000 Ltd v Andrews [2007] IRLR 569*** although that now needs to be understood in the light of the repeal of the statutory dismissal procedures (see the references to Section 98A(2)). Elias J (P) (as he then was) gave the following guidance:

"(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment,

including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) The s.98A(2) and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a tribunal considers some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

(7) Having considered the evidence, the tribunal may determine:

(a) That if fair procedures had been complied with, the employer has satisfied it – the onus being firmly on the employer – that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).

(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.

(d) Employment would have continued indefinitely.”

70. Following the repeal of the statutory dismissal procedure in ***Ministry of Justice v Parry*** [2013] ICR 311 it was said (by Langstaff J (P)):

“We should add that some of the way in which this subject is dealt with in Harvey has the capacity to be misleading. At para 2558 (Vol 1, D1) it cites Software 2000 Ltd v Andrews [2007] IRLR 568, [2007] ICR 825, and accurately quotes a lengthy passage from the judgment of the EAT given by Elias P. Under para 54, at point (7) under in his distillation of the effect of the authorities he says:

“(7) Having considered the evidence, the tribunal may determine: (a) that if fair procedures had been complied with, the employer has satisfied it-the onus being firmly on the employer-that on the balance of probabilities the dismissal would have occurred when it did in any event: the dismissal is then fair by virtue of section 98A(2); (b) that there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly”

Unfortunately, it is not made clear in the text of Harvey that this part of the decision is no longer appropriate guidance, since s 98A(2) was in force at the time it was delivered, and has been repealed since. When it was in force the range of chance of dismissal met a watershed at 50% above which – by however little or however much – a completely fair hypothetical dismissal was to be assumed for the purposes of compensation to be awarded for an actual one already held unfair. It is not in force any more. Chance of dismissal now runs across the whole spectrum from zero to 100%, as assessed by the tribunal. It would therefore be best if this part of the otherwise very helpful guidance were no longer put forward as if it might be relied upon.

Unfair dismissal - discussions and conclusions

71. The first issue I must deal with is whether the Respondent has established that the reason of if more than one reason the principal reason for the dismissal was ‘conduct’. I have no difficulty accepting that not undertaking any productive work during working hours would satisfy the definition of conduct set out in ***Thomson v Alloa Motor Co Ltd***. Equally I would accept that intentionally claiming an expense form an employer that the employee knew they were not entitled to would also satisfy that definition.

72. The Claimant does not admit that those matters were the principle reason for his dismissal. Whilst his case was put somewhat obliquely he did suggest that the true reason for his dismissal arose out of, or was connected to, the fact that he had complained about Reece Burton telling him that he was disliked and was on ‘borrowed time’.

73. There is certainly some evidence in support of the Claimant’s position. I have accepted that he was told in terms that he was on ‘borrowed time’. It was common ground that Gary Pottle took no action whatsoever when he was informed of this. Brushing off a complaint that a manager has spoken in the language quoted by the Claimant is surprising. It seems that both Gary Pottle and Michael Achilleos were satisfied simply to take Reece Burton’s word that what he was giving was ‘honest feedback’ or simply to assume that was the case.

74. I have found that Gary Pottle’s statement that the investigations into

the Claimant's activities at work started 'at the end of November 2019' was incorrect. I have rejected that suggestion and found that the investigation started later and importantly after complaints had been raised about Reece Burton. I have also concluded that Gary Pottle had a more significant role in the initial stages of the investigation than disclosed in his witness statement.

75. As such there is some evidential basis for the suggestion that Reece Burton wanted the Claimant out of the business and that he could rely on the support of Gary Pottle to back him up.

76. Against that I have the fact that the CCTV evidence coupled with two of the three witness statements that were taken from fellow employees did provide support for the allegation that the Claimant spent a large amount of working time not carrying out his duties. Undisputed matters included a large number of cigarette breaks and two periods when the Claimant was asleep. The existence of an ostensible potentially fair reason for a dismissal is in no sense conclusive that that was the reason or principal reason. The fact that an employer might dislike an employee and acts enthusiastically when a potentially fair reason for a dismissal arises does not mean in itself that the reason for the dismissal is not fair reason - see *Aslef v Brady* [2006] IRLR 576 EAT.

77. In assessing the true reason for the dismissal the existence or otherwise of reasonable grounds for believing the employee to be guilty of misconduct is relevant. A strong basis for concluding that there was misconduct provides a more convincing ostensible reason for a dismissal than a poorly supported allegation. Below I go on to find that there was no reasonable grounds for believing that the Claimant had intentionally claimed monies he knew he was not entitled to. However, I need to deal with Gary Pottle's state of mind. This requires some supplementary findings of fact. When he gave evidence, he satisfied me that he was convinced that there were no circumstances where the Claimant could ask for payment of an allowance to facilitate him attending his normal workplace. I do not believe that Gary Pottle had any real understanding of the expenses policy or had given any real thought to any interpretation other than his own. I find that his view that the claim was improper was genuine even if it was unsupported by the evidence.

78. Whilst I find that the Claimant had become unpopular both with Reece Burton and, by tacitly supporting Reece Burton, by Gary Pottle I do not find that any animosity towards the Claimant was the principal reason for the dismissal. I accept that the principal reason for the dismissal was that Gary Pottle believed that the Claimant had intentionally claimed sums he knew he was not entitled to and that he had spent working time not doing productive work. I therefore find that the Respondent has satisfied me that the reason for dismissal was for the potentially fair reason of 'conduct'.

79. The next issue for me to consider is whether there were reasonable grounds for the conclusions that Gary Pottle reached. There were two charges and I need to deal with each in turn.

80. I start with the conclusion that the Claimant had *'intentionally claimed for travel expenses that you are not entitled to'*. I consider that the wording of this is poorly thought out. The Claimant was not claiming travel expenses at all. He was claiming for an allowance for staying with friends because he said it was impractical for him to travel from home.

81. It is important to discern what the Claimant was being accused of. The disciplinary invitation does not make it entirely clear whether the allegation is one of dishonesty. However, I consider that that is the necessary implication. I do so for 2 reasons the first is that the word 'intentionally' suggests that there is some intent to obtain something knowing that there is no entitlement to it. That is dishonesty by another label. The second is that the allegation is 'deemed' to be gross misconduct and a comparison with the non-exhaustive list of matters said to have be gross misconduct in the disciplinary procedure would not suggest that anything short of dishonesty would be deemed to be gross misconduct in those circumstances. In his witness statement Gary Pottle does not distinguish between the two allegations when saying that the Claimant was trying to defraud the company. I asked Gary Pottle if he had found the Claimant to be dishonest and he said that he had.

82. In some cases, a lack of clarity about a disciplinary charge might preclude an employer making a finding of dishonesty. I do not need to decide the case on that basis. I consider that the Claimant was sufficiently aware that the allegation against him was that he had acted dishonestly. That was the conclusion that Gary Pottle reached and which was upheld on appeal.

83. There was no dispute that the Claimant had completed an expense form where he claimed 3 allowances for staying with friends. There was no dispute that he had stayed with friends. He had completed the form giving the postcode of his girlfriend's father's house where he had stayed. His home address was known to the Respondent. The reason that the Claimant gave for claiming the allowance was that staying with his girlfriend was necessary as there was no public transport.

84. The Claimant had completed a form in handwriting and approached the duty manager Reece Burton for authorization. The expenses policy and indeed common sense makes it clear that the process of authorization is to include ascertaining whether the expenses claimed fall within the policy. Whilst the policy makes it clear that the employee should also check that their claim falls within the policy the authorization process gives a second opportunity for that. The fact that the Claimant set out what he was claiming and why and then submitted it for scrutiny does not support any conclusion that he was dishonest but undermines it.

85. The Claimant is directed to Ms Butler who was also required to scrutinize the claim. She approved it then, without reverting to the Claimant with any query, she apparently raised concerns with Reece Burton and then Gary Pottle.

86. During the investigatory meeting the Claimant was asked what days he worked. He took exception to the fact that Reece Burton was looking both

at his claim and the roster and therefore was better placed than the Claimant to answer his own question. There was no need to invite the Claimant to remember what days he worked it was a matter that was capable of agreement. The Claimant was able to make his case clearly enough that Reece Burton understood what he had claimed and why. In the notes of made and later repeated in the adjournment summary Reece Burton records the Claimant as accepting that he had not worked on the evening of 27 December 2019 but saying that he had stayed with friends because he was unable to get home due to public transport. That caused Reece Burton to make his own enquiries and to conclude that the Claimant could in fact have travelled on 27 December 2019. As I find above he did not discuss those enquiries during the meeting but only in his conclusions.

87. During the disciplinary hearing there was some confusion about what the Claimant was claiming for. Garry Pottle does not appear to understand what the Claimant is claiming for. I consider that he, and not the Claimant, is responsible for any confusion as the Claimant's position was very clear. The Claimant was saying that he was entitled to claim for staying with his girlfriend on 25 and 26 December 2019 because he had to stay there on that day in order to get to work on 25 December 2019. He claimed for the 27 December 2019 because having finished his shift on the morning of 27 December 2019 he could not travel to his own home by public transport. Gary Pottle's misunderstanding is repeated in his witness statement.

88. If the Claimant's position had been unclear during the disciplinary hearing, which I do not accept it was, then he made his position perfectly clear during the appeal process.

89. The Claimant had been perfectly open about what he was claiming and why. He was claiming a modest allowance. What then were the grounds for believing that he had been dishonest?

90. Gary Pottle relied on the fact that the Claimant had read and he infers understood the expenses policy. In his witness statement Gary Pottle sets out his reasoning at in numbers sub-paragraphs of paragraph 38.

91. His first conclusion is that there was public transport available on 27 December 2019. He reached that conclusion by reference to documents that he had not discussed with the Claimant.

92. In cross examination Mr Wilson challenged the Claimant's suggestion that there was no public transport by reference to an entirely different route home. From my own local knowledge and from the information provided it was possible to work out that if the Claimant could get to Barking station he would have been able to reach Tilbury on 27 December 2019 by taking a train running on the Okendon Line. I remind myself that at this stage I must not substitute my view for that of the employer. Nor is the employer entitled to advance a position not considered in the disciplinary process. Mr Wilson's suggestion of a route home was not one referred to in the disciplinary hearings and its relevance is limited to the issue of remedy.

93. If I were free to substitute my own findings for those of the employer at this stage I would accept the Claimant's evidence that neither the replacement bus service or the two bus routes mentioned on the C2C website provided a route home. I would also conclude that Michael Achilleos's conclusion to the contrary in the face of the Claimant's appeal letter where he points out that the bus routes do not go to Tilbury was completely without foundation. I am entitled to have regard to that latter point in assessing whether there were reasonable grounds for a finding of intentionally claiming an allowance that the Claimant knew he was not entitled to.

94. I consider that the whilst issue of whether the Claimant could, or could not, have got home by public transport on 27 December 2019 might inform a conclusion that the Claimant was making a dishonest claim. However, before that inference could be drawn it would be necessary to find or draw an inference that the Claimant knew of the alternatives or that he had willfully disregarded them. If he did not, the fact that he thought that there was no public transport could not support a finding of dishonesty. Remarkably this is not something that was explored at any stage with the Claimant.

95. Gary Pottle's next reason for inferring dishonesty is the fact that in his view the Claimant would never be entitled to claim for expenses when travelling to his normal place of work. Whilst in line with the position taken by HMRC the policy makes it clear that travel expenses from home to a normal place of work cannot be recovered it does not say that accommodation expenses for staying near work cannot be claimed. On the contrary the policy sensibly acknowledges two circumstances where accommodation in hotels might be appropriate these are late working and severe weather. The section on the 'staying with friends allowance' gives no such examples but simply requires that the travel is on 'company business'. It is a perfectly reasonable conclusion to assume that an absence of public transport requiring employees to stay near the workplace is in the same category as severe weather or late night working and therefore might be considered 'company business'. That might not be the only interpretation but it is not an unreasonable one and certainly is an interpretation that could be honestly held.

96. Gary Pottle then complains that the Claimant did not seek authorization from himself 'per the Global Travel and Expense Policy'. I am not sure whether Gary Pottle was suggesting that the policy required the Claimant to ask whether he could claim the allowance before he stayed with his girlfriend or whether he thought that the Claimant ought to have presented his expenses form to him to seek his approval. It seems to me quite clear that the policy does not expressly require prior approval for claiming the 'staying with friends allowance'. I accept that that is not the case for hotel stays near work which must be approved by a 'line manager'. Expenses up to £200 can generally be approved by the Duty Leadership team. Gary Pottle accepted that Reece Burton was a member of the Duty Leadership team. Again even if I am wrong about that as a matter of construing the policy it does not affect my conclusions as I consider that an employee could quite

reasonably have reached this interpretation.

97. Gary Pottle then repeats his misunderstanding of the Claimant's reasons for claiming for 27 December 2019 repeating that the Claimant had not worked on that day. In fact, he had and had clearly said so. He had not worked that night and had never claimed to have done so. The Claimant had made it quite clear that he was saying that he could not have got home by public transport on that day.

98. Finally, Gary Pottle said that the Claimant had clearly read and understood the expenses policy. There was no dispute that the Claimant had read it and had a copy when he completed his form. That must have been how he found out about the allowance. It is implicit in what Gary Pottle says that he believes the policy makes it clear that the allowance could not be claimed if an absence of public transport that made travel to work impractical. I do not accept that the policy clearly states that. I find that the Claimant's interpretation of the policy was reasonable whether it is right or wrong.

99. I accept that had the Claimant raised the question of the transport difficulties in advance then some other solution might have been found. I accept that finding a colleague to give him a lift was a possibility. The Claimant did demonstrate that a taxi to work would have cost much more than he claimed. However, that in my view is beside the point. The issue is whether his failure to raise the transport difficulties in advance could support an inference of dishonesty. It assumes that the Claimant had decided to claim the allowance before he stayed with his girlfriend. There is no evidence that he did.

100. I am assessing whether there were 'reasonable grounds' for a conclusion and must not substitute my own view of the evidence before the decision maker. I must take special care when the decision maker has drawn inferences from primary facts. Applying that test I ask whether Gary Pottle's decision was one open to a reasonable employer. I have no hesitation in finding that it was not. The Claimant made a claim for expenses which at least arguably fell within the policy. He explained exactly what he was claiming and why. He submitted his form for scrutiny to Reece Burton who I find was, (and the Claimant could have reasonably believed he was) entitled to authorize the payment. If there had been any issue about whether the Claimant was on company business or whether the expense was excessive or unnecessary then the Claimant gave the Respondent an ample opportunity to scrutinize his claim and if it chose to refuse it. Nothing was hidden, nothing was disguised. I find that there was no reasonable basis for the conclusion that the claim was dishonest or in the words of the charge, that the Claimant had intentionally sought an expense he was not entitled to. The flaws in Gary Pottle's reasoning are not corrected on appeal.

101. I turn then to the second allegation made against the Claimant and ask whether there were reasonable grounds for concluding that the Claimant spent 34.5 hours during working time doing work that was not productive.

102. The figure of 34.5 hours is the amount of time that the Claimant was

not observed on the shop floor. If the charge was taken literally the Respondent would have to make out reasonable grounds for believing that the Claimant did no productive work at all away from the shop floor. It was common ground that the Claimant was entitled to 1.5 hours rest each shift. No complaint ought to have been made about that nor as I understand was it intended to do so. In that sense the wording of the charge is unfortunate.

103. There has been some carelessness in adding up the total hours that the Claimant worked on the 6 days that he was observed on. Whoever compiled the summary sheets has concluded that the total hours worked was 72.5 whereas the correct total from the rounded figures on the sheets is 75. The summary sheets then take out the time when the Claimant is observed on the shop floor which is 37.21 hours which has apparently been rounded up to require the Claimant to explain what he was doing for the remaining time. This was said during the disciplinary process to be 34.5 hours but in fact probably nearer 37.5. Of that it was accepted that the Claimant was entitled to 9 hours break.

104. On a literal reading of the charge there was no reasonable basis for concluding that the Claimant had done no productive work during any period he was not on the shop floor. The summary sheets have numerous entries which, as might be expected, show the Claimant dealing with staff. Taking 18 December 2019 as an example: 21:33 to 21:50 the note says that the Claimant is in the admin room, on the computer talking to George. From 22:04 to 22:21 the Claimant is in the Admin room in a 'part huddle' which I take to be a team meeting. At 08:00 the following morning the Claimant is recorded on a number of occasions as being with Reece Burton apparently handing over the shift. There are numerous other examples where the Claimant is recorded as engaging with other staff members, Reece Burton and Gary Pottle. There are numerous entries where the Claimant is observed doing paperwork.

105. I do not take Gary Pottle to take such a literal view of the charge. He has focused on a number of matters which he considered of particular concern. There are set out in his witness statement and reflected in the letter recording the Claimant's dismissal. They include observing the Claimant with his feet up watching something on his phone, walking around the office looking in draws or cupboards. The fact that the Claimant admitted sleeping for 2 periods of 22 minutes. 4 hours and 35 minutes spent in the training room when the lights went out automatically. More generally he criticises the Claimant for not spending more time on the shop floor.

106. The Claimant did not want to view the CCTV. He appears to have accepted that Gary Pottle could proceed on the basis of written summaries. He did not dispute that he took a large number of smoke breaks, that he might have used his mobile phone to watch a program and that he fell asleep on 2 occasions. In the dismissal letter Gary Pottle records the Claimant as saying that he spent the whole time 'planning'. That is not exactly what the Claimant said during both the disciplinary and investigation meetings. He said that he did planning and other administrative duties. When he gave evidence, he referred to taking telephone calls from Gary Pottle by way of an example.

The Claimant did not during the disciplinary process provide any explanation of why the lights were out in the training room. During his evidence he suggested he may have left the training room via a different exit.

107. Whilst I could not accept that the Respondent had a reasonable basis for concluding that the Claimant did no productive work for the whole time he was not on the shop floor I do accept that there were reasonable grounds for the conclusions reached by Gary Pottle in respect of the specific examples he identified. In addition to the CCTV summaries and the parts of the CCTV he watched he also had two statements from the Claimant's colleagues. Aeron Lincoln's statement supported the conclusion that the Claimant, fed up with the shifts he had been allocated, was threatening to do little or no work. The anonymous statement documented a single instance where the Claimant was asleep for which the Claimant was able to provide a possible explanation. I also accept that he had a reasonable basis for believing that the majority of the planning work would already have been done.

108. I conclude that there was a reasonable basis for concluding for at least some proportion of the time the Claimant was not on the shop floor he was not carrying out his full duties and at times he was asleep. I accept Gary Pottle could reasonably have concluded that this exceeded the breaks that were permitted.

Was there a reasonable investigation?

109. The first point taken by the Claimant was that it was inappropriate for Reece Burton to have been involved in the investigation. He had two complaints. The first was that it was inappropriate to ask Reece Burton to investigate him just after he had complained about Reece Burton. The second was that Reece Burton ought not have been looking in to the expenses issue as he was the person from whom the Claimant had first sought authorization. I shall deal with each in turn.

110. It was not disputed that the Claimant had complained about Reece Burton. I have found that Gary Pottle did nothing in response to those complaints other than saying that he would speak to Reece Burton. However, the fact that an employee has a difficult relationship with their manager does not necessarily preclude that manager from any further managerial dealings with the employee. The dispute giving rise to the complaint had no direct bearing on whether the Claimant had acted as he was alleged to have done. On the other hand, the Claimant had told Garry Pottle that Reece Burton had told him he was on 'borrowed time'. It was a finely balanced decision whether or not fairness required some other person to carry out the investigation. Had this been the only way the argument was put I may have considered the decision robust but within the range of reasonable actions.

111. The Claimant's next argument was that the disciplinary policy provided that the investigation manager should have had any involvement in the matter under investigation. The Claimant says that Reece Burton was involved as he was the first person to be presented with the expenses form. Mr Wilson argued that this was not sort of involvement that would preclude Reese

Burton from investigating the expenses claim. I disagree. At the heart of the allegation was the issue of whether the Claimant intended to claim for something he knew he was not entitled to. Gary Pottle treated that as an allegation of dishonesty and for the reasons I have set out above I consider that that is exactly what it was. If honesty was an issue then the fact that the Claimant first presented his claim to Reece Burton and the manner in which he did so was an important factor in deciding whether he was acting dishonestly. A lengthy passage in the investigation meeting notes surround the Claimant protesting that he had sought authorization from Reece Burton and Reece Burton saying that he had only looked at the claim but not read it. I consider that Reese Burton did have involvement. I test that by asking whether if he had not been the investigating manager he might have been asked for a witness statement. The answer is yes.

112. The final point which the Claimant took was that the November 2019 version of the disciplinary procedure provided that where a manager was investigated then the investigating manager should (if possible) be from a different store/depot/region/department. This was a point that he took in his appeal letter. The response of Michael Achilleos in the outcome letter was to say that it was not possible to find another manager at this time of year. His witness statement says nothing about why it was not possible to get a manager from another store. It was said in oral evidence that this would have caused delay as it was a busy time of year. I note that there was not seen to be any need to suspend the Claimant which would mitigate against the need to act at speed. Garry Pottle suggested that the January period was busy and that finding another manager would have caused delay. He did not go as far as to say that he had asked whether any other manager had the capacity to investigate. I am not satisfied that any efforts were made at the time and therefore do not accept that the Respondent has established that it was not possible to find an alternative manager.

113. Taking these three matters together I consider that there were two failures by the Respondent to follow their own procedure those coupled with the fact that only days before the investigation started the Claimant had said that Reece Burton had told him he was on borrowed time mean that the decision to appoint Reece Burton as an investigator was a serious procedural failure.

114. The next matter I deal with is the question of whether the approach to dealing with the Claimant being able to use public transport on 27 December 2019 was conducted fairly. If a decision is to be made against an individual, fairness demands that the basis of any decision is raised with them. I was concerned that Reece Burton, Gary Pottle and Michael Achilleos all came to the conclusion that the Claimant could have travelled home by bus on 27 December 2019 but did not raise this in any detail during their meetings with the Claimant. This is despite the Claimant putting this clearly in his grounds of appeal. I consider that the failure to investigate the Claimant's position by discussing exactly where the replacement bus routes were said to have gone is a significant failure to investigate. Just as importantly there is no attempt throughout the disciplinary process to explore whether the Claimant knew or

ought to have known at the time he made his expenses claim that he could have travelled by alternative means. This was an important and essential step and required careful investigation.

115. The Claimant took the point that the CCTV used against him was the sort of monitoring of performance that is expressly discouraged by the CCTV policy. I consider that to be a matter of interpretation. This was not 'routine monitoring' but monitoring after Aeron Lincoln complained about the amount of work that the Claimant was doing. I do not think that the Respondent's approach to the CCTV contributed to any unfairness.

116. I have made findings above in respect of the involvement of Gary Pottle in the investigation prior to his role as the disciplinary manager. This is a point which Michael Achileos dealt with on the appeal and concluded, without giving any reasons, that Garry Pottle had no prior involvement. However, this was not a point taken by the Claimant either in his ET1 or submissions. I do not need to deal with this point in the light of my other conclusions and shall not take this into account.

117. During both the investigation and during the disciplinary hearing the Claimant was offered the opportunity to view the CCTV. In each case he declined to do so. It would have been obviously impractical to have watched all 75 hours of CCTV. However, the Claimant is asked questions that are more specific. He could had he wanted have asked to see those parts in order to dispute the conclusions that were drawn. I am critical of the Respondent in requiring the Claimant to justify all the hours not spent on the shop floor in the general way that the allegation was put. I have considered whether it was unfair not to play the significant parts of the CCCTV to the Claimant and ask for his comments. On balance given the fact the Claimant is a Manager, that he had the summaries, and that he was asked if he wanted to view the CCTV I do not think the Respondent's approach was one which was unfair.

118. A further anonymous statement is read out by Gary Pottle during the disciplinary hearing. I do not find that the abstract prospects of retaliation referred to as a reason for granting anonymity amount to the sort of 'exceptional circumstances' set out in the investigations policy. It is quite clear that the statement has been precured in response to a request. Whilst the Claimant did not dispute the contents I had no explanation of why that statement was taken, by whom and in what circumstances. There was no explanation of why that statement could not have been provided in good time before the disciplinary hearing.

119. I am unimpressed with the depth of analysis on the appeal. There are instances where Michael Achileos has simply misunderstood what the Claimant was saying. For example, when the Claimant complains that he was not provided with a witness statement from Laura Butler he makes it clear by using a quotation from the investigation meeting notes that Reece Burton had said that he would have a statement taken from Laura Butler to deal with the Claimant's concerns about the manner in which the statement had been prepared. Michael Achileos missed the point completely and has assumed in

his outcome letter that the statement referred to in the disciplinary letter (about which the Claimant had complained) was in fact sent to him. Again, this was not a point taken by the Claimant and is unnecessary for my decision.

120. Overall, discounting failures that the Claimant did not rely upon, I am not satisfied that the investigation process as a whole was one open to a reasonable employer. I have reminded myself that the proper approach is not for me to determine for myself whether I would have taken some additional procedural steps. I must ask whether the investigation process right through to the appeal was one which was open to a reasonable employer – see **Sainsbury's Supermarkets Ltd v Hitt**. I consider that there were several significant procedural failures (expressly discounting points not advanced by the Claimant). Even had I concluded that there were reasonable grounds for both of the conclusions reached I would still have found that the investigation into the expenses allegation was outside the range of reasonable responses to what was a serious allegation of dishonesty. The findings that relate to the investigation of the Claimant's activities are in my view less serious. I would not have found that that aspect of the investigation fell outside the band of reasonable responses.

Dismissal for two reasons or a composite reason?

121. It follows from my conclusions above that whilst I have found that there was no reasonable basis for the conclusion that the Claimant intentionally claimed expenses that he was not entitled to and that the investigation into that matter fell outside the range of reasonable responses I have not made those findings in respect of the allegation in relation to the time spent on productive work. I have not accepted that there was any reasonable grounds for finding that the Claimant was engaged in unproductive activities for the entirety of 34.5 hours but that there were reasonable grounds for concluding that the Claimant was engaged in unproductive activities for some significant periods.

122. If a separate conclusion had been reached in respect of each allegation then, applying the law set out above, a dismissal might be fair even if one of the two conclusions was flawed. I find as a fact that there was no attempt in Garry Pottle or Michael Achileos's minds to separate the two allegations when considering whether or not dismissal was the appropriate sanction. Neither the dismissal letter nor the record of the appeal outcome seek to suggest that the reason for the dismissal was not a combination of the two allegations found proven in the minds of the decision makers.

123. I have found one aspect of that composite reason for dismissal to be seriously flawed. Applying **Barchester Healthcare Limited v Tayeh** it follows that in taking account of that aspect in reaching the decision to dismiss Gary Pottle reached a conclusion on a basis that falls outside the range of reasonable responses both substantially and procedurally.

124. It therefore follows that the Claimant was unfairly dismissed.

Would or could the Respondent have fairly dismissed the Claimant?

125. As I set out above if the Respondent seeks to persuade the Tribunal to reduce the compensatory award on the basis that, had it acted fairly, it would or could have lawfully dismissed the Claimant. In considering this point it is for me to make primary findings of fact.

126. Mr Wilson asked me to find that the Claimant had intentionally claimed expenses when he knew that he was not entitled to them. As I set out above he was, through cross examination, able to establish that the Claimant could have managed to travel home on 27 December 2019 rather than to stay at his girlfriend's father's house.

127. I find that for the Respondent to show that dismissal was an appropriate sanction for the actions of putting in an expenses claim there would have to be an element of dishonesty. I have set out above my findings that the Claimant could reasonably have understood the policy as permitting him to claim for accommodation costs if he was unable to get to work by public transport and needed to stay close to the workplace. He could have reasonably believed that Reece Burton was the appropriate person to authorize such a claim. I find that dishonesty could only be inferred in these circumstances if there was evidence that the Claimant knew that there was public transport on 27 December 2019 or that there was evidence that he did not care one way or the other but put in the claim recklessly. I cannot make any such finding. Having heard from the Claimant I accept that rightly or wrongly he is convinced that the train line to Tilbury was not running on 27 December 2019 and that that provided the only practical means of getting home. I find that that belief was honestly held.

128. I do not find that the Claimant's expenses claim was dishonest or, if it is any different, that he intentionally claimed an expense that he knew he was not entitled to. I do not find that the expenses claim provided any grounds for dismissing the Claimant that would be lawful.

129. I have accepted that there were reasonable grounds for concluding that the Claimant had not been engaged in productive work for periods when he was being paid to work. Approaching the matter for myself I would accept that for some significant periods the Claimant did not do productive work. I agree with Gary Pottle that it is more likely than not that when the lights went off in the training room the Claimant was asleep. I agree that the Claimant took excessive number of cigarette breaks. I would further accept that the Claimant spent more time than was strictly necessary in the office in contrast to working on the shop floor. It was not disputed that the Claimant was watching something on his phone in working hours.

130. I have had regard to the Facebook and text messages from the Claimant's girlfriend who is clearly disappointed and angry at what she sees as the Respondent's unfair rostering of the Claimant over the Christmas period. I find that the Claimant shared that view. I consider it more likely than not that the Claimant said something like the comment reported by Aeron Lincoln to the effect that he was upset about the rostering and intended to

spend time in the office. In that sense I find that some of the Claimant's actions were deliberate.

131. I would accept a point made by Mr Wilson that the Claimant was the most senior manager on duty. He could be expected to set an example. In those circumstances any deliberate protest manifested by a quasi one man strike was a serious act of misconduct.

132. I must ask whether the Respondent could have fairly dismissed the Claimant. I have regard to the fact that Gary Pottle took the matter very seriously. Had he approached the matter disregarding the expenses allegations I find that there is a real possibility that he would have considered that allegation alone sufficiently serious to dismiss the Claimant.

133. One point raised by the Claimant during the appeal and indeed in his witness statement before me was that he said that because of the hours he had been rostered for and because he had often been required to work beyond those hours whether he had engaged in non-productive activities for a period he had overall fulfilled his obligation to work for 45 hours a week.

134. The Claimant was asked to work for an extraordinary number of hours apparently far in excess of the maximum set down in the Working Time Regulations 1998 (had that pattern been replicates over a longer period). I have accepted his evidence that he was often required to work beyond the end of his shift. Had it been necessary to decide it, I would not have read the Claimant's contract of employment as permitting the Respondent to require the Claimant to work in excess of 48 hours per week. I do not accept that, having turned up to work any shift, whether or not in breach of contract, it was open to the Claimant not to undertake any productive work without that being categorised as misconduct. The proper approach would have been to have raised a grievance referring to the terms of the contract and/or the Working Time Regulations. That said I do consider that a reasonable employer would have had regard for the fact that the Claimant did work for a large number of hours that severely disrupted his social and family life when taking any decision about whether dismissal for a first offence fell within the range of reasonable responses.

135. I find that it is possible that the Respondent acting lawfully could have concluded that the willful nature of the inactivity made the conduct sufficiently serious that even on a first offence the decision to dismiss fell within a range of reasonable responses. I do not find that that was inevitable. Had Garry Pottle disregarded expenses issue and taken all matters into account I assess that there is at least a 50% chance that the Claimant could have been fairly dismissed.

136. I therefore conclude that it would be just and equitable to reduce any compensatory award to the Claimant made under Section 123 of the Employment Rights Act 1996 by 50%.

Should I reduce the basic award and or compensatory award to reflect my findings about the Claimant's conduct?

137. I have found that the Claimant did spend some time when he ought to have been working undertaking non-productive activity. I have found that to a degree he did so deliberately in protest about being expected to work excessively. I have found that that was not the right way to go about things when the Claimant was expected to lead by example.

138. I accept that the conduct I have found proven was culpable or blameworthy and as such both sections 122(2) and/or 123(6) of the Employment Rights Act 1996 are engaged. I must ask whether it is just and equitable to reduce the basic award and/or further reduce the compensatory award to reflect my findings.

139. I consider that the Claimant has behaved foolishly but I have some real sympathy for him. He was told by Reece Butler that he was on 'borrowed time' and Gary Pottle took no action when a complaint was raised. He was asked to work for a very large number of hours. He had no real time off over Christmas. There is little wonder that the Claimant was fed up and behaved badly.

140. In principle it is open to me to make a reduction to reflect the possibility of a fair dismissal and further reduce the basic and compensatory awards under Sections 122(2) and 123(6) of the Employment Rights Act 1996 see **Rao v Civil Aviation Authority [1994] ICR 495**. However, **Lenlyn UK Limited v Kular, UKEAT/0108/16/DM** provides authority for the proposition that I should be aware of the possibility that any 'double reduction' may have the consequence of punishing the Claimant twice for the same conduct.

141. I consider that in the present case any further reduction to the compensatory award by reason of the contributory fault I have found would mean that there Claimant was being punished twice for the same conduct and if I were to apply any reduction the overall compensation would not be sufficient to compensate him for the unfair dismissal.

142. The same does not apply to the basic award which is unaffected by my finding that there might have been a fair dismissal. This is a sufficiently good reason on the facts of the present case to make a reduction in the basic award to reflect the Claimant's conduct. I consider it just and equitable to reduce the basic award by 25%.

143. All other matters in respect of remedy will be determined at a remedy hearing unless the parties are able to reach an agreement as to what the Claimant should be paid. For the avoidance of doubt, I have not dealt with the issue of mitigation of loss.

Accrued but untaken Holiday Pay

144. The Respondent's case is that the Claimant had exhausted his entitlement to annual leave. It says that nothing is due to the Claimant. It is the Claimant's case that he had not taken all of his leave.

145. To an extent both parties confused the right to accrued holiday pay

that is given by Regulation 14 of the Working Time Regulations 1998 with the contractual position. However, the Asda employee handbook which was provided in the agreed bundle is incorporated into the contract of employment and includes a provision whereby when an employee leaves they will be entitled to any accrued but untaken holidays. As such the contractual and statutory rights overlap.

146. It was common ground that the Respondent's holiday year started on 1 April. The Claimant's dismissal took effect on 9 January 2020. The handbook sets out the holiday entitlement. Three types of entitlement are identified. These are standard days, a floating day and bank holidays. From the table in that handbook it is possible to see that the Claimant was entitled to 26 standard days. He is entitled to one floating day (which must and be booked and taken within a certain period) and 8 bank holidays.

147. The Respondent says, and the Claimant agrees that he was contractually entitled to 34 days holiday in the year commencing 1 April 2019. The Respondent calculates that pro-rated that means that on 9 January 2019 the Claimant had been entitled to 26.45 days holiday. Doing the calculation for myself I find that is almost exactly correct and the figure given is fractionally favourable to the Claimant. I shall use the Respondent's figures which are inclusive of any bank holiday entitlement.

148. What is surprising is that is the point where any agreement diverges. The Respondent asserts that the Claimant used all of his holiday but is unable to tell me when that was taken. The Claimant says that he only took 14 days holiday. I was disappointed to learn that that there are no paper records of when holiday is booked or taken by the Respondent's managers.

149. The Respondent relies on an exchange of e-mails between Lou Holloway and 'People Services' in which there is an assertion that the Claimant took all 26 days holiday and 2 'lieu days'. There is no separate treatment or reference to bank holidays. There is no other evidence to contradict the Claimant's case and very realistically Mr Wilson recognized he had evidential difficulties.

150. The Claimant accepted that he had had holidays. He had produced some text messages that showed him talking about holidays. He accepted that he had had a 2-week holiday between 8 and 21 August 2019 and a further week's holiday in November 2019. Mr Wilson suggested that the Claimant had had 2 weeks off in May 2019. The Claimant told me, and I accept, that he was off work during that time but not on holiday. He had had a car crash and was on sick leave. The Claimant further accepted that he had one bank holiday where he had not been rostered to work.

151. The Claimant said that if he worked a bank holiday he was given an 'in lieu' day. That approximates to the position in the ASDA handbook in which it is clear that if an employee is contracted to work on a bank holiday they may take the equivalent period of leave on some other day.

152. From the ASDA handbook taking 1 week off would mean that the

Claimant had used 5 days of his holiday entitlement. Accordingly, the 3 weeks that the Claimant says he had off used up 15 days of his entitlement. He had not worked for 1 bank holiday (New Year's Day) which meant that he had used up 1 further day making 16 days in total.

153. I accept the Claimant's evidence that he took no further holiday or had bank holidays off in 2019. He is therefore entitled to 26.45 – 16 days that is 10.45 days accrued but untaken holiday. I was not provided with the figures for 1 day's pay and this is a matter that can be finally determined, if not agreed, at the remedy hearing.

Payment for 2 – 9 January 2020 – sick pay

154. For the purposes of this claim I make the following findings of fact. The Claimant was at work on 2 January 2020. That was the day he attended the investigation meeting with Reece Burton. He left work and went home after the meeting concluded at 23:58. That was 3 hours into his shift.

155. On 3 January 2020 at 13:57 Reece Burton attempted to call the Claimant on the telephone but did not get through. The bundle includes a 'colleague call back form' that is signed and dated by Reece Burton on 4 January 2020. That indicates that he has spoken to the Claimant and that the Claimant has informed him that he is suffering from 'stress' and that he had not yet attended his doctor's and intends to provide self-certification for his absence. It is not clear when they spoke.

156. The Claimant attended work on 9 January 2020 for the purposes of the disciplinary hearing. He was dismissed at the conclusion of that hearing.

157. The sick pay provisions in the company handbook are expressly incorporated into the contract of employment. Under the absence management procedures an employee working a night shift is required to notify their manager or another member of the leadership team at the earliest opportunity and in any event by 5pm before any night shift is due to start.

158. Under the terms of the contract the Claimant was entitled to the benefit of a company sick pay scheme. The period for which sick pay is paid depends upon length of service and the 'zone' which is the grade or level in the organization. I was not told the Claimant's 'zone' but it is of no consequence as the shortest period for sick pay is 8 weeks and it is not suggested by the Respondent that the Claimant had exhausted his sick pay. The rate of pay makes up the difference between statutory sick pay and the full contractual rate of pay.

159. The ASDA handbook sets out circumstances where sick pay might not be paid. Under a heading 'Which days are considered for payment' it is stated that 'any period of absence not covered by a fit note when one is needed cannot be processed for sick claims, therefore you will not receive any sick pay if you do not require the relevant fit notes'. The handbook states that a medical certificate is necessary for absences of more than 7 calendar days.

160. In addition, under a heading 'When may sick pay be withheld' a number of other circumstances are set out. There are 2 of relevance. Sick pay may be withheld where an investigation or disciplinary proceedings are pending. Sick pay may be withheld where there is an unreasonable refusal to comply with the absence management notification procedure.

161. As the Claimant was not off work for more than 7 days he was not required to provide medical evidence for his absence. Whilst the ASDA Handbook preserves a right to ask the Claimant to provide a certificate within that period (at Asda's expense) there was no such request in the present case.

162. I accept that the Respondent had a discretion to withhold sick pay from the Claimant because he was absent pending a disciplinary hearing. However, this is not a point that was taken in the ET3. Nor was there any evidence of anybody considering whether this exception should apply. The ET3 simply states that the Claimant was paid up to the termination date.

163. The Claimant's final payslips are in the bundle. The payslip dated 4 January 2020 relates to the pay for December and is immaterial to this dispute. The payslip dated 1 February 2020 relates to January and does not include any normal salary or sick pay. It does appear to include payment for a bank holiday which I assume was 1 January 2020. I do not accept that the Claimant was paid for the period 2 January to 9 January 2020 and therefore reject the pleaded defense.

164. It seems to me that independently of any sick pay issue the Claimant is entitled to be paid for 2 and 9 January both being days that he attended at work.

165. Mr Wilson did draw my attention to the provision permitting the Respondent to withhold sick pay where there is absence pending a disciplinary hearing. Whilst there is no express reliance on that provision in the ET3 the Claimant had an opportunity to deal with the point and I do not consider that he would suffer any prejudice if I permitted the Respondent to rely on the exception.

166. This exception is not absolute. It uses the expression 'may'. It therefore gives rise to a discretion that may be exercised. There was no evidence before me that anybody in the Respondent's organization had given the matter any thought at all. I find that nobody did consider this. If they had then I would have expected the Claimant to have been paid statutory sick pay (there being no discretion to withhold this). If the claim was brought as a claim for damages then it might have been open to the Respondent to say that there was no loss to the Claimant as it could have exercised its discretion to withhold the sick pay. However, this is a claim for unlawful deduction from wages (a species of claim for debt). The Claimant was entitled under the terms of his contract to be paid sick pay unless the Respondent exercised a discretion to withhold it. The Respondent did not exercise that discretion it simply failed to pay what was due. I consider that the Claimant has established that he is entitled to be paid up to and including 9 January 2020.

167. I conclude that the Claimant has established that the Respondent has unlawfully deducted his wages or his contractual sick pay entitlement for the period 2 to 9 January 2020.

168. I was not addressed on the amount that the Claimant is due and, unless it is agreed that matter can be addressed at the remedy hearing.

169. I will list a remedy hearing for ½ a day but would suggest that the parties attempt to resolve or narrow their differences in order to avoid or reduce the costs associated with that hearing.

**Employment Judge Crosfill
Dated: 11 January 2021**