



EMPLOYMENT TRIBUNALS

Claimant: Mr A. Anderson

Respondent: Allvotec Ltd

RESERVED JUDGMENT

Heard at: Teesside **On:** 16th and 17th December 2019

Before: Employment Judge Sweeney (sitting alone)

Representation:

For the claimant: In person,
For the respondent: Mr R Ryan, counsel

The Judgment of the Tribunal is as follows:

1. **The Claimant's claim of unfair dismissal is well founded and succeeds.**
2. **The compensatory award is reduced by 75% to reflect the fact that the Claimant would have been fairly dismissed.**
3. **The Claimant contributed towards his own dismissal and the basic award is reduced by and the compensatory award further reduced by 60%.**
4. **The name of the Respondent is amended to Allvotec Ltd**
5. **The parties must inform the Tribunal whether a remedy hearing is required within 21 days of receipt of the reserved judgment.**

REASONS

The Claimant's claims

1. By a Claim Form presented on 30 April 2019, the Claimant brought a claim of unfair dismissal arising out of his summary dismissal on 14 January 2019.

The Hearing

2. The claimant represented himself, the Respondent was represented by counsel, Mr Richard Ryan. The parties had prepared an agreed bundle running to 114 pages. At the beginning of the hearing, Mr Ryan explained that the correct employer is Allvotec Ltd, which is part of the Daisy Group. The Claimant was unsure and was not in a position to counter this. Given the importance of identifying the correct employer, and having the assurances of counsel the identity of the Respondent is amended to Allvotec Ltd. A list of issues had been agreed in advance and were found at page **31F** of the bundle.
3. Those issues are:
 - (1) Has the Respondent ('R') shown that the Claimant ('C') was dismissed for a potentially fair reason (conduct)?
 - (2) Did R act reasonably in all the circumstances of the case in treating that conduct as a sufficient reason to dismiss C, having regard to equity and the substantial merits of the case?
 - a. Was the investigation fair and reasonable?
 - b. Was C permitted to put his case?
 - c. Did R act in a consistent manner given previous cases referred to by C?
 - d. Was C's dismissal within the band of reasonable responses?
 - e. Did R adopt a fair process? To the extent any procedural error took place, was that corrected at the appeal stage?
 - (3) What remedy is C entitled to given the findings of fact and the law?
 - (4) In particular, if it is found that C's dismissal was procedurally unfair, should any Polkey reductions be made on any compensatory award due under any unfair dismissal finding, and if so, by what percentage? (or what date would C have been dismissed in any event?)
 - (5) Did C contribute to his dismissal? If so, by what percentage should the compensatory/basic award be reduced?
 - (6) If it is found that C's dismissal was unfair, to what extent has C mitigated his losses?
4. The Respondent called three witnesses:

- (1) Mr Adam Dawson, Team Leader (investigating manager),
- (2) Mr Ray Harber, Service Delivery Manager (dismissing manager),
- (3) Mr Tony Smith, Senior Service Delivery Manager, (appeals manager).

5. The Claimant gave evidence on his own behalf.

Correspondence after final submissions

6. Following the conclusion of the hearing, on 19 December 2019 the Claimant emailed the Tribunal and the Respondent to draw to my attention a particular reference in the bundle of documents. The Respondent replied to this email which in turn was responded to by the Claimant on 24 December. I have read and considered that correspondence, treating them as further points made by way of submissions.

Findings of facts

7. Having considered all the evidence before me (written and oral) and the submissions made by the representatives on behalf of the parties, I find the following facts.
8. The Claimant worked as an I.T. engineer on what is known as '2nd support'. He had previously been employed by ATOS carrying out the same work as he did for the Respondent, in the same location. However, ATOS outsourced their level 2 support work to the Respondent company in about October 2016. The Claimant's employment transferred to the Respondent under TUPE. After the transfer he continued to work alongside ATOS staff (who were employed on '1st support' work). ATOS was a customer or client of the Respondent, in the sense that it was a sub-contractor to ATOS.

New Year's Eve 2018

9. In November 2018, during a 'huddle' (team talk) Mr Dawson had told staff that the company was contracted to have staff until 7pm but that there might be a chance of an early finish on Christmas Eve and New Year's Eve.
10. The Claimant had asked to take New Year's Eve off as holiday but this had been declined. Accordingly, he was scheduled to work on that day until 7pm – referred to as a late shift. He was one of two of the Respondent's employees scheduled to work until 7pm that day, the other being a Mr Sherriff. On New Year's Eve, the Claimant went to work with the firm expectation that he would be allowed to leave his work early.
11. The Claimant and others were aware that the company was contractually obliged to cover 7am to 7pm. The practice was, and had always been, that the manager in charge on the day during the festive season would consider whether an

employee could be allowed to finish the shift early. This was a discretion which was taken on a day-to-day basis and the Claimant understood this to be the practice.

12. The Claimant accepted during the course of the hearing that it was customary that management would wait to see if call volume was such that people could be released early and that this decision would be made later in the day. However, he says that on this particular occasion (contrary to practice) he had been given an assurance or guarantee of an early release by Mr Dawson. I reject this. I find that he was given no such assurance. I conclude that because Mr Dawson had said in November that staff might be released early and because staff in fact had been released early on Christmas Eve, the Claimant assumed the same would follow on New Year's Eve. In his statement prepared for the disciplinary hearing the Claimant referred to having been told by Mr Dawson that an early finish was 'on the cards' (page 79). The statement reads:

"I had already been told that an early finish was on the cards by Adam when I had discussed my holiday requests and due to the fact that the team finished early on Christmas eve had not given this much thought. As such I had made arrangements with my partner to travel to Pooley Bridge that evening and that there was a table booked for 8.30pm."

13. Mr Dawson had not in fact told the Claimant he could be released early on New Year's Eve when discussing the Claimant's previous holiday request – he had only referred to the possibility of an early finish during the team huddle. In any event, that an early finish might be 'on the cards' is a far cry from being given a guarantee or assurance that he could leave work early on New Year's Eve. The reference to being 'on the cards' is consistent with Mr Dawson's evidence that some reference had been made to finishing early in paragraph 12(i) of his witness statement where he said:

"I was specifically asked in a team huddle if we would be covering 7 – 7 for each working day and I did reply saying that we still were contractually required to provide a 7 – 7 service, however, if call volumes allowed we would see if we could allow some people an early release."

14. Therefore, the claimant, expected (but did not have authorisation) to leave work early. Consequently, he booked a table in a hotel restaurant in Pooley Bridge for 8.30pm, an hour and a half's drive from his home. The Claimant was, in effect, taking a gamble – he was banking on an early finish based on his experience of what had happened at Xmas Eve and on the previous comment made to the 'huddle' that an early finish might be possible – or 'on the cards'. He expected to leave by 6pm, albeit this time was never mentioned to him.

15. The Claimant had been unwell over the Christmas period. Both he and his partner had come down with some bug, which the Claimant told me was 'rotavirus'. I have no reason to doubt this and, although there was no medical evidence, this

was not challenged by the Respondent either at the time or during these proceedings. However, the Claimant went to work on New Year's Eve. He rode on his motorcycle to the office expecting to work a full day less one hour, then return home on his motorcycle and then travel to the lake district where he was to have a New Year's Eve meal at a hotel. He could have called in sick if his illness was such that he was unable to work and he could not have been criticised for doing so. I have no doubt the Claimant was feeling a little sorry for himself and still feeling under the weather, and he may well have mentioned to the security officer, Roger, on arriving at work that he had been in bed most of the holiday. Nevertheless, I can only conclude from his actions that he was fit enough to go to work. He made the decision to do so. During the course of the disciplinary hearing he said that he only came to work to avoid management thinking he was 'taking the piss'. That may be so, but if that was his thinking at the time it was because he, himself, believed that it might not look good if - having previously been declined a request to take New Year's Eve as holiday - he then called in sick only on the same day to travel to the lake district for a New Year's Eve meal with his partner. Therefore, his perception that management might have considered him to be 'taking the piss' was the result of his own actions in booking the hotel and how he believed that might look – it was not the result of anything management had said or done.

16. On arriving at work on the morning of New Year's Eve the Claimant spoke with Luke Turnbull, a newly promoted deputy team leader. Mr Turnbull referred the claimant to an email (which was not in the bundle) to the effect that the Claimant was expected to work until the end of the shift. The Claimant was unhappy with that. He already felt that it was unfair to have to work New Year's Eve when he had worked late the week before and he had calculated on being away by 6pm if he were to get to the lake district via home by 8.30pm. He replied that he had been told by Mr Dawson that he could have an early finish. As Mr Dawson was not at work that day Mr Turnbull said he would call him. However, before he did so, the Claimant, by now agitated, stood over Mr Turnbull's desk and said in a loud voice that he wanted to go early as he had plans for the evening, that he had booked a table in Pooley Bridge.
17. The Claimant said to Mr Turnbull that he was not well; that if he was not allowed to finish early he would go home sick as he probably should not have come to work in the first place. The Claimant accepted in evidence that he raised his voice and was speaking loudly. He created a bit of a scene and others overheard him raising his voice at Mr Turnbull and becoming agitated.
18. When Mr Turnbull telephoned Mr Dawson to ask what had been said, Mr Dawson said that he had not given any assurance of an early finish. After Mr Turnbull reported this back to the Claimant, the Claimant said that he was going home and Mr Turnbull said that the absence would have to be marked as sickness. The Claimant left the building. He did go home and he and his partner later drove to Pooley Bridge where they had dinner which, as set out above, had been pre-arranged for 8.30 pm.

19. Mr Turnbull's account of matters is at page 65 of the bundle, and the Claimant did not challenge that account. In evidence he said it was broadly accurate.
20. As I have already found, the Claimant knew, and said as much in evidence, that custom and practice around this time of year was that management would exercise their discretion at some point later in the shift with a view to allowing workers an early finish. The Claimant also accepted that, had he stayed around, he might well have been released early if call volume permitted and he may well have made the meal on time. He also accepted that – to avoid any issue at the hotel - he could have called the restaurant in Pooley Bridge to put the booking back by 30 mins. However, he said that he did not think of doing this. The Claimant said that this was due to his judgement being impaired by his illness, which he said also accounted for his behaviour.
21. Therefore, had the Claimant stayed at work there would have been a chance that he would be released early (depending on work levels). He did not stay because he regarded the comment from Mr Dawson to the huddle regarding getting away early as good as an assurance and – given staff got away early on Xmas Eve - he found it unacceptable that he was now being told in the morning that he was expected to work until 7. He was angry that he had had to work two late shifts, angry that he had booked a table for which he might be late and angry at what he considered to be a personal injustice. I have no doubt that his judgement on that day was impaired – but by his anger and a sense of injustice, not by ill health. A red mist descended which led to a rapid deterioration in his behaviour.
22. During the course of these events (between first being told that he was to work late and Mr Turnbull telephoning Mr Dawson) the Claimant went into the kitchen area. The events in the kitchen formed a significant but not an exclusive part in the decision to terminate his employment.

The events in the kitchen

23. The Claimant went to the kitchen area carrying a tray of cups. Present in the kitchen area were two ATOS employees whom I need only refer to as DB and CG. The Claimant was angry on entering the kitchen. He put the tray on a bench in a way which gave the impression to those observing that he was angry. The Claimant made much of the description of him 'throwing' the tray down. While it may be debatable as to whether it is right to describe him as 'throwing' the tray on the bench (as opposed to 'dropping' or 'slamming') I can understand why an observer at the scene might describe it as such. His rough handling of the tray of cups reflected his anger and frustration and the phrase '*Andy came in full of hell threw the cups down on the bench*' is as good a way as any to get across the point that he was angry and that it was obvious that he was. Indeed, it is entirely consistent with my findings that a red mist had descended on the Claimant, resulting in a rapid deterioration in his behaviour. The Claimant maintained that the description of how he came in and threw the cups down was an exaggeration

by DB and CG. I reject that. Neither, in their written accounts, was making a big deal about the cups. All that they were saying was that the way in which the Claimant came in to the kitchen area made it clear to them that something was wrong – which of course there was, from the Claimant's perspective.

24. DB asked the Claimant what was wrong. He said he had been promised an early finish, that he was 'pissed off' and was not well enough to be at work anyway. He complained of favouritism. DB thought by the way he came in he was going to hit something. She jokingly took a step back and the Claimant said words to the effect of *"I'd take a step back as well, as to be honest its either you or the cupboard that's getting hit"*.
25. DB believed this was said in jest. However, it was the venom and anger behind it (as she described it) which made her feel a little worried that it wasn't in jest; she felt a little uncomfortable and a little wary of the Claimant's ability to control his anger and a little intimidated by his conduct (underlined emphasis is mine).
26. The incident in the kitchen could not have lasted very long – a matter of seconds. This is clear from the description from both DB and CG (pages **66, 67, 105, 106**).
27. Essentially, the Claimant, angry, fuelled by a sense of injustice and feeling sorry for himself that he had left his sick bed to go to work, lost his control – it was, as Mr Smith described it in his witness statement at paragraph 30 a momentary display of anger.
28. After the Claimant left the workplace for the day, Mr Turnbull telephoned Mr Dawson to say that the Claimant had gone and that he had 'kicked off'. As Mr Turnbull was a newly promoted deputy team leader, Mr Dawson drove to the office to see what assistance he could give. He explained to Mr Sherriff that he would have to work late, which Mr Sherriff accepted.
29. Mr Dawson was in the office for about an hour. He spoke to Luke Turnbull and also to Mark Smith. A short note of what Mr Smith said (and the content of a subsequent email) is found at **page 64**. I accept Mr Dawson's evidence that he did not speak to DB during that period, although he had been given a basic understanding of what had allegedly happened in the kitchen by Joanne Wilkinson (an ATOS employee and line manager of DB). The email from DB on **page 66** gives no indication at all that she had spoken to Mr Dawson about the events prior to sending that email.
30. On 02 January 2019, DB emailed Mr Dawson to draw to his attention her concern about the Claimant's conduct on 31 December 2018. In that email (**page 56 and also at 66**) she said (words in bold are my emphasis):

"My issue is not that he was angry, annoyed or anything like that it's the part that happened next, he said 'I'd take a step back as well as to be honest its either you or the cupboard that's getting hit' or words to that affect. Now I believe it was said

in jest however the venom and anger that was behind it took me by surprise to the point I was a little worried it wasn't in jest. It was a little uncomfortable and made me feel a little wary of his ability to control his anger. I appreciate he was angry but felt a little intimidated by him.

*.... Another prominent part was where he was stood over Luke in the middle of the office saying that if he wasn't allowed to go home on an early finish he'd just go home sick. I feel that whilst he was ill to threaten in that environment was highly unprofessional and **I thought he may genuinely hit someone because he wasn't getting his own way.***

*I'm sorry Adam I mainly wanted to bring up to you how Andy made me feel **in the hope a word from you may affect his behaviour.***"

31. The Claimant suggested that Mr Dawson and DB colluded in sending this email. I reject the allegation. There is not the slightest evidence that this was the case and I accept Mr Dawson's evidence. Mr Dawson did not speak to DB on 31 December 2018 when he came to work for an hour. He was next back in work on 02 January 2019, arriving after the email had been sent to him by DB. In any event, if the implication is that the two colluded with a view to securing the dismissal or disciplining of the Claimant, the final sentence would run counter to any such suggestion.

David McKinnon

32. On 03 January 2019, Mr David McKinnon approached Mr Dawson to say that the Claimant had, in his view, been unprofessional and that he wanted to raise his concern about his conduct on New Year's Eve. He then sent an email at 10.27am which is at page **57** of the bundle. Mr McKinnon had witnessed the Claimant's behaviour when he was addressing Mr Turnbull.
33. Mr Dawson also spoke very briefly to CG. He did not take a note of the conversation as she said she would email him what she had to say. She subsequently sent an email – **page 67**.

Meeting with Claimant on 07 January 2019

34. On 07 January 2019, Mr Dawson met with the Claimant. He explained that there had been issues raised regarding his conduct on New Year's Eve towards Luke Turnbull and his conduct in the break room/kitchen. Notes of the discussion are at pages **61-62**. The Claimant was suspended pending investigation and he was told that he would be required to attend a disciplinary meeting.
35. Mr Dawson did not take any notes of any interviews with witnesses. He did not actually interview anybody other than the Claimant (his note of the meeting on 07 January is at page **61-62**). Mr Dawson relied on the emails he had already received from DB, CG, David McKinnon and Mark Smith and on the written

account by Mr Turnbull. He emailed Mr Harber on 07 January 2019 at 10.28am (page 60) with 6 attachments.

Further email from DB

36. After Mr Dawson had emailed the documents to Mr Harber, DB sent another email to Joanne Wilkinson, her line manager, copying in Mr Dawson. The email is at page 72 of the bundle but is undated. It had to have been sent after Mr Dawson emailed the attachments to Mr Harber at 10.28am on 07 January 2019 and before 12.39 on 07 January 2019, which was when Mr Dawson forwarded it to Ms Shar Kydd, HR Adviser (see page 71a). In the third paragraph of her email at page 72, DB refers to a worry that she may have sparked the Claimant's ire and while hoping that nothing might happen in the future, she said to her line manager that *"if I hear anything Joanne, I'd like to inform you that I would be looking to raise a complaint about it. Again I hope I'm jumping the gun here but thought it better to cover myself."* Towards the end of that email DB said *'As far as I'm concerned I sent an email to basically try and get someone with a little more authority than I to say calm it down and that would be the end of it.* This email had not been sent to the Claimant in advance of the disciplinary hearing – although he was made aware that DB had sent an email. A copy of it was not provided to the Claimant until after these proceedings had commenced. The Claimant maintained during these proceedings that this was unfair because Mr Harber relied on its content.

Emails from Sharon Warren of ATOS

37. On 08 January 2019, Sharon Warren of ATOS emailed Mr Harber (page 70). In that email, Ms Warren said:

"I have received a formal complaint from a member of the ATOS 1.5LS Service Desk team in Durham about the behaviour of Andy Anderson in the office at Durham on New Years Eve.

In essence Andy was displaying aggressive and threatening behaviour in the kitchen area because he had been told he could not finish early on that day. I believe you have already received a copy of the complaint from the person involved from 1.5LS so I won't go into detail again here. I also understand that he was also acting in an aggressive manner with the 2 LS Deputy Team Leader in the office on the same day in front of not only the 2 LS team but also several other ATOS teams that work in the same office area.

This kind of behaviour cannot be tolerated and as such I would ask that Andy be removed from site with immediate effect on a permanent basis."

38. This was followed by a further email from Ms Warren to Mr Harber on the same day saying:

“Just to clarify, given the nature of this incident we would not want Andy to work on any AtoS contract.”

A copy of these emails was not provided to the Claimant until after these proceedings had commenced.

Suggestion by the Claimant of bias by Mr Dawson and Mr Harber

39. The Claimant suggested that Mr Dawson was biased against him and should not have been permitted to undertake any investigation into his conduct. He put to Mr Dawson that he had been condescending towards him in the past during a discussion on a technical matter. Mr Dawson had apparently interjected in a conversation between the Claimant and someone else with a suggestion of his own. The Claimant did not take kindly to the interjection and regarded Mr Dawson as undermining or speaking down to him. I reject the suggestion that Mr Dawson was biased against the Claimant and unsuited to investigating the allegations. The Claimant was, in fact, held in high regard for his technical expertise. He also held himself in high regard and in my judgement most likely misinterpreted the situation.
40. The Claimant also suggested that he was regarded by management as being a thorn in the side, or a bit of a pain in the neck and that his dismissal is explained by this. There is no evidence that this was the case and I reject it. On the contrary, the Claimant was regarded as a very diligent worker and someone of expertise. The matters which he, on occasion, would raise in discussion were matters of a technical nature which was not something which any of the witnesses before me regarded negatively, nor was there any evidence of that. The fact that the Claimant may have perceived this to be the case does not mean that it actually was the case.
41. The Claimant suggested that he had been belittled and insulted constantly in the workplace. The only potential relevance to this was that it might suggest an ulterior motive for dismissing him, or may potentially form the basis for an argument that Mr Dawson or the decision maker, Mr Harber, was biased against him - either in the way in which the complaint was investigated or in the decision-making. However, the Claimant was invited by me to say how he was bullied and belittled but was unable to give any examples or any basic account of such allegations other than a general perception on his part. He regarded the interjection of others on technical matters as being examples of bullying or undermining, or of people not listening properly to what he was saying. He was also frustrated by the lack of progress on certain matters he had been working on, such as the development of email templates. Looked at objectively, at best the evidence suggested nothing more than normal workplace interactions, some of which the Claimant was unhappy about. Mr Dawson apologised if the Claimant felt that he had been condescending towards him and suggested they had 1:2:1 meetings going forward to address this – these did not materialise owing to the Claimant’s subsequent dismissal. The Claimant offered no evidence nor any

convincing explanation of what Mr Dawson said or did that was undermining or condescending. He could point to nothing that would reveal any bias against him. In any event whatever issues had arisen earlier in the workplace had no bearing at all on the subsequent events, despite the Claimant's assertion to the contrary.

42. On 08 January 2019 Mr Dawson wrote to the Claimant inviting him to attend a disciplinary hearing on 14 January 2019 before Mr Ray Harber (page **68-69**). The allegations were as follows (I have added the numbering to make easier reading):

“That on 31st December you attended work and when found that you may not be entitled to an early finish and would be required to work the entirety of your scheduled shift, (1) you became hostile and disruptive to the acting team leader raising your voice and voicing your displeasure.

Whilst the acting team leader was then trying to get some clarification on what can be done, (2) you then created an environment that was felt to be intimidating and hostile by two ATOS employees and they have raised subsequent complaints regarding your conduct.

(3) You then decided that as you would not be permitted to leave early you chose to leave anyway as felt you were unwell and unable to work but then travelled to Ullswater.”

43. The above three allegations were all clearly inter-linked, arising out of the same occasion on 31 December 2019.

44. On 09 January 2019 the Claimant emailed Ms Sharon Kydd, HR Adviser. In that email he said:

“I would like to discuss with you my attendance and concerns in respect of having the opportunity to have a fair hearing as I have some concerns about Ray Harber conducting the investigation. I have previously raised issues with Ray in relation to situations in the workplace and these remain unresolved.

I don't have a trade union representative and would like to discuss how I could receive this additional support.”

45. The Claimant pursued this point during the tribunal hearing but had no basis and could not articulate any proper basis for suggesting that Mr Harber should not have conducted the disciplinary hearing. As I have already found, there was no evidence of any bias against the Claimant nor was there any evidence of any difficulties between the two of them prior to the hearing. Insofar as the Claimant was suggesting that Mr Harber was not impartial I reject this.

46. The Claimant also said that he was deprived of representation. However, he was not. It is right that he wanted to have a discussion with HR about representation. This was obliquely alluded to in his email to Ms Kydd (**page 71**). However, reading the email it refers to a discussion about how he can have the additional support of a trade union representative. The Claimant could have been more explicit in that email. He could have pointed out that, in fact, he wanted his partner, Ms English, to accompany him – which is what he said at the tribunal

hearing. However, he did not say this in the email and he attended the hearing without representation.

Disciplinary Hearing 14 January 2019

47. On 14 January 2019 the Claimant attended a disciplinary hearing, chaired by Mr Harber who was supported by Ms Kydd. The notes of that meeting are at pages **73 – 78**. The upshot was that the Claimant was dismissed for gross misconduct.
48. I reject the suggestion that the Claimant was refused the right to read out his statement. The Claimant had prepared a written statement and Mr Harber said that he would read that (the Claimant's statements for use at the disciplinary hearing are at pages **79-86**). It was not a case of refusing a request to read the statement, it was simply a case of Mr Harber saying that he would take time to read the statement first of all, which he did.
49. Mr Harber upheld the three allegations (as numbered by me in paragraph 42 above). Mr Harber concluded as follows:
- (1) The Claimant had taken it for granted that he would be released early on New Year's Eve;
 - (2) When he believed he would not be released early, the Claimant caused a scene resulting in his conduct creating a threatening or hostile environment for two ATOS employees, DB and CG;
 - (3) He was hostile to the deputy team leader (Mr Turnbull), raising his voice and expressing his displeasure;
 - (4) When he thought that he was not going to get an early finish because Mr Turnbull had told him it could not be guaranteed, he raised the issue of being unwell;
 - (5) He chose to leave his place of work early which in the circumstances and given his behaviour as a whole was inappropriate;
50. Mr Harber concluded that the Claimant's overall behaviour was hostile and had caused unnecessary disruption in the workplace. He believed from the accounts that he had been given, including the Claimant's account, that the Claimant had tried to manipulate Mr Turnbull's inexperience as a manager; that the Claimant had not been truthful in telling Mr Turnbull that Mr Dawson had agreed an early finish for him and that, while the Claimant may have been unwell leading up to New Year's Eve, this did not justify him walking out of work in all the circumstances.
51. The Claimant says that Mr Turnbull does not say in his statement at **page 58** that he was manipulated by the Claimant or that the Claimant lied to him. However,

Mr Harber was entitled to conclude, by proper inference, that the Claimant was taking advantage of Mr Turnbull's managerial inexperience (which he refers to as manipulation) and that the Claimant's behaviour was disruptive and unnecessarily so and that he was aggressive and hostile. He was also entitled to conclude that the Claimant had not been truthful when saying to Mr Turnbull that Mr Dawson had assured him of an early finish. It is not my function to substitute my view of the Claimant's actions for that of Mr Harber.

52. In respect of matters raised by the Claimant (in relation to how he perceived himself as having been bullied in the past and that he was a thorn in the side) Mr Harber concluded that the Claimant was trying to deflect from his conduct on New Year's Eve. Again, he was entitled to conclude this based on the Claimant's account of what had happened and of their relevance to the events of New Year's Eve. Insofar as relevant to the issues I have to decide, I agree with him. In raising these issues, the Claimant was deflecting from the events in question and based on the evidence I heard, and having given him an opportunity to explain the nature of the alleged bullying, I find that the Claimant had no complaints beyond a perception of being overlooked and not respected.
53. I must now address and resolve an issue which arose between the parties relating to three emails: a second email from DB to her own line manager, copying in Mr Dawson (at page **72**) and the two emails from Sharon Warren (at page **70**). Those emails had been sent to Mr Harber prior to the disciplinary hearing but they had not been sent to the Claimant. I deal firstly with the email from DB at page **72**.

Email from DB (page 72)

54. The Claimant's position was that Mr Harber insisted on including that email at some point during the middle of the disciplinary hearing and that Mr Harber relied on the email in arriving at his decision to dismiss. Mr Harber's position was that he raised the existence of the email at the outset of the hearing because he had printed it out, assuming that the others also had a copy and that he did not have regard to it when HR said it should not be included because it was a personal email.
55. The email starts by DB saying she would like to bring up some serious concerns she has with the Claimant. She says that she was happy for the email she sent to Mr Dawson to be used in evidence but wanted either someone to make clear to the Claimant that she did not send the email in a vindictive manner or for her name to be redacted from the email. She was expressing the view that she did not want any comeback from the Claimant on his return to work. She expressed some worry that she may have sparked his ire and hoped that there would be no negative treatment of her regarding her transitioning (DB is a trans woman). She added that if that were to happen she would raise a complaint about it. She ended by saying that she had sent the earlier email (the one at page **66**) to try and get

someone with a little more authority than her to say 'calm it down and that would be end of it'.

56. Mr Harber addresses this email in paragraphs 41 - 48 of witness statement. Those paragraphs contain a rather sophisticated analysis as to whether the email at page **72** should have been disclosed to the Claimant, conveying that this analysis was undertaken by Mr Harber at the beginning of the disciplinary hearing. I mean no discourtesy to Mr Harber when I say that such sophistication of analysis was not reflected in his oral evidence.

57. I reject what Mr Harber says, namely that he considered the position at the time as described in those paragraphs – although I accept what he says in paragraphs 41 and 42 of his statement. I also reject what the Claimant says happened, namely that Mr Harber was adamant during the course of the hearing that he wanted to introduce the email but did not only when HR said he could not. The truth of the matter was clear from Mr Harber's own evidence in answer to questions by the Claimant:

Claimant: "you are lying about that; you were adamant you wanted to raise it; I said you should not admit it cos I hadn't seen it; hr intervened and said can't admit it;"

Mr Harber: "no. right at beginning we were looking to see if we all had the same documents; I had an email; I showed it to Shar; she said personal email; I put it to one side; that was it; "

58. Whilst I have rejected Mr Harber's evidence that he embarked on a sophisticated analysis of that email, I should make it perfectly clear that I accept his evidence that he had assumed others had had a copy of the email, that he mentioned this at the outset of the hearing and that when HR told him to put it to one side, he did so. He was not adamant that it be introduced at the hearing at all. Far from it. Mr Harber simply followed the advice of the HR adviser unquestioningly and did not give the email much, if any, attention. Therefore, I find that he did not rely on the email at page **72** in arriving at his decision, nor was he influenced by its content.

The emails from Sharon Warren (page 70)

59. As articulated above, the email at page **72** from DB was not the only email which Mr Harber had received and which was not shown to the Claimant prior to his dismissal. Mr Harber had received the email from the ATOS Operations Manager, Sharon Warren (see paragraphs 37-38 above). Unlike the email at page **72**, Mr Harber did not say to the Claimant at that stage that he had received correspondence from ATOS. He had not printed out that email to take with him to the disciplinary hearing.

60. During the course of the proceedings, the Claimant put to Mr Harber that he should have been provided with the email at page 70 and should have been allowed to address what was said because he (Mr Harber) could have been influenced in his decision to dismiss by what Sharon Warren had to say. Mr Harber said that he was not influenced by it.

61. Mr Harber addresses this email at paragraphs 14 – 15 of his witness statement. He says that he put these emails to one side and that they were there only in the background, having decided not to add to the allegations this ‘formal complaint’ from ATOS. The fact that he considered the email, regarded it as a formal complaint and considered but decided not to include it as an allegation suggests strongly that it was a significant issue for him. He says it was just in the background (and would only have come into play if he felt that a sanction less than dismissal was appropriate in respect of the Claimant’s conduct). However, in the letter of dismissal at page 95-96 he refers directly to the ATOS request not to permit the Claimant back on any of their sites:

“Having considered the facts of the case very carefully, I believe this amounts to Gross Misconduct and I find that there is a fundamental breakdown in trust and confidence and therefore your position is untenable in the organisation. You have adversely affected and put at risk the commercial reputation of the Company on a Customer Site. ATOS have also requested that you are not permitted back on any of their sites..

My decision therefore to confirm, is to summarily dismiss you for threatening inappropriate behaviour and leaving your shift claiming you were unwell but still attending an event. Your employment will be terminated on 14th January 2019 without notice.”

62. This suggests that the fact of the complaint played a role in his thinking on sanction. If, as Mr Harber suggested, it would only come into play **if** he concluded that the Claimant’s conduct would not warrant dismissal why mention it, one might ask, in that part of the letter which comes before the reference to sanction?

63. Later in evidence the Claimant asked Mr Harber whether the issue regarding the incident in the kitchen could not have been dealt with by a meeting between him and DB (in essence a sort of clear the air meeting). Mr Harber said:

“it could have been; it went higher; her line manager complained; so we had to carry out an investigation.”

64. That answer also suggests that the view of ATOS was an important consideration in Mr Harber’s mind.

65. Then in a further exchange in the evidence:

Claimant: “could you have taken different course of action? Mediate?”

Mr Harber: "could have; ATOS raised complaint as formal complaint; that email sent; it was..."

Claimant: "why not speak to ATOS without it having to be investigated?"

Mr Harber:" Danielle complained to Joanne; went to service delivery manager, Sharon delivery manager; they make decision as to whether anyone works on their contracts; that was indication that they took it seriously;"

66. This clearly illustrates that Mr Harber regarded Sharon Warren's intervention as significant. Mr Harber was asked whether he could have taken a different course of action such as mediation. He said that he could have but that ATOS had raised the complaint as a formal complaint and referred again to the email from Sharon Warren.
67. All of this suggests that Mr Harber had in mind ATOS's response as a measure of the seriousness with which they regarded the matter. I bear in mind what Mr Harber says in his witness statement at paragraph 53. However, I reject what is said there, namely that he referred only to ATOS because there was a 'connection' between his reason for dismissal and the ATOS instruction not to permit the Claimant to return to any site. Once again, I conclude that this too is an ex post facto attempt to apply a sophistication of analysis which was not present in Mr Harber's mind at the time he made his decision.
68. I am in no doubt that Mr Harber, when deciding whether to dismiss the Claimant, could have been influenced by the emails from Sharon Warren. Of that I am certain. Mr Harber says that he was not influenced (but neither he nor anyone else can exclude the possibility that he may have been influenced even sub-consciously). A more difficult question is whether he was in fact influenced.
69. I find, on the balance of probabilities, that Mr Harber's decision making was in fact influenced by the content of the emails he received from Sharon Warren. I infer such influence from the letter of dismissal, from his oral evidence and from the fact that the complainant herself (DB) and the only other witness to the kitchen incident (CG) were putting it no higher than that the Claimant's behaviour in the kitchen – whilst unacceptable and intimidating - was a momentary loss of control by the Claimant which caused DB to be a little worried, a little uncomfortable, a little wary and a little intimidated. I also bear in mind that neither Mr Harber nor Mr Dawson spoke directly to DB or to CG. All that Mr Harber had to go on regarding the kitchen incident itself was the written accounts of DB and CG and the Claimant's account. However, behind the scenes he also had the written email from Sharon Warren.
70. Of course, Mr Harber had also concluded that the Claimant's conduct towards Mr Turnbull and his decision to leave work on sick leave after being told that he had not been given any assurance by Mr Dawson. His decision to dismiss the

Claimant was influenced not only by Ms Warren's views (significant though that was) but also by his overall findings.

71. I address the significance of this in my conclusions. Returning to my findings of fact, the next event is the appeal.

Appeal against dismissal

72. The Claimant appealed by an email dated 22 January 2019 (page **97-99**). The appeal was heard by Mr Tony Smith on 05 February 2019. After the hearing, Mr Smith interviewed DB and CG on 13 February 2019. He did not interview Mr Dawson or Mr Turnbull. Nor did he send copies of the notes of his meetings with DB and CG to the Claimant to give him an opportunity to address what was said prior to Mr Smith reaching any conclusions on the appeal. The notes of the interviews of DB and CG are at **pages 105-106**.

73. Mr Smith interviewed only DB and CG because in his view the 'kitchen incident was the key event'; he wanted to see the 'whites of their eyes', as he described it and to see whether there was potential for softening their statements. If there was potential for upholding the appeal he believed it would lie in what they might say about the kitchen incident.

74. Mr Smith said in evidence that the impression he took from speaking to DB was that the events had had a serious impact on her. However, that does not come across at all from his note at **page 105**. Again, DB says that she only wanted Adam (Mr Dawson) to take the Claimant to one side and have a strong word; that she was glad he was appealing. There is nothing in that note that suggests she was concerned for her safety or that she felt intimidated or frightened. She clearly did regard the Claimant's conduct as unacceptable but of course she had always said that but what she said she wanted was for someone to have a word with the Claimant about his behaviour.

75. Mr Smith said in evidence that he could see the effect that the events had had on DB, that she was seriously concerned by the Claimant's behaviour. He said the interview note does not quite portray the effect it had on her. He is right in that it does not portray an effect of the sort described by Mr Smith. I had difficulty in accepting Mr Smith's evidence on this issue. If the very purpose of speaking to DB and CG was to 'see the whites of their eyes' (as he put it) and to consider how they genuinely felt about the incident, and if they had really conveyed to Mr Smith a heightened state of concern over and above that stated in their original emails, then I would expect to see that reflected in the note. To say that the note does not reflect how she (DB) really viewed the incident or the effect it had on her makes no sense in light of what Mr Smith says in paragraphs 17 and 24-27 of his witness statement. I do not accept Mr Smith's evidence that DB expressed such serious concern about the Claimant.

76. Mr Smith's witness statement and oral evidence endeavours to paint a picture of a scared DB, badly affected by the incident in the kitchen. The difficulty with his evidence is twofold:
- a. His note of the interviews of DB and/or CG nowhere reflects this;
 - b. DB's original complaint does not suggest this;
77. The written material (obtained from DB and CG) which was given to the Claimant at the disciplinary hearing is at page **66-67** and the further written material (which not given to the Claimant during the course of the appeal) is at page **105-106**.
78. Whilst I have no doubt that the unacceptable conduct of the Claimant had an effect on DB, I do not accept Mr Smith's evidence that she (or CG) gave him to believe that the effect on her was any greater or more serious than that outlined by her in her emailed statement at page **66** or as is apparent from the note of her interview which is at page **105**. It is more likely than not (and I take this from DB's email at page **72**) that DB was more concerned about the potential ramifications for her as a complainant. Many people who complain of the behaviour of a work colleague (I venture to suggest most) will understandably be concerned that the person who is the subject of the complaint might react adversely to them upon that other person returning to work perhaps after a period of suspension. That is a natural concern and tension likely to arise in workplaces. I have no doubt that DB's concerns – a complainant of unacceptable behaviour against the Claimant - would be heightened owing to the fact that she is a transitioning or transitioned trans-woman who held a 'hidden belief' that some (including, by implication, the Claimant) harboured unexpressed views about her status. It can be difficult for trans-women to be accepted in the workplace – what DB was expressing in the email at page **72** was a concern that the Claimant might use the fact that she complained against him as a vehicle for being 'less polite' about her transition.
79. However, that is a very different thing to DB saying that she was seriously concerned about the Claimant's conduct on the day (i.e. New Year's Eve) and that this had a serious impact on her. There is nothing in Mr Smith's note to suggest this, and as I have found, nothing in DB's emails to that effect. Therefore, if Mr Smith took anything from the meeting with DB which (as he puts it) was not accurately reflected in his note, I find on the balance of probabilities that it was DB's concern that the Claimant might be less acceptable of her transition on his return to work. Of course, the Claimant does not accept that he would have treated DB in such a way – more importantly, he was not given the opportunity of addressing any such concern.
80. I am fortified in my conclusion that DB did not express serious concerns about the impact on her of the Claimant's conduct on New Year's Eve by the content of Mr Smith's appeal outcome letter of 07 March 2019, at page **113**, where he says (my emphasis added):

*“...I have considered all the relevant facts including taking further time to interview the sole two witnesses to the incident in order to gain a full understanding of the facts of situation on the day. The witnesses were questioned on the content of their statements and **I am satisfied from those discussions that the statements are a true account of the incident**, in that your behaviour was threatening, inappropriate and unacceptable conduct.”*

81. Those two statements (at pages **66 and 67**) were measured statements, and with reference to DB in particular, showed a level of concern on her part about the Claimant's conduct, but not to what I find to be the exaggerated extent described by Mr Smith in his witness evidence.

82. In Mr Smith's witness statement at paragraph 30, he concluded as follows:

“taking the evidence of Danielle and Claire together I felt that it was probable that the Claimant did not intend to cause offence or make someone feel threatened. It was a momentary display of anger. However, it still concerned me that the Claimant was capable of this. I felt that he should be more careful, particularly when it was a shared kitchen and people from ATOS could walk in at any time.”

83. Like Mr Harber, Mr Smith was also aware of the views of Sharon Warren (contained in the email at **page 70**) and like Mr Harber he says that the Claimant was not dismissed because of this customer complaint (see Mr Smith's witness statement paragraph 51). He too says that he did not consider this as part of the appeal. I find that difficult to accept and to the extent Mr Smith maintains he was not influenced by the views of Sharon Warren I reject that evidence. The Claimant was a former ATOS employee and he worked exclusively on the ATOS contract. ATOS was an extremely important client of the Respondent and the Senior Service Delivery Manager was saying to the Respondent that – following receipt of DB's complaint - the Claimant would not be permitted on any of its sites. Yet two service delivery managers of the Respondent say that this formed no part of their thinking. The natural expectation would be for it to form part of their thinking. Indeed, given what is said by Sharon Warren, it is difficult to understand why they say they did not consider what she said.

84. I am driven to the finding from the evidence as a whole that Sharon Warren's views did in fact play a part in their decision-making and that their strenuously adopted position to the contrary is based on a recognition and concern that this complaint was not disclosed to the Claimant, that no steps were taken to discuss it with Sharon Warren and that the Claimant was not given an opportunity to address it. The Claimant was prepared to apologise to DB for his conduct on the day and he was willing to meet with her in some form of mediation.

85. Mr Smith met with the Claimant again on 25 February 2019 to give him his decision which was to reject the appeal.

Relevant law

Unfair dismissal

86. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section 98(2) or that it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The reference to the 'reason' or 'principal reason' in section 98(1)(a) and s98(4) is not a reference to the category of reasons in section 98(2)(a)-(d) or for that matter in section 98(1)(b). It is a reference to the actual reason for dismissal (**Robinson v Combat Stress** UKEAT/0310/14 unreported). The categorisation of that reason (i.e. within which of subsection 98(2)(a)-(d) it falls) is a matter of legal analysis: **Wilson v Post Office** [2000] IRLR 834, CA.
87. A reason for dismissal 'is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA. In a more recent analysis in **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240, CA, Underhill LJ said that the 'reason' for dismissal connotes the factor or factors operating on the mind of the decision maker which causes them to take the decision. It is a case of considering the decision-maker's motivation.
88. An employer may have multiple reasons for dismissing an employee. In **Robinson v Combat Stress** Langstaff P said at paragraphs 20 and 21:
- "where an employer has a number of reasons which together form a composite reason for dismissal, the tribunal's task is to have regard to the whole of those reasons in assessing fairness. Where dismissal is for a number of events which have taken place separately, each of which is to the discredit of the employee in the eyes of the employer, then to ask if that dismissal would have occurred if only some of those incidents had been established to the employer's satisfaction, rather than all involves close evaluation of the employer's reasoning. Was it actually that once satisfied of one event, the second merely leant emphasis to what had already been decided? There may be many situations in which, having regard to the whole of the reason the employer actually had for dismissal, it is nonetheless fair to dismiss.*
- All must depend on the employer's evidence and the Tribunal's approach to it. But that approach must be to ask first what the reason was for the dismissal, and to deal with whether the employer acted reasonably or unreasonably by having regard to that reason: that is, the totality of the reason which the employer gives."*
89. Where the reason is a composite of a number of conclusions about a number of different events the tribunal must examine all of the employer's reasoning as that was the actual reason for its dismissal.

90. In a 'misconduct' dismissal, the employer must also show that the principal reason for dismissal relates to the conduct of the employee. If it is established that the reason for dismissal relates to conduct the next question is whether the employer has acted reasonably in treating that reason as a sufficient reason for dismissal – s98(4) ERA 1996. The burden here is, of course, neutral. It is not for the employer to prove that it acted reasonably in this regard. The Tribunal must not put itself in the position of the employer. The Tribunal must confine its consideration of the facts to those found by the employer at the time of dismissal and not its own findings of fact regarding the employee's conduct.
91. Section 98(4) poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. It requires the Tribunal to apply an objective standard to the reasonableness of the investigation, the procedure adopted and the decision itself. However, they are not separate questions – they all feed into the single question under section 98(4). Whilst an unfair dismissal case will often require a tribunal to consider what are referred to as 'substantive' and 'procedural' fairness it is important to recognise that the tribunal is not answering whether there has been 'substantive' or 'procedural' fairness as separate questions.
92. The approach to be taken when considering s98(4) is the well-known band of reasonable responses, summarised by the EAT in **Iceland v Frozen Foods Ltd v Jones** [1983] I.C.R. 17. The Tribunal must take as the starting point the words of s98(4). It must determine whether in the particular circumstances the decision to dismiss was within the band of reasonable responses which a reasonable employer might have adopted. In assessing the reasonableness of the response it must do so by reference to the objective standard of the hypothetical reasonable employer (**Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387, CA @ para 49). The Tribunal must not substitute its own view as to what was the right course of action.
93. In misconduct cases, the approach which a Tribunal takes is guided by the well known decision of **British Home Stores v Burchell** [1978] IRLR 379, EAT. Once the employer has shown a valid reason for dismissal the Tribunal there are three questions:
- (i) Did the employer carry out a reasonable investigation?
 - (ii) Did the employer believe that the employee was guilty of the conduct complained of?
 - (iii) Did the employer have reasonable grounds for that belief?
94. In gross misconduct unfair dismissal cases, in determining the question of fairness, it is unnecessary for the Tribunal to embark on any analysis of whether the conduct for which the employee was dismissed amounts to gross misconduct. However, where an employer dismisses an employee for gross misconduct, it is

relevant to ask whether the employer acted reasonably in characterising the conduct as gross misconduct – and this means inevitably asking whether the conduct for which the employee was dismissed was capable of amounting to gross misconduct – see **Sandwell & West Birmingham Hospitals NHS Trust v Westwood** (UKEAT/0032/09/LA) [2009] and **Eastland Homes Partnership Ltd v Cunningham** (EAT/0272/13). This means asking two questions:

- (1) is the conduct for which the employee was dismissed conduct which, looked at objectively, capable of amounting to gross misconduct, and
- (2) Did the employer act reasonably in characterising the conduct as gross misconduct?

Fair procedures

95. A dismissal may be unfair because the employer has failed to follow a fair procedure. In considering whether an employer adopted a fair procedure, the range of reasonable responses test applies: **Sainsbury plc v Hitt** [2003] I.C.R. 111, CA. The fairness of a process which results in dismissal must be assessed overall.

Polkey

96. What is known as ‘the Polkey principle’ (**Polkey v AD Dayton Services** [1988] I.C.R. 142, HL) is an example of the application of section 123(1). Under this section the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. A tribunal may reduce the compensatory award where the unfairly dismissed employee could have been dismissed fairly at a later stage or if a proper and fair procedure had been followed. Thus the ‘Polkey’ exercise is predictive in the sense that the Tribunal should consider whether the particular employer could have dismissed fairly and if so the chances whether it would have done so. The tribunal is not deciding the matter on balance. It is not to ask what it would have done if it were the employer. It is assessing the chances of what the actual employer would have done: **Hill v Governing Body of Great Tey Primary School** [2013] I.C.R. 691, EAT.
97. Whilst the Tribunal will undertake the exercise based on an evaluation of the evidence before it, the exercise almost inevitably involves a consideration of uncertainties and an element of speculation. The principles are most helpfully summarised in the judgment of Elias J (as he was) in **Software 2000 Ltd v Andrews** [2007] I.C.R. 825, EAT (paragraphs 53 and 54).

Contributory conduct

98. If a dismissal is found to be unfair, under section 123(6) ERA where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding even in cases where the parties do not raise it as an issue (**Swallow Security Services Ltd v Millicent** [2009] ALL ER (D) 299, EAT). The relevant conduct must be culpable or blameworthy and (for the purposes of considering a reduction of the compensatory award) must have actually caused or contributed to the dismissal: **Nelson v BBC (No2)** [1980] I.C.R. 110, CA. For the purposes of the compensatory award there must be a causal connection between the conduct and the dismissal. The conduct must be to some extent culpable or blameworthy (**Nelson v BBC (No.2)** [1980] I.C.R. 110, CA). Langstaff J offered tribunals some guidance in the case of **Steen v ASP Packaging** [2014] I.C.R. 56, EAT, namely that the following questions should be asked: (1) what was the conduct in question? (2) was it blameworthy? (3) did it cause or contribute to the dismissal? (for the purposes of the compensatory award) (4) to what extent should the award be reduced?
99. There is an equivalent provision for reduction of the basic award, section 122(2) which states that '*where the tribunal considers that any conduct of the complainant before the dismissal...was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*'. The tribunal has a wider discretion to reduce the basic award on grounds of any conduct of the employee prior to dismissal. It is not limited to conduct which has caused or contributed to the dismissal.
100. Unlike the position under section 98(4) ERA where the Tribunal must confine its consideration of the facts to those found by the employer at the time of the dismissal, the position is different when the Tribunal comes to consider whether, and if so to what extent, the employee might be said to have contributed to the dismissal. In this regard, the Tribunal is bound to come to its own view on the evidence before it. Decisions on contributory fault are for the Tribunal to make, if a decision is held to be unfair. It is the claimant's conduct that is in issue and not that of any others. The conduct must be established by the evidence.

Submissions

101. The Claimant read out a prepared statement. I have considered that statement and also had regard to the points which he makes in his witness statement, much of which is interspersed with points which might be regarded as submission points and in the additional correspondence sent after the hearing had concluded. By way of overall summary, the Claimant says that the investigator and decision-makers were biased against him; that he was treated inconsistently to others; that the investigation was flawed in that no-one spoke to the security officer; that there were inconsistencies in accounts; that Mr Dawson colluded with DB in the making of the complaint; that he failed to take statements;

that it was unfair not to provide him with the email at page **72** which must have influenced Mr Harber as it was powerful and emotional.

102. The Claimant submitted that Mr Harber and Mr Smith were influenced by the email from Sharon Warren at page **70**; that Mr Smith should have interviewed others in addition to DB and CG and that he failed to document a conversation with Mr Harber; that he need not have been dismissed because all that was required was for some form of mediation between him and DB, and that the Respondent could have spoken to the ATOS manager, Ms Warren. He maintained that his judgement was impaired on New Year's Eve due to his sickness and that his actions were not threatening or hostile; that he was not angry, he was just upset because the Respondent had gone back on an assurance given to him. He submitted that, should I find that he was unfairly dismissed, there should be no reduction for contributory conduct.
103. For the Respondent, Mr Ryan emphasised the approach which must be taken under section 98(4); that it is not for the Tribunal to substitute its view for that of the Respondent and that even if the Tribunal had sympathy for the Claimant that was not the issue. Mr Ryan reminded the Tribunal of the Burchell test; he referred to the investigation carried out by Mr Dawson and the accounts contained in the emails; that the Claimant was given these in advance and had the opportunity of commenting on them and presenting his case. He submitted that the investigation was reasonable and that there were reasonable grounds for Mr Harber's belief. Mr Ryan submitted that the failure to provide the claimant with the email at page **72** was a procedural issue but had no adverse impact on fairness because her complaint was already known from page **56/66** and she had made the point she was not seeking the claimant's dismissal; what was in the email at page **72** was already known to the Claimant and the part that was not did not advance matters further, expressing only her concern about what might happen after the matters were concluded; however, it did not impinge on the fairness of the Claimant's dismissal.
104. Mr Ryan submitted that, if the Tribunal had concerns about the failure to speak to DB during the process – and should the Tribunal consider this to be a procedural defect - Mr Smith cured any unfairness that might arise by ensuring that he spoke to her and to CG. As regards the email from Sharon Warren at page 70, this was not part of the disciplinary process. Mr Ryan said that it post-dated the beginning of the investigation. Even if it had been given to the Claimant, the result would have been the same, Mr Ryan submitted – in light of the Client's adamant position as expressed in that email.
105. As to the events of New Year's Eve, Mr Ryan submitted that the Claimant accepted in evidence that he over-reacted and accepted that Mr Dawson had not given him any firm time by which he was allowed to leave work that day; that when he arrived at work he was relying on an assumption he could leave. There was no conspiracy or collusion as suggested by the Claimant. The Respondent acted reasonably in regarding the Claimant's conduct as being gross misconduct.

The procedure adopted was fair. There was no need to revert to the Claimant after Mr Smith's meeting with DB and CG because what they said had not changed what they had said. Even if the procedure was in some way lacking or unfair, Mr Ryan submitted that the Claimant would have been fairly dismissed had a fair procedure been followed. Further he said that the Claimant contributed 100% to his own dismissal.

Conclusions – application of law to the facts

Reason for dismissal

106. I must first of all determine what the actual reason for dismissal was – before considering how that actual reason is to be categorised within section 98 ERA 1996. There was no serious challenge to the Respondent's category of the reason for dismissal as one relating to conduct.

107. Mr Harber dismissed the Claimant because he genuinely believed and concluded that:

(a) The Claimant was disruptive on the day in question and displayed hostility towards Mr Turnbull by raising his voice whilst standing over him and was undermining him as a newly promoted deputy team leader;

(b) The Claimant by his angry demeanour and by saying to DB "I'd take a step back as well, as to be honest its either you or the cupboard that's getting hit" created an intimidating and hostile environment for DB and CG and in doing so made DB concerned that his anger might get the better of him and that he might hit someone;

(c) That the Claimant had taken it for granted that he would get off early and that he used his ill-health as a reason for leaving the work-place when he did not get what he expected, when he had been well enough to attend work in the first place and to work almost a whole day's shift.

108. Therefore, these were the three factors all of which formed a composite reason and which constitute the 'principal reason' for the Claimant's dismissal. The respondent has satisfied me that it genuinely believed that the Claimant had committed those acts and that the reason for dismissal was related to conduct (which was not in any event challenged) and therefore potentially fair.

Reasonableness of decision to dismiss – investigation and procedure

109. As stated above, section 98(4) poses a single question: whether the employer acted reasonably or unreasonably in treating the principal reason for dismissal as a sufficient reason for dismissing the employee. Although it is helpful to consider substantive and procedural aspects of the dismissal separately, a tribunal must then stand back and look at the overall picture to answer that single question. It is also important to recognise that the appeal process is an integral

part of the dismissal procedure and the totality of the procedure (investigation, dismissal hearing and appeal hearing) must be considered together.

110. I conclude that Mr Harber had reasonable grounds for the conclusions he reached and that the investigation into the allegations was reasonable. While there was some dispute regarding the Claimant's precise actions on the day the dispute was more to do with how his conduct was described (for example whether it was accurate for the witnesses to refer to him as 'towering' over Mr Turnbull, or that he 'threw' the tray of cups on the bench or that he was 'shouting' or that his behaviour was intimidating or hostile). However, there was in truth reasonably little dispute as to what had happened, and in any event, Mr Dawson's investigation was reasonable and gave Mr Harber reasonable grounds on which to sustain his belief in the Claimant's conduct.

111. I reject the submission that the Claimant's judgement on the day was impaired by illness. He has not advanced any medical support for such an assertion. In light of my findings I conclude that any impairment of judgement was due to his anger and sense of injustice.

112. I do not regard the failure to speak to the security officer to ascertain whether the Claimant told him that he had spent much of Christmas in bed to have been a failure to carry out a proper investigation. The Respondent does not say that he was not unwell. Their point, which I accept, is that the Claimant must have been well enough to attend work as demonstrated by his actions. Quite how speaking to the security officer would have assisted in any investigation was never made clear, and in any event, clearly would not have taken matters anywhere. The investigation which was undertaken by Mr Dawson (and then taken further by Mr Smith) was in all the circumstances a reasonable one.

113. I reject the submission that the Claimant was refused an opportunity to put his case (by not being permitted to read his statement). He had every opportunity of putting his case at the disciplinary and he did so. I also reject the Claimant's point that he was treated inconsistently to others – there was not the slightest evidence of this and no other cases similar in nature to the Claimant's disciplinary were identified.

114. As already stated, it is not for me to substitute my views on the facts or on the sanction for those of Mr Harber or Mr Smith. I am required to consider whether they acted reasonably in characterising the Claimant's character as gross misconduct. I bear in mind that Mr Smith considered the Claimant's conduct in the kitchen as a momentary display of anger – and had that been the only thing for which the Claimant had been dismissed, my conclusion might have been different. However, having regard to the totality of the reason for dismissal and the overall conclusions of Mr Harber in paragraph 108 above, I conclude that the Claimant's overall conduct on that day was capable of amounting to gross misconduct and that the Respondent acted reasonably in so characterising it.

115. However, that is not the end of the matter. As the Respondent itself observed, a finding of gross misconduct does not automatically lead to a decision to dismiss. The question posed by section 98(4) is whether the Respondent acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. That question must be determined in accordance with equity and the substantial merits of the case.
116. What has led me to conclude that the Claimant was unfairly dismissed is the Respondent's failure to disclose and address a matter which had a significant influence on the decision to terminate the Claimant's employment – namely, the email at page **70** from Sharon Warren and the failure to approach her to discuss those views. Mr Harber and Mr Smith were not open about the extent of the influence on them of that email and they failed to ensure that the Claimant was able to address them on Ms Warren's concerns. They failed to speak to Sharon Warren about her views prior to reaching any decision on sanction.
117. The views of DB and CG as expressed in the email (and even in the note taken by Mr Smith) were measured. Mr Ryan submitted that to the extent that there was a defect in not speaking to DB and/or CG earlier, this was cured by Mr Smith on appeal. However, whilst it probably would have been helpful for Mr Dawson to have spoken to DB and CG as part of his investigation, that was less of an issue for me in terms of overall fairness. As I have found, their account of what happened was largely unchallenged and was clear and their views on outcome were also clearly expressed. Any failure by Mr Dawson to speak to them did not – in the circumstances - result in any unfairness to the Claimant. Therefore, when Mr Smith spoke to them he was not 'curing' any unfair defect. Ironically, however, he could easily have created an element of unfairness by speaking to them and then proceeding to dispose of the appeal without reverting to the Claimant to give him an opportunity to address what they said.
118. I say 'could have' created an element of unfairness only because I have rejected Mr Smith's evidence that DB and CG in fact conveyed to him a 'serious' concern about the Claimant's conduct on New Year's Eve over and above that which they had already expressed in their original emails. Had I found that they had in fact expressed such serious concerns and that Mr Smith arrived at his decision based on these undocumented concerns, then I would have found that this in itself rendered the process unfair. However, it did not come to that, because on my finding they did not tell him anything new. If they had, then he should have and would have documented it.
119. Therefore, in the circumstances of this case it was not in fact the failure to interview DB and CG that resulted in unfairness; nor was it the failure to go back to the Claimant after Mr Smith spoke to them. While both of those things may have been desirable, it was within a band of reasonable responses not to do either because their accounts were clear and measured and, on the whole, not seriously disputed by the Claimant.

120. It was the influence of Sharon Warren's email on the decision making and the failure to afford the Claimant the opportunity to deal with that which results in unfairness to the Claimant. Because her views had such a significant influence on the decision to dismiss, it was unfair not to address this with the Claimant head on.
121. In failing to do this the Respondent acted outside the range of reasonable responses open to a reasonable employer. A reasonable employer would have disclosed the emails at page 70 and would have afforded the Claimant the opportunity of addressing the views of ATOS directly. A reasonable employer would then have taken on board what the Claimant had said, approached Sharon Warren and asked her whether, in the light of the measured views expressed by DB and CG, the response of the Claimant – including that he was prepared to apologise – and would have asked her to give the matter further, more considered reflection. It would then have taken her response and considered that along with all the other factors before arriving at a decision.
122. Why would a reasonable employer have done those things? Because it accords with basic fairness – Mr Smith and Mr Harber say that the views of DB and the views of Sharon Warren were relevant only to sanction. However, that is precisely the point. Ultimately, the question posed by section 98(4) is about that very thing: the sanction. The thing which must be determined is the reasonableness of the decision to dismiss. Here we had a complainant (DB) asking only that someone speak to the Claimant and a senior manager (Sharon Warren) saying that the Claimant must not be permitted back to work on any of their sites. In light of DB's position, the views of Sharon Warren seems particularly stringent. A reasonable employer would have spoken to her in order to see if she would step back from such an extreme position.
123. Mr Ryan submitted that the email from Sharon Warren was not part of the disciplinary process and that the Claimant was dismissed because of the events of New Year's Eve. Mr Harber and Mr Smith may not have been influenced by the views of Sharon Warren on the question of what actually happened on New Year's Eve. They were able to form their own conclusions on the facts from the material in front of them. However, they must have been (and I have found that they were) influenced by her views when deciding (in Mr Harber's case) on what sanction to impose on the Claimant and (in Mr Smith's case) on whether to uphold that sanction. In Mr Smith's case it was that view of Sharon Warren on behalf of ATOS – as opposed to any strength of feeling conveyed to him by DB following his meeting with her – which influenced him in upholding Mr Harber's decision.
124. Therefore, although the Respondent had a potentially fair reason for dismissing the Claimant, it did not act reasonably in treating that reason as a sufficient reason for dismissing him – the unreasonableness being their failures regarding Sharon Warren's email. Considering the findings of fact overall, and applying the legal principles to those facts, I find that the Claimant was unfairly dismissed.

125. I now turn to other aspects: Polkey and Contribution.

Polkey

126. I must consider now whether the Respondent could have fairly dismissed had it acted as a reasonable employer would have, and what are the chances that it would have done? I find that the Respondent could have fairly dismissed the Claimant and that the chances that it would have fairly dismissed the Claimant had it acted reasonably are 75%.

127. It was submitted that the Claimant would inevitably have been dismissed even if the Respondent had approached Sharon Warren. However, beyond being told in evidence that Sharon Warren was 'ATOS through and through' there was no evidence that she would have maintained her rigid view had she been approached and had she been made aware that the Claimant was willing to apologise for his conduct and that DB and CG had simply expected that someone speak to the Claimant regarding his behaviour. The Respondent had not approached Sharon Warren to seek her views. Nor did it approach her for the purposes of these proceedings. It was open to the Respondent to call evidence from ATOS but it did not. There must be a chance that Sharon Warren's views would have changed. That possibility cannot be ruled out.

128. Had it not been for the fact that the Claimant was dismissed for a composite reason I would have found the percentage chance of a fair dismissal to be less than 75%. However, the facts are that the Claimant was dismissed not simply for the kitchen incident but for his conduct towards Luke Turnbull and for leaving work when things did not go his way.

129. I conclude that it is possible that something might have emerged from an open discussion with Sharon Warren and from giving the Claimant the opportunity to address the issue of returning to work alongside DB and ATOS staff (of which he had been one) that this would have influenced Mr Harber's and Mr Smith's decision on sanction. As they were influenced to dismiss by her email at page 70, so too they may and would likely to have been influenced by her views if she had stepped back from her very trenchant view expressed in that email. Had she reconsidered her position then that would have had some impact on the Respondent's decision to dismiss even bearing in mind the other two aspects (behaviour towards Mr Turnbull and walking out of work).

130. If she had softened in her views, that would have been a factor in the overall decision making: that DB was not pressing for dismissal, that Sharon Warren had stepped back somewhat from her original position – but there is also the other findings of Mr Harber, namely the Claimant's conduct towards Luke Turnbull and his leaving work when things did not go his way. Standing back and looking at matters overall, realistically the chances that the Respondent would

fairly have dismissed the Claimant are high. I bear in mind, in particular, the other matters and not just the kitchen incident. I assess the prospect that the Respondent would have fairly dismissed as 75% and reduce the compensatory award by that proportion.

Contributory conduct

131. I further reduce both the basic and the compensatory award by 60% to reflect the fact that the Claimant's own conduct on New Year's Eve was blameworthy and contributed to his dismissal. In respect of the compensatory award, I have regard to the need to assess contribution on a just and equitable basis and having regard to the Polkey reduction. In this case, the facts are unavoidable: the Claimant may have been unwell leading up to and even during New Year's Eve but he went to work of his own volition. He rode on his motorcycle to the office on a December morning. I have concluded that he was fit enough to work. He had gone expecting to work a full day less one hour (he expected to be released at 6pm as opposed to 7pm). When he did not get what he wanted and expected he reacted in a wholly unacceptable manner. He raised his voice. He stood over Mr Turnbull and put him in a difficult position. He said something wholly unacceptable to DB. The way in which he entered the kitchen, slamming the tray on the table and saying directly to DB that if not the cupboard getting hit it would be her is culpable and blameworthy conduct. Even if he did not mean to do this (and I do not suggest for one moment that the Claimant threatened or intended to hit her) his behaviour created a hostile and intimidating environment albeit for a very short period of time. It may have been a momentary lapse of control but nevertheless unacceptable and blameworthy conduct. When things did not go the way he expected them to, he left his place of work using his sickness as the explanation (even though he was able to go to work and was expecting to work more or less a full day). These things did not entirely cause his dismissal as was submitted by Mr Ryan – because a significant contributing factor was the influence of Sharon Warren. However, his conduct was a significant cause.

132. Considering the issues drawn up by the parties (and set out in paragraph 3 above) and answering them directly by reference to those numbers:

(1) Yes;

(2) No;

- a. Yes;
- b. Yes;
- c. Yes (although more accurately, there was no inconsistency as no other comparable cases were identified);
- d. No and no;

(3) A basic award and a compensatory award (reduced as per my conclusions on Polkey and contributory conduct);

(4) Yes, by 75%;

(5) C contributed to his own dismissal and the basic and compensatory award should be reduced by 60%

(6) Yet to be determined.

133. I have not been able to arrive at any findings in respect of mitigation of losses as I heard no evidence or submissions on that. If necessary, that issue can be addressed at a remedies hearing. In light of my conclusions, it may be that the parties are able to come to an agreement on remedy. The parties must inform the Tribunal within 21 days of receipt of this reserved judgment whether they will be able to resolve all matters of remedy or whether they require a hearing to be listed.

Employment Judge Sweeney

13 January 2020