EMPLOYMENT TRIBUNALS

Claimants:		**Respondent:**
Mr A Gavli Mr M Ali	**v**	LHR Airports Limited

Heard at: Reading **On:** 30 June & 1 July 2020

Before: Employment Judge Anstis (sitting alone)

Appearances:
For the Claimant: Mr S Perhar (counsel)
For the Respondent: Miss C Urquhart (counsel)

RESERVED JUDGMENT

1. Both claimants were unfairly dismissed.

2. The respondent must pay compensation to the claimants as follows:

   2.1. To Mr Gavli: £7,086.64

   2.2. To Mr Ali: £4,853.82

3. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply in respect of both claimants.

   3.1. In relation to Mr Gavli:

      3.1.1. The prescribed element is: £5,337.69

      3.1.2. The prescribed period is: 21 February 2019 to the date on which this judgment is sent to the parties

      3.1.3. The total amount of the award is: £7,086.64

      3.1.4. The balance of the award is: £1,748.95

   3.2. In relation to Mr Ali:

      3.2.1. The prescribed element is: £3,329.69

3.2.2. The prescribed period is: 16 May 2019 to the date on which this judgment is sent to the parties

3.2.3. The total amount of the award is: £4,853.82

3.2.4. The balance of the award is: £1,524.13

REASONS

A. THE HEARING

1. This hearing took place during the Covid-19 pandemic. It was listed to be heard on 29 and 30 June 2020 and 1 July 2020, which immediately followed the lifting of the Presidential moratorium on in-person hearings. The week prior to the hearing the case was designated to be heard in-person, as originally listed, with appropriate precautions being taken at the hearing centre.

2. The respondent initially objected to this. The effect of this objection was that I converted the first day of the hearing to become a preliminary hearing for case management purposes, to be held by telephone. At that hearing I was able to describe the precautions and risk mitigation measures taken at the hearing centre. Following this, Mr Perhar and Miss Urquhart very helpfully agreed a timetable for the hearing of the case, and later that afternoon it was agreed that the evidence of all four witnesses would be heard in an in-person hearing on Tuesday 30 June 2020, with submissions to follow by video, using the CVP system, on Wednesday 1 July 2020. I am grateful to the representatives for their helpful approach, and also to the witnesses for enabling the evidence to be heard in person in accordance with the agreed timetable. I heard evidence from both claimants, from Spencer Adaway (the person who made the decision to dismiss the claimants) and Elizabeth Hegarty (who heard their appeals).

3. Submissions followed by CVP on Wednesday 1 July 2020, and I reserved my decision.

4. In accordance with the Senior President's Judges' and Members' Administrative Instruction No 2:

> *This has been a partly remote hearing which has been consented to by the parties. The form of remote hearing was video - CVP. A face to face hearing was not held on the second day because submissions could be dealt with properly by a video hearing. The documents that I was referred to are in a bundle of 389 pages, supplemented by the parties during the in-person part of the hearing. The judgment made is set out above.*

B. INTRODUCTION

5. The claimants' claims are of unfair dismissal only. The respondent says that they were dismissed for a reason related to their conduct: that is, "*bullying, harassment and intimidation towards new starters*".

6. This is not a case in which the claimants cast aspersions on the motives of the managers who dealt with the allegations against them. It is not part of the claimants' case that the managers were acting in bad faith or with some ulterior motive for dismissing them. It is not alleged by the claimants that the relevant managers were not appropriate people to take decisions on the allegations against them. Although not at any point conceded by Mr Perhar there was nothing in his questioning of the relevant managers which suggested that they did not have a genuine belief that the claimants were guilty of misconduct. The focus of the claimants' arguments was on the procedure that had been adopted, the question of whether further investigation was required and, in Burchell terms, whether there were reasonable grounds for the relevant manager's belief that they had committed misconduct. It was also their case that in the circumstances of their case dismissal was not within the range of reasonable responses open to the respondent.

C. FACTS

Introduction

7. The question of whether the claimants committed the misconduct they were accused of was in dispute, but that is not the central issue in an unfair dismissal claim. Apart from that, there are few disputes of fact between the parties. The respondent's process in handling the disciplinary allegations against the claimants are fully documented. What follows are largely undisputed facts, and I have noted where there is a conflict in evidence that I have had to resolve.

8. The claimants were employed by the respondent as passenger service operatives (PSOs). In the case of Mr Gavli from 18 June 2015 (or 20 July 2015 on the respondent's case, but nothing depends on that difference) to 21 February 2019 and in the case of Mr Ali from 20 July 2015 (or 4 July 2015) to 16 May 2019. In practice this meant that they worked as part of a team of around a dozen employees looking after trolleys at Heathrow Airport. The team they were part of reported to a "passenger service manager" (PSM).

9. The workers in the trolley operations teams were not subject to close supervision from the PSMs, and would work either alone or in pairs across the airport site. As such, it was important that the respondent was able to trust them to work without immediate supervision. Another consequence of this was that unless they were specifically assigned to work with a colleague, team members would only come across each other in the restroom they shared.

10. The team the claimants worked in had a number of members who had, at the relevant time, only worked for the respondent for a few months, alongside those such as the claimants who had been working for the respondent for a number of years.

11. The allegations arise in the context of uncertainty as to the future of the trolley team, and whether it would be outsourced. It is accepted by the respondent that at this time they were considering a range of options for the future of the trolley team, including outsourcing. It is the respondent's case, and I have no reason to doubt this, that any changes to staffing arising from the outsourcing would be dealt with by collective consultation. In fact, no outsourcing took place and the trolley team seems to have continued with no substantial changes being made to their working arrangements.

12. Although their full names were given in evidence during the hearing I have chosen (as the investigator did) to refer to the claimant's colleagues in the trolley team only by their initials. It is not necessary for their full names to be set out in this public judgment and reasons.

The initial allegations

13. I was not told how the allegations made against the claimant first came to the attention of the respondent. In his statement, Mr Adaway simply says:

> "*In September 2018 it came to* [the respondent's] *attention that* [the claimants] *had been intimidating new starter PSOs by saying that they were going to lose their jobs due to ongoing outsourcing conversations the business was having.*"

14. The bundle contains a series of statements said to date from the end of August 2018 and the start of September 2018. In a note dated 30 August 2018, MS says:

> *"Over the last two weeks rumours of our dept being outsourced has been circulating around. It seems that those rumours have been directed towards two colleagues (new starters) GR and AK in a way to intimidate them … One of the prevalent rumours is that the new starters will be the first to leave Heathrow. Obviously such talk is rather disheartening."*

15. On the same day, AS wrote the following:

> *"I was sitting in the rest room with another new starter. There was a conversation going on in the room amongst DR and* [Mr Gavli] *about being outsourced and an external agency coming in. As we have heard about this topic many times we carried on our conversation and ignored what they were talking about.*

> [Mr Gavli] *then turned around and said if we do get outsourced the new started would be the first to be sacked. I just ignored the comment as I had it feeling it had little merit …"*

16. DR was the union representative for the trolley team.

17. In a statement dated 31 August 2018 HK notes discontent among the new starters, but does not identify anyone as responsible for that.

18. On 5 September 2018 CJ says that Mr Gavli and DR had told the new staff "*that section will be outsourced and they will be the first unemployed.*"

19. On 5 September 2018 MC says that "*the new guys … mentioned to me that established members of staff had asked them why they had applied for jobs that were going to be outsourced at the end of December*". He goes on to refer to the Dignity at Work policy.

20. In a further note addressed to his manager, described in the bundle index as being from 15 September 2018, MS goes further, saying:

> *"… over the past few weeks, myself and the other new starters have been targeted and subjected to a form of intimidation and fear mongering that I can only liken to psychological bullying. In only the second week … I was told by GR that a few of the longer standing team members (*[Mr Gavli] *and DR) have been pedalling and perpetuating the idea that our department will be 'outsourced' and that as new starters we will be 'the first to be kicked out'.*
>
> *Upon hearing this, it filled me with despair and a lot of confusion, as it did with all the new starters. As the rumours continued to circulate, it was apparent that a select group of people feel nothing but animosity towards us. However, the more sensible and pragmatic team members, CJ, MC and HK encouraged us to bring this to the management's attention. The support from* [management] *has been a huge encouragement. One example of some of the behaviour and attitude towards us took place today (15/9/18) at the first push in at around 8:00am, CJ and GR entered the baggage hall, NC and I remained outside. Spectating us was* [Mr Ali], [Mr Gavli]*, NN and MS and at no point did* [Mr Ali or Mr Gavli] *offer to assist, even though it was made clear in the briefing that someone from departures should do so. After the push in was complete, NC and I were met with rather aggressive* [Mr Gavli] *who said 'it is sinful to push long lines' and that 'bad things will happen now', to which NC and I ignored. Shortly after, GR and I spent a short break in the rest room,* [Mr Gavli and Mr Ali] *also entered the rest room.* [Mr Gavli] *then began to question GR and I about whether we are part of the union, to which GR and I replied we are not and we then began making our way to leave the rest room. Upon leaving,* [Mr Ali] *remarked 'are you not*

> *part of the union', to which GR replied, 'my job is in my hands', to which* [Mr Ali] *then said 'we can help you get sacked'.*"

21. On 16 September 2020 GR wrote to his manager to say:

> "*I want to bring to attention of a incident that took place yesterday which I felt upset and intimated about the incident. The incident was* [Mr Ali] *asked me a question if I was part of the union and I said no there no need I quoted fuck the union if I get sacked then I get sacked he ended up saying his gonna get me sacked people in the room heard what he said MS and NC heard what* [Mr Ali] *said …*
>
> *I also heard from GS what* [Mr Gavli] *and DR said about being outsourced they told him if we get outsourced we will be the first to be sacked because we are new and still on probation and I feel upset and stress because we work hard and we put a lot of effort to join the company but only to find out we might lose our jobs by December.*
>
> *I would like this to be looked into because I don't want us guys to be treated differently.*"

The investigation

22. Neena Haria was commissioned to investigate these matters. On 28 September 2018 she wrote to both claimants notifying them that she was investigating allegations against them of "*bullying, harassment and intimidation towards new starters*". She invited them to separate investigatory interviews on 12 October 2018.

23. On 4 October 2018, Mr Gavli was suspended, apparently on the basis that had contravened a restriction "*not to contact any parties involved in a current case whilst being investigated*". I was not told by the respondent what this contact amounted to. Mr Gavli said in his evidence that he had contacted a colleague to try to swap a shift. This was not challenged by the respondent. In the suspension letter he was told that he should not contact colleagues unless told to do so.

24. At the meeting on 12 October 2018 Mr Gavli was accompanied by his trade union representative, who asked to see any witness statements that the investigator had. Ms Haria, after speaking to HR, refused to provide copies of the witness statements, but offered to read out extracts. The union representative pressed that they were entitled to see the statements, saying twice that they needed to hear (or read) what Mr Gavli was accused of. Ms Haria insisted that she did not have to provide the witness statements, and eventually called offered Mr Gavli an adjournment to "*see how we can move on from this*". It appears this offer was accepted and the meeting ended.

25. The meeting with Mr Ali on 12 October 2018 ran along much the same lines, albeit with a different union representative and no offer from Ms Haria to read out extracts from the witness statements.

26. On 18 October 2018 Ms Haria interviewed CJ, who said that MS and GS were unhappy, and that at the end of August Mr Gavli had told them that the trolley work was to be outsourced and they would be "*the first to be sacked*". CJ accepted he had not personally witnessed this conversation. He also said that Mr Ali had threatened to get GR sacked if he did not join the union.

27. Further interviews followed through October and November 2018. MS identified MC and HK as having said the new staff would be dismissed on any outsourcing, and Mr Gavli and DR as having spread rumours to that effect. He identified MS, AG, NC "*and at least 3 more*" as having witnessed Mr Ali threatening to have GR sacked. He described Mr Gavli and DR as being antagonistic to management.

28. GS identified Mr Gavli and DR as having said "*you guys will get sacked first – last in first out*", and that this had "*turned into a campaign to get us new guys to join* [the union] *we ignored them now*". He described it as being "*intimidating*".

29. NC said:

> "*GR and MS walked in and colleagues* [Mr Ali and Mr Gavli] *asked them … if they were part of the union. No, they said, GR said he doesn't care if he gets sacked, he gets sacked. Implied it doesn't matter if you are a union member, if you get sacked, my perception of what he said.* [Mr Ali] *said we will make sure that happens. My initial thought was he meant that they would become union members, on reflection I think he meant they will get sacked. I believe that's how GR has taken it. Laughing and joking afterwards, do not think there was anything of it. GR had left and* [Mr Ali and Mr Gavli] *were joking around.*"

30. MS said:

> *"DR,* [Mr Gavli and Mr Ali] *were in staff room telling new starters that they will be out of a job at the end of the year because it will be outsourced.* [Mr Gavli and Mr Ali] *said that they were stupid to get a job at Heathrow because it is a shit company and their jobs were going to be outsourced.*
>
> *Some of the new starters were upset because every day they were coming to work they were being told the same thing …*
>
> *Since* [Mr Gavli] *has been suspended he has been calling MS and GS and asking them why they have made a complaint against him. He has called others."*

31. When asked whether he had directly heard or seen what he was talking about, MS said:

> *"I heard some. But they switch language so that I don't understand. The new starters told me some of it."*

32. AK said, "[Mr Gavli] *said first in first out, I was in the room and DR. He also said we have no rights for 2 years. I didn't think anything of it.*" He described what he was told as "*childish rumours*" and said that he had not been in the room when Mr Ali allegedly threatened to get GR dismissed.

33. BS said that he was not there at the time first in first out was mentioned. He said he had been asked by Mr Gavli and DR to join the union, but he refused. He says that Mr Gavli replied that he (Mr Gavli) would report him to management if he didn't follow health or safety or work hard, and then he would need the union. He said that he had been told to work to rule by Mr Gavli and Mr Ali, saying that they had said "*whether you push 1 or 16 trollies you get the same pay*", but he said that he "*laughed this off*".

34. On 15 November 2018 Ms Haria called second investigatory meetings with the claimants, for 28 November 2018.

35. On 21 November 2018 Mr Ali was suspended, apparently because of "*new information becoming available during the course of an on-going investigation*" but it was not explained to me what that material was. (The suspension letter is dated 21 November 2018 and refers to Mr Ali being suspended from 21 October 2018. I take it that that is a misprint for 21 November 2018.)

36. In the case of Mr Gavli, this achieved no more than the first, lasting five minutes and with the whole of the minutes of the meeting reading as follows:

> *"NH Introduction to roles, here to due to accusation of bullying/harassment/intimidation. Do you know where these came from?*
>
> *AG No*
>
> *EB (union rep) Do you have the witness statements?*
>
> *NH Not able to show the statements, this is your opportunity to give your version of events on what I will disclose.*
>
> *EB Not prepared to continue without statements.*
>
> *NH You will see all statements if there is a case to answer. Otherwise I can only take away what we discuss today.*

EB In that case we will have to close the meeting how do we know there are true?

NH There are multiple statements.

EB If this moves forward we will then see all the statements … do you want to continue?

AG No."

37. In the case of Mr Ali, Ms Haria put it to him that "*you have been named by a witness to saying 'you can arrange to be sacked'*". Mr Ali replies "*no*". On being asked for the statements by his trade union representative, Ms Haria says "*not showing statements but I will advise you of the allegations*". Following this she repeats the allegation that Mr Ali has told people that he can get them sacked, has told PSOs their jobs will be outsourced or threatened that they may not have a job. Mr Ali denies each of these. His union representative questions how comments in relation to outsourcing could be bullying or harassment. Ms Haria says they were "*seen as intimidating*". When the union representative says, "*has he threatened that they may not have a job*" Ms Haria replies "*no*". At the conclusion of the meeting Mr Ali's trade union representative says "*what has* [Mr Ali] *done to be contexted as bullying*" and Ms Haria replies "*comments have been seen as intimidating behaviour*".

38. I was told that the respondent's policy was not to disclose statements in possible bullying and harassment cases at the investigation stage for fear that disclosure of these statements would provoke further bullying and harassment.

39. Despite all the work that had been done by Ms Haria, by the time she concluded her investigation, Mr Gavli had been told nothing more by the respondent about the accusations against him other than the one line that appeared in the original letter sent to him: "*bullying, harassment and intimidation towards new starters*". Mr Ali knew more of the case against him, but not (apart from 'new starters') who he was alleged to have bullied, harassed or intimidated, or when this allegedly happened.

40. Ms Haria prepared full (but undated – they appear to have been completed in late January 2019) reports setting out the work she had done and the recommendations she had drawn from that, which were (in the case of Mr Gavli):

> *"I believe there is a case of bullying, harassment and intimidation as there are consistencies within the interviews that link to the Dignity at Work Policy, 'making threats to their job/job security for no reason'.*
>
> [Mr Gavli] *was given the full opportunity to state his case however chose not to, which makes it very difficult to make a full*

recommendation as I must use the evidence that has been provided through all interviews and statements.

I believe there are consistencies within the interviews that state [Mr Gavli] *openly has conversation about the PSO role being out-sourced, however rather than these conversations being informative and sharing the full legalities with outsourcing and TUPE-ing.*

There are consistencies within statements that state Mr Gavli told PSOs they had no employee rights under 2 years of employment. I believe [Mr Gavli] *has told the newer PSOs this to threaten their job security, so they would join the TU.*

New PSOs have been consistent in how they have felt by the out-sourcing conversations. They have felt intimidated, fearful of their job security which falls in line with the dignity at work policy and therefore gross misconduct under the disciplinary policy.

Based on the information and interviews conducted I believe there is a case to answer at gross misconduct and should proceed to disciplinary hearing."

41. For Mr Ali her recommendations were similar:

"I believe there is a case of bullying, harassment and intimidation as there are consistencies within the interviews that link to the Dignity at Work Policy, 'making threats to their job/job security for no reason'.

I believe the consistencies with the witness interviews with regards to [Mr Ali's] *conversation within the rest room with GR and MS have malicious intent when suggesting MA will be able to get MS sacked.* [Note: I think this must be intended as a reference to GR rather than MS.]

MA was given the full opportunity to state his case however chose not to, which makes it very difficult to make a full recommendation as I must use the evidence that has been provided through all interviews and statements.

I believe there have been conversations regarding out-sourcing as Heathrow is in talks with the TU regarding this, however, I believe there has been malicious intent within the conversation rather than sharing the full legalities of outsourcing and TUPE-ing.

Based on the information and interviews conducted I believe there is a case to answer at gross misconduct and should proceed to a disciplinary hearing."

The disciplinary hearings

42. On 7 February 2019 Mr Gavli was invited to a disciplinary hearing to take place on 14 February 2019. This invitation said:

> *"At this hearing you will be required to answer the following charge(s) of gross misconduct:*
>
> *Serious and/or deliberate breach of the company's HR, IT, operating, health & safety, code of professional conduct and security policies and procedures:*
>
> *Bullying, harassment and intimidation towards new starters."*

43. On the same day, Mr Ali was invited to answer the same disciplinary charge at a disciplinary hearing on 21 February 2019.

44. As Mr Adaway accepted during his evidence, the reference to particular policies in the letters was essentially "boilerplate", with none of the multiple policies referred to having any relevance to the disciplinary charges that the claimant was to face. The policy which was potentially relevant, and which had been identified by Ms Haria, was the "Dignity at Work" policy. However, Mr Adaway said that he had not been aware of the possible relevance of that policy and had not taken it into account in his decisions.

45. The invitation letters included Ms Haria's full investigation report (including the relevant witness statements) and a copy of the respondent's disciplinary policy, which identified "*bullying or harassment towards a fellow employee*" as potentially amounting to gross misconduct.

46. For reasons I need not go into, both claimants had good reasons for not attending the disciplinary hearings as originally scheduled. The respondent accepted those reasons and rescheduled the disciplinary hearings, which eventually took place on 21 February 2019 for Mr Gavli and 16 May 2019 for Mr Ali.

47. I was told that DR was also subject to a disciplinary hearing, but the outcome of this was that he was not dismissed. I had no information in relation to his situation and it was not part of the claimant's case that their dismissal was unfair by reason of inconsistent treatment of them and DR.

The decision in respect of Mr Gavli

48. Mr Gavli's disciplinary hearing took place before Mr Adaway on 21 February 2019. Mr Gavli was accompanied by his trade union representative.

49. During the meeting, Mr Gavli confirmed he had read all the papers in the investigation pack prepared by Ms Haria. When asked about any conversations with others regarding outsourcing, he said that there had been one conversation about outsourcing that he had been part of at the

rest room. He denied having mentioned first in first out during this conversation (the notes show that Mr Adaway only mentioned first in first out, although the apparent issue was with mention of last in first out, which would have affected the new starters). He said that he had never told MS that he (MS) would be the first to be dismissed. He said he "*never had situation to talk to new guys*". He said that he did not have any problem with the PEMs. He denied having said to others that you got paid the same for pushing 1 or 15 trollies (this is another odd point of confusion in the notes, since the allegation was about a comment in relation to pushing 1 or 16 trollies). He denied having said that he would report someone for health and safety breaches so they would have to join the union. He said that he had only spoken about outsourcing in the rest room with his trade union representative, and not with anyone else.

50. When he was asked why so many new starters would make these statements against him, he said that he had had no interaction with the new starters and had only worked with one of them (NN), and there was no statement from that person. His union representative criticised the investigator for not taking statements from four people where those statements may be favourable to him. After an adjournment to consider the situation, Mr Adaway returns, and his decision is recorded in the notes of the meeting as being:

> "*made decision on number of statement, such a first in first out, I find bully and harassment, I find proven, I find new starters to feel this, whether it be you can't remember, I feel reasonable belief, I find charges to be proven in letter therefore summarily dismissed.*"

51. Mr Adaway followed this up with a letter dated 12 March 2019 stating that the claimant had been dismissed with immediate effect on 21 February 2019. In this, he emphasised the number of statements against the claimant, including one (from MS) referencing "*psychological bullying*", in contrast to Mr Gavli simply saying that he had had no contact with the new starters. He concluded:

> *"After looking through the evidence and listening to your view, I have reason to believe that these incidents did occur, there are consistent statements throughout regarding your actions and how they affected your colleagues. There is evidence of your behaviour affecting your colleagues and I deem it to be bullying, harassment and intimidating, causing undue distress to your peers."*

52. Mr Adaway explained his decision in this way in his witness statement:

> *"I decided that the allegations against* [Mr Gavli] *had been proven and therefore, especially in the light of the fact no mitigation evidence had been provided, decided to summarily dismiss him for gross misconduct. I was acutely aware that there were a number of statements collated as part of the investigation, all of*

> *which stated that* [Mr Gavli] *had in some way made threats against their employment or they had heard* [Mr Gavli] *make threats against other new starters employment.* [His] *only defence to these allegations was that they did not happen. I found this to be implausible given the number of statements that had been made and the consistency of them. I particularly noted that* [MS's statement] *stated that the behaviours displayed … could be likened to psychological bullying which was something that particularly concerned me, as that is a very strong thing for an employee to say … As* [Mr Gavli] *had not provided me with any evidence which needed further investigation, I considered that I could make my decision that day after an adjournment."*

53. He continues in his witness statement, to explain why a warning would not be sufficient:

> *"I did consider whether a lesser sanction such as a final written warning would be appropriate, but my view was that a lesser sanction was not appropriate given my belief … that* [Mr Gavli] *had bullied and intimidated the new starters which is something LHR cannot countenance from its employees."*

The decision in respect of Mr Ali

54. Mr Ali's disciplinary hearing took place on 16 May 2019. Mr Ali was accompanied by two trade union representatives.

55. In an exchange of emails between Mr Ali and Mr Adaway ahead of this meeting, Mr Adaway said:

> *"In relation to the additional witnesses you have identified, during the hearing tomorrow I will listen to your rationale and consider whether further interviews are required to support your case."*

56. Mr Ali said that he had sent an email asking for other witnesses to be interviewed, which had prompted this response from Mr Adaway. There was no such email in the bundle, nor was any such email produced during the hearing, so what had prompted this response from Mr Adaway remained unclear.

57. Mr Adaway asked Mr Ali about the allegation that he had threatened to get GR sacked. Mr Ali denied this, and said that CJ was not there. He said this had followed an occasion when GR and MS had breached health and safety rules by taking on more trollies than they should have. His representative said that others had been present at this time but had not been asked for statements by the respondent. Mr Adaway said that Mr Ali had not addressed the allegations during his investigation meeting, and his representative said that he did not know during the investigation what the allegations were. The representative asked to be told what the allegations were. Mr Adaway said that the allegations were in the letter suspending Mr Ali.

58. Mr Ali said that he had refused to work with CJ for health and safety reasons. He said that MC and CJ had been bullying and harassing him, hence his request to move to a different terminal. Mr Ali denied that there was any conversation about outsourcing in front of the new starters. The meeting notes suggest that the disciplinary hearing itself was somewhat disorganised, with regular interruptions from the claimant's trade union representative and it being quite difficult to discern at which points Mr Ali is asked to address the allegations against him. The claimant's trade union representative is noted as saying, "*the way the case been built, it needs to have more clarity*". Mr Adaway then adjourns, and on reconvening the meeting delivers his decision:

> *"Discussed colleagues re: bullying and harassment each incident serious, collectively very serious. I have reasonable belief in statements are accurate, allegations are substantial, you are able to appeal."*

59. Mr Adaway confirmed the outcome of the hearing to Mr Ali in a letter dated 30 May 2019, giving his rationale as:

> *"Throughout the entire investigation there is a multitude of statements that made it very clear that your actions had a direct impact on how they felt working alongside you. I believe that your intent when having conversations around outsourcing was to use that topic to bully and intimidate those who had joined the company recently to make them feel isolated and unsure of their position within the company. I have reason to believe that these incidents did occur as there are consistent statements from multiple colleagues expressing how they felt. I believe there is evidence of your behaviour having an impact on your colleagues and the operation which I deem as bullying, harassment and intimidation. I find that the trust and confidence in you has an employee to be lost and find no reason for the allegations against you to be false."*

60. In his witness statement, Mr Adaway describes having relied only on the witness statements of CJ, GR, BS and MC in respect of the allegations against Mr Ali, as these were the only ones who had raised specific complaints about Mr Ali. He says:

> *"I specifically asked* [Mr Ali] *to give me his responses to the allegations. If* [he] *had said, for example, that the only reason that the statements had been made was because he himself was being targeted for bullying then I would have then investigated that further, and it may well have impacted my decision. However, he did not. I recall that* [his] *answers to my questions as to whether he said the statements or not, was that he was in the area but he did not make the comments. Given the other evidence, I did not consider that this simple denial was on its own creditable."*

61. Mr Adaway concludes his witness statement by saying:

> *"In reaching my conclusions in relation to both* [claimants]*, I considered that it was likely that they had made these comments to the new starters because they wanted to control the way of working within the terminal, and they wanted to the work to be done in a certain way which it was not their prerogative to do."*

The appeals

62. Both claimants appealed against their dismissal. As with the original disciplinary hearings, for good reasons there were some delays in them being able to attend their appeal hearings. In the case of Mr Gavli his appeal hearing took place on 28 April 2019. For Mr Ali it took place on 15 August 2019. In both cases the appeals were heard by Elizabeth Hegarty, and the claimants had trade union representatives attending the hearings alongside them.

Mr Gavli's appeal

63. Mr Gavli's appeal was set out on the following basis:

> *"- I feel the decision was very harsh and based on hearsay.*
>
> *- I feel the statements made against me were from conversations that was not fully heard.*
>
> *- I feel the statements that could have exonerate me were not taken."*

64. For the purposes of his appeal, Mr Gavli submitted statements from NN, MSa, MK, Mr Ali, AG and DR. A number of those are in the form of basic character references which I accept had no special relevance to the charges against him. Others were more specific.

65. NN said that he regularly worked as a pair with Mr Gavli. He says that he was a witness to the discussion Mr Gavli had with a colleague about union membership and that "*I did not see that Mr Gavli was rude, towards the new starters*".

66. MSa said that outsourcing was commonly a matter of discussion and concern within the trolley team, and that the new starters were themselves breaking health and safety rules and harassing Mr Gavli and other longer-serving colleagues.

67. Mr Ali's statement provided in support of Mr Gavli's appeal was the fullest account Mr Ali had yet given of the relevant events. He says that Mr Gavli asked a colleague (not GR) whether he wanted to join the union, whereupon GR intervened and said (quoting directly from Mr Ali's statement): "*I don't give a f*** about union … or joining them because I don't care about losing this job …*". Mr Ali said that GR continued to swear, and he (Mr Ali) said to him (GR):

> *"brother you can believe whatever you like but please don't be using this language as it's against our dignity at work and if you keep this tone then I would no choice but to have to take it up with your manager and you may have disciplinary action which can lead to you being sacked."*

He continues:

> *"I believe this is the reason I have also been suspended as they thought I would report this to the managers so they made their own story up … with the help of CJ and other colleagues to try and trap me and* [Mr Gavli]*.*

This is the first time that Mr Ali had given this account of events.

68. He says that Mr Gavli did not speak to the new starters on that occasion other than to invite them to join the union.

69. AG said that he had not noticed any bullying by Mr Gavli.

70. DR said that rumours about outsourcing had been common ever since he started work.

71. At the appeal hearing Mr Gavli reiterates the points made in his written appeal application. He produced the witness statements referred to above. Ms Hegarty asked him why these had not been produced by him prior to the disciplinary hearing. He says "*I was not asked during my meetings. I did not know I would lose my job*". His representative says that at the time of the investigation meeting he did not know what he was being investigated for. Ms Hegarty said, "*I will take the statements but am not considering the content at this time.*" Ms Hegarty did not make a decision on the appeal during the meeting, but gave her decision in writing on 21 May 2019.

72. In her written decision, Ms Hegarty said that the claimant could have given the names of his new witnesses during the investigation meeting – or at least by the time of his disciplinary hearing at which point he had the full investigation papers. She says:

> *"I do not believe you provided a satisfactory explanation as to why you had not provided mitigation to your case earlier in the process, the additional statements provided have added little weight to my deliberation of your appeal."*

73. She continues:

> *"On review of the Investigation Pack, it is my view that the variety of witnesses and consistency of the statements made support the reasonable belief of the disciplinary hearing manager that you made comments that led to the concern and worry of new starter colleagues is a reasonable conclusion without Heathrow's disciplinary policy and process."*

74. She says:

> *"Having considered all the information available to me, listened carefully to yourself and the points made by your TU rep my decision is to uphold the original decision of your dismissal."*

Mr Ali's appeal

75. Mr Ali gave the following grounds of appeal:

> *"- I believe the decision of my dismissal was unfair and impartial.*
>
> *- All the witnesses were not interviewed, and only specific ones have been interviewed.*
>
> *- The witnesses that have been interviewed were not all present at the time of the incident or present on the day.*
>
> *…*
>
> *- I would like to have a different policy case advisor because my hearing was not fairly done and witnesses that should have been interviewed were noted but not followed up. The policy case advisor did not advise the hearing manager to follow the correct process."*

76. In support of his appeal, like Mr Gavli, he submitted further witness statements.

77. One of those witness statements was from Mr Gavli, who said that Mr Ali did not say that he could get GR sacked, and that he felt that some of the new starters were trying to provoke Mr Ali.

78. MSa said:

> "[Mr Ali]*, MS and GR … were discussing something to do with joining the union.* [Mr Ali] *was very calm and professional at the situation but new starters were aggressive and restless …* [Mr Ali] *did not say anything to bully or intimidate or harass them. He did not say anything to do with getting them sacked.*"

79. NN said that during the discussion on union membership:

> "*I could feel both* [MS and GR] *were very aggressive and volatile towards* [Mr Ali] *as they were both picking on* [Mr Ali] *but I witnessed* [Mr Ali] *being calm and trying to talk in a professional manner … [Mr Ali] did not say or do anything to provoke, bully, harass or intimidate anyone at anytime. I can also confirm he did not say anything to do with getting the new starters or anyone sacked. I was never approached by anyone from* [the respondent] *regarding this case to provide a witness statement".*

80. AG says that Mr Ali did not say that he would get GR sacked.

81. At the appeal hearing Mr Ali said that he had not been given the chance to present his side of the story during the investigation. His union representative said that Mr Ali had not seen the allegations against him during the investigation. He said that of the eight statements prepared by the responding, only some were from people who had been in the room. Four others had been mentioned as being present in the room but had not been asked by the respondent for statements.

82. In response to Mr Ali producing his own witness statements from these individuals, Ms Hegarty said, "*I will take copies, not appropriate, not as process. If something completely brings another side I will read through. Otherwise I won't consider. This is not another hearing."*

83. Mr Ali said there was only one incident of potential bullying (presumably his confrontation with GR) and "*other incidents I'm not bullying anyone*".

84. Following the meeting Ms Hegarty checked with Neena Haria whether she had spoken to NN, MSa or AG as part of her investigation. She replied that "*none of the 3 … mentioned were invited for a witness meeting or statement*", and when asked whether the names had ever been raised during the investigation, she said she thought not as she did not recognise the names. As referred to above, in her interview with MS MS had mentioned AG as being present, along with "*at least 3 more*" people.

85. On 11 September 2019 Ms Hegarty sent a letter to Mr Ali giving the outcome of his appeal. She pointed out that he had had two investigatory interviews, and received the full investigation pack before the disciplinary hearing. She says that she "*accepted a copy of four witness statements* [produced by Mr Ali] *to aid further investigation*". She said that she had checked with Mr Adaway who said that he had decided not to interview these individuals because no-one else had identified them as being present at the relevant meeting, they were notified too late, one of them was already under investigation, and the allegations related to more than just one incident. She concludes:

> "*Whilst I have looked into the points you raised during the appeal in detail I must remind you the purpose of an appeal is fundamentally to focus on key areas such as the process/procedure/policies not being followed, new information coming to light with includes mitigation, the penalty was not appropriate, the sanction is inconsistent with what has previously been issued and unfairness or bias by the original decision maker. I do not believe your case satisfied any of these points … it is my decision to uphold* [the] *decision to terminate your contract of employment.*"

Facts in relation to remedy - introduction

86. As is sometimes the case, it was apparent that the parties had put much more work into addressing questions of liability rather than remedy. The claimants submitted revised schedules of loss during the hearing but apart from the question of mitigation did not address the figures in those schedules in their evidence. The respondent produced counter-schedules of loss, which Miss Urquhart spoke to in her closing submissions, but offered little if any evidence in relation to remedy other than Mr Adaway commenting on Mr Gavli's application for reinstatement.

87. I will discuss the facts in relation to each individual claimant below, but note for now that while the claimants found themselves in very similar positions so far as liability arguments were concerned, their personal circumstances in relation to remedy are very different. Mr Gavli is in his 40s and described himself as the sole breadwinner for a family of five. Mr Ali is in his 20s and, as will appear below, was able to draw on family support to fund a retraining program.

88. Miss Urquhart raised arguments in relation to *Polkey* and deductions for contributory fault, which I will address in my conclusions.

Mr Gavli

89. Mr Gavli had three years continuous service and was aged 41 at the date he was dismissed. This means that the multiplier for any basic award for him is 3.

90. There was no agreement between the parties on Mr Gavli's net or gross weekly pay. According to his revised schedule of loss the figures were £432.47 and £505.47, apparently calculated by dividing figures taken from his last three payslips by 12.

91. The respondent's counter schedule of loss showed figures of £339.55 and £470.75. In her submissions, Miss Urquhart said this had been derived from his (and Mr Ali's) pay being £24,479 a year, comprising £21,944 salary plus shift allowance of £2,535.

92. No witness gave evidence in relation to Mr Gavli's earnings, but the bundle contained pay slips for him. Mr Gavli has taken the last three of these for his weekly pay calculations, but this is distorted by his final payslip not being for a complete month and containing a large payment in respect of accrued leave. The best representation of his pay is in the month of December 2018, which contains no exceptional items. While recognising that this is not strictly how the statutory calculation is done, the best calculation I can do to get to his weekly gross and net pay is:

£1,948.48 x 12/52 = £449.65

and

£1,612.56 x 12/52 = £372.13

93. Mr Gavli claims reinstatement as a remedy for unfair dismissal. I will discuss this point in any conclusions on remedy that may arise.

94. Mr Gavli claimed universal credit in the period following his dismissal, so there will need to be recoupment of part of any compensatory award he may be awarded.

95. So far as his search for work since leaving the respondent was concerned, in his witness statement he simply says "*since my dismissal I have applied for many jobs, but these are not successful because when they ask why I left HAL I have no answer*". However, his revised schedule of loss shows him as having worked from 27 June 2019 onwards earning £165/week. He explained this in his oral evidence as being casual work in a coffee shop. A handful of emails in relation to job applications made by him are contained in the bundle. This comprises around eight applications from October 2018 to April 2020, some of which were made while still employed by the respondent. They are typically for hospitality positions, with Mr Gavli having said that he had previously worked as a restaurant supervisor. When asked why there were so few documents showing his job applications he said that in many cases the applications were made simply by registering on websites and did not result in any emails or other materials that he could present to the tribunal. As far as I can tell there is nothing in the tribunal bundle in relation to his work at the coffee shop. He said that he was continuing to apply for full time work.

96. Mr Gavli was dismissed at a time when the economy around Heathrow and in west London was buoyant and had not been affected by the Covid-19 pandemic. My assessment is that jobs were available, particularly in the hospitality industry where Mr Gavli had previous experience. I do not accept that he has been applying (unsuccessfully) for jobs to the extent he says he has. While most job applications these days will be made through registration on a website, those application will also typically result in emails or other documentary evidence. Some of the emails he produced to the tribunal in respect of job applications were emails that had resulted from registration on an employer's website. I do not accept that there would be no documentary evidence of other applications made through websites. I am also surprised that the claimant has apparently not disclosed any documents in relation to the casual work he has obtained.

97. There is no documentary evidence suggesting that the reason why he lost his job with the respondent was an obstacle to him obtaining work nor, if it was, why his present employers were apparently prepared to overlook it.

98. Subject to the question of reinstatement, on the question of any award of compensation my assessment is that with the economy of west London as it then was, the claimant could have obtained full time work at the same sort of level of pay he had been earning with the

respondent within around three months of losing his job with the respondent. That takes his period of loss to the end of May 2019.

99. Mr Gavli's schedule of loss included a claim for an annual bonus of £750. There was nothing to show the basis on which this was claimed. Mr Gavli said in oral evidence that it was routinely paid in March each year. Miss Urquhart pointed out that the contact described the bonus as discretionary. Although I was not specifically referred to it I note that in Mr Ali's papers there is a letter showing that he was paid a bonus of £678.39 (gross) at the end of March 2019.

100. Mr Gavli's schedule of loss also includes an uplift for failure to comply with the ACAS Code of Practice, What that alleged failure was is not obvious to me, is not set out in the claimant's claim and was not referred to in his evidence or in Mr Perhar's submissions.

101. There is a claim for loss of statutory rights at £500, which Miss Urquhart said should be £100.

102. Finally, Mr Gavli's scheduled of loss included an element for pension contributions against which was written "TBC", which I take to be "to be confirmed". He did not mention this at all in his evidence. It was never "confirmed", quantified or indeed mentioned at all, so I do not see how I can properly include it in his loss of earnings.

Mr Ali

103. Mr Ali had three years' continuous service and was aged 24 at the date he was dismissed. This means that the multiplier for any basic award for him is 2.5.

104. Mr Ali's revised schedule of loss sets out his gross weekly pay as £538.00 and his net weekly pay as £431.11, but there is no indication of how this has been calculated. Miss Urquhart contended that these figures should be £470.75 and £339.55, for the same reasons given for Mr Gavli. There were no payslips produced for Mr Ali's work with the respondent. I am at something of a loss in determining what his weekly pay was, as both sides have rival contentions but have not produced any evidence to back up their respective contentions.

105. In those circumstances I consider that the most reliable figures I can adopt are those calculated for Mr Gavli: £449.65 and £372.13. Both claimants did the same job and I have not seen any factor that may suggest that one got paid more than the other for the same job.

106. In his witness statement, the only thing that Mr Ali says in relation to remedy is:

> *"Since being dismissed I have tried to apply for many jobs. I have managed to get past initial application, but when I tell them I was*

dismissed from my previous role I believe I am rejected for roles because of this."

107. This is, at best, incomplete, and there were unexplained differences between his original and revised schedule of loss. His original schedule of loss shows earnings of £1,508 (net) for temporary security work in July 2019. This clearly happened, because there are pay slips for this in the bundle, but it does not appear in his revised schedule of loss.

108. His original schedule of loss said that he had enrolled on a two-year course in August 2019, and appears to suggest that he can do part-time work (120 hours a month) alongside this. This was explained during the hearing as being a course to train as a pilot, which he was funding with loans from his family. He said he had always wanted to do this, but had planned to remain in work with the respondent to save up money to fund the course. He also said in his oral evidence that he could combine this course with full time work. There is no mention of this course in his revised schedule of loss, and no documentation in the bundle showing what the course involves, where it is located and what demands it may make of Mr Ali.

109. Mr Ali is not seeking reinstatement.

110. The bundle appears to contain many job applications made by Mr Ali since leaving the respondent, but a closer reading of them shows that this is not the case. Most of the papers relate to a series of applications for security work in the period directly after his dismissal, which ultimately lead to the security work he did during July and August 2018. There are only three applications relating to the period after he started his training as a pilot.

111. I do not accept that Mr Ali has been continuing to properly seek work after starting his pilot's course, nor that the reason why he had not obtained other work is because of his dismissal by the respondent.

112. I have expressed my view as to the economy and job prospects in Heathrow and west London at the relevant time when discussing Mr Gavli's situation. Mr Ali is much younger so did not have the work experience that Mr Gavli did to draw upon in searching for work, but his qualifications, ambition and the resources available to him are demonstrated by his taking on his pilot's course. I consider that like Mr Gavli he could have found work at the same sort of level of earnings as his previous job within three months. He did not do so because his focus was on his course.

113. His revised schedule of loss includes a claim for the £750 bonus, which the letter in the tribunal bundle would indicate he had received. The issues in relation to the claim for pension contributions, and uplift for failure to follow the ACAS Code of Practice, and loss of statutory rights are the same as for Mr Gavli. His original (but not revised) schedule of loss says that he has claimed universal credit.

114. Mr Ali's original schedule of loss claimed a range of additional items which did not appear in the revised schedule of loss and which are either not within the tribunal's jurisdiction or for which there is no supporting evidence.

D. THE LAW

115. Neither party made any substantial submissions on the law or suggested that this case required consideration of anything other than standard unfair dismissal principles. I was only referred to one authority, as described below. I will also set out the basic law on unfair dismissal (liability only) by way of introduction to my conclusions. I will refer to the law on remedy when considering what (if any) remedy the claimants are entitled to.

116. Section 98 of the Employment Rights Act 1996 reads as follows:

> *"(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:*
>
> *…*
>
> *(b) relates to the conduct of the employee,*
>
> *…*
>
> *(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."*

117. Section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides:

> *"In any proceedings before an employment tribunal … any Code of Practice issued … by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question."*

118. In this case the relevant Code of Practice is the Code of Practice on Disciplinary and Grievance Procedures (2015).

119. In British Home Stores v Burchell [1978] IRLR 379 it was said that:

> *"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question … entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time … First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case …*
>
> *It is not relevant … that the tribunal would itself have shared that view in those circumstances."*

120. Subsequent changes to the law have meant that it is no longer for the employer to satisfy the tribunal of the second and third elements of the test (as to which the burden of proof is neutral).

121. The reference to it not being relevant that the tribunal would have shared the employer's view is one of many cautions that the tribunal must not adopt a "substitution mindset". The tribunal is assessing the respondent's decision to dismiss, not deciding whether it itself would have dismissed the claimants in those circumstances.

122. The dismissal is only unfair if the respondent's decision falls outside the range of responses which a reasonable employer could have adopted in these circumstances. This "range of reasonable responses" test applies equally to the scope of the investigation (see, for instance, Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588).

123. Miss Urquhart relied on X County Council v D UKEAT/0155/12 in respect of the significance of the additional witness statements produced by the claimants at their appeal hearings,

E. CONCLUSIONS ON LIABILITY

124. Both claimants' dismissals were unfair.

125. The unfairness has at its root a consistent lack of clarify from the respondent as to what exactly the claimants were said to have done wrong. By the conclusion of the hearing I was still not sure how far the allegations against the claimants stretched.

126. At the time of their investigatory hearings, all they had been told was the basic allegation of "*bullying, harassment and intimidation of new starters*". They were told that this was in breach of several policies, none of which had any relevance to bullying, harassment and intimidation. The policy that did deal with bullying and harassment was the Dignity at Work policy. This was occasionally referred to in the paperwork (including in Mr Adaway's dismissal letter) but Mr Adaway himself said that he had not taken that into account.

127. I understand the respondent may be reluctant to reveal the full statements at the investigation stage in cases of suspected bullying and harassment, but if they do not do this then they need to be sure to put the substance of the allegations to the claimants during the investigation hearings, and this was never done. I accept that in one hearing Ms Haria offered to give the gist of the allegations, but in fact this was never done. Faced simply with a general accusation of bullying and harassment against a group of people, it is not surprising that the claimants could not give any substantial response, and it was not fair that that was later held against them.

128. By the time of the disciplinary hearings, the claimants had been provided with the full investigation pack, including statements and the various interviews. What they did not know, however, was which elements of these statements made up the accusations against them. They were left with a general allegation of bullying and harassment and then pages of miscellaneous complaints made about them and others by colleagues. Which of those complaints were said to amount to bullying, harassment or intimidation? At the end of the hearing it was clear to me that the allegation that Mr Ali threatened to get GR (or maybe someone else) dismissed was an allegation of bullying, harassment or intimidation, but that did not apply against Mr Gavli. It appeared that the allegations that they had talked about "last in first out" (or the different terms used by Mr Adaway in his disciplinary materials) were also allegations of bullying, harassment or intimidation, but I was much less clear about the significance of other incidents such as the reference to "*pushing 1 trolley or 16*".

129. This failure to properly identify the allegations against the claimants led to a failure properly to investigate the allegations. This is hardly surprising. If the allegations are not clear it is difficult then to conduct a proper investigation. If there had been a proper focus on particular incidents said to amount to bullying, harassment or intimidation, then Mr

Adaway could have properly explored them before reaching his conclusion.

130. For instance, if it had been set out that the question of Mr Ali having threatened to get someone dismissed was an act of bullying, then Mr Adaway could have concentrated on what was said and why, for instance, one of the witnesses apparently considered what was said to be ambiguous.

131. If it had been set out that the discussions of "last in first out" were alleged to amount to bullying, harassment and intimidation then Mr Adaway could have explored whether this was a discussion in good faith that happened to upset particular members of staff or whether it was a malicious act by the claimants intended to undermine their colleagues. This appears to have been a central point. Where there are known to be plans to change the service, it is hardly surprising that employees will talk and speculate on what is to come. Those discussions may be entirely legitimate – albeit upsetting to some – particularly where, as in this case, they appear to involve the trade union representative. With a focus on this allegation, Mr Adaway could (and should) have explored whether this was a one-off (as some witnesses seemed to suggest) or constant (as others said). He could (and should) also have explored exactly what the claimants' roles in those discussions was. I am unclear what it was that led him to the conclusion that these discussions were acts of bullying, harassment or intimidation, rather than legitimate discussions about possible changes to the service. I can see how the respondent may take a dim view of such speculation, or regard it as unhelpful, but that does not make it bullying, harassment or intimidation.

132. On the remaining points, as set out above I am unclear to what extent these were said to be bullying, harassment or intimidation, or what conclusions Mr Adaway could properly have reached for them.

133. Mr Adaway seems to have been highly influenced in his thinking by the fact that a witness had described the events as "psychological bullying". I acknowledge that the perception of any individual will be important in such a situation, but those does not relieve the respondent of its obligation to investigate and form its own view of whether the claimants' behaviour amounted to bullying, harassment or intimidation.

134. I conclude that while Mr Adaway had a genuine belief that the claimants were guilty of misconduct, he did not hold that view on reasonable grounds and the respondents did not conduct as much investigation as was reasonable in the circumstances. This came about because the allegations against the claimants were never made specific, and in consequence there was no real focus on the detail of the allegations, and whether it actually amounted to bullying, harassment or intimidation. The position on this was not improved by the appeal to Ms Hegarty since she was no clearer as to the particular allegations and explored the allegations no more than Mr Adaway did.

135. For essentially the same reasons I find that dismissal was not within the range of reasonable responses open to the respondent in this situation. I do not see how the respondent could properly have concluded that the claimants' behaviour amounted to bullying, harassment and intimidation without further investigation. Dismissal was not within the range of reasonable responses open to Mr Adaway on the basis of the material before him.

F. REMEDY

The law

136. Under s112 and 113 of the Employment Rights Act 1996 on finding that a dismissal is unfair the tribunal can make an order for reinstatement or re-engagement. Mr Gavli seeks reinstatement (and I will address the law in relation to that when considering his situation) or, failing that, compensation. Mr Ali only seeks an award of compensation under s118. Compensation for unfair dismissal comprises a basic award calculated in accordance with s119, and a compensatory award under s123, being (s123(1)):

> *"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."*

Polkey and contributory fault

137. Miss Urquhart said that if there was to be an award of compensation for unfair dismissal, it should be reduced to nothing by either a *Polkey* deduction and/or a 100% deduction (across the basic and compensatory award) for contributory fault.

138. To make a *Polkey* deduction requires me to assess whether, if the employer had carried out a fair process, it would have affected when a claimant was dismissed, and what the percentage chance is that a fair process would still have resulted in the claimant's dismissal.

139. For the purposes of a deduction for contributory fault the relevant statutory provisions are s122(2) and s123(6) of the Employment Rights Act 1996, which are, respectively:

> *"Where the tribunal considers that any conduct of the complainant before the dismissal … was such that it would be just and equitable to reduce … the amount of the basic award to any extent, the tribunal shall reduce … that amount accordingly.*
>
> *"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable …"*

140. To consider a *Polkey* deduction and contributory fault both require me to assess what, if anything, the claimants did wrong. This is rather difficult in the circumstances of this case, where I have identified that the unfairness arose from a lack of clarity about what the claimants did wrong.

141. In discussing the fairness of the dismissals I identified three different elements of potential misconduct: a direct threat to have someone dismissed (which applies in relation to Mr Ali only), discussion about last-in first-out, and other conduct in relation to new starters.

142. On the evidence before me I find myself unable to make any *Polkey* deduction nor any deduction for contributory fault. In relation to the other conduct I am unable to see what there was about this that would amount to misconduct. In relation to last-in first-out, to identify this as misconduct requires a consideration of the claimants' motives in their discussion. That seems never to have been explored by the respondent and so did not form part of the respondent's evidence before me. As regards the most serious allegation – that Mr Ali threatened to have someone sacked – I consider that there would need to be greater exploration of how that arose (and of whether it may have been misinterpreted) as suggested by one witness before I could conclude that it was misconduct. Accordingly, I will make no deduction for *Polkey* or contributory fault.

Mr Gavli

143. Mr Gavli is seeking reinstatement. This is governed by s116 of the Employment Rights Act 1996, which requires me to consider (amongst other things) (s116(1)(b) & (c)):

> *"- whether it is practicable for the employer to comply with an order for reinstatement, and*
>
> *- where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement."*

144. If I find that there should be no order for reinstatement then I must consider whether there should be an order for re-engagement, but the considerations that apply to that under s116(3) are almost identical to the ones set out above.

145. The question of reinstatement is dealt with briefly by Mr Adaway in his witness statement as follows:

> *"… although from a purely skills perspective* [Mr Gavli] *could return to his role, his relationship with his colleagues broke down due to his actions, and since he left the terminal the atmosphere amongst employees has significantly changed for the better …* [his] *behaviour in my mind means that he could not and should*

not return to the airport in any form as … the relationship of trust and confidence … has irretrievably broken down."

146. Given my findings in relation to contributory fault, the only matter that could count against reinstatement (or re-engagement) was whether it was practicable for the respondent to comply with any order for reinstatement (or re-engagement).

147. I accept Mr Adaway's evidence (and indeed it was not challenged) that for whatever reason Mr Gavli's relationship with the new starters – his colleagues at work – had broken down, and I consider from what I have seen that it had broken down irretrievably. This makes it impracticable for him to resume his former job by way of reinstatement. What remains is a consideration of whether re-engagement should be ordered. There was little or no discussion before me in argument or in evidence what form that re-engagement could take, if reinstatement was not practicable. I was not clear, for instance, whether the team that the Mr Gavli worked within was limited to one terminal, with separate teams at other terminals. It appears from various materials (including Mr Ali's application for a transfer to a different team) that that probably was the case – the work that Mr Gavli did was limited to one terminal. That raises the question of whether he could be re-engaged to work at a different terminal. I was given no information as to the practicalities of that by either side, but it appears to me that if there were different trolley teams at different terminals they were closely connected, and I also taken into account the respondent's evidence that the members of the trolley teams worked with minimal supervision from management. In those circumstances, bearing in mind the breakdown in relationship that there had been within the team that Mr Gavli was part of, and the respondent's undisputed genuine belief that he was guilty of misconduct, I do not consider that re-engagement is practical either.

148. That means that Mr Gavli is entitled to compensation only. I have set out in my findings of fact the necessary findings in relation to his pay and mitigation, and earlier I have set out that there should be no deductions for *Polkey* or contributory fault. The calculations which result are set out below. In Mr Gavli's case I have included an element to reflect the lost bonus. While I accept that it was discretionary, it is clear that it was actually paid at the relevant time, because Mr Ali received it. Mr Gavli would have received it too during his loss period if he had remained employed, so it seems to me to is just and equitable to include it in his compensatory award. I only have the gross figure from Mr Ali's papers but have deducted a notional figure for tax arriving at a net figure of £500. I have adopted a conventional figure of £400 in both cases for loss of statutory rights.

<u>Basic award</u>

£449.65 x 3 = £1,348.95

<u>Compensatory award</u>

21 February 2019 to 21 May 2019 gives 13 weeks of loss.

£372.13 x 13 =	£4,837.69	
Add bonus:	£500.00	
Add loss of statutory rights:	£400.00	
Total compensatory award:		£5,737.69
Total award:		**£7,086.64**

149. This will be subject to recoupment as set out in the judgment.

Mr Ali

150. For Mr Ali it is simply a question of calculating compensation based on the facts I have found, as follows:

Basic award

£449.65 x 2.5 =	£1,124.13

Compensatory award

16 May 2019 to 16 August 2019 is 13 weeks

£372.13 x 13 =	£4,837.69	
Less actual earnings:	(£1,508.00)	
Add loss of statutory rights:	£400.00	
Total compensatory award:		£3,729.69
Total award		**£4,853.82**

151. Mr Ali's original schedule of loss says that he claimed universal credit, but his updated schedule of loss did not include this. I do not see why he would mention it in his original schedule of loss if he had not claimed it, so I have set out the judgment on the basis that his award will be subject to recoupment.

Employment Judge Anstis
8 July 2020

Sent to the parties on: .21/8/20.

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For the Tribunals Office

Public access to employment tribunal decisions:
All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.