THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr D L Short	**AND**	**(1) The Trustees of Berwick Animal Rescue Kennels** **(2) G Reavley** **(3) L Pearson** **(4) L Scott**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On:** **6 & 28 March 2017**

Before: **Employment Judge Johnson**

Appearances

For the Claimant: **Mr C Fairfield (Lay Representative)**
For the Respondents: **Mr A Pentecost (Solicitor)**

JUDGMENT

1 The claimant's complaint of unfair dismissal is well-founded and succeeds.

2 The claimant's claim of entitlement to a redundancy payment is dismissed upon withdrawal by the claimant.

3 The respondent is ordered to pay to the claimant compensation for unfair dismissal in the sum of £806.15.

4 The respondent is ordered to pay to the claimant the further sum of £1,200 by way of reimbursement of the Employment Tribunal fees.

REASONS

1 The claimant was represented by his lay representative Mr Fairfield, who called the claimant to give evidence. No other witnesses were called by or on behalf of the claimant. The respondent was represented by its solicitor Mr Pentecost who called to give evidence to following persons:-

1.1 Laurence Pearson (Trustee).

1.2 Ms Kirsty Leigh Riley (Kennel Assistant).

1.3 Ms Margaret Scott (Kennel Assistant).

1.4 Ms Janice Ross (Kennel Manager).

2 There was an agreed bundle of documents marked R1, comprising an A4 ring binder containing 132 pages of documents. The claimant and the four witnesses for the respondent had all prepared formal, typed and signed witness statements. Those statements were taken "as read" by the Tribunal, subject to questions in cross-examination and from the Employment Tribunal Judge.

3 By claim form presented on 2 November 2016, the claimant brought complaints of unfair dismissal and entitlement to a redundancy payment. The respondent defended the claims. In essence they arise out of the claimant's dismissal on 20 October 2016, for reasons which the respondent says related to the claimant's conduct. The respondent had initially denied dismissing the claimant, insisting that the claimant had resigned by his own conduct, namely refusing to attend for work when instructed to do so. By the time the full liability hearing commenced on 6 March, the respondent had conceded in writing to the Employment Tribunal and to the claimant, that it had in fact dismissed the claimant. At the beginning of the hearing on 6 March, the claimant formally withdrew his claim for a redundancy payment, acknowledging that the reason for his dismissal had nothing to do with redundancy.

4 The respondent is a charitable trust, whose management in vested in a number of Trustees. The Trustees at the time of the hearing are listed as being Ms Susan Stevens, Mr Laurence Pearson, Mr Thom Stebbing, Mr Graeme Reavley, Ms Linda Scott and Ms Joyce Landells. Mr David Knight had resigned as a Trustee on 3 October 2016.

5 The issues identified as those the Employment Tribunal was required to decide were as follows:-

5.1 What was the respondent's reason for dismissing the claimant?

5.2 Was that reason a potentially fair reason under section 98 of the Employment Rights Act 1996?

5.3 If misconduct, did the respondent hold a genuine belief that the claimant had committed the alleged acts of misconduct; were there reasonable

grounds for that belief; had the respondent carried out a reasonable investigation into the allegations?

5.4 Did the respondent follow a fair procedure, either in accordance with its contractual policies or in accordance with the ACAS Code of Practice, before dismissing the claimant?

5.5 Was the respondent's decision to dismiss the claimant one which fell within the range of reasonable responses open to a reasonable employer in all the circumstances?

5.6 If the dismissal was unfair, what, if any, compensation should be awarded to the claimant?

5.7 Should there be any reduction in any compensation to reflect the possibility that the claimant may have been dismissed in any event, had a fair procedure been followed?

5.8 Should there be any deduction for any compensation payable to reflect the extent to which, if any, the claimant had contributed towards his dismissal by his own conduct?

6 Having heard the evidence of the claimant and the witnesses for the respondent, having examined the documents to which it was referred and having carefully considered the closing submissions of Mr Fairfield and Mr Pentecost, the Tribunal made the following findings of fact on a balance of probability:-

6.1 The respondent is a small registered charity based in Berwick-upon-Tweed, which provides temporary refuge for unwanted and stray domestic animals. It operates from Windmill Way East at Berwick-upon-Tweed and covers an area to the north and south of the Scottish Border. The centre is staffed by nine part time members of staff, who are supervised by a manager. A number of volunteers also assist at the centre. Management of the charity is vested in six Trustees, none of whom are employees of the respondent.

6.2 The claimant's employment with the respondent began in 2008, when he was employed as a kennel assistant. A copy of his terms and conditions of employment appears at pages 97-102 in the bundle. At page 103-108 is a copy of the respondent's disciplinary rules and procedures. At page 98 the section headed "Hours of Work", it states:-

> "You will be required to work a shift system between the hours 8:00am and 8:00pm, Monday to Sunday, including Bank Holidays. You will be required to work 66 hours in a four week period."

6.3 The claimant's remuneration was based upon the statutory minimum wage. At page 100 of the document, the claimant's signature appears in two places. Above the second signature it states:-

> "I hereby warrant and confirm that I am not prevented by previous employment terms and conditions or in any other way from entering into employment with the charity or performing any of the duties of employment referred to above. I accept the terms of this agreement."

The claimant's signature is dated 4 March 2009.

6.4 From the date when he commenced his employment with the respondent until the date of his dismissal, the claimant always worked an afternoon shift. His hours were usually from 4:00pm to 8:00pm, although on Saturdays or Sundays he worked from 2:00pm to 8:00pm or 3:00pm to 8:00pm. The claimant never worked a morning shift throughout his employment with the respondent. The claimant nevertheless confirmed under oath that he was aware of the provision in his contract whereby he could be required to work any shift pattern between the hours of 8:00am and 8:00pm. There was never any written agreement between the claimant and the respondent to the effect that he would only be required to work an afternoon shift and would never be required to work a morning shift. There was never any oral agreement between the claimant and the respondent that he would only work an afternoon shift and would never be required to work a morning shift. The claimant's employment with the respondent was never conditional upon him only working the afternoon shift.

6.5 In 2016 a number of complaints were made to management by the claimant's colleagues, about his conduct and his behaviour. Those allegations related to the claimant failing to follow agreed procedures and in particular those procedures which appear at page 118-120 in the bundle. Those relate to a specific timetable for the performing of the various tasks in the kennels between the hours of 1.00pm and 8:00pm. It was alleged that the claimant was failing to follow the timetable and in particular that he was walking a number of dogs earlier than was required and that he was leaving work before 8:00pm. It was further alleged that the claimant adopted an unpleasant and domineering attitude and that, when challenged, he became aggressive and intimidating towards his colleagues.

6.6 The respondent was obliged to take those complaints seriously and commenced an investigation into the claimant's behaviour.

6.7 The claimant was invited to attend a meeting on 22 July 2016 with the kennel's Manager Janice Ross and Mr David Knight, one of the Trustees. The respondent's intention was to discuss with the claimant his working relationship with his colleagues, his workload and his timekeeping. That meeting was cancelled at short notice because Mr Knight was unable to attend. The claimant had not at this stage been told exactly what the meeting was about. The claimant began to question his colleagues about the purpose for the meeting, but none could tell him what it was about as none actually knew the purpose of the meeting. The claimant asked

Janice Ross "What's this meeting about?" and was told that it was just to be an informal discussion between himself, Ms Ross and Mr Knight about some issues which needed to be addressed. Later that evening, Ms Ross was in a restaurant having a meal with her husband to celebrate her wedding anniversary, when she received a telephone call on her mobile phone from the claimant. The call was timed at 18:19 and lasted 2 minutes 23 seconds. Ms Ross' evidence, which was accepted by the Tribunal, was that the claimant was speaking in a very loud voice, saying:-

> "You've organised a meeting behind my back. I demand to know what it is about. It says in the diary it's just you and me and David Knight. I demand to know as I'm entitled to legal representation."

Ms Ross attempted to explain that it remained an informal meeting and that there was no need for him to have any legal representation, as it was simply to discuss some issues that were causing concern and how those problems could be sorted out. The claimant demanded, "What issues – I demand to know what issues." Ms Ross attempted to explain that she was in a restaurant and was unable to have a detailed discussion, but that as she had previously indicated, the meeting was to discuss some issues that were causing concern but which could be resolved. The claimant's reply was, "My attitude?, What issues? I demand to know. You just can't spring a meeting on me. I want to know what issues. Your supposed to be the Manager and you don't know anything, I'm going to ring David and Graeme on their mobiles."

6.8 Later that evening, Ms Ross received a telephone call from Margaret Scott, one of the Kennel Assistants. Ms Scott reported that she had been upset by the contents of a discussion she had had with the claimant some three or four weeks earlier, when the claimant had been complaining about "how things are changing in here" and how he did not know who it was who was "causing trouble." Ms Scott asked the claimant outright if he thought that it was she who was causing the trouble and although the claimant had insisted that he did not think so, Ms Scott had formed the view that the claimant held her responsible. Ms Scott asked Ms Ross if her shifts could be changed, so that she no longer would be working on the same shift as the claimant. On Friday, 22 July, Ms Scott stated that she had arrived for work at 6:00pm when the claimant was already out walking a dog. When the claimant returned, he asked Ms Scott if she knew what "this meeting" was about. Ms Scott replied that she did not know because she had not been told, to which the claimant replied, "I'm going to phone her when I get back." Ms Scott described the claimant as "speaking angrily". Ms Scott's evidence, which was accepted by the Tribunal, was that the claimant said, "I'm going to find out what this is all about." Ms Scott described the claimant as being "in such a temper, talking loudly and quickly and angrily. He was almost spitting." Ms Scott then heard the claimant telephone Ms Ross. Ms Scott's evidence to the Tribunal was that, "I could hear Douglas shouting and ranting to Jan over the telephone, even though I was in the kitchen and he was in the office. He came out of the office in a blind rage, charged into the kennels,

grabbed Chilli and stormed off out of the kennels." Ms Scott then began to walk another of the dogs and when she met the claimant en route informed him, "Douglas I cannot work like this." The claimant's response was, "It's you that's been doing this shit- stirring isn't it? Yes, you've been doing all this shit -stirring." Ms Scott became distressed at this, that was why she telephoned later that evening and spoke to Ms Ross.

6.9 Ms Ross contacted a number of Trustees and provided them with her account of the recent events, together with that of Ms Scott. The Trustees decided that an investigatory meeting should be held with the claimant and that the meeting would take place with Mr Graeme Reavley and Mr Laurence Pearson, two of the Trustees. The claimant attended for work on 27 July, where he was met by Mr Reavley and Mr Pearson. The claimant was informed of the complaints which had been made by Ms Ross and Ms Scott. The claimant insisted that all he had wanted to know was why he had been asked to go to a meeting and what that meeting was about. The claimant accused the respondent of using "underhand tactics", because the meeting had to be rescheduled and he had not been told what it was about. The claimant accused Ms Scott of lying and denied accusing her of "shit-stirring". It was decided that the claimant should be suspended on full pay and that he would be invited to a formal disciplinary hearing.

6.10 By letter dated 31 July (page 3) the claimant was invited to a disciplinary hearing on Wednesday, 3 August. He was told that the meeting would be conducted by Mr David Knight (Trustee). The letter states:-

> "The meeting will consider the allegations of your inappropriate conduct on Friday, 22 July 2016, full details of which you were made aware of at the investigative meeting on Wednesday, 27 July 2016 with Graeme Reavley and I (L J Pearson). Those allegations are being treated as gross misconduct and the possible outcome of the meeting could be your dismissal. You are entitled to bring to the meeting either a work colleague or an accredited trade union official. They will be given the opportunity to address the meeting and respond on your behalf if you so wish. Mrs Linda Scott who is also a Trustee of BARK will take minutes of the meeting, but will not take part in the proceedings."

6.11 By letter dated 2 August (page 4) the claimant replied stating:-

> "I have no idea why I have been asked to attend a disciplinary hearing. I cannot attend a disciplinary hearing until you send me written details of my alleged misconduct. At the meeting on 27 July I asked for a copy of the notes that were taken, could you please send me these and also any other information that would help me to be properly prepared for the meeting. I really miss not coming to work and I hope we can get this sorted out as soon as possible."

6.12 By letter dated 6 August, Mr Pearson wrote to the claimant stating that the disciplinary hearing would now take place on Thursday, 11 August 2016. The letter repeated the allegations contained in the earlier letter, but this time enclosed a copy of the notes of the meeting on 27 July, a copy of Margaret Scott's note of the events of 22 July and a copy of Jan Ross' note of events of 22 July. Those notes appear at pages 6 and 7 in the bundle.

6.13 Notes of the disciplinary hearing of 11 August appear at pages 8 and 9 in the bundle. The claimant was accompanied by Mr Fairfield, one of the respondent's volunteer workers. The allegations were put to the claimant. The claimant denied the allegations and gave his version of events. It was put to the claimant that only one employee wanted to work alone with him in the evening, because of his threatening behaviour. At the end of the meeting, the claimant was told that his suspension on full pay would continue until a decision had been made.

6.14 On 13 August and whilst the claimant remained suspended, two 15 year old volunteers were walking dogs on behalf of the respondent. The claimant began taking photographs of those volunteers and the dogs. Two Kennel Assistants provided statements to the respondent alleging that the claimant had refused to stop taking photographs of the two 15 year old volunteers and their dogs.

6.15 The claimant was told by letter dated 31 August that he was required to attend a further disciplinary hearing on Friday, 2 September. The letter states:-

> "The meeting will be with Graeme Reavley and myself (L J Pearson) and will endeavour to resolve the disciplinary matter which has been the subject of previous meetings."

6.16 Minutes of the meeting of 2 September appear at pages 25 and 27 in the bundle. The meeting began at 4:00pm and ended at 4:45pm. The initial allegations were again put to the claimant and were denied by him. The minutes record Mr Pearson asking five specific questions of the claimant. He was asked if he was allowed to come back to work, then would he be prepared to do so on the same terms and conditions. The claimant replied that he thought he could return, but believed that it would be difficult, especially as he had recently been informed that only one other member of staff was prepared to work with him. The claimant was then asked if he agreed that in order to do his work, he would have to build bridges with the other employees and volunteers, to which the claimant replied that he would do his job to the usual high standard, but would doubt if he could build bridges. The claimant challenged that the allegations against him were being categorised as "gross misconduct" and Mr Pearson explained that the alleged incidents were potentially gross misconduct. Mr Pearson went on to suggest that compromises needed to be made by both parties and that if possible, they should "move forward, build bridges and put this matter behind them." The claimant maintained his denial of any

wrongdoing. At the end of the meeting, Mr Pearson explained that the matter would have to be discussed by a meeting of the Trustees as soon as possible. The claimant was again asked by Mr Pearson if he would want to return to work and the claimant is noted to have replied that he would need to consider that, but believed that "all respect had gone."

6.17 By letter dated 9 September (page 32) Mr Reavley informed the claimant of the outcome of the disciplinary hearing. The letter states:-

> "I am writing regarding our recent hearing, a summary of which is enclosed for your records. Having finished my investigation of this matter, I am writing to confirm that I am issuing you with a formal written warning concerning your conduct over the incidents of 22 July 2016 and 13 August 2016. I expect to see an improvement in your conduct and performance and shall be reviewing this with you at weekly intervals. In the meantime I confirm that:-
>
> 1 You will return to work on 19 September 2016.
>
> 2 You will be expected to attend anger management training, organised and paid for by BARK.
>
> 3 As BARK has a duty of care to all its employees, there will be changes to your shift pattern and these will involve more morning shifts but will be within your contractual hours of between 8:00am and 8:00pm, Monday to Sunday including Bank Holidays.
>
> If there is no improvement in your performance or should a further breach of discipline occur, you may be subject to further disciplinary action in accordance with BARK's disciplinary procedures. This warning will apply for a period of 12 months; a copy of this letter will be retained on your personal file. If you do not agree with this decision or disagree with the enclosed interview summary, you have the right to appeal and should inform me in writing within 5 days of receiving this letter. If I do not hear from you within this time I will assume that you accept the interview summary as an accurate record together with my decision. Please sign one copy of this letter and return it to me immediately."

6.18 By letter dated 15 September 2016, the claimant formally appealed against the imposition of that disciplinary sanction. The letter appears at pages 34-36 in the bundle. The penultimate paragraph on the last page states as follows:-

> "You state in your letter that my working hours will be changed to include morning shifts. This is not acceptable to me. I would not have applied for the job 10 years ago if you had been looking for someone to work in the mornings. Jan Ross will substantiate the above statements."

The claimant had pointed out earlier in his letter that when he applied for the job, he was interviewed by Ms Ross and had explained "that evening and weekend work would suit me very well, since it would not clash with my window-cleaning business. I've worked the same hours for 10 years, namely (afternoon shifts)."

6.19 The appeal hearing was conducted by Ms Scott on 4 October. Minutes of the meeting appear at pages 44-51 in the bundle. Ms Scott made a note of her decision at pages 52-53. Ms Scott concluded that the evidence of the other employees was to be preferred to that of the claimant, that the original finding of the disciplinary hearing should be upheld and that the claimant's appeal should be dismissed. The claimant was informed of that by letter dated 5 October (page 54). The end of the letter states:-

> "We confirm your return to work on Tuesday, 11 October. Week 2 shifts are:-
>
> - Tuesday 8-12
> - Thursday 8-12
> - Saturday 8-12
> - Sunday 8-12".

6.20 By letter dated 7 October (page 55) the claimant replied as follows:-

> "I enclose for easy reference a copy of the letter that I have received from Ms L Scott. I have informed BARK on many occasions that I do not work for BARK during weekday mornings. I have never worked on weekday mornings for BARK during the 10 years that I have worked for BARK. Please be advised therefore that I will not be reporting for work on Tuesday, 11 October 2016 at 8:00am. I am writing under separate cover to give you my comments on the handling of the hearing of my appeal by Ms L Scott."

6.21 The claimant did not report for work as instructed. By letter dated 13 October (page 59) Mr Graeme Reavley wrote to the claimant in the following terms:-

> "Further to the recent correspondence with regard to disciplinary matters, the final written warning dated 9 September 2016, your appeal letter dated 15 September and the appeal hearing on 4 October, we note that you have failed to attend for work as arranged on 11 October 2016. By failing to attend your place of work you are in breach of your employment contract. We look forward to hearing from you as a matter of urgency. If we receive no response within 5 working days and if you continue to be absent from work, we will have no option but to assume that you have unilaterally terminated your contract of employment with BARK with immediate effect."

6.22 The claimant replied by letter dated 17 October, in the following terms:-

> "This letter is not to be read as my resignation from employment with BARK. I am not unilaterally terminating my contract of employment with BARK. The matter has now extended for almost three months. You seem to be determined to force me into working on weekday mornings with BARK in spite of the fact that you know that I cannot. I have not worked anything other than afternoon or evening shifts for the 10 years that I have worked for BARK. I have now been in contact with ACAS and I have explained the salient facts of this matter. I have informed them that I considered that BARK are treating me unfairly without justification. The advice that I received from ACAS is to the effect that you have created an hostile working environment which would make working there impossible. Under these circumstances I am advised to suggest the following resolution. BARK paying me compensation because of the loss of employment and for the stress caused. I suggest that BARK pay me one year's salary and my holiday pay as compensation. I repeat that this letter is not to be read as my resignation from BARK and I look forward to an early reply."

6.23 By letter dated 20 October, the respondent replied, stating:-

> "I refer to your letter of 17 October 2016 the contents of which are not accepted as a true reflection of the situation. You were asked to return to work in the first instance on 19 September. but because of your appeal this was deferred. Following the dismissal of your appeal, you were again asked to return to work on 11 October 2016 but failed to do so. We consider this to be an unauthorised absence and a further indication that you are not willing to return to work. We have consulted ACAS and explained the circumstances of your suspension and the current situation. They advised that if you did not return to work this was an unauthorised absence and a breach of your contract of employment. We are entitled therefore to consider that you have terminated your employment and we are entitled to make the appropriate payment in lieu of notice. We are not prepared to enter into any further correspondence with you on this matter."

Enclosed with that letter was a payslip and cheque in the sum of £1,198.60, representing the claimant's outstanding wages, holiday pay and payment in lieu of notice.

6.24 The claimant presented his complaint to the Employment Tribunal on 2 November 2016.

7 On the morning of the first day of this hearing, enquiry was made of the claimant, through Mr Fairfield, as to exactly what his allegation was concerning the terms of his contract of employment. That question was also put to the claimant by the

Employment Tribunal Judge, whilst the claimant was giving his evidence. The claimant readily accepted that the respondent was entitled under the terms of his contract to require him "to work a shift system between the hours of 8:00am to 8:00pm, Monday to Saturday, including Bank Holidays." The claimant accepted that it was not a breach of his contract of employment for the respondent to require him to work a morning shift instead of an afternoon shift. Both the claimant and Mr Fairfield accepted that by requiring the claimant to work a morning shift, the respondent was issuing him with a lawful and reasonable instruction. Both the claimant and Mr Fairfield accepted that by refusing to attend for work on a morning shift, the claimant was refusing to comply with a lawful and reasonable instruction. The claimant's case as he put it, was simply that it was "morally wrong" for the respondent to require him to work on a morning, when they knew that he had a window-cleaning round, which he carried out on a morning. Both the claimant and Mr Fairfield maintained the position that the claimant had never resigned from his employment and that there had been no fundamental breach of his contract by the respondent, which could have led him to resign. The claimant nevertheless insisted that the respondents requiring him to work a morning shift was a malicious device designed to remove him from his post, because the respondent knew full well that the claimant would not be prepared to work a morning shift when it clashed with his window-cleaning round.

8 The Tribunal found that the respondent's witnesses were all aware that the claimant had a window-cleaning round on a morning. However, the Tribunal found that, by requiring the claimant to work a morning shift, the respondent was making a genuine attempt to separate the claimant from those other colleagues who had complained about him and a genuine attempt to find a way by which the claimant's employment with the respondent could and would continue. The Tribunal found that, had the claimant returned to work on a morning shift, then no further action would have been taken against him, so long as he complied with the requirement to attend an anger management course and improved his general standard of behaviour. The Tribunal rejected the claimant's allegations that the requirement for him to work a morning shift was a device designed to ensure that he was removed from his employment with the respondent.

The law

9 The statutory provisions engaged by the claim brought by the claimant are set out in the Employment Rights Act 1996, as follows:-

94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

98 General

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

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--

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

(3) In subsection (2)(a)--

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

122 Basic Award

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, that tribunal shall reduce or further reduce that amount accordingly.

123 Compensatory award

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

10 The ACAS "Code of Practice on Disciplinary and Grievance Procedures" for March 2015, provides guidelines for handling disciplinary issues in the workplace. An Employment Tribunal may take the Code into account when considering appropriate cases. In simple terms, the Code provides that, if it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. The notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences, to enable the employee to prepare to answer that case at a disciplinary meeting. That meeting should be held without unreasonable delay, whilst allowing the employee reasonable time to prepare their case. Workers have a statutory right to be accompanied by a companion at such a disciplinary meeting if it could result in a formal warning or the taking of some other disciplinary action. At the meeting, the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. Where disciplinary action has been taken, the employee should be given the right to appeal against that decision. Any such appeal should be dealt with impartially and where possible, by a manager who has not previously been involved in the case.

11 The respondent (page 103-108) has its own set of disciplinary rules and procedures. Examples of the type of conduct that would normally be addressed through implementation of the procedure include "serious or repeated failure to follow reasonable requests or instructions". The procedure contains provision for the employee to be suspended pending an investigation. It provides for a disciplinary hearing at which the employee has the right to be accompanied and at which the employee should be given a full explanation of the case against them and then be given every opportunity to challenge any allegations. The policy provides a right of appeal against any sanction.

21 Guidance as to the interpretation of the relevant statutory provisions on misconduct dismissals has been given to the Employment Tribunals by decisions made in the Employment Appeal Tribunal, Court of Appeal and Supreme Court. A useful summary was provided by Lord Justice Aikens in **Orr v Milton Keynes Council [2011] EWCA-Civ-62** in the Court of Appeal, when he said:-

> "Case law on the interpretation and application of section 98 of the Employment Rights Act 1996 is vast; indeed, it could be said that the section has become encrusted with case law. I think that the relevant principles established by the cases are as follows:-

(1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss the employee.

(2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee, to establish that the real reason for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.

(3) Once the employer has established before the employment tribunal that the real reason for dismissing the employee was one within what is now section 98(1)(b) ie that it was a valid reason, the employment tribunal has to decide whether the dismissal was fair or unfair. That requires first and foremost, the application of a statutory test set out in section 98(4)(a).

(5) In applying that subsection, the employment tribunal must decide on the reasonableness of the employer's decision to dismiss for the real reason. That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.

(6) If the answer to each of those questions is "yes", the employment tribunal must then decide on the reasonableness of the response of the employer.

(7) In doing the exercise set out at (5), the employment tribunal must consider by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a band or range of reasonable responses to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.

(8) The employment tribunal does not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The employment tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

(9) The employment tribunal must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice".

22 Much of the claimant's evidence in the present case and indeed his cross-examination of the respondent's witnesses, related to the original allegations against the claimant, which led to the sanction of the formal written warning on 9 September 2016. The claimant's internal appeal against the imposition of that sanction was dismissed. Mr Fairfield on behalf of the claimant has not argued that the imposition of that warning was "manifestly inappropriate". He has not argued before the Employment Tribunal that this warning was one which should not have been taken into account by the respondent. In any event, the Employment Tribunal has found that the warning was fairly and reasonably imposed and was a proportionate sanction in response to the acts of misconduct by the claimant, which were found by the respondent to have taken place.

23 The reason for the respondent's dismissal of the claimant was a reason related to his conduct. The misconduct which led to his dismissal was his deliberate refusal to comply with a lawful and reasonable instruction, namely to attend for work as from 11 October 2016 and thereafter to work the morning shift. The claimant has not disputed that he clearly and unequivocally refused to attend for work in accordance with that lawful and reasonable instruction. There can be no doubt that an employee's refusal to comply with a lawful and reasonable instruction to attend for work, amounts to a fundamental breach of his contract of employment. The Tribunal found that the respondent was entitled to accept that breach and to terminate the claimant's contract of employment with notice.

24 The flaw in the respondent's case is that, with regard to the misconduct for which the claimant was dismissed, it failed to follow its own internal disciplinary procedure and furthermore failed to follow the ACAS Code of Practice on Disciplinary Procedures. Whilst it had followed its own procedure and the Code of Practice with regard to the original allegations which led to the warning, it failed to take any of the necessary steps before dismissing the claimant for refusing to attend for work. The claimant was not invited to an investigatory meeting to explain his refusal. The claimant was not invited to a disciplinary hearing and thus not given the opportunity of answering, challenging or explaining the allegation against him. He was denied the opportunity to try and persuade his employer to ameliorate the disciplinary sanction and allow him to continue on the morning shift, rather than dismiss him. The claimant was not provided with the opportunity to appeal against his dismissal. Because of that, the respondent's dismissal of the claimant was procedurally unfair.

25 At no time since his dismissal, and particularly during these Employment Tribunal proceedings, has the claimant sought to retract his clear and unequivocal refusal to attend for work in accordance with his employer's lawful and reasonable instruction. The claimant has made it perfectly clear to the respondent and to the Employment Tribunal that under no circumstances would he have been prepared to return to work on the morning shift. The claimant regarded his window cleaning round as far more important to him. When asked in clear terms by the

Employment Tribunal Judge as to whether he had made a commercial decision to retain the window cleaning round rather than lose it, the claimant answered that he had done so. The claimant's position was that the respondent knew that he had a window cleaning round and had known since he was first interviewed for the post. The claimant insisted throughout the Employment Tribunal proceedings that by imposing the morning shift upon him, the respondent knew that the claimant would be unable to continue to work for the respondent and would either have to resign or be dismissed. Contrary to the claimant's assertion, the Tribunal found that there is no such malicious intent on the part of the respondent and that their decision to require the claimant to work a morning shift was a lawful and reasonable response to the claimant's misconduct, which was designed both to assuage the concerns of the other employees and to enable the claimant to continue his employment with the respondent.

26 Accordingly, the claimant is entitled to a declaration that his dismissal by the respondent was unfair.

27 With regard to remedy, Mr Pentecost for the respondent urged the Employment Tribunal to take into account the likelihood of the claimant having been dismissed in any event, had the respondent followed a fair procedure. In **Polkey v AE Dayton Services Limited [1988] ICR 142** the House of Lords held that the fact that a failure to follow a fair procedure makes no difference to the ultimate dismissal, could not prevent a dismissal from being unfair. However, the reasonableness of the employer's actions in dispensing with normal procedural requirements remains highly relevant to the question of remedy. This basic principle stems from the earlier decision of the House of Lords in **W Davis & Sons Limited v Atkins [1977] ICR 662** when the House of Lords held that, "It cannot be just and equitable that a sum should be awarded in compensation when in fact the employee has suffered no injustice by being dismissed."

28 The Tribunal has found that, on the facts known to the respondent at the date of the dismissal, it would have dismissed the claimant in any event, had a fair procedure been followed. The lack of any investigation into the claimant's refusal to attend for work could not really be criticised, as no investigation into the fact of his refusal was necessary. The claimant had received from his employer a lawful and reasonable instruction, namely to attend for work. The claimant had refused to do so and had made it clear to the respondent that there were no circumstances in which he would consider returning to work on a morning. The reasons for that refusal had been fully aired by the claimant at the appeal hearing against the warning. What the claimant was denied was the opportunity to further explain that refusal personally, either at an investigatory meeting or more importantly, at a disciplinary hearing convened to consider the sanction of dismissal for refusing to attend for work. What the Tribunal had to consider in those circumstances was whether there was anything which could or would have been said by the claimant at such a meeting which may have led to a decision other than his dismissal. From the evidence in the hearing bundle and from his clear and unequivocal evidence at this hearing, the Tribunal found that the claimant would not have been prepared to return to work on the morning shift. The claimant's case was simply that, had he been given the opportunity, he may have been able to persuade the Trustees that he should be permitted to continue

working on the afternoon shift. The respondent insisted that the claimant would only have been permitted to return to work on the morning shift, that he would not have agreed to do so, and that his dismissal was thus inevitable.

29 The Tribunal was asked to consider the length of time it would have taken the respondent to dismiss the claimant, had it followed a fair procedure. The Tribunal found that it would probably have taken no more than two weeks for the respondent to convene the appropriate disciplinary hearing and reach a conclusion that the claimant should be dismissed, assuming that the claimant could not persuade them to change his shift.

30 Mr Pentecost for the respondent further invited the Employment Tribunal to reduce the level of any compensation payable to the claimant to reflect the extent to which he had by his own conduct, contributed towards dismissal. Mr Pentecost reminded the Tribunal that it had been the claimant's wilful refusal to comply with a lawful and reasonable instruction (to return to work on the morning shift) which had led to his dismissal. In those circumstances, Mr Pentecost submitted that it would be just and equitable to make a substantial reduction of any compensation payable. Mr Pentecost submitted that this was one of those cases where the deduction should be 100%, so that the claimant did not receive any compensation whatsoever.

31 Based upon his age and length of service, the claimant is entitled to a basic award of 8 weeks pay @ £126.23 per week, which totals £1,009.84. The claimant has lost the right not to be unfairly dismissed and will have to work for a further two years before he regained that entitlement. The Tribunal assesses the value of the claimant's loss of statutory rights in the sum of £350. The Tribunal has found that the claimant was likely to have been dismissed in any event after a further two weeks. The claimant's compensatory award is therefore limited to two weeks pay at £126.23 per week, in the sum of £252.46. The total compensation payable to the claimant is therefore £1,612.30.

32 The Tribunal was satisfied that the claimant had contributed by his own conduct to his dismissal, specifically by his refusal to return to work in accordance with a lawful and reasonable instruction. The Tribunal found this to be culpable and blameworthy conduct and that it is just and equitable to make an appropriate reduction in accordance with the provisions of sections 122(2) and 123(6) of the Employment Rights Act 1996. Mr Pentecost for the respondent urged that there be a deduction of 100%, to reflect the inevitability of the claimant`s dismissal in any event. Mr Fairfield for the claimant submitted that any deduction should be minimal, on the basis that the respondent had used the original procedure which led to the warning, as a device by which the claimant would be removed from his employment. The Tribunal found against the claimant with regard to that issue. Mr Fairfield further argued that the claimant had been denied the opportunity to argue against dismissal, by seeking to persuade the respondent to permit him to return on the morning shift. The Tribunal found that it would be just and equitable in this case to reduce the compensation payable to the claimant by 50%, to reflect that culpable and blameworthy conduct, as ameliorated by the denial of the chance to argue against dismissal. That reduction applies to both the basic

award and the compensatory award. The total compensation payable to the claimant is therefore £806.15.

33 Mr Fairfield for the claimant applied for the Employment Tribunal fees paid by the claimant in the sum of £1,200 to be reimbursed by the respondent. The Tribunal is satisfied that this is a case where those fees should be repaid, as the claimant has succeeded in his complaint. The respondent is therefore ordered to pay the further sum of £1,200 to the claimant by way of reimbursement of the Employment Tribunal fees.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

12 April 2017

JUDGMENT SENT TO THE PARTIES ON

13 April 2017

AND ENTERED IN THE REGISTER

M M RICHARDSON

FOR THE TRIBUNAL