



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

5

**Case No: 4100657/2017**

**Hearing Held at Edinburgh on 31 October, 1 & 2 November, 21 & 22 November  
and 18 & 20 December 2017**

10

**Employment Judge: I McFatridge (sitting alone)**

**Mr Anthony Carson**

**Claimant  
Represented by:  
Mr O'Donnell  
Solicitor**

15

**Scottish Borders Council**

**Respondents  
Represented by:  
Mr Davidson  
Solicitor**

20

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

25 The claimant was unfairly dismissed by the respondents. The respondents shall pay to the claimant a monetary award of Fifty Six Thousand, Five Hundred and Eighty One Pounds and Nine Pence (£56,581.09). There is no prescribed element.

30

**REASONS**

1. The claimant submitted a claim in which he claimed that he had been unfairly dismissed by the respondents. The respondents submitted a response in which they accepted that the claimant had been dismissed but stated that he had been summarily dismissed for gross misconduct and that his dismissal was procedurally and substantively fair. The claim was originally set down to take place over four days commencing on 30 October. Unfortunately, due to administrative issues the hearing could not take place on 30 October but did

35

commence on 31 October. The evidence was not completed during the days available and the hearing was adjourned to further diets which took place on 21 and 22 November and 18-20 December. During the lunch break on 18 December the Tribunal was advised that Mr Davidson, the respondents' agent, had suffered a sudden bereavement within his close family and as a result the hearing did not proceed on the afternoon of 18 December nor on 19 December. The hearing proceeded on 20 December when the evidence was completed. The Tribunal would wish to record its thanks to Mr Davidson for his professionalism in attending to complete the case on 20 December in circumstances which must have been very difficult for him. At the hearing evidence was led on behalf of the respondents from Ms Gillian Young, a Function Manager with the respondents who carried out the investigation into the matter which led to the claimant's dismissal; Mr D Robertson, Chief Financial Officer with the respondents who convened the disciplinary hearing following which the claimant was dismissed and Mr Davidson, who as well as representing the respondents gave evidence in relation to the unsuccessful appeal which the claimant made to the elected members. The claimant gave evidence on his own behalf. A joint bundle of productions was lodged which was added to by both parties during the course of the hearing. On the basis of the evidence and the productions I found the following essential facts relevant to the case to be proved or agreed.

### **Findings In Fact**

2. The respondents are Scottish Borders Council. The claimant was employed by the respondents on two occasions, the most recent starting on 8 July 2008 when he was appointed Principal Environmental Health Officer. The claimant was then appointed Regulatory Services Manager in or about 2011 and remained in that post until he was summarily dismissed on 13 December 2016. At the date of dismissal his gross pay was £44,013.22 per annum which is equivalent of £846.41 per week. As Regulatory Services Manager the claimant reported to a Brian Frater who was initially termed Head of Service but latterly was designated as Director of Regulatory Services. The Regulatory Services department within the Council brought together a number of roles which had previously been administered separately including Trading Standards, Environmental Health, Pollution Control, Food Safety, Animal Welfare, Trading Standards and Weights

and Measures. The claimant had three direct reports under him. These managers were responsible for three separate sections within Regulatory Services. At the time prior to his dismissal Tricia Scott was responsible for Trading Standards and Environmental Health, Sally Reynolds was responsible for Food Safety and Health and Safety and Lynn Crothers was responsible for Amenity and Pollution. Prior to Sally Reynolds being employed the person who had managed the Food Safety and Health and Safety section was Gwen Robertson. She had decided to stand down from this managerial position in or about 2013 and been replaced by Sally Reynolds. Gwen Robertson had continued as an Environmental Health Officer in a non-managerial post working in the section managed by Lynn Crothers.

3. Prior to the events which led to his dismissal the claimant had a totally clear disciplinary record and had not been the subject of any complaints regarding his conduct either formal or informal.

4. In or about January 2016 the claimant was called to an informal meeting by his manager Mr Frater. The claimant met with Mr Frater who was accompanied by Pamela Culbertson of the respondents' HR department. The claimant was told that a member of staff had raised concerns about himself and Sally Reynolds. He was told that the complaint was not formal and no specification at all was given regarding the allegations. The claimant was asked a number of questions. He was asked if he was approachable and whether in his view he micro-managed staff. He was also asked about how he conducted the authorisation of mileage claims. One of the claimant's roles was to check mileage claims submitted by the Environmental Health Officers within his department. This included his own three reports but also the other members of staff who reported to the various managers. He advised Mr Frater and Ms Culbertson how he carried out this task every month. He said he felt that he was approachable because a lot of the time he spent in the office was taken up with people coming up to him and asking him about things. The claimant worked alongside the other staff in an open plan office. He also said that he did not feel that he micro-managed staff. No additional information was given to the claimant about who had made the allegation or precisely what the allegations were.

5. The claimant was then called to a further meeting in February 2016 with Mr Frater. Mr Frater was accompanied by a Dee MacLean from HR. Mr Frater advised the claimant that he understood things had got a lot better in his department. He said that the initial complaint had come from Lynn Crothers who was one of his direct reports. The claimant was asked if he would agree to go to mediation with Lynn Crothers and the claimant advised that he would. Ms MacLean then mentioned that there were various concerns about Sally Reynolds and the rest of the meeting was taken up with Ms MacLean asking the claimant a number of questions regarding Ms Reynolds' management style and concerns which Ms MacLean had regarding Ms Reynolds.
6. Ms MacLean advised the claimant that she would provide him with dates for the proposed mediation. At some point subsequent to the February meeting Ms MacLean provided the claimant with dates however the claimant felt the dates were incorrect because the dates given did not match the days of the week which were given. He questioned this with Ms MacLean and anticipated that he would get back to her confirming proper dates. By 4 April 2016 Ms MacLean had not got back to him. On that date the claimant was called to a meeting with Philip Barr the respondents' Deputy Chief Executive and told that he was being placed on special paid leave following allegations of bullying behaviour which had been made against him. On 4 April 2016 Mr Barr wrote to the claimant confirming this and setting out the terms of his special paid leave. This letter was lodged (pages 34-35). As is usual the claimant was advised that he must not attend work or attempt to influence anyone who might be involved in the investigation. He was told that the leave was expected to end on 4 May and that he would be contacted to attend an investigation meeting at which he would have the right to be accompanied.
7. As one would expect the respondents have a number of policies relating to HR matters which are available on their intranet. A number of these policies were produced at the Tribunal hearing. The respondents have a policy on dignity and respect in the workplace. This was lodged (page 737-759). This provides a policy statement at paragraph 2.1 (page 739) which states that everyone has the right to be treated with consideration, fairness, dignity and respect and states that everyone in the Council and those who have dealings with the Council have a

responsibility to maintain good working relationships and not use words or deeds that may harm and wellbeing of others. It states at Section 2.1.1 (page 739)

5 *“The Council has a zero tolerance policy and will investigate vigorously any allegations of bullying, harassment, discrimination, victimisation or unacceptable (referred to from this point forward as bullying and harassment) behaviour towards an individual or group, regardless of whether the matter has been raised formally or informally.*

10 *2.1.2 The Council fully recognises that bullying and harassment is a serious offence which may cause fear, stress and anxiety and be detrimental to the health, safety and the well-being of employees and interfere with work effectiveness. It is also recognised that some employees may be unaware of the effect their behaviour has on others and that the most productive way to resolve such issues is to facilitate mediation between the parties involved.*

15 *2.1.3 The Council is also aware that cases of bullying and harassment can involve difficult and sensitive circumstances e.g where the bully or harasser is an employee’s line manager or a very senior officer. Consequently, it undertakes to deal with cases involving harassment promptly, sensitively and confidentially. At all stages the wishes of the employee(s) involved will be taken into account.”*

20

8. Reference is made to various other policies with the Council including the Code of Conduct, Disciplinary Procedure and Grievance Procedure. At section 4.3 (page 741) it states

25 *“Any employee who wishes to make a complaint under this policy is encouraged to first discuss matters informally with their line manager or with Human Resources, provided that they feel able to do so. Should the issues not be resolved at this stage, or the employee feels unable to raise the issue informally, then a formal resolution will be entered into.”*

30

There is a definition of bullying provided in paragraph 5.2.2 which is stated to be

*“... persistent, unwelcome, offensive and intimidating behaviour or misuse of power which makes someone feel upset, threatened, humiliated or vulnerable and undermines their self-confidence.”*

It goes on to state

*“Bullying is unlikely to be a single or isolated instance. It is usually, but not exclusively repeated and persistent behaviour which is offensive, abusive, intimidating, malicious or insulting.”*

5 It then goes on to provide various instances and examples of bullying. At section 5.3 it states

*“5.3.1 Most people will agree on extreme cases of bullying, harassment, discrimination and victimisation, but it is sometimes the ‘grey’ areas that cause problems.*

10 *5.3.2 Behaviour that is considered unacceptable by one person may be considered firm management by another.*

*5.3.3 Legitimate management action within agreed procedures to deal with staff whose ability or behaviour is in question is not bullying or harassment. However, it is if that manager’s behaviour is outside what we would consider to be ‘legitimate and reasonable management action’ such as:*

- *deliberately undermining a competent worker by giving them more work than they can cope with, or*
  - *withholding information, or supplying incorrect information,*
- 15  
20 *then we would consider them as having harassed or bullied the employee concerned.”*

The Bullying and Harassment Complaint Procedure is set out in Section 8 (page 751-754). Paragraph 8.1 states

*“What to do if you feel you are being bullied or harassed.*

25 *An employee (or group of employees) who believes that he or she has been the subject of bullying or harassment should, if they feel able, in the first instance ask the person responsible to stop their behaviour. It may be that the person did not realise that their behaviour was offensive and unwanted and will stop it once it is brought to their attention. It is important to gather as much supporting evidence of your experience as possible. Therefore it would be helpful if the*

30 *employee writes down the nature of the bullying or harassment, including what was said or done, the time, date, place, and any other relevant circumstances and details of any witnesses. The note should*

*be made as soon as possible after the event occurred. Please use the Dignity at Work Incident Log/Complaint Form (Part A)."*

Paragraph 8.1.1 then goes on to state that if the employee feels unable to ask the person to stop their behaviour they may contact the most immediate departmental manager not involved in the complaint or HR. It goes on to suggest that they might wish to involve their trade union.

9. 8.1.3 refers to what an individual who is made aware that their behaviour is unacceptable should do and refers to listening carefully to the complaints and the particular concerns raised, respecting the other person's point of view, understanding and acknowledging that the other person's reaction to another's behaviour is important, agreeing the aspects of behaviour which will change and reviewing their general conduct/behaviour at work and with workplace colleagues. Section 8.1.4 then states

*"If there is no change in the behaviour of the perpetrator, or the employee still feels that they are still being harassed or bullied it will be necessary to complete Part B (Informal Complaint Form) of the Dignity at Work Incident Log/Complaint Form."*

The policy then goes on to state

*"8.1.5 In many cases it will be possible for the line manager or member of HR to resolve the problem informally. However, if informal action fails or is not appropriate, a formal investigation of the complaint will be carried out in accordance to the Council's Grievance Policy."*

Section 8.2 sets out what informal action can be taken. Section 8.2.1 notes that the appropriate supervisor/manager or member of HR will arrange a confidential meeting with the employee at a location other than their immediate workplace and that the case will be discussed. It then states that further investigation will be undertaken as appropriate to establish the facts. Section 8.2.2 provides that a meeting will then be arranged involving all relevant parties and that the purpose in the meeting will be to mediate between the parties and where possible to restore working relationships and find a solution that allows the parties to continue working together. Section 8.2.3 provides that in cases where a meeting has not resolved the issues or is otherwise inappropriate and the complaint is found to be justified informal action will vary according to the nature of the harassment but

may include the line manager consulting HR for advice on policy, rights and procedures. Section 8.3 deals with formal action and states

5                   *“8.3.1 Where informal action has failed to provide a solution, or is not appropriate because of the seriousness of the matter, a formal investigation will be carried out in accordance with the Council’s Grievance Policy. In which case you will need to complete the Council’s Grievance Notification Form. Please refer to the Grievance Policy and Procedure.”*

10                   Section 8.3.4 states that the action will be undertaken expeditiously and sensitively and that every effort will be made to ensure that the process does not cause unnecessary distress to either party and that confidentiality will be maintained. Section 8.3.5 states

15                   *“At the conclusion of the investigation the appropriate action will be taken and may range from no action where no evidence has been found to substantiate an allegation of harassment to a formal disciplinary hearing and appropriate disciplinary action which may include dismissal as in accordance with the Council’s Disciplinary Policy.”*

20                   The relevant blank forms described in Appendix A and B were lodged (page 755-759).

10.                   During the course of preparation for the hearing the claimant’s representatives arranged for an Additional Informal Order to be served on the respondents which requested full and specific details of the concerns raised by employees and asked  
25                   that if they were set out in writing that the respondents provide a copy of the relevant documents. The answer recorded is that despite the clear terms of their policies, the respondents confirmed that nothing was set out in writing. Despite this and also despite the policy suggesting that a grievance procedure would require to be instituted before any formal disciplinary action was taken the  
30                   respondents at some point around the beginning of April 2016 decided to appoint an Investigating Officer in terms of the respondents’ disciplinary policy.

11.                   Ms Fiona Young a manager with the respondents was appointed to carry out a disciplinary investigation of the claimant and Sally Reynolds, one of the three



managers who reported directly to the claimant. Ms Reynolds was also suspended by the respondents at the same time as the claimant. On 6 April 2016 Ms Young wrote a letter to all members of staff in the Regulatory Services department. A copy of this letter was lodged. The initial copy lodged by the respondents was illegible and a further legible copy was lodged at page 782. It is as well to set out the terms of this in full.

*“Investigation – Regulatory Services*

*Following the meeting with Regulatory Services staff yesterday with Philip Barr, Depute Chief Executive and Dee MacLean, Human Resources Business Partner, and the subsequent e-mail confirming arrangements, I have been appointed to investigate allegations of Bullying within Regulatory Services.*

*Creena Thomson, Senior Admin Assistant will provide administrative support to the Investigation.*

*I have been asked to contact members of staff directly and confidentially to offer the opportunity of informing the Investigation by giving a statement.*

*If you have no information, or do not wish to be involved, please advise me of this.*

*If you do feel you have information which may be relevant, I would be grateful if you could contact Creena Thomson who will arrange for us to meet for a formal Investigatory Meeting.*

*If you have any questions please feel free to contact me or Creena, although please note that I will be on annual leave between 7<sup>th</sup> April and 18<sup>th</sup> April 2016.”*

An organogram showing the structure of Regulatory Services was lodged (page 187). This shows the three teams. Within the Trading Standards Team managed by Tricia Scott there were nine members of staff. Two of these contacted Ms Young and were interviewed. In the Food Team managed by Sally Reynolds there were nine members of staff and eight of these approached Ms Young and were interviewed. In the Public Health team managed by Lynn Crothers, Lynn Crothers herself approached Ms Young and was interviewed. The claimant had previously been advised that Lynn Crothers was the person who had made complaints about him although he had not been given any detail of these. In addition, there were seven people in Ms Crothers’ team and five of these

approached Ms Young and were interviewed. In addition to this a further member of Ms Crothers' team, Mary Rose Fitzgerald, had recently left the employment of the respondents. Ms Young arranged to contact her and she agreed to meet with Ms Young in order to be interviewed by her and give her a statement.

5

12. Ms Young also interviewed Sally Reynolds and Tricia Scott. She also interviewed the claimant's Line Manager Mr Frater. Ms Young also interviewed Sarah Halliday of the respondents' HR department. She also contacted Pam Culbertson and Dee MacLean of HR but it would appear did not interview them. Following these interviews the claimant met with Mr Carson. In advance of this meeting Ms Young sent a letter to the claimant on 11 May. This letter was lodged (page 37-38). The letter states

10

*"Investigatory meeting*

15

*I am arranging an investigatory meeting and clarifying further details of the allegations provided to you at the meeting on 4 April. The investigatory meeting is as follows:*

*On Friday 20<sup>th</sup> May at 9.00am in Corporate Management Team Meeting Room 1*

20

*The purpose of the meeting is to investigate the allegations against your bullying behaviour. The further details of the allegations are set out below and are indicative of examples provided by witnesses:*

25

*Bullying behaviour towards some members of staff an inconsistency of approach between management of staff members, which has had a negative impact on how staff perceived their own professional ability and confidence and which is being described by some staff as a 'culture of fear'.*

*The following are examples of alleged indicative behaviours:*

30

- *Unnecessary scrutiny of mileage claims, diary and work planning.*
- *Treatment of staff during one to one meetings, the business review process meeting and the Dronehill investigation.*
- *Victimisation/intimidation of staff - when very sensitive issues were raised with you directly by Brian Frater in Human Resources you made it known to staff you were aware of this and described it to them as defamation and advising you were taking legal advice.*

35

• *Discussing personal staff issues in an open office area e.g. making negative comments regarding members of staff. I'll be assisted at this meeting by Creena Thomson, Assistant Investigatory Officer and an Assistant HR Adviser. The investigation is being carried out in accordance with the disciplinary policies and procedures for misconduct (a copy has already been provided to you). You have the right to be accompanied by an accredited trade union representative or work colleague, although you should understand that this is an investigatory meeting and not a disciplinary hearing. All reasonable requests will be approved.*"

Both Sally Reynolds and the claimant were interviewed on 19 May 2016 which was after the date that the other witnesses were interviewed. No attempt was made after Mr Carson's or Ms Reynolds' interview to put any of the points made by them to the other witnesses. During his meeting the claimant was not provided with copies of the witness statements which Ms Young had taken from the other witnesses. After each interview Ms Young kept a note of the investigation meeting and the note of the meeting with the claimant was lodged (pages 633-657). It is signed by the claimant on page 657. It was signed by him on 20 June 2016 and prior to this he was given a copy. Before signing it he made various alterations to the copy in handwriting which are reflected in the document lodged. Many of the questions asked of the claimant were extremely general such as "How would you describe the management culture within Regulatory Services?". The claimant was also told

*"Your staff have outlined a culture of fear and controlling environment within the team, how do you perceive this?"*

He replied that he was surprised and shocked at that. The claimant's answers to the various questions with his handwritten amendments to the answers provided are as lodged.

13. The claimant was questioned regarding who authorised the mileage claims for staff. The claimant advised that he would not go through what the journeys were but might query some things such as the same journey on consecutive days or the same premises visited two or three times a week. He said if there was anything unusual he would look in their diaries. He said that the reason he asked for diaries to be accurate is that these are used for the lone working protocol. He

said he had previously contacted police plus driven round looking for staff that had gone missing. He was asked what the process was if there was a discrepancy and said *“with David he had bulked all his visits for the day in one box and was not clear if it was in a sequence.”* He asked for journeys to be recorded separately so he could see roughly where they were going. He said he had sent him an e-mail asking for a chat to explain and offered to show him how other staff did there. Subsequently the claimant added

*“It’s never going to be exact and I don’t work that level of precision.”*

He was asked if this was something he did with everyone and said not everyone maybe one or two people per month (page 638). On page 639 it was put to him that several staff had confirmed that there was a high level of scrutiny on mileage claims. The claimant denied that he counted miles or checked spelling. He referred to one occasion when someone had put a 6 instead of a 3 so claimed 69 miles instead of 39 miles. He said he was checking for things like that. It was put to him that he had grilled a member of staff for an hour and this was denied. He said that he had spoken to the member of staff who was not following the lone working protocol. He had arranged this in a meeting room as very aware of the open plan office. He confirmed the same process was applied to all staff. He denied that some staff were subject to more scrutiny than others. He said that the number of enquiries had come in are hired for the responsive teams and the pro-active teams. He was asked about one to ones. It was put to him that a member of staff had outlined that one to ones were confrontational. The particular member of staff was not mentioned.

14. The claimant was asked about one to ones for his direct reports. He confirmed that since mid December 2015 he had produced a note of one to ones with Lynn Crothers. He said that this was due to a particular issue around communication. He said that – *“We realised we had different understandings to what had been agreed at a meeting regarding train noise”* (page 641). He said that he had told Ms Crothers that he was doing the note of the meeting to provide a common understanding of the meeting and hoped this would be seen as supportive. He referred to a meeting with Lynn Crothers on 23 December 2015 and that Lynn Crothers had wanted to change the plan but the claimant felt the development plan should be given a chance before altering service plans and he indicated Ms Crothers had not been happy with this. He said he did not feel this was

confrontational but did notice a change in Ms Crothers' demeanour. He referred to an issue regarding abandoned vehicles in February 2016. He said he requested information and clarity around statutory requirements for this and changes to the charges. He said that Ms Crothers had responded quite badly and had got upset and then stood to clear her stuff to leave the room. He said he had asked her to sit down and asked why he needed the information. He said she had eventually given him the information. He said that he didn't think he had been particularly critical asking for the information. He said he reflected on what happened and whether he had said something that had triggered this but he said that he thought she felt he was being critical because this was a project she had worked heavily on and he was asking for information. He said that in the week prior to 3 February 2016 he had been aware of gossip and whispering in the office. He said that a senior member of staff came to him and said they had heard that Mary Rose was leaving because of his management. He said that he thought that was really unfair as this was the first time he had heard it (page 642).

15. None of the questions asked of the claimant were specific, an example of this is question 16 (page 642) which states

*"A witness has advised us that 'this year's one to ones have become more difficult and the feedback suddenly became very detailed. I became worried that this was evidence gathering and some of the comments were taken out of context to be used word and phrases that I hadn't used and things that Anthony said during the meeting were not documented. I felt I couldn't challenge this as at this point I had become scared and intimidated and I was concerned that if I didn't agree with the feedback then there would be another difficult one to one – can you comment on this?' ..."*

Other examples are:

*"Question 19 Witnesses reported that they feel they are not able to make decisions based on their own professional judgment as they feel that they are undermined and professional judgment eroded. Are you aware of this? What steps have you taken to address this with your staff? (page 645). ..."*

*Question 32 Witnesses have said to us that you allegedly speak to people in an inappropriate way and that this makes people frightened*

*to speak up they have seen what has gone on with others and are fearful they will be targeted in the same way. Can you comment on this?"*

- 5 16. There were however certain matters which were put to the claimant in particular question 30:

10 *"A complaint was received about Dronehill Wind Farm and Lynn Crothers was asked to do an investigation. 8<sup>th</sup> September 2015 David Brown and Mary Rose Fitzgerald were called into an unannounced meeting with yourself to discuss the complaint. At this meeting you asked Mary Rose Fitzgerald to provide a significant amount of data about the case by the end of that week. These staff were asked to keep the afternoon of 15 September free. At 3:30 Mary Rose Fitzgerald was asked to attend and that David would come in after.*

15 *Mary Rose Fitzgerald was allegedly interrogated for an hour and a half. Question after question. She felt that she was being pushed into saying that she had done a poor investigation. She felt 'this man has no faith in me'. She has said that it became clear that she felt she had no faith in her but she felt she was heavily criticised can you comment*

20 *on your account of these events?"*

17. The claimant responded to the effect that he had been asked by Brian Frater to be the Investigating Officer following the complaint coming in. He confirmed that he had asked Mary Rose Fitzgerald and David Brown as the officers involved for
- 25 information. He said he had initially anticipated that Lynn Crothers would do the investigation but due to pressure of work on her he had ended up doing more of this than anticipated. He described his meeting at which he sought to obtain information necessary to answer the complaint as following a fairly standard approach and that whilst this might have come over as questioning *"that's the*
- 30 *nature of looking into something like that"*. He was surprised that Mary Rose Fitzgerald had described the meeting like that. He denied having no faith in Mary Rose Fitzgerald. It was also put to him (question 29, page 649) *"When a member of staff requested an exit interview with you in February 2016 can you clarify why you are not willing to have a discussion with him about the points he had raised*
- 35 *with you and their reasons for leaving."* The claimant understood that this related to Mary Rose Fitzgerald who had left the respondents' employment in February.

He indicated that he had planned to have an exit interview with her but found that the exit interview had taken place the day before and been conducted by Lynn Crothers. Mary Rose Fitzgerald had been an officer in Lynn Crothers' team. When she was leaving Lynn Crothers had downloaded a form from the internet which was not a standard form used by Borders Council and suggested that Mary Rose Fitzgerald complete this. Mary Rose Fitzgerald had completed the form in a way which was critical of Mr Carson. The claimant indicated to Ms Young that he had met with her and was prepared to talk about general issues but that because she had issues in her form which were similar to the issues that Mr Frater had raised with him he did not feel it appropriate to discuss further with her at an exit interview. The claimant was also asked about Sally Reynolds in relation to this issue although it is unclear precisely what relevance this had to this point. At question 34 (p652) it was put to the claimant:

*"18/2/16RSMT it is alleged that at this meeting you spoke on a few occasions during this meeting in an aggressive manner and was agitated by LC three or four times during the meeting. LC had brought a document to the meeting are notes and it is alleged that you 'scolded her' for this as any documents were to be circulated for the meeting. She explained that it was just an aide memoir to remind her of where progress was. Can you recall this event and comment on your recollection of the meeting. Can you clarify what the situation was when Tricia Scott then referred to her notes but did not get the same reaction as Lynn had just allegedly received."*

The claimant's response was

*"At the end of the meeting I said to the team that if you're going to bring anything to the meeting let me know in advance it would be helpful to circulate. At that meeting I had asked managers to prepare a list of actions for business plans and Lynn had brought a list of business processes."*

He indicated that Ms Scott had not brought a document as such but just notes and that Lynn's was a document.

18. It was put to the claimant he had been aggressive in meetings with Lynn Crothers and he denied this. It was put to the claimant that *"Witnesses had advised that*

*in their view they had observed you in making negative comments about staff. Can you comment on this? And discussing personal matters on an open plan office, sick leave etc.*" The claimant asked for specifics and was given a list of names which he was alleged to have called people but not the circumstances, dates or context in which he was alleged to have done so. The claimant denied the allegation and indicated that he was very careful about discussing people in open areas and would usually stop telephone conversations. The claimant was also asked various matters relating to Sally Reynolds.

19. Ms Young completed her report in mid-August and the report itself dated 15 August 2016 was produced (pages 47-736). The report thus extends to almost 700 pages including the appendices in which the notes of each witness meeting were included. It is appropriate to say at this stage that the document is in a highly unusual form for an investigation report. It starts off by listing the witnesses who were interviewed and allocating them initials. It then purports to produce a timeline. No back up documentation is provided in respect of this timeline. The timeline is inaccurate in a number of respects. The document then purports to set out a history of the investigation in entirely subjective terms it accepts that the witness statements show that staff have different experiences and different perceptions of the situation within the regulatory services section. The document on page 54 then sets out what are described as allegations of bullying behaviours. These were

*"4.3.1 - Discussing personal staff issues in an open office area eg making negative comments regarding members of staff.*

*4.3.2 - Unnecessary scrutiny of mileage claims, diary & work planning.*

*4.3.3 Treatment of staff during 1:1 meetings, the Business Review Process meetings and the Dronehill investigation.*

*4.3.4 Victimisation/intimidation of staff – when very sensitive issues were raised with you directly by Brian Frater and Human Resources you made it known to staff you were aware of this and described it to them as defamation and advised that you are taking legal advice.*

*4.3.5 Awareness of Situation."*

Each particular behaviour was broken down.



20. There then follows a series of tables in which excerpts are selectively taken from various witness statements. Sometimes the same statement is used in a number of different boxes. All of the boxes concentrate on the subjective impact of the claimant's behaviour as reported by the various witnesses. Throughout the document there is a complete lack of any specification of what it is that the claimant is supposed to have done. Following each particular section there is a short section of commentary by Ms Young which sets out her view of what the following extracts show and again it is impossible to establish from this what it is that the claimant is supposed to have done. Finally, on page 122 there are a list of what are described at this point as allegations. It is probably as well to set out this page in full.

- “• **Allegation number 1:** *Discussing personal staff issues in an open office area, e.g. making negative comments regarding members of staff.*

The investigating officer(s) found that there was evidence to support this allegation because:

- The number of witnesses and examples where negative comments were made about staff as well as the variety of different examples given by a number of staff. AC said that he 'couldn't think of one occasion when the threshold had been crossed where there have been people around'.
- **Allegation number 2:** *Unnecessary scrutiny of mileage claims, diary & work planning.*

The investigating officer(s) found that there was evidence to support this allegation because:

- The majority of staff confirmed that AC carried out checking of mileage claims and 5 described that significant levels of detailed checking were evident. A variety of different examples were given by numerous staff
- AC stated that he does not carry out detailed checking of mileage.
- **Allegation number 3:** *Treatment of staff during 1:1 meetings, the Business Review Process meetings and the Dronehill investigation.*

The investigating officer(s) found that there was evidence to support this allegation because:

- In all the examples outlined in the statements there were significant situations described where AC had presented to staff in an

inappropriate way. Examples included descriptions such as 'confrontational', 'aggressive', 'targeted', 'red Marker treatment'. Staff felt 'afraid' and 'nervous' and some had health issues as a result of the work environment.

- 5
- **Allegation number 4:** *Victimisation/intimidation of staff – when very sensitive issues were raised with you directly by Brian Frater and Human Resources you made it known to staff you were aware of this, and described it to them as defamation and advised that you are taking legal advice.*
- 10
- There are two separate occasions when it was alleged that AC advised staff that he was aware of staff having gone to HR with complaints and keeping notes.
    - One was reported second-hand via a Principal Officer that staff in Business Support had been approached.
- 15
- Second was in relation to the exit questionnaire where the employee had cited that AC was the reason why they had left. They requested to meet with AC to discuss this and AC allegedly said that he couldn't talk about it as he had taken legal advice.
- 20
- AC does not agree that he asked staff, but did say he would not discuss it with Mary Rose Fitzgerald as it was defamation."

21. There was no attempt to set out the specific incidents which were said to constitute the above allegations. During the process there was no attempt by Ms Young to test any of the statements made to her. Essentially Ms Young's approach was to simply write down everything that was said without casting any critical eye over it. Her approach was that if someone said they were upset after an interaction with the claimant then this was taken to be evidence of bullying. She made no attempt to assess whether what the claimant was doing amounted to the carrying out of his management duties or not. In relation to the mileage issue for example she simply recorded the people felt upset at being challenged rather than whether the challenges were or were not justifiable in terms of the Council policy.

35 22. Generally speaking she ignored the many positive comments which were made about the claimant's management style and the positive effect which he was said

to have had on the department by a number of witnesses. There was little or no attempt to test the credibility of Lynn Crothers who was the principal witness against the claimant. Lynn Crothers claimed to have kept a diary. This diary was lodged as a production in the report. No attempt was made to test the entries against the evidence of other witnesses. A number of matters referred to by Lynn Crothers were directly contradicted by other witnesses.

23. Somewhat oddly it is clear that the report was initially prepared on the basis that the same report would be used for the claimant and Ms Reynolds. At some point in August Ms Reynolds resigned from the Council and the final report therefore dealt with the claimant alone. The final report therefore contains various sections which have been redacted or blanked out. These were said to be sections which related solely to Ms Reynolds. A number of sections relating to Ms Reynolds were however included. Examples of this are on page 55 in relation to comments made by AB, JH, FS; page 56 in respect to comments made by Lynn Crothers and various others; page 57 in comments made by TS; page 72 in comments made by JS; page 73 in comments made by GR; page 77 in comments made by TS; page 78 in comments by LC; page 82; page 94 in comments by MJ; page 105 and page 120. A particularly significant example of this is at page 55 where very specific quote about Sally Reynolds by AB is used to provide ammunition for criticising the claimant. Similarly on the same page there is a quote from JH which was made specifically about Sally Reynolds which is being used as if it referred to the claimant. In addition many of the broad allegations made against the culture would appear to relate to Ms Reynolds and not the claimant.

24. In addition to this it is clear from a comparison of the witness statements and the claimant's statements that a very substantial number of the points made in the witness statements were never put to the claimant at any point. Furthermore, where an allegation was made about something which must have been obvious in the open office no attempt was made to find out who else was present and interview them. Ms Young only interviewed those people who volunteered to come forward as a result of the "trawling" e-mail which she had sent out. Although Ms Young stated at the beginning of her report that she was asking standard questions of witnesses it is clear that in fact she asked slightly different questions of different witnesses.

25. There were also a number of occasions in the report where Ms Young demonstrated bias against the claimant. Where there were three or four people who gave statements favourable to the claimant this would be described as “few or small” on the other hand where three witnesses allegedly expressed concern about potential repercussions from coming forward this was described as a “significant number”.

26. There are a number of points in the report which make it clear that Ms Young failed to carry out any critical questioning of the witnesses or and made no attempt to resolve disputes of fact. There were other occasions where it is clear that other witnesses could have been spoken to about a particular incident which was alleged to take place but were not. Examples of these are at page 77-78 where JS is quoted as stating that she observed GR being treated with disrespect on numerous occasions. There is no attempt to obtain details of this and in fact when one looks at JS’s statement at page 303 there is a note that the examples are found later in the report at question 9. When one looks at question 9 this has been almost wholly redacted and indeed the question refers purely to conversations “Sally” has with staff. At page 75 there is a reference to “staff” being threatened with disciplinary action by the claimant. The sole evidence of this appears to come from the statement of JH at page 73 where JH states

*“Regarding the Stitch Hill Jerseys JH described ‘I subsequently heard that AC had told SR that if I hadn’t done this then disciplinary action should be taken against me’.”*

The reference only refers to disciplinary action in relation to one person rather than “staff” which is plural. In addition, there is absolutely no direct evidence that the claimant threatened anyone. Furthermore, it would appear that this incident related to a situation described by JH in relation to question 1 of her statement she stated

*“Last year myself and a colleague were tasked by Sally to deal with premises that was not compliant under Food Safety legislation. It hadn’t been compliant for 8-9 years and it was felt that perhaps more experienced officers could achieve the required outcome given the character of the Food Business Operator. After discussions with the owner we felt that we were getting to the point of achieving legal compliance but we were directed to serve legal notices on the owner*

by Sally before the end of the day when the matter was raised. I subsequently heard that Anthony Carson had told Sally that if I hadn't done this then disciplinary action should be taken against me. By questioning the matter as to whether legal notices should be served Sally told me that she felt I was undermining the Council's Enforcement Policy and her as my manager."

The remaining part of the section is redacted and it would appear would relate to Ms Reynolds. No attempt was made by Ms Young to investigate whether or not it would be good environment health practice to serve statutory notices on a business which had been non-compliant with food safety legislation for 8-9 years. There was also no attempt to ascertain from whom JH had "heard" that the claimant was involved in telling her that she should be disciplined. Throughout the whole report there is absolutely no attempt to analyse what level of control the claimant was exercising and whether this was appropriate in all the circumstances of the case. Ms Young seemed to take it as a given that if for example individuals complained that their mileage claims were subject to too much supervision then this was automatically evidence that their mileage claims were subject to too much supervision. Lynn Crothers says in her statement that she was told by KC that she and DS had met with Mr Carson and that Mr Carson had referred to the complaints that had been made about him to HR. Despite Ms Young acknowledging on page 109 that this was simply hearsay on the part of Ms Crothers, Ms Young did not make any attempt to follow this matter up either with KC or DS.

27. One of the issues which Ms Young considered she was investigating related to the Dronehill investigation. The background to this was that a complaint had been made about noise emanating from a wind farm. The complaint had been investigated by Mary Rose Fitzgerald and Mr Brown. A complaint had then been made via certain Councillors about the way that they had handled the noise complaint. The matter was somewhat high profile and the claimant was asked by Mr Frater to investigate the matter. Both Mary Rose Fitzgerald and Mr Brown complained that they had been taken into a meeting room and asked questions. Both complained that the manner in which the questions had been asked was unduly aggressive. Mr Brown referred to it as feeling like the Spanish inquisition (page 273). Despite this there was no attempt by Ms Young to drill down and find exactly what questions Mr Brown had been asked. Both Mr Brown and Mary

Rose Fitzgerald indicated that they felt annoyed that the claimant had asked to look at their notebook. There was no attempt to find out if this was standard practice (as claimed by the claimant) or not. There was no attempt to ascertain what the claimant was supposed to have said or done that was so unacceptable. Instead in this case as with the others Ms Young simply accepted that if a person said they had been bullied then if they sounded credible this meant they had been bullied.

28. Generally speaking no attempt was made to resolve conflicts in evidence where Lynn Crothers said one thing and the claimant another. An example of this is at page 81 in reference to a publicity document. The background to this was that Ms Crothers had prepared a publicity document which she thought was very good and wished to hand out to the public. She had presented this to the claimant who felt that the tone and content of the document were inappropriate. Subsequently Ms Crothers had been at a meeting with her own staff at which the claimant was not present. The issue of the publicity document had been raised and Ms Crothers had been praised for it and had burst into tears. Ms Young took this as confirmation that Ms Crothers had been bullied. In general terms there was a failure by Ms Crothers to put many of the allegations made to the claimant in a way which was comprehensible and where there was a conflict between what the claimant said and the content of these allegations then Ms Young made no attempt to resolve that. As well as the example already given regarding what Mr Carson was supposed to have said to AC and DS there is a statement from JS that *"it appears that they (Sally Reynolds and Mr Carson) preferred to make an example of colleagues in front of everyone else if anyone does or says something they don't agree with."*

29. In general the allegations against the claimant are hopelessly unspecific and Ms Young made absolutely no attempt to try to drill down and find out exactly what it was the claimant was said to have done, where he did it and when he did it and who else was there. One of the few exceptions to this related to an allegation by Ms Crothers in relation to the meeting of the Regulatory Services Management Team on 18 February 2016. There was a conflict of evidence between the claimant and Lynn Crothers about what was supposed to have happened at the meeting. Tricia Scott was also at the meeting but was not asked about it by Ms Young.

30. On 17 August 2016 the claimant was sent a letter by the respondents inviting him to a disciplinary hearing. He was provided with a copy of the investigatory report and appendices. This letter was lodged (page 42-43). The letter included the following:-

*“This is to consider the following allegations of Bullying Behaviours which fall into the following themes:*

- *Discussing personal staff issues in an open office area, e.g. making negative comments regarding members of staff – Culture/Environment.*
- *Unnecessary scrutiny of mileage claims, diary & work planning – Mileage & Control.*
- *Treatment of staff – staff scrutiny/target during 1:1s, presenting a publicity document, the Business Process Review, the Dronehill investigation and the Health & Effect on staff.*
- *Victimisation of staff – when very sensitive issues were raised with you directly by Brian Frater and Human Resources you made it known to staff you were aware of this, and described it to them as ‘defamation’ and advised you were taking legal advice, specifically in relation to an exit interview and a staff meeting.”*

The claimant was advised of his right to be represented. The claimant was advised that management did not intend calling any witnesses. The disciplinary hearing initially fixed for 1 September required to be postponed and on 30 August the claimant was advised the meeting had been rescheduled for 23 September. This meeting did not take place either and on 6 October the respondents wrote to the claimant inviting him to a hearing for 3 and 4 November 2016. This letter was lodged (page 45-46). The allegations contained in this were slightly different from those contained in the letter 17 August 2016 although no additional information was provided by the respondents nor was any explanation given as to why the allegations had changed. The letter stated:

*“This is to consider the following allegation of Bullying Behaviours which fall into the following themes;*

1. *Discussing personal staff issues in an open office area, e.g. making negative comments regarding members of staff*
2. *Unnecessary scrutiny of mileage claims, dairy and work planning*
- 5 3. *Treatment of staff during 1:1 meetings, the Business Process Review and the Dronehill investigation*
4. *Victimisation of staff – when very sensitive issues were raised with you directly by Brian Frater and Human Resources you made it known to staff you were aware of this, and described it to them as ‘defamation’ and advised you were taking legal advice.”*

The claimant was told that management would be calling witnesses namely Lynn Crothers, Gwen Robertson, Mary Rose Fitzgerald and Jane Suddaby.

15 31. The disciplinary hearing took place on 3 and 4 November but did not conclude on these dates and was therefore continued to 30 November 2016. It was chaired by David Robertson the respondents’ Chief Financial Officer. Mr Robertson was on nodding terms with the claimant prior to carrying out the disciplinary but did not know him.

20 32. Mr Robertson had originally been due to also deal with the disciplinary hearing relating to Sally Reynolds. I was not able to make a finding as to whether or not he had seen the unredacted report containing the pages relating to Ms Reynolds which had been taken out of the claimant’s report or not. Mr Robertson was accompanied at the hearing by Heather Melville of the respondents’ HR department. The claimant was accompanied by Janet Stewart, Unison representative.

25 33. The section of the respondents’ HR policies relating to arranging a disciplinary hearing was lodged (pages 206-212). It states at 23.4

30 *“The hearing should be recorded, so a note taker may also be present.”*



34. Despite this no notes of the meeting were taken or provided. It is unclear from Mr Robertson's evidence whether he took notes himself but in any event if he did they were not provided to the hearing.
- 5 35. At the hearing Ms Young presented the management case and led evidence from the management witnesses mentioned. Ms Stewart questioned Ms Young and the management witnesses and also led evidence from other witnesses.
- 10 36. Generally speaking Mr Robertson's approach followed that of Ms Young's. He did not seek to provide any specification to the claimant of what the claimant was alleged to have done. Mr Robertson's position was that it was not for him to test evidence objectively. His view was that if an individual said that they felt bullied then he would consider whether or not he believed they were genuine in making this statement. If he did consider that they were genuine, which in the case of  
15 Ms Crothers, Mary Rose Fitzgerald and Gwen Robertson he did, then this was sufficient in his mind for him to make a finding that they had been bullied.
- 20 37. Following the evidence of the witnesses the claimant read out a personal statement. At the end of the hearing Mr Robertson indicated that he was not in a position to issue a decision but would do so in writing. On 14 December Mr Robertson wrote to the claimant. A copy of this letter was lodged (pages 901-904).
- 25 38. The letter sets out the allegations. Allegation 1 was "*Discussing personal staff issues in an open office area, e.g. making negative comments regarding members of staff.*" On the basis of the information before him Mr Robertson found no evidence that personal staff issues had been discussed by the claimant in an open office area. Mr Robertson however decided that the claimant had made inappropriate comments about staff to other colleagues in meetings. Despite the  
30 fact that this was not something which the claimant was charged with Mr Robertson made a finding in his decision letter that he was upholding this allegation which had never been put to the claimant at any stage. Mr Robertson does not give any information in his decision letter as to what the comments were or which meetings they were supposed to have been said in. It is probably as  
35 well to set out his rationale.

5 “The statements submitted to the hearing by several colleagues highlighted instances where the comments made by you regarding members of your team were inconsistent with your responsibilities as a manager i.e. to lead by example, and foster an environment where you are available to staff to discuss any issues in a constructive manner. You repeatedly stated that you had no awareness that your conduct in this matter may be of concern to staff until sight of the investigation report and associated appendices yet the weight of information presented and confirmed by witnesses contradicts this, as I address below.”

10

39. With regard to allegation 2 Mr Robertson did not uphold this allegation. He states

15 “I found there was evidence of scrutiny of mileage claims, diary and work planning where there were concerns about personal staff safety or that policy was not being applied or there were concerns over the accuracy of staff mileage claims. We accept that it was reasonable for you to scrutinise these mileage claims and I therefore do not uphold this allegation.”

20 40. With regard to allegation 3 this was described by Mr Robertson as

“Treatment of staff during 1:1 meetings, the Business Review Process meetings and the Dronehill investigation.”

Mr Robertson found this allegation to be upheld. Again, it is probably as well to state his reasoning.

25 “I found that your treatment of staff was inappropriate in 1:1 meetings. Particularly based on testimony from staff involved I found that you were confrontational and dismissive and that certain members of staff found your conduct to be intimidating. I also cannot ignore the weight of evidence where staff have reported as being afraid and nervous nor the testimony of a member of staff that they had sought treatment for health related issues as a direct result of the work environment and their interactions with you.”

30

41. The position regarding 1:1 meetings was that the claimant only had three direct reports with whom he held 1:1 meetings. They were Sally Reynolds, Tricia Scott and Lynn Crothers. In addition to this the claimant had previously held 1:1s with Gwen Robertson when Gwen Robertson had been a Manager. Gwen Robertson had previously managed the team which was later managed by Sally Reynolds. Gwen Robertson had resigned from this post in late 2013. She was replaced by Sally Reynolds who took over the post from 6 January 2014. Ms Robertson had therefore not had any 1:1s with the claimant for over two years before the investigation into the claimant started. In Gwen Robertson's statement (pages 445-458) she was not asked a specific question about 1:1s. There is a reference to 1:1s on page 454 which states

***“Can you tell us about conversations you had with Anthony when you were Principal Officer?”***

*Anthony has an amazing mind. He is very intelligent but a very shrewd businessman. He thinks in mind maps – there were examples of this in the notes he took at our 1:1s. Even the language he used I would have to go and look up in a thesaurus.”*

Ms Reynolds was asked about 1:1s with the claimant and her response was

*“I have monthly 1:1s with Anthony, but have fallen off. Don't find I'm lacking in support, Anthony is very supportive. Anthony is always accessible and I feel supported in my role by him.” (page 578).*

Tricia Scott was asked about 1:1s at her meeting with Ms Young and her response is on page 717-718. She was asked if she had any difficult discussions with the claimant and stated

*“No, my relationship with Anthony is good”.*

In response to the question whether she had found the claimant supportive she stated

*“When going through the re-structure I had a few ruffled feathers with a member of staff but they have now settled in to the role. I did make Anthony aware of the situation.”*

Tricia Scott also stated (page 715) that 1:1s were meant to take place every three weeks and sometimes they would happen and sometimes they would not. She said the last couple had been rescheduled. She said *“Latterly I felt I was*

*supporting Anthony rather than the other way around.*” She clarified that this was because she was aware that the claimant had been told that there were problems in the team.

5 42. Lynn Crothers did raise a number of points regarding her 1:1s in her statement  
and in what she claimed to be a diary which she had provided to Ms Young. She  
also spoke regarding this at the disciplinary hearing. None of the specific points  
raised by Ms Crothers in relation to 1:1s apart from those already mentioned were  
put to the claimant. One difference which did arise is that both Ms Crothers and  
10 the claimant were in agreement that following her 1:1s Ms Crothers would receive  
notes from the claimant confirming the discussion. Both agreed that the claimant  
did not provide these notes to others as a matter of routine. The claimant’s  
position was that he started doing this following a particular occasion in 2015  
when it became clear following a 1:1 meeting that his understanding of what it  
15 had been agreed Ms Crothers was supposed to do and Ms Crothers’  
understanding of what she was supposed to do was different. The claimant  
therefore started providing her with notes so that there would be no doubt as to  
what it was that Ms Crothers had been instructed to do at the 1:1. Ms Scott’s  
position set out on page 718 when asked about whether she had received notes  
20 stated

*“Only a couple of times. I feel really bad when Lynn says she gets  
screeds and screeds of notes.”*

25 43. With regard to the one specific incident put to the claimant relating to Ms Crothers’  
allegation that the claimant had “rubbished” a draft leaflet which she had  
produced Mr Robertson took the fact that Ms Crothers had appeared upset at a  
meeting where the matter was raised as evidence that things had progressed as  
stated by her.

30 44. Mr Robertson’s letter of dismissal goes on to state in relation to allegation 3

*“In relation to the Dronehill investigation individuals reported as feeling  
‘targeted’ or having ‘red marker treatment’ as well as feeling  
interrogated and intimidated in your handling of this matter.”*

35 As noted above there was no attempt to provide any specifics in relation to what  
the claimant was supposed to have said or done in advance of the disciplinary

hearing and during the disciplinary hearing itself no evidence was given as to the specifics of what the claimant was supposed to have said or done. Once again Mr Robertson accepted impressionistic evidence to the effect that if individuals felt that they were being bullied and he believed them then that was evidence that the claimant was guilty of misconduct.

45. With regard to allegation 3 Mr Robertson's letter goes on to state

*"I also found evidence different treatment being applied to your direct reports in relation to the Business Review Process. There is clear evidence that was corroborated during the hearing that your behaviour towards an individual was bullying. I therefore uphold this allegation."*

46. Although Mr Robertson's evidence was not at all clear on the subject it would appear that this paragraph related to an allegation by Mary Rose Fitzgerald and Lynn Crothers that at a meeting to deal with the Business Review Process, Mary Rose Fitzgerald (who is not one of the claimant's direct reports) had produced a document. Her allegation was that the claimant shouted *"Is that it, get out."* She placed the date of this meeting as 13 November 2013. She was also generally critical of how these meetings had been conducted. In her statement (page 472) she stated that the meetings had taken place every week between 14 May 2013 and 30 July 2013. The claimant could not recall this incident. Ms Crothers' version of the incident was

*"Anthony asked me and others to look at the legislation contained in the Public Health (Scotland) Act 2008 and do a business process for it. When we had a meeting about it, we could not identify a process, the legislation provided powers to use in certain situations but it was not something we would receive a request to use. We put together a briefing for discussion at the meeting. Mary Rose and I attended the meeting. Trish Scott and Richard Anderson also attended. I presented the paper to Anthony. He held it up and said 'am I expected to read this?' and then let it drop on the table. It was excruciating and confrontational. He then turned to Mary Rose and said 'she might as well leave the meeting' and Mary Rose got up and left." (page 322).*

47. Richard Anderson was not interviewed by Ms Young as part of her investigation and took no part in the process.

48. Tricia Scott stated (page 721)

5                   *"I recall Mary Rose was re-doing a business process and Anthony said  
                          'I don't have time to read it' and threw it back at her."*

49. Mr Robertson's dismissal letter goes on to make a finding that allegation 4 is upheld. This was stated to be *"Victimisation/intimidation of staff – when very sensitive issues were raised with you directly by Brian Frater and Human Resources, you had made it known to staff that you were aware of this and described it to them as defamation and advised that you were taking legal advice."* Mr Robertson then goes on to set out what he understood to be the history of the matter and noted the contention put forward by the claimant to the effect that although it was accepted he met with Mr Frater and HR on 15 January and 23 February he was unable to act on these concerns and he was unaware of the specific concerns. Mr Robertson then goes on to state that this gave significant cause for concern *"even if you were unaware"*. He then goes on to say that he does not accept the claimant was unaware of the impact this behaviour was having and that in his view it went beyond what could be termed robust management.

50. In his findings Mr Robertson did not make any specific findings regarding what the allegation was actually about. The claimant's understanding was that what was alleged that he was that he intimidated staff by stating that he considered what they were saying to be defamation and that he was taking legal advice. The claimant denied this. His position (repeated at the Tribunal hearing) was that he had told Mary Rose Fitzgerald that he was prepared to have the exit interview with her but did not wish to discuss the detail of the matters raised by her in the exit form which had been given to her by Lynn Crothers for completion. This was on the basis that the matter was subject of discussion between himself and HR. Mr Robertson does not make any factual findings about the allegation. It is noteworthy that Mary Rose Fitzgerald's allegation relating to being threatened with defamation is that she was told by Lynn Crothers that the claimant had said this. She does not provide any direct evidence of this.

51. Mr Robertson decided that the claimant should be summarily dismissed. He sought to relate this to the respondents' disciplinary procedure stating

5 *“Consequently I have concluded that this amounts to gross misconduct in terms of the Council’s Disciplinary Procedures for Misconduct, in particular on the following grounds:*

- *Indecent, abusive or threatening behaviour.*
  - *Serious breach of trust and/or confidence caused by the actions of the employee.*
  - *Serious breach of relevant Codes of Practice, Regulations, Policies and Procedures.”*
- 10

52. The claimant duly submitted an appeal. The claimant's appeal form was lodged (page 905-907). Attached to it was a letter from his union. The grounds for appeal were stated to be

- 15
- *The disciplining officer placed authority on an inept, potentially biased and seriously flawed investigation report from the outset of the hearing with no regard to issues raised relating to the investigation and it’s conduct raised by Anthony and myself*
  - *The disciplining officer placed authority on witness statements and witness testimony with no regard to contrary actual evidence; and hence the disciplining officer cites evidence in support of his conclusion to dismiss that is unsubstantiated, hearsay and not in fact evidence*
  - *The disciplining officer has not made any attempt to establish evidence where instances or issues were disputed*
  - *The role of members of staff from HR prior to, during and after the investigation which demonstrate that members of staff within HR had taken a position in the allegations from at least November 2016*
  - *That the sanction is too severe”*
- 20
- 25
- 30

53. The appeal before the respondents' staffing appeals committee was due to take place on 13 February however it did not take place on that date since a conflict of interest was discovered. A copy of the minute was lodged. A conflict of interest is noted in paragraph 4 (page 911) as being *“Ms Stewart indicated there was a*

35

statement in the additional papers noted in paragraph 3 that alleged the Chair of the Appeals Committee had bullied one of the witnesses in relation to a ward issue.” It was decided that the appeal be abandoned and reconvened at a further date (pages 910-911). The appeal hearing was reconvened on 10 April 2017. It was attended by the claimant who was again accompanied by Ms Stewart a Unison Regional Organiser. In advance of the meeting Ms Stewart had expressed concern that no minute of the disciplinary hearing had been taken. As a result of this a minute of the appeal hearing was taken and lodged (page 1037-1090). In advance of the appeal the claimant’s union representative sent in a note of the reasons for the appeal dated 27 March (page 913-914). The letter suggests that the ACAS guidance has not been followed and includes the following.

*“The investigating officer has already advised that she was simply asked to interview people on how things in the workplace were for them and that the ‘facts’ were to be established by the disciplining officer.*

*It is therefore fair to state that the investigation was flawed to the extent that no onus should be placed on it and that all areas which the investigation officer present as fact should be ignored and only the investigation and establishment of facts by the disciplining officer should be alluded to.*

- The disciplining officer has already advised that he did not investigate to establish the legitimacy of disputed facts. Rather, the disciplining officer advised that he placed no weight on any contradictory evidence and actually opted to ignore all disputed facts.*

*It is therefore fair to state that the disciplining officer did not perform any investigatory role either and as such no-one within Scottish Borders Council investigated contradictory evidence given the fact that the disciplining officer has not made any attempt to establish evidence where instances or issues were disputed*

- The role of members of staff from HR prior to, during and after the investigation which demonstrate that members of staff within HR had taken a position on the allegations from at least November 2016*



- *That the sanction is too severe*
- *That this matter is not and was never a disciplinary matter and should not have been treated as such.”*

The document then goes on to provide further details (pages 915-919).

5

54. Subsequent to the claimant's dismissal on 14 December but prior to the appeal hearing in April the respondents had provided a restructuring paper to the joint trade union meeting on 26 January 2017 in which the role held by the claimant that of Regulatory Service Manager had been restructured out of existence. During the course of the hearing the members were assured that if the claimant were reinstated he would be reinstated into an equivalent alternative role.

10

55. In advance of the hearing the claimant sought to have a number of employees attend the appeal hearing. These were Gillian Young, David Robertson, Dee MacLean the HR officer and Pam Culbertson an HR Officer. He also lodged various e-mails including an e-mail from Karen Cruise who the claimant had initially sought to call but who had said that she was not confident about attending the hearing as a witness. She basically refuted a particular point made by Lynn Crothers one of her allegations where she had said the claimant had thrown a pen across the room. She described Ms Crothers' version as "*Eh not exactly as I remember.*" (page 967).

15

20

56. In terms of the respondents' procedure the appeal hearing is a review of the decision of Mr Robertson and not a re-hearing. That having been said a number of witnesses were called on behalf of management including Lynn Crothers who was accompanied by her own union representative, Gwen Robertson and Tricia Scott.

25

57. The decision on the appeal was made by the elected members. They wrote to the claimant on 20 April 2017 confirming that the appeal was not upheld (the letter was lodged, page 1029-1036.) The claimant had no further right of appeal.

30

58. Following the termination of his employment the claimant applied for a number of jobs both within his profession and in other areas including certain unusual areas. He took all appropriate steps to mitigate his losses. The claimant was unsuccessful in finding other employment. Eventually he decided to set up two

35

companies. One required to be dissolved after a short time. The claimant has carried out environmental consultancy work through one of these companies. He mainly carries out assessments of private water supplies for developers. This company was set up in June 2017. He was successful in obtaining work from July to September. He was unable to draw a salary from this business in the early months but had taken a total of £1884 in the period from the date of his dismissal to the date of the Tribunal. He anticipates being able to take around £680 per month out of this business.

59. The claimant's gross weekly wage at the time of dismissal was £846.4. In addition to the Claimant's salary the respondents paid employers contributions into the local government pension scheme on behalf of the Claimant. At the time of the claimant's employment the pension contributions amounted to 18% of pensionable salary.

#### **Observations on the Evidence**

60. In his submissions the claimant's representative invites me to find that Mr Robertson and Ms Young who gave evidence on behalf of the respondents were inherently unreliable witnesses. I have to say I agree entirely with the comments which the claimant's representative has made. I did not find their evidence to be reliable and neither witness appeared to be willing to assist the Tribunal by answering questions openly and honestly. Even during evidence in chief Ms Young was not prepared to answer questions directly but simply leafed through the report and repeated sections of the report which she felt might be of assistance to the respondents' case. In cross examination she was evasive. She did not appear willing to answer straightforward questions and even when the answer was quite obvious she was reluctant to give any answer at all until pushed. Mr Robertson was also an entirely unsatisfactory witness. Like Ms Young he was unwilling to answer questions in a straightforward way. He gave the impression of having made up his mind that he was not prepared to make any concessions and even when the most obvious points were made to him he refused to accept them. Mr Robertson also significantly changed his evidence at several points. Most obviously he gave entirely different evidence on re-examination than he had given in answer to cross examination questions asked by the claimant's representative. He also gave contradictory evidence in

relation to his involvement with Ms Reynolds. It was put to him in cross examination that he was also to be the Disciplinary Officer in respect of Ms Reynolds had she remained with the Council. He categorically denied this. Various documents were then put to him both in cross examination and, after the  
5 break, in re-examination which clearly indicated that he had been the person who was due to deal with the disciplinary in respect of Ms Reynolds. He then accepted that he had but stated that he had at no point seen an unredacted copy of the report. His evidence by this point was frankly incomprehensible and at the end of the day I felt unable to make any finding of fact as to whether he had seen a  
10 copy of the unredacted report or not. In relation to the claimant his evidence was quite clear to the effect that he had read the whole 600-odd page report by the time he sent the invitation to the disciplinary hearing to the claimant on 17 August 2016. In relation to Ms Reynolds it is clear that he wrote to her on 12 July inviting her to a disciplinary hearing and enclosing a copy of the report in relation to Ms  
15 Reynolds which presumably at that stage had not been redacted so as to take out the entries relating to Ms Reynolds.

61. It was also noteworthy that Mr Robertson's position changed considerably between what was said in the dismissal letter, what he said at the appeal, what  
20 he said when giving evidence in chief and during cross examination from what he eventually said during re-examination. It appeared to me that during re-examination Mr Robertson was being directed to those matters which he ought to have considered and formed a view on at the disciplinary hearing but that he had not. I did not consider his answers in re-examination to be credible and  
25 believe that by that stage he was simply giving whatever answer he thought would best suit the respondents' case.

62. During his evidence Mr Robertson made it clear on many occasions that he had made a finding that the Claimant was guilty of bullying on the basis that he felt he  
30 had evidence from someone who said that they had felt bullied and he believed them. It was put to him many times that this was an inappropriate basis on which to reach a decision. Generally, Mr Robertson would deny that he made findings purely on the basis of such subjective evidence but when he was asked to provide objective justification as to why he made a finding he was unable to do so and  
35 then subsequently, when pressed, again gave evidence which was along the lines that if somebody said they were bullied he accepted this. I accepted entirely

the position of the Claimant's representative that Mr Robertson's reasoning was indeed along the lines alleged.

5 63. Having made these findings however I should be clear in saying that my decision  
in this case did not in any way depend on the adverse credibility findings I have  
made in respect of Ms Young and Mr Robertson. In my view the agreed facts of  
the case and the agreed contemporary documents clearly demonstrate the many  
ways in which the respondents failed to deal with this matter properly. It appears  
to me that having belatedly realised this Ms Young and Mr Robertson were simply  
10 attempting to do what they could to limit the damage by giving evasive answers  
to the Tribunal.

15 64. A curious feature of the way the respondents presented their case was that there  
was no evidence led from witnesses directly involved in what is perhaps the most  
important part of the story namely the early stages. As I have set out above the  
respondents have a fairly detailed process which they have set out as being the  
way that they will deal with the issue of bullying. It is equally clear from the  
documentation that virtually no part of this process was complied with. Clearly  
certain decisions were made at an early stage both in relation to the appointment  
20 of an Investigating Manager and in relation to the remit of the investigation. No  
evidence whatsoever was led in respect of this.

25 65. With regard to the appeal none of the parties who made the decision were called  
to give evidence. Instead Mr Davidson who was representing the Council gave  
evidence which was essentially to the effect that the minutes were accurate and  
that the letter sent out after the hearing accurately showed the respondents'  
position. He also gave evidence that the appeal was a review and not a re-  
hearing of the case. Mr Davidson had drafted the letter refusing the appeal and  
indicated it was approved by the committee members before being sent. He also  
30 confirmed that essentially the committee came to the conclusion that Mr  
Robertson was entitled to reach the decision he did.

35 66. I considered that the claimant was a credible and reliable witness. I was invited  
by the claimant's representative to suggest that on the basis of the way he gave  
his evidence it was unlikely that he was a bully of the sort described in certain of  
the documents. I would agree with the respondents' representative that this

would not be a proper conclusion for me to draw. The manner in which he gave evidence would be no indication as to how he behaved in the entirely different setting of a manager dealing with his subordinates. The claimant was subject to intense cross examination in respect of a number of detailed points. My view was that, like Mr Robertson's re-examination, this was an event which was happening far too late in the day. Points were being put to the claimant which were assembled from the various documents in a way which had not been done at any point prior to the claimant's cross examination at the Tribunal. It would clearly have been much better if the claimant had been asked about these matters properly at a much earlier stage such as during Ms Young's alleged investigation. I should record that in respect of all the points which were made in cross examination the claimant was able to provide an entirely credible and reasonable explanation which refuted the suggestion that he had been bullying staff. The claimant's answers in relation to matters which could be checked were generally in accordance with the contemporary documents. So far as the specific allegations made by Lynn Crothers were concerned the claimant's explanation was that either matters had not happened or had not happened in precisely the way that she stated. Where something had happened the claimant was able to provide an explanation which was generally along the lines that he was acting in the way which he believed a responsible manager should act.

### **Issues**

67. The issue to be determined by the Tribunal was whether or not the claimant had been unfairly dismissed. If I found in the claimant's favour the claimant was seeking compensation.

### **Discussion and Decision**

68. At the end of the evidence it was agreed that the parties would submit written submissions and comments on each other's submissions by 12 January 2018. Both parties produced written submissions which I found to be helpful. Rather than attempt to summarise them and no doubt fail to do justice to them I shall refer to them where appropriate below.

35

69. Section 98 of the Employment Rights Act 1996 states

“(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*

5 (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.”*

10 70. It was the respondents’ position that the reason for the claimant’s dismissal related to his conduct which is a potentially fair reason falling within Section 98(2)(b) of the said Act. The claimant did not dispute that this was the reason for dismissal and Mr Robertson’s evidence was to the effect that he dismissed because of his belief as to the claimant’s conduct. I was prepared to accept that

15 the respondents had established that the reason for dismissal was conduct. Section 98(4) of the said Act goes on to state

“(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) –*

20 (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*

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

71. It is now well established that the burden of proof in Section 98(4) is neutral and it is for the Tribunal to make findings on the balance of probabilities. Both parties

30 were agreed that the correct approach for the Tribunal to take is that set out in the well-known case of ***British Home Stores Ltd v Burchell [1980] ICR 303***. This makes it clear that it is not for the Tribunal to form its own view as to the guilt or innocence of the employee but to look at the actions of the employer to determine whether or not the employer acted reasonably or unreasonably in

35 terms of Section 98(4). The case of ***Burchell*** famously sets out a three-fold test. First as mentioned in the claimant’s submissions

5           *“What the Tribunal have to decide every time is broadly expressed whether the employer who discharged the employee on the grounds 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. That is really stating shortly and compendiously what is in fact more than one element first of all there must be established by the employer the fact of that belief that the employer did believe it, secondly that the employer had in his mind reasonable grounds upon which to sustain that belief and thirdly, we think, that the employer at*  
10 *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.”*

15 72. Generally speaking, the respondents' position was that Mr Robertson had formed the view that the claimant had engaged in bullying behaviour.

73. It is at this stage I should address one of the matters in the respondents' case which I found most difficult. On the basis of the allegations the investigative report  
20 and the decision letter it was very difficult to establish exactly what conduct it was that Mr Robertson believed the claimant was guilty of. Both Ms Young and Mr Robertson gave evidence to the effect that they had previously been involved in disciplinary processes both gave evidence to the effect that in those processes the allegations had followed the usual pattern whereby an employee was accused  
25 of having done a certain thing on a certain date or dates with appropriate details. Neither of them could give an adequate explanation as to why his time honoured practice had not been followed in this case.

74. Mrs Young's position was that she and her HR colleague would write down  
30 everything they were told and would not seek to refine matters further. Although it was clear from the report that this statement was simply not true and that Ms Young and her HR colleague had made their own value judgments the report does not seek in any way to refine down what has been said into a set of allegations which are capable of being understood or indeed responded to in a  
35 sensible manner. Mr Robertson's view appears to be that he has gone through the report and taken some parts out and then come to a decision on them. It is

unclear whether these were the same parts to which he was directed in examination in chief by the respondents' representative or not. Certain aspects which, from the report one might have thought were important, were said by Mr Robertson in cross examination to have been matters which carried little weight with him. For example he said that he had not taken any real cognisance of the allegation that the claimant had bullied members of staff by allegedly instructing Sally Reynolds to threaten them with disciplinary action if they did not serve a statutory notice. I shall comment further on the other ways in which this decision making method of Mr Robertson impacted on fairness later in the judgment however at this stage I am simply trying to deal with the question of whether Mr Robertson, the decision maker in the case, had a genuine belief that the claimant was guilty of the misconduct alleged. At the end of the day having heard Mr Robertson's evidence I am satisfied that Mr Robertson did hold a genuine belief that the claimant was guilty of bullying of some sort. I was not able to make any finding that Mr Robertson had a genuine belief that the claimant was guilty of any particular act which was alleged since it was clear from Mr Robertson's evidence that where there was any kind of dispute he made no attempt to resolve this and indeed did not make any real attempt to make factual findings.

75. Given that the appeal in this case was accepted by Mr Davidson to be simply a review of Mr Robertson's decision my finding is that all that I can really tell from the material before me in relation to the appeal is that the Councillors on the appeal committee considered that Mr Robertson's decision should not be interfered with I am not in any position to make any findings as to what they did or did not believe.

76. Looking at the other aspects of the **Burchell** test I consider it appropriate to look at the third aspect first namely whether or not a reasonable investigation was carried out before Mr Robertson came to the decision he did. The case of **Sainsbury's Supermarkets v Hitt [2003] IRLR 23 CA** makes it clear that the test to be applied is that of the range of reasonable responses. There is no one size fits all approach. Employers are free to carry out their investigation in whichever way they choose and whichever is most appropriate for them. It is only if the investigation is outwith the range of reasonable responses that a Tribunal is entitled to interfere. There is also a long line of authorities saying that



it is not necessary for employers to carry out their investigation with the same rigour and attention to detail as a police investigation. What is required is an investigation which is within the band of reasonableness given the circumstances of the case. I should say at the outset that the investigation in this case was well  
5 outside the range of reasonable responses and was one of the most woefully inadequate investigations of misconduct I have ever come across. Given that the circumstances of this case were that an employee with a hitherto unblemished record was facing and did in fact require to endure dismissal for gross misconduct in respect of the allegations the standard of the investigation in this case was  
10 utterly shameful.

77. I shall say more about the procedural aspects of this case in due course however I should say that at the outset the investigation got off to a poor start because the respondents did not follow their own policy and insist that Mrs Crothers submitted  
15 a formal grievance setting out her concerns. They did not investigate her allegations as a grievance and as a result Mrs Young appears to have started out with entirely inadequate terms of reference. Her first step is to write to all members of staff in Regulatory Services. The letter at 782 states

*"I have been appointed to investigate allegations of bullying within  
20 Regulatory Services."*

She goes on to say that she has been asked to contact members of staff directly and confidentially to offer the opportunity of informing the investigation by giving a statement. This method of starting off the investigation was characterised by the claimant's representative as being a self-fulfilling prophecy where those most  
25 likely to come forward were those unhappy with how they were being managed. I would entirely agree with that. The letter also highlights the other problem with the remit of the investigation report which was never resolved during the whole process. On the one hand Ms Young has been appointed to carry out an investigation following the suspension of the claimant and Ms Reynolds. Her  
30 investigation is clearly designed to be focused on these individuals. Yet Ms Young says she is investigating bullying behaviour in general. It is also clear that Ms Crothers at least had raised allegations about the claimant and Ms Reynolds in November 2015 yet the investigation does not commence until April 2016. Rather than focus on the allegations of Ms Crothers the attempt seems to be  
35 being made to widen out the terms of the investigation.

78. Even more fundamentally Ms Young makes no real attempt to actually carry out any investigation into what she is being told. She does not seek to come up with a list of specific allegations and ask the witnesses if they know anything about them. She does not put the allegations to the claimant in a way that he can sensibly respond to them. There is no attempt to follow up the points made by the claimant about the “*process*” which was followed prior to his suspension. Ms Young appears to have obtained an “*authorised version*” of what took place from some unknown source to the effect that the claimant was told about the allegations and both made no attempt to curb his behaviour as a result of the allegations and secondly refused to engage in mediation. Ms Young’s investigation report provides no real evidence in the form of statements as to how she came to this view and this view was completely contradicted by the claimant both at the disciplinary hearing and when he gave evidence to the Tribunal. It is also noteworthy that the respondents did not bring anyone to the Tribunal who could speak about this. The methodology of the investigation was seriously flawed. Individuals are asked a series of questions with no attempt to seek to marry them up or to test one piece of evidence against another. Sometimes it is not clear whether individuals are talking about the same incident or a different one. Where individuals are mentioned as having been present when an incident took place there is no attempt to obtain verification of the incident from that individual.
79. The respondents’ position was that the allegation of bullying coalesced into four themes which subsequently formed the detail of the bullying allegation and that the use of themes allowed Mr Carson the opportunity to be fully aware of the case against him. I totally disagree. I also disagree with the suggestion made by Mr Robertson that somehow the claimant could have trawled through the 600-odd page report and worked out what it was in this that Mr Robertson would be concentrating on. I entirely agree with the claimant that the claimant could not know the case against him on the basis of the investigation report. The specific incidents which were said to amount to “*discussing personal staff issues in an open office area, unnecessary scrutiny of mileage claims, diary and work planning, treatment of staff during 1:1 meetings, the business review process meeting and victimisation/intimidation of staff*” was nowhere set out in the

investigation report and the claimant was not given the opportunity of commenting on it.

5 80. The importance of the investigation stage in any disciplinary process is that often the employee accused of misconduct is at a particular disadvantage and is reliant upon the employer to investigate things properly. The employee is may be suspected as here and prohibited from talking to witnesses. He does not have access to his work diary or IT support. An important part of the investigation process is that the detail of the allegation is put to the employee so that he can  
10 then respond and suggest to the Investigating Officer where the appropriate evidence which may exculpate him might be found. Absolutely none of that happened in this case.

15 81. The report is itself confusing is that it sets out themes into which facts were organised at pages 57 and 54 and also sets out conclusions at page 122. The evidence of the respondents' witnesses as to which of these set out the allegations varied over time but no matter which of these are said to contain the nub of the allegations against the claimant it is clear to me that the conclusions of the investigation report are entirely vague and that as a result it was not  
20 possible for the claimant to know what it was he was meant to have done. The end product of Ms Young's investigation was a report which where she had, in her own words, deliberately set out not to make any factual findings but set out the evidence as it was. The report does not in any way seek to weigh up the evidence in respect of what has been said by any of the witnesses but simply  
25 records this without comment. In my view it is not a real investigation report.

30 82. I should also say that I considered the report demonstrated clear bias. As the claimant's representative pointed out there are many parts of the report where evidence favourable to the claimant is glossed over whilst statements critical of the claimant from only one or two sources are said to be general complaints by "*staff*". In my view the failure of Ms Young to identify exactly what it was in the way of incidents or conduct on the part of the claimant rendered the investigation completely outwith the band of reasonableness.

35 83. So far as Mr Robertson is concerned he carried out no additional investigation other than to question witnesses during the hearing. During the Tribunal hearing

he mentioned at several points that he had been convinced by what people had told him. Once again however, on drilling down this amounted to little more than Mr Robertson believing people when they said that they were bullied by the claimant. Mr Robertson made no real attempt to identify any specific conduct which the claimant had carried out. Additionally, one of the most glaring failures of both Mr Robertson and Ms Young was their total refusal to investigate what one of the key issues in any allegation of bullying. By the end of the process it is clear that the main source of complaints about bullying by the claimant are Ms Crothers and to an extent Gwen Robertson. Both of these were individuals managed by the claimant. Both of them were, on the basis of their own statements, employees who were having difficulties in their work. In Ms Robertson's case this had resulted in her resigning from her promoted position some two years earlier. Interestingly, no complaints appear to have been made by her at the time and one of the many questions not asked of her during the investigation is why this was the case. The key issue to be addressed in any investigation like this is whether what is being done by the manager is legitimate management action of an employee with performance issues or whether it crosses over into bullying. There is absolutely no attempt by either Ms Young or Mr Robertson to investigate this crucial aspect. Interestingly, Mr Robertson appears to make a finding that one of the key themes identified by Ms Young - being overzealous in checking mileage claims was not bullying but was in fact legitimate management supervision. The basis of this decision was not clear either from his decision letter or from his evidence but at least it shows that Mr Robertson was aware of the potential need to make findings in relation to this point. There was no attempt to investigate this matter in relation to any of the other points.

84. Due to the many other deficiencies in the respondents' investigative process it is not particularly easy to single out matters which may have been the incidents on which the respondents sought to rely. One example however appears to be the Dronehill investigation. There is an agreement that the claimant sought Ms Fitzgerald's notebook. The claimant's position at the time and at the Tribunal hearing is that this is a perfectly normal thing for an officer investigating a complaint do in the circumstances. Apart from the fact Mary Rose Fitzgerald and Mr Brown complained about it, there is nothing in any of the papers or in any of the Tribunal evidence to suggest that the claimant is not entirely correct in this.

If however this was indeed the basis for Mr Robertson's decision that it was bullying behaviour to do this then the issue should have been canvassed and investigated properly by Mr Robertson before he made his decision. It was not.

5 85. We would also agree with the claimant's representative that the fact that not all  
of the employees within Regulatory Services was interviewed was a further  
deficiency in the investigation. In his submissions the respondents'  
representative indicated that Ms Young's initial remit was to investigate high level  
allegations of bullying behaviour against Mr Carson and Ms Reynolds. This was  
10 put forward as a justification for the investigatory report not following what might  
be described as the standard format for such reports where specific allegations  
are made and then investigated. If this were the case and Ms Young was carrying  
out a high level report into the culture and atmosphere in the workplace and  
particularly when part of the allegations related to discussions being held in an  
15 open plan workplace a proper investigation had to involve interviewing all staff.  
In fact only around two thirds of the staff were interviewed and these were  
concentrated into two of the three teams. I would agree with the claimant's  
representative that given Ms Young had chosen to proceed by essentially inviting  
complaints from disgruntled employees then the mere fact that the complaints  
20 were concentrated in this way ought to have alerted her to the issue that there  
might well be problems within these two groups rather than with the claimant's  
overall management of the service. This matter was not investigated either.

25 86. We would also agree with the claimant's representative's specific concerns  
regarding the confusion of Ms Young's remit so far as whether she was meant to  
be factfinding or not. We would agree that if it was the case that, as she says,  
she was only to gather information then she has clearly gone beyond her remit  
by coming to conclusions about the allegations. If on the other hand contrary to  
what she and Mr Robertson said, her remit was to find facts and reach  
30 conclusions then we would agree that she failed to carry this out properly. There  
was no attempt to carry out any critical questioning or analysis of the information  
being provided and she made no attempt to resolve any factual disputes.  
Nowhere in the report did she carry out any further analysis of the evidence. We  
would agree with the claimant's representative that what she has done is accept  
35 at face value what those who make allegations against the claimant have said

without giving the claimant the same benefit. She entirely failed to check corroborating witnesses where they would have been available.

5 87. We would also agree with the claimant's representative that the report is flawed in that it has clearly started out as a report against both the claimant and Ms Reynolds but various parts have been redacted prior to the report being sent to the claimant. Mr Robertson's understanding of the position was that these related to Ms Reynolds however it is clear that certain allegations which were allegations against Ms Reynolds appear to have been held against the claimant.

10

88. The various deficiencies in the investigation would of themselves be enough to render the dismissal unfair however for the sake of completeness I should deal briefly with the second strand of the **Burchell** test. In my view it was absolutely clear that at the time he made his decision that the claimant was guilty of "*bullying and harassment*" Mr Robertson did not have before him sufficient evidence to allow him to reasonably come to that conclusion. Quite apart from the deficiencies in the investigation and the complete failure to even specify in advance what specific pieces of conduct were alleged to be misconduct Mr Robertson's decision making suffers from a fatal flaw. During the course of his evidence it became clear that Mr Robertson believed that his job was to ascertain whether the witnesses who complained that Mr Carson bullied them were credible or not. His position was that Ms Crothers, Ms Robertson and Ms Fitzgerald had all given evidence to the effect that they felt bullied and that he believed them. He then made the logical leap that the claimant must have been guilty of some conduct which made them feel bullied. In my view this was a completely impermissible leap to take. Even in relation to those very few matters where by delving down into the body of the report and the statements one could come up with a specific allegation relating to conduct, Mr Robertson did not have any proper basis for coming to the view that he did. For example, in relation to the Dronehill investigation he appears to have come to the view that the claimant behaved inappropriately without any evidence as to what the claimant is actually supposed to have said. What the witness statements say is that Ms Fitzgerald and Mr Brown were called in to be asked questions and that it felt like an interrogation. We were not told what specific things Mr Carson is supposed to have done which made it feel like an interrogation.

15

20

25

30

35

89. Approaching the matter in terms of the three strand **Burchell** test I would therefore find that the dismissal was unfair however there were a number of other matters in relation to the way the respondents dealt with the matter which made me also consider that the dismissal was unfair in any event.

5

90. The first of these relates to natural justice. In my view the way the respondents dealt with this matter entirely failed to comply with the tenets of natural justice. The claimant was not properly told what the allegations were against him. He was called into meetings where he was told first of all that complaints were made without giving the name of the complainer or any detail and then to a meeting where he was told the name of the complainer but not given any details. He agrees to mediation but mediation does not take place and he is then suspended. His suspension takes place some five months after the allegations were first made by Ms Crothers in November 2015. A “so-called” investigation is then carried out and during the course of this he is interviewed but not given any detail of the allegations against him. A report is then produced which again provides nothing in the way of specification of the allegations but contains a substantial amount of documentation and makes it clear that a view has already been taken. He then attends a disciplinary hearing. We don’t have any notes of the disciplinary hearing however during the course of this it would appear that the claimant’s representative sought to challenge the respondents’ version of events by bringing a substantial number of witnesses who could speak to what the claimant understood was the ‘gist’ of the charges against him. One of the allegations related to scrutiny of mileage claims is dismissed. With regard to one of the other claims that the claimant has discussed matters with staff inappropriately in the public office Mr Robertson accepts that there is no actual evidence justifying this. Mr Robertson then however goes on to invent a different charge on which he finds the claimant guilty that is discussing matters inappropriately in private meetings. The claimant had not even a vestigial notice that this was something which was going to be dealt with. I also consider the various deficiencies in Mr Robertson’s decision making which I have already outlined to demonstrate a failure to comply with the rules of natural justice.

10

15

20

25

30

91. Finally, it is well known that an important part of overall fairness is procedural fairness. In this case there was a complete failure to provide the claimant with any procedural fairness at all. Many of the substantive criticisms which I have

35

made above also include failures to follow procedural fairness. As well as this however it is clear that a reasonable employer will follow their own procedures. Dealing with allegations of bullying is a difficult matter for any organisation to deal with. For that reason the respondents have a number of policies and procedures which they have published to their workforce which relate how they will deal with such allegations. As can be seen the respondents failed to follow these procedures almost in their entirety in this case. In my view there was also a failure to follow the terms of the ACAS Code in that the claimant was not provided with properly set out allegations. I entirely refute the respondents' suggestion that this was something which they were entitled to do given the "unusual" circumstances. It is quite correct that those alleging that someone is a bully often have difficulty in coming up with specifics but it is also equally true that if someone is accused of bullying they are unable to deal with the matter at all unless they are given specifics as to which behaviours and which pieces of conduct under scrutiny. The questions which then have to be asked are whether the incident happened and then crucially whether the interpretation of the incident placed on it by the person who alleges bullying is correct or not. To put it bluntly a person may feel bad at a meeting with their manager because their manager is speaking to them inappropriately or they may feel bad because their manager is pointing out they have not been doing their job properly. A manager may provide one employee with notes of meetings because he is trying to set that employee up to fail or it may be because there have been communication difficulties in the past and the manager wishes to make his views clear. This is the purpose of investigation. That was not done in this case.

92. In terms of the ACAS code paragraph 9 states that after the investigation stage the employee should be notified if there is a disciplinary case to answer and that 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 the case of the disciplinary meeting. That was not done in this case. I do not find the reasons put forward by the Respondents for not complying with this basic rule to be in any way adequate.

93. For the above reasons I had absolutely no doubt in considering their dismissal in this case to be unfair.



94. I was invited by the respondents' representatives to reduce any compensation due to the claimant on the basis that by his conduct the claimant contributed to his dismissal. I entirely reject that submission.

5 95. The difficulty in this case is that because no proper investigation was done it would be very difficult for me to make a finding of anything at all in relation to the claimant's conduct. It is entirely possible that the claimant was guilty of bullying behaviours however the complete mess made of the investigation means that it is not possible for me to make any finding at all as to whether the claimant  
10 contributed to his dismissal by his behaviour or not.

96. During the course of cross examining the claimant a number of matters were put to the claimant by the respondents' representative. These did relate to the claimant's conduct. I agree entirely with the position of the claimant's  
15 representative that these were matters which ought to have been put to the claimant at the very early stages of the investigation. They had not. Where specific allegations were put to the claimant relating to conduct I find that the claimant answered them adequately and his answers taken at face value would indicate there was nothing at all wrong with his conduct. It is of course entirely  
20 possible that there exists other evidence elsewhere which might have contradicted what the claimant said but on the basis of what took place at the Tribunal hearing I entirely accept the claimant's position. I should also say that comparing what the claimant said with such evidence regarding the specific incidents as was contained in the investigation report it appears to be much more  
25 likely that the claimant's version of events was true than the contrary.

97. It was also the respondents' position that if a proper procedure had been followed in this case then there was a chance that the claimant would have been dismissed anyway. I have to say that I do not accept that this is the case. I consider that  
30 the various deficits in the respondents' decision making in this matter render the dismissal substantially as well as procedurally unfair. It is very difficult for me to make any finding as to what would have occurred had a proper investigation taken place. Much of the evidence in the Tribunal naturally dealt with the respondents' decision making and it is on that basis that I have found the dismissal unfair. The evidence which I heard relating to the factual position as to  
35 whether or not the claimant was actually guilty of bullying behaviour was fairly

limited. Essentially it was limited to hearsay evidence from Mr Robertson and Ms Young to the effect that certain employees felt bullied and that they were upset and distressed and the evidence contained within the various statements. As against that I have the claimant's evidence given in cross examination in which he denied certain allegations and provided a cogent acceptable and non-bullying explanation in respect of others. On that basis my view has to be that if a proper investigation and a proper procedure had been carried out then the claimant would not have faced any chance whatsoever of being dismissed.

## 10 Remedy

98. The claimant produced a Schedule of Loss. I did not understand the respondents to make any substantive point regarding failure to mitigate. In my view the claimant has taken entirely adequate steps to mitigate his loss. He was faced with what must have seemed to him as a career ending decision and the likelihood of him being employed as a manager with any other local authority having been dismissed for gross misconduct in those circumstances was slight. In my view he has taken appropriate steps to mitigate his loss by setting up his own business and he has not delayed too long in doing so.

99. The claimant is entitled to a basic award of nine and a half weeks' pay at the appropriate statutory maximum of £489. He is therefore entitled to a basic award of £4645.50. With regard to past loss the claimant's date of dismissal was 13 December 2016 and the final day of the hearing was 20 December 2016 although final submissions were not exchanged until 12 January 2018. I considered it appropriate to award the claimant his full loss from the date of dismissal amounting to the final date of the hearing (53 weeks). The compensatory award requires to be calculated on the basis of net pay. It is clear from the Schedule of Loss prepared by the claimant that the claimant's calculation is based on gross pay. This is incorrect. I was not provided with any pay slips however in the ET1 the claimant states that his net pay was £2600 per month which equates to £600 per week and in the ET3 the respondents say £2540 per month which equates to £586.15 per week. In the circumstances I proceeded on the basis that the claimant's net pay is £586.15 per week and on this basis I calculate the total wage loss to date as £31,065.95. From this I would deduct his earnings from his business to date amounting to £1884 giving total wage loss to date of £29,181.95.

The claimant sought 26 weeks' future loss less earnings from his new job of £157 per week. I consider this request to be fairly modest. I would therefore be quite prepared to award the sum of £11,157.90. (26 x (586.15-157)). The total wage loss is therefore £40339.85.

5

100. The claimant's Schedule of Loss sought compensation for pension loss. The Claimant considered it proportionate to calculate this on the basis of the contribution method given the existence of the statutory cap. Their calculation was based on the understanding that the employer's contribution rate was 5% of salary however it would appear from the information provided by the respondents that it is in fact 18% of salary. The local government pension scheme is a generous final salary one and there is clearly a possibility that the claimant will be unable to obtain similar benefits at all in his future career unless he is in a position to go back to local government. Given the Schedule of Loss and given the statutory cap I would award pension loss for 18 months. Given the circumstances had the statutory cap not been in play I would have considered it appropriate to use the standard Ogden tables method of calculating the current value of the claimant's future pension loss as is set out in the recent Presidential Guidance on the subject. Given the existence of the statutory gap however I would agree with the claimant's representative that it is in order to use the contribution method. The claimant's gross salary was £44,013.22. Pension contribution is therefore £7922.37 per annum and the loss of pension contribution over a period of 77 weeks is therefore £11,731.20. Adding this to the figure for wage loss of £40,339.85 gives a total compensatory award of £52,071.05. The statutory cap in this case is equal to one year's remuneration. The claimant's gross pay was £44,013.22. In given the decision in the case of ***Drossou v University of Sunderland*** there is to be added to that the employer's pension contribution payable for that year and the total statutory cap is therefore £51,935.59. The total compensatory award after application of the statutory cap is therefore £51,935.59. I should say that I consider that in this case there was a quite inexcusable failure to comply with the terms of the ACAS Code in particular paragraph 9. I would have happily been prepared to make an order increasing the amount of the compensatory award to take account of this however given the existence of the statutory cap in this case I was not requested by the claimant's representative to do this and in the interests of proportionality have not done so.

35

101. The total monetary award (compensatory award plus basic award) is therefore £56,581.09 (£4645.50 + 51,935.59). I was not given any information about any benefits claimed by the claimant and presume that none were. On this basis there is no prescribed element.

5

10 Employment Judge: I McFatridge  
Date of Judgment: 13 February 2018  
Entered in register: 16 February 2018  
and copied to parties