EMPLOYMENT TRIBUNALS

Claimant:	**Mr I McIver**
Respondent:	**Yorkshire Tiger Limited**
Heard at:	Leeds **On:** 4 & 5 September 2017
Before Employment Judge	Dr E Morgan
Representation	
Claimant:	Ms Boynes (Solicitor)
Respondents:	Ms Wilson (Solicitor)

JUDGMENT

1. The claim of unfair dismissal is well founded and succeeds.

2. The procedure to which the Claimant was subjected was one to which the ACAS Code applied.

3. There was a 70% prospect that the Claimant would have been dismissed following a fair procedure in any event and the compensation otherwise payable to the Claimant shall be reduced accordingly.

4. The Claimant did not contribute to his dismissal as such no deduction is to be made in respect of the basic award.

REASONS

The Claim

1. By his claim form lodged with the Tribunal on 9 May 2017, the Claimant alleges he was unfairly dismissed. There are no other financial claims.

The Response

2. Whilst the fact of dismissal is admitted, it is contended on behalf of the Respondent that the dismissal was fair for the purposes of section 98(4)

of the Employment Rights Act 1996 and/or that a fair procedure would have resulted in the dismissal of the Claimant in any event.

Case Management and Issues

3. At the outset of the hearing, the parties provided a bundle of documents [356 pages] and an agreed schedule of issues. There were no other case management issues requiring resolution; it being agreed that the earlier case management orders had been complied with. However, the Tribunal identified that there was within the bundle and witness statement from the Claimant, a reference to a third party service user. It was agreed that the name of the third party would be redacted and references to her anonymised by means of the letter 'A'.

Evidence

4. The Claimant gave evidence before the Tribunal. He did not call any supporting witnesses. The Respondent adduced evidence from Mrs Hugget (Commercial Officer) and Mr Finnie (Appeal Officer). The Tribunal has read and considered only those documents to which it was expressly referred within the parties' witness statements or during the course of evidence and submissions.

5. The parties have been ably represented by Ms Boynes and Ms Wilson. Both made helpful and detailed submissions in connection with the issues of liability; drawing upon the agreed schedule for this purpose. Ms Boynes also helpfully provided the Tribunal with copies of a number of authorities which have been read and considered for the purposes of this judgment. There was no dispute between the parties as to the relevant principles of law requiring consideration and application in this case.

Findings of Fact

6. Having heard that evidence and upon the balance of probabilities, the Tribunal makes the following principal findings of fact:

6.1 The respondent is concerned in the operation of a public transport undertaking. At least 70% of its operations emanate from WYCA (hereafter referred to as Metro). One of the services operated by the Respondent was known as the Access Service. This service was intended to provide a means of public transport to those who were otherwise restricted by reason of ill-health, or other infirmity from gaining access to the main public transport network;

6.2 The Claimant commenced his employment as an Access Bus Driver in May 2000. That part of the undertaking in which he was then employed was the subject of a TUPE transfer in September 2014; with the result that his employment transferred at that time to the Respondent. It is common ground that the relevant Employee Handbook applicable to the Claimant's employment was that which originated with Kirklees Council [p29 et seq];

6.3 It is not uncommon for the Respondent to receive complaints from members of the public concerning the conduct of their drivers or in relation to the manner in which its vehicles are being operated. In the case of the Access Bus Service, the vehicles in question bore the livery of Metro; thus, any complaint arising from the operation of the service was made direct to Metro and thereafter relayed to the Respondent for action;

6.4 The provision of public transport services – no matter how sourced- involves a number of commercial and operational uncertainties. Contracts allocated to the Respondent were invariably let following a public procurement tender process; one in which reputational issues and public dissatisfaction were relevant considerations. There was also provision within the relevant contract for the imposition of financial penalties where standards of service were considered by the client (i.e. Metro) not to have been met;

6.5 By November 2015, a number of complaints had been made in connection with the Claimant's operation of his vehicle. It is common ground that the complaints originated from third parties and were then channelled by Metro to the Respondent. There is no suggestion that the Respondent solicited or encouraged them. The documents confirm that the complaints were considered by Metro to be serious and indeed, that they expected formal action to be taken in connection with them.

6.6 Following a form of investigatory process, the Claimant was invited to a disciplinary hearing. The letter convening the hearing made clear that the issues which the Claimant faced were considered matters of potential gross misconduct and could – if proven – lead to the termination of his employment. The events relied upon were said to have occurred in October and November 2015 [p103 and p115];

6.7 The disciplinary hearing was eventually convened on 21 December 2015 [p117]. The disciplining officer concluded that certain of the allegations had been made out and resolved to dismiss the claimant. This took effect on 22 December 2015. Whatever else may be said about the process, it is clear that this was the Respondent reacting to the concerns and complaints communicated by Metro. It was considered at that time that the evidence supported the findings made [p118-120];

6.8 The Claimant exercised his right of appeal against the decision to dismiss him [p126]. The appeal letter shows a detailed understanding and recital of the law relative to unfair dismissal and the Claimant's rights in that regard. Ultimately, it was the Claimant's contention that the misconduct in question had been improperly categorized as gross misconduct [p127]. Happily, the parties were able to come to terms and a COT3 form was entered into [p137] with the result that the Claimant was re-instated;

6.9 There was an issue between the parties as to whether Metro was aware of the Claimant's reinstatement. The Claimant had been a party to a conversation with a representative of Metro ('Fiona') who had

referred to him as the 'bad penny' returned. Mr Finnie also made clear that he had informed Mr Neale Wallace (Manager of Metro) of the reinstatement. The Tribunal is satisfied that this was the case. It is clear that Metro had been informed of the Claimant's reinstatement and had been provided with an explanation for it. Neither the reinstatement nor the re-allocation of the Claimant to his duties prompted any form of retaliation or reprisal from Metro. In the view of the Tribunal, had there been any ambiguity around the decision to reinstate, or the reasons for it, it is highly likely that this would have prompted – in the very least- inquiry from Metro; particularly, given the ease of communication between Mr Wallace and Mr Finnie. The absence of such communication at that time is consistent with the narrative offered by Mr Finnie as to what occurred between them;

6.10 On 13 July 2016, the Respondent received a further complaint concerning the Claimant. There were two aspects to the complaint, namely: (a) it was said the Claimant's vehicle had collided with the wing mirror of an ambulance; and (b) it was alleged the Claimant had been aggressive towards paramedic personnel. The Claimant was interviewed and denied any form of wrongdoing. At the time of Metro's referral of the complaint to the Respondent - or within a short period thereafter-, it had in its possession a statement from a service user: A. This statement exonerated the Claimant from any form of wrongdoing. Despite this, Metro made clear that they wished action to be taken and – by email of 14 July 2016 – Metro requested that the claimant was 'taken off all WYCA contracted work with immediate effect' [p141]. This request was made at 12:36 hours on 14 July 2016 and was confirmed as having been implemented at 12:44 hours. At 12.46 hours the same day, Metro stated: '*he cannot do any contracted work for us Stuart until the outcome of the investigation…."* No criticism is made by the Claimant of the Respondent's implementation of this request;

6.11 It is clear that the July 2016 complaint was viewed by Metro as serious; and indeed, for its purposes, a sequel to the earlier issues which had arisen with the Claimant. This was not a view shared throughout the Respondent organisation. The Claimant's line manager indicated that the incident did not merit the involvement of the company's loss adjusters [p147]. Mr Finnie (the same individual who had been responsible for the reinstatement of the Claimant in April 2016) was contacted directly by the client. He responded in the form of an email from a mobile device at 13:08hrs on 14 July 2016 in terms: *'needless to say he will be dealt with!'* The Claimant sought to make much of this text suggesting it was indicative of pre-determination or a settled intention on the part of the Respondent to simply do the client's bidding. The Tribunal accepts the evidence of Mr Finnie in this respect. He was keen to allay his client's concerns and wished to impress upon his client that the issue was being addressed with due seriousness. It is not difficult to see how a reasonable employer would consider it necessary to provide such an assurance given the dependency of the business upon this client and the potential reputational consequences in any tender process. In the view of the Tribunal, this is not affected by the manner in which the sentiment was expressed. Further and in any event, it was Mr Finnie who by reason of his subsequent involvement in the disciplinary process which followed, proposed terms of re-engagement to the Claimant. In the view of the Tribunal, there was no

pre-determination or settled resolve; only a commitment to assure the client that the issue would receive due attention. In this respect, it is to be noted that it was no part of the Claimant's case that Mr Finnie had sought to improperly influence those responsible for the ensuing investigatory or disciplinary processes;

6.12 At the time of receiving notice of this complaint, there were suggestions of police involvement. However, it is clear that from the Respondent's perspective at least, it responded with the application of an investigatory process conducted by Mr Luke Smith [p154]. The notes of a meeting held on 14 July 2016 confirm that the Claimant appreciated the significance of the allegation and the suggestion that he had conducted himself in an inappropriate manner; any doubt in this respect is removed by his voluntary statement: "*I wasn't offensive. I just went on then and carried on with my job*";

6.13 For reasons which are not entirely clear, the disciplinary procedure devolved to Mr Elliott Day. The Claimant was invited to attend an investigatory meeting by letter dated 20 July 2016 [p157]. In the events, the meeting was postponed to accommodate health issues concerning the Claimant and only reactivated following receipt of occupational health advice. With each item of correspondence, the Claimant was informed that the issue under investigation was one of misconduct. In the meanwhile, the Claimant had been suspended from employment. The reason for his suspension was said to be issues of potential misconduct;

6.14 Having secured clearance from a relevant medical advisor, the Respondent attempted to convene a meeting on 11 October 2016. As with earlier correspondence, the invitations issued to the Claimant relied upon issues of misconduct [p173]. Similar sentiments were communicated in later correspondence [e.g. pp185A and 187]. By letter dated 26 October 2016, the Claimant raised a grievance in which he cited '*numerous difficulties'* with Mr Day; including suggestions that Mr Day's investigation had been neither fair nor impartial [p191];

6.15 By letter dated 16 November 2016 [p198] the Claimant was informed that Mrs Hugget was to take over conduct of the disciplinary hearing. As with earlier correspondence, the letter confirmed the subject matter of the proposed disciplinary hearing was alleged misconduct. The Claimant and those supporting him proceeded upon this basis;

6.16 There followed a meeting between the parties on or about 22 November 2016. There is a dispute as to what occurred in that meeting. The Claimant suggests that there was no mention of any limitations placed by Metro upon the Respondent. Mrs Hugget states that she did mention the pressure from Metro, but agreed she had not provided to the Claimant any documentation in connection with it. The Tribunal is satisfied that the Claimant was informed that the issue had been viewed with particular seriousness by Metro. But the exchange did not go so far as to inform the Claimant that the allegations of misconduct had been withdrawn. Had this been the case, a reasonable employer would have communicated this important fact to the claimant at that time in clear

terms; and in the view of the Tribunal, confirmed the communication in writing. Further, in the Tribunal's view, had such a suggestion been made within the course of the meeting, not only would one expect the Claimant to recall this important event, it would be of sufficient importance to prompt inquiry as to the proposed subject matter of any reconvened meeting. It is common ground that the need for a further meeting was identified as being necessary at the conclusion of the meeting on 22 November 2016. Unfortunately, no notes were compiled of this meeting. There was equally no correspondence between the parties on this issue. The Tribunal is satisfied that, whilst reference to external commercial pressure was made, it was somewhat anecdotal and was insufficient to alert the Claimant to the fact that his employment was imperilled by reason of that pressure and that pressure alone;

6.17 By 5 December 2016, Mrs Hugget had conducted her own investigation into the alleged incident. Having done so, she was readily satisfied that there was no evidence to substantiate the complaint or allegation of misconduct against the Claimant. She did not immediately communicate this to the Claimant. In fact, he was not made aware of this position until the resumed meeting of 12 December 2016;

6.18 However, having concluded her investigation – itself prompted by an inability to verify the investigation undertaken by Mr Day- Mrs Hugget communicated with Metro to inform them of the position she had reached. She did so by email transmitted on 5 December 2016 at 12:41 hrs [p200]. Her communication was clear: '*there was no proof*'. The email ends with a statement from Mrs Hugget concerning the wishes of Metro: "*I am aware that you no longer want him working on any tendered services so I was wondering what you have…."* The balance of the sentence has been redacted and much has been made of the fact of its redaction. The unredacted version [p212] ends with the sentiment: *"so we can go down the avenue of terminating his employment due to restrictions imposed by yourselves…"* The Claimant has sought to categorise this communication as an invitation for reasons to dismiss the Claimant and/or as being predicated upon a misplaced assumption concerning the view taken by Metro. However, this is not easy to reconcile with the response received from Metro at 13:01hrs on the same date: "*What you do with the driver is up to you but our decision stands."* In the view of the Tribunal, this is not capable as being read as a reference to suspension pending investigation. In arriving at this conclusion, the Tribunal bears in mind that the email from Mrs Hugget was unambiguous. She was seeking guidance. Her request for guidance was founded upon her own clearly expressed view that there was no evidence to implicate the Claimant, whilst at the same time acknowledging the views previously expressed on behalf of Metro and the seriousness with which it viewed the nature and number of the complaints received;

6.19 What lies at the heart of the Claimant's submission is the suggestion that Mrs Hugget was approaching the issue with too reactive a mindset and as a result, made erroneous assumptions concerning the stance which Metro had adopted or might adopt in the light of her conclusion on the issue of alleged misconduct. However, the email

correspondence continued with a transmission from Metro on the following day, 6 December 2016 at 16:11hrs. When read objectively, the document confirms Metro was aware of the difficulties around the earlier investigations and the resultant reinstatement of the Claimant. They were equally aware of Mrs Hugget's view regarding the lack of evidence in connection with the July 2016 complaint. They nonetheless renewed their insistence that the driver be "*removed from Access Bus and any other WYCA supported services…"* Mrs Hugget made no further contact with Metro on the subject;

6.20 This correspondence was not shared with the Claimant at that time. He attended the disciplinary hearing on 12 December 2016 accompanied by his union representative. The notes of the meeting are scant. It is common ground that within this meeting, the Claimant was for the first time informed that he was no longer facing allegations of misconduct. He was advised that he was being dismissed for capability related reasons and, due to the absence of any alternative role, his dismissal would take effect with pay in lieu of notice. At that time, there had been no discussion with the Claimant as to the substance of Metro's position, the posts available within the Respondent organisation or the inability of the Respondent to provide work for the Claimant which did not involve duties for Metro;

6.21 In fact all of the duties undertaken by drivers on behalf of the Respondent involved Metro rostered work. More fundamentally, the other posts available at the time of the dismissal would not have been suitable alternatives for the Claimant. The Claimant accepts this to be the case. The kernel of the Claimant's complaint in this regard concerns the failure to discuss those options with him *and* the suggestion that inadequate consideration was given to the re-allocation of duties of other drivers to – in effect – create a 'Metro free' role for the Claimant. As to the former, the Tribunal is satisfied there was no consideration of the Claimant's position or any consultation with him in connection with the vacancies which existed within the Respondent organisation. The Tribunal is satisfied that Mrs Hugget considered the potential for re-allocation of duties; discounting it as unworkable upon the basis that all drivers undertook Metro duties;

6.22 The Claimant was notified of his dismissal on 12 December 2016; with the decision confirmed by letter dated 20 December 2016 [p203]. The Claimant exercised his right of appeal;

6.23 The Respondent's procedure accommodates two appeals. In preparation for the appeal, the Claimant lodged a data subject access request [p208]. By this means, he had access to the emails transmitted between the Mrs Hugget and Metro previously referred to in the course of this judgment;

6.24 The first appeal was unsuccessful. The Claimant exercised his further appeal. This was heard by Mr Finnie. In the view of the Tribunal, Mr Finnie was acutely aware of the views of the client: Metro. He was nonetheless exercised by the plight in which the Claimant now found

himself. Whilst not detailed within his witness statement, he stated to the Tribunal – and the Tribunal accepts- that he made additional representations to Metro; these culminated in a concession that the Claimant could undertake Metro works, but not participate in the Access Bus service. This prompted an offer of re-engagement of the Claimant to a position which restored his employment, but confined him to duties in line with the concession which the client had provided. The Claimant declined that offer; and

6.25 The terms of re-engagement were unattractive to the Claimant. However, it is clear from his own evidence to the Tribunal that the reason for the non-acceptance of the offer was in fact due to a lack of trust between the Claimant and the Respondent. In evidence, the Claimant confirmed he was prepared to consider redeployment to the Access Bus arrangement only. This was due to the fact that – as far as the Claimant was concerned – it was well known this service was due to be the subject of a TUPE transfer; with the result that the Claimant would cease to be employed by the Respondent. This was the operative reason for the Claimant's rejection of the offer; not the terms upon which the offer was in fact made. The Access Bus Service devolved by relevant transfer to a third party in August 2017.

Submissions

7. The Tribunal received helpful and clear submissions from both parties. It was accepted that the parties would make submissions on all issues of liability; including contribution and *Polkey*. They have done so.

8. On behalf of the Claimant, Ms Boynes submitted (adopting the order detailed within the agreed Schedule of Issues):

8.1 **Reason for Dismissal**: The Claimant acknowledged the reason for his dismissal was the commercial pressure applied by Metro;

8.2 **Fairness of Procedure:** The procedure adopted by the Respondent was scant and could not be said to comply with the ACAS Code. In this respect, she placed particular reliance upon the form and content of the correspondence issued to the Claimant and the failure to provide the Claimant with copy documents (e.g. email correspondence) and evidential reports which exonerated him from any misconduct. She submitted that these failings deprived the Claimant of any advance notice or understanding of the reason for his dismissal. These requirements, she submitted, did not cross Mrs Hugget's mind.

8.3 **Application of the ACAS Code**: Ms Boynes conceded the ACAS Code did not address or seek to engage with SOSR dismissals. Drawing upon the authorities identified in the Schedule to this Judgment, she placed particular emphasis upon the procedure which had been applied to the Claimant and the need for the ACAS Code to be given a purposive interpretation. In addition to the general procedural failings which she submitted rendered the process unfair, Mr Boynes submitted that there had been two material aspects of non-compliance with the Code, namely: failure to properly investigate the facts relied upon and a failure to provide adequate notice to the Claimant;

8.4 **Substantive Unfairness**: It was also submitted that the dismissal was unfair by reason of the failure on the part of the Respondent to take into consideration, or adopt any appropriate step, to ameliorate the injustice likely to be visited upon the Claimant. She advanced two points. First, that the injustice to the Claimant was not considered at all. Second, that whether or not there was any consideration of these matters, no meaningful steps were taken to explore the means by which the Claimant could be insulated from the injustice which would arise in the event of his dismissal;

8.5 **Impact of Appeal**: Furthermore, it was submitted that the appeal procedure adopted by Mr Finnie did nothing to repair these failings. There was, she contended, no evidence of any reconsideration of issues such as the reorganisation of duties amongst drivers, or, any meaningful attempt to persuade the client to an alternative view point. Taken together, it was said the failings at the time of dismissal and appeal evinced a willingness on the part of the Respondent to actively encourage the decision of dismissal; instead of testing the validity and justification for the views expressed by the client. In this respect, reliance was placed upon the email from Mr Finnie [p149]; it being suggested that this was consistent with acquiescence and nothing more;

8.6 **The Offer of Re-engagement**: The offer was unreasonable and thus the Claimant's rejection was reasonable and could not constitute contributory conduct; and

8.7 **Polkey**: Whilst acknowledging the obligation of the Tribunal to engage with the question of *Polkey*, it was submitted that this was a case in which no informed hypothesis could be undertaken. There was, it was said, too many imponderables. Upon this basis, there should be no *Polkey* reduction in the compensation otherwise payable to the Claimant. In any event, a fair procedure would have taken a number of months; given the intervention of the seasonal holidays.

9. On behalf of the Respondent, Ms Wilson submitted:

9.1 **Reason for Dismissal**: The reason for dismissal was SOSR. Third party pressure can amount to a legitimate reason. The Respondent does not have to establish the truth of the third party's belief or test the sincerity of its rationale. It was enough that the request had been received. In this case, Metro was the Respondent's biggest client. This points to the Respondent as having discharged its burden of proof in connection with the reason for dismissal;

9.2 **Fairness of Procedure**: A fair procedure was followed. Insofar as there was any procedural failing at the time of dismissal, they were in any event repaired within the appeal process;

9.3 **Application of the ACAS Code**: The reason for dismissal was SOSR and, as such, the ACAS Code has no application to the dismissal process;

9.4 **Substantive Unfairness**: The Respondent was confronted with a situation in which the client was fully aware of the lack of evidence and the inability to

uphold any complaint against the Claimant. The client nonetheless made clear – in the various emails – this did not justify any alteration in its position and insistence that the Claimant should not participate in any of its services. The Respondent did all it could to consider and ameliorate the potential injustice to the Claimant. In essence, however, it was left with no choice;

9.5 **Impact of Appeal:** Insofar as there was any procedural error at the time of the dismissal, it was corrected by the process undertaken by Mr Finnie at the time of the second appeal; a process in which the Claimant was afforded a full opportunity to participate and challenge the commercial realities which were operating upon the Respondent. He did not do so. Within this same process, Mr Finnie carefully evaluated the position of the client and secured a concession which would – if accepted by the Claimant – have resulted in the restoration of his employment on terms which were acceptable to both Respondent and its client;

9.6 **Offer of Re-engagement**: There was no legitimate basis for the Claimant to refuse the offer of re-engagement. The terms were no less favourable than those which he accepted with a third party several weeks later. In failing to accept the position, he contributed to his dismissal. There was no reasonable basis upon which the Claimant could have formulated a distrust of the Respondent; and

9.7 **Polkey**: This is a case in which the outcome was clear as the client's views were consistent. There was no prospect of the Claimant retaining his position. If there has been any failing in procedure, the Tribunal was entitled to conclude that a dismissal for this reason would have been the outcome of a fair procedure in any event. There is a 100% likelihood that this would have occurred. Moreover, the timing of the communications entitle the Tribunal to conclude that the resolution of any procedural failings would not have lengthened the process. The dismissal would have been implemented at the time it was in any event.

Discussion and Conclusions

10. The Tribunal is required to consider the questions posed by section 98 of the Employment Rights Act 1996. The Schedule of Issues correspond with those matters; albeit supplemented by express reference to the ACAS Code and issues of *Polkey* and contribution. In approaching these matters, the Tribunal has reminded itself that these issues fall for determination from the vantage point of the reasonable employer. The fact the Employment Tribunal may have come to a different conclusion of view is nothing to the point.

What was the reason for dismissal?

11. The burden facing the Respondent is notoriously low. It was initially suggested that the reason for the dismissal was some larger design on the part of the Respondent to remove those –like the Claimant- who were employed on highly favourable contractual terms such as sickness pay and overtime entitlement. However, during evidence the Claimant acknowledged the reason for his dismissal was in fact the pressure applied to the Respondent by Metro. As the authorities make clear, it is sufficient for the employer to point to a set of facts known, or, beliefs held by the employer as at the date of dismissal. No challenge has

been made as to the authenticity of the Respondent's belief regarding the form or quality of the commercial pressure applied by Metro. Nor has it been suggested that the apprehension expressed by Mrs Hugget and Mr Finnie as to the potential for adverse consequences from Metro, were insincere. The Tribunal is satisfied that at the time of the decision to dismiss, the reason relied upon by the Respondent was some other substantial reason, namely: the commercial pressure which had been applied and repeated by Metro in the form of recent email correspondence.

Was dismissal for that reason fair?

10. This decision to dismiss was prompted by real and tangible pressure on the part of Metro which required the removal of the Claimant from their duties/operations. The point is properly taken that a belief on the part of the employer must be the product of a reasonable investigation. In this respect, Ms Boynes points to the fact that where – as here – the Respondent is subjected to external pressure from a client, the notion of a reasonable investigation requires more than acquiescence; in the least requiring a deliberative process in which the position of the Claimant is considered.

11. The scope of the duties operating upon the employer in such circumstances have been the subject of judicial guidance. In **Dobie v Burns [1984] EWCA Civ 11**, the Master of the Rolls expressed the position in the following terms:

> "In deciding whether the employer acted reasonably or unreasonably, a very important factor of which he has to take into account, on the facts known to him at the time, is whether there will or will not be injustice to the employee and the extent of the injustice. For example, he will clearly have to take account of the length of time during which the employee has been employed by him, the satisfactoriness or otherwise of the employee's service, the difficulties which may face the employee in obtaining employment, and matters of that sort. None of these is decisive, but they are all matters of which he has to take account…."

12. Similar sentiments were expressed by the Lady Smith in **Petrofac v Olley [2005] UKEAT 0031**. The question before the EAT was whether a failure to engage with or address the matters identified in *Dobie* gave rise to issues of procedure only. The EAT concluded that they were not:

> "These are not procedural matters. Further, their findings in the remedy section of their reasons….that more could have been done to try and persuade Kerr McGee to change its mind and to try and effect redeployment that avoided dismissal appear to us, properly understood, to be matters which fell to be considered not just when looking at remedy but also when considering the fundamental fairness of the dismissals. Again these are not simply procedural matters but go, we agree, to the substance of the case…"

13. In **Greenwood v Whiteghyll Plastics Ltd [2007] UKEAT 0219-07**, Silber J sought to emphasise the need for the Respondent to adduce evidence to substantiate its consideration of the issues adumbrated in *Dobie* and its attempted assessment and accommodation of the injustice(s) likely to be visited upon the employee in such cases. In doing so, he commented:

> "Perhaps the injustice suffered by the Claimant was so severe that the respondent might have been able to re-organise its business so that the claimant could have taken the job of the person who took over his job with the respondents working for Morrison's or perhaps there could have been a re-organisation of jobs so that the Claimant could have worked for another customer of the respondent…"

14. More recently, in **Henderson v Connect [2009] UKEAT 0209 – 09**, Underhill J observed:

> "Cases of this kind are not very comfortable for an employment tribunal. Nevertheless, it has long been recognised that the fact that the client who procures, directly or indirectly, the dismissal of an employee may have acted unfairly, and that the employee has thus suffered an injustice, does not mean that the dismissal is unfair within the meaning of the statute. That is because the focus of s98 …is squarely on the question whether it was reasonable for the employer to dismiss…It must follow that the employer has done everything that he reasonably can to avoid or mitigate the injustice brought about by the stance of the client- most obviously by trying to get the client to change his mind and, if that is impossible, by trying to find alternative work for the employee- but has failed, any eventual dismissal will be fair. That may seem a harsh conclusion, but it would of course be equally harsh for the employer to have to bear the consequence of the client's behaviour and parliament has not chosen to create any kind of mechanism for imposing vicarious liability or third party responsibility for unfair dismissal."

15. Somewhat unusually, there is no contemporaneous record of the deliberations undertaken by the dismissing officer: Mrs Hugget. A number of points were relied upon by the Claimant in this regard.

16. It was submitted that it was not enough for an employer to succumb to the pressures of an external third party; customer or client. The authorities confirm this to be the case. What is called for is more than a Pavlovian response; the employer is required to consider and take full account of a number of factors, including the length of service of the employee and the plight to which he might be exposed by succumbing to the third party request. The authorities make clear that none of these factors is to be afforded precedence. However, it is also apparent that the employer must undertake a deliberative exercise in which these matters are weighed in the balance. The guidance provided in *Dobie* was not intended to be – and cannot be read as – a form of straitjacket. It attests to the need for the employer to consider and evaluate all relevant matters and not simply submit to the will of third party without more.

17. It is difficult to envisage a situation in which the commercial pressure of the type under consideration here would not result in some immediate and very real injustice to any affected employee. That being so, the authorities point to a duty on the part of the employer to take reasonable measures to ameliorate that injustice. As noted by Underhill J in *Henderson,* such measures may take the form of representations to the client or relevant third party. It may equally extend to the interrogation of alternative employment opportunities. In the view of the Tribunal, however, it is important not to lose sight of the fact that the employer is required to undertake an evaluation; not secure an outcome. In such an evaluation, and the Tribunal's subsequent scrutiny of it, it is important to give due weight to the commercial context in which the assessment is to be conducted. It is not disputed that the Respondent is almost exclusively

dependent upon Metro; nor that all of its drivers undertake work for Metro as part of their duties. It is apparent from the exchange of correspondence that Mrs Hugget did not simply succumb to the pressure of Metro. She provided the client with her conclusions and in so doing was inviting a reconsideration of the position. Within the same emails, she was communicating her own concern that there was no evidence to implicate the Claimant. Further, whilst there is no log or check list to indicate that she considered each of the factors identified in *Dobie,* it was her clear evidence – which the Tribunal accepts – that she gave consideration to the potential for redeployment of the Claimant. In the view of the Tribunal, she would not have engaged with either had she not been concerned for the injustice to which the Claimant was exposed. More fundamentally, the measures which the authorities advocate do not constitute some form of mechanistic checklist. Whilst certain employers may have catalogued their efforts, documenting the evaluation by reference to the various criteria, others may consider it unnecessary to do so having regard to the nature and character of the business they operate.

18. There was no conscious consideration of the Claimant's length of service or the difficulties to which he would be exposed in seeking alternative employment. However, as noted in *Dobie*, none of the factors is to be afforded precedence. More fundamentally, where as here, the restrictions which Metro communicated constituted a 'Hobson's choice', the employer is for practical purposes confronted with the two options identified by Underhill J: the making of representations to the client and considerations of redeployment. From the perspective of a reasonable employer, the Tribunal is satisfied that Mrs Hugget gave adequate consideration to the potential for redeployment. Drawing upon her knowledge of the business and the manner in which driver duties were allocated, she concluded that there was no scope for deployment or re-allocation of duties amongst drivers.

19. As to the potential for representations to the client, Ms Boynes was critical of the communications from Mrs Hugget. She suggested that the employer was required to 'fight the employee's corner'. In fact, the authorities do not trespass into the form, character, or nature of the representations which an employer may be required to make. This is hardly surprising. These are highly fact-sensitive issues. Such communications – and the options available to the employer in their formulation - fall to be viewed in the real world. In such circumstances, there will be a number of sensitivities competing for priority. The importance of this client was obvious to all concerned. In the view of the Tribunal, it is difficult to see what additional representations Mrs Hugget could have made without exacerbating the commercial risk which both she and Mr Finnie identified and to which there was no challenge by the Claimant.

20. In the light of these conclusions and having identified the reason for dismissal, the Tribunal is satisfied that dismissal for that reason was within the range of responses available to a reasonable employer. In these circumstances, and upon the facts which arise in this case, the Tribunal is satisfied that the Claimant's dismissal was substantively fair. However, consideration must be given to the procedure by which the Respondent reached and thereafter implemented that decision.

21. In his dealings with Ms Hugget, the Claimant was not informed of the abandonment of the allegations of misconduct and had not been provided with the correspondence in which Metro had expressed its insistence regarding his position. These factors place the procedure adopted by Ms Hugget some distance away from the fair procedure anticipated of a reasonable employer. Whilst the Tribunal is satisfied that Mrs Hugget did consider the issue of alternative employment, she failed to consult with the Claimant on those matters. Instead, she proceeded upon the basis of assumption. The implications of this position are addressed below.

Did the ACAS Code Apply to this dismissal?

22. The Claimant contended the ACAS Code applied to the procedure to which the Claimant was subjected. It is common ground that the Code makes no reference to SOSR dismissals. It is equally common ground that the Code must be given a purposive interpretation. In the view of the Tribunal, the fact that the Claimant was in the events dismissed for some other substantial reason is not determinative. The Code is intended to define standards of conduct and protection within specific types of procedure applied to employees. In **Lund v St Edmund's School Canterbury [2013] UKEAT**, Keith J concluded that it was the initiation of the process which mattered; not its outcome. This was in the context of compliance with the statutory grievance and disciplinary procedures which obtained at that time. However, similar observations have been made more recently in a wider context. In **Hussain v Jurys Inn Group [2016] UKEAT** Laing J encouraged the adoption of a purposive interpretation. It is possible to infer from Laing J's analysis that this is particularly important where the substantial reason relied upon has its origins in perceptions of the Claimant's conduct. In the events, Laing J was not required to resolve the issue in that case. The final case to which the Tribunal was referred is **Phoenix House Ltd v Stockman [2016] UKEAT**. In that case Mitting J expressed significant misgivings in exposing employer's to the risk of punitive sanction in circumstances where the Code made no express provision for such cases; a view he maintained notwithstanding the demands of commonsense and fairness.

23. Whilst informative, the authorities offer no settled answer on the application of the ACAS Code to cases of some other substantial reason generally. As the foreword to the Code indicates, it is intended to provide principles for handling 'disciplinary' situations. The same language is used in the main text of the code [e.g. paras 1 and 2]. Significantly, paragraph 4 of the Code identifies certain core principles where a 'disciplinary process' is being followed.

24. On the facts of this case, there can be no doubt that the Respondent was following a disciplinary process. This remained the position from receipt of the complaint in July 2016 up to and including the hearing of 12 December 2016. The Claimant was only informed of the abandonment of disciplinary allegations moments before he was notified of his dismissal. Upon the facts as the Tribunal has found them, it is clear that insofar as any procedure was being followed at the date of dismissal, it was a disciplinary process within the meaning of the Code. The fact that the decision to dismiss was made on grounds of some other substantial reason at the very conclusion of a disciplinary process, does not alter the character of the process itself. To conclude otherwise would remove the

protection to which an employee in the Claimant's position was entitled and would lend itself as a device for avoidance.

25. For these reasons the Tribunal is satisfied that this was a case to which the ACAS Code applied.

Did the Respondent adopt a fair procedure?

26. It is not incumbent upon employers to replicate the standards of the courts and Tribunals. Rather, the procedure adopted by the Respondent must be considered through the lens of reasonableness. In engaging with this procedure – doing so for the first time- Mrs Hugget failed to inform the Claimant in advance of the dismissal hearing that she considered the allegations of misconduct groundless. She failed to notify him prior to 12 December 2016 that the only reason why his employment was at risk was the commercial pressure emanating from Metro. In advance of that hearing, she failed to provide the Claimant with her correspondence with Metro and the responses she had received. Similarly, she failed to explore with the Claimant the potential for his redeployment and/or the re-allocation of duties amongst colleagues. Whether viewed by reference to the ACAS Code or common standards of reasonableness, these omissions rendered the dismissal process procedurally unfair. Whilst it was suggested that Mrs Hugget had also failed in responding to the Metro correspondence, this is in fact addressed earlier in this judgment as a facet of substantive rather than procedural fairness.

27. However, the matter does not end there. The authorities make clear that it is necessary for the Tribunal to consider the dismissal procedure in its entirety; including any appeal process. Whilst the Claimant makes a number of complaints concerning the appeals, it is clear that Mr Finnie considered the plight of the Claimant and made an authentic attempt to reconcile the conflicting demands of acquiescence to the client and providing protection to the Claimant. His solution was to uphold the appeal and make an offer of re-engagement; an offer which the Claimant considered unacceptable. Mr Finnie's evidence was clear and whilst certain of the details provided in cross-examination had not been foreshadowed in his witness statement, the Tribunal has accepted his evidence as both credible and reliable.

28. The appeal was held on 12 April 2017. Mr Finnie's reasons for upholding the appeal are detailed within paragraph 9 of his statement and no material challenge was made to the matters there set out. It refers to the concession from Mr Wallace as providing the opportunity for the offer. It was an opportunity which Mr Finnie utilised. There is no further elaboration as to his deliberative process. It is nonetheless clear that this was – according to Mr Finnie - the only option available. This was not challenged. Whilst the Claimant had obtained some of the documentation concerning the pressure communicated by Metro through the data subject access process, he did not have all of the material. Further, insofar as there were representations made to, or conversations held with, Mr Wallace, the Claimant was not provided with any transcript of them or otherwise afforded any opportunity to comment upon them. In these circumstances, the Tribunal is unable to conclude that procedural deficiencies which preceded the decision to dismiss were remediated on

appeal, or, that the process taken as a whole is capable of being considered procedurally fair.

29. Accordingly, the Tribunal is satisfied that the Claimant was unfairly dismissed within the meaning of section 98 (4) of the Employment Rights Act 1996.

Polkey?

30. It was submitted on behalf of the Claimant that this was a case in which there were too many imponderables for any meaningful hypothesis to be undertaken for the purposes of Polkey. Ms Wilson suggests the exact opposite. As always in such cases, the position is slightly more nuanced. Mrs Hugget failed to press for clarification from Metro with regard to the basis of their insistence or the quality of their resolve. In the circumstances, it was reasonable for her not do so. However, she deprived the Claimant of the opportunity to make representations to the Respondent on the potential suitability of alternative vacancies, the scope for redeployment and/or reason for his dismissal. The Claimant may himself have wished to make representations to Metro with regard to his position at that time.

31. A period of 4 months had elapsed between Mrs Hugget's decision and that of Mr Finnie. The contract between Metro and the Respondent had remained in place. It is clear that the passage of time had resulted in some thawing of the client's position. However, there remained a firm resolve which precluded the Claimant from participation in the Access Bus service. The same personnel had been involved on behalf of Metro throughout these communications. There is little to indicate that the resolve would have been any different in December 2016 and indeed, every reason to conclude that it would have been more resistant to any involvement of the Claimant in the Metro services; as indeed was communicated in the email correspondence at that time. The commercial realities would have remained the same.

32. The claimant was either unable or unqualified to seek the additional roles which were available at that time; such that consultation about them would have been futile. The Claimant had reached a firm position – it was the Access Service or nothing. This is of course difficult to reconcile with the Claimant's request for reinstatement; articulated within these proceedings. However, it is clear that the Claimant had a good degree of mistrust toward the Respondent and would not have been prepared to consider re-employment in any other position; as indeed proved to be the case at the time of the offer of re-engagement.

33. The procedural failings which have been identified include issues concerning notice of withdrawal of the allegations of misconduct, communications regarding the commercial pressure, and consultation upon options short of dismissal; including redeployment of the Claimant and others. Even if full notice and consultation had taken place, the dilemma would, in the view of the Tribunal, have remained the same. In the event the Claimant had chosen to make additional representations to Metro or the Respondent, the client's resolve would in all probability have remained the same.

34. Upon this basis, the Tribunal has concluded there was a 70% prospect that a fair procedure would have culminated in the dismissal of the Claimant in any event. The Tribunal is satisfied that in the event that the Respondent had caused a procedure to be adopted which fully accommodated the considerations and demands of a fair evaluation process and procedure, such would have been the outcome.

Contribution?

35. The position advanced by the Respondent is to the effect that the refusal of the offer of re-engagement was an act of contributory conduct. In the alternative, it is suggested that the failure represented a failure to mitigate on the part of the Claimant. It is clear that the real reason for the Claimant's refusal of this post was a loss of trust and confidence in the Respondent; not the terms upon which the offer was made. The question thus becomes whether the Claimant's lack of trust in the Respondent might be classified as unreasonable so as to represent contributory conduct. In this respect, a distinction is to be drawn between the considerations to be found in section 122 of the Employment Rights Act 1996, since what was in issue here was not reinstatement but re-engagement.

36. The difference in terms offered were significant and removed from the Claimant material benefits which were more than discretionary. The Claimant had been subjected to a process in which important information had been with-held from him; including information which exonerated him in respect of misconduct allegations. He was not given advance notice of the real reason why his job was at risk. He raised a grievance in connection with Mr Day. This prompted the appointment of Mrs Hugget. Yet these omissions occurred when Ms Hugget had conduct of the process itself. In these circumstances, it is not able to classify the Claimant's suspicion or lack of trust in the Respondent as unreasonable. Accordingly, the Tribunal is not satisfied it is appropriate to reduce the basic award on the grounds of contributory conduct or conclude that the refusal represented a failure to mitigate.

37. The claim of unfair dismissal therefore succeeds. There being no claim for re-employment, the compensation otherwise payable to the Claimant will be reduced by 70% in line with the *Polkey* principle. There is to be no deduction of the basic award in respect of contributory conduct.

Employment Judge Morgan

Dated: 25 September 2017