Case Number: **1801599/2017**

1801600/2017

EMPLOYMENT TRIBUNALS

Claimants: **Mr D Walker**

Mr D Robinson

Respondent: **DHL Supply Chain Limited**

Heard at: **Leeds**

On: **Monday 14 May 2018 to**

Thursday 17 May 2018

11 June 2018 (in Chambers)

Before: **Employment Judge Eeley**

Members: **Mr G Harker**

Mr M Brewer

Representation

Claimants Mr M McGrath, lay trade union representative

Respondent: Mr J Jenkins of Counsel

RESERVED JUDGMENT

1. The Claimants' claims of automatically unfair dismissal contrary to section 152 of the Trade Union & Labour Relations (Consolidation) Act 1992 and contrary to section 103A of the Employment Rights Act 1996 fail and are dismissed.
2. The Claimants' claims of 'ordinary' unfair dismissal fail and are dismissed.
3. The Claimants' claims of public interest disclosure detriment contrary to section 47B of the Employment Rights Act 1996 fail and are dismissed.
4. The Claimants' claims of trade union detriment contrary to section 146 of the Trade Union & Labour Relations (Consolidation) Act 1992 fail and are dismissed.
5. The Claimants' claims for breach of contract in respect of a failure to pay notice pay fail and are dismissed.

REASONS

Background

1. By a claim form presented on 12 September 2017 the Claimants pursued claims of automatically unfair dismissal by reason of trade union activities or in the alternative by reason of a public interest disclosure and in the further alternative claims of so-called 'ordinary' unfair dismissal. In addition, they made claims of detriment on grounds of trade union activity or on grounds of public interest disclosure. Finally, they brought claims of breach of contract in relation to a failure to pay notice pay.

2. During a final hearing which lasted for four days the Tribunal considered the relevant documents within an agreed bundle which ran to 554 pages. The Tribunal heard evidence from a number of witnesses. The Claimants relied on the written witness statements and oral evidence of:

   Mr Dean Walker (Claimant);

   Mr David Robinson (Claimant);

   Mr Michael McGrath, trade union representative and employee at the Respondent.

   In addition, a number of written witness statements were presented by the Claimants in support of their case. Those witness statements came from Mr Gary Turnbull, Mr Paul Evans and Mr Stuart Porter, who did not attend the Tribunal hearing in person or undergo cross examination.

The Tribunal read witness statements and heard oral evidence from the following witnesses on behalf of the Respondent:

Mr Andrew Downs (Contract Operations Manager), acting as grievance manager;

Mr Lee Hirst (General Manager), acting as grievance appeal manager;

Mr Richard Harrison (General Manager), acting as disciplinary appeal hearing manager;

Mr Richard Jackson (Transport Integration Manager) acting as disciplinary hearing manager;

Mrs Sally Mackay (Senior HR Business Partner).

In addition, the Tribunal heard submissions from both parties' representatives for which we were grateful.

3. In resolving the Claimants' claims the following issues arose for determination:

(1) Did the Claimants make a protected disclosure within the meaning of the 1996 Act? They assert that they made a disclosure to the Respondent's Global Compliance Officer ("GCO") to the effect that at some point prior to the disclosure the Respondent and Unite the Union (the recognised union on site) had signed an agreement which superseded the existing relevant agreement. The full-time trade union official was at the time a Mr Evans. The suggestion was that the agreement had the effect of making it easier to transfer part or parts of the Respondent's operation by assigning defined workers to defined activities. It was the allegation of the Claimants that Mr Evans had signed the agreement without consulting his members and that he had done so because he had been promised freelance work with the Respondent should he subsequently leave Unite. It was asserted that that had in fact come to pass. The allegation was therefore that the agreement was essentially corrupt. The Claimants contended that these were disclosures of information which in the Claimants' reasonable belief tended to show one of the following:-

a. That a criminal offence had been committed both by the Respondent and Mr Evans since he had, in effect, been bribed;

b. Mr Evans had failed to comply with the legal obligation inherent in his role to properly represent his members.

The Claimants contended that they reasonably believed that the disclosure was made in the public interest and that it was made to their employer.

(2) In the event that there was a protected disclosure was the protected disclosure the reason or the principal reason for the dismissal? If so, then the dismissal would be automatically unfair.

(3) In the alternative was the sole or principal reason for the dismissal the fact that the employees were members of an independent trade union, had taken part or proposed to take part in the activities of an independent trade union at an appropriate time or had made use or proposed to make use of trade union services at an appropriate time within the meaning of section 152 of the Trade

Union and Labour Relations (Consolidation) Act 1992? If trade union grounds were the reason for dismissal it followed that any dismissal would be automatically unfair.

(4) If neither automatically unfair reason for dismissal is established the Respondent contends that the Claimants were dismissed by reason of their conduct which is a potentially fair reason within the meaning of section 98 of the Employment Rights Act 1996. The Tribunal will have to consider the following matters.

a. Did the Respondent have a genuine belief in the Claimants' misconduct.

b. Was that belief based on reasonable grounds following a reasonable investigation?

c. Was the decision to dismiss the Claimants within the band of reasonable responses? The Tribunal will consider the procedural and substantive fairness of the decision and in the event that there is a finding of procedural unfairness will go on to consider whether or not in the absence of a procedural flaw the Claimants would still have been fairly dismissed pursuant to the principles enunciated in Polkey v AE Dayton Services Ltd.

d. In the event that the Tribunal concludes that the decision to dismiss was unfair the Tribunal will go on to consider whether or not there should be a reduction in either the basic or compensatory award pursuant to sections 122(2) and 123(6) of the Employment Rights Act 1996.

(5) Were the Claimants guilty of gross misconduct such that the Respondent was entitled to summarily dismiss them without making a payment in respect of notice pay?

(6) Were the Claimants subjected to any detriment on the grounds of their alleged protected disclosures? The Claimants allege that the detriment in this case was their suspension from work during the course of the disciplinary investigation which kept them out of the workplace and hampered their trade union activities for the duration.

(7) Were the Claimants subjected to any detriment on grounds related to their trade union membership or activities within the meaning of section 146 of the 1992 Act? Once again, the Claimants contend that the detriment was their suspension from work during the course of the disciplinary investigation with its associated impact on their ability to engage in trade union activities.

Findings of fact

4. Mr Walker commenced employment with the Respondent on 23 August 2010. Mr Robinson commenced employment with the Respondent on 6 January 2014. They were both employed as warehouse operatives at the Respondent's Bawtry campus. A copy of each Claimant's contract of employment appeared in the bundle. There was a company handbook applicable to the Claimants'

employment which had been written in 2009 and remained in place at the time of the Claimants' dismissal. Furthermore, there was a representation and procedural site agreement between the Respondent's predecessor (McGregor Cory) and the Transport and General Workers' Union, a copy of which was to be found at page 241 of the bundle. This document was signed by Mr John Evans for the trade union side and he was the T&G's full time official. The agreement itself (or the copy within the bundle) is undated. The Respondent subsequently went through various changes of identity. It became DHL Excel and then finally DHL Supply Chain Limited as it is named in these proceedings. That site agreement previously referred to passed down and continued to be applicable within DHL Supply Chain Limited. Unite was the successor union to the Transport and General Workers' Union.

5. In 2014 Mrs Mackay came into post with the Respondent and realised that she wanted to improve the working relationship with the trade union on site. She contacted Mr Evans, the then full-time trade union official, in order to discuss this. As a result, a new agreement was arrived at which is at page 143 within the bundle. That agreement had been arrived at following discussions involving not only Mr Evans but also three other trade union representatives. The agreement was signed off in March 2015 by Mr Evans, for Unite (on 4 March 2015) and by Mr Dan Smith (Operations Director) on behalf of the Respondent (on 6 March 2015). It was the product of a working group set up involving Mr Evans and three other shop stewards. Mrs Mackay drove that negotiation forward and general managers were involved on the Respondent's side. There were a number of meetings involving Mr Evans and the shop stewards and following the reaching of the agreement Mrs Mackay cascaded the details of that agreement to the general managers within the Respondent. There is no evidence before the Tribunal that the information contained in the new agreement was cascaded down by the trade union officials to the wider trade union membership. The agreement stated on its face that: *"this agreement between the union and DHL supersedes all national and local agreements or understandings whether written or verbal which may exist. The agreement is designed to cover the rates of pay and conditions of employment relating to those DHL employees who performed their work duties at the Bawtry campus, Doncaster (sites 1, 2 and 3) and any other sites that may form part of the Bawtry campus. Where either party to this agreement wishes to negotiate a change in the terms of the agreement or to introduce new terms other than the rates of pay the party concerned will give four weeks notice of their intention to the other signatory party. No action to implement the change shall be taken until agreement has been reached or the procedure exhausted. Parties to this agreement only continue to be so for as long as they are recognised by the company."* John Evans retired in the middle of 2015.

6. On 17 April 2015 there was a change in relation to mobility agreements with the workforce. Prior to April 2015 there was a verbal agreement that the Respondent could ask employees within the warehouse to move between client contracts and between sites at short notice to meet fluctuations in demand. The mobility clause

was contained within their contract. For example, Mr Walker's contract (at page 54 of the bundle and at page 60), clause 10, dealt with the issue of mobility thus: *"the company reserves the right to reasonably require you to work at any place or location other than your normal place of work either on a temporary or permanent basis as is reasonably required for the business. You will be given reasonable notice of any change in your place of work. Where permanent relocation is required, you may be entitled to a company sponsored relocation as set out in the company's relocation policy"*. On 17 April 2015 letters were sent out to the warehouse operatives including the Claimants. A copy of the letter sent to Mr Walker is at page 69 of the bundle. These letters specified which client account each individual warehouse operative was assigned to. In the case of these Claimants it was the Reckitt Benckiser contract. There was essentially no change to the Claimants' terms and conditions of employment but there was clarification within these letters that each employee had a primary client contract albeit they could be asked to work elsewhere and for a different client. After naming Reckitt Benckiser as the primary client the letter stated as follows:

"*You are expected to carry out all of the duties, if any, which the company may from time to time direct you to perform and which are reasonably associated with your role. Any oral instructions and/or written descriptions of your roles, duties and responsibilities should serve as a guide to the areas for which you are responsible. Due to the changing nature of the business, your obligations may vary and develop. The company reserves the right to ask you to perform other duties that may fall outside your normal role responsibilities but which are within your reasonable capabilities. To meet customer needs you may also be asked to work on a different customer contract within the Bawtry campus as instructed on an ad hoc basis. Should you permanently transfer to another customer contract this will be notified to you in writing. This is not a change to your current terms and conditions of employment which remain unchanged*".

7. In June 2016 the Respondent lost the Reckitt Benckiser contract and commenced TUPE consultation with various members of its workforce. In around June 2016 initial consultation letters went out to the workforce, an example of which is to be found at page 84 of the bundle. It named Mr Nesbitt and Miss Eisner as trade union representatives and noted that the proposed transfer of employment was to Great Bear Distribution. It was noted that the Respondent intended to begin both collective and individual consultations towards the end of 2016.

8. The Respondent's Bawtry campus originally consisted of three sites. Site 2 and 3 had large single warehouses whereas site 1 had a number of separate warehouses, some of which were used by a number of different customers and some of which were exclusive to specific customers. Up until October 2016 the Claimants' permanent place of work was on site 1, specifically warehouse 11, which was an overspill warehouse exclusively for Reckitt Benckiser. Reckitt Benckiser's main warehouse was on site 3. In October 2016 both Claimants were asked to move from site 1 to site 3 on the basis that the warehouse in which they were then working was no longer to be used for the

contract. It appears that the TUPE transfer referred to above took place on or around 17 June 2017.

9. It appears that the up-to-date site agreement referred to above had gone unnoticed by the general trade union membership at the premises until the TUPE issue arose. Various consultation meetings apparently took place. There was a new full-time union official at the time that TUPE transfer issue arose (Harriet Eisner) and the trade union shop stewards were Mr McGrath, Mr Nesbitt and Mr Dominic Field. It is apparent, therefore, that none of the individuals involved in negotiating the so-called 'secret site agreement' were still at the Respondent workplace at the time that the TUPE issue arose, save for Sally Mackay. By early February 2017 at the latest Mr McGrath and the wider trade union membership became aware of the 2015 site agreement. There were trade union meetings to discuss it.

10. In early to mid February 2017 the Claimants made complaints to the GCO which is a third party body which the Respondent commissioned to operate its complaints system. The phone number for the office was obtained by Mr McGrath and phone calls were made by each Claimant. The Tribunal heard evidence that they would speak to an operator, questions were posed and then records made as to the nature of the complaint. The documents within the bundle are made up of screenshots from the GCO computer system. The screenshots in relation to Mr Walker commence at page 250A of the bundle. The subject of the complaint is recorded as "Dan Smith." The issue summary is "union changed contracts without the employees' knowledge". The complainant is identified as Mr Walker. On page 250B there is a narrative summary which sets out a number of standard questions with the responses to them. The substance of the complaint is that Dan Smith, general manager, met with the union secretly to change the employees' contracts. The caller will be unemployed within the next three months because of that. He wants this issue to be investigated.

11. The Tribunal notes that there was no reference within this record to Mr Evans and no reference to bribery or corruption. Furthermore, there was no reference to Mr Evans getting a job at the Respondent subsequent to his retirement from his union position. It appears that the response to the complaint was to be given to the Claimants electronically and in order to obtain it each Claimant would need to log on to a computer system. As a result of this and because of his lack of a computer Mr Walker did not get the electronic message outcome at page 250C. The Tribunal finds that the screenshots within the bundle are genuine and are not fabricated (contrary to the Claimants' contention). There is limited information recorded within them but the Tribunal is not prepared to accept that the Claimant said more than that which has been captured on paper. The Tribunal is not prepared to accept that the Claimants made allegations about bribery and corruption in circumstances where this is not recorded. The Tribunal is not asserting that the Claimants are lying in relation to this, rather that they cannot remember the precise words used during the course of these conversations given the number of different discussions about this subject which took place

over an extended period of time and given the lack of a contemporaneous documentary record of the discussion save for the said screenshots.

12. The outcome to Mr Walker's complaint appears at page 250J and it states:

    "*I can now advise we have carried out the investigation into your allegation that the union changed employees' contracts without employees' knowledge and that the general manager met with the union secretly to change employees' contracts. The investigation has found that this site agreement was indeed amended and those changes were agreed and signed off by Dan Smith on behalf of DHL and John Evans on behalf of Unite. There was no evidence to suggest that this was carried out secretly and both were acting in line with their implied responsibilities to undertake such discussions and agreements. I'm sorry you feel that you were not consulted regarding the changes but I believe that this is an issue you need to take up with your union as I would presume it would be their responsibility as your elected representatives to ensure that you were fully informed on such matters. On this basis I will now close the case on the compliance system".*

13. The record in relation to Mr Robinson's complaint begins at page 250K of the bundle. The issue summary is: "*The caller reported that the contracts of the employees have been changed without them knowing"*. The caller is said to be anonymous and the subject of the allegation is said to be "Dan Smith." In addition to these initial complaints there is an email chain from Stuart Sumner to Mrs Mackay asking for further information in relation to the subject matter of the complaint. The information provided by Sally Mackay is at page 250F of the bundle. In summary she confirms that the Respondent wouldn't have a note saying that all trade union members agreed to the change. She doesn't believe members get to vote on the site agreement but that would be a Unite process in any event, not a Respondent DHL process. She confirms that John Evans was representing the union in his capacity as regional officer at that time and he spent time with the local representatives on it before he ultimately signed it off. She notes that the process should be that the local representatives discussed this with the membership but that is a function of Unite. So if it is the case that the members did not get the proper details from the representatives ultimately this was a failure on the part of Unite. She notes that she had met with Unite that day at their request with the intention of trying to update the site agreement. One of the local representatives referred to the complaint that had been submitted to global compliance and the fact that the members believed the current agreement should be set aside. She says that they were unable to make headway on amending the site agreement as Unite remained of the view that the current site agreement should be set aside which was not the Respondent's view. However, they did agree that a working party would be beneficial and Unite were going to raise this matter at the next branch meeting. She confirmed that the new site agreement did not change terms and conditions but rather were about how DHL and Unite worked together. She goes on to give further information and detail and this information was a source of evidence for the GCO in providing an outcome to the complaint. There is nothing within Sally Mackay's account which suggests she was asked whether John Evans would be working for the Respondent after his retirement. The bribery element of the Claimants' allegation is wholly absent. The Tribunal was not informed who else provided

information to the GCO for the purposes of the investigation or what that other evidence was.

14. The Tribunal concludes that at this stage in the chronology Sally Mackay knew that it was Mr Walker who had made a complaint but not necessarily the identity of the other complainant. In addition, she was unaware of the bribery element of the complaint. In any event the Tribunal accepts Mrs Mackay's evidence that this information was given to her on a strictly confidential basis and that she did not disseminate any information about it or about the GCO complaint to other managers. The rest of management were not in any way contaminated by knowledge of the specific GCO complaint which the Claimants rely upon as their protected disclosure in this case.

15. It is unclear whether either of the Claimants got the GCO outcome because it was given online and neither of them logged on to the relevant computer system. However, the Tribunal does not consider that this undermines the legitimacy of the documents provided by the Respondent at pages 250A-J of the bundle. It does not accept that these documents are forgeries or have been tampered with in any way after the event.

16. Prior to Sally Mackay sending the email to GCO there was a meeting with the trade union. The minutes are at page 463 of the bundle and the meeting took place on 2 March 2017. The Tribunal notes that the attendees included Kevin Holt (general manager), Sally Mackay (senior HR business partner), Mick McGrath (union representative), Harriet Eisner (Unite regional officer), Keith Nesbitt (union representative), Dominic Field (union representative) together with two general managers and a note taker.

17. At the outset of the meeting Harriet Eisner referred to the problem regarding the agreement signed in March 2015. She confirmed that the main issue was that John Evans signed it off and the members didn't know anything about it. However, there is no reference in the minutes to bribery and corruption by Mr Evans. The Tribunal notes that the new site agreement gives the Respondent a veto over the election of certain representatives. Two of the paragraphs which were particularly relevant to Mr McGrath are those at paragraph (b) and (d) at page 147 of the bundle. Paragraph (b) reads: *"candidates for election must not be subject to live formal disciplinary warning….. whether or not that warning is subject to an appeal at the time that candidacy is submitted*". Paragraph (d) states: *"all representatives must be mutually acceptable to the union and the company. The company will not unreasonably object to a choice of union representative. In the event that the company objects to a specific nomination, a meeting will be held to resolve the matter. In the interim the person nominated by the union will not take up post. In the event that agreement cannot be reached, and only after full discussion carried out with goodwill on both sides, the union will put forward an alternative nomination".*

18. The contents of these paragraphs effectively prevented Mr McGrath from actively pursuing his trade union activities. As a result of the discussion at the meeting the Respondent agreed to disapply those pre-conditions so there was no bar to Mr McGrath acting as a trade union representative. However, there was no formal amendment to the documentation. The trade union still wanted to set aside the written agreement in its entirety. The Respondent was willing to amend but not withdraw the whole agreement. Therefore, a working party was set up between the two parties in order to look at amendments in the future.

19. At the meeting on 2 March 2017 Mr McGrath mentioned the issue of corruption and bribery by senior management but did not refer to that in the context or detail of the Claimants' complaints. Nor were the Claimants identified by name at this meeting. The Tribunal concludes that Mr Holt would be aware that complaints had been made to GCO and that there was a reference to bribery because of his attendance at this meeting as reference was made during the course of the meeting to two complaints having been made to GCO. However, the Tribunal finds that he would not have been aware who had made the complaints or what the details of those complaints actually were. The Tribunal notes that at this stage nobody had the whole picture regarding the content and nature of the alleged protected disclosures save for Mrs Mackay and she had not and was not going to tell anybody else about it in terms of its substance or the identity of the complainants.

20. On 4 February 2017 there was a union branch meeting with the entire workforce for all three sites. The collective anger of the attendees was directed at John Evans and his actions in relation to the agreement. Steve Clarke confirmed that he knew that John Evans was working for DHL as an HR consultant after he took his retirement from the union. There was a unanimous agreement about balloting for strike action on three points, namely: the site agreement; pay talks; and the TUPE process. Keith Nesbitt the union steward on site 3 did not attend this branch meeting.

21. The crucial events in this case took place on 9 March and are captured on CCTV footage. The Tribunal reviewed this CCTV footage a number of times. It shows a view of the canteen at the Respondent's workplace in the period running up to the 2pm change of shifts. (It should be noted that there was no audio track to the video footage and there was a limited field of vision.) Various people are seen milling about in the canteen and the Tribunal notes that other people may be present at the location but not visible (being 'off camera'). The Tribunal notes that Mr Nesbitt arrives at the canteen and Mr Walker goes over to him immediately and thereafter Mr Walker is never more than a couple of metres away from Mr Nesbitt. He is clearly remonstrating with Mr Nesbitt. Mr Robinson joins in. He demonstrates clear animated gesticulations, finger waving and pointing and bangs on the table with his hands. He goes away from Mr Nesbitt and then returns displaying significantly aggressive body language. Mr McGrath then joins the conversation and is clearly seen talking to all involved. His body language appears to be explanatory in nature. There is no evidence of him

remonstrating with Mr Nesbitt. There is no evidence of aggression on his part. He appears to be explaining things to both sides of the discussion. Mr Nesbitt, as previously stated, had come into the canteen and gone to the vending machine. He stops to deal with both Claimants and is responding to their interventions. He is apparently giving his version of events. His body language is self contained and does not display any aggression. He appears to be explaining the situation. The duration of the whole event is about six minutes. The Tribunal notes that there were both trade union and non trade union members present at the time. The Tribunal notes that the CCTV footage shows a heated debate. It is an argument rather than a meeting. Nothing in the CCTV indicates that it was a formal meeting. Nothing indicates that it had been pre-arranged in terms of time and place or pre-notification to trade union members. In essence trade union members caught what was going on if they just so happened to be there at the time.

22. Mr McGrath confirmed that in relation to trade union meetings they would usually be called by means of a notice displayed on the notice board and that non trade union members were not really allowed to attend. Clearly this was not a trade union meeting in that sense. Rather, it was a group of trade union members discussing trade union issues with Mr Nesbitt when they caught up with him before the shift change. Mr Walker viewed himself as a shop steward but he was not in fact one. He had not yet got his credentials. He had stood for election but the election had not concluded by 9 March. During the Tribunal hearing the Claimants suggested that a manager had been watching the incident throughout via CCTV but did not intervene in events, the implication being that the matter cannot have been that severe or serious. It is alleged that the said manager got hold of Mr Nesbitt after the event and took him to make a formal complaint. The Tribunal cannot accept this. There is no real evidence of it. There is no evidence to show that someone would have seen or heard what had gone on or that they failed to intervene because the incident was not as serious as now contended. There is no evidence to show that the manager forced Mr Nesbitt to make a complaint. Indeed, an alternative explanation might be that he was enquiring as to Mr Nesbitt's welfare. The Tribunal cannot accept the Claimants' interpretation and assertions about this. In any event, it is not necessary for us to resolve that particular dispute of fact. In terms of the content of the discussion it appears that they were discussing a union issue. Mr Nesbitt wanted to avoid the industrial action ballot and go to ACAS. He had been sending emails to the union membership to that effect. The Claimants were challenging him on his actions. Some of the members wanted him to stand down as trade union representative because he had been questioning what they felt they had already decided vis-a vis industrial action.

23. The incident occurred at approximately 2pm and Mr Nesbitt complained about his treatment to Mr Holt shortly thereafter and asked to be transferred to another site. Mr Bunting had also spoken to Mr Nesbitt before this point and he got a witness statement from Mr Nesbitt. A number of other witness statements were taken on the day. There was a witness statement taken from Mr Paul Evans in which he states that there was shouting. He refers to the incident as being *"nasty, volatile and intimidating"*. He notes that Mr McGrath had to intervene to

stop it. His witness statement is clearly critical of the Claimants' actions on the day in question. There are two purported witness statements from Yvonne Rollinson and Paul Evans. There was no reason in the Tribunal's view to conclude that either of these documents was a forgery or to conclude that the Respondent should not have taken them into account. There was a difference of language at certain points between the two witness statements but this was not a difference of substance. Both were clearly describing an aggressive episode. In particular, they refer to two men having a go at another man and they refer to the two individuals behaving like Rottweilers. There is reference to it being an intense experience. On 10 March Keith Nesbitt raised his own grievance and he referred to Dave Robinson talking to him in an aggressive manner telling him that he had no right to ask union members for their opinion on the proposed talks with ACAS. He noted that from then on he had several people shouting at him and referred to a torrent of abuse. He also referred to Mick McGrath coming to join the people around him and trying to calm the people down who were shouting. He referred to feeling extremely intimidated, not only by the things that were being said to him but also by the aggressive manner in which they were said.

24. Mr Walker and Mr Robinson were suspended from duty on 10 and 12 March respectively. Following this point a number of witness statements were collated as part of a disciplinary investigation. Documents were collated by Mr Roman Kotwicki, a warehouse manager. Those documents included Mr Nesbitt's written grievance and the minutes from his grievance hearing together with the written statements provided by Paul Evans and Yvonne Rollinson, Mr Robinson, Gary Turnbull, Simon Piggott, Raphael Woszczek, Stuart Porter and Kevin Holt. They also included minutes from investigation meetings conducted by Mr Kotwicki with Mr Nesbitt, Mr Turnbull and Mr McGrath and the documents and correspondence that related to the formal investigation of Mr Walker and Mr Robinson.

25. A review of the documents collated for the purposes of the investigation reveals that there were a number of witnesses who were specifically critical of the Claimants' actions in the course of the incident, in particular Raphael Woszczek, Mr Nesbitt, Mr Evans and Yvonne Rollinson. Furthermore, even those who were less critical of the Claimants were somewhat equivocal in their support for the Claimants. For example, various witnesses stated that the actions of Mr Robinson could be interpreted as intimidating if one did not know him and his character and it is clear from Mr Nesbitt's demeanour shortly after the incident that he was tearful and upset when he made his initial complaint to Mr Holt. The Tribunal notes that a thorough investigation has been undertaken by Mr Kotwicki. All of the witnesses describe the atmosphere as lively and loud. There is some clear evidence of volatile behaviour. Even those supporting the Claimants say it was a confrontation and that Mr McGrath had to intervene and calm things down. It is clear from the evidence available that Mr Nesbitt was being asked to stand down as trade union representative. The Claimants were asking for a meeting about the industrial action ballot. The membership was angry because emails had been sent out trying to persuade people to go to ACAS as an alternative. It is also apparent that there were non trade union members present in the canteen during these discussions and that this was not a formal trade union meeting.

26. Mr Richard Jackson was appointed as the disciplining officer. He reviewed the documentation previously referred to together with the CCTV footage. A disciplinary meeting took place between the Mr Robinson and Mr Jackson on 10 April. Various things were said in the course of that meeting. In particular, Mr Robinson referred to being animated, to slapping the table and he effectively confirmed that this 'is just how he is' and his normal way of behaving. He also accepted that Mr McGrath came in to calm the situation down. He questioned why Mr Nesbitt did not leave when he was first upset if he was genuinely upset by the Claimant's behaviour. He referred to previous "ding dongs" between himself and Mr Nesbitt and referred to a previous occasion on which he had managed to get Mr Nesbitt to cry.

27. There was also a disciplinary meeting with Mr Walker who confirmed that there was no swearing or insults although there may have been some raised voices but nothing too aggressive. He asserted that it was just a trade union debate. He asserted that he wasn't intimidating although he said *"I am vocal down there and I speak for people"*. He accepted that there were raised voices. He asserted that Keith Nesbitt wanted centre stage but from the Tribunal's review of the CCTV this is not borne out by the footage. It is not a case of Mr Nesbitt taking over the debate, rather of him being accosted by the Claimants.

28. Mr Nesbitt was interviewed by Mr Jackson on 27 April and minutes were taken. He confirmed that he had tried his best to explain his actions in relation to the pay negotiation and he confirmed that he did his best to remain calm and did not want to cry in front of a room full of colleagues. He became emotional when speaking to Mr Jackson and on several occasions broke down in tears. Mr Jackson had to adjourn the meeting so that Mr Nesbitt had the opportunity to calm down. Mr Nesbitt confirmed to Mr Jackson that the incident had left him feeling very shaken.

29. Mr Jackson also decided that he needed to speak with Stephen Archer, another warehouse operative and witness to the events who had not been previously asked to provide a written statement. The contents of that statement make it clear that Mr Archer did not want to get involved in the matter. He confirmed that there were raised voices but he did not think anyone was out of order. He felt that Mr Robinson was just being himself. Mr Jackson also wanted to speak to Simon Piggott, warehouse operative, as he could see he was present throughout the incident on the CCTV. However, by that time Mr Piggott (who was an agency worker) had left the business for an alternative position and so it was not possible to interview him.

30. Following the disciplinary hearings Mr Walker submitted a grievance which is found at page 277 of the bundle. Essentially, he complained about the length of the suspension that he had been subjected to and asserted that he wanted quick closure to the investigation. He asserted that he had been targeted for his views

in relation to the TUPE transfer and pay negotiations. Mr Andrew Downs was appointed to carry out a grievance investigation and he met with the Claimant on 3 May to hold a grievance hearing. Mr Walker was accompanied by Mr Dominic Fields (a trade union representative) and minutes of the hearing were taken. Again, Mr Walker complained that he had been deliberately targeted because of his views in relation to TUPE and he asserted that Mr Bunting had coached witnesses. Mr Downs explained to Mr Walker that the complaint relating to the length of his suspension should be dealt with as part of the disciplinary process and that he would pick this up with Mr Jackson. He asked Mr Walker to expand on his other complaint. Mr Walker asserted that some people who had been named in Keith Nesbitt's statement had not been interviewed. He also asserted that he thought some of the witnesses had been coached and that the statements did not match the CCTV. He also asserted that it was Neil Bunting, warehouse manager, who had targeted him and that he was targeting him because he was standing for shop steward and because he had been vocal about the TUPE transfer.

31. At the conclusion of the meeting Mr Downs explained that he would conduct an investigation but there might be an overlap in relation to a number of issues that had been raised and that some issues might be better dealt with as part of the ongoing disciplinary procedure. It was agreed that the outcome of the grievance would be provided in writing.

32. Mr Downs interviewed Mr Jackson on 4 May. Mr Jackson confirmed that he had no concerns regarding the witness statements that had been taken during the investigation and that he was comfortable with the investigation that had been undertaken. He did not have any concerns about the reliability of the statements and he was comfortable that the statements were each witness's own account of events. Mr Jackson confirmed that investigations were still ongoing hence the length of the suspension. On 4 May Mr Downs also interviewed Roman Kotwicki who had collated the investigation documents. He confirmed that he had obtained statements from all those that Mr Nesbitt had mentioned in his grievance. He confirmed that Mr Bunting (the manager on site at the time of the incident) had initially collated written statements from all those involved and that he had taken statements from those who were willing to assist with the process. These were then passed to Mr Kotwicki for him to undertake the formal investigation. Mr Downs then asked him about the timeline of events. Mr Kotwicki talked him through the process and explained that there had been some delays due to diary commitments and Mr Walker's trade union representative's availability. On 11 May Mr Downs met with Mr Bunting. He asked whether there was anyone that was named in Mr Nesbitt's grievance that had not been interviewed. Mr Bunting confirmed that Stephen Archer had not provided a statement initially as he said that he had not heard anything. Otherwise Mr Bunting confirmed that he had asked people to produce a statement and provide him with a copy which he had then passed to Mr Kotwicki in order to carry out the investigation. He said that at the time he did not have access to DHL's HR templates and that that was the reason why some statements were on standard paper rather than a headed template document. Mr Bunting confirmed that he did not discuss the statements with anyone. Nor did he tell anyone what they

needed to write. He also confirmed that he had suspended Mr Walker based on the contents of the statement and that he was concerned that Mr Walker had breached the diversity at work policy. He confirmed that the suspension had nothing to do with trade union views and that he had no personal issues with Mr Walker at all. In relation to the TUPE transfer he stated that they were all in the same situation.

33. Mr Downs provided his findings in a written outcome. He concluded that there was an overlap with the disciplinary process and this was a matter for the disciplinary manager to address. He concluded that he was confident that Mr Jackson had identified what further investigation he needed to do as part of the disciplinary process and was not simply relying wholly on the contents of the investigation. Having spoken to Mr Bunting he concluded that the witnesses had not been coerced into making statements and he did not think there was anything untoward about the statements being written on normal paper rather than in a formal template document. Having spoken to the key people Mr Downs was also comfortable that the only reason Mr Walker was subject to this disciplinary was due to his behaviour on that day. He could see no evidence to suggest that it had anything to do with the ongoing TUPE situation, the ongoing pay negotiation, or his views and/or beliefs on any of these topics, or his activity in the trade union. As part of understanding the incident he also watched the CCTV footage to satisfy himself that the statements which had been taken did not misrepresent what the footage showed. He concluded that it was reasonable for there to be an investigation and disciplinary into the incident and that this process had not been to target Mr Walker. Having considered the timeline of events in relation to the incident, the suspension, the investigation and the current disciplinary process, he was comfortable with the timeline. He accepted that matters had been ongoing for a couple of months but concluded that this was necessary due to the number of individuals involved and the complexity of the issues. He wrote to Mr Walker to confirm his findings on 17 May.

34. Following the initial disciplinary hearings Mr Jackson wished to reconvene the disciplinary hearings with each of the Claimants. Mr Walker refused to attend a reconvened hearing because he had yet to have an outcome to his grievance. Mr Robinson did attend a reconvened hearing on 18 May. Mr Jackson wrote to both Claimants setting out his decision and the reasons for it. In summary Mr Jackson found that, although the statements were not all 100% aligned in terms of detail as to what had happened, he accepted that it is rare to get such consistency given that different individuals interpret things in different ways. However, having reviewed the statements, met with the key individuals involved and having watched the CCTV himself on a number of occasions Mr Jackson was satisfied that both Mr Walker and Mr Robinson had displayed aggressive and intimidating behaviour towards Mr Nesbitt. Having spoken to Mr Nesbitt in person he could see how this incident had affected him and the impact it had had on him and this confirmed it in Mr Jackson's mind. In Mr Jackson's view no colleague should have to come to work feeling threatened, intimidated or concerned about their welfare. He witnessed first hand that Mr Nesbitt was crying and shaking. Mr Jackson could find no evidence that any of this had come about due to the Claimants being involved in pay discussions as they had both

asserted in the disciplinary hearings. During the process the issues relating to both the TUPE transfer and the wider DHL Unite relationship came up but Mr Jackson did not have any concerns about either of the individuals being treated differently because of their involvement or their views in this regard. Mr Robinson apparently stood out to Mr Jackson more than Mr Walker mainly because of his maintaining that this was just an example of him 'being himself'. Throughout the process Mr Robinson maintained that he was a loud individual and this was just how he was naturally and that he had not acted any differently towards Mr Nesbitt than he usually would. Mr Jackson also noted that when he spoke about making Mr Nesbitt cry on a previous occasion he did not show any remorse or compassion in relation to this and appeared almost to gloat about his behaviour. Although Mr Robinson stood out more, Mr Jackson was still satisfied that Mr Walker's actions constituted gross misconduct. He was actively involved in the debate and in particular could be seen on the CCTV footage following Mr Nesbitt towards the fridge in the canteen. Mr Walker's name was expressly mentioned in a number of statements confirming that he was actively involved and that his voice was raised. Mr Nesbitt confirmed that Mr Walker's actions made him feel intimidated. Mr Jackson accepted that Mr Nesbitt was also animated in the CCTV in his hand gestures. However, having met Mr Nesbitt, Mr Jackson was satisfied that this was Mr Nesbitt trying to express himself and explain something to the group of people who were surrounding him. The CCTV footage showed that both Mr Walker and Mr Robinson were in Mr Nesbitt's personal space. The CCTV footage also showed Mr Robinson leaning over the pool table with his hands on the table slapping his hand down on the table. Having considered the allegations and the evidence Mr Jackson reached the decision that both Mr Walker and Mr Robinson had behaved in an aggressive and intimidating manner and that their actions had seriously affected another employee. Having reviewed all of the evidence he was satisfied that disciplinary action had been taken against the right people. From the statements there were two other named mentioned as being involved in the incident: Gary Turnbull and Mr McGrath. Neither of these were dismissed for their actions but neither of them were involved to the same extent nor were they the main protagonists in making Mr Nesbitt feel intimidated.

35. Mr Jackson then went on to consider what the appropriate disciplinary sanction should be. He took into consideration Mr Walker's six years of service and Mr Robinson's three years of service. He considered whether any sanction less than summary dismissal would be appropriate. On balance he did not think that a final written warning would be appropriate in the circumstances as he could not see a way of Mr Walker and Mr Robinson working amicably with Mr Nesbitt again. Further, he was not satisfied that this type of incident would not happen again as neither had shown any remorse for their actions. Finally, he considered their behaviour to be sufficiently serious to warrant a sanction of dismissal. He accepted that due to the potential TUPE transfer tensions were high but did not accept that this was an excuse to behave in such a manner. Whilst Mr Jackson was aware that Mr Robinson was on a final written warning for a separate conduct issue he did not give this any further consideration as in his mind he was satisfied that his conduct was sufficiently serious to warrant dismissal in its own right. In addition, with regard to Mr Robinson, Mr Jackson did not think that the explanation of him simply 'being himself' was an acceptable justification and he

was not satisfied that this would not happen again. He therefore decided that summary dismissal was appropriate in this case. He considered that Mr Walker had longer service and a clean record but again, due to the seriousness of the allegations, his actions and the specific confirmation he was one of the individuals who made Mr Nesbitt feel intimidated Mr Jackson concluded that summary dismissal was appropriate in his case too.

36. The Tribunal accepts that the summary set out above represents the genuine reasoning behind Mr Jackson's decision to dismiss and was actively considered by him at the relevant time. The Tribunal notes that Mr Jackson had no particular axe to grind and was wholly uninvolved in the wider issues at the workplace.

37. The Claimants appealed against the decision to dismiss on 20 May. The appeal was dealt with by Mr Harrison. The appeal hearing for Mr Robinson took place on 26 May 2017 at 2.30pm. Mr Harrison had been appointed because he did not know the two Claimants. At the appeal hearing the thrust of the complaint was that Mr Robinson could not understand why only four people had been suspended and how his colleagues had known about the suspension before he was in fact informed of it. He also asserted that the way that he had behaved was just how he was and that he talked with his hands. He asserted that Mr Nesbitt was not genuinely upset and he asserted that Mr Bunting had been putting words into witnesses' mouths. He asserted that he had been targeted because of his trade union activities and he complained about the length of the process. There was also an appeal hearing for Mr Walker which took place on 7 June and again he asserted that he had been targeted for his trade union opinions and his opinions in relation to TUPE. He complained that not all witnesses had been spoken to for the purposes of the disciplinary hearing.

38. After the two appeal hearings Mr Harrison spoke to Yvonne Rollinson, Stuart Porter, Stephen Archer, Gary Turnbull and Paul Evans in order to deal with the allegation that they had been coerced into making statements or that the evidence did not constitute their genuine account of what had happened. Although the witnesses had varying opinions as to what had happened all of the witnesses were comfortable with the content of the statements that they had provided at the relevant time. The only person who added anything was Mr Evans who clarified that he had referred to somebody asking Mr McGrath to calm it down and that was a reference to him himself asking Mr McGrath to calm it down. He also stated that the main protagonists were Mr Walker and Mr Robinson and that he found the atmosphere to be intimidating, that he would have felt intimidated had the behaviour been directly towards him, and that, in his view, the situation went too far. Mr Harrison did not speak to Mr Nesbitt again as he had already reviewed his grievance statement and seen the minutes of the meeting that he had had with both Mr Kotwicki and Mr Jackson. The only other people who were present at the incident that he did not speak to were Simon Piggott (as he had left DHL) and Raphael Woszczek who was not specifically mentioned in Mr Walker or Mr Robinson's appeals. He also made enquiries with Mr Alan Jones (contract manager at site 3) about the additional cctv footage that Mr Walker had requested but found that this particular footage had not been retained as it would have been deleted after 30 days. As far as he

was aware this was the first time that the footage had been requested. He then took some time to pull together all the information he had gathered during the appeal and concluded, as Mr Jackson had, that there were differing opinions in relation to the exact detail of the incident. However, it was clear from some of the witnesses that there had been a very hostile, intimidating environment which he concluded was unacceptable. It was also clear from Mr Nesbitt's evidence that this situation had caused him a great deal of stress and upset. Mr Harrison did not know Mr Nesbitt and felt that although from his physical presence people might believe that he was able to take any such abuse, this was no excuse to subject him to such behaviour. After consideration he concluded that the original decision should be upheld for both of the Claimants. One of the main differences between the two individuals was that Mr Robinson continued to maintain throughout the process that this was just the way he was and that he was simply acting in his usual way with his usual mannerisms. He admitted several times that he knew the effect that his behaviour had on individuals. Mr Harrison did not find that this explanation was acceptable. In fact he felt that it worsened the situation in that he knew that what he was doing was wrong. It was not a credible excuse for the way that he had behaved. Although Mr Walker did not raise the same points as Mr Robinson, Mr Harrison was still comfortable that dismissal was the appropriate sanction for him as well given the seriousness of his actions. Mr Harrison felt that claiming that they had only been dismissed due to their activity within the trade union was an easy claim to make given the nature of the conversation that had been taking place at the time of the incident. However, he felt that there was absolutely no evidence that this was the case. Mr Harrison could find no evidence to support either Mr Walker or Mr Robinson's assertion that they had been targeted, treated less favourably, or discriminated against, due to their trade union beliefs and he was satisfied that this was the case. He concluded that Mr Walker and Mr Robinson may have become involved in the incident due to their views on trade union activity at the site but that this behaviour was unacceptable regardless of the reasons for it or the contents of those heated discussions. He also concluded that there was no evidence that Mr Walker or Mr Robinson had been treated inconsistently with anyone else and that the appropriate people had been suspended and disciplined. He concluded that both Mr Walker and Mr Robinson had behaved in a manner that was considered by a number of colleagues to be aggressive and threatening. He concluded that due to the number of people involved in the incident there was a degree of gossip surrounding what would happen which is why individuals were discussing suspension. However, he concluded that this had no bearing on the decision that was made. Having spoken to all the witnesses he had no reason to believe that the witness statements were not genuine or freely given. He was satisfied that the incident had not been blown out of proportion and that Mr Walker and Mr Robinson's behaviour had been hostile, threatening and uncomfortable. He considered the situation as a whole and concluded that dismissal was the appropriate sanction in the circumstances given that these individuals had bullied and harassed another colleague. On 12 June he wrote to Mr Robinson setting out his decision and on 13 June he wrote to Mr Walker setting out his decision.

39. The Tribunal accepts that the reasons set out by Mr Harrison for his decision at the appeal stage were the genuine reasons he had at the time for making his decision.

40. Mr Walker appealed the grievance outcome that had been provided by Andrew Downs and, whilst Mr Kevin Holt was initially appointed as the grievance appeal hearing manager, the appeal hearing was postponed and Mr Lee Hirst was appointed to conduct the appeal. The hearing took place on 1 August. Prior to the hearing Mr Hirst had reviewed the email of appeal and Mr Downs' outcome letter. He could see that the vast majority of the issues were issues relating to the investigation that should be dealt with as part of the disciplinary process. He decided that he needed to speak to Richard Jackson, the disciplinary hearing manager, to ensure that this had been dealt with. One of the issues referred directly to Mr Jackson having not spoken to people in a timely manner and Mr Hirst decided he would need to address this with him.

41. At the grievance appeal hearing Mr Walker was asked to summarise his appeal. He asserted that he was being treated unfairly and that only two people had been dismissed. Some time was spent trying to establish the complaints in the meeting. Each time Mr Walker raised complaints about the witnesses, the investigation and the process Mr Hirst reminded him that the disciplinary process was a separate matter to the grievance process and this was not another opportunity for him to appeal the dismissal. Mr Walker was not able to explain exactly what he was unhappy about. Mr Hirst told Mr Walker that he would look into the delays around Mr Jackson and asked him whether there was anything else he wanted Mr Hirst to look into and Mr Walker confirmed that there was not.

42. In the outcome to the grievance appeal Mr Hirst concluded that although three of the points were raised in the meeting, they related specifically to the disciplinary process and should have been raised during that process and would not be dealt with again in a grievance appeal. Those three points were: (i) the claim that Mr Nesbitt changed his statement during the course of the disciplinary process; (ii) the claim that the Claimant had been targeted for his views during the disciplinary and (iii) the claim that others mentioned in Mr Nesbitt's grievance were not subjected to the same treatment as the Claimant.

43. The fourth matter was deemed a proper subject for the grievance appeal. The fourth issue was the allegation that the timescale for Richard Jackson to interview two people was inappropriate. Mr Walker believed that Mr Jackson had had the opportunity to interview them from Monday 10 April to Friday 14 April but did not take it. Mr Hirst looked into this by examining Mr Jackson's diary for the relevant period and he confirmed that the two colleagues in question were on early shift that week. Monday was taken up with disciplinary hearings, on Tuesday Mr Jackson was off site with a customer, on Wednesday there were various pre-booked meetings, on Thursday there were meetings and preparations for the Easter bank holiday. Friday was Good Friday and Mr Jackson had started his holiday and was unavailable. After deliberation Mr Hirst decided to uphold the original grievance decision. He did not believe that there was sufficient opportunity for Richard Jackson to carry out the interviews with the

two colleagues during the week in question due to a combination of his pre-planned workload and a shortened week due to holiday.

The law

44. The Claimant brings a claim for unfair dismissal. The Tribunal must determine whether the reason for dismissal was a potentially fair reason within the meaning of section 98 of the Employment Rights Act 1996. As stated in Abernethy v Mott Hay and Anderson *[1974] ICR 323, [1974] IRLR 213*, the reason for a dismissal is:
"…a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee." Or, as referred to by Underhill LJ in Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401, [2017] IRLR 748,

"the factor or factors operating on the mind of the decision-maker which causes them to take the decision – or, as it is sometimes put, what 'motivates' them to do so."

45. It is for the Respondent to show what the reason for dismissal was even if the claimant asserts that it was a dismissal for an automatically unfair reason, save in cases where the claimant has less than 2 years' qualifying service and must establish that the Tribunal has jurisdiction to hear his claim. This is not such a case.

46. The Claimants assert that the dismissal was automatically unfair contrary to section 103A Employment Rights Act 1996 or contrary to section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992.

47. In the context of a case of alleged automatic unfair dismissal the Tribunal's thought process will be as set out in Kuzel v Roche Products Limited [2008] EWCA Civ 380, [2008] IRLR 530. Indeed as summarised by the EAT below:

"(1) Has the Claimant shown that there is a real issue as to whether the reason put forward by the Respondent was not the true reason?

(2) If so, has the employer proved his reason for dismissal?

(3) If not, has the employer disproved the section 103A reason advanced by the Claimant?

(4) If not, dismissal is for the s 103A reason.

In answering those questions it follows:

(a) that failure by the respondent to prove the potentially fair reason relied on does not automatically result in a finding of unfair dismissal under s.103A;

(b) however, rejection of the employer's reason coupled with the claimant having raised a prima facie case that the reason is a s.103A reason entitles the tribunal to infer that the s.103A reason is the true reason for the dismissal, but

(c) it remains open to the respondent to satisfy the tribunal that the making of the protected disclosures was not the reason or principal reason for dismissal, even if the real reason as found by the tribunal is not that advanced by the respondent;

(d) it is not at any stage for the employee (with qualifying service) to prove the s.103A reason."

48. It is only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss which the tribunal must examine in considering both section 98(1) and section 98(4) of the Employment Rights Act 1996 (Royal Mail v Jhuti [2017] EWCA Civ 1632).

49. The automatically unfair reasons for dismissal on which the Claimants rely are those set out at s103A of the Employment Rights Act 1996 and section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 which state:

Section103A:

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

Section 152:

For purposes of [Part X of the Employment Rights Act 1996] (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—

(a) was, or proposed to become, a member of an independent trade union, . . .

(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, . . .

[(ba) had made use, or proposed to make use, of trade union services at an appropriate time,

(bb) had failed to accept an offer made in contravention of section 145A or 145B, or]

(c) was not a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions, or had refused, or proposed to refuse, to become or remain a member.

(2) In subsection [(1)] "an appropriate time" means—

(a) a time outside the employee's working hours, or

(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union [or (as the case may be) make use of trade union services];

and for this purpose “working hours”, in relation to an employee, means any time when, in accordance with his contract of employment, he is required to be at work.

[(2A) In this section—

(a) “trade union services” means services made available to the employee by an independent trade union by virtue of his membership of the union, and

(b) references to an employee's “making use” of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.

(2B) Where the reason or one of the reasons for the dismissal was that an independent trade union (with or without the employee's consent) raised a matter on behalf of the employee as one of its members, the reason shall be treated as falling within subsection (1)(ba).]

(3) Where the reason, or one of the reasons, for the dismissal was—

(a) the employee's refusal, or proposed refusal, to comply with a requirement (whether or not imposed by his contract of employment or in writing) that, in the event of his not being a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions, he must make one or more payments, or

(b) his objection, or proposed objection, (however expressed) to the operation of a provision (whether or not forming part of his contract of employment or in writing) under which, in the event mentioned in paragraph (a), his employer is entitled to deduct one or more sums from the remuneration payable to him in respect of his employment,

the reason shall be treated as falling within subsection (1)(c).

(4) References in this section to being, becoming or ceasing to remain a member of a trade union include references to being, becoming or ceasing to remain a member of a particular branch or section of that union or of one of a number of particular branches or sections of that trade union. . ..

[(5) References in this section—

(a) to taking part in the activities of a trade union, and

(b) to services made available by a trade union by virtue of membership of the union,

shall be construed in accordance with subsection (4).]

50. In relation to a section 152 dismissal it is not enough to show that union grounds (as defined) contributed to the dismissal: it must be shown that they constituted the sole or predominant reason for the dismissal. The trade unionist is protected whether he participates *as a* member or *as an official.* The expression, 'activities

of an independent trade union' is not defined in the legislation. Case law indicates that the terms should not be construed restrictively. (Dixon and Shaw v West Ella Developments Ltd [1978] IRLR 151, [1978] ICR 856, EAT. It is essentially a question of fact for the Tribunal. The sort of conduct which constitutes participating in the activities of a union may include routine union activities like reading union noticeboards, attending union meetings, participating in union ballots, paying over union subscriptions, consulting a union shop steward or other union official. If the member concerned happens to be a union official, then his participation would include discharging the corresponding functions: putting up notices on the union's noticeboard, calling and organising union meetings and ballots, collecting subscriptions, dealing with his constituents' problems, and so on. Arranging or participating in an informal gathering of union members can constitute union activities. Acting in defiance of union instructions, or contrary to declared union policy may not be participating in the activities of that union but merely calling a meeting to challenge the union's officialdom, to complain about its inactivity or manner of conducting business or to seek to get it moving may be part of the activities of that trade union (British Airways Engine Overhaul Ltd v Francis [1981] IRLR 9, [1981] ICR 278, EAT).

51. The activities concerned do not have to be official, *union-organised* activities: ordinary members behaving as such may be engaging in the activities of their union even though the activity is spontaneous and not instigated 'from above' (Dixon and Shaw v West Ella Developments Ltd [1978] IRLR 151, [1978] ICR 856, EAT; British Airways Engine Overhaul Ltd v Francis [1981] IRLR 9, [1981] ICR 278, EAT). On the other hand, the activities concerned must be activities 'of a union' and not merely activities of a person who happens to be a trade unionist. The question is really whether the individual was ‘acting as a union member’ or simply ‘acting as an employee’.

52. 'The way in which trade union activities are carried out is immaterial to the decision as to whether they are in fact trade union activities unless the way in which they are carried out is such as to be dishonest, in bad faith, or carried out for some other organisation or cause so as to remove them from the scope of what can properly be called trade union activities' (Mihaj v Sodexho Ltd *UKEAT/0139/14* (23 May 2014) *at [17]*). What is to be determined is whether the dishonesty or bad faith is such that this takes the activities outside the scope of trade union activities. The fact that activities are unreasonable is not enough on its own to take them outside the scope of union activities but clearly if an employee engages in activities which are wholly unreasonable, extraneous or malicious, then it will be easier for a tribunal to conclude that those activities are not in fact union activities.

53. Guidance on the meaning of “at an appropriate time” is set out by Lord Reid in Post Office v Union of Post Office Workers and Crouch [1974] IRLR 22, [1974] ICR 378, [1974] 1 All ER 229*, HL where he stated:*

"The definition includes all time outside the worker's working hours, and “working hours” is defined as meaning time when in accordance with his contract with his employer he is required

to be at work. I do not think it was or can be disputed that "at work" means actually at work and does not include periods when in accordance with his contract of employment the worker is on his employer's premises but not actually working. It is common knowledge, and Parliament was very well aware, that every day there are periods when a worker is on his employer's premises but is not expected or required to be actually working. He arrives at his employer's premises some time before he starts work. He leaves some time after his day's work is done. And I should think that in almost all cases he is not expected to work non-stop. There are recognised breaks for meals and perhaps other purposes during which he does and is expected to remain on his employer's premises. "In accordance with his contract" does not, I think, mean in accordance with some formal condition, but rather in accordance with what the employer recognises to be customary. It cannot matter whether provision for dinner and other breaks in working time is written into his contract or is merely a recognised concession. So in my judgment the Act entitles a worker who is a member of a trade union to take part in the activities of his union while he is on his employer's premises but is not actually working."

54. For the purposes of the definition an employee's own time includes tea breaks and meal breaks (whether paid or not: Zucker v Astrid Jewels Ltd [1978] IRLR 385, [1978] ICR 1088, EAT), and times immediately before or after work when he is customarily on his employer's property but not actually required to work.

55. In this case the Claimants rely on section 43B(a) and section 43B(b) to show that they made qualifying disclosures for the purposes of the section103A and section 47B claims:

Section 43B (insofar as relevant):

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,……

….

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).]

56. The Tribunal reminds itself that it is necessary that the worker making the disclosure has a reasonable belief that the disclosure is in the public interest *and* tends to show *one of the six statutory categories of 'failure'*. What is required is only that the worker has a reasonable belief. It is not necessary for the information itself to be actually true. The statutory test is a subjective one i.e. there must be a reasonable belief of the worker making the disclosure. The individual characteristics of the worker need to be taken into account and the relevant test is not whether a hypothetical reasonable worker could have held such a reasonable belief. The public interest element is also qualified by the 'reasonable belief of the worker' element. There is no clear 'bright line' between personal and public interest, with any element of the former ruling out the statutory protection. In a case of mixed interests, it is for the tribunal to rule as a matter of fact as to whether there was sufficient public interest to qualify under the legislation.

57. With regard to head (b) (failure to comply with a legal obligation), the word 'legal' must be given its natural meaning, with the result that the fact that the individual making the disclosure thought that the employer's actions were morally wrong, professionally wrong or contrary to its own internal rules may not be sufficient (Eiger Securities LLP v Korshunova *[2017] IRLR 115*, EAT*).*The disclosure of information in question must have identified to the employer the breach of legal obligation concerned: Fincham v HM Prison Service UKEAT/0991/01 (3 December 2001, unreported*)*. It need not be 'in strict legal language'.

58. An employee wanting to rely on the whistleblowing protection before a tribunal bears the burden of proof on establishing the relevant failure. In Boulding v Land Securities Trillium (Media Services) Ltd UKEAT/0023/06 (3 May 2006, unreported) Judge McMullen said:

    "As to any of the alleged failures, the burden of the proof is upon the Claimant to establish upon the balance of probabilities any of the following:

    (a) there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on.

    (b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject."

59. Under s 43B(1)(*b*) it is necessary that the relevant information must tend to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject. The term 'likely' requires more than a possibility or a risk that the employer might fail to comply with a relevant legal obligation. The information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable or more probable than not that the employer will fail to comply with the relevant legal obligation. In a case where the whistleblower reasonably believes that a criminal offence has been committed, is being committed or is likely to be committed:

provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong — nor (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to criminal offence is sufficient of itself to render the belief unreasonable and thus deprive the whistleblower of the protection of the statute.'

60. If the dismissal was not for an automatically unfair reason the Tribunal will consider whether it was for a potentially fair reason within the meaning of section 98 Employment Rights Act 1996, which 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

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

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

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

[(ba) . . .]

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

[(2A) . . .]

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

[(3A) . . .]

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

(5) . . .

(6) [Subsection (4)] [is] subject to—

(a) sections [98A] to 107 of this Act, and

(b) sections 152, 153[, 238 and 238A] of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action)."

61. If the reason was a potentially fair one the Tribunal will consider whether it was fair within the meaning of section 98(4) of the Employment Rights Act 1996.The Tribunal reminds itself that it must not substitute its own view for that of the reasonable employer, rather it should apply the standard of the "band of reasonable responses" (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, Foley v Post Office and HSBC Bank plc v Madden [2000] ICR 1283, [2000] IRLR 827.) The fact that other employers might reasonably have been more lenient is irrelevant.

62. In a conduct dismissal case following the guidance in the case law the Tribunal must consider whether the respondent had a genuine belief in the claimant's guilt which was based on reasonable evidence following a reasonable investigation. It must then consider whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer. The Tribunal must consider both the fairness of the procedure and of the substantive decision to dismiss. The range of reasonable responses test is applicable to the procedural fairness of the decision as well as the substantive fairness. Whitbread plc v Hall [2001] IRLR 275.

63. In the event that the dismissal is found to be procedurally unfair the Tribunal will go on to consider what would have happened in the absence of the procedural flaw in line with the principles enunciated in Polkey v AE Dayton Services Ltd [1987] IRLR 503 and subsequent cases. It will consider whether the respondent would have been able to dismiss the claimant fairly had the procedural flaw not occurred. It may be appropriate to assess the percentage chance of a fair dismissal absent the procedural flaw or, it may be appropriate to consider how long the claimant's employment would have continued for had a fair procedure been undertaken in circumstances where a fair dismissal could certainly have been effected in the absence of a procedural flaw.

64. In the event that the Tribunal finds that the dismissal was unfair it will consider whether to make a reduction in the basic and/or compensatory awards pursuant to section 122(2) and/or section 123(6) of the Employment Rights Act 1996. In the base of the basic award the tribunal will consider whether there was any conduct of the claimant prior to dismissal/notice of dismissal which renders it just and equitable to reduce the amount of the basic award. In the case of the compensatory award it will consider whether there were any actions on the part of the claimant which could be considered to be culpable or blameworthy which, notwithstanding the actual unfairness of the dismissal, contributed to the respondent's decision to dismiss the claimant.

65. The relevant statutory provision in relation to the trade union detriment claim is section 146 which states:

"(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—

(*a*) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,

(*b*) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so,

(*ba*) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or

(*c*) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions …"

66. On a complaint of detriment on union grounds, it is for the employer to prove the sole or main purpose for which he acted or failed to act (TULR(C)A 1992 s 148(1)), and the tribunal may draw an adverse inference from his failure to do so. *"Both under section 146 (see Yewdall) and section 152 (see Kuzel) it is for the employee to raise a prima facie case. In the dismissal case it is perhaps more accurate to say that it is for the employee to show "only that there is an issue warranting investigation and capable of establishing the prohibited reason"'.*' Dahou v Serco Ltd [2017] IRLR 81). *Dahou* in the Court of Appeal held that the position was the same in both detriment and dismissal cases so that an employer's failure to show what the reason for detriment was does not entail the conclusion that the reason was the one asserted by the employee: while very often a failure by the employer to establish the veracity of the reason it was relying on will lead to the conclusion that the employee was right to allege that there was an anti-trade union purpose to the detriment, this is not inevitable. The current position therefore seems to be that in both detriment and dismissal cases it is for the employer to show the sole or main purpose for its action or omission. In both detriment and dismissal cases it is however necessary for the employee to advance evidence which puts the trade union purpose or reason into play by showing that there are matters requiring investigation which could establish the prohibited purpose or reason. This may

not necessarily require evidence going as far as a prima facie case. In both detriment and dismissal cases, once the burden is on the employer to show its purpose or reason was not a prohibited trade union one. If the employer fails to establish its innocent reason to the satisfaction of the employment tribunal the employer is not certain to be found to be in breach: while this will usually follow it remains the duty of the tribunal to determine the true purpose or reason for the employer's action or omission and this could be something other than what was contended for by either the employee or the employer.

Conclusion

67. The first question is whether there was a protected disclosure in relation to a breach of contract or a criminal offence. On reviewing the relevant documents the Tribunal concludes that the disclosure did not include reference to any potential criminal offence. The allegation was that the contracts of the employees had been changed in secret. There was no allegation of bribery, corruption or anything of a criminal nature in the course of the disclosure to the GCO.

68. The Tribunal went on to consider whether or not it could be said that there was a protected disclosure in relation to a breach of a legal obligation. The difficulty here was in identifying what legal obligation it was alleged had been breached. The Claimants had failed to properly identify this. At most it was a complaint that the trade union negotiators should have consulted with the wider membership before signing the said site agreement. Based on all the evidence presented to the Tribunal it is not apparent that this is a breach or an alleged breach of a legal obligation. The Tribunal notes that the whole process was based on the trade union representatives negotiating with the authority of their members. The Tribunal cannot see which legal obligation the Claimants have made a disclosure in relation to. The evidence is that the trade union team negotiated with the involvement of three shop stewards in any event and so it is not true to say that the employees were kept in the dark in relation to the changes. There was no secret agreement in the manner which the Claimants allege.

69. In light of the above the Tribunal is not satisfied that a protected disclosure had been made by the Claimants.

70. In any event and more importantly even if there was a protected disclosure within the meaning of the 1996 the Tribunal concludes that it did not cause the detriment or dismissal in this case. The Tribunal reminds itself that it has to look at the decision maker’s reason for dismissing the Claimants and not the motivations of the wider workforce. Even if there had been a problem in relation to Mr Bunting’s motives that had been cured by the time the decision maker was looking at the evidence in the case. Mr Kotwicki had thoroughly investigated and obtained genuine and reliable witness statements from the people concerned and indeed he had checked with the witnesses that the statements accurately reflected their evidence. It is on that evidence that Mr Jackson and the

subsequent appeal manager based their decisions. Those decisions were therefore untainted by any alleged problem arising from Mr Bunting's involvement in the early stages of the process. None of the decision makers knew about the alleged protected disclosure or that it had been made by the Claimants. The only person who knew about the disclosure including the contents of it and the identity of the complainants was Mrs Mackay and the Tribunal has accepted that she kept this information confidential. The relevant decision makers were kept innocent of this information and therefore the suspension and the dismissal had nothing to do with any protected disclosure.

71. In relation to the issue of trade union activities the Tribunal concludes that the discussions which were taking place in the canteen could be said to constitute trade union activities within the meaning of section 152 and 146 of the 1992 Act. They had the necessary content and took place at an appropriate time outside work but in the workplace. It was not necessary for the Tribunal to find that it was an official or pre-organised trade union meeting. However, the Tribunal concludes that they were not the cause of the dismissal or the detriment. The behaviour demonstrated by the two Claimants and not the context or content of the meeting is what was relevant. Had the Claimants behaved in the same manner (ie aggressively) towards Mr Nesbitt about any other subject matter or in the context of any other discussion the Tribunal concludes that the Respondent would still have suspended and dismissed the two Claimants. In order for the claims to succeed the Claimants must show that the trade union activities were the sole or principal cause of the dismissal and the Tribunal is not satisfied that they are able to pass over this hurdle. Again, the Tribunal reiterates that they are considering the reasons of the decision makers and not any concerns in the wider organisation. Therefore, although there were trade union activities at the relevant time they were not causally relevant to the detriment or the dismissal and therefore these aspects of the Claimants' claims must fail.

72. The Tribunal went on to consider the claim for 'ordinary' unfair dismissal. The Tribunal concluded, based on the credible and consistent evidence of the Respondent's witnesses, that both the decision makers at dismissal and appeal stages had a genuine belief in the Claimants' guilt and misconduct. The Tribunal considered that the investigation carried out on behalf of the Respondent was more than reasonable in all the circumstances. If there had been problems with Mr Bunting's motivation, if he had, as alleged, put words into the mouths of witnesses or had an untoward motivation those problems were cured by the subsequent investigation of Mr Kotwicki and the further investigations carried out at the disciplinary and appeal stages. Therefore, Mr Bunting did not 'contaminate' the decision to dismiss or undermine the reasonableness of the investigation. The Tribunal notes that every point raised by the Claimants during the course of the disciplinary process was picked up by the relevant officers and investigated so a fair procedure was applied in this case. The officer had a clear and reasonable evidential basis for their conclusions.

73. The Tribunal went on to consider the band of reasonable responses and concluded that the Respondent employer was entitled to conclude that the Claimants were guilty of gross misconduct. Whilst this conclusion might be at the harsh end of the band of reasonable responses the Tribunal was unanimously satisfied that it did in fact fall within the band of reasonable responses. In particular, the evidence had to be considered in the round looking both at the content of the witness statements and also at the CCTV footage and the clear evidence as to the impact of the conduct upon Mr Nesbitt.

74. Looking at the other matters that were raised by the Claimants in relation to the fairness of the dismissal the Tribunal concluded that the Respondent had provided a proper explanation as to why the formal template had not been used on some of the witness statements and the Tribunal concluded that in any event this was not relevant to the overall fairness of the procedure or the decision to dismiss. It was a matter of form rather than substance. The Tribunal did not accept that Mr Nesbitt was inconsistent or evasive during the course of the disciplinary procedure. Whilst further details of his complaint may have come out the Tribunal is satisfied that his evidence was consistent and consistent with the CCTV footage and his emotional reaction in the immediate aftermath of the incident. The Tribunal concludes that nothing turns on the precise timings of Mr Nesbitt's initial complaint to Mr Holt. The Claimants had asserted that it could not have taken place at 2pm. The Tribunal takes the view that the initial complaint was made to Mr Holt reasonably quickly after the incident in question. In any event, the wider evidence available in this case corroborates Mr Nesbitt's account of not only what took place but also how he reacted to it and how upset he was by it. Likewise, the Tribunal is satisfied that the Respondent based its decision on the genuine evidence of all the witnesses, including that of Yvonne Rollinson, particularly as she was later asked to confirm that her witness statements accurately reflected the evidence that she wished to give. Indeed, it is notable that Yvonne was interviewed at the appeal stage and further made a comment regarding behaviour being like a pack of wolves which is consistent with her earlier statement. A question was raised as to whether or not the dates on Yvonne Rollinson's and Paul Evans' evidence referred to the date when the statement was taken or the date of the index incident. The suggestion seemed to be that the witness statements were taken before Mr Nesbitt had complained. However, it was pointed out on behalf of the Respondent that in fact Mr Evans was one of the Claimants' witnesses and in those circumstances he could have been asked to clarify whether or not his witness statement was taken before the complaint had been raised by Mr Nesbitt. If he had been involved in some sort of conspiracy surely he would have said so in his witness statement to the Tribunal or he would have given further evidence to that effect.

75. The Claimants sought to suggest that Mr Nesbitt's reaction to the incident was in some way concocted or that he became emotional, not as a result of the Claimants' behaviour, but because of pressure applied by the Respondent. The Tribunal finds this assertion to be unsupported by any evidence. The best evidence of Mr Nesbitt's reaction was that provided by Mr Jackson and he set out his interpretation of this reaction and why he interpreted it that way. The Tribunal is content with that summary, particularly in the absence of concrete evidence to

the contrary. The Claimants also sought to suggest that the GCO record had been falsified by the Respondent. There is no evidence of that. The complaints system was created and managed by a third party and the Tribunal accepts that it was a genuine record of the allegation as it was made at the time. This does not render the decision to dismiss unfair. The Claimants also suggested that the disciplinary procedure should have been put on hold pending the conclusion of the grievance hearing but at the same time Mr Walker was complaining regarding the length of the suspension. The Tribunal accepts the suggestion made on behalf of the Respondent that the Claimants cannot both complain about the length of the suspension but also ask to be kept on suspension longer to the end of the grievance procedure. Those are mutually inconsistent submissions and the Tribunal does not accept them. The Claimants also sought to complain about the fact that Mr Holt was initially appointed as the appeal manager in relation to the grievance. Indeed, it would have been inappropriate for him to undertake that appeal but in fact that did not happen and therefore this has no bearing on the fairness of the decision.

76. In light of our findings the issue of contributory fault doesn't strictly arise for consideration as the dismissal is both substantively and procedurally fair. However, had that not been the case then the Tribunal would have been minded to find some significant level of contributory fault on the part of the Claimants.

77. The Tribunal is satisfied that the Respondent considered the relative culpability of the two Claimants. They clearly considered the differences and similarities between their conduct and the relative seriousness of it. Whilst they identified that Mr Robinson's conduct was perhaps more serious than Mr Walker's this does not take their decision to dismiss both outside the band of reasonable responses. Whilst Mr Walker's behaviour may not have been so obviously gross misconduct it still was gross misconduct and dismissal within the band of range of reasonable responses. In considering which individuals had been considered for dismissal the Tribunal notes that whilst Mr McGrath was initially suspended he then suffered a heart attack prior to his disciplinary hearing taking place. The TUPE transfer then took effect and the matter passed out of the Respondent's hands. His disciplinary case remained unresolved at the date of the TUPE transfer. It cannot be said, therefore, that the Respondent unfairly differentiated between the Claimants and Mr McGrath in terms of the disciplinary sanction applied. Likewise, Mr Turnbull was found to have no case to answer shortly after suspension and this was based on both a consideration of the CCTV footage and the contents of the witness statements in question and this was a reasonable decision for the Respondent to come to on the evidence. Consequently, there is no unfairness in the fact that Mr Turnbull was not subjected to disciplinary consequences whereas the Claimants were both dismissed.

78. In light of the above the Tribunal concludes that the decisions to dismiss were fair and that the claims of automatically unfair dismissal, ordinary unfair dismissal and trade union and whistle blowing detriment and dismissal should be dismissed. Furthermore, on the basis that both Claimants were guilty of gross misconduct constituting a repudiatory breach of contract the Respondents were entitled to summarily dismiss them without paying notice pay and therefore the breach of contract claim cannot succeed.

Employment Judge Eeley

Date: 17th July 2018