EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
MR. H. BIRDI	v	**MEARS LIMITED**

Heard at: **London Central** **On: 23, 24 and 25 January 2018**

Before: **Employment Judge Mason**
Members: **Ms N. Foster**
Ms. J. Cameron

Representation
For the Claimant: **Mrs. M. Landy, solicitor.**
For the Respondent: **Miss. N. Owen, counsel.**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant was dismissed for a reason relating to his conduct. That dismissal was unfair but he contributed to his dismissal and the Compensatory Award is reduced by 100%. The Basic Award is uplifted by 25% to reflect the Respondent's failure to comply with the ACAS Code and then reduced by 50% for the Claimant's contributory conduct. The Claimant is awarded £6,735.93.

2. The Claimant was not directly discriminated against because of his race and the discrimination complaint against the Respondent is dismissed.

3. The Claimant was not wrongfully dismissed and his claim of wrongful dismissal fails and is dismissed.

4. The Remedy Hearing provisionally listed to be heard on 30 April 2018 is vacated.

REASONS

Background and procedure at the Hearing

1. In this case Mr. Birdi ("the Claimant") claims that he has been unfairly dismissed and claims compensation for unfair dismissal and damages for wrongful dismissal. He also claims that he was racially discriminated against. The Respondent denies that he was unfairly and wrongfully dismissed and that he was discriminated against.

2. The issues to be determined by the Tribunal, as identified and agreed at a Preliminary Hearing in August 2017, are as follows:

"Unfair Dismissal:

1. *Was the Claimant dismissed for a potentially fair reason in accordance with section 98(4) of the Employment Rights Act 1996 ("ERA")? The Respondent relies on conduct.*
2. *If so, was the Claimant's dismissal unfair?*
3. *Is the Claimant entitled to a basic award and/or compensatory award, and, if so, in what sums, in the event that it is determined he was unfairly dismissed? In determining this, the Tribunal should consider the following:*

a. *If there should be any uplift in the award as a consequence of any failure to follow procedure under the ACAS code?*
b. *If there should be any reduction or limit in the award to reflect the chance that the Claimant would have been dismissed in any event and that nay procedural errors accordingly made no difference to the outcome in accordance with Polkey?*
c. *If there should be any reduction to reflect any contributory fault on the Claimant's behalf towards his own dismissal?*
d. *Whether or not the Claimant has taken reasonable steps to mitigate his loss?*

Wrongful Dismissal:

4. *It is accepted that the Claimant did not work his notice period or receive a payment thereof. It is agreed that the Claimant was dismissed without notice. In failing to provide such notice (or payment thereof) did the Respondent wrongfully dismiss the Claimant, or were the Respondent's actions justified on the basis of the Claimant's alleged misconduct?*
5. *If the Tribunal determines that the Claimant was wrongfully dismissed it must determine if the Claimant is entitled to a payment reflective of his contractual notice period.*

Direct Race Discrimination:

6. *For the purposes of his race discrimination claim the Claimant relies on section 9(1)(a) Equality Act 2010 ("EqA"). The Claimant relies on his skin colour i.e. brown (non-white) and relies on actual comparators who are white.*
7. *Do the following detriments amount to less favourable treatment because of the Claimant's race pursuant to section 13 of the EqA, when compared to another (real or hypothetical) whose circumstances are not materially different to his own?*

a. That the Claimant was subjected to the Respondent's disciplinary process and/or suspended following an allegation of drinking alcohol and using a company vehicle?
b. That the Claimant was dismissed for gross misconduct because of drinking alcohol and using a company vehicle?
8. Are the circumstances of Gary Kennet, Matthew Johnson and Terry and Johnson not materially different to the Claimant's in accordance with section 23 EqA? If not, do they provide evidence in support of the construction of a hypothetical comparator?
9. In the event that the Tribunal determines that the Claimant has been unlawfully discriminated against what level of compensation should be ordered? In determining this the Tribunal; should consider the following:
a. That it should not award the same loss twice, to the extent that this claim overlaps with any of the Claimant's other claims.
b. What loss the Claimant has actually suffered.
c. Whether the Claimant has taken reasonable steps to mitigate his loss.
d. If the Claimant is entitled to an award for injury to feelings and if so what level should this be in accordance with Vento guidelines."

3. At the outset, it was agreed with the representatives that the Tribunal would hear evidence and determine liability and issues relating to possible adjustments to any compensation awarded in accordance with **Polkey** and/or contributory conduct and/or any failings to comply with the ACAS code of Practice on Disciplinary and Grievance Procedures ("ACAS code"). We were provided with an agreed bundle of documents which included the witness statements; at the Hearing, the Claimant provided better copies of photographs in the bundle. Any reference in this Judgment to [x] refers to page [x] in the bundle. We have only considered documents which are cross-referred to in the witness statements or which we were taken to at the Hearing.

4. Miss Owen applied on behalf of the Respondent to submit an amended version of Mr. Hodgson's witness statement. Mr. Hodgson (Managing Director) was the Appeal Officer and unable to attend the Tribunal hearing. Mrs. Landy objected on the basis witness statements had been exchanged several weeks prior to the hearing. The Tribunal retired to read the witness statements and any pages in the agreed joint bundle referred to in those statements and to consider Miss Owen's application. Having done so, the Tribunal allowed the amended version of Mr. Hodgson's statement to be produced in evidence bearing in mind his absence reduced the weight placed on his statement and the Claimant would have the opportunity to address the (limited) amendments in his verbal evidence.

5. We heard from the Claimant. On behalf of the Respondent we heard from Mr. Julian Atkin (Investigating Officer and (as at the date of dismissal) Area Manager (Stepney & Wapping); Mr. Michael Edwards (Claimant's line manager, General Manager) and Mr. Lee Smith (Disciplinary Officer, Regional Director). Mr. Hodgson (Appeal Officer and Regional Director) was unable to attend.

6. On the third day, the evidence having been concluded, we heard submissions from both representatives. Mrs. Landy provided a Skeleton Argument and Miss Owen provided written Closing Submissions. The Hearing concluded at noon on the third day and having reserved its decision, we agreed with the representatives a provisional date for a Remedy Hearing and the Tribunal then met in chambers to make a decision which we now give with reasons.

Findings of fact

7. Having considered all the evidence we make the following findings of fact having reminded ourselves that the standard of proof is the balance of probabilities.

8. The Respondent is silent in the ET3 [19] as to the size of the organisation and number of employees. However, at the Hearing, Miss Owen informed us that the Respondent is a wholly owned subsidiary of Mears Group Plc. Mears Group PLC has about 11,825 "permanent" employees and a further 3,000 employees on "zero hours" contracts; the Respondent has 3,125 employees of which about 84 are at the Tower Hamlets branch where the Claimant was based. Mears Group PLC has 6 HR Business Partners supported by 8 administrative staff; they also give HR support to the Respondent.

9. We accept Mr. Edward's evidence that there is a roughly even split between white British employees and ethnic minorities at the Tower Hamlets branch; this was accepted by the Claimant at the Tribunal hearing [268-269]. There are two Managers at the same level as the Claimant namely TO and MA who are Black African and Bangladeshi respectively [255].

10. The Claimant was employed at the Tower Hamlets branch as Voids/Decent Home & Call Out Manager. His employment was transferred to the Respondent on 1 April 2011 from Morrisons and he had 29 years continuous service as at the date of his dismissal on 13 December 2016. It is not in dispute that he had a completely clean disciplinary record.

11. The Claimant managed two supervisors, an administrator, operatives and a bank of subcontractors. He and his team were responsible for void refurbishment and out of hours emergency cover on the Tower Hamlets contract. When tenants moved out of a council owned property, it was his team's responsibility to oversee bringing the property back up to standard so that it could be re-let. The Claimant reported to Mr. Edwards, General Manager. Both the Claimant and Mr. Edwards say they had a very good working relationship prior to events on 30 September 2016

12. His salary was £48,000 gross per annum and he had a company van and was in the Respondent's pension scheme. His company van was liveried and therefore identifiable as part of the Respondent's fleet. All company vehicles had a tracker; vans had a tracker installed and company cars had a removable tracker in the form of

a dongle. He confirmed at the Hearing, that employees and contractors reporting to him had company vehicles.

Respondent's Drivers Handbook [56-66]

13. The Respondent's Drivers Handbook includes the following:

13.1 "*Remember that as a driver of a Mears vehicle you are representing the company and the company's image to the wider public. Your are responsible for ensuring that your vehicle is clean and tidy and your driving standards are of the highest quality so as not to bring Mears image into question through your actions. Should any driver be found to be abusing the privilege of using a company vehicle disciplinary action will be taken*" [59].

13.2 Under the heading "*Tiredness Kills"* and a sub-heading "Think!" are 5 bullet points of which the second reads:
"*Don't drive after you have been drinking alcohol*" [60].

13.3 Under the heading "Alcohol" it states:
"*We all know that it is illegal to drive if your blood alcohol level is higher than specified legal limits. However it is never advisable to drive after consumption of even minimal amounts of alcohol as your reactions and concentration levels will still be impaired, Also be careful if drinking the night before a journey, alcohol can still be present in your bloodstream the next morning*".[61].
"*Mears has a zero tolerance policy against driving under the influence of alcohol and drugs. This includes drinking alcohol at lunchtime/during working hours when you are expected to return to work. Any member of staff found breaking this policy will be subject to disciplinary action.*" [61]
Under this last paragraph is a photograph of a police officer.

13.4 A "*Company Vehicle Agreement for Commercial Vehicle or Occasional Drivers*" consists of one page [63]. It starts "*This is in addition to your contract of employment*" and states that it should be "*read in conjunction with the Company Vehicle Handbook*". It sets out the terms relating to use of company vehicles including maintenance of vehicles, accidents, thefts private use, fines, fuel cards and driving licences. There is no mention of alcohol. At the foot, the employee is required to sign to confirm that they have read the agreement and understand that breaches will lead to disciplinary action being taken.

13.5 A *"Company Vehicle Code of Conduct"* [64] states that "*the following should be adhered to at all times"* and then lists six "dos and don'ts", the first of which reads:
"*At no time must the driver who is in charge of a company vehicle be under the influence of drugs or alcohol. Any driver or employee in charge of a company vehicle that is found to be under the influence of drugs or alcohol will be reported to the police and expected to attend a discipline meeting which could result in dismissal*". At the foot, the employee is required to sign.

14. We accept the Claimant's evidence that he was not provided with a copy of this Handbook until the disciplinary proceedings:

14.1 Mr. Edwards says that all new employees are provided with the Handbook and other policies on induction and it is his understanding that it also happens when employees join the Respondent having been transferred. However, the Respondent has been unable to provide any evidence that the Claimant was provided with this Handbook and given that employees are required to sign to confirm receipt, it is reasonable to assume that he would have so signed and HR would have a copy which could be produced. The Respondent has significant HR resources at its disposal and there is no explanation for the absence of such supporting evidence.

14.2 Mr. Atkin told us all policies are on the Respondent's intranet but we do not accept this as there is no supporting evidence that this includes the Driver's Handbook and this was not put to the Claimant at any time either during the disciplinary process or the Tribunal hearing.

14.3 The Respondent points out that the Claimant was involved in two disciplinary investigations in 2014 and 2015 regarding use of company vehicles. The notes (taken by the Claimant) refer to "the Mears vehicle policy" [78]. However, we accept the Claimant's explanation that he only had a verbal understanding of the policy and furthermore both these investigations related solely to unauthorised personal use.

14.4 The Respondent says the Claimant must have been aware of the Respondent's policy as he was a manager and supervised staff who also had company vehicles. However we accept his explanation that again, he thought the policy was verbal.

14.5 The Respondent points out that the Claimant's previous employer, Morrisons, had a Vehicle Policy which specifically states that "*on no account is an employee to drink alcohol ... while driving a company car*" [72]. However, as Mr. Edwards and Mr. Atkin conceded at the Tribunal hearing, the Respondent only relied upon its own policy (i.e. the Vehicle Handbook) the Claimant's employment with Morrisons having ceased more than 5 years prior to the event in question.

14.6 The Respondent says the Claimant, as a Manager, was required to have monthly internal "Toolbox" talks with his staff but there is no supporting evidence that the Claimant discussed the Drivers Handbook or drink/driving policy at any such talk.

15. The correct interpretation of the "Drivers Handbook" is in dispute. The Respondent says that the policy is "zero tolerance" i.e. no alcohol must be consumed before driving a company vehicle. The Claimant says the policy is "zero tolerance" of "being under the influence" i.e. over the legal limit for drinking and driving (80mg per 100ml of blood). We find that the Respondent's policy (written or unwritten) was unclear. We find that the wording of the Handbook is ambiguous.

15.1 There is emphasis in the Handbook on the repeated phrase "*Under the influence*". This is not a defined term and at the Hearing the Respondent's own witnesses were at odds as to its meaning. All three witnesses were adamant that the intention of the policy is zero tolerance of any consumption but were not in agreement as to the meaning of "*under the influence*". Mr. Atkin and Mr. Edwards said they thought it meant being over the legal limit whereas Mr Smith said his interpretation was that it meant any consumption.

15.2 Mr. Edwards stated understanding of the policy (i.e. zero consumption of any alcohol) is undermined by his claim (which we do not accept) that the Claimant reported for work on the morning of 30 September 2016 smelling of alcohol and yet Mr. Edwards says he sent him home knowing he would be driving his company van.

15.3 Mr. Atkin's stated understanding of the policy (i.e. zero consumption of any alcohol) is undermined by the fact he considered it necessary to investigate further despite the Claimant's ready acknowledgement at the investigatory meeting on 6 October 2016 that he had consumed some alcohol.

15.4 11 employees were asked (at the Claimant's request as part of the investigation) what their understanding of the policy was and gave varying responses see para. 30 below). When asked about this at the Tribunal hearing, Mr. Smith, who made the

decision to dismiss, acknowledged that "*some [employees] are clear, some are not clear*".

16. In light of this we accept the Claimant's evidence that he understood that the Respondent's (verbal) policy was zero tolerance only of alcohol consumption at or above the legal limit. Had his understanding been otherwise, he would not have volunteered from the outset that he had drunk some alcohol and drawn to Mr. Atkin's attention the breathalyser he kept in his car.

30 September 2016

17. On 30 September 2016, the Claimant attended a function at All Star Lanes Bowling Alley. This was organised and paid for by the Respondent; free alcoholic drinks, soft drinks and a buffet were provided from 18.30 hrs until close of business. About 30 to 40 employees from the Tower Hamlets branch attended. It is not in dispute that the Claimant drank alcohol at that function and then drove home in his company van.

18. Mr. Edwards says he had cause to speak to the Claimant about using his company vehicle on previous occasions:

18.1 Christmas party December 2015: He says he knew that the Claimant drank at that event and used his company vehicle to get home. However, although he recognised this "*was a serious cause for concern*" he "*just had an informal chat*" [285]. The Claimant told him that his brother drove his van home and Mr Edwards was happy with this explanation.

18.2 He says he also spoke to the Claimant earlier that day (i.e. 30 September 2016). It is not in dispute that the Claimant arrived for work late (12.05). Mr. Edwards says the Claimant looked dishevelled and he "*could smell alcohol on his breath from about 2 foot away*" [276]. He says he asked the Claimant about it and the Claimant immediately apologised and explained he had been out the night before. Mr Edwards says he told the Claimant he could not be in the office and instructed him to go home once he had done anything important. The Claimant denies that this conversation took place and that he arrived late due to childcare issues. We prefer the Claimant's account for the following reasons:

(i) If Mr. Edwards smelt alcohol on the Claimant's breath, it is unlikely he would send him home in the company vehicle (or any vehicle) as a matter of common sense, health and safety and in accordance with the Respondent's own (asserted) policy.

(ii) Despite the obvious significance of such a conversation, Mr. Edwards failed to mention this at any time prior to the disciplinary hearing - some two months later - despite providing a statement. He said he did not do so because he did not want to influence the outcome of the process and it was "*between friends*" but we do not accept this explanation as it is entirely inconsistent with the fact he initiated the investigation following the function on 30 September 2016 and it was incumbent on him to disclose such a significant conversation as part of that investigation.

Investigation

19. Mr. Edwards thought the Claimant had travelled to the event by train having received a message to that effect from the Claimant earlier that day [85]; he also thought he had accepted a lift home with other employees. However, he had a "*niggling doubt*" that the Claimant had driven the company van home and he checked the Tracker Report for the Claimant's vehicle [86] which showed he had used his company van to drive to and from the venue; he had arrived at 17.37 hrs and left at 22.44 hrs. Mr. Edwards spoke to two employees, RS and DS, who had left the venue at the same time as the Claimant; they verbally confirmed to him that they had seen the Claimant drive away in his company vehicle having consumed alcohol. On the strength of this, Mr. Edwards initiated an investigation as to whether the Claimant had driven his vehicle home after the event whilst "*under the influence*" of alcohol.

20. On 6 October 2016, Mr. Edwards appointed Mr. Atkin as Investigating Officer. Mr. Atkin was (at that time) Area Contract Manager and reported to Mr. Edwards. Mr. Atkin had also attended the event and seen the Claimant drink alcohol; he says in his witness statement: "*I saw Harjinder drink a pint of lager ...* " [para 5]; *"I saw Harjinder come back from the bar with a glass of rosé wine..."* [para 6]; " *He soon walked over to the team he was playing bowls with. I believe that he was consuming alcohol.*" [para 6]; "*He appeared to be a very lively character who had had a few drinks...*";
However, he did not regard himself as conflicted or impartial having left the venue at around 9pm.

21. At 10am, Mr. Atkin met with the Claimant and asked him five questions (as set out in his witness statement para 15)
    "*a. Did he attend the event?*
    b. Did he drive the Company vehicle to the event?
    c. Did he drink alcohol at the event?
    d. Did he drive the Company vehicle home from the event?
    e. Did he have anything further to add?"
    Arpita Sutradhar (Finance Administrator) also attended the meeting as notetaker. Mr Atkins told the Claimant that the Respondent had "*reasonable suspicion to believe that he drove his vehicle home whilst under the influence*" [w/s para. 16] and that he wanted to hear his version of events. He explained that he had a tracker report and names of witnesses who had seen him leave the venue and it was believed he had consumed alcohol. The notes of that meeting [89] record that the Claimant confirmed that he had drunk two alcoholic drinks, specifically one pint of beer and one glass of wine, and that he drove home in the company vehicle. The Claimant did not raise any issues at this meeting relating to race discrimination..
    Mr. Atkin referred to the Drivers' Handbook but did not have a copy at that meeting and this was therefore not shown to the Claimant nor were any statements. He then suspended the Claimant on full pay "*pending further investigation*" [w/s 21] and took from the Claimant his vehicle keys, ID and phone and drove the Claimant home in his company van. During the drive to the Claimant's home, the Claimant told Mr. Atkin he kept a breathalyser in the Company vehicle. Mr. Atkin did not consider this to be relevant "*as he had already admitted to consuming alcohol*" and he was only

concerned with whether the Claimant had breached the Respondents policy, "*not whether he had broken any criminal laws*" [WS 24].

22. On his return to the office, Mr. Atkin interviewed witnesses [95-98Q]. We accept Mr. Atkin asked Mr. Edwards to indicate who he should interview on the basis Mr. Edwards remained at the event after Mr. Atkin left at 9.00 pm and could identify potential witnesses who were observed drinking with the Claimant. Mr. Edwards identified six witnesses. These six witnesses were RS, DS, MC, TJ, JG and himself. It is not in dispute that they are all white. Their evidence with regard to the Claimant's alcoholic consumption on the night can be summarised as follows:
    - RS (Operational Support): 2 glasses of blush wine, 1 shot
    - DS (Supervisor): 2 large glasses of rose wine, at least 1 shot of tequila.
    - MC (Operative): 1 pint of lager
    - TJ (Operative): Unspecified "*alcohol*" at around 6.45 pm and later 1 tequila shot.
    - JG (Apprentice) : 2 tequila shots.
    - Mr. Edwards (GM): 1 pint of lager, several glasses of rose wine, a few tequila shots and Jagermeister bombs

23. This was the full extent of Mr. Atkin's investigation prior to compiling his "Investigation Managers Report" later that day [99-103]. The allegation recorded in that Report is that the Claimant drove back from the function in his company vehicle "*whilst under the influence of alcohol*" [101]. Mr. Atkin concluded that a number of witnesses had observed the Claimant drinking alcohol throughout the evening and then driving his vehicle home. He concludes: "*The drinking of alcohol whilst in the possession of the company vehicle is outlined in the Mears vehicle code of conduct and also the current laws of the land*" and recommended that the matter be progressed to a disciplinary hearing. Appended to the report were copies of the 6 witness statements, investigation/suspension meeting notes and the Claimant's vehicle tracker report.

24. On the same day, HR sent a letter to the Claimant [93] confirming his suspension pending further investigation into the following allegations of gross misconduct:
    - "*Serious breach of the "Drivers Hand Book" with regards to driving a company vehicle under the influence of alcohol.*
    - *Conduct which has the potential to bring the Company into disrepute.*
    - *Breach of trust and confidence between employee and employer".*

    The basis for the allegations was described as follows:
    "*On Friday 30th September 2016 it is alleged that you attending [sic] a work function (out of work hours) where you consumed alcohol and then drove your Company vehicle*".
    His suspension was described as "*precautionary*" and a *"neutral act that carries no implications of guilt".*
    The only enclosure with that letter was the Disciplinary Policy.

25. The Respondent did not lift the Claimant's suspension. Mr. Atkin told the Tribunal he was waiting for guidance from HR who had advised him to suspend in the first place.

Events after 6 October 2016 and prior to DH

26. HR wrote to the Claimant on 20 October 2016 [104] requesting his attendance at a disciplinary hearing on 2 November 2016 to be conducted by Mr Lee Smith, Regional Director. The allegations were stated as follows:
"*The purpose of this hearing is to consider the question of disciplinary action against you, in accordance with the Disciplinary Procedure, following allegations of gross misconduct.*
- *Serious breach of the "Drivers Handbook" with regards to driving a company vehicle under the influence of alcohol*
- *Conduct which has the potential to bring the company into disrepute.*
- *Breach of trust and confidence between the employee and employer."*

The Claimant was advised that "*some of these allegations are considered to be gross misconduct*" and termination of his employment was one possible outcome. He was informed of his right to be accompanied.

27. On 25 October 2016, the Claimant responded [106-108]:

27.1 He asked if all employees who consumed alcohol and drove company vehicles home would be subjected to the same disciplinary process,

27.2 He asked to interview a further 10 witnesses plus Mr Edwards.

27.3 He said he had never seen the evidence "*that started this whole process*" and asked for it to be provided; he confirmed he had seen the six witness statements taken as part of the investigation but not statements from the two witnesses who *"originally started this investigation*".

27.4 He said he would be emailing photos for evidence

28. Kelly Tapley (HR) responded on 31 October 2016 [126-127] requesting justification for asking his named employees to the Disciplinary hearing. The Claimant responded the same day [109-114] giving his reasons and asked for a postponement pending these further investigations. HR replied on 3 November 2016 agreeing that questions could be put to the witnesses who were present at the function (MY, TO, BA, GB, JG, MB and EM) and inviting him to a disciplinary hearing on 10 November 2016.

29. On 7 November 2016, the Claimant responded with a list of 10 questions to be put to the employees [124] which were as follows:
"*1. Can you confirm if you were at the bowling event arranged by Mears on the 30th September?*
2. Was [sic] you drinking alcohol provided at the event by Mears?
3. Are you aware of the vehicle policy in relation to alcohol is that "drinking alcohol is not advisable" however it does not say that "it is prohibited/not allowed"?
4. Did you speak to Harjinder during the course of the evening?
5. Were you aware Harjinder drove a company vehicle to the event?

6. *Can you recall how much alcohol, specifically Harjinder consumed in your presence?*
7. *Did anyone at the event raise any concerns over the consumption of alcohol by Harjinder?*
8. *At any time during the evening, would you say Harjinder was not in control; of his mental or physical abilities as a result of alcohol consumption?*
9. *Whilst playing bowling together with Harjinder, do you recall Harjinder drinking alcohol to the effects to make his judgement, thinking or mood impaired?*
10. *With your experience of knowing Harjinder for many years, would you say he was not his normal self and was "in no fit state to drive"? or "under the influence of alcohol"?*

30. The disciplinary hearing scheduled for 10 November was postponed and the Respondent asked the further witnesses the questions posed by the Claimant (above). The witnesses gave the following evidence with regard to their understanding of the vehicle/alcohol policy (Q3) and how much the Claimant drank in their presence (Q6) [129-139]:
    GB: Q3:*"0 tolerance drink and drive over the limit"*
    Q6:*"Don't know".*
    MB: Q3: "*No"*
    Q6: *"n/a"*
    JG: Q3: "*Was not aware of policy, but thought same as the law/gov. limits"*
    Q6: *"No"*
    JA: Q3: "*My understanding is no drink, drugs or smoking permitted*"
    Q6: "*Saw him drink a glass of pink wine in a tall glass"*
    TO: Q3: "*I'm aware"*
    Q6: "*Saw him drinking but not aware of how much he drank"*
    DS: Q3: "Yes"
    Q6: "*At the start of evening he had 11/2 pint lager/ale + glass wine. Towards the end of the night I saw him have 2 shots.*"
    BA: Q3: "*No, I do not drive"*
    Q6: "*No I did not see him drinking"*
    MY: Q3: "*Yes*"
    Q6: *"I can't tell how much he drank as I was not drinking and didn't go to the bar area"*
    RS: Q3: "*Yes"*
    Q6: "*None"*
    EM: [No questions answered].
    AK: Q3: "*I thought it was zero tolerance to drinking and driving"*
    Q6: "*No I did not see how much or if he had any*"

31. These completed witness questionnaires were sent to the Claimant on 17 November 2016 [118-119]. The Claimant responded on 21 November [117] asking again where the original allegations were recorded which led to his suspension.

Disciplinary Hearing 1 December 2016

32. The Disciplinary Hearing was conducted by Mr. Lee Smith on 1 December 2016. We accept his evidence that he has conducted a number of disciplinary hearings. Also in attendance were Kelly Tapley (HR and notetaker), the Claimant and Mark Glasgow (work colleague). The notes of that hearing are in the bundle [140-146]. The hearing lasted just over two hours.

33. At the Disciplinary Hearing, the Claimant made the following key points:

33.1 He drank ¾ of a pint of beer and ½ a glass of blush wine, 3 units in total. He showed photos which he said showed the same glass of blush wine at 18.40 and at 20.30. He said he was at the function for 5 hours and consumed food which is enough time for his liver to process the alcohol and his breathalyser confirmed he was not over the limit. He follows the law and has to uphold having been appointed magistrate in 2015. He said he did not have any further alcohol after 20.40; he toasted with one shot but did not drink it. The witnesses gave conflicting statements as to how much he had drank.

33.2 He could not recall his induction on being transferred to Mears 5 years previously. The policy was not clear and did not say that any consumption was prohibited only that it was not advisable. Two witnesses had stated that a breach of the policy was being over the limit.

33.3 The investigation was unfair:

(i) Mr. Atkin was not impartial as he was not only the Investigating Officer but also a witness.

(ii) He was asked just three closed questions and not asked to give his version of events and give a full explanation.

(iii) Mr. Atkin did not mention in his report that the Claimant had a breathalyser in his vehicle.

(iv) Mr Atkin did not ensure that the Claimant had a copy of the policy.

(v) The initial six witnesses interviewed were all white and this was race discrimination.

(vi) One witness, MC, was too drunk to remember if he had seen the Claimant drinking. Others were also drunk.

33.4 He had been singled out. Other managers and supervisors had been drinking and had their company vehicles. At previous Christmas functions, managers and supervisors were drinking and had photos.

33.5 His suspension for more than two months was unnecessarily drawn out and a punitive measure.

33.6 Mr. Edwards had a responsibility to take away his vehicle keys if he genuinely believed he was too intoxicated to drive and the two witnesses should have called the police.

33.7 He pointed out he had 29 years service; he was a magistrate; he had an excellent attendance record and no disciplinary record and raised money for charity.

33.8 No-one had spoken to him before about concerns around drinking alcohol and driving a company vehicle.

34. At the end of the disciplinary hearing, Mr. Smith said he wished to make further enquires before making a decision and would get back to the Claimant by the following Wednesday.

35. On 12 December 2016, Mr. Smith made the following further enquires:

35.1 He spoke to RS [180]; she said the Claimant definitely did not have time to use his breathalyser between getting into his van and driving past her; she felt it was not even two minutes.

35.2 He spoke to Mr. Edwards [181-183] and Mr. Edwards mentioned the following for the first time:

(i) He had spoken to the Claimant at Christmas 2015 about his concerns regarding the Claimant having possibly driven his vehicle home after the Christmas party but had accepted the Claimant's explanation that his brother had driven it.

(ii) On the morning of the 30 September 2016, the Claimant reported for work at about 11.30/12.00 and he was "*still drunk*" from the night before; he could smell alcohol on his breath from 2 feet away. He told the Claimant he needed to go home. The Claimant did a couple of hours work and then went home. He did not believe the Claimant was going to attend the bowling event.

(iii) He did not have concerns that the Claimant was driving at the end of the night on 30 September 2016 because he thought he was getting a lift with RS and DS.

(iv) He said he checked the Claimant's vehicle tracker because he had spoken to the Claimant on the morning of 30 September 2016. He then asked RS and DS whether they had seen the Claimant when the left and they said they had seen him get into his van and drive away.

(v) The Claimant would be aware of the Drivers Handbook as he had previously disciplined members of his team for breaches although not for alcohol/drinking issues.

36. Mr. Smith did not put these two witness statements to the Claimant for comment prior to making his decision to dismiss. At the Tribunal Hearing, Mr. Smith was asked why not. With regard to the additional statement from RS, he said there was "*no particular reason*" but the breathalyser had "*no overarching sway*" on his decision". With regard to the additional statement from Mr. Edwards, he said there was no point showing this to the Claimant as this was effectively covered at the appeal hearing when the Claimant denied that anyone had mentioned any concerns to him before the event on 30 September 2016.

37. Mr. Smith decided to dismiss the Claimant for gross misconduct and wrote to the Claimant on 13 December 2016 [184-190]. He dealt with the Claimant's concerns regarding the investigation and concluded that the selection of the witnesses was not discriminatory in any way. His conclusions with regard to the three allegations were as follows:

37.1 "*Serious breach of the "Drivers Handbook" with regards to driving a company vehicle under the influence of alcohol"*

(i) The Handbook is clear that the Respondent has "*a zero tolerance policy to driving whilst under the influence of alcohol*" and "*the correct interpretation of this is that to consume any alcohol and drive is strictly against Mears' policy ..."*

(ii) Based on the evidence from the witnesses and the Claimant's own admission that he had consumed beer and wine, he was satisfied that the Claimant had breached this policy. Furthermore, he did not believe that the Claimant was within the legal drink driving limit when he drove home and did not believe the Claimant's assertion that he got a 000 reading from his breathalyser.

(iii) It was reasonable to expect the Claimant to be aware of the policy as a Voids Manager with 5 years experience and manager of a group of staff who also drove company vehicles. He was satisfied that he was in fact aware of the policy Mr Edwards having informed him that the Claimant had carried out disciplinary hearings for members of his staff who had in the past breached the policy.

(iv) Not only did his "*actions represent a serious breach of the Drivers handbook but a serious breach of the law, the consequences of which could have been dire*" [186]

37.2 "*Conduct which has the potential to bring the company into disrepute*"
His conduct had the potential to bring the company into disrepute as it "*could have had serious repercussions*" had he been stopped by the police or been involved in a road accident whilst driving a company vehicle under the influence of alcohol.

37.3 "Breach of trust and confidence between employee and employer"
The incident on 30 September 2016 was not isolated as the Claimant had confirmed at the disciplinary hearing that he had previously consumed alcohol prior to driving his company vehicle. Furthermore, Mr. Edwards had spoken to him on the morning of 30 September 2016 about driving a company vehicle whilst still under the influence of alcohol.

38. He took into account the Claimant's "*considerable length of service and previous clean disciplinary record*" but felt that he had no option other than to dismiss him given the seriousness of his conduct and the potential consequences. He concluded that the relationship of trust and confidence had "*fundamentally and irreparably broken down*" [189]. At the Tribunal hearing, Mr. Smith said he only knew about the Claimant's last 5 years service (since his transfer to the Respondent); he said he did not consider giving the Claimant a warning as this would set a precedent; he could not simply remove his vehicle as he would then be unable to carry out his role; he did not consider allowing him to return to a lesser role which did not require him to drive a company vehicle.

Appeal

39. The Claimant appealed and submitted written appeal submissions dated 23 December 2016 [198-207].

39.1 His grounds of appeal were are follows:
"1. Failure to follow a fair procedure and catalogue of errors during the process.
2. My evidence was not taken into consideration when making a decision.
3. The sanction was too harsh which lead to my dismissal,
4. Unfair treatment [direct discrimination].
5. Catalogue of errors in the decision letter"
He then expands in some detail under each of these headings.

39.2 He concludes: "*Overall the bullet points below are a summary of my appeal*
- *Treated unfairly and victimised.*

- *Unfair decision.*
- *Investigating Manager was a witness to allegation and has already confided to work colleagues he only done what Michael Edwards told him to do.*
- *Failure to follow best practice and a fair process.*
- *Evidence that led me to believe that this was a pre-determined decision.*
- *No considering my submission in a fair or appropriate way and I feel victimized.*
- *Evidence produced after the hearing without letting me have any challenge to or give my version against these new false allegations.*
- *No other employees were subjected to this investigation following the Christmas party & bowling event which leads me to believe that I was treated unfairly on the grounds of my race and length of service with Mears (this is a cheaper option to redundancy)."*

40. The appeal hearing took place on 30 January 2017 and was conducted by Mr. David Hodgson, Managing Director. Also in attendance were Mr. Graham Swales, HR Business Partner. The Claimant was accompanied by Mr John Gray (Unison). Mr. Swales took notes [212- 214]. The notes record that the Claimant said he was aware that his role had been filled and therefore the appeal was prejudged; Mr. Swales told him that "*this would not be a factor in whether DH decided to reinstate and would not influence the outcome of this appeal*" [212].

41. Mr. Hodgson wrote to the Claimant on 3 February 2017 [216-217] upholding the decision to dismiss. He conceded that the investigation "*could have been better*" and that there were "*some lessons to be learned*" but it was not sufficiently flawed to reverse the decision. He agreed that there was some confusion as to the actual amount of alcohol the Claimant consumed but concluded that "*on the balance of probabilities"* it was *"quite some volume".*

42. Prior to the appeal hearing, a meeting had been held in December 2016 between Mr Edwards and three Area Managers, including Mr. Atkin. A proposed reorganisation was discussed as a result of a client wanting to reduce the number of Area Managers from 3 to 2. Following that meeting, we accept Mr. Atkin's evidence that the Claimant's position of Voids Manager was offered initially to someone else (SS) in late December; SS turned it down and it was then offered to Mr. Atkin and he accepted it and became Voids Manager at the end of January 2017. Mr. Atkin told the Tribunal that the job was not offered to him on a temporary basis conditional upon the Claimant not returning to work and it was not explained that the Claimant was going through an appeals process. With regard to the timing, Mr. Edward's evidence is that it was not until 3 February 2017 that Mr. Atkin "*formally accepted the role of Voids Manager*" [ME WS para 52 page 288]. The Respondent relies on emails from Mr. Atkin to third parties [redacted] [249-252]: in an email dated 27 January 2017 timed at 14.48 his job title is "Area Contract Manager" but in an email at 14.57 the same day his title is "Area Contract Manager/Void Manager"; in an email dated 21 February 2017 timed at 10.50 his title is "Area Contract Manager/Void Manager" but later that day at 11.03 it changes to "Voids Manager". However, we place no weight on these emails as evidence as to when Mr Atkins was appointed and prefer Mr. Atkin's own

verbal evidence and an email from Mr. Atkin dated 9 January 2017 [244A] in which he advised the recipients:

"*In line with future changes within THH I will no longer be managing the Stepney and Wapping day to day repairs contract area. I will be moving my responsibilities over the next few weeks into managing the Voids Section and associated works*".

43. Accordingly, we do not accept that one possible outcome of the appeal hearing could have been reinstatement of the Claimant as by the time Mr. Hodgson made his decision on 3 February 2017 the Claimant's job had been reallocated on a permanent basis to Mr. Atkin. In view of this chronology we find that the outcome of the appeal hearing was predetermined.

Race discrimination claim

44. The Claimant identified as his comparators GK, MJ and TJ. Mr Edwards says TJ drove home that night in his company vehicle but did not drink alcohol that night and in fact the Claimant agrees with this [206] and there is no evidence that TJ drank alcohol at the 2015 Christmas party. GK did not use his company vehicle at all that night or at the 2015 Christmas party [267]. At the Tribunal Hearing, the Claimant said he was no longer arguing that MJ was a comparator.

45. We accept the Respondent's evidence that at the Tower Hamlet's branch, out of 12 disciplinary cases since 2014, 5 relate to employees of White British/White Other origin [256] and out of 7 gross misconduct dismissals, 4 relate to employees of White British/White Other origin [256].

Wrongful dismissal

46. As the Claimant has made a claim of wrongful dismissal it is necessary for us determine whether or not (and to what extent) he was in breach of contract by his conduct on 30 September 2017.

46.1 We have found that the policy was ambiguous (para. 15 above) but we also find that it was an implied term that the Claimant should not drive a company vehicle having consumed alcohol at or above the legal limit. This must be "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood* " (**Arnold v Britton** [2015] 1 AC 1619 per Lord Neuberger PCS at paragraph 15 of his judgment - see 1627). Indeed, the Claimant does not seek to argue otherwise.

46.2 We are then required to determine if the Claimant's alcohol consumption that night placed him over the legal limit. The standard of proof in the Employment Tribunal is the balance of probabilities unlike in a criminal court where the test is "*beyond all reasonable doubt*" and it is the Employment Tribunal's function to apply the tests laid down by employment law. We have considered all the various witness evidence and also factored in the length of time the Appellant was at the event (5 hours) and that food was provided and that the witnesses vary in their account of how much he drank and may themselves have been drinking. However on the balance of probabilities we find that his alcohol level at the point he drove his company vehicle home was over the legal limit. The weight of the witness evidence is against him – including from witnesses who he asked to be questioned - and it is entirely to be expected that there

would be some inconsistencies in personal observations in a social environment over a period of 5 hours. In the circumstances we place no weight on his evidence that his personal Breathalyser showed 0.000.

The Law

Unfair dismissal

47. **Section 98 (1) ERA:**

In determining 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.

48. **Section 98(4) ERA:**

48.1 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 reasons 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.

48.2 In accordance with the tests set out in **British Home Stores Ltd v Burchell [1980] ICR 303** the Tribunal must consider:

(i) Did the Respondent believe the Claimant was guilty of misconduct?

(ii) Did the Respondent have in its mind reasonable grounds upon which to sustain that belief? and

(iii) At the stage at which that belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances of the case?

48.3 Range of reasonable responses

(i) When assessing whether the **Burchell** test has been met, the Tribunal must ask whether dismissal fell within the range of reasonable responses of a reasonable employer and this test applies both to the decision to dismiss and to the procedure. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

(ii) The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer; it is not for the Tribunal to impose its own standards. The Tribunal has to decide whether the dismissal and

procedure lay within the range of conduct which a reasonable employer could have adopted.

(iii) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair. However, the band is not infinitely wide and is not a matter of procedural box ticking

49. Compensation

49.1 In addition to a basic award (section 119 ERA), **Section 123(1) ERA p**rovides for a compensatory award**:** "*... the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".

49.2 Contributory conduct:

(i) **Section 122(2) ERA** states:
"*Where the tribunal considers that any conduct of the complainant before the dismissal ... was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*"

(ii) **Section 123(6) ERA** states:
"*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complaint, it shall reduce the amount of the compensatory award by such proportion regard to that finding*".

(iii) Before making any finding of contribution:

a. A claimant must be found guilty of blameworthy or culpable conduct; that enquiry is directed solely towards the conduct of the claimant and not towards the conduct of the employer or other employees.

b. For the purposes of a contributory fault reduction the employee's conduct must be known to the employer at the time of dismissal and have been a cause of the dismissal.

c. Once a finding of blameworthy or culpable conduct is made the Tribunal must make a contributory fault reduction, the proportion of the reduction being such amount as it considers to be just and equitable.

49.3. Mitigation:
Section 123(4) ERA requires a claimant to mitigate their loss and a claimant is expected to explain to the tribunal what actions they have taken by way of mitigation. This includes looking for another job and applying for available state benefits. The tribunal is obliged to consider the question of mitigation in all cases. What steps it is reasonable for the claimant to take will then be a question of fact for its determination.

49.4 **Polkey**:
Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a tribunal could make. In

some cases it may be clear that the employee would have been retained if proper procedures had been adopted. In such cases the full compensatory award should be made. In others, the tribunal may conclude that the dismissal would have occurred in any event. This may result in a small additional compensatory award only to take account of any additional period for which the employee would have been employed had proper procedures been carried out. In other circumstances it may be impossible to make a determination one way or the other. It is in those cases that the tribunal must make a percentage assessment of the likelihood that the employee would have been retained.

49.5 We have also considered **section 207A** of the **Trade Union and Labour Relations (Consolidation) Act 1992**, and in particular section 207A(2), (referred to as "s. 207A(2)") and the **ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009** ("the ACAS Code").

If it appears to the Tribunal that—

(a)the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b)the employer has failed to comply with that Code in relation to that matter, and

(c)that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3)If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a)the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b)the employee has failed to comply with that Code in relation to that matter, and

(c)that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

Wrongful dismissal

50. **Section3(2) ERA and Article 3 of Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 SI 1994/162**3 gives the Tribunal jurisdiction to hear claims for damages for breach of contract of this kind provided the claim arose on termination of the contract of employment and has been brought in time.

50.1 Subject to any defining terms in the contract of employment, summary dismissal is only permissible if the claimant's conduct amounted to a repudiatory or fundamental breach of contract.

50.2 In accordance with **s86 ERA,** employees are entitled to one week's notice for each complete year of service unless dismissed for gross misconduct. If an employee proves that they have been dismissed (constructively or otherwise) without due notice, this will give rise to a claim for damages for wrongful dismissal.

50.3 Section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992,** and in particular section 207A(2) and (3) may apply (see para. 49.5 above).

Direct race discrimination

51. **Section 13 EqA 2010**

51.1 "A" discriminates directly against "B" if B establishes the detrimental action relied upon (e.g. dismissal), and A treated B less favourably that A treated or would treat others (an actual or hypothetical comparator) whose circumstances are not materially different to B's and the less favourable treatment is because of a protected characteristic.

51.2 **Section 136 EqA**: There is an initial burden of proof on the Claimant and the Tribunal must look at the entirety of the evidence to establish if the first stage of s136 is reached (**Ayodele v Citylink Ltd and anor [2017] EWCA Civ 1913**).

51.3 In determining whether a claimant has been directly discriminated against on grounds of race, the Tribunal must consider:

(i) was the Claimant subjected to less favourable treatment?; and,

(ii) if so, was that treatment by reason of his race? This is a subjective test and treatment will be because of race if race is the substantial or effective reason for that treatment.

51.4 Provisions relating to remedies including compensation are set out in s124.

Conclusions

Unfair dismissal

52. Applying the relevant law to the findings of fact to determine the issues, we have concluded that the Claimant was unfairly dismissed.

53. We are satisfied that the Respondent has shown that the reason for the Claimant's dismissal was a potentially fair reason, specifically his conduct (s98(1) ERA) having reminded ourselves that we must consider Mr. Smith's reason for dismissing the Claimant; Mr. Smith made the decision to dismiss, not Mr, Edwards or Mr. Atkin.

53.1 It was the facts known to Mr. Smith or beliefs held by him regarding the Claimant's conduct on 30 September 2016 (drinking alcohol and driving) which caused him to dismiss the Claimant. We accept that Mr. Smith believed the Claimant was guilty of misconduct; whilst the Respondent's policy was ambiguous (para. 15 above) the factual matrix was clearly identified.

53.2 We have been unable to find on the evidence before us that the reason for the Claimant's dismissal was related to the subsequent reorganisation in December 2016/January 2017. However, we have considered the timing and terms of Mr. Atkin's appointment to the Claimant's role in determining the fairness of the appeal procedure (below).

53.3 We do not accept that the Claimant was singled out and therefore that he was treated differently because of his race. We will deal with this in more detail below (para. 60) but suffice to say at this juncture that he has not shown that either on the occasion in question (30 September 2016) or on previous occasions that other employees, including his comparators, were treated differently.

54. We then moved on to consider the fairness of the Claimant's dismissal (s98(4) ERA and whether in the circumstances (including the size and administrative resources of

the employer's undertaking) the employer acted reasonably or unreasonably in treating the Claimant's conduct as a sufficient reason for dismissing the employee in accordance with equity and the substantial merits of the case. We have reminded ourselves that we must not substitute our own decision as to what was right or impose our own standards but having considered together all the circumstances of the case both substantive and procedural, we have concluded that dismissal was unfair and did not fall within the range of reasonable responses of a reasonable employer for the following reasons:

54.1 The Drivers Handbook is ambiguous and it was clear to Mr. Smith, based on the witness statements, that there was confusion and uncertainty as to what the Respondent's policy was with regard to alcohol and driving. In such circumstances, it was unreasonable to rely rigidly on his own understanding or interpretation of the policy.

54.2 Mr. Smith did not give sufficient consideration to the Claimant's long unblemished service.

54.3 The procedural flaws were as follows:

(i) Mr. Atkin was a witness of fact and it was inappropriate to appoint him Investigating Officer. Having said that, the investigation itself, up to the Disciplinary Hearing, fell within the range of reasonable responses as the Claimant was allowed to seek via a questionnaire statements from a number of additional witnesses of his choice.

(ii) The Claimant's suspension was continued without explanation after Mr. Atkin's investigation concluded on either 6 or 7 October 2016.

(iii) Mr. Smith relied on two statements taken after the Disciplinary Hearing without first giving the Claimant the opportunity to comment and explain. It was unfair for Mr. Smith to assume that the Claimant would have nothing further to add given that Mr. Edward's statement contained new evidence not previously aired.

(iv) The timing and terms of Mr. Atkin's appointment to the Claimant's role indicates there was never a realistic possibility of the Claimant being reinstated and therefore the appeal outcome was predetermined.

Compensation

55. Before considering a possible **Polkey** reduction in compensation we have considered whether or not and to what extent the Claimant contributed to his own dismissal by his conduct. Mr. Smith not only concluded that the Claimant consumed alcohol on 30 September 2016 but also that he was above the legal drink driving limit when he drove home. This was blameworthy pre-dismissal conduct known to Mr. Smith and which actually caused or contributed to the Claimant's dismissal and in accordance with s123(6) ERA we are obliged to reduce the amount of the compensatory award by such proportion as we consider just and equitable. We may also reduce the Basic Award (s122(2) ERA) but have more discretion and it is acceptable, if unusual, to make different percentage assessments.

56. Dealing first of all with the Compensatory Award, we have reminded ourselves that only the Claimant's conduct is relevant, not the Respondent's. With this in mind, we have reduced the Compensatory Award by 100% taking into account the following:

56.1 The Claimant's conduct was the sole reason for his dismissal.

56.2 The actual loss sustained by the Claimant in consequence of his dismissal [350].
56.3 The gravity of the Claimant's conduct in driving having consumed alcohol over the legal limit and the potential consequences.
56.4 He was driving the Respondent's vehicle which was identifiable as the Respondent's vehicle.
56.5 His conduct was observed by other employees and this must undermine his position as a manager with management responsibility for a number of employees and contractors including some with company vehicles.

57. In view of the Tribunal's decision to reduce the Compensatory Award by 100%, there is no purpose in considering **Polkey** .

58. With regard to the Basic Award, we have considered the Claimant's long unblemished service of 29 years and for this reason we have not reduced the Basic Award by the same percentage but reduced it by 50%. Based on his age (46 years) and length of service at the date of dismissal, the multiplier in the Claimant's case is 22.5. The applicable weekly cap is £479 and therefore his Basic Award is £479 x 22.5 which is £10,777.50. We have increased this by 25% therefore to £13,471.87 in view of the Respondent's failure to comply with the ACAS code in particular Mr. Smith's failure to give the Claimant an opportunity to comment on the two additional statements (para.54.3(iii) above) and the predetermined appeal (para.54.3(iv) above). The 50% reduction for contributory conduct reduces this to the final figure of £6,735.93.

Wrongful Dismissal:
59. The Respondent did not wrongfully dismiss the Claimant as his dismissal was justified on the basis of his misconduct which amounted to a fundamental breach of contract. Accordingly he is not entitled to monies in lieu of notice.
59.1 For these purposes, the Tribunal must be satisfied that the Claimant committed misconduct, not just that the Respondent had a reasonable belief that he committed the misconduct. For this reason, we considered the extent of his alcohol consumption (para. 46 above) and found on the balance of probabilities that his alcohol level at the point he drove his car home was over the legal limit.
59.2 Whilst the Respondent's policy is ambiguous, the Claimant accepts that driving a company vehicle whilst over the legal limit would be a breach of the policy and in any event this must be in breach of an implied term in that it must be so obvious that the parties must have intended it.
59.3 We conclude that this was a fundamental breach as it was sufficiently serious to amount to a repudiation given his seniority and the standards of conduct which it is reasonable to expect of a manager.

Direct Race Discrimination:
60. The Claimant bears the burden of proof at the first stage (s136 EqA and **Ayodele**) but we have concluded that he has not established prima facie evidence of less favourable treatment because of his race when compared to another (real or hypothetical) whose circumstances are not materially different to his own.

60.1 We are not persuaded that he was treated any differently in terms of the disciplinary procedure or his dismissal. The Claimant initially named three comparators, GK, MJ and TJ. The Claimant dropped MJ as a comparator and it is not in dispute that TJ did not drink on 30 September 2016 and we have found that he did not drink alcohol and then drive after the 2015 Christmas party. This just leaves GK who did not use his company vehicle on 30 September 2016 or at the 2015 Christmas party [267]. The circumstances of his comparators are therefore materially different to the Claimant's and there is no evidence in support of the construction of a hypothetical comparator.

60.2 We have found that the Claimant's conduct was the sole reason for his dismissal and we do not accept that the Respondent was motivated when making the decision to initiate the disciplinary proceedings or to dismiss him.

60.3 The Claimant accepts that there is a roughly even split between white British employees and ethnic minorities at the Tower Hamlets branch and there are two Managers at the same level as the Claimant who are Black African and Bangladeshi respectively. There is no evidence to support a conclusion that Mr. Edwards wanted an all-white management team.

60.4 We have accepted the Respondent's evidence regarding the disciplinary matters which have arisen at the Tower Hamlet's branch [para. 45].

61. In summary, the Tribunal's unanimous conclusions are as follows:

61.1 The claim for unfair dismissal succeeds; the Compensatory Awards is reduced by 100% for contributory conduct; the Claimant is awarded a Basic Award increased by 25% for the Respondent's failure to follow the ACAS code less 50% for contributory conduct leaving a sum of £6,735.93.

61.2 The claim for wrongful dismissal fails and is dismissed.

61.3 The claim in respect of race discrimination fails and is dismissed.

62. In view of this, it is not necessary for the Tribunal to consider compensation and the Remedy Hearing provisionally listed for 30 April 2018 will be cancelled.

63. For the purposes of rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues identified as being relevant to the claim are at paragraph 2; all of these issues which it was necessary for the Tribunal to determine have been determined; the findings of fact relevant to these issues are at paragraphs 7 to 46; statement of the applicable law is at paragraphs 47to 51; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 52t o 6.

Employment Judge Mason on 2 February 2018