EMPLOYMENT TRIBUNALS

Claimant: Mrs P Harrison

Respondent: D. E. L. T. A. Merseyside Ltd

HELD AT: Liverpool **ON:** 30 January 2017

BEFORE: Employment Judge Tom Ryan

Appearances:
Claimant: In person
Respondent: Mr I Steel, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of unfair dismissal is well-founded.

2. The compensation to be awarded to the claimant will be determined at a hearing which has been listed at the Liverpool Employment Tribunal on 6 April 2017 at 10 a.m.

REASONS

1. By a claim presented to the tribunal on 22 September 2016 the claimant alleges that she had been unfairly dismissed from her employment as a telephone operator by the respondent on 16 May 2016. The respondent resisted the complaints and contended that if the claimant were found to have been unfairly dismissed than any compensation should be reduced by reason of the Polkey principle or by reason of her contributory conduct.

2. I indicated that I would first consider and determine the issue of liability. At the conclusion of that I announced to the parties that I considered the complaint of unfair dismissal was made out. There was little time to consider the question of remedy and a further hearing has been arranged for that purpose.

3. I heard evidence from Mr Paul McHugh, HR manager and Mr Gary Beesley, Chief Executive for the respondent and from the claimant herself. Each had made a written witness statement. These were treated as evidence in chief. I was provided with a tribunal bundle and other loose documents which I identify where necessary. These included a chronology from the respondent and submissions in writing from both parties.

4. I make the following findings of fact. I say at this juncture that I do not refer to every topic that was discussed at hearings or mentioned in letters but only those which I consider to be germane to the decision that I have to take.

5. The respondent is a taxi company which employs about 60 telephone operators and 20 other staff. It maintains that it engages taxi drivers to work on a self-employed basis.

6. The telephone operators of which the claimant was one operate on a shift system from either the respondents Bootle or Liverpool premises. It is a 24-hour a day operation. Shifts start on the hour from early in the morning until 11 o'clock in the evening. They are 8 hours long. The number of operators on each shift varies depending upon the time of day and upon which day of the week they are working to meet the demands of the business.

7. The claimant started her employment on 30 May 2011. She initially worked 2 shifts per week starting at 6 p.m. and finishing at 2 a.m. She was provided with a handbook in 2013 which contained the company's disciplinary policy.

8. In 2014 the claimant began to perform 2 additional shifts per week.

9. The respondent's record (1-5) shows that the claimant had attendance issues predominantly associated with ill-health. She had a prolonged period of absence between starting from February 2015 which was certificated by her doctors. Initially the absences were due to chest infections. At a back to work meeting on 4 March 2015 (114) her manager has recorded that she had requested a change of shifts in order to enable to her work day shifts because she was suffering from chronic insomnia.

10. Prior to the claimant commencing long-term sickness on 6 May 2015 the request the day shifts had been refused because they were not available at that time. A letter from the claimant's GP dated 6 May 2015 (6) explained that the claimant had been working nights but was unable to sleep during the day and she had developed mental health problems with persistently depressed mood. She had also had a significant lowering of immunity due to the insomnia and recurrent chest infections. He said that he had urged her to change your working hours because the regime of night shifts was damaging to her health and he considered that something more close to a regular 9-to-5 working pattern would be beneficial.

11. Mr McHugh wrote to the claimant on 9 July 2015 (7-8) asking her to attend a meeting to discuss her working pattern and in that letter stated that if she were

unable to work the shift she was employed to do or other ships that were offered "we will have to discuss with your employment can continue with the company or whether your employment should be terminated on the grounds of capability."

12. That meeting took place on 17 July 2015. Mr McHugh wrote to the claimant on 6 August 2015 (20-21). He noted that she was an outpatient at Aintree Hospital and under investigation for chest pains and was unable to return to work to perform shifts in the evening and night-time. He recorded that he had previously offered day shifts during weekends at Bootle but the claimant did not wish to work at weekends. He had offered day shifts at Liverpool and what was called the "flexible rolling rota" but that was not convenient to the claimant. The claimant was seeking day shifts which would allow her to ensure that she was at home when her daughter returned from school. Mr McHugh proposed a solution where he agreed to try and schedule the claimant for any available shifts that accommodated her medical condition and availability. The claimant was to perform between one and 4 shifts a week subject them being available and subject to her not turning them down if they met her medical and childcare requirements. Mr McHugh said he would try this on a trial basis for 18 weeks but reconsider it if it did not work.

13. The claimant was signed back fit to work in September 2015 and started on that arrangement. On average she performed one or 2 shifts a week in the following months but her attendance again suffered due to health and other reasons.

14. As a result of continued absences the respondent wrote to the claimant on 14 January 2016 requiring her to attend a disciplinary hearing on 21 January 2016. The meeting was arranged to discuss her level of attendance and punctuality. It was said that she had been absent or failed to complete a full shift on 15 occasions since September 2016 when she returned to work for a range of illnesses, "including depressive illness, dizziness, vomiting, chest pains and tonsillitis." It was said she'd also been late to work on 3 occasions. The letter set out that the outcome of the hearing "may be either 1) no action 2) a written warning or 3) dismissal."

15. The claimant attended the meeting. The claimant's health was discussed. Mr McHugh said he would need a letter from the claimant's GP. It was understood that the claimant would provide a letter from her doctor. The GP wrote a brief letter dated 9 February 2016 (37) stating that the claimant had made a good recovery and "has been well for a few weeks now." It was said that the medication for depression had helped the claimant to sleep and that she was fit to return to night duty.

16. Given that the doctor had changed from saying the claimant was not fit to do night work to saying that she was now fit to do it again Mr McHugh decided to obtain a doctor's opinion himself. On 19 February 2016 he wrote to the claimant informing her of that. On 22 February 2016 he wrote to a Dr Reddington who appears to have been a GP in Formby. The claimant was seen by Dr Reddington for the purposes of a report which she wrote dated 14

March 2016 (44-45) she summarised the claimant's sickness absence during the preceding year in this way:

> "She 1st went off sick in March 2015 following a cancer scare with regard to a gynaecological problem, the which he was subsequently given the all clear, although she did need time off to attend hospital appointments. This incident triggered a bout of reactive depression, panic attacks, insomnia and anxiety. Mrs Harrison stated that she had never previously suffered these sorts of problems."

17. The doctor recorded the claimant seeking help from her GP. She recorded that there was a wealth of evidence confirming that shift workers in particular suffer disproportionately from physical and mental ill-health that overproduction of the stress hormone cortisol can lead to insomnia and lower immunity levels. She recorded that the move today shifts did not prove to be as beneficial as had been hoped. She then addressed the questions that Mr McHugh had posed. She said there may be risks in the claimant retained her previous pattern of shifts. She expressed the opinion that the miscellaneous conditions that the claimant had suffered over the winter could be linked to lower immunity connected to stress/impact resistance to colds and viruses. She said it was reasonable to give me the claimant is not his return to her previous shift pattern on a temporary basis with a condition that her performance in attendance be monitored. The doctor said, "You may wish to inform Mrs Harrison that should this trial period prove unsuccessful it may lead to a termination of her contract."

18. Mr McHugh said that he did not receive a letter until towards the end of March 2016. He wrote to the claimant on 19 April 2016 (46-48) saying that he wished to "resume the disciplinary". He noted a further 14 occasions when the claimant had been absent or left early from the beginning of 2016. It appears that was in fact 13 occasions. The claimant had been late for work on for further occasions which were identified.

19. In addition, the respondent raised a new allegation that the claimant appeared to be running her own baking business as shown on her Facebook pages. Mr McHugh quoted clause 14 of the claimant's contract of employment which he set out which prevents an employee from working for any other employer during or outside normal working hours without the written permission of a director. The contract says that a breach of that term may result in summary dismissal. Mr McHugh posited whether some of the claimant's absences were due to the fact that she was placing her own business first rather than her work for the company. He said, "This is a potential breakdown in trust and confidence because we are left questioning why you run on your own business, but cannot attend ours on time or on a regular basis."

20. This allegation was based upon Facebook pages that a member of the respondent's staff who was not identified had brought to his attention. The respondent included photographic images taken from the claimant's Facebook page with the letter (49-58). There is no doubt that some of the images contained a "banner" title: "Harrison's Homemade" and in addition against some of the entries the claimant had written words such as "Available to order inbox me", "Last order date for Mother's Day is 1st March… Any message any colour

inbox me" and "A cupcake bouquet available to order any colour. Inbox for details."

21. On 20 April 2016 the claimant wrote to Mr McHugh insisting that she was entitled to an investigatory meeting in respect of the new allegations and refuting the allegations of running a cake business. She said she was simply following her doctor's advice to take up a hobby and it was a non-profit making hobby. Mr McHugh responded by adjourning the proposed meeting to 6 May 2016. He noted the claimant's response about cake making being a hobby not a business. He asked the claimant to bring with her to the meeting documentary evidence of the number and frequency of orders that she had received for the last 12 months.

22. The respondent also arranged an investigatory meeting for 4 May 2016 with a manager, Kevin Button, and notes of that meeting were taken (63). The claimant presented a handwritten letter dated the same day (64-71) at that meeting.

23. The letter explained that the claimant had taken up baking cakes which she enjoyed doing with her children and did predominantly on a Saturday or Sunday afternoon outside working hours. However because of the cost of ingredients she decided to put pictures on Facebook so that those who were her friends on Facebook and family could ask you to make a cake by supplying ingredients or meeting the cost of the ingredients. She had made one cake from a member of the respondent staff, Michelle McQuade on such a basis. The cake was made for 11 February 2016 and she made it on the previous day when she was not rostered for work. It was delivered by the claimant's husband and Miss McQuade also paid for petrol.

24. In the letter the claimant went on in detail to address each of the pictures she had posted on Facebook, identifying that some of the cakes were made by her daughter, and some for family birthdays and graduations and other such events. She explained that she had written the title "Harrison's Homemade" because unscrupulous people "steal pictures" off the internet and then offer to make cakes they cannot deliver receive payment and rip people off and she thought the use of the name would avoid that. The claimant also provided a breakdown of the costs involved in making the cake for Miss McQuade.

25. The disciplinary hearing resumed on 5 May 2016 with Mr McHugh and the claimant. Notes were taken (83-90). Although the claimant maintained that she was not conducting a business the notes show that she agreed why the respondent could think it was a business or that it could appear to an outsider that it looked like a business. Mr McHugh asked about 25 February when the claimant rang in sick because of migraine and yet had posted on Facebook that day concerning christening cakes. The claimant provided an explanation that while she may have posted a photograph on Facebook that day that did not mean that the cakes illustrated were baked that day. The meeting concluded with a conversation about the claimant's contractual arrangements. Mr McHugh said that he was going to take advice from solicitors and would let the claimant know the outcome in due course.

26. On 16 May 2016 (91-95) Mr McHugh wrote to the claimant with the outcome of the disciplinary hearing. He summarised the claimant's absence record as being 14 occasions prior to 21 January and a further 19 occasions since the 1st disciplinary hearing. He referred to 4 incidents of poor punctuality prior to 21 January and 4 since that date. On 2 of those occasions the claimant was 15 minutes late, 45 minutes late on a third occasion and on the remaining 5 occasions she was late by one hour or more.

27. He set out the contractual term concerning the restriction on performing other work. He identified the breakdown of trust and confidence because "we are left questioning where you can run your own business. But cannot attend ours on time or on a regular basis." [sic]

28. Having referred to the claimant saying that she understood why the respondent might believe it was a cake making business, he wrote:

> "During the investigation you pointed out that you'd refused orders placed by colleagues. I understood that it was intended to show to us that unlike a business should turn down work when you chose not to work. However, upon investigation of this, orders were not refused because he did not want to bake 3rd parties; you decline orders because you could not bake because you were on holiday.
>
> You insisted that you did not bake for profit and only charged for the ingredients. give However, given the contents of the Facebook pages I am satisfied that Harrison's Homemade is a business.
>
> However, the most troubling aspect of the situation is whether your Harrison's Homemade cake making operation has had an impact on your attendance and influenced or caused your high level of absences and punctuality."

29. Mr McHugh said that he came to the following conclusions. Under the heading "Breach of Contract". He said that he believed that the claimant was operating a business as a self-employed person and that the restriction in the contract applied to her and that doing this without permission was an act of gross misconduct.

30. He described the absences levels as unacceptably high and that the claimant's failure to attend work on so many occasions was gross misconduct. He also found that the poor punctuality was gross misconduct.

31. Finally, under the heading of "Trust and Confidence" he referred to the claimant's failure to disclose the work she was doing outside of the employment and said that he believed it impacted on the claimant's work with Delta. He said that he believed that the claimant had given priority to her own business above her duties as an employee. He said that it contributed to the absence levels and poor punctuality. He described the claimant's "refusal to acknowledge and accept what has happened" as unacceptable and that it placed "question marks over our trust and confidence in you as an employee."

32. He wrote that he had decided that the appropriate sanction was summary dismissal for gross misconduct.

33. The claimant was notified of her right of appeal which she took up by sending a letter to Mr Beesley on 20 May 2016 (96-103). Mr Beesley replied by letter dated 31 May 2016 summarising 9 grounds of appeal.

34. The appeal hearing was scheduled for 10 June 2016 but rearranged the claimant's request because the respondent had delivered a 146 page bundle of documents to her home at 5:45 on the previous evening.

35. The appeal hearing was rearranged for 23 June 2016. It took a similar format in that Mr Beesley and the claimant were present. Notes were taken (140-180).

36. Mr Beesley clearly conducted a detailed appeal. The notes reveal that the first 12 or so pages were concerned with the documents. Then (153) Mr Beesley said that he was going to look at the sequence of events, the claimant's medical condition, the employee handbook, the reason for dismissal and the grounds of appeal. In the section dealing with the reason the dismissal, which Mr Beesley described as "looking at why you were dismissed", he discussed the issue of high absence levels. Turning to the claimant's medical conditions he asked her to identify which of the absences related to her medical condition. She replied that all of them were elated save for when the dog died, her daughter wasn't well and one day there was an emergency with her mother. The claimant accepted that she had a poor punctuality record but said there were explanations for the incidents. Mr Beesley asked whether the claimant accepted that if she was running a business on a self-employed basis she accepted it was in breach of her contract. The claimant maintained she was not running a business it was merely a hobby.

37. Then Mr Beesley turned to the breakdown of trust and confidence. He raised that the investigation report suggested that the claimant had been off work even though she was not ill. This was a reference to Facebook entries showing the claimant was out socialising at night and went with her family to Newcastle races. Mr Beesley asked whether the claimant can understand why Mr McHugh might have concluded that the claimant was not sick at all since she had had 102 absences since 3 February 2015.

38. The claimant said that had absences recovered by a doctor's note and that she had hospital appointments on medication and prescriptions so she could not understand why Mr McHugh might make that assumption.

39. Mr Beesley then went through the grounds of appeal. The claimant had raised that issues of absence/sickness levels and a punctuality were not listed under gross misconduct in the staff handbook. The claimant pointed out was that she was not saying she could not be disciplined for those matters but they were not gross misconduct. Mr Beesley pointed out that the handbook said that repeated lateness, persistent absenteeism and conduct of any kind that impairs the working efficiency of others could result in dismissal in serious cases. The claimant made the point that she was given no warnings about those.

40. On the cake making topic Mr Beesley pointed out that the claimant had not informed her employer of the cake making operation. The claimant riposted that the contract does not state that she had told her employer about a hobby which is all it was. Mr Beesley is recorded as saying the following, "You say that it is not a business and you are not self-employed. Paul disagreed and took the view that you are self-employed are running a business. I understand that you are adamant that you are not running a business but is anything else you want to add?" The claimant suggested that Mr McHugh had made up his mind even before the subject was investigated.

41. Towards the end of the notes (177) the claimant referred to a medical report dated which refers to her suffering from anxiety and depression which the claimant then described as "a form of disability under the Disability Act". She went on to say this,

> "After 5 years of service with your company I would have expected more support from your company, instead of being accused of running a business which is not true. This appears to be an excuse to dismiss me due to my previous sickly which is genuine and from which I returned to work on nights on 4.5.16.
>
> As my absences, lateness and sickly were not dealt with previously, and I have returned to work, I am confused as to how I can be dismissed for gross misconduct when such issues are not listed under gross misconduct and the staff handbook, and I have not received any written warnings the sickness absence/lateness."

42. At the conclusion of the hearing Mr Beesley said that he would get back to the claimant as soon as possible with a decision.

43. On 7 July 2016 Mr Beesley responded to an enquiry from the claimant saying that he had completed his investigation into the appeal and it was with lawyers for advice and guidance.

44. The letter giving the claimant the outcome of the (184-195) appeal was not dated but according to the respondent's chronology was dated 26 July 2016. The letter broadly followed the same pattern as that of Mr McHugh.

45. In a section dealing with the documents that were produced at the appeal Mr Beesley acknowledged that the claimant had not seen various documents such as attendance records going back to 2012 but maintain that only the records relating to absences set out in the letter were relevant. I note that this is in contrast to the reference to 102 days' absence to which Mr Beesley referred in the hearing.

46. Mr Beesley set out that persistent absenteeism and poor punctuality could justify disciplinary action and might justify dismissal. He stated that a higher level of absence had been tolerated in the claimant's case because of her medical condition. He accepted there was no formal disciplinary action or warnings about attendance prior to 14 January 2016.

47. However, he referred to the claimant being spoken to about the amount of time she had off on 4 March 2015 and said he was satisfied that she was aware it was causing concern.

48. At the conclusion of this section of the letter Mr Beesley said that he was satisfied the claimant had a high absence level that she had been spoken to before about that and the company was entitled to discipline the claimant and dismiss her for that. He said that he thought the respondent tried to accommodate the claimant's medical condition and considered offered reasonable adjustments. He described the recommendations from the claimant's GP is contradictory and said "whether you worked nights or days, you had a high level of absence and it was reasonable to conclude that this in itself was gross misconduct".

49. He dealt with the issue of punctuality much more briefly. He said that it was not appropriate to make a finding that poor punctuality was gross misconduct. To that extent I note he reached a different conclusion from Mr McHugh. He concluded there were grounds to dismiss the claimant for poor punctuality.

50. Mr Beesley reached a conclusion himself that it was reasonable to conclude that the claimant was effectively running a cake making operation on a self-employed basis. Under the heading of "Breakdown in Trust and Confidence" Mr Beesley said this,

> "Paul concluded that because the cake making operation was pursued on a self-employed basis, and he believed that your priority was making cakes rather than attending work, as evidenced by your high absence level and poor punctuality, he had lost trust and confidence in you as an employee. From what you have indicated, it seems to me that you have lost trust and confidence in Paul.
>
> Personally I think we as a company have tried very hard to help you, but despite this, everything we do seems to result in criticism of us. For this reason I do agree with Paul that the relationship appears to have broken down and we have reached a stage where there is a lack of trust and confidence in each other."

51. In dealing with what he called other grounds of appeal Mr Beesley referred to the claimant's attendance at Newcastle races and booking taxis personally from the respondent under the name "Paula H" He did not state that he had placed reliance upon those matters.

Relevant law

52. In written submissions Mr Steel for the respondent summarised the test laid down by section 98 of the Employment Rights Act 1996. He reminded me that the tribunal was not substituted view for that of the employer, referring to **London Ambulance Services NHS Trust v Small [2009] IRLR 563 CA.**

53. In addressing the issue of reasonableness he referred to the case of **Perkin v St George's Healthcare NHS Trust [2005] EWCA Civ 1174** as support for the

proposition that the principles in **Burchell** can be applied by the tribunal in determining whether an employee was fairly dismissed for some other substantial reason.

54. He referred to the well-established test in **British Home Stores Ltd v Burchell [1978] IRLR 379** in respect of dismissals relating to conduct. He recited the factors that the tribunal will need to consider in considering the fairness of capability or qualification dismissals.

Respondent's submissions

55. In oral submissions Mr Steel submitted that it was reasonable implied believe the claimant is running a business. He accepted that the respondent did not appear to have considered whether it was a business run in competition or a business wholly unrelated to the undertaking of the respondent. He accepted that was a relevant consideration.

56. Mr Steel further accepted that it was relevant to the tribunal to consider the way in which Mr McHugh and Mr Beesley characterised the various matters that were raised with the claimant. This arose because I had asked Mr McHugh in the course of oral evidence to explain why he had characterised punctuality and sickness absence as gross misconduct. I had also enquired what his understanding was of the significance of a finding of gross misconduct in relation to dismissal. I had also asked Mr Beesley similar questions.

57. Neither Mr McHugh nor Mr Beesley were able to explain the basis upon which the sickness absence was classified as gross misconduct having regard to the staff handbook. However, in the case of Mr Beesley his response prompted me to ask whether he accepted that the claimant's sickness absences as certified by her GP were genuine and he treated them as such. He told me that he did not. He accepted that this issue had never been raised with the claimant at any stage of the procedure. Because this matter had never been previously raised nor explored it was of greater significance because clearly, on the evidence, Mr McHugh did not appear to approach the matter in that way and, further to that, there were clearly significant occasions that were likely to have been genuine medical sickness absences.

58. I make it clear that I did not ask Mr McHugh the same question because his responses to my initial question suggested some, perhaps understandable, confusion about what might amount to gross misconduct and what might not.

59. In submissions Mr Steel emphasised the fact that the employer had to have trust in the employee and that there was evidence that there was a breach of trust and confidence. He referred to 2 instances of absence 9 and 25 February 2016 where the claimant's absence coincided with Facebook postings about the cake making.

Conclusions

60. Insofar as the conclusions of Mr McHugh are concerned I have no cause to doubt that he did not reach a genuine belief upon reasonable grounds on the issue of conduct.

61. For reasons I set out below I consider that the reasonableness of Mr Beesley's belief in relation to the finding of misconduct in respect of the claimant's sickness absence is open to significant question.

62. I remind myself that in considering the investigatory process which leads to a decision to dismiss the tribunal must consider the entirety of the process including the appeal. Ever anxious to avoid the substitution mindset the test here is also whether the process was one which a reasonable employer could reasonably have adopted [see: **Sainsbury's Supermarkets v Hitt [2003] ICR 111]**.

63. In my judgment the disciplinary process was tainted here to the extent that no reasonable employer would have adopted it, by Mr Beesley having reached the conclusion that even some of the claimant's certificated medical absence was not genuine medical absence but, in effect, absence without proper cause and, in particular, reaching that conclusion, without ever having raised this with the claimant to enable her to have addressed it. A reasonable employer might, having regard to the history of this case, have legitimately reached that conclusion. But no reasonable employer could fairly do so without having given the employee an opportunity to say something about the suspicion.

64. In my judgment this flaw is one of real significance and is compounded by the unexplained decisions of Mr McHugh and Mr Beesley to treat punctuality and sickness absence, which in the case of Mr McHugh wholly and in the case Mr Beesley at least in part was genuine medical absence. Being sick is not misconduct. Even less is it gross misconduct. Were I not to have found that the flaw in Mr Beesley's approach had occurred the mischaracterisation of the sickness absence would I think have been a more finely balanced issue. A third factor supporting a finding that the decision to dismiss was unfair, although of lesser significance in the overall context, was the respondent's decision to consider that dismissal was merited for the capability issues, properly so characterised, when no previous procedure of warnings and opportunities to improve had been followed at all. In that regard, I consider that Mr Beesley's attempt at the appeal to treat two earlier conversations is in some way meeting the usual requirement for proper steps to verge on the disingenuous.

65. That said, I make it clear that I do not criticise Mr McHugh and Mr Beesley for a lack of understanding about the interrelationship of gross misconduct and summary dismissal. I pause only to reflect that if their evidence is correct and they were taking legal advice about their conclusions that lack of understanding is somewhat concerning.

66. As to the conclusion that the claimant was carrying on a business, I might, if I were in the respondent's shoes, have found it much more difficult to reach

the same conclusion as they did. But that would be to substitute my view for theirs.

67. In my judgment there was material upon which a reasonable employer could reasonably have concluded that the claimant was undertaking business outside of her employment and that that was a breach of the specific term of the contract.

68. If there was no cause to believe that the cake making operation impinged in any way upon the claimant's attendance at work then it would again be a finely balanced question whether any reasonable employer could reasonably conclude that it was such a breach as merited the sanction of dismissal. However, that is not this case. Again there was factual material upon which an employer could conclude that there were periods when the claimant was absent from work and undertaking cake making.

69. In my judgment the combination of those circumstances, the use of what looks like a trading name and the references to orders to be made by a certain date point to the respondent reaching a conclusion that this was conduct for which a reasonable employer might have reasonably dismissed.

70. However, as Mr Steel acknowledged, if the tribunal concludes that the dismissal was unfair by reason of the application of the section 98 test then it is bound by the decision of the House of Lords in **Polkey v AE Dayton Services Ltd [1987] IRLR 503** to make that decision and cannot find the dismissal was fair because it would have made no difference if the respondent had acted differently.

71. For those reasons, and in what I acknowledge to be comparatively unusual circumstances, I find that the claimant was unfairly dismissed.

72. This decision gives rise to a number of further issues concerning remedy. However, I record that the claimant here seeks compensation rather than reinstatement or re-engagement. I indicated to the parties that having heard the respondent's solicitor briefly on the issues of Polkey and contributory conduct that I considered that this was a case in which I could see the argument for making a Polkey reduction albeit on a percentage basis rather than awarding compensation for a limited period of time. Further, I indicated that I did not think this was likely to be a case for a contributory conduct reduction. I mention these matters so that the parties considering the matter going forward should be reminded of my comments and should note that they were made without hearing full argument on the facts or indeed any evidence about the extent of the claimant's loss or issues of mitigation.

73. If my comments, and that is all they are at this stage, can assist the parties to resolve remedy without a hearing then so be it. The parties must consider that all matters of remedy remain at large to be determined at any further hearing. At any such hearing I may make findings confirming the comments in the preceding paragraph or be persuaded to different findings in respect of Polkey or contributory conduct.

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Employment Judge Tom Ryan 17 February 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 February 2017

FOR THE TRIBUNAL OFFICE