THE INDUSTRIAL TRIBUNALS

CASE REF: 17412/18IT

CLAIMANT: **Nevin McEldowney**

RESPONDENT: **Randox Farming Limited trading as Cherryvalley Farms**

JUDGMENT

The unanimous decision of the tribunal is that the claimant was unfairly dismissed. The tribunal awards the claimant the sum of **£8,585.00** as remedy for his unfair dismissal**.**

CONSTITUTION OF TRIBUNAL:

Employment Judge: **Employment Judge Gamble**

Members: **Mrs C Stewart**
Mr B Heaney

APPEARANCES:

The claimant was represented by Ms E McIlveen Barrister-at-Law, instructed by John J McNally Solicitors.

The respondent was represented by Mr J Algazy QC, instructed by the respondent's in-house legal department.

Ms Suzanne Smith attended the hearing as an Intermediary during the claimant's cross examination during the reconvened hearing on 17 and 18 November 2020.

1. BACKGROUND

1. The claimant was employed as a Shepherd, latterly the head Shepherd for the respondent, from 5 December 2014 until his summary dismissal on 10 August 2018.

2. The claimant presented a claim, which included a claim of unfair dismissal and failure to pay notice pay, to the tribunal on 8 November 2018. The claim form was prepared and lodged on behalf of the claimant by his solicitor.

3. The other claim within the claimant's claim form (namely unlawful discrimination on grounds of religious belief) was dismissed on 14 October 2019, following its withdrawal by the claimant, leaving only the claims of unfair dismissal and failure to pay Notice Pay to be determined by the tribunal.

4. The respondent, in its response, presented on 27 December 2018, denied all of the claimant's claims. The reasons for resistance can be summarised in the following extracts from the response form: *"The claimant was summarily dismissed with immediate effect due to an act of gross misconduct", "there had been a breach of trust and confidence which left the respondent with no option but to consider the sanction of gross misconduct"* and *"the actions leading to his dismissal were a clear breach of the essential trust and confidence required between employee and employer."*

2. FACTUAL BACKGROUND

2.1. From the evidence proffered by both parties, it is common case that on the 26 July 2018 the claimant took a freshly deceased lamb, slit its throat, hoisted it on a forklift truck, bled it, removed its entrails, skinned it, removed its head, sawed it down the middle and transported it to the cold store on the respondent's farm. It was not disputed by the respondent that EM (a more junior employee) was present when the dead lamb was prepared and that DB (the Farm Manager) was present when the claimant placed the lamb in the cold store and did not object.

2. The next day, being 27 July 2018, an investigation was commenced into the claimant's actions and the claimant was suspended from work on full pay. The investigation was carried out by Pauline Bradley, the Operations Manager of Randox Laboratories Ltd.

3. Following a disciplinary hearing held on 10 August 2018, the claimant was summarily dismissed with immediate effect. The disciplinary hearing was conducted by Charles McGonagle, the Environmental Manager of Randox Laboratories Ltd. The claimant was summarily dismissed at the conclusion of that hearing.

4. The dismissal decision was communicated to the claimant orally at the conclusion of the disciplinary hearing on 10 August 2018, confirmed in writing in a letter dated 16 August 2018, and set out in the full Disciplinary Overview and Outcome Report, which was sent to the claimant on 7 September 2018.

5. The claimant appealed against his dismissal, and his appeal was heard on 18 September 2018 by Susan Hammond, Global Sales Manager of Randox Laboratories Ltd. The appeal was not upheld and this decision was communicated to the claimant by letter dated 15 October 2018.

3. THE CONTENTS OF THE CLAIM FORM

3.1. The claim form consists of a narrative account, setting out a brief summary of the incident which gave rise to the claimant's dismissal (paragraphs 5 to 8), an account of the disciplinary process (paragraphs 6 to 12), the reasons for dismissal (paragraphs 13 to 18) and a conclusion (paragraphs 19 to 21).

3.2. The claim form rehearsed a history of the claimant having brought a complaint against a number of co-workers, namely SW, RE and EM in or around May 2018. The claim form records that, after the outcome to the complaint, the claimant lodged a grievance against SW, RE, and EM and that he also raised complaints about how his complaint was investigated by his employer.

3.3. Under the section entitled "Disciplinary Process" the claim form rehearses that the claimant had received statements about the incident from MR, DB and EM, that during the process the claimant had raised his belief that MR had made a malicious report because of his grievance against MR's uncle, SW. The claimant also complained that neither EM nor DB had been disciplined for the incident.

3.4. Under the section entitled "Reasons For Dismissal", the claim form provided some further detail about the nature of the claim, namely:

> "*13. The claimant maintains that the findings against him are based on assumptions rather than positive action by him. The claimant maintains the respondent has placed unreasonable reliance upon statements made by employees against whom the claimant had lodged a grievance.*

14. Indeed, the allegations of theft are based on supposed intentions rather than action. The claimant did not remove the lamb from the farm premises and therefore he did not commit theft nor did the claimant have any intention of removing the lamb from the premises until he had spoken to (the owner of the business).

15. The claimant has been open and honest throughout the entire investigation. The claimant never received any food safety training and was assisted in placing the lamb into the cold store by his manager.

16. In all the circumstances, the claimant maintains that it is grossly disproportionate to find him guilty of gross misconduct.

17. Prior to the incident with the lamb, the claimant had a clear disciplinary record.

18. …."

4. THE CONTENTS OF THE RESPONSE FORM

4.1. At paragraph 3.4 of the response, which was presented on the 24 December 2018, it is recorded:

"1. *On Friday, 27 July 2018 a serious issue was reported to Ms Pauline Bradley, Finance Manager of Randox Laboratories Ltd, concerning the conduct of the claimant. It was reported the claimant had slaughtered and butchered a sheep on the farm premises of the company. For the avoidance of doubt this animal is owned by the respondent and the claimant is not authorised to slaughter or butcher on the premises nor does this ever form part of his duties. Indeed Cherry Valley Farms is not licensed to slaughter or butcher animals on the premises.*

2. Following an investigation into this matter the decision was made to place the claimant on paid suspension until the investigation had been concluded by Pauline Bradley. Pauline Bradley concluded from her investigations the acts committed by the claimant was considered to be

gross misconduct and referred the matter to a disciplinary hearing on Friday, 10 August 2018.

3. Charles McGonagle, Environmental Manager of Randox Laboratories Ltd, presided over the disciplinary hearing on Friday, 10 August 2018. Following two adjournments on this date, Mr McGonagle reached the decision to summarily terminate the claimant's contract of employment with immediate effect. Mr McGonagle concluded the butchering and slaughtering of dead animals has never been within the remit of the claimant's job, the claimant agreed this was the case and that his job was to care for the welfare of sheep. The claimant accepted he has never been instructed to do this and the company has two specific processes for legally disposing of dead animals both outside of Cherry Valley farm premises. For the avoidance of doubt animals are never slaughtered and butchered on the premises of Cherry Valley Farms. Handling of dead animals either for destruction or to the food chain is tightly regulated industry and Cherry Valley Farms is not licensed for this purpose. This lamb could never enter the food chain therefore on the balance of probability the claimant can only have been intending this lamb for his own personal use. The actions of the claimant were outside his remit not in keeping with company practice and potentially dangerous and illegal. The claimant argued he was not trained on food handling and was unaware of the potential consequences to the business as a result of his actions. This is a moot point as food handling was not part of the claimant's job and he should never have processed this lamb at all.

….

8. The claimant was dismissed for his own actions. These actions were unrelated to and therefore entirely separate to his grievance. … whereas his dismissal concerned his illegal and unauthorised butchering of a Cherry Valley lamb. The actions leading to his dismissal were a clear breach of the essential trust and confidence required between employee and employer.

…."

2. This response asserted at paragraph 6.2.3 that:

"The claimant was dismissed for his own actions. These actions were unrelated to and, therefore, entirely separate to his grievance. His grievance concerning the allegations towards his co-workers of

religious discrimination, whereas his dismissal concerned his illegal and unauthorised butchering of a Cherry Valley Farms lamb. The actions leading to his dismissal were a clear breach of the essential trust and confidence required between the employee and employer."

3. The response form also confirmed that the investigator for the claimant's complaint was Ms Bradley. The response form denied that the claimant had raised complaints about how his complaint was investigated by the respondent, but stated:

> "*the claimant raised this point in his first grievance on 28 June 2018 but further revised this in his new grievance submitted on 17 July 2018. The respondent asked the claimant in his grievance meeting on 20 July whether he left this point out in error, the claimant confirmed that religion did not come into Ms Bradley's decision and he did not want to pursue this point."*

4. At paragraph 6.2.9 of the response, the disciplinary outcome report findings were set out and explained, recording, amongst other things, that the disciplinary outcome report stated that the claimant was planning to take the meat home and that this was theft and considered as gross misconduct, as well as gross negligence, which placed junior staff in an unprecedented position. The respondent asserted that the decision was based solely on the actions of the claimant and his failure to follow the correct company processes for the disposal of dead animals. The respondent further denied that there was an unreasonable reliance upon statements made by employees which the claimant had lodged grievances against. The response confirmed that statements were taken from EM, DB and MR. The claimant had only raised a grievance against EM.

5. Paragraph 14 of the response denied that the allegations of theft against the claimant were based upon supposed intentions rather than action and explained the basis of the allegation of theft.

6. Paragraph 15 of the response agreed that the claimant had not received food safety training for meat handling as it was not in his job requirements. The respondent asserted that the claimant's role was to look after the welfare of the flock, not to handle meat on the premises. The response asserted that the claimant's actions were directly against the processes of Cherryvalley Farms. In the response the respondent neither agreed nor denied that the claimant's manager assisted the claimant and placing the lamb into the cold store as DB ceased employment with the company on 27 July 2018.

7. Paragraph 16 of the response denied that it was grossly disproportionate to find the claimant guilty of gross misconduct, concluding that the claimant's actions were not acceptable to the company and that there had been a breach of trust and confidence which left the respondent with no other option but to consider the sanction of gross misconduct.

5. THE AGREED ISSUES

5.1. The following List of Issues (as Amended and Agreed) was lodged by the parties and summarised the issues for determination by the Tribunal:

*"**Unfair Dismissal***

1. *What was the principal reason for dismissal?*
2. *Was it a potentially fair one in accordance with Article 130(2) of the Employment Rights (Northern Ireland) Order 1996 (as amended)?*
3. *Was the dismissal procedurally fair and in accordance with the statutory procedures?*
4. *Was dismissal within the range of reasonable responses?*
5. *Has the respondent otherwise acted reasonably?*
6. *If the claimant was unfairly dismissed, did the claimant's conduct contribute to his dismissal?*
7. *Has the claimant taken such steps as are reasonable in all the circumstances to mitigate such loss as may be established?*
8. *Should any award be further reduced for any other reason?*

Notice Pay

9. *Was the claimant entitled to notice pay of £1260 or was the respondent entitled to dismiss the claimant?*

Jurisdiction

10. Were all of the claimant's complaints presented within the applicable time limits?"

2. As the date of dismissal was 10 August 2018, and the claim was presented to the tribunal on 8 November 2018 (within the applicable time limits) no jurisdictional issue arises.

6. SOURCES OF EVIDENCE

6.1. The respondent's witnesses gave direct evidence by way of witness statements and were cross examined. The tribunal considered written and oral evidence from the following witnesses on behalf of the respondent:

(i) Cathy Hurrell (Assistant Human Resources Manager of Randox Laboratories Ltd). She provided HR support to the disciplinary investigation and disciplinary hearing stages of the disciplinary process.

(ii) Pauline Bradley (Operations Manager of Randox Laboratories Ltd.) She was the person who conducted the disciplinary investigation and made the decision to suspend the claimant.

(iii) Charles McGonagle (HSE Manager of Randox Laboratories Ltd.) He was the person who conducted the disciplinary hearing and made the decision to dismiss the claimant.

(iv) Susan Hammond (Global Sales Manager in Randox Laboratories Ltd.) She was the person who heard and determined the claimant's appeal against dismissal.

(v) The tribunal also admitted witness statements from Maeve Loane, William Mark Campbell, and Rebecca Lavery, who attended the tribunal and answered questions in brief cross examination to confirm that they had no involvement in the process that led to the dismissal of the claimant. Ms Loane carried out an investigation into the claimant's grievance, Mr Campbell considered the appeal against the outcome of that grievance and Mrs Lavery provided human resources support to that process.

2. The claimant also gave direct evidence by way of a witness statement and was cross examined. Following issues which arose during the hearing as set out at paragraph 7.1 below, the claimant's cross examination was halted. On the application of the Ms McIlveen and with the agreement of Mr Algazy QC, Ms Smith attended the hearing as an Intermediary in accordance with the principles and guidance promulgated in the decision of **Galo v Bombardier Aerospace [2016] NICA** 25, when the claimant's cross examination was recommenced in its entirety in accordance with the arrangement agreed at a Ground Rules Hearing held on 21 September 2020 (see paragraphs 8.9 to 8.12 below), at the reconvened hearing, on 17 and 18 November 2020.

3. The tribunal also considered documents within a bundle of documents, which had been exchanged between the parties, as supplemented during the hearing.

4. During the course of the hearing, the tribunal made such enquiries of witnesses as it considered appropriate for the purposes of clarification of the issues or the elicitation of the evidence.

7. ISSUE AT THE HEARING IN OCTOBER 2019

7.1. On the third day of the substantive hearing, during the claimant's cross examination (which had commenced that morning), the claimant's representative raised concerns regarding whether the claimant was effectively participating in the hearing. No application for reasonable adjustments or special arrangements had been made in advance of the hearing, and the claimant's representative, on being asked at case management stage, had confirmed that none were necessary. Nevertheless, the tribunal, mindful that, even in the absence of an application by the party's representative, the *"duty is cast on the Tribunal to make its own decision in these matters"* (**Galo v Bombardier Aerospace [2016] NICA 25** at paragraph 59), made enquiries from the claimant in order to be satisfied regarding his level of understanding of the questions which were being put to him. Following his responses, and further enquiries by the tribunal, an unopposed application was pursued by the claimant's representative to adjourn the hearing to allow the precise nature and extent of the factors which appeared to be impacting upon him at the hearing to be investigated. This application was acceded to by the tribunal and further directions were given as recorded in the record of proceedings dated
15 October 2019.

8. FURTHER CASE MANAGEMENT AND GROUND RULES HEARING

8.1. A report was obtained by the claimant's representative from Dr J Eakin and on foot of the recommendations of Dr J Eakin, specific adjustments were sought on behalf of the claimant, as recorded in paragraphs 2 (a) to 2 (i) in the Record of Proceedings of a case management discussion which took place on 17 January 2020.

8.2. These were:

(a) written cross examination questions to be provided to the claimant in advance of giving evidence;

(b) the claimant should be provided with a registered intermediary;

(c) the hearing to proceed at a slower pace to allow the claimant to fairly answer the questions;

(d) question should be short and simple;

(e) new topic should be signposted;

(f) the following should be avoided:-

(i)idiomatic language,

(ii)tag questions

(iii)hypothetical or abstract questions

(g) the tribunal should intermittently check the claimant's understanding by asking the claimant to repeat back what he thinks he has been asked/ said;

(h) the tribunal should intervene if there is a potential for misunderstanding or rephrase questions for the witness if necessary; and

(i) the claimant should be given regular breaks during the hearing.

3. At the hearing on 17 January 2020, Mr Algazy QC confirmed that the adjustments set out at (b) to (i) above were agreed between the parties. The only matter which Mr Algazy QC was not agreeable to was the provision of written cross examination questions to the claimant in advance of his giving evidence.

4. Ms McIlveen also pursued an application that the claimant's oral evidence at the last hearing should be disregarded by the panel and cross examination restarted with appropriate arrangements. That application was resisted by Mr Algazy QC.

5. Following that case management discussion, with the agreement of the parties, the President of the Industrial Tribunal, at the request of the tribunal, requested that an intermediary be appointed and that the intermediary would meet the claimant and further assess his needs when giving evidence, in advance of a reconvened hearing and confirmed that a ground rules case management discussion would be convened to consider the recommendations contained in the intermediary's report and the role of the Intermediary at the hearing.

6. A report was provided by the intermediary, Ms Suzanne Smith, dated 15 February 2020. The report confirmed the intermediary's role was to assist communication with the claimant and to assist the claimant to communicate with others. In the report, Ms Smith confirmed that she was not an expert witness nor could she give opinion on the accuracy of the claimant's recall of the facts in the case nor give an opinion on whether the claimant is telling the truth in his evidence. This report confirmed that it was important that a ground rules hearing should take place before the claimant gave his evidence. Ms Smith's conclusions and recommendations are set out at section 5 of her report.

7. Both the claimant and the respondent were given the opportunity to lodge written submissions on whether the evidence should be restarted. Ms McIlveen's submission dated 24 January 2020 summarised what were in her view the relevant authorities from the Advocate's Gateway, to which she believed parallels could be drawn, on judicial control of questioning and vetting of advocates' questions before trial. Ms McIlveen submitted that whether the dismissal was unfair would be a question of reasonableness on the part of the respondent.

8. Mr Algazy QC put forward a proposal dated 10 February 2020 "in the spirit of progressing matters" and in accordance with the overriding objective, which included that the claimant's cross examination should be re-commenced, that the respondent should supply its cross examination questions to the

Intermediary, that the respondent would be allowed to ask additional questions arising from the claimant's answers, with time to confer with the Intermediary to be allowed, that the respondent would be allowed to refer back to answers previously given by the claimant as part of cross examination and that the parties would be at liberty to refer to the totality of the claimant's evidence and submissions and comment on weight and credibility thereon is considered necessary. In relation to the authorities relied on by the claimant, the respondent submitted that these did not significantly assist with evidential issues and argued that this was, "to a large extent, uncharted territory in the context of tribunal hearings and employment law context."

9. A Ground Rules Preliminary Hearing for case management purposes took place on 21 September 2020. The Ground Rules Hearing was attended by Ms Smith, the Intermediary. At this hearing the mode of hearing was discussed and the Intermediary informed the tribunal that, in order to facilitate good communication, it would be best if the hearing took place with all parties present in the same room. Mr Algazy QC confirmed that he would be willing to travel to the tribunals' building for an in person hearing.

10. At the Ground Rules Hearing on 21 September 2020, Mr Algazy QC confirmed that he accepted the content of both Dr Eakin's and Ms Smith's reports and accepted the recommendations, save for the provision of written questions to the claimant.

11. The tribunal was informed that the dispute between the parties as to the restarting of the claimant's evidence had been resolved in the following manner, namely that the claimant's evidence would be recommenced in its entirety, that is, the respondent's representative would ask all of its questions afresh, as if no cross examination had already taken place. The parties' representatives agreed a proposal that following the completion of cross examination, the parties' representatives would be able to, should they wish, make representations about the contents of all the claimant's oral evidence. Mr Algazy QC also proposed that he would submit his draft questions to Ms Smith. It was confirmed that at the hearing Mr Algazy QC would be entitled to ask follow-up questions but would be required to consult the Intermediary in settling these.

12. At that time, Mr Algazy QC also confirmed that he was confident he would be able to complete his cross examination within the further allotted hearing days and if necessary a further separate submissions hearing could be convened.

13. A case management preliminary hearing was held on 21 October 2020. At that short hearing, Mr Algazy QC alerted the tribunal to difficulties he had in attending an in person hearing and pursued an application for a hybrid

hearing to take place. That application was considered and was not acceded to for the detailed reasons set out in the relevant Records of Proceedings, in light of the overriding objective and the principles set out in **Galo.**

14. At a case management preliminary hearing held on 11 November 2020, the parties agreed that the hearing would proceed as an in person hearing on 17 and 18 November 2020. Ms Smith confirmed that she had discussed the questions with Mr Algazy QC by video conference and that the cross examination was ready to proceed.

15. In his closing submission, Mr Algazy QC characterised the steps taken by the tribunal as *"extra-ordinary",* whilst noting that they had been taken with the full co-operation of the respondent. The tribunal would characterise the steps taken by it as *necessary* in light of the reports which were placed before it, in light of the agreed position of the representatives as rehearsed in paragraphs 36 to 44 above, in light of the overriding objective and the principles set forth in **Galo.**

9. RECONVENED HEARING

9.1. The reconvened hearing took place on 17 and 18 November 2020.

9.2. The tribunal wishes to place on record its gratitude to the parties' representatives for their co-operation in advance of and during the reconvened hearing. The tribunal also wishes to place on record its gratitude to Ms Smith and Mr Algazy QC for their work in advance of the hearing to ensure that the questions prepared for cross examination were appropriate. During the course of the reconvened hearing, Ms Smith alerted the tribunal when she had concerns. The tribunal is grateful for her efforts in rephrasing questions, to ensure the claimant had properly understood the questions that had been posed to him and rephrasing the content of documents, to ensure that the claimant understood the lengthy sections of text that he was referred to.

9.3. During the reconvened hearing, the tribunal also intermittently checked the claimant's understanding of questions that had been posed, sought assurance that the claimant was looking at the appropriate page of the bundle and took account of the need for the hearing to proceed at a slower pace. The claimant was afforded regular breaks during his cross examination.

9.4. Whilst the tribunal recognises the considerable burden which fell to Mr Algazy QC in adhering to the recommendations of the reports as adopted at the ground rules hearings, and has no doubt of the efforts that he had clearly made to discharge the obligations placed upon him by **Galo** and the Equal Treatment Bench Book, it notes that on a number of occasions lengthy sections of text were read to the claimant, that required to be broken down. The questions that were posed to the claimant were sometimes lengthy and used complex language and negative elements, and sometimes included more than four pieces of information (contrary to the recommended limitation contained in the report of the Intermediary). On occasions when this occurred, the tribunal intervened, either of its own motion or on being alerted by the Intermediary, as was consistent with the principles in **Galo** and the overriding objective. As observed in Chapter 2, of the Equal Treatment Bench Book at paragraph 126:

> *"Witnesses must be able to understand the questions and enabled to give answers they believed to be correct. If the witness does not understand the question, the answer will not further the overriding objective. The manner, tenor, tone, language and duration of questioning should be appropriate to the witness's developmental age and communication abilities."*

The tribunal rose to facilitate discussion between Mr Algazy QC and the Intermediary, so that Mr Algazy QC could fairly and appropriately pose his question having regard to the contents of the reports and the agreed ground rules. On occasion, the tribunal afforded latitude to Mr Algazy QC, in the interests of allowing him to put his client's case without unnecessary interruption. Mr Algazy QC was able to complete his cross examination in a robust manner, within the time allocated.

5. During the restarted cross examination, Mr Algazy QC asked the claimant why he had given a different answer to a question when it was posed at the earlier hearing in October 2019. The claimant stated that he'd been made to read paragraphs from the bundle and then referred to another page. He stated that he was all over the place. He stated that was why he didn't understand and had agreed with what was put to him. He explained that when he was asked to read and then go to a different page he couldn't remember what he had read.

6. At the close of the first day of the reconvened hearing, Ms McIlveen objected to the questions that were being posed on behalf of the respondent on the basis of relevance to the issues before the tribunal. Mr Algazy QC accepted that these questions were not directly germane to the unfair dismissal case but insisted on his right to cross-examine on this material, whilst it remained part of the claimant's case. The tribunal rose to afford the representatives the

opportunity to discuss this issue further and to agree a way forward in accordance with the overriding objective. Following these discussions, Ms McIlveen confirmed that the claimant was not relying on the following matters which were included in the claimant's witness statement:

i) the date EM started;

ii) the condition of the sheep when the claimant started;

iii) the hours that the claimant worked on the farm;

iv) the claimant's role in selling sheep;

v) the claimant's relationship with SW; and

vi) the claimant's relationship with EM.

In light of this confirmation by Ms McIlveen, the tribunal has not considered these matters as forming part of the claimant's case.

7. Following this confirmation, Mr Algazy QC confirmed that he would not pursue cross examination on these points. The cross examination of the claimant completed by 11:20 on the second day.

8. Mr Algazy QC informed the tribunal that he would not be in a position to prepare closing oral submissions at the conclusion of the evidence. Accordingly, by agreement, the parties were ordered to exchange written submissions and lodge them with the tribunal by 27 November 2020.

10. CLOSING SUBMISSIONS

1. The parties provided written submissions for consideration by the tribunal. Ms McIlveen had included a closing submission on the evidence in an additional trial bundle lodged with the tribunal office in advance of the reconvened hearing. This was not considered by the tribunal until the evidence had concluded and all the submissions were received. Ms McIlveen also provided a further closing submission on 27 November 2020. Mr Algazy QC provided a closing submission on the evidence and the law on 27 November 2020.

2. The parties were offered the opportunity to provide replying submissions. Ms McIlveen declined the opportunity to provide a replying submission on 30 November 2020. Mr Algazy QC provided a replying submission on 1 December 2020. The parties' submissions and replying submission were considered by the tribunal. The tribunal is grateful to the parties' for those helpful written closing submissions.

3. The submission on behalf of the claimant was to the effect that the respondent had blown the claimant's actions out of all proportion, that the disciplinary process which was instigated did not make it clear what the claimant was accused of, that the claimant's conduct did not amount to gross misconduct and at most warranted a final written warning, that dismissal was not within the band of reasonable responses open to the respondent and that no alternative sanction was considered. The submission was that the respondent had acted unreasonably throughout the process, that the dismissal was unfair and that the tribunal should uplift the compensation (by 50%) beyond that which was sought in the Schedule of Loss, as it was contended that the statutory dismissal procedure had not been followed.

4. The submission on behalf of the respondent invited the tribunal, in light of the respondent's full submission, to find the dismissal was fair. The respondent's submission included the contention that "after a full and thorough investigation, the respondent formed a belief in the guilt of the claimant in respect of his actions on 26 July 2018", that the dismissal was for a lawful reason, namely conduct and that the "facts also sustain a dismissal for an additional or alternative reason, namely "some other substantial reason" within the meaning of Article 130 (1)." In the event that the tribunal found the dismissal unfair, in the respondent's submission, the tribunal ought to find that the claimant's conduct was such that he was the author of his own misfortune and that any award should be reduced to nil, on the application of Article 156(2) and 157(6) of the 1996 Order.

5. In its replying submission, the respondent, after reviewing the relevant legal authorities invited the tribunal to reject the claim that the statutory dismissal procedures had not been complied with.

6. In its closing submission, the respondent stated that, in the context of contentions about credibility and reliability, the claimant was "a poor historian and that his recollection of the material events is shaky" and suggested that his claim had changed and mutated over time.

7. The tribunal is aware of matters in which the claimant has been a poor historian. For example, in his witness statement at paragraph 38 and following his evidence was that he was suspended on 10 August 2018. In light of the documentary and other evidence, this was clearly incorrect. However, in the

unique and particular circumstances of this case, the tribunal has not equated this with a lack of credibility on the claimant's part.

11. RELEVANT LAW

11.1. EMPLOYMENT RIGHTS (NI) ORDER 1996 - PART XI UNFAIR DISMISSAL

CHAPTER I RIGHT NOT TO BE UNFAIRLY DISMISSED

The right

126.—(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Paragraph (1) has effect subject to the following provisions of this Part (in particular Articles 140 to 144).

…

Fairness

General

130.—(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

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

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

…

(c) relates to the conduct of the employee,

…

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

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

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

(6) Paragraph (4) is subject to Articles 130A to 139

…]

2. Burden of Proof

It is for the employer to show the reason for the dismissal. The question of whether the employer acted reasonably is "neutral" and is for the tribunal to decide (**Boys and Girls Welfare Society v McDonald [1996] IRLR 129**). As noted by Harvey on Industrial Relations and Employment Law at Division DI Unfair Dismissal, section 7. Reasonableness: General Principles, subsection A. Introduction paragraph 951:

> *"Apart from those cases where a dismissal is automatically fair or automatically unfair, establishing a prima facie fair reason for dismissal, i.e. one which is capable of rendering the dismissal fair, is only the first stage in defending an unfair dismissal claim. In addition, under ERA 1996 s 98(4)* (the equivalent to art. 130(4)) *the tribunal must be satisfied that the employer has acted reasonably in all the circumstances in treating that reason as sufficient. Whereas the onus is on the employer to establish that there is a fair reason, the onus in this second stage is cast in ostensibly neutral terms. Accordingly the tribunal must make up its mind whether s 98(4) is satisfied in the light of all the information before it."*

3. The Law on Misconduct Dismissals

The parties' representatives made reference to the following authorities in their submissions, which were considered by the tribunal:

Ms McIlveen BL:

Brian Jenkins v Larchwood Care (NI) Limited NIIT 7749/19 (a first instance tribunal decision)

Connolly v Western Health & Social Care Trust [NICA] 2017 (the minority decision of Gillen LJ)

Mr Algazy QC:

Venniri v Autodex Ltd UKEAT/0436/07
Rogan v South Eastern Health and Social Care Trust [2009] NICA 47
Rice v Dignity Funerals [2018] NICA 41
Taylor v OCS Group Limited [2006] IRLR 613 EWCA
Abernethy v Mott, Hay and Anderson [1974] ICR 323 EWCA
Trust House Forte Leisure Ltd. V Aquilar [1976] IRLR 251 EAT
W Devis and Sons Ltd v Atkins [1977] ICR 662 HL
Burdett v Aviva Employment Services UKEAT/0439/13/JOJ
Ardron v Sussex Partnership NHS Foundation Trust [2019] IRLR 233
Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23
Ulsterbus v Henderson [1989] IRLR 251
Chubb and Fire security Ltd v Harper [1983] IRLR 311
London Ambulance Service NHS Trust v Small [2009] IRLR 563
Connolly v Western Health and Social Care Trust [2017] NICA
Doherty v Castle Hotel NI Ltd NIIT 1093/13
Software 2000 Ltd v Andrews [2007] UKEAT/0533/06/DM
Laws v London Chronicle (Indicator Newspapers Ltd) [1959] 2 All ER 287
Adesokan v Sainsbury's Supermarkets Ltd [2017] EWCA Civ 22
Neary v Dean of Westminster [1999] IRLR 288
Lewis v McWhinney's Sausages Ltd [2013] NICA 47
Alexander and another v Bridgen Enterprises Ltd [2006] ICR 1277
Draper v Mears Ltd [2006] IRLR 869

4. The Court of Appeal in **Rogan v South Eastern Health & Social Care Trust [2009] NICA 47** approved the earlier decision of Court in **Dobbin v Citybus Ltd [2008] NICA 42** where the Court held:-

> *"(49) The correct approach to [equivalent GB legislation] was settled in two principal cases – **British Home Stores v Burchell [1980] ICR 303** and **Iceland Frozen Foods Ltd v Jones [1983] ICR 17** and explained and refined, principally in the judgements of Mummery LJ, in two further cases **Foley v Post Office** and **HSBC Bank PLC (formerly Midland Bank) –v- Madden reported at [2000] ICR 1283** (two appeals heard together) and **J Sainsbury v Hitt [2003] ICR 111**.*

(50) *In **Iceland Frozen Foods**, Browne-Wilkinson J offered the following guidance:-*

"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by [equivalent GB legislation] is as follows:-

(1) the starting point should always be the words of [equivalent GB legislation] themselves;

(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another;

(5) the function of an industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case, 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. "

(51) *To that may be added the remarks of Arnold J in **British Home Stores** where in the context of a misconduct case he stated:-*

"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that

time. That is really stating shortly and compendiously what is in fact more than one element. First of all, it must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the Tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the Tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure", as it is now said more normally in a criminal context, or, to use the more old fashioned term such as to put the matter beyond reasonable doubt. The test, and the test all the way through is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion." (Tribunal's emphasis.)

5. In **Rogan** the Tribunal was found to have substituted its view of the evidence for that of the employer, the error referred to at paragraph 50 sub paragraph (3) of the **Iceland Frozen Foods** decision above.

6. In **Taylor v OCS Group Limited [2006] IRLR 613 EWCA** at paragraph 47 the Court observed:

> ***"…****This error is avoided if employment tribunals realise that their task is to apply the statutory test. In doing that, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.*

48 In saying this, it may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that section 98(4) of the Employment Rights Act 1996 requires the employment tribunal to approach its task broadly as an industrial jury. That means that it should consider the procedural issues together with the reason for the dismissal, as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss. So, for example, where the misconduct which founds the reason for the dismissal is serious, an employment tribunal might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the employment tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee. The dicta of Donaldson LJ in ***Union of Construction, Allied Trades and Technicians v Brain [1981] ICR 542, 550****, are worth repetition:*

> *"Whether someone acted reasonably is always a pure question of fact … where Parliament has directed a tribunal to have regard to equity-and that, of course, means common fairness and not a particular branch of the law-and to the substantial merits of the case, the tribunal's duty is really very plain. It has to look at the question in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane."* (Tribunal's emphasis.)

7. In **Abernethy v Mott, Hay and Anderson [1974] IRLR 213** at 215, [1974] ICR 323 at 330, Cairns LJ offered the classic definition:

> *'A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.'*

8. **Trust House Forte Leisure Ltd v Aquilar [1976] IRLR 251 EAT**, at paragraph 18 of the decision states:

> *"The employer's description of the reason for the dismissal is by no means conclusive. The Tribunal, if the case comes to the Tribunal, must look into the matter and determine what was the reason. But that reason, whatever it is, is something which exists at the moment of*

dismissal. Matters which happen subsequently are irrelevant to the ascertainment of what was the reason. They may throw a good deal of light upon whether the employer came to a fair decision in dismissing an employee for that reason, but they cannot in our judgment affect the identity of the reason." (Tribunal's emphasis.)

9. In **W Devis and Sons Ltd v Atkins [1977] ICR 662 HL** the House of Lords held that the determination of the question whether the dismissal was unfair 'having regard to the reason shown by the employer' depended on whether in the circumstances the employer had acted 'reasonably in treating it as a sufficient reason for dismissing the employee'. Lord Diplock observed:

> *"'It' must refer to the reason shown by the employer and to the reason for which the employee was dismissed. Without doing very great violence to the language I cannot construe this paragraph as enabling the Tribunal to have regard to matters of which the employer was unaware at the time of dismissal and which therefore cannot have formed part of his reason or reasons for dismissing an employee."* (Tribunal's emphasis.)

10. In **Burdett v Aviva Employment Services UKEAT/0439/13/JOJ** Judge Eady QC reviewed the concept of gross misconduct in the context of unfair dismissal.

> ***"[29]*** *What is meant by "gross misconduct" – a concept in some ways more important in the context of a wrongful dismissal claim – has been considered in a number of cases. Most recently, the Supreme Court in* ***Chhabra v West London Mental Health NHS Trust [2013] UKSC 80, [2014] 1 All ER 943, [2014] ICR 194*** *reiterated that it should be conduct which would involve a repudiatory breach of contract (that is, conduct undermining the trust and confidence which is inherent in the particular contract of employment such that the employer should no longer be required to retain the employee in his employment, see* ***Wilson v Racher [1974] IRLR 114, [1974] ICR 428, 16 KIR 212, CA*** *and* ***Neary v Dean of Westminster [1999] IRLR 288****, approved by the Court of Appeal in* ***Dunn v AAH Ltd [1974] ICR 428, [1974] IRLR 114, 16 KIR 212, CA****). In* ***Chhabra****, it was found that the conduct would need to be so serious as to potentially make any further relationship and trust between the employer and employee impossible. It is common ground before me that the conduct in issue would need to amount to either deliberate wrongdoing or gross negligence (see* ***Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09/LA****).*
>
> ***[30]*** *The characterisation of an act as "gross misconduct" is thus not simply a matter of choice for the employer. Without falling into the substitution mindset warned against by Mummery LJ in* ***London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220, [2009] IRLR 563****, it will be for the Employment Tribunal to assess*

whether the conduct in question was such as to be capable of amounting to gross misconduct (see ***Eastland Homes Partnership Ltd v Cunningham UKEAT/0272/13/MC*** *per HHJ Hand QC at para 37). Failure to do so can give rise to an error of law: the Employment Tribunal will have failed to determine whether it was within the range of reasonable responses to treat the conduct as sufficient reason for dismissing the employee summarily.*

[31] *The reason for a dismissal will be determined subjectively: what was in the mind of the employer at the time the decision was taken. Whether the dismissal for that reason was fair, however, imports a degree of objectivity, albeit to be tested against the standard of the reasonable employer and allowing that there is a margin of appreciation – a range of reasonable responses – rather than any absolute standard. So if an employer dismisses for a reason characterised as gross misconduct, the Employment Tribunal will need to determine whether there were reasonable grounds for the belief that the employee was indeed guilty of the conduct in question and that such conduct was capable of amounting to gross misconduct (implying an element of culpability on the part of the employee). Assuming reasonable grounds for the belief that the employee committed the act in issue, the tribunal will thus still need to consider whether there were reasonable grounds for concluding that she had done so wilfully or in a grossly negligent way.*

[32] *Even if the Employment Tribunal has concluded that the employer was entitled to regard an employee as having committed an act of gross misconduct (i.e. a reasonable investigation having been carried out, there were reasonable grounds for that belief), that will not be determinative of the question of fairness. The tribunal will still need to consider whether it was within the range of reasonable responses to dismiss that employee for that conduct. The answer in most cases might be that it was, but that cannot simply be assumed. The tribunal's task in this regard was considered by a different division of this court (Langstaff P presiding) in* ***Brito-Babapulle v Ealing NHS Trust UKEAT0358121406****, as follows:*

"38 The logical jump from gross misconduct to the proposition that dismissal must then inevitably fall within the range of reasonable responses gives no room for considering whether, though the misconduct is gross and dismissal almost inevitable, mitigating factors may be such that dismissal is not reasonable. [. . .]

39 [. . .] What is set out at paragraph 13 ['Once gross misconduct is found, dismissal must always fall within the range of reasonable responses . . .'] is set out as a stark proposition of law. It is an argument of cause and consequence which admits of no exception. It rather suggests that gross misconduct, often a contractual test, is determinative of the question whether a dismissal is unfair, which is not

a contractual test but is dependent upon the separate consideration which is called for under s 98 of the Employment Rights Act 1996.

40 It is not sufficient to point to the fact that the employer considered the mitigation and rejected it [. . .], because a tribunal cannot abdicate its function to that of the employer. It is the tribunal's task to assess whether the employer's behaviour is reasonable or unreasonable having regard to the reason for dismissal. It is the whole of the circumstances that it must consider with regard to equity and the substantial merits of the case. But this general assessment necessarily includes a consideration of those matters that might mitigate. [. . .]"

And at paragraph 66:

"…His admission that he had carried out the assaults was not an admission that he had thereby wilfully misconducted himself. On the unusual facts of this case, the ET needed to do more than simply consider whether there were reasonable grounds for concluding that the Claimant had performed the act in question; it also had to ask whether there were reasonable grounds for concluding that he had done so wilfully or in a grossly negligent way." (Emphasis added.)

11. **Ardron v Sussex Partnership NHS Foundation Trust [2019] IRLR 233** was a case which involved failings by a Psychiatrist over a period of 12 weeks in relation to a vulnerable young man who had previously attempted suicide. The Court summarised the relevant legal principles, including, at paragraph 78, that

"(9) The concept of 'gross misconduct' in the employment law context connotes misconduct which justifies summary dismissal, and which therefore amounts to a repudiatory breach of contract. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Gross misconduct may include, but is not limited to, dishonesty or intentional wrongdoing, for example: conduct which is seriously inconsistent with the employee's duties to his employer; or conduct which is of such a grave and weighty character as to amount to a breach of the confidential relationship between employer and employee, such as would render the employee unfit for continuance in the employer's employment, and give the employer the right to discharge him. The focus is on the damage to the relationship between the parties. Dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category, but so in an appropriate case can an act of gross negligence. See ***Adesokan v Sainsbury's Supermarkets Ltd [2017] EWCA Civ 22, [2017] IRLR 346*** *paras [21]–[23] (Elias LJ). Very considerable negligence, historically summarised as 'gross negligence' is therefore required for a finding of gross misconduct:* ***Sandwell & Birmingham Hospitals NHS Trust v Westwood (2009) UKEAT/0032/09 at [112]–[113]****.* (Tribunal's emphasis.)

The court concluded:

> *"It also seems to me that the Trust has a sufficient case in relation to breach of the implied term identified in **Mahmud v Bank of Credit and Commerce International SA [1997] IRLR 462, 468**, for the same reasons that there is a sufficient case in relation to 'gross negligence'. Indeed, the case in both respects is essentially the same; namely that the acts amounting to gross negligence meant that Dr Ardron was acting in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between her and the Trust."*

12. **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23** established that the range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason.

13. An employer is not expected to conduct a quasi-judicial investigation into allegations of misconduct. Nonetheless any investigation of the material facts must be carefully conducted and must be conscientious in character. (**Ulsterbus v Henderson [1989] IRLR 251**).

14. **Chubb and Fire Security Ltd v Harper [1983] IRLR 311** related to a dismissal of an employee after being asked to enter into new contractual terms following a business reorganisation. The EAT held that

> *"the Industrial Tribunal made no finding as to the advantages to **Chubb** of the proposed re-organisation and whether it was reasonable for them to implement the re-organisation by terminating existing contracts and offering employees new ones – see **Hollister v NFU [1979] IRLR 238 CA**. In the absence of such a finding the Industrial Tribunal failed to ask themselves the appropriate question which was: Was Chubb acting reasonably in dismissing Mr Harper for his refusal to enter into the new contract? In answering that question the Industrial Tribunal should have considered whether **Chubb** was acting reasonably in deciding that the advantages to them of implementing the proposed re-organisation outweighed any disadvantage which they should have contemplated Mr Harper might suffer."*

15. In **London Ambulance Service NHS Trust v Small [2009] IRLR 563** the Court of Appeal in England and Wales warned tribunals against adopting the substitution mindset where a claimant has gained the sympathy of the tribunal so that it is distracted from the question of whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal. Mummery LJ stated:

> *"It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the*

ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

16. In **Rice v Dignity Funerals [2018] NICA 41** the Northern Ireland Court of Appeal endorsed the summary of the legal principles relating to Article 130 of the 1996 Order set out in the minority judgment of Gillen LJ in **Connolly v Western Health and Social Care Trust [2017] NICA 61**. These are as follows:

"[28] …

(i) The starting point is the words of Article 130(4) of the 1996 Order.

(ii) The Tribunal has to decide whether the employer who discharged the employee on grounds of misconduct entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct.

(iii) Therefore there must in the first place be established a belief on the part of the employer.

(iv) The employer must show that he or she had reasonable grounds for so believing.

(v) The employer, at the stage he/she formed the belief, must have carried out as much investigation into the matter as was reasonable. It is important that an employer takes seriously the responsibility to conduct a fair investigation.

(vi) The Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider that the dismissal to be fair.

(vii) In judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(viii) In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another, quite reasonably, take another.

(ix) *The function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case 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.*

(x) *A Tribunal however must ensure that it does not require such a high degree of unreasonableness to be shown that nothing short of a perverse decision to dismiss can be held to be unfair within the relevant legislation.*

(xi) *Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee. The disobedience must at least have the quality that it is wilful. It connotes a deliberate flouting of the essential contractual conditions.*

(xii) *More will be expected of a reasonable employer where the allegations of misconduct and the consequences to the employee if they are proven are particularly serious.*

(xiii) *In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the employer's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses that an employer could reasonably make in the circumstances. The fact that other employers might reasonably have been more lenient is irrelevant (see the decision of the Court of Appeal in* ***British Leyland (UK) Ltd v Swift [1981] IRLR 91****,* ***Gair v Bevan Harris Limited [1983] IRLR 368*** *and Harvey on Industrial Relations and Employment Law at [975].*

(xiv) *The conduct must be capable of amounting to gross misconduct.*

(xv) *The employer must have a reasonable belief that the employee has committed such misconduct.*

(xvi) *The character of the misconduct should not be determined solely by the employer's own analysis subject only to reasonableness. What is gross misconduct is a mixed question of law and fact. That will be so when the question falls to be considered in the context of the reasonableness of the sanction."* (Tribunal's emphasis.)

17. In **Connolly v Western Health and Social Care Trust [2017] NICA 61** Deeney LJ, giving the majority decision reviewed the existing authorities and cited with approval the reasoning in **Sandwell & West Birmingham Hospitals NHS Trust v Mrs A Westwood [2009] UKEAT/0032/09/LA** stating:

> *"[14] The decision in Iceland was followed by this court in* ***Dobbin v Citybus Ltd [2008] NICA 42*** *and* ***Rogan v South Eastern Health &***

Social Care Trust [2009] NICA 47. *Those courts also cited with approval passages from the judgment of Arnold J in* ***British Homes Store v Burchell [1980] ICR 303***. *Since then there has been a decision of the Employment Appeals Tribunal in* ***Sandwell & West Birmingham Hospitals NHS Trust v Mrs A Westwood [2009] UKEAT/0032/09/LA****:*

"109 We do not accept that submission. It is not clear to us what the breach of Trust policy actually was. The conduct complained of was taking the patient outside. Assuming that is a breach of Trust policy, it still remains to be asked – how serious a breach is that? Is it so serious that it amounts to gross misconduct? In our judgment that is not a question always confined simply to the reasonableness of the employer's belief. We think two things need to be distinguished. Firstly the conduct alleged must be capable of amounting to gross misconduct. Secondly the employer must have a reasonable belief that the employee has committed such misconduct. In many cases the first will not arise. For example, many misconduct cases involve the theft of goods or money. That gives rise to no issue so far as the character of the misconduct is concerned. Stealing is gross misconduct. What is usually in issue in such cases is the reasonableness of the belief that the employee has committed the theft.

110 In this case it is the other way round. There is no dispute as to the commission of the act alleged to constitute misconduct. What is at issue is the character of the act. The character of the misconduct should not be determined solely by, or confined to, the employer's own analysis, subject only to reasonableness. In our judgment the question as to what is gross misconduct must be a mixed question of law and fact and that will be so when the question falls to be considered in the context of the reasonableness of the sanction in unfair dismissal or in the context of breach of contract. What then is the direction as to law that the employer should give itself and the employment tribunal apply when considering the employer's decision making?

111 Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee: see ***Wilson v Racher [1974] ICR 428, CA*** *per Edmund Davies LJ at page 432 (citing* ***Harman LJ in Pepper v Webb [1969] 1 WLR 514*** *at 517):*

`Now what will justify an instant dismissal? - <u>something</u> done by the employee <u>which impliedly or expressly is a repudiation of the fundamental terms of the contract</u>`

and at page 433 where he cites Russell LJ in ***Pepper*** *(page 518) that the conduct*

`must be taken as conduct repudiatory of the contract justifying summary dismissal.'

In the disobedience case of ***Laws v London Chronicle (indicator Newspapers) Ltd [1959] 1 WLR 698*** *at page 710 Evershed MR said:*

`the disobedience must at least have the quality that it is <u>'wilful'</u>: it does (in other words) connote <u>a deliberate flouting of the essential contractual conditions.'</u>

So the conduct must be a deliberate and wilful contradiction of the contractual terms."

[15] That decision, with which I agree, is relevant in the case before us in several respects. It was expressly cited by the Tribunal which rightly acknowledged that this was a mixed question of fact and law.

18. At paragraph 16 of the judgment Deeney LJ cited the dictum of Evershed MR in the decision of ***Laws v London Chronicle Limited [1959] 2 ALL ER 285*** and described it as of strongly persuasive authority in the Northern Ireland Court of Appeal:

"[16] ….. I think that it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal <u>only if</u> it is of a nature which goes to show (in effect) that the servant is <u>repudiating the contract</u>,

or one of its essential conditions; and for that reason, therefore, I think that one finds in the passages which I have read that the disobedience must at least have the quality that it is <u>`wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions.</u> (Emphasis added.)"

…

19. The majority in **Connolly** also deliberated on consideration of lesser sanctions.

[22] At paragraph 59 [of the tribunal's judgment] *one finds this.*

> *"It is not for a tribunal in then determining whether or not dismissal was a fair sanction to ask whether a lesser sanction would have been reasonable, the question being whether or not dismissal was fair."*
>
> *I express a degree of caution with that statement. The decision is whether or not a reasonable employer in the circumstances could dismiss bearing in mind 'equity and the substantial merits of the case'. I do not see how one can properly consider the equity and fairness of the decision without considering whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct. How does one test the reasonableness or otherwise of the employer's decision to dismiss without comparing that decision with the alternative decisions? In the context of dismissal the alternative is non dismissal i.e. some lesser sanction such as a final written warning."*
>
> *…*
>
> *[36] It appears to me that, even taking into account the delay, for which an explanation was given which was not rejected as a finding of fact, that could not constitute "deliberate and wilful conduct" justifying summary dismissal. Her Terms of Employment do not seem to have expressly prohibited such a use. The Code of Conduct is ambiguous at best on the topic. If she had asked the Ward Sister for permission before she used the inhaler and the Sister had refused her permission and she had nevertheless gone ahead and used it one might have had the sort of act of disobedience contemplated by the Court of Appeal in* ***Laws v London Chronicle Limited****, op cit. That would have been a deliberate flouting of essential contractual conditions i.e. following the instructions of her clinical superiors. But that is not what happened here. Furthermore, I agree with the statements in Harvey on Industrial Relations and Employment Laws [1550]-[1566] that dismissals for a single first offence must require the offence to be particularly serious. Given the whole list of matters which the employer included under the heading of Gross Misconduct it is impossible, in my view, to regard the nurse's actions as "particularly serious".*

[37] The Tribunal cannot have been mindful of the statement of Edmund Davies LJ, as he then was, in ***Wilson v Racher [1974] ICR 428, CA*** *at page 432, citing* ***Harmon LJ in Pepper v Webb [1969] 1 WLR 514 at 517****:*

> *"Now what will justify an instant dismissal? — something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract."*

[38] For this court to approbate the Tribunal's decision upholding as within a reasonable range of responses the summary dismissal of an employee from her chosen profession on these facts without any prior warning as a "repudiation of the fundamental terms of the contract" would be to turn language on its head." (Tribunal's emphasis.)

20. In **Neary v Dean of Westminster [1999] IRLR 288** at paragraph 22 Lord Jauncey observed:

> *"What degree of misconduct justifies summary dismissal? I have already referred to the statement by Lord James of Hereford in* ***Clouston & Co Ltd v Corry****. That case was applied in* ***Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 WLR 698****, where Lord Evershed MR, at p.700, said: 'It follows that the question must be – if summary dismissal is claimed to be justified – whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.' In* ***Sinclair v Neighbour****, Sellers LJ, at p.287F, said: 'The whole question is whether that conduct was of such a type that it was inconsistent, in a grave way – incompatible – with the employment in which he had been engaged as a manager.' Sachs LJ referred to the 'well established law that a servant can be instantly dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his master but is also inconsistent with the continuance of confidence between them'. In* ***Lewis v Motorworld Garages Ltd [1985] IRLR 465****, Glidewell LJ, at 469, 38, stated the question as whether the conduct of the employer 'constituted a breach of the implied obligation of trust and confidence of sufficient gravity to justify the employee in leaving his employment ... and claiming that he had been dismissed.' This test could equally be applied to a breach by an employee. There are no doubt many other cases which could be cited on the matter, but the above four cases demonstrate clearly that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no*

longer be required to retain the servant in his employment." (Tribunal's emphasis.)

21. In **Adesokan v Sainsbury's Supermarkets Ltd [2017] EWCA Civ 22** the Court of Appeal in England and Wales held that in deciding whether misconduct can properly be described as "gross", the focus is on the damage to the relationship between the parties. Dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category, but so in an appropriate case can an act of gross negligence. Elias LJ observed at paragraph 24:

> "*The determination of the question whether the misconduct falls within the category of gross misconduct warranting summary dismissal involves an evaluation of the primary facts and an exercise of judgment. The primary facts in this case are not in dispute. It is now well established that where that is the case, when determining whether the judge was wrong in reaching his decision, this court ought not to interfere unless satisfied that the decision of the judge lies outside the bounds on which reasonable disagreement is possible: see* ***Assicurazioni Generali SpA v Arab Insurance Group*** **[2003] 1 WLR 577** *per Clarke LJ paragraphs 16–17*; ***Datec Electronics Holdings Ltd v United Parcels Services Ltd*** **[2007]** ***1 WLR 1325*** *per Lord Mance pp.1347–1349*; *and R (on the application of* ***Sky Blue Sports and Leisure Ltd) v Coventry City Council [2016] EWCA Civ 453, [2016] All ER (D) 120 (May)****, paragraph 12 per Tomlinson LJ. It is not a question of this court simply asking whether it would have held the misconduct to be gross. Having said that, in my judgment the parameters available to a judge in a case of this kind are limited; it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or undermine the employer's policies constitutes such a grave act of misconduct as to justify summary dismissal."* (Tribunal's emphasis.)

In that particular case, the critical feature justifying the conclusion that the claimant was guilty of gross misconduct was, that as regional manager, he was responsible for ensuring the successful implementation of the Talkback Procedure in his region. Once it became known to him that the integrity of the process was being undermined or at least was at risk of being undermined, it was his duty to ensure that this was remedied.

12. AUTOMATIC UNFAIR DISMISSAL – THE PROVISIONS OF THE DISMISSAL AND DISCIPLINARY PROCEDURES

1. STANDARD PROCEDURE

Step 1: statement of grounds for action and invitation to meeting

1.—(1) The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him

to contemplate dismissing or taking disciplinary action against the employee.

(2) The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

Step 2: meeting

2.—(1) The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.

(2) The meeting must not take place unless—

(a) the employer has informed the employee what the basis was for including in the statement under paragraph 1(1) the ground or grounds given in it, and

(b) the employee has had a reasonable opportunity to consider his response to that information.

(3) The employee must take all reasonable steps to attend the meeting.

(4) After the meeting, the employer must inform the employee of his decision and notify him of the right to appeal against the decision if he is not satisfied with it.

Step 3: appeal

3.—(1) If the employee does wish to appeal, he must inform the employer.

(2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.

(3) The employee must take all reasonable steps to attend the meeting.

(4) The appeal meeting need not take place before the dismissal or disciplinary action takes effect.

(5) After the appeal meeting, the employer must inform the employee of his final decision.

2. The Labour Relations Agency Code of Practice on Disciplinary and Grievance Procedures states:

> *"[15] The first step in any formal process is to let the employee know in writing the nature of what they are alleged to have done wrong. The letter or note setting out the allegation can also be used to explain the*

basis for making the allegation. It is important that an employee is given sufficient information to understand the basis of the case against them."

3. In **Venniri v Autodex Ltd UKEAT/0436/07** the EAT held that tribunals were required to consider whether a dismissal was automatically unfair for breach of the statutory dismissal and disciplinary procedures, even where this allegation was not expressly pleaded.

4. In **Doherty v Castle Hotels N.I. Ltd 1093/13** Employment Judge Drennan QC held:

> *"3.10 Article 130A(2) made further changes in the law in relation to unfair dismissal and, in particular, provided in certain circumstances, the partial reversal of the principles set out in the well-known House of Lords decision in the case of* ***Polkey v AE Dayton Services Ltd [1988] ICR 344 ('Polkey')****. However, Article 130A (2) does not apply in a case where there has been a dismissal in breach of the statutory dismissal procedures, whereby the dismissal is automatically unfair under Article 130A(1). Article 130A(2) of the 1996 Order therefore is only of application where the statutory dismissal procedure has been complied with but there has been a breach of procedures, other than statutory dismissal procedures."*

5. LCJ Morgan, delivering the judgment of the Court of Appeal in ***Lewis v McWhinney's Sausages Ltd [2013] NICA 47***, in which the judgment in **Alexander v Bridgen Enterprises Ltd [2006] ICR 1277** said this**:**

> *"[23] The requirements of these provisions were considered by the EAT in* ***Alexander v Bridgen Enterprises Ltd [2006] ICR 1277****. In step 1 the employer merely had to set out in writing the grounds which led him to contemplate dismissing the employee. Under the second step the basis for the grounds was simply the matters which had led the employer to contemplate dismissing for the stated grounds. The objective is to ensure that the employee is not taken by surprise and is in a position to deal with the allegations. The letter of 20 May 2010 identified the occasion on which the alleged insubordination occurred and identified verbal abuse as the nature of the insubordination. The letter was sent 2 days after the meeting of which complaint was made so the appellant was in a good position to contradict any alleged statement or explain anything said by him. In those circumstances the letter satisfied both of these tests so that no failure to comply with the statutory procedures arose in this case. The statutory procedures do not require the employer to set out the evidence in respect of the matters in issue although it can be helpful if the employer chooses to do so."*

6. In **Alexander and another v Bridgen Enterprises Ltd [2006] ICR 1277,** Elias P laid down the following principles**:**

“33. The issue, therefore, is what information ought to be provided to an employee in order for the employer to comply with the statutory obligation. In answering that question, it seems to us that there are three matters in particular which should inform the answer, although they do not all point in the same direction.

34. First, the purpose of these statutory procedures is to seek to prevent the matter going to an employment tribunal if possible by providing the opportunity for differences to be resolved internally at an earlier stage: see the observations in ***Canary Wharf Management Ltd v Edebi [2006] ICR 719***. Hence the reason why these procedures apply at the stage when dismissals are still only proposed and before they have taken effect. However, to achieve that purpose the information to be provided must be at least sufficient to enable the employee to give a considered and informed response to the proposed decision to dismiss.

35. Second, these procedures are concerned only with establishing the basic statutory minimum standard. It is plainly not the intention of Parliament that all procedural defects should render the dismissal automatically unfair with the increased compensation that such a finding attracts. They are intended to apply to all employers, large and small, sophisticated and unsophisticated. They are not intended to impose all the requirements breach of which might, depending on the circumstances, render a dismissal unfair. This suggests that the bar for compliance with these procedures should not be set too high.

36. Third, we think that it is relevant to bear in mind that, once the statutory procedures have been complied with, employers are thereafter provided with a defence for failing to comply with fuller procedural safeguards if they can show that the dismissal would have occurred anyway even had such procedures been properly followed. This factor, in our view, militates against allowing the bar for the statutory procedures being set too low.

37. It must be emphasised that the statutory dismissal procedures are not concerned with the reasonableness of the employer's grounds, nor the basis of those grounds, in themselves. It may be that the basis for a dismissal is quite misconceived or unjustified, or that the employer has adopted inappropriate or vague criteria, or acted unreasonably in insisting on dismissing in the light of the employee's response. These are of course highly relevant to whether the dismissal is unfair, but it is irrelevant to the issue whether the statutory procedures have been complied with. The duty on the employer is to provide the ground for dismissal and the reasons why he is relying on that ground. At this stage, the focus is on what he is proposing to do and why he proposing to do it, rather than how reasonable it is for him to be doing it at all.

38. Taking these considerations into account, in our view, the proper analysis of the employer's obligation is as follows. At the first step the employer merely has to set out in writing the grounds which lead him to contemplate dismissing the employee, together with an invitation to attend a meeting. At that stage, in our view, the statement need do no more than state the issue in broad terms. We agree with Mr Barnett that at step 1 the employee simply needs to be told that he is at risk of dismissal and why. In a conduct case this will be identifying the nature of the misconduct in issue, such as fighting, insubordination or dishonesty. In other cases it may require no more than specifying, for example, that it is lack of capability or redundancy. That is consistent, we think, with the approach which this appeal tribunal has adopted in relation to grievance procedures in ***Canary Wharf [2006] ICR 719*** and other cases. Of course, most employers will say more than this brief statement of grounds, but compliance with the statutory minimum procedure is in our view met by a limited written statement of that nature.

39. It is at the second step that the employer must inform the employee of the basis for the ground or grounds given in the statement. This information need not be reduced into writing; it can be given orally. The basis for the grounds are simply the matters which have led the employer to contemplate dismissing for the stated ground or grounds. In the classic case of alleged misconduct this will mean putting the case against the employee; the detailed evidence need not be provided for compliance with this procedure, but the employee must be given sufficient detail of the case against him to enable him properly to put his side of the story. The fundamental elements of fairness must be met." (Tribunal's emphasis.)

13. Contributory Conduct

13.1. Employment Rights (Northern Ireland) order 1996

Basic award: reductions

156. …

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) 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.

…

Compensatory award

157. …

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

13.2. Although the specific authorities on contributory conduct were not referred to in the submissions to the tribunal, these are well known and would be familiar to employment law practitioners. In ***G McFall & Co Ltd v Curran [1981] IRLR 455*** the Northern Ireland Court of Appeal held that the reduction in the two awards must be treated consistently.

13.3. In ***Maris v Rotherham Corpn [1974] 2 All ER 776, [1974] IRLR 147*** Sir Hugh Griffiths made comments, in the context of a predecessor to the present provision, which apply equally to Article 156(2) of the 1996 Order.

> *"[The section] brings into consideration all the circumstances surrounding the dismissal, requiring the tribunal to take a broad commonsense view of the situation and to decide what, if any, part the [claimant's] own conduct played in contributing to his dismissal and then in the light of that finding decide what, if any, reduction should be made in the assessment of this loss".*

13.4. In ***Nelson v BBC (No.2) [1979] IRLR 346*** the Court of Appeal in England and Wales held that in determining whether to make a reduction for contributory conduct, an Industrial Tribunal must make three findings. Firstly, there must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy. It could never be just or equitable to reduce an award of compensation unless the conduct on the claimant's part relied upon as contributory was culpable or blameworthy. Brandon LJ held:

> *"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved'."*

Secondly, there must be a finding that the matters to which the complaint relates were caused or contributed to some extent by action that was culpable or blameworthy. In this context, the expression "matters to which the complaint relates" means the unfair dismissal itself and the word "action"

comprehends not only behaviour or conduct which consists of doing something but also behaviour or conduct which consists of doing nothing or in declining or being unwilling to do something. Thirdly, there must be a finding that it is just and equitable to reduce the assessment of the complainant's loss to a specified extent.

13.5. In ***Gibson v British Transport Docks Board [1982] IRLR 228*** BrowneWilkinson J put it clearly and succinctly as follows:

> *"What has to be shown is that the conduct of the [claimant] contributed to the dismissal. If the applicant has been guilty of improper conduct which gave rise to a situation in which he was dismissed and that conduct was blameworthy, then it is open to the tribunal to find that the conduct contributed to the dismissal. That is how the section has been uniformly applied".*

13.6. **Harvey** at paragraph 2724.01, citing ***Bell v The Governing Body of Grampian Primary School UKEAT/0142/07, [2007] All ER (D) 148*** notes:

> ***"****The contributory conduct must be conduct which is 'culpable or blameworthy' and not simply some matter of personality or disposition or unhelpfulness on the part of the employee in dealing with the disciplinary process in which he or she has become involved"*

14. RELEVANT FINDINGS OF FACT, APPLICATION OF LAW AND CONCLUSIONS

14.1. The tribunal has considered the question of the fairness of the dismissal in accordance with the agreed issues, on the basis of the oral and documentary evidence before it, having had the benefit of hearing and seeing the witnesses. The tribunal has been careful to consider the reasonableness of the respondent's actions in dismissing the claimant, and has been careful to avoid substituting what the tribunal would have done in those circumstances.

14.2. WHAT WAS THE REASON FOR THE DISMISSAL?

14.2.1. As noted at paragraphs 11.1 and 11.2 above, the onus is on the respondent to show what the reason (or if more than one, what the principal reason) for the dismissal was.

14.2.2. Two reasons were advanced by the respondent in the pleadings and through the witness statements of the respondent's witnesses who were involved with

the disciplinary hearing and dismissal (Ms Hurrell and Mr McGonagle), namely misconduct and terminal loss of trust and confidence.

14.2.3. However, only one reason was given in the contemporaneous documentation generated on this dismissal of the claimant by Mr McGonagle. The reason given in the contemporaneous documentation for the dismissal of the claimant by Mr McGonagle is the claimant's conduct.

14.2.4. The tribunal finds that the actual reason for Mr McGonagle's dismissal of the claimant per **Abernethy** (see paragraph 11.7 above) was alleged gross misconduct only and was not a terminal loss of trust and confidence in the claimant. The tribunal finds on the balance of probabilities that if it had been Mr McGonagle's belief *at the time of the dismissal* (per **Aquilar**, see paragraph 11.8 above) that the respondent no longer had trust and confidence in the claimant, he would have stated this in clear and unequivocal terms as the reason for the dismissal, both at the time of the dismissal, when he had the opportunity to do so, and on a number of occasions shortly thereafter, when the decision was confirmed in writing. These occasions were:

i. at the meeting on 10 August 2018, when the dismissal decision was announced;

ii. in the termination letter of 16 August 2018; and

iii. in the Overview and Outcome report dated 7 September 2018.

14.2.5. The tribunal finds that the respondent has discharged the onus upon it to show that alleged gross misconduct was the reason for the dismissal. However, in light of the unexplained inconsistencies between the contemporaneous documentation, which do not advance terminal loss of trust and confidence as an operative reason for the dismissal, and the evidence of Ms Hurrell (who provided HR support) and Mr McGonagle in their witness statements to the tribunal, as to Mr McGonagle's reliance upon terminal loss of trust and confidence as a reason, the tribunal finds that the respondent has not discharged the onus upon it to show that terminal loss of trust and confidence was the reason (or principal reason) for the dismissal, as Ms Hurrell and Mr McGonagle did not address or explain the omission of terminal loss of trust and confidence from the contemporaneous documentation when they had the opportunity to do so in their witness statements. The claimant's representative did not address the inconsistency in her closing submission.

14.2.6. During cross examination, Ms Bradley (who had conducted the investigation) expressed her view that she had lost trust and confidence in the claimant. Ms Bradley had also expressed this view in her Overview and Outcome investigation report, concluding that the claimant's poor judgment in the whole incident had caused her to have lost any trust and confidence in the claimant. Notwithstanding this, the tribunal has considered the evidence and proceeded to determine the reasons relied upon by Mr McGonagle (and not the comments of Ms Bradley in the Investigation Report and in her oral evidence), because Mr McGonagle was the person who made the decision to dismiss the claimant, not Ms Bradley.

14.2.7. During cross examination, Ms McIlveen referred Mr McGonagle to the content of Ms Bradley's Investigation Report, where Ms Bradley had made comments about the claimant's poor judgment having caused her to lose trust and confidence in the claimant. Mr McGonagle stated that regarding the role of Head Shepherd, he agreed with Ms Bradley's opinion. However, Mr McGonagle's agreeing at the Hearing with the opinion of Ms Bradley, as expressed in her Investigation Report, does not alter the reasons given and relied upon by Mr McGonagle on behalf of the respondent, at the time of the dismissal.

14.2.8. The relevant excerpts of the contemporaneous documentation which confirm the reliance on misconduct but do not refer to loss of trust and confidence in the claimant are set out below:

The disciplinary hearing invitation letter

14.2.9. The disciplinary invitation letter dated 8 August 2018 stated:

> *"The purpose of the hearing is to consider an allegation of gross misconduct, details of the allegation are detailed within Mrs Pauline Bradley's Overview and Outcome report…If the allegations are found to be proven, it will be considered Gross Misconduct under the Company Disciplinary Rules and your employment may be summarily terminated."* (Tribunals' emphasis.)

The letter did not expressly set out that the charges might also give rise to a finding of loss of trust and confidence or that dismissal was being contemplated on that additional or alternative ground.

Paragraph 2 of Mr McGonagle's witness statement confirmed that the terms of reference of the disciplinary hearing conducted by him was to investigate an allegation of gross misconduct.

The Minutes of the disciplinary meeting confirming oral reasons given on 10 August 2018

14.2.10. The minutes of the disciplinary meeting, as excerpted in the respondent's closing submission, record that Mr McGonagle summarily dismissed the claimant and orally announced his decision, giving reasons, after a break from 12.14 to 12.44:

> *"Charles opened the meeting and informed Nevin he has considered everything he (Nevin) has said today. Charles explained to Nevin he has been working with the farm for 3 years and he has never deferred from Linergy or the Kennels and this was the known practice on the farm.*
>
> *Charles further explained to Nevin from his time-line of events he has said he had 20 minutes to seek approval before he committed the act. Charles informed Nevin he was a paid employee and he cannot react or act on instinct. Charles said because Nevin knows what he can and can't do he should not have done this without approval, he did not call Dan or seek guidance. Charles said he does not believe he needs to carry out any further investigation on this matter. Charles said he does view Nevin's conduct to be Gross Misconduct and for that **reason** he has made the decision to summarily terminate his contract of employment and this was effective immediately."* (Tribunal's emphasis.)

Letter dated 16 August 2018 confirming the dismissal

14.2.11. The tribunal accepts Ms Hurrell's evidence in her witness statement that a letter confirming the dismissal was posted to the claimant on 16 August 2018.

14.2.12. This letter (contained at page 299 of the bundle) confirmed:

> *"…The Hearing had been arranged to discuss alleged act of gross misconduct as detailed within Pauline Bradley's overview and outcome report.* (sic.)
>
> *…*
>
> *After the hearing and subsequent adjournment, Mr McGonagle fully considered the facts presented through the investigation pack and what you discussed during your disciplinary hearing and concludes your actions are considered to be gross misconduct and therefore made the decision to summarily terminate your contract of employment with immediate effect."* (Tribunal's emphasis.)

The Overview and Outcome Report dated 7 September 2018

14.2.13. Ms Hurrell, at paragraph 31 of her witness statement gave evidence, that Mr McGonagle's Overview and Outcome report was emailed and posted to the claimant on Friday 7 September 2018. This was four weeks after the dismissal

had taken effect and the reason for it had been communicated orally to the claimant. This evidence was not challenged and is accepted by the tribunal.

14.2.14. The document entitled "Overview and Outcome" dated 7 September 2018 is contained at pages 301 to 304 of the bundle. Mr McGonagle's conclusions are set out in the Outcome section of that report:

> *"Cherry Valley has processes and procedures in place for a reason, to ensure legislation is adhered to and protect staff and the interests of the business. The actions of each employee reflects on the company and all employees are expected to act in the best interests of the company. Someone who acts on impulse or instinct without thinking of the implications of their actions is a risk to the company. Just because the opportunity was there does not mean Nevin had to act as he did.*
>
> *While this approach may be common practice on a small farm this is not the environment Nevin was working within. Staff are expected to follow company processes and systems in place; this is a basic requirement of every role. For Nevin to say he was not explicitly told he couldn't manage fallen stock in this way is not an acceptable defence and does not justify his actions. In my opinion the fact that he has never been told he is allowed to do it and the fact it has never occurred during his three-year service with the company is reason enough not to. Nevin has spent enough time with the company to know this is not how fallen stock is managed on site, regardless of how or when the animal died. Having worked with the company for three years Nevin is aware of the correct disposal process for fallen stock, which he has confirmed more than once during this investigation and has never deviated from the set processes in the past. I find it difficult to believe that not once during the bleeding, skinning, gutting etc. of the sheep this thought didn't occur to him or that he should ask permission before taking action given this was not a practice performed on the farm or within the requirements of his role of Head Shepherd.*
>
> *Nevin believes the findings made against him are based on assumptions rather than action by him, however that is exactly <u>what this decision is based on, his actions and failure to follow the correct company processes.</u>* (Tribunal's emphasis.)
>
> *It is my decision to summarily terminate Nevin's contract of employment with immediate effect."*

14.2.15. The Overview and Outcome report from Mr McGonagle expanded considerably on what was communicated at the hearing or in the letter confirming his dismissal. However, even at this stage, there is no express

reference to loss of trust and confidence as a reason for the dismissal. Accordingly, the respondent has not shown that loss of trust and confidence was the reason for the dismissal, at the time of the dismissal. As per **Aquilar,** the reason, whatever it is, is something which exists at the moment of dismissal (see paragraph 11.8 above).

The Disciplinary Appeal on 18 September 2018

*14.2.16.*The tribunal notes that Ms Hammond purported to introduce terminal loss of trust and confidence as an additional reason for the dismissal, when it was included by her at the appeal outcome stage. In her Overview and Outcome report she stated, in the context of the reasonableness of the sanction: *"In a responsible position as head shepherd, there has been a breach of trust and confidence, leaving no option but to consider the sanction given."* She was asked why she had included this in the appeal outcome during cross examination and answered that she liked to give a professional opinion on a review. The tribunal does not accept that her opinion in this regard could, following an appeal hearing, augment or alter the reasons which had been advanced by the decision maker for the dismissal, at the time of the dismissal. As per **Aquilar** (see paragraph 11.8 above)**,** the reason, whatever it is, is something which exists at the moment of dismissal. Matters which happen subsequently are irrelevant to the ascertainment of what was the reason.

14.3. **WAS THE REASON A POTENTIALLY FAIR ONE IN ACCORDANCE WITH ARTICLE 130(2) OF THE EMPLOYMENT RIGHTS (NORTHERN IRELAND) ORDER 1996?**

*14.3.1.*A reason which relates to the conduct of the employee is a potentially fair reason for the dismissal. The claimant had a clear disciplinary record prior to the incident that led to his dismissal. Therefore, for a fair dismissal to arise on a single incident of conduct, that conduct must amount to gross misconduct.

*14.3.2.*One difficulty that has troubled the tribunal is that the respondent did not summarise the disciplinary charges that the claimant was to answer in the disciplinary invitation letter. The letter, dated 8 August 2018, stated:

> *"The purpose of the hearing is to consider <u>an allegation of gross misconduct</u>, details of the allegation are detailed within Mrs Pauline Bradley's Overview and Outcome report."* (Emphasis added.)

14.3.3.Ms Bradley's report ran to four pages and contained matters which Ms Bradley conceded during cross examination were her opinion, rather than

disciplinary conclusions, as well as commentary on the actions that had been admitted by the claimant.

14.3.4. In his witness statement Mr McGonagle described being asked to investigate an allegation of gross misconduct which he set out as follows:

> *"Nevin failed to follow the correct disposal process for fallen stock at Cherryvalley Farm, choosing to bleed, skin, gut and dismember a lamb rather than leave it for collection and disposal via a licensed waste management company."*

14.3.5. At paragraph 18 of his witness statement, Mr McGonagle's evidence was that he concluded that *"Nevin was guilty of misconduct as he failed to follow the correct disposal process for fallen stock…"*

14.3.6. During cross examination Mr McGonagle was asked about the charge of gross misconduct and agreed that it was "not following the fallen stock procedure".

14.3.7. On this basis, the tribunal finds that the act of gross misconduct relied upon by the respondent comprised not following the correct disposal procedure for fallen stock.

14.4. Allegation and Finding of theft

14.4.1. If the claimant had been found guilty on a disciplinary charge of theft, there can be no doubt that such charges would have supported a finding of gross misconduct capable of justifying summary dismissal and would also have led to a terminal loss of trust and confidence in the claimant.

14.4.2. Ms Bradley's Overview and Outcome, the entirety of which is, on the respondent's case, to be taken as comprising the disciplinary charges stated:

> *"This lamb was the property of the company and to take company property without permission is considered to be theft and as a serious gross misconduct matter"*

14.4.3. During cross examination, Ms Bradley denied that her report contained an allegation of theft. Her oral evidence was that the sentence set out above should not be construed as an allegation of theft, but merely a suggestion that *if* someone was to take company property, this *would be* theft.

14.4.4. Whilst Mr McGonagle's witness statement to the tribunal makes no reference whatsoever to any finding of theft against the claimant, Mr McGonagle was cross examined about his conclusion in his Overview and Outcome report, at page 302:

> *"I am of the opinion Nevin was planning to take the meat home…<u>This is theft and considered to be gross misconduct</u>"* (Emphasis added.)

14.4.5. The tribunal therefore finds on the basis of the evidence before it that at the time Mr McGonagle dismissed the claimant, he had also made a finding that the claimant was guilty of theft in respect of the lamb.

14.4.6. Mr McGonagle conceded during cross examination that the claimant did not steal, and he informed the tribunal that that was *"not what I based my decision on*." He accepted that his report was *"poorly worded"* in this respect and that he confirmed unequivocally that he *"didn't think it was theft"*.

14.4.7. The claimant appealed the finding of theft and this ground of appeal was not upheld by Ms Hammond. She concluded that this amounted to *"the intent of theft."* During cross examination, Ms Hammond conceded that she was wrong to uphold the original finding in respect of theft in the appeal outcome.

14.4.8. For the avoidance of any doubt, the tribunal, in light of the evidence before it and the concessions by the respondent's witnesses, finds that the finding of theft against the claimant by Mr McGonagle was not well founded. The tribunal accepts the claimant's evidence that it was his intention to seek the views of the farm owner on what should be done with the prepared lamb carcase. That finding is not affected by the unresolved conflict on whether the claimant told other co-workers that he would bring his brother to the lamb or the lamb to his brother, for the purpose of butchering.

14.5. Did the conduct amount to gross misconduct?

14.5.1. The tribunal has considered whether not following the correct disposal procedure for fallen stock amounted to gross misconduct. As per **Burdett** (see

paragraph 11.10 above), it is for the tribunal to assess whether the conduct in question was such as to be capable of amounting to gross misconduct. As per **Connolly**, this is a mixed question of fact and law. Having carefully considered whether the reason for the dismissal of the claimant, namely not following the correct disposal procedure for fallen stock, amounted to gross misconduct, the tribunal finds that whilst the claimant's actions were misconduct, they did not amount to gross misconduct, as they were not wilful disobedience or a deliberate flouting of the essential contractual conditions per the majority decision in Connolly and the minority decision of Gillen LJ in **Connolly** (see paragraphs 11.16 to 11.19 above), as approved by the Northern Ireland Court of Appeal in **Rice** or to gross negligence as per **Ardron** (see paragraph 11.11 above) or per **Adesokan** (see paragraph 11.21 above)**.**

14.5.2. During cross examination Mr McGonagle was asked in what way the claimant's actions amounted to a breach of the disciplinary rules on gross misconduct. The tribunal was referred to page 228 of the bundle, where Mr McGonagle stated that the claimant's conduct was a breach of the following rules:

> *(i) Wilful damage or negligence involving damage to property belonging to the Company, other employees or the general public;*
>
> *(ii) Performing, arranging or carrying out any work or activity which could be considered to be in competition with, or which adversely affects in any way the Company's interests.*

14.5.3. The tribunal notes that Ms Bradley during cross examination accepted that the lamb carcase did not enter the food chain, that no harm was caused to the company, that the regulatory authorities who had oversight of the respondent's new meat business were not alerted, that the claimant's actions did not in fact interfere with the food business. Mr McGonagle, during cross examination, stated that he was not sure if there had been loss sustained by the respondent, he stated he was unable to confirm if there was contamination of other food in the cold store and he stated he was not aware of any adverse impact to the respondent's food business.

14.5.4. The tribunal has considered whether the claimant's actions could have been characterised as "wilful", in the sense that the claimant had acted in a deliberately or intentionally damaging or negligent manner. The tribunal finds on the basis of the evidence before it that the claimant did not intend to or deliberately set out to cause loss or damage to the respondent or deliberately or intentionally act in a negligent manner.

14.5.5. The tribunal finds the claimant's actions lacked the quality of amounting to wilful disobedience or a repudiation of the fundamental terms of the contract per **Connolly** (see paragraphs 11.16 to 11.19 above) for the following reasons:

(i) There was no written policy on the disposal of fallen stock at the farm that specifically prohibited the actions of the claimant in butchering the lamb and Mr McGonagle accepted during cross examination that the lack of a written policy allowed room for confusion.

(ii) The claimant's job description did not have any express reference to disposal of fallen stock and therefore the claimant's actions in not following the unwritten procedure could not be said to be repudiatory of the essential contractual terms (per **Connolly**) or inconsistent/incompatible with the essential terms of the contract (per **Neary** – see paragraph 11.20 above).

(iii) The tribunal finds that there was no written environmental/food safety procedure and that the claimant had no previous training in food safety which would have put him on notice of the potentially serious consequences of his actions (albeit he was not involved in that side of the business).

(iv) In the absence of the knowledge that his actions amounted to a breach of the policy or had food hygiene/farm safety consequences, it cannot be said that he was being wilfully disobedient or negligent or acting in a repudiatory manner.

14.5.6. The tribunal's conclusions in this regard are confirmed by the contemporaneous records of the investigation which record DB's admitted assisting the claimant in placing the lamb carcase in the cold store, without objection. DB was the farm manager. This tends to show that the claimant's actions were not recognised by his immediate manager as a gross breach of the farm rules. Likewise, the claimant's co-worker MR, who prompted the investigation and disciplinary sanction against the claimant, told the investigation that the lamb meat could potentially have been made use of. On this basis, it was not clear to the claimant's co-worker MR that the actions of the claimant in preparing the lamb were prohibited.

14.5.7. The tribunal also finds that the actions of the claimant lack the character of being "gross negligence" per **Ardron** (see paragraph 11.11 above) because, acting as an industrial jury, the tribunal finds that the actions of the claimant

did not amount to very considerable negligence and were not repeated on a number of occasions or conducted over a period of time. The tribunal finds that as per **Adesokan** (see paragraph 11.21 above) that there was no intentional decision to act contrary to or undermine the employer's policies on the part of the claimant. The tribunal characterises the claimant's actions as having been impulsive rather than deliberate. On the basis of the claimant's evidence, which is accepted by the tribunal, they were well intentioned and had been acceptable in his previous employment – to avoid wasting the meat.

14.5.8. The tribunal, mindful of the respondent's submission that the facts would also have sustained a dismissal for an alternative reason, namely "some other substantial reason" within the meaning of Article 130 (1) of the Employment Rights (Northern Ireland) Order 1996, and that the respondent had pleaded loss of trust and confidence in the claimant, has considered whether the actions of the claimant should be considered as gross misconduct because they could potentially have given rise to a terminal loss of trust and confidence. As noted at paragraphs 14.2.4 and 14.2.5 above, the tribunal has found that terminal loss of trust and confidence was not a reason relied upon for the dismissal by Mr McGonagle at the time of the dismissal. Even if this finding is disregarded, the tribunal is not satisfied that the actions of the claimant had the character of gross misconduct, on the basis that they were not capable of undermining the trust and confidence which is inherent in the particular contract of employment to such an extent that the respondent should no longer be required to retain the claimant in his employment (as per **Neary**). Without the element of theft (with implied dishonesty), the tribunal, acting as an industrial jury, is not satisfied that a reasonable employer would have viewed the claimant's actions as capable of giving rise to a terminal loss of trust and confidence in an employee in the claimant's position.

14.6. Was the dismissal procedurally fair and in accordance with the statutory procedures?

14.6.1. The tribunal has considered whether there has been a breach of the statutory disciplinary and dismissal procedures, as this is relevant to the question of remedy.

14.6.2. In the claimant's closing submission, the claimant's representative submitted:

> *"Given that the statutory dismissal process was not complied with (failure to detail the disciplinary charge), the Panel is also asked to consider a 50% uplift to the loss detailed in his Schedule of Loss."*

14.6.3. The claimant's representative also submitted that inaccuracies were followed through to the Disciplinary Hearing and in particular that the disciplinary invite referred to "an allegation" of misconduct, when Ms Bradley's Overview and Outcome report made numerous allegations; that the actual disciplinary charge was unclear.

14.6.4. The respondent's representative in his closing submission, contended that no specific allegation of breach of the statutory procedures was put to the respondent's witnesses. However, the relevant witnesses on behalf of the respondent, who were involved in the disciplinary process, were asked questions about whether the claimant knew he was attending a disciplinary interview and about what charges he was facing.

14.6.5. During cross examination, Mr McGonagle was referred to Ms Bradley's Investigation report also entitled "Overview and Outcome" at pages 269 to 272 of the bundle and he conceded that that disciplinary charge he relied upon (namely failure to follow the correct procedure for disposing of fallen stock) had never been put in writing to the claimant. Notwithstanding that concession, the tribunal notes that Ms Bradley's Overview and Outcome report did in fact contain an oblique reference to the claimant having breached the farm practice in the disposal of dead animals, namely at page 270, where she stated:

> *"Nevin's decision to prepare the already dead lamb for butchering goes against Cherryvalley farm practice in the disposal of dead animals."*

14.6.6. The tribunal finds that the disciplinary process which the claimant was subject to, ending in his dismissal, complied with the minimum requirements set out in the statutory disciplinary and dismissal procedures. Despite the criticism of the failure of the respondent to summarise and set out the disciplinary allegation(s), the respondent had set out in writing in general terms the conduct and other circumstances, which had led to the respondent contemplating dismissing or taking disciplinary action against the claimant, had sent a copy to the claimant and had invited the claimant to a meeting to discuss the matter. The claimant was informed of his statutory right of accompaniment. The respondent informed the claimant of its decision and notified him of the right to appeal against the decision, which was exercised. The basic requirements as set out in **Lewis** (see paragraph 12.5 above) and **Alexander** (see paragraph 12.6 above) were met. The fact that the that the respondent did not summarise or settle disciplinary charges and has adopted vague criteria does not change the fact that in this case, the claimant was given sufficient detail in advance of the disciplinary hearing to enable him properly to put his side of the story, which he did when he attended the hearing and read his pre-prepared notes and responded to the questions he was asked. Accordingly, the fundamental elements of fairness as referred to in **Alexander** were met.

14.6.7. There has been no failure to follow another disciplinary procedure relied upon which would engage Article 130A(2) of the 1996 Order.

14.7. Other unfairness

14.7.1. From the course of the hearing and Ms McIlveen's closing submissions a number of matters can be distilled regarding other unfairness relied upon in support of the claimant's case. These are set out below in bold along with the tribunal's finding in respect of each:

(i) The claimant was not under the impression that he was being investigated by Ms Bradley.

The tribunal accepts Ms Hurrell's evidence in her witness statement, in which she confirmed that she did not give the claimant any information concerning the purpose of the request for Ms Bradley and herself to meet with the claimant. Notwithstanding this uncontroverted evidence, the statutory procedures do not require that information is given to an employee in advance of an investigation meeting. He was provided with the statements relied upon and the investigation report and had the opportunity to address the matters contained therein at the disciplinary hearing.

(ii) The claimant had previously raised a complaint against Ms Bradley and that she should not have been involved in the investigation in light of this.

Ms McIlveen informed the tribunal during the claimant's cross examination that no grievance had been made by the claimant against Ms Bradley. However, the tribunal notes that the statement of Maeve Loane, which was admitted in evidence, stated:

> *"In his original letter of appeal dated 28 June 2018, Nevin stated that he did not believe that Pauline Bradley's investigation was done fairly or thoroughly, and for that reason believed that Pauline's outcome to his complaint may amount to unlawful discrimination on the grounds of religious belief. This statement was not included in Nevin's grievance letter dated 15 July 2018. During the hearing on 20th July 2018, Nevin confirmed that he*

did not wish to pursue this and that there was not a religious reason behind Pauline's decision…"

Notwithstanding the finding that a complaint had been made against Ms Bradley regarding her handling of the claimant's earlier complaint, the tribunal does not find that Ms Bradley had a conflict of interest or that she should not have carried out the disciplinary investigation, as there was no live complaint against her at the time the claimant's actions over the lamb were reported to her, on 27 July 2018.

(iii) The claimant was told by Cathy Hurrell that when he was invited for the disciplinary interview that he should come over to the main office for 15 minutes and that it wouldn't take long.

This part of the claimant's evidence was not put to Ms Hurrell during cross examination and, accordingly, the tribunal accepts the unchallenged refutation by Ms Hurrell contained in her witness statement at paragraph 26.

(iv) Those involved in the disciplinary process had lunched together and that they had discussed the claimant.

As noted by Mr Algazy QC in closing submissions, this matter was not pleaded in the claimant's case, nor included in the claimant's witness statement, nor put to any of the respondent's witnesses during cross examination and accordingly the tribunal cannot be satisfied that this was the case.

(v) The claimant felt that Charles McGonagle was being directed by Pauline Bradley to dismiss him. At the disciplinary hearing, the claimant felt that Mr McGonagle didn't want to sack him, was very nervous and came across as he was doing something that he didn't want to do.

As noted by Mr Algazy QC in closing submissions, this matter was not pleaded in the claimant's case, nor included in the claimant's witness statement, nor put to any of the respondent's witnesses during cross examination and accordingly the tribunal cannot be satisfied that this was the case.

(vi) The disciplinary investigation did not follow up to clarify whether DB had helped saw the legs of the dead lamb.

It is not disputed that Ms Bradley did not follow up with DB to establish if he had helped saw off the lamb's legs. The tribunal does not find that this was unreasonable given that DB had left his employment with respondent, nor does the tribunal find that this materially affected the fairness of the investigation given that the investigation did reveal that DB had not objected to the lamb carcase being kept in the cold store.

(vii) The investigation was materially flawed.

The tribunal notes the conclusions that were contained in the Investigation Overview and Outcome report by Ms Bradley. It is not for the tribunal to substitute its own findings for those of the Investigator, only to consider the reasonableness of the investigation.

The tribunal notes that the claimant pursued a case that he was the victim of a conspiracy or vendetta by co-workers, as a result of previous complaints. The claimant was not able to proffer evidence to support this assertion. Whether or not there was bad intent on the part of MR when he reported the claimant's actions, or EM when she gave her account, the tribunal is satisfied that the respondent was entitled to investigate the claimant's actions and consider them in a disciplinary context.

The tribunal further finds that the claimant was given the opportunity to give account of himself at both the investigation and disciplinary hearings.

The tribunal notes that when the claimant was placed on suspension it was to allow Ms Bradley to conclude her investigation. Ms Bradley conceded during cross examination that she did not in fact carry out any further investigation. The tribunal is also of the view that some of Ms Bradley's conclusions were not appropriate to the Investigation stage of the process.

Notwithstanding this, the tribunal finds that when looked at as a whole the investigation carried out by Ms Bradley was a reasonable investigation per **Sainsbury's Supermarkets Ltd v Hitt** (see paragraph 11.12 above), as in the circumstances as she spoke to relevant witnesses and sought and obtained an explanation from the claimant about the incident.

(viii) **These matters were not rectified on appeal, in particular allegations of theft and breaches of food safety legislation.**

Ms Hammond conceded during her oral evidence that the respondent's finding in respect of theft should not have been upheld on appeal.

14.8. Was the dismissal within the range of reasonable responses?

14.8.1. It follows from the finding that the conduct of the claimant, namely not following the correct disposal procedure for fallen stock (being the reason shown by the employer for the dismissal), did not amount to gross misconduct that the claimant should not have been dismissed on a first offence and that the dismissal was therefore unfair.

14.8.2. As noted in **Burdett** (see paragraph 11.11 above) even if the tribunal had found the misconduct amounted to gross misconduct, the tribunal would still need to consider whether it was within the range of reasonable responses to dismiss that employee for that conduct. In the event that the tribunal has erred in its finding that the conduct was not gross misconduct, it has proceeded to consider whether dismissal fell within the band of reasonable responses.

14.8.3. The tribunal, acting as an industrial jury, finds that dismissal was not within the band of reasonable responses even if the conduct of not following the correct disposal procedure for fallen stock amounted to gross misconduct. The tribunal, acting as an industrial jury, finds that no reasonable employer would have dismissed the claimant, who had a clear disciplinary record, for a first offence in the circumstances which were not repudiatory and where no real harm was sustained by the employer as a result of his one off action.

14.8.4. The tribunal also makes this finding because the tribunal is not persuaded that alternative sanctions were considered by Mr McGonagle. The Replies dated 4 July 2019 recorded that *"… dismissal was considered the appropriate sanction. No other sanctions were considered."* Neither Mr McGonagle nor Ms Hammond had given any evidence in chief in their witness statements that lesser sanctions had been considered and discounted. Notwithstanding this, Ms McIlveen briefly addressed the consideration of alternative sanctions with Mr McGonagle during cross examination. In doing so, she elicited oral evidence from Mr McGonagle that he had considered alternatives to dismissal. His oral evidence to the tribunal was inconsistent in that he first stated that he had considered alternatives to dismissal as part of the disciplinary process, but then gave evidence that he had not given consideration to the giving of a written warning. In Mr Algazy QC's closing

submission, the tribunal was invited to find that Mr McGonagle meant by this that he did not consider it an appropriate sanction. The tribunal declines to do so as to attribute this meaning would distort the meaning of Mr McGonagle's answer to a straightforward question. Accordingly, the tribunal is not satisfied that lesser sanctions were considered by Mr McGonagle at the time of the dismissal.

14.8.5. The tribunal's not being satisfied that lesser sanctions were considered is of significance, as per the remarks of Deeney LJ in **Connolly**, set out at paragraph 11.19 and below**:**

> *"The decision is whether or not a reasonable employer in the circumstances could dismiss bearing in mind 'equity and the substantial merits of the case'. I do not see how one can properly consider the equity and fairness of the decision without considering whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct. How does one test the reasonableness or otherwise of the employer's decision to dismiss without comparing that decision with the alternative decisions? In the context of dismissal the alternative is non dismissal i.e. some lesser sanction such as a final written warning."*

14.8.6. Ms McIlveen also elicited evidence from Ms Hammond during cross examination as to Ms Hammond's consideration of alternatives to dismissal. Ms Hammond's oral evidence was that she had considered alternatives to dismissal, but when she looked at the decision of Mr McGonagle and the facts, that she had not upheld a lesser sanction as appropriate. When asked why she had not considered a verbal warning as appropriate, she referred the tribunal to her reasoning in her Appeal Overview and Outcome report at page 346, which stated:

> *"Cherryvalley farm has processes regarding dead animals and their disposal. … [The claimant] did what he wished to do on a personal level rather than give any consideration to Cherryvalley farm processes. …His actions were not acceptable to the company. In a responsible position as head shepherd, there has been a breach of trust and confidence, <u>leaving no option but to consider the sanction given</u>"* (Tribunal's emphasis.)

This does not seem to support any proper consideration by her of alternative sanctions, but rather confirms that the respondent considered that there was no other option but dismissal.

14.8.7. Even if the tribunal should have been persuaded by Mr McGonagle's contradictory evidence that he had considered alternatives to dismissal, the tribunal finds that the contemplation of theft, which has in effect been disclaimed by Ms Bradley, Mr McGonagle and Ms Hammond during the course of the hearing, was a factor in the outcome of the disciplinary process, as recorded in the contemporaneous records of the disciplinary and appeal hearings. The tribunal considers that this highly prejudicial finding was likely to have impacted upon the consideration of alternative sanctions, short of dismissal.

14.8.8. As per the majority in **Connolly,** the tribunal in considering the equity and fairness of the decision, concludes that a lesser sanction would have been the sanction that a reasonable employer would have applied and that in these circumstances dismissal was unreasonable and lay outside the band of reasonable responses.

14.9. Has the respondent otherwise acted reasonably?

14.9.1. It follows as a necessary consequence of the tribunal's findings having regard to the reason shown by the employer, namely:

i. the conduct of the claimant was not gross misconduct; and

ii. dismissal otherwise lay outside the band of reasonable responses

that the respondent did not act reasonably in dismissing the claimant and that the claimant's dismissal was unfair.

CONCLUSION

15. In light of the above findings of fact, and on the application of the relevant law, the tribunal concludes that:

i) the respondent has shown that, under Article 130, the reason for the claimant's dismissal was related to the conduct of the claimant;

ii) the respondent has not shown that the dismissal was for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held; and

iii) having regard to the reason shown by the employer, the dismissal is unfair because the respondent acted unreasonably, in the circumstances, in treating the claimant's conduct as a sufficient reason for dismissing the claimant, in accordance with equity and the substantial merits of the case.

CONTRIBUTORY CONDUCT

16. If the claimant was unfairly dismissed, did the claimant's conduct contribute to his dismissal?

16.1. Mr Algazy QC concluded his closing submission as follows:

> *"Should the tribunal find against the respondent, the submission is that the claimant's conduct was such that he is the author of his own misfortune and that any award should be reduced to nil – See Article 156(2) in respect of the basic award and Article 157(6) in respect of the compensatory award."*

16.2. The tribunal finds that the conduct of the claimant which led to the dismissal was not such that it would be just and equitable to reduce the amount of the basic award and compensatory award.

16.3. In making this finding, the tribunal has considered whether the conduct of the claimant was culpable or blameworthy. His actions that day, when viewed objectively, were not done with ill intent, and were not perverse or foolish, or in other words bloody-minded. (See **Nelson** at paragraph 13.4 above.)

16.4. The tribunal acknowledges that the claimant's conduct was more than trivial misconduct. The tribunal notes that although the process for the disposal of fallen animals was not written, the claimant was familiar with it and had followed it throughout his time with the respondent. The tribunal notes from the evidence of Ms Bradley that the actions of the claimant occurred in the context of the respondent's imminent launch of its food business at the Antrim Show. Disregarding the fact that the lamb had not been home slaughtered as a live animal, but was fallen stock, if it had been eaten by anyone other than the owner's family, this would have been unlawful and in breach of the regulatory requirements governing the farm. However, the tribunal is not satisfied that the claimant understood the Food Hygiene and Food Safety legislation and notes that he had not been trained in them. In the absence of this training, whilst his conduct was impulsive and not well considered, the tribunal does not find that the actions of the claimant were blameworthy or culpable, or could be described as bloody minded.

16.5. In light of its finding that the claimant's actions were not blameworthy or culpable, the tribunal declines to make a finding of contributory conduct or to

make a finding that it would be just and equitable to reduce his award.

17. REMEDY

17.1. The primary remedy for unfair dismissal is reinstatement. The claimant indicated on his claim form that he was seeking compensation only. The claimant's representative confirmed at the hearing that in the event that he was successful, he was still seeking the remedy of compensation. Compensation is made up of a Basic Award and a Compensatory Award. The parties agreed compensation of **£8,585.00**. This is made up of:

i) a **Basic Award** of **£840.00;**

ii) a **Compensatory Award** of **£7,245.00**; and

iii) a loss of **statutory rights** of **£500.00**

as set out in the Schedule of Loss.

17.2. The claimant made a claim for Notice Pay but the element of Notice Pay was not broken down in the Schedule of Loss.

17.3. The claimant's representative was asked to clarify whether a claim for Notice Pay in an amount of £1260 was still being pursued. That clarification was not provided and accordingly the tribunal makes no separate award in respect of Notice Pay. It appears from the Schedule of Loss that the calculation of the Compensatory Awards takes into account the period of notice that the claimant would have been entitled to.

17.4. The claimant on his claim form has declared that he did not claim Job Seeker's Allowance, Income Support or Income Related Employment and Support Allowance. Accordingly, no question of recoupment arises under the provisions of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations (Northern Ireland) 1996.

17.5. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: **15, 16 and 17 October 2019 and 17 and 18 November 2020, Belfast.**

This judgment was entered in the register and issued to the parties on: