

THE INDUSTRIAL TRIBUNALS

CASE REF: 16062/18IT

CLAIMANT: Aaron Seamus Kearney

RESPONDENT: Department for Infrastructure

DECISION

The unanimous decision of the Tribunal is that the claimant's claims of unfair dismissal and direct age discrimination are dismissed

Constitution of Tribunal:

Employment Judge: Employment Judge Knight

Members: Mrs D Adams
Ms F Cummins

Appearances:

The claimant was represented by his mother, Mrs Mahon.

The respondent was represented by Mr Summers, Barrister-at-Law, instructed by the Departmental Solicitor's Office.

THE CLAIM

1. This claim is for unfair dismissal and direct age discrimination. The respondent's case is that the claimant was fairly dismissed for gross misconduct in relation to alleged fraud concerning the issuing of tickets on the Strangford Ferry and that he was not subjected to less favourable treatment on grounds of age.
2. The claimant's case is that the disciplinary investigation was instigated and pursued by the efforts of the SPTO, Mrs Carrie Teggart. He alleged that she was motivated by antipathy towards him because he was younger and that she treated him less favourably than older Agency workers in the provision of training for his large Passenger endorsement and that she instigated the process leading to his dismissal so that he could not apply for promotion as he was younger than individuals she wanted to appoint.

THE ISSUES

3. The issues for the Tribunal were therefore as follows:

Unfair Dismissal

- (i) Was the claimant fairly dismissed for gross misconduct?
- (ii) Did those who took the decision to dismiss genuinely believe that the claimant was guilty of the misconduct alleged, was that belief based on reasonable grounds following a reasonable investigation and was the penalty of dismissal within the band of reasonable responses for a reasonable employer in the circumstances?
- (iii) In the event that any procedural defects rendered the decision to dismiss unfair, should a **Polkey** deduction be applied on the basis that if a proper procedure had been followed the claimant would have been dismissed in any event?

Direct Age Discrimination

- (iv) Was Mrs Teggart motivated with antipathy towards the claimant because he was younger?
- (v) Was the claimant treated less favourably than his named comparators, Mr Murphy and Mr Young in the provision of wheelhouse training and in the arrangements made to fill promotional posts?
- (vi) It was agreed that the Tribunal would consider and decide upon the liability issues only and that if either or both claims were upheld the hearing would be reconvened to consider remedy.

SOURCES OF EVIDENCE

- 4. The Tribunal considered a written statement and oral evidence from the claimant and the oral evidence and statements of the following witnesses of the respondent:
 - 1. Ms Laura Connolly, Deputy Principal in NICS HR Employee Relations who provided HR services to the respondent;
 - 2. Mr Brendan Fitzpatrick, Principal Officer Grade 7, who dealt with the disciplinary hearing and made the decision to dismiss;
 - 3. Mr Michael Cooke, Director of Employee Relations Grade 5 NICS, who dealt with the appeal;
 - 4. Mrs Carrie Teggart, SPTO responsible for the Strangford Lough Ferry service between 14 March 2008 and 30 November 2017;
 - 5. Mr Michael Murray, PTO who provided support to the Ferry Manager and Strangford Ferry management team;
 - 6. Mr David McCaw, Principal Engineer with responsibility for the Strangford Lough Ferry Service;
 - 7. Mr Graham Reilly, investigator for the Group Fraud and Audit Investigation

Service; and

8. Mr Tony Moore, Human Resources (HR) formerly of HR Connect who conducted the disciplinary investigation into the allegations against the claimant.
5. The Tribunal had regard to the documentation to which it was referred together with the claim and response forms and viewed CCTV footage from the 16:14 sailing of the Strangford Ferry on 16 October 2017.

FINDS OF FACT AND CONCLUSIONS

6. The Tribunal found the following relevant facts proven on a balance of probabilities and reached the following conclusions having applied the legal principles to the facts found.
7. The claimant was employed as a purser in Crew 1 on the Strangford Ferry from 14 May 2015 until 26 July 2018 until his dismissal for gross misconduct on 26 July 2018. His main duty was to collect fares and issue the correct ticket to drivers and passengers in accordance with Ferry procedures and the current fares schedule. His line manager was the shift manager, Mr Chris Beale who reported to the Ferry Manager, Mr Tim Tew. He in turn reported to Mrs Carrie Teggart, who is in her 50's. At the relevant time the claimant was 26 years old.
8. Three crews operate the ferry sailings on a rotating shift pattern. Each crew comprises at least four members, two of whom must hold a Boatmaster's Licence ("BML") as required by the Merchant Shipping (Boatmasters' Qualifications Crew and Hours of Work) Regulations 2015. A shift will ideally comprise a Shift Manager, Skipper, two Senior Pursers and two Pursers. Pursers are not required to have the BML.
9. Due to a lack of response from suitably qualified applicants in open recruitment competitions held previously, it was decided in 2012 to fill future senior purser vacancies internally by training Pursers and promoting them to the Senior Purser grade. By 2015 two pursers gained the BML and were promoted. In 2015/16 a group of five pursers, including the claimant and Mr Ray Barlow received training for the BML. There was frustration on the part of management that only one of this group actively pursued the wheelhouse training and obtained his BML in December 2016.
10. The respondent also employed agency staff, some of whom were former fishermen who held a BML. They were required by the respondent for business reasons to undergo a boat handling assessment by the Maritime and Coastguard Agency, followed by 90 days' wheelhouse experience to get the Large Passenger Vessel endorsement which qualified them to skipper the ferry. From 7 October 2017, Agency pursers, Paul Murphy and Rodney Young, who both had BMLs, were given one or two hours' wheelhouse training in an 8-hour shift.
11. On 31 July 2017, Mr McPeak informed the remaining four trainees that a promotion competition for Senior Purser would be run in early 2018. Agency staff were ineligible to apply for promotion posts. By 5 December 2017, the claimant had in fact completed all the necessary theory training and assessment, paid for by the

respondent. He only had only to complete the 90-day qualifying period for the award of the Large Passenger Vessel endorsement. The claimant accepted in cross examination that he also received approximately two hours wheelhouse training per shift so in fact he was not subjected and therefore in this regard was not treated less favourably than Mr Murphy and Mr Young.

12. On 15 October 2017, Mrs Teggart was told in a conversation with her sister, Mrs Corbett, that she had travelled that day in her blue Nissan Micra on the 16.15 sailing of the Strangford Ferry. Mrs Teggart asked her sister what she had paid for her ticket and was told she had paid £5.80, which was the correct fare for a single journey for a car and driver. She said when she refused the receipt offered by the purser, he had crumpled up the paper which came out of his ticket machine. Mrs Teggart told the Tribunal that this “*set off alarm bells*” as Ferry procedures provide that passengers should not be issued a receipt for a cash fare. On single journeys and the first leg of return journeys, a ticket must be issued which passengers should retain for inspection. On the return journey passengers are issued with a receipt in exchange for the return ticket and are required to retain the receipt as proof of having paid a fare. The Tribunal accepted that Mrs Teggart did receive have this conversation with her sister and that she accurately and truthfully conveyed what she was told.
13. So, the next day, Mrs Teggart asked Mr Murray to check the CCTV footage and ticketing records for the 16.15 sailing. He found that 19 vehicles had travelled but only 18 tickets had been issued. The only pursers on duty that day were the claimant and Mr Shane Flynn. The CCTV footage confirmed that the claimant had served the blue Nissan Micra. Mrs Teggart initially suspected that the claimant may have given her sister’s ticket to another passenger and kept for himself the full £5.80 fare. She therefore completed an Initial Fraud Report form to this effect in accordance with the Fraud Response Plan procedures, following consultation with Mr McCaw who in turn spoke to Mark McPeak.
14. On 24 October 2017 Mr McPeak instructed Mrs Teggart to make further investigations, which were carried out by Mr Murray. A review of the ticket sales database revealed that the discrepancy between the number of vehicles travelling (19) and the number of tickets issued (18) by the two pursers on duty was in fact due to fact that one vehicle had been issued with a non-payment report. Further investigation of the CCTV footage showed that the blue Nissan Micra car was the fourth vehicle approached by the claimant and his shift audit report showed that his fourth ticket issued was a Blue Badge ticket, which has a concessionary fare of £2.50. The claimant’s end of shift pay-in sheet did not show any surplus cash collected over the total value of tickets issued as shown on his ticket machine waybill. Mrs Teggart’s sister is not a Blue Badge holder and was travelling alone. This suggested to Mrs Teggart and Mr Murray that the claimant had collected the full £5.80 fare but had issued a lower value Blue Badge ticket. Mrs Teggart surmised if the wrong ticket had been issued by the claimant in error, there should have been £3.30 cash over the total waybill. She speculated that this might not be an isolated case as she had experience previously where a purser had repeatedly issued lower value tickets than the cash fare collected from the passenger, keeping the balance for himself.
15. She therefore asked Mr Murray to carry out an analysis of the total ticket sales to vehicles measuring up to 6m from 24 October 2016 until 24 October 2017 to

compare the numbers of Blue Badge sales made by the claimant and other pursers, on the assumption that Blue Badge holders are more likely to drive a vehicle within this category. A total of 60,245 single fare tickets were issued during this period and 6513 (10.81%) of these were issued to Blue Badge holders. Of that total, the claimant issued 6676 tickets and 1168 (17.49%) of these were issued to Blue Badge holders. Additionally, a further analysis of ticket sales in September and October 2017 showed that the claimant issued 730 single tickets of which around 29% were issued to Blue Badge holders, whereas the percentages of Blue Badge tickets issued by the other Pursers in September and October 2017 ranged from 8% to 14%. They also showed that in September and October 2017, Ray Barlow issued a total of 1032 tickets of which 14% were issued to Blue Badge holders, which was a higher percentage than she expected.

16. Mrs Teggart compiled these statistics into an initial fact-finding report dated 31 October 2017. She recommended that the claimant's and Mr Barlow's higher than expected percentage Blue Badge sales should be investigated further. She outlined that audit checks were carried out as follows:
 - A monthly vehicle audit check to compare the number of tickets issued on a particular sailing to the number of vehicles carried and ensure that a ticket was issued for each vehicle carried.
 - The Ferry Manager carries out random ticket inspections during office hours to check that a ticket has been issued for each vehicle and that the correct ticket was issued for each vehicle.
 - Out of hours duty managers carry out regular ticket inspections (at least 10 vehicles and 30 passengers per week) to check that a ticket has been issued for each vehicle and that the correct ticket was issued for each vehicle.
17. She also completed a revised Fraud report form on 7 November 2017 to correct her original Fraud Report. This confirmed that the matter had come to light as a result of a conversation with *"a relative of the Strangford ferry management team"* evidence appears to show that a £2.50 ticket was issued for the passenger and that this *"may be indicative of a regular occurrence."*
18. The potential allegation of wrongdoing against the claimant was discussed informally at a meeting held on 14 November 2017 with Mr McCaw and Ms Teggart, Mrs Connolly and Mr Fitzpatrick which had been arranged to discuss unrelated disciplinary casework. The Tribunal accepted that this was coincidental and did not consider that this was indicative of any sinister motive against the claimant.
19. On 14 November 2017, Strangford Ferry Management made a referral to the Group Fraud and Audit Investigation Services ("GFIS") 2017 to investigate the potential fraud. Mr Graham Reilly the investigator in GFIS had the revised Fraud Report form and fact-finding report. He met with Mrs Teggart and Mr McCaw to discuss the referral. He did not seek to interview Mrs Corbett. The Tribunal accepted that Mrs Teggart did not ask Mr Reilly not to interview her sister and that this was his decision. He was informed that further checks showed that the claimant's Blue Badge ticket sales were increasing on a monthly basis with a potential financial loss to the Department of £1500.00. On 23 November 2017, Mr Reilly emailed Mrs

Connolly, (copying in Mr McCaw, Mr McPeak and Mrs Teggart with whom he met again on 21 November 2017) confirming his advice that to make a formal referral to the PSNI, a surveillance operation would have to be undertaken to acquire sufficient evidence to secure a criminal conviction under the Fraud Act 2006. His advice was that such operation would be resource intensive and would cost more than the estimated loss to the Department. In addition, there were concerns about the admissibility of such evidence in a criminal trial. He understood from discussions with Mrs Connolly that the case might be suitable for disciplinary action. (He later completed his investigatory report on 15 December 2017).

20. Following advice from Mr Reilly, a decision was made to suspend the claimant on full pay, due to the nature of the allegations and prevent further potential losses, pending a formal disciplinary process. Mrs Connolly prepared the draft letter of suspension and guidance which was sent to Mr McCaw on 4 December 2017. Enquiries were made but it was not possible to transfer the claimant to other duties.
21. Mr McCaw met the claimant on 5 December 2017 and informed him he was being suspended with immediate effect to facilitate the investigation of a serious allegation of ticket sale fraud or theft relating, which may have an adverse effect on the working of the Department and could result in disciplinary action. He confirmed that the NICS fraud unit was aware of the matter. He advised the claimant that there was no presumption of guilt and the suspension was not a penalty. He gave the claimant the letter of suspension drafted by HR and a copy of the disciplinary policy. The claimant was shocked and visibly upset. He asked what the accusations against him were. Mr McCaw responded that it was in relation to ticket sales, but he could give more information. The claimant was told he was not to have contact with other colleagues, (except for his step-father -also an employee on the ferry). He was asked to return his passes, keys and told to take his belongings before leaving the building. Mr McCaw gave him details of the NICS Welfare Service and advised him that he may wish to contact his trade union representative.
22. Mr McCaw agreed to delay the Senior Purser Recruitment exercise, following representations by the claimant's trade union representative.
23. On 19 December 2019, Mr Moore of HR Connect Casework Services was appointed to carry out the disciplinary investigation. He had previously carried out an investigation involving unrelated allegations of fraud against a former employee on the Strangford Ferry. Mrs Connolly met Mr Moore on 11 January 2018. They agreed Terms of Reference for the investigation by HR Connect and the production of a report to enable the Discipline Officer to arrive at a decision.
24. Mrs Connolly wrote to the claimant on 16 January 2018 to advise that Mr Moore had been appointed to carry out an investigation in accordance with the Disciplinary procedure into a possible breach of conduct in relation to:

“...a Breach of Official Instructions; a Breach of Procedures and Misconduct of any kind that may have an adverse effect on the working of the Department and Theft and Fraud. Specifically:

Allegation 1. It is alleged that on 15 October 2018 you failed to follow Strangford Ferry procedures on Ticket Sales by issuing a customer on the 16.15 sailing from Portaferry a Blue Badge ticket costing £2.50 despite said

customer purchasing a full price fare costing £5.80

Allegation 2. It is alleged that between 24 October 2016 and 30 November 2017 you failed to follow Strangford Ferry procedures on Ticket Sales by systematically issuing tickets of a lesser value than the fares you collected from customers on Strangford Ferry.”

25. Mr Moore reviewed the following documentation, which were later Annexed to his report:
- a. Strangford Ferry Procedures on Ticket Sales.
 - b. Group Fraud Investigation Report dated 15 December 2017.
 - c. Excel workbook comparison of ticket sales 1 September to 30 November 2017. (Later updated to cover the period from 1 January 2017 until 5 December 2017 and from 6 December 2017 until 17 February 2018 for Crew 1.
 - d. Mrs Teggart’s factfinding report dated 31 October 2017.
 - e. Amended Fraud Report dated 7 November 2017.
 - f. Excel Workbook Crew 1 voided tickets 1 January 2017 to 5 December 2017.
 - g. Excel Workbook Crew manning levels 1 January 2017 to 6 December 2017.
 - h. Excel Workbook comparison of ticket sales less senior pursers.
 - i. Excel Workbook overall ticket sales from 24 October 2016 to 24 October 2017.
 - j. Initial Fraud report dated 17 October 2017.
 - k. Email from Mr McPeak re follow up investigation dated 24 October 2017.
 - l. Excel Workbook shift audit report for the claimant and Mr Flynn dated 15 October 2017.
 - m. The claimant’s and Mr Flynn’s pay in summary dated 15 October 2017.
 - n. Written response to interview notes from the claimant dated 26 April 2018.
 - o. NICS 6.01 Standards of Conduct policy and 6.03 Discipline Policy.
26. Mr Moore interviewed Mrs Teggart on 14 February 2018, Mr Tim Tew on 19 February 2018 and Mr Michael Murray on 21 February 2018 respectively. All three confirmed to Mr Moore that the potential fraud on the part of the claimant had not been previously detected. The reasons for this were that the CCTV vehicle audit simply confirmed that a number of tickets were issued for the number of vehicles travelling on a sailing; there was a management assumption that passengers were issued the correct ticket for the amount of fare collected; no

passenger had ever raised a complaint about the claimant and his Blue Badge ticket sales as a percentage of the total number of ticket sales for vehicles less than six metres in length was always around 10%. It appears that prior to May/June 2017 the percentage of Blue Badge ticket sales of total ticket sales was also on average 10%. Mr Tew told Mr Moore that he had done some (unspecified) research which showed that 10% of the population in Northern Ireland were Blue Badge holders. Mr Moore told the Tribunal that he had also “googled” this figure but could not remember the source. It was suggested to Mr Moore that the issue would not have arisen had it not been for Mrs Teggart’s conversation with her sister. Mr Moore did not make any enquiry about ticket inspections. Mr Murray conceded in cross examination that if carried out on any of the claimant’s shifts, these may have picked up whether a ticket had not been correctly issued. It appears from the response to the claimant’s SAR, that inspections were carried out on three dates in January 2017, three dates in February 2017, five dates in March 2017, two dates in April 2017, five dates in May 2017 and one date each in June 2017, July 2017 August 2017, September 2017, October 2017 and December 2017. The claimant did not make the case to the Tribunal that any of these inspections were carried out during any of his shifts.

27. Mr Moore explained to the Tribunal that in these circumstances, a passenger is unlikely to raise any complaint, simply because they are unaware that anything is amiss, and as far as the respondent is concerned the total cash collected, tallies with the number and types of tickets issued.
28. The claimant’s meeting with Mr Moore was rescheduled to 10 April 2018 to accommodate Mr John Rooney, the claimant’s trade union representative. He was not provided with any documentary evidence prior to this meeting.
29. Mr Moore read out Allegation 1 and invited the claimant to tell him what he knew about this incident. The claimant was unaware that the passenger in question was Mrs Teggart’s sister and that she had not made a written statement. The claimant said he was unable to speak about a specific vehicle or ticket. Mr Moore asked him to “talk him through” the process of issuing tickets on the Strangford Ferry. The claimant confirmed that he was familiar with the procedures for the sale of tickets for the Strangford Ferry, including that *“a separate ticket must be issued to all drivers and passengers in accordance with the current fares schedule”* (paragraph 4) and paragraph 10.5 which states *“the Purser is responsible for the total amount of cash due and must personally make up any shortfall. Any surplus cash remains the property of the Department and must be handed in.”*

Mr Moore referred the claimant his shift audit report for the 16.15 sailing which showed he issued tickets to 11 vehicles in total and that he issued a single Blue Badge holder ticket to the driver of the fourth vehicle that he served. The CCTV footage confirmed that the fourth vehicle approached by the claimant was a Blue Nissan Micra. The claimant was shown six screenshots of the CCTV footage for the 16.15 sailing and his pay in sheet which showed no surplus. It was put to the claimant that the complainant was not a Blue Badge holder, was travelling alone and did not present a Blue Badge and had paid the full fare. When the claimant queried if this had been proven, Mr Moore responded: *“It is a statement of fact. You issued the driver of the Blue Nissan Micra a Blue Badge ticket costing £2.50 despite the customer purchasing a full price fare costing £5.80”*. The claimant denied this and insisted that he would have only issued a Blue Badge holder ticket on

presentation of a Blue Badge by the passenger. He denied there had been £3.30 surplus and asserted that this was *“one person’s word against another”*. He further suggested that issues previously raised, including the ticket machines not working in the rain, printing problems and not being able to annul tickets, had not been addressed by management.

30. Turning to allegation 2, Mr Moore informed the claimant that 10% of the population of Northern Ireland are registered Blue Badge holders and therefore Strangford Ferry management expected a similar percentage of Blue Badge holders to be using the ferry at any one time.
31. Mr Moore referred the claimant to the relevant documents as he asked him various questions. The claimant and his representative were given an opportunity to consider the document in question and to respond to the same as they went along.
32. Mr Moore referred the claimant to figures in an Excel workbook which showed a comparison of single tickets sales for vehicles less than six meters in length against single Blue Badge holder tickets by the claimant, Mr Flynn and Mr Barlow from 1 January 2017 until 5 December 2017 and the claimant’s daily sales figures during that period. The claimant responded that in a two-purser crew, he sold tickets to the vehicles, while his colleague dealt with the foot passengers. He also suggested that it was *“not uncommon to get a boat full of Blue Badge holders”* and that there are also *“seniors’ days out”* which he said resulted in a significantly higher number of Blue Badges on those sailings.
33. The claimant was shown a comparison of ticket sales for April 2017 why his Blue Badge sales increased to 13.24% and why on specific dates in April, namely, 6 and 25 April 2017 his Blue Badge sales increased to over 30%. Mr Flynn’s figure was 8.63% and Mr Barlow’s was 10.76%. The claimant said that this *“could happen”* and *“you would need to shadow someone on the boat to see it happen”* and suggested that there was misuse of Blue Badges.
34. In May 2017 his percentage Blue Badge sales rose to 18.48% and on specific days in May, namely, Friday 12, Thursday 18 and Sunday 21 May 2017 his Blue Badge ticket sales exceeded 30%. The claimant suggested that *“weekends are always busier”*.
35. In June 2017 the claimant’s Blue Badge sales rose to 21.65% The Blue Badge tickets issued by the other pursers decreased. On certain days such as 1 and 13 June, 1 and 16 August and 10 September 2017, the claimant’s Blue Badge tickets sales were over 30%. The claimant suggested that the summertime is particularly busy, that there were increases at certain times of the year, Bank Holidays and summertime. He conceded that November is not particularly busy.
36. Mr Moore suggested that although he accepted that there could be periods throughout the year when more people use the ferry and as a result there may be more Blue Badge holders, he could not accept this as the reason for the significant increase in the claimant’s Blue Badge ticket sales, when compared with sales figures for the other pursers.
37. The claimant informed Mr Moore that when he voided Blue Badge tickets on 1 and 20 June 2017, 5 July 2017, this was potentially due to a machine fault. Mr Moore

speculated that these might be occasions where passengers had paid him for full fares and had queried why they had been issued with a Blue Badge ticket. The claimant denied this was the case.

38. Mr Moore directed the claimant to specific dates on which his percentage Blue Badge ticket sales were particularly high. The claimant responded that this was due to “daily fluctuations”. In September 2017, his Blue Badge single ticket sales rose to 26.5% of his total sales. On 3 September 2017, the claimant issued 16 single tickets for vehicles less than 6m, of which 9 were for Blue Badge holders (over 50%). The claimant suggested that if he only served 16 vehicles that day, he “*must have been dealing with foot passengers*”. On 9 October 2017, 7 out of 10 single tickets were for Blue Badge holders. The claimant’s explanation was that he did not choose his customers. On seven occasions, namely, 6, 9, 10, 11, 12, 22, and 27 October 2017, his Blue Badge sales ranged between 30% -70%. In November 2017, there were 21 occasions when the claimant’s single Blue Badge holder ticket sales were between 33% and 77%.
39. Mr Moore suggested that the sales of Blue Badge tickets decreased in the claimant’s absence after 5 December 2017. The claimant responded that this was the quietest time of year and that January, February and March are “*dead months*”.
40. Mr Moore put it to the claimant that from 1 January 2017 until 5 December 2017 he had issued 1328 Blue Badge tickets, whereas other pursers had issued a combined total of 5194 Blue Badge holder single tickets. Consequently, he estimated that the claimant may have fraudulently taken fares from 500-600 vehicles, equating to a loss of £1500-1800. The claimant denied that he would intentionally defraud the Department, as he valued his job and was “*paid well enough*”. He told Mr Moore that he had been unaware that a fraud could be carried out in this manner and denied doing it. He pointed out that this was the first time he had seen these figures.
41. After this interview, Mr Moore carried out further investigation into the matters raised by the claimant. He held second interviews with Mr Murray and Mr Tew on 11 April 2018. They confirmed that in the claimant’s crew there were two and sometimes three pursers during busy periods and that the practice was that one purser would collect fares from the foot passengers while the other collected fares from the vehicles on the first leg of the Strangford to Portaferry sailing and swap over on the return sailing. It was further confirmed that in 2017, the claimant had reported three faults with the TransMach ticket machine: on 12 October he reported that it was printing faded tickets; on 16 March 2017 he reported that the screen was going dark and that the spare machine had “*printer issues*” which made waybills and tickets difficult to read. The main problem reported was the smart card reader not working. Mr Murray confirmed that he, and not Seamus Fitzsimmons, had trained the claimant to use the machine. It took about 30 minutes as it was not complicated.
42. The claimant and his trade union representative subsequently confirmed to Mr Moore that the meeting was accurate. These were returned to Mr Moore with a document dated 24 April 2018, in which the claimant raised several points which he asked should be taken into consideration. He queried how a passenger would know that they had been charged incorrectly if they had not been issued with a ticket and what evidence was available to show that they did not produce a Blue

Badge. He asserted that he would only take a concessionary fare on the production of a Blue Badge. He challenged the fairness of being asked to respond to an “*anonymous allegation*”.

43. The claimant challenged the reliability of the statistics relating to the second allegation in two respects:
- a. Whether it had been considered that he had worked on a 4-man crew with two pursers as opposed to a 6-man crew with four pursers. He contended that this would result in a significantly higher ratio of disabled fares than those working within a crew with four pursers;
 - b. The conclusion that the claimant must be committing fraud when his percentage Blue Badge sales exceeded 10% his total sales because this was more than the Northern Ireland average percentage. The claimant suggested that Strangford Ferry, which caters for commuters and tourists, and gives a discount to Blue Badge holders, would attract more than the population of Northern Ireland, attracting visitors from the rest of the UK and beyond. He suggested that there were 2.4 million Blue Badge holders in England and around 600,000 in the rest of the UK. Additionally, he suggested that the percentages could be skewed by the fraudulent use of the Blue Badge scheme. He suggested that it would be more than reasonable to assume that there would be a higher proportion of Blue Badge holders using the ferry.

The claimant further expressed distress that his employer had acted upon what he believed at that time to be an anonymous complaint and that it had further gone out of its way to discredit him with what he considered to be unreliable statistics. No mention was made by the claimant about Mr Moore’s demeanour during the investigatory meeting nor did he raise any issue about being disadvantaged by the way in which Mr Moore had presented documentation to him during the hearing.

44. Mr Moore completed his investigatory report setting out the evidence and his recommendations. He dealt with the second allegation first “for the purpose of clarity and succinctness”, because it fell within the time frame covered by the second allegation.

In relation to Allegation 2, Mr Moore concluded that an analysis of the ticket sales showed that:

- a. The claimant issued a significantly higher amount of single Blue Badge holder tickets in comparison with the other pursers. From 1 January 2017 until 5 December 2017, 21.14% of the tickets issued by the claimant for vehicles less than 6m length were for Blue Badge holders as opposed to 10.17% issued by the other pursers;
- b. The number of Blue Badge tickets issued by the claimant rose steadily throughout 2017, except for slight decrease in March and July 2017;
- c. In June 2017, 21.65% of tickets issued by the claimant for vehicles less than 6m length were single Blue Badge holder tickets. The claimant attributed this to a busy summer season, but the average amount of

single Blue Badge holder tickets issued by other pursers dropped to 9.89% in the same period;

- d. In July 2017, described by the claimant as *"the height of the summer"*, the percentage tickets issued by the claimant for vehicles less than 6m length fell to 19.89%. The percentage tickets issued by other pursers was 11.15%;
- e. In August 2017, 21.54% of tickets issued by the claimant for vehicles less than 6m length by the claimant were single Blue Badge holder tickets, compared with the average amount of single Blue Badge Holder tickets issued by the other pursers which was 10.69%;
- f. In the summer months of June, July and August 2017, 21.02% of tickets issued by the claimant for vehicles less than 6m length by the claimant were single Blue Badge holder tickets, compared to 10.57% for other pursers. Mr Moore concluded that this suggested that one in every five vehicles served by the claimant during the summer was a Blue Badge holder compared to an average of one in every 10 vehicles for other pursers (the level anticipated by management);
- g. In September 2017, the claimant served a total of 366 vehicles less than 6m in length of which 97 were for Blue Badge holders, which equated to 26.5%, compared to 10.93% for other pursers. On 3 September the claimant issued 56.25% Blue Badge holder single tickets, compared to 13.27% for other pursers on the same day. On 3 September 2017 the claimant issued 16 single tickets for vehicles less than 6m of which 9 were for Blue Badge holders (over 50%). The claimant suggested that if he only served 16 vehicles, he must have been dealing with foot passengers. Mr Moore did not accept the claimant's explanations that *"we're always busy on Sundays"* and *"I can only serve what I am shown"* explained why his sales of Blue Badge single tickets was five times the anticipated level and almost four times the amount sold by the other pursers on duty that day;
- h. In October and November 2017, which the claimant said were not busy times, his Blue Badge holder single ticket sales rose respectively to 29.61%, compared to 9.39% for the other pursers, and 49.88%, compared with 10.59% for other pursers;
- i. In November 2017, there were 21 occasions when single Blue Badge holder tickets issued by the claimant amounted to between 33% and 77%. Mr Moore did not accept that claimant's explanation that he issued had issued appropriate tickets;
- j. In November 2017, there were 2776 vehicles less than 6m in length in total compared to 3673 in October 2017, yet the number of Blue Badge tickets issued by the claimant almost doubled during what he previously referred to as a quieter month;
- k. In December 2017, when the claimant only worked three full days, he issued 27 Blue Badge holder single tickets out of a total of 50 vehicles

less than six metres in length compared with 5 Blue Badge holder tickets out of a total of 66 vehicles less than 6 metres in length by his fellow crew members;

- i. During the period 1 January 2017 to 5 December 2017, the claimant voided 8 tickets for Blue Badge holders, noting that these occurred at times when his sales of Blue Badge holder tickets was particularly high. He voided almost double the amount of single Blue Badge holder tickets when compared to fellow crew members;
- m. After his suspension from 6 December 2017 until 17 February 2018 of the total tickets issued by Crew 1 for vehicles less than 6m, the percentage of Blue Badge holder single tickets fell to 9.69%;
- n. Mr Moore acknowledged that the claimant had denied the allegation outright and gave possible explanations including faulty machines, lack of training, “under manning”, Blue Badge misuse, seasonal trends and being primarily assigned to vehicles on the ferry. Mr Moore further investigated these and found that allegations of a faulty machine was not supported by the fault book and in any event this did not impact upon the issuing of tickets. Mr Moore investigated the crew manning levels from 1 January 2017 until 6 December 2017 and did an analysis of shifts of Crew 1, 2 and 3 where two, three- and four-man crews had been assigned. He concluded that the evidence contradicted the claimant’s suggestion that his crew was permanently undermanned;
- o. There was no supporting evidence of Blue Badge misuse; and
- p. During the period in question, the claimant had issued 8497 single adult tickets, 5508 single tickets to vehicles less than 6m in length and 1168 Blue Badge holder single tickets whereas Shane Flynn issued 9562 single adult tickets, 6614 single tickets to vehicles less than 6 m in length and 750 Blue Badge holder tickets. Mr Moore therefore concluded that the evidence did not support the claimant’s assertion that he had served only vehicles, whereas Mr Flynn served foot passengers.

While Mr Moore acknowledged that there was no concrete evidence regarding the actual numbers of Blue Badge holders who used the ferry during the claimant’s shifts, he considered that there was sufficient evidence from which to conclude that the claimant had breached the NICS Disciplinary policy and,

“Specifically, there is sufficient evidence to suggest that Mr Kearney had for a significant period of time been issuing tickets of a lesser value than the fares he collected from customers on Strangford ferry and, in doing so, appropriated approximately £1500-£1800.”

Accordingly, he stated that the respondent could consider upholding the allegation and continuing with the disciplinary procedure in this instance.

45. Moving on to Allegation1, Mr Moore concluded that the CCTV footage and documentary evidence showed that the claimant had been the purser who dealt

with Mrs Corbett's car, the fourth vehicle approached by him and his shift audit report showed that the fourth ticket sold was a Blue Badge holder ticket at a value of £2.50. His pay in summary did not declare or show a surplus of £3.30. On the basis that Mrs Teggart had stated that her sister had informed her that she had paid £5.80 and had not been given a ticket, but was issued a receipt, Mr Moore found that *"the existence of a £3.30 surplus was probable"*. He further noted on the same day, the claimant had served a total of 47 vehicles and issued 12 single Blue Badge holder tickets. Mr Moore acknowledged that he was not afforded the opportunity to question or take a statement from Mrs Teggart's sister but had been advised by Ms Connolly that he should use the evidence of the Group Investigation report in this regard. Mr Moore further noted that GFIS did not in fact interview Mrs Teggart's sister. Nevertheless, he concluded that *"in isolation this incident could be considered one person's word against another, however when considered along with the findings at allegation 2, weight is given to the fact that it appears that Mr Kearney had for a significant period of time been issuing tickets of a lesser value than the fares he collected from customers on Strangford ferry."*

He also noted that during October 2017, the percentage of single Blue Badge holder tickets attributed to the claimant was particularly high (29.61%). He accordingly found that the evidence gathered *"supports the assertion that Mr Kearney failed to follow Strangford Ferry procedures on ticket sales by issuing a customer on the 16.15 sailing from Portaferry a Blue Badge ticket costing £2.50 despite the said customer purchasing a full price fare costing £5.80"*.

46. Mr Moore recommended that consideration be given to upholding both allegations and continuing with the disciplinary procedure in this instance.
47. The Investigation Report was sent to the respondent on 21 May 2018 and passed to Mr Fitzpatrick. Mr Fitzpatrick took over the role of Decision Officer from Mrs Connolly, to deal with the disciplinary process because the allegations against the claimant potentially constituted gross misconduct. The Tribunal did not consider that this raised an unfairness to the claimant as in fact Mr Fitzpatrick had less involvement with the investigatory stages than Mrs Connolly, who had liaised directly with Mr Reilly and Mr Moore.
48. The claimant raised a grievance on 26 May 2018 as at that date he had not received information about the progress of the investigation. Three weeks had elapsed since the date of his investigatory interview with Mr Moore and six months from the date of his suspension. He complained that another member of staff, also being investigated for fraud, had not been suspended and was still working on the ferry with a date for an interview within weeks. He asserted that this may amount to unlawful discrimination on religious belief or political opinion and requested proposals to resolve the matter within 10 working days.
49. Ms Connolly contacted the claimant on 30 May 2018 to advise Mr Fitzpatrick was now the Decision Officer in the disciplinary case and that he would also *"take forward the handling of the grievance"*. Mr Fitzpatrick subsequently referred the grievance to Mr McCann of Employee Relations to deal with under the Dignity at Work policy because the grievance included an allegation of discrimination. The claimant later clarified at a preliminary interview held with Mr McCann on 28 August 2018 that his grievance against Mrs Teggart was that that she had treated him less favourably on grounds of age and religion and that his comparator for was Mr

Barlow, who was around 31 years old at the relevant time.

Disciplinary Hearing

50. The claimant was invited to attend a disciplinary meeting by letter dated 5 June 2018. This was compliant with Step 1 of the statutory disciplinary and dismissal procedures. The disciplinary meeting took place on 26 June 2018. The claimant was again accompanied by Mr Rooney. Mr Fitzpatrick read out the disciplinary charges and reiterated that these matters were considered to be a breach of the rules of conduct set out in the NICS Standards of Conduct policy of the HR Handbook specifically in relation to a breach of official instructions, Breach of Procedures, Misconduct of any kind that may have an adverse effect on the Working of the department; theft and fraud.
51. Mr Fitzpatrick confirmed that as HR Connect had already carried out a thorough and comprehensive investigation, he did not intend to “*re-enact*” the investigation but rather would give the claimant the opportunity to provide a response. Mr Fitzpatrick confirmed to the Tribunal that he acted in reliance upon the contents of Mr Moore’s report. The claimant was not given a copy of that report in advance of the disciplinary meeting. That said, neither the claimant nor his trade union representative raised any objection about this at the time and the had received most of the spreadsheets containing the ticket sales statistics, to which he had been referred by Mr Moore during the investigatory meeting, which were appended to the report. Mr Fitzpatrick followed the format of the investigatory report and dealt with Allegation 2 first. He read out and invited the claimant to respond to paragraphs 4.134 to 4.157 of Mr Moore’s report, which were subsequently set out in full in the record of the meeting.
52. The claimant responded that the “*data was incorrect*” and had been presented in “an incorrect manner”. He suggested that:
 - a. Senior Pursers should not have been included in the analysis as collecting tickets is only part of their job.
 - b. Most of the “regulars” who travel are Smart Card holders and pay £50 for 20 journeys and therefore pay the same amount as Blue Badge holders.
 - c. The data should be re-run on a crew by crew basis to take into account that he worked in a two-person crew with two less people who therefore carried a greater workload than a four-person crew.
 - d. He would only collect £2.50 if a Blue Badge is presented and contended “*there is a lot of Blue Badge fraud*”. Mr Rooney further suggested that the claimant’s crew had requested body cameras and that the training provided to the claimant had been poor.
 - e. The data showed that the claimant’s machine had been used while he was on a day off. On 28 April 2017, his machine had checked in 35 cars of which 5 were for Blue Badge holders. However, he conceded that each user must log in by using their own unique user login.

53. Mr Fitzpatrick then dealt with the first charge (6.01 Disciplinary Policy Annex 1 Para B Misconduct of any Kind) and read out paragraphs 4.248 to 4.256 of the investigatory report to the claimant which again were subsequently transcribed in full in the record of the disciplinary meeting. The claimant reiterated that this allegation was one person's word against another and insisted that he would not have issued a Blue Badge ticket without a Blue Badge having been presented. He again suggested that the percentage of Blue Badge holders in Northern Ireland is high and that Blue Badge holders from the rest of the UK and Ireland also use the ferry. Mr Fitzpatrick disclosed for the first time during this meeting that the "*complainant*" was Mrs Teggart's sister.
54. The claimant read out a statement which he gave to Mr Fitzpatrick along with a copy of his letter to Mr Moore of 24 April 2018, which, Mr Fitzpatrick assured him, would be taken into account. Mr Rooney summarised the claimant's submissions and stated that the accusations had had an "*immeasurable adverse impact*" upon the claimant and his family. He also mentioned that recommendations made in a report compiled in 2014 had not been addressed and that Mr Moore had not been made aware of a book recording machine faults.
55. Mr Fitzpatrick made further enquiries after the disciplinary meeting about the matters raised by the claimant. He requested additional data excluding Senior Pursers and including Smart Card Holders and information for 28 April 2017 when the claimant asserted he had been on leave.
56. Mr Fitzpatrick notified the claimant of the disciplinary outcome by letter 26 July 2018. His decision was that the claimant's behaviour amounted to **Gross Misconduct** and that he was to be dismissed from the service.

Mr Fitzpatrick informed the claimant in respect of Allegation 1 that, "*the evidence gathered supports the assertion that you failed to follow Strangford Ferry procedures on ticket sales by issuing a customer on the 16.15 sailing from Portaferry a Blue Badge ticket costing £2.50 despite the said customer purchasing a full price fare costing £5.80 and that his actions in this regard amounted to "misconduct".*"

He cited the claimant's audit report, which showed that he keyed in a single Blue Badge holder ticket and the comparison of single tickets issued on 15 October 2017 by Crew 1 for vehicles less than six metres in length, which showed that the claimant served a total of 47 vehicles and issued 12 single Blue Badge holder tickets. He stated that: "*I also agree with the investigators that when taken in isolation, this could be considered one person's word against another, however when considered along with the findings at Charge 2, weight is given to the fact that it appears that you had for a significant period of time, been issuing tickets of a lesser value than the fares you collected from customers on Strangford Ferry.*"

57. Mr Fitzpatrick informed the claimant that in relation to Allegation 2 (6.01 Disciplinary Policy Annex 2 Theft or Fraud), having re-run the data to exclude senior pursers and to include Smart card holders, the percentage Blue Badge sales of the claimant was "*still significantly higher and indeed for some months more than double the average of other pursers, excluding senior pursers,*" and further, that the claimant's Smart Card transactions were similar to those of other pursers over the same period of time. He rejected the claimant's assertion that he was on leave on

28 April 2017 as *“information from the RDS consultancy and the ship’s log confirmed otherwise”*. Mr Fitzpatrick concluded in relation to the understaffing point, that the data showed that between January and December 2017, of 227 shifts carried out by Crew 1, 161 (70%) were assigned to a two man crew, 62 (27.31%) were assigned to a three man crew and 4 (1.76%) were assigned a four man crew. In the same period of 226 shifts conducted by Crew 2, 161 (71.23%) were assigned to a two-man crew, 49 (21.68%) were assigned to a three-man crew and 16 (7.07%) were assigned to a four-man crew. In relation to the claimant’s assertion that the numbers of Blue Badge holders for the whole of the UK should have been used, Mr Fitzpatrick was of the view that *“irrespective of the figures used, it does not detract from the fact that he issued a significantly higher number percentage of Blue Badge sales and in some months more than double the average of what other pursers issued”*. His view was that the claimant’s alleged lack of training was irrelevant to the allegations and that the claimant had not raised any such issues in three years of using the machine. He therefore concluded that the claimant had deliberately issued tickets of a lesser value than the fares collected from ferry customers over this period of time and that his actions in respect of this charge amounted to **“Gross Misconduct”**.

He notified the claimant that his dismissal would take effect from 26 July 2019 and of his right to appeal against his decision. The respondent therefore complied with Step 2 of the Statutory Disciplinary and Dismissal Procedures.

Appeal

58. The claimant subsequently appealed on the grounds that the decision was unfair and unreasonable in all the circumstances; the penalty of dismissal was unduly harsh in all of the circumstances; that there were procedural failings and that the employer had failed to follow its own procedures; that there was a failure to take into account available relevant evidence; there had been a failure in the duty of care in relation to equality of treatment in the workplace; and that new evidence had come to light.
59. Mr Michael Cooke conducted the appeal hearing which took place on 17 August 2018. His role under the NICS Disciplinary procedures NICS Handbook Section 6.03 was *“to consider and review the correctness of the disciplinary procedure, any additional evidence provided, the fairness of the decision and the appropriateness of the penalty”*. The claimant was again accompanied by Mr Rooney.
60. The claimant elaborated on his appeal grounds to Mr Cooke. He disputed the accuracy of Allegation 1 because it stated that he had *“issued a ticket”* whereas it was described in the minutes of the disciplinary hearing as being a *“non-payment”*. His main point however was that Mrs Teggart should not have been involved in the initial investigation as she had a conflict of interest, given that the complainant was her sister. He referred to the response to his FOI request which showed that Mrs Teggart had met with Mr Fitzpatrick and Ms Connolly. He asserted that the investigation should have been carried out by someone with no personal involvement in the case. Further, the claimant alleged that Mrs Teggart was not impartial as they had a *“fractious relationship”* which he told Mr Fitzpatrick arose when she had dealt with a complaint that the claimant had shortchanged a customer. He stated that Mrs Teggart had accepted his explanation at the time.

The claimant did not raise any issue about Mrs Teggart's attitude towards him at the time.

61. Mr Cooke took care to confirm with the claimant that he had received the statistical information concerning the issuing of Blue Badge holder and single tickets which he had previously requested relevant to Allegation 2. Mr Rooney suggested to Mr Cooke that the statistical evidence had been compiled on the assumption that the claimant was guilty and that "*charge 2 is driven by charge 1*". Further points were raised as follows:
- a. There was a conflict of interest.
 - b. Mr Rooney explained that he had originally requested that Senior Purser statistics should be removed from the analysis as ticket sales is a small percentage of their duties and suggested that their removal had made a "*slight difference*". He asserted that the claimant's percentage Blue Badge holder tickets sales was significantly higher due to the inclusion of certain groups within the comparison. He requested that agency staff and other persons who only worked during busy periods should also be removed from the analysis and that the statistics should be run with only "*like for like comparators*" namely, Shane Flynn, Ray Barlow and Colin Gaw as they are the only permanent staff. The claimant informed Mr Cooke that he had calculated from the statistics that he issued on average one Blue Badge holder ticket per hour this did not change during the period of analysis, so the charge that he had issued a significantly higher amount of tickets was incorrect and there was no change in the rate of issue of his Blue Badge holder tickets.
 - c. He suggested that Smart Pass ticket sales should be included in the analysis as a true picture could not be gained by only looking at cash sales. The claimant's argument was that in 2016 and 2017 the numbers of Smart pass sales increased drastically so that the number of Blue Badge sales would have remained the same but that the sales for single vehicle tickets less than 6m would have decreased as these customers availed of the cheaper fares through Smart pass.
 - d. It was submitted that requested documentation had not been provided prior to the disciplinary meeting. Mr Rooney advised that a request was sent to Mr Moore in April for further information and a reworking of the statistics and no response had been received. Mr Moore had not supplied the comparison of sales between January to March 2017 and January to March 2018 to support his contention that the sale of single Blue Badge holder tickets had decreased after the claimant's suspension.
 - e. The claimant asked Mr Cooke to locate the machine faults book which had gone missing which he contended would contain a record of machine faults he had reported, namely the machine not logging tickets, ticket annulments and the machine not working in wet weather. He had raised concerns about machine faults at the investigatory and disciplinary meetings. Mr Moore was not aware of this book and had

not requested it. He also complained that he had only received 30 minutes training on the machine.

- f. He asked Mr Cooke to review alleged disparities in the schedule. He contended that the data provided showed that he had been off for 45 days but that on some of these dates there was data present which suggested that someone else had used his machine. He contended had been on leave on 28 April 2017, but the ship's log recorded him as present. The shift pattern provided by HR was inaccurate. The claimant confirmed that he had to log into his machine but that there were issues with the machine. He speculated that the machine may have retained his log in details and showed data against him when the machine was next used by someone else although he did not have any specific examples of this type of incident occurring. Additionally, if he had worked on 28 April 2017, he would have been entitled to receive payment at overtime rate which he had not.
- g. Checks carried out by professionally trained audit staff did not raise any concerns about sales patterns. Mr Cooke took this to confirm acceptance by the claimant of the accuracy of the data being used by management.
- h. The disciplinary outcome was predetermined, tainted with conflict of interest and the evidence was provided to suit that desired outcome. Mr Rooney also mentioned that "*Mr Moore has attempted to rough Mr Kearney up in a verbal sense*". Mr Cooke did not address this issue as it was not specified to be a point of appeal. After the appeal hearing, Mr Cooke carried out further enquiries and asked for the data on ticket sales to be re-run as requested by removing "incorrect" comparators and including Smartcard sales. He checked the Schedule data, namely the ship's log and Waybill and Purser summary sheet and formed the view that these documents did not support the claimant's assertions about his absences and attendances.

62. Mr Cooke did not uphold the appeal. He set out the reasons for his decision in a letter to the claimant dated 6 September 2018. He rejected that there had been any conflict of interest on the part of Mrs Teggart who he said was "*carrying out her management responsibilities in gathering information for the attention of others as to whether or not the matter raised in relation to the 16.15 sailing on 15 October 2017 would be formally investigated.*" He concluded that as follows:

- (a) Conflict of Interest. He rejected that there had been a conflict of interest as Mrs Teggart was "*carrying out her management responsibilities in gathering information for the attention of others as to whether or not the matter raised in relation to the 16.15 sailing on 15 October 2017 would be formally investigated.*" He concluded that Mrs Teggart did not have input into the decisions which were taken to progress investigation matters and subsequent actions taken by Employee Relations in Employee Relations to initiate disciplinary action.
- (b) Make up of Comparator Pool. Mr Cooke concluded that the analysis

of the re-run data relating to Mr Flynn, Mr Barlow and Mr Gaw showed that the claimant had an even greater level of Blue Badge ticket sales than before when compared with his chosen comparators and that Blue Badge ticket sales issued by the claimant increased month on month (except for a slight variance in June and July) peaking at 49.88% in November 2017. He therefore did not uphold this point of appeal on the basis that the sales analysis information supports the assertions made by Mr Fitzpatrick in the dismissal letter.

- (c) Smart Pass Issue. The data re-run to include Smart Pass data showed a similar pattern of increase in the number of Blue Badge tickets issued by the claimant from May 2017 onwards when compared to those for the new comparator group, peaking at up to three times the second highest sales level by one of his colleagues in November 2017. Mr Cooke noticed a similar pattern of increases as for the data without the Smart pass which shows a steady increase from May 2017 onwards, except for a small decrease in October 2017. Mr Cooke did not uphold this point of appeal as he considered that this further supported the assertions of Mr Fitzpatrick in the dismissal letter. He therefore rejected this challenge to the statistical evidence.
- (d) Request for Documentation not received prior to the disciplinary Hearing, namely a blue backed fault logbook, the data analysis of ticket sales and Mr Moore's report. Mr Cooke attached a copy of the fault logs from January 2017 to November 2017 in a spreadsheet format and advised that he had written confirmation from Mr Murray that if a ticket machine develops a fault it is reported to either Mr Murray or the ferry a manager at the earliest opportunity are recorded on the attached sheet. Mr Cooke pointed out that the claimant had confirmed to him that he had received the data analysis of the Blue Badge ticket sales before the appeal hearing. The SAR team also confirmed to Mr Cooke that they had not received a FOI request for a copy of the fraud investigation report from Mr Rooney as had been alleged at the appeal hearing. He confirmed that the claimant had received the sales analysis relied on by Mr Fitzpatrick when making his decision and a significant part of the appeal hearing was focused on this data. On the basis that the requested information had either been provided or was not available in the format as stated, Mr Cooke did not uphold this point of appeal.
- (e) The failure to locate log machine faults book. Mr Cooke concluded that the reported faults did not relate to the validity of the data being produced by the ticket machines nor to others using the machine and remaining logged in. Mr Cooke reviewed the spreadsheet and noted three entries by the claimant, two on 20 March 2017 and one on 12 October 2017, reporting screen fade and difficult to read tickets, some with faded print. Mr Cooke did not accept as valid the claimant's suggestion that the machine was used by others while he was still logged in and his further enquiries confirmed that other pursers do not have access to colleague password information. He therefore concluded that the fault logs do not appear to support the claimant's assertion regarding ticketing machine issues and other users and he

therefore rejected this appeal point.

- (f) Review the Schedule Disparity. Mr Cooke did not uphold this point of appeal. He considered that a waybill and Purser Shift summary signed by the claimant on 28 April 2017 contradicted the claimant's assertion that he was not in work that day. Further he considered that the ship's log was sufficient evidence to show that the claimant was not in work on 7 and 8 January 2017 and 2 and 26 March 2017 as was alleged by him. On this basis Mr Cooke did not uphold this point of appeal.
- (g) Alleged predetermined outcome and that the evidence was provided to suit that decision. Having studied the evidence Mr Cooke was *"strongly of the view that there is a clear pattern of evidence which points to the systematic retention of fare monies through the issuing of Blue Badge tickets in place of full fare single tickets. The issue only came to light as result of a conversation between Mrs Teggart and her sister and subsequently led to an analysis of ticket sales. I am content that Mr Fitzpatrick followed due process and the decision to dismiss was fair and reasonable."*

63. This exhausted the claimant's right of internal appeal and Mr Cooke's decision was final. Mr Cooke advised the claimant of his right to appeal to the NICS appeal board within 3 months from the date of dismissal. The claimant later appealed to the NICS appeal board, but this was not upheld. The respondent has therefore complied with the third step of the statutory dismissal procedure.

Allegations of Inconsistency

64. The claimant alleged at the Hearing that there was a disparity in the way the respondent dealt with similar disciplinary allegations against Mr Barlow. Firstly, he complained that he had been suspended and Mr Barlow had not; and secondly, in almost identical circumstances leading to charge 1 being upheld against the claimant, Mr Fitzpatrick found that there was no evidence to uphold a charge against Mr Barlow. The circumstances in Mr Barlow's case was that it was reported to the respondent by an employee, that on 7 November 2017 she had paid £5.80 for a ticket but was not issued with a ticket because the purser said his machine was faulty, who she then observed issuing tickets to other vehicles. CCTV footage matched with Mr Barlow's record of sales showed that he was responsible for the £2.50 Blue Badge holder ticket issued to the customer. A fact-finding report showed that for the period 30 November 2016 until 30 November 2017, Mr Barlow's percentage Blue Badge sales was 12.4% compared to 11.17% for all sales. This was also reported to the PSNI and GFIS
65. Another incident occurred on 12 December 2017, in which Mr Barlow voided a ticket sale but retained the £12 fare, neither handing it in to management nor returning it to the passenger. His pay in sheet did not have the annulled ticket attached, there was no additional explanation and no extra cash.
66. Mr Reilly carried out the GFIS investigation and compiled a report on 20 March 2018. Following an analysis of Mr Barlow's ticket sales from January 2017 until November 2017, Mr Reilly concluded that while Mr Barlow's Blue Badge ticket sales

were above average at 12.41% of his total ticket sales, there was no evidence to suggest that the failure to issue a ticket on 7 November 2017 was indicative of a more significant underlying issue. Mr Reilly's recommendation was that the matter should be referred to NICS HR for consideration of disciplinary action. On the basis of this recommendation, unlike in the claimant's case, where it had been concluded there had been an ongoing issue, Mr Fitzpatrick, who was the Disciplinary Officer, decided that it was not necessary to refer the matter to HR Connect for any further investigation before instituting disciplinary charges against Mr Barlow. These were:

“Charge 1: A complaint was made to Strangford Ferry’s Management from a passenger on 7 November 2017 who travelled on the 16.30 sailing from Portaferry, the purser failed to issue her with a ticket, that you sold a Blue Badge holder ticket costing £2.50 however they have stated that they purchased a full price fare costing £5.80.

Charge 2: On 12 December 2017 you issued the return ticket for a vehicle up to 6 metres in length... with a value of £12 on the 19.15 sailing from Portaferry. You failed to give the £12 refund to the passenger or the ferry manager in the circumstances when the refund was due”.

67. Mr Fitzpatrick was initially minded to suspend Mr Barlow after the disciplinary hearing on 29 May 2018 as evidenced by a draft letter of suspension dated 4 June 2018 addressed to Mr Barlow but he decided not to do so. The Tribunal accepted Mr Fitzpatrick's explanation that this was because the investigatory process and disciplinary hearing had already completed in Mr Barlow's case.
68. Mr Fitzpatrick decided on 12 June 2018, following consideration of the evidence that Mr Barlow's behaviour amounted to gross misconduct.

Mr Fitzpatrick considered the representations made at the disciplinary meeting and the findings of GFIS and concluded that there was insufficient evidence to uphold the first charge.

In relation to the second charge, he concluded Mr Barlow's behaviour and actions amounted to gross misconduct and that by failing to hand in the £12 there was breach of the standards of conduct namely:

“6.01 Standards of Conduct Annex 1 Para 2.2.1 (b) “Always act in a way that is professional and that deserves and retains the confidence of all those with whom you have dealings”; Annex 2 Paras 2,3, 10 and 13 “unauthorised /improper receipt of money”; and “theft or fraud” in that there was a deliberate attempt to defraud the Department in breach of the disciplinary procedures and “breach of the NICS/Departmental procedures and policies” in failing to hand in the money with an explanation and “potentially bringing the organisation into serious disrepute” as his actions could have seriously damaged the reputation of NICS. He imposed a final written warning.

69. Mr Barlow subsequently appealed against this outcome. Mr Cooke dealt with the appeal which he upheld. He revoked the Final Written warning and substituted a First Written warning. The Tribunal accepted that the key issue for Mr Cooke was, while the failure to follow the procedure was serious, he had accepted Mr Barlow's explanation that he did not set out intentionally to defraud the Department.

Whereas he considered that the evidence before him at the appeal in the present case indicated an intention on the part of the claimant to defraud the Department over a period, which led to his decision not to uphold the claimant's appeal.

The Law

70. The right not to be unfairly dismissed is set out in the Employment Rights (Northern Ireland) Order 1996 as amended ("the 1996 Order"). Article 130 provides that it is for the employer to show the reason for the dismissal and that the reason falls within one of the fair reasons outlined at Article 130(2). One of the potentially fair reasons for dismissal, listed at Article 130(2)(b), relates to the conduct of the employee. If the Tribunal finds that the employer has dismissed for a potentially fair reason, the Tribunal must then go on to consider whether the dismissal was fair or unfair in accordance with Article 130(4) which states:

"(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".

71. The task for the Tribunal in a misconduct dismissal case is set out as follows in ***British Home Stores Ltd v Burchell 1980 ICR 303***:

"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the grounds of misconduct in question ... 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 there 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. 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".

72. The Northern Ireland Court of Appeal decision in the case of ***Rogan v the South Eastern Health and Social Care Trust 2009 NICA 47*** endorses the ***Burchell*** approach and outlines the task for the Tribunal in a misconduct dismissal case. The test is whether dismissal was within the band of reasonable responses for a reasonable employer. The Tribunal must not substitute its own view for that of the employer but must assess whether the employer's act in dismissing the employee fell outside the band of reasonable responses for a reasonable employer to adopt in the circumstances. This assessment applies to both procedure and penalty.

73. The case of **Connolly v Western Health and Social Care Trust [2017]** NICA states as regards dismissal for gross misconduct:

“[22] 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.

[23] The authority for the Tribunal’s statement given in Harvey, Industrial Relations at paragraph [975] is the decision of the Court of Appeal in England in British Leyland UK Limited v Swift [1981] IRLR 91. Lord Denning MR said the following at p. 93:

“The first question that arises is whether the Industrial Tribunal applied the wrong test. We have had considerable argument about it. They said:

‘... A reasonable employer would in our opinion, have considered that a lesser penalty was appropriate’.

I do not think that that is the right test. The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him.”

*Ackner LJ and Griffiths LJ, as they then were, gave concurring ex tempore judgments. None of those say that a lesser penalty was not a consideration that was relevant for the Tribunal to take into account. They were stating that the overall test was. I think it important to bear this in mind. Harvey also cites in support **Gair v Bevan Harris Limited [1983] IRLR 368**. The judgment of the Lord Justice Clerk does indeed cite and follow the decision in **British Leyland** but it does not exclude consideration of a lesser sanction as a relevant consideration”.*

74. The **Connolly** decision confirms that the task of the Tribunal is not to substitute its view for the employer’s. The Tribunal must decide in a gross misconduct case whether there was wilful and deliberate disregard for rules or policies and whether dismissal was an appropriate sanction. The Tribunal must look at whether the actions of the employer regarding process and penalty were

within the band of reasonable responses for a reasonable employer in the circumstances. The Tribunal must then determine whether the dismissal was fair or unfair in accordance with equity and the substantial merits of the case. As part of this assessment the Tribunal must look at whether a lesser sanction was appropriate in the circumstances.

75. The Employment Equality (Age) Regulations (NI) 2006 prohibit discrimination on grounds of age unless it is justified, and they also prohibit victimisation on grounds of having done a protected act.
76. The initial burden is on the claimant to prove facts from which the Tribunal could conclude that an act of discrimination has occurred. If the claimant succeeds in proving such facts the burden shifts to the respondent to prove that any detrimental acts were in no sense whatsoever connected to the claimant's age or the protected act or acts.

Conclusions

Age Discrimination

77. The claimant's allegation was that he was given less wheelhouse training than older colleagues which impeded him from obtaining the BML. The Tribunal concludes that the claimant has not established facts from which it could conclude that he was treated less favourably in the provision of training than the older agency workers. The Tribunal does not accept that the agency pursers are correct comparators for this purpose as they were not permitted by the respondent to participate in the internal promotion competition. In any event, the claimant conceded in cross examination that up until his suspension he received the same amount of wheelhouse training as the older agency pursers. Therefore, he has not established less favourable treatment or that he suffered a detriment.
78. Further there was absolutely no evidence before the Tribunal that Mrs Teggart was motivated against him and brought about his dismissal because he is in his mid-20s. The Tribunal notes that there was no suggestion of age discrimination in the initial grievance letter. At the grievance hearing under the DAW policy, he suggested that the reason for the alleged "fractious relationship" was her dealings with him over the previous customer complaint. The reason for the treatment therefore according to the claimant was not due to his age. The Tribunal is satisfied that Mrs Teggart had a genuine suspicion of wrongdoing which resulted from the information received from her sister and that she acted in good faith. Apart from carrying out preliminary fact finding, she was not the decision maker and was not responsible for the decision to dismiss the claimant.
79. The claimant's claim of unlawful age discrimination is therefore dismissed.

Unfair Dismissal

80. The respondent has complied with the statutory disciplinary and dismissal procedures in the present case and therefore this is not a case of automatically unfair dismissal. The respondent has further discharged its burden of showing on a balance of probabilities that the principal reason for dismissal in the present case was the conduct of the claimant, which is a potentially fair reason.
81. The Tribunal went on to consider whether in all the circumstances the respondent acted reasonably or unreasonably in treating this as sufficient reason to dismiss the claimant. In the present case the claimant completely denied any wrongdoing in respect of both disciplinary charges. In particular, he criticised the respondent for not obtaining a statement from Mrs Teggart's sister. Mr Fitzpatrick confirmed, without the finding of guilt in relation to Charge 2, that he also would have treated the first charge as being "*one person's word against another*" and he would probably not have upheld the first charge. While the Tribunal considered that it would have been best practice for a statement to have been taken from Mrs Corbett, it notes that a finding of guilt in respect of the first charge, which was categorised as "*misconduct*" rather than gross misconduct would not have led to his dismissal.
82. The information from Mrs Teggart's sister was the catalyst for the wider investigations which led to the second disciplinary charge, and ultimately the claimant's dismissal for gross misconduct. The Tribunal accepted that Mrs Teggart accurately and truthfully conveyed the information she had been given by her sister which raised a suspicion that the claimant may be engaged in more extensive wrongdoing. The Tribunal does not consider that it was unreasonable of the respondent to act upon that information by instigating its investigations into whether there was evidence of more extensive wrongdoing on the part of the claimant.
83. The Tribunal was satisfied that the respondent correctly categorised the claimant's actions in relation to the second charge as being gross misconduct which, it is clear from the respondent's disciplinary policy, will normally attract a penalty of summary dismissal. The Tribunal considered that the investigations carried out by the respondent were thorough and extensive by Mr Moore during the investigation and further investigations were carried out by Mr Fitzpatrick and Mr Cooke at the disciplinary and appeal hearings, into all of the factors raised by the claimant to attack the statistical evidence which he alleged was inaccurate and misleading.
84. The respondent's case, in relation to the second charge, is based largely upon statistical evidence and the inferences which may be properly be drawn from them. It must be acknowledged that this type of offence, involving a cash transaction of relatively low value, is very difficult to detect as was explained by Mr Moore. The Tribunal considers that the statistical evidence gathered by the respondent justified its conclusion that the claimant had been systematically and increasingly issuing Blue Badge tickets, when a passenger had requested and paid for a full single fare, and had kept the balance monies for himself. In reaching this conclusion, both Mr Fitzpatrick and Mr Cooke were influenced to the startling disparity between the greater and ever increasing percentage of Blue Badge holder tickets sold by the claimant from April 2017 up until his suspension, as compared with the Blue Badge ticket sales of the other pursers. The Tribunal found the explanations which were

advanced by the claimant during the disciplinary process and at the Hearing to be both implausible, and in some instances, irrelevant. Mr Fitzpatrick and Mr Cooke only discounted the claimant's explanations and submissions after carrying out further reasonable enquiries and investigations. The Tribunal is therefore satisfied that the respondent has proven on a balance of probabilities that it held a reasonable suspicion amounting to a belief that the claimant was guilty of gross misconduct at the time of his dismissal. Therefore, the Tribunal considers that the decision summarily to dismiss was substantively fair.

85. The claimant contended that his dismissal was rendered procedurally unfair because he was not provided with copies of the statistical evidence before his meeting with Mr Moore and Mr Fitzpatrick in the format appended to the investigatory report. The Tribunal is satisfied that the claimant was fully aware of the nature of the allegations made against him and certainly that by the appeal stage, as he confirmed to Mr Cooke, had all the relevant statistical evidence to enable him to meet the case against him. It was significant that the claimant's criticisms of the statistical evidence made at the Hearing, after the exchange of discoverable documentation, were not significantly different from or add to the representations, he made to the respondent at various stages of the disciplinary process.
86. The Tribunal does not accept the claimant's argument that there was inconsistency of treatment between himself and Mr Barlow. The claimant was not suspended until it was ascertained that there was the need for an investigation by HR Connect. The services of HR Connect were not considered necessary in Mr Barlow's case. Further, as already stated, in relation to the first charge, Mr Fitzpatrick accepted the claimant's contention that without more evidence this was "one person's word against another". In the claimant's case the Tribunal accepted that it was reasonable for Mr Fitzpatrick to take into account the findings in relation to Allegation 2 as being probative of Allegation 1 and therefore the Tribunal rejects that there was any inconsistency in his approach to this charge. Further, the Tribunal accepted Mr Fitzpatrick's evidence that that by itself Allegation 1 would not have led to the claimant's dismissal in any event.
87. The claimant's claim of unfair dismissal is therefore also dismissed.

Employment Judge:

Date and place of hearing: 25-28 June 2019, Belfast.

Date decision recorded in register and issued to parties: