EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4105559/2016

5 **Heard in Glasgow on 3 and 4 April 2017**

Employment Judge: Lucy Wiseman

10 **Mr Stephen Edgar** **Claimant**
Represented by:
Ms K Osborne
Solicitor

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South Lanarkshire Council **Respondent**
Represented by:
Mr G Mays
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(1) The judgment of the Tribunal is that the claimant was unfairly dismissed. The respondent is ordered to pay to the claimant compensation comprising 25 a basic award of £616.16, (Six Hundred and Sixteen Pounds, Sixteen Pence) and a monetary award of £3,206 (Three Thousand, Two Hundred and Six Pounds). The prescribed element is £2,889.36 (Two Thousand, Eight Hundred and Eighty Nine Pounds, Thirty Six Pence) and relates to the period 10 August 2016-17 November 2016 and 4 April 2017 to date. The 30 monetary award exceeds the prescribed element by £316.64 (Three Hundred and Sixteen Pounds, Sixty Four Pence).

(2) The complaint of breach of contract is well founded and the respondent shall pay to the claimant the sum of £1,081.60 (One Thousand and Eighty One Pounds, Sixty Pence) in respect of the payment of notice.

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REASONS

1. The claimant presented a claim to the Employment Tribunal on 11 November 2016 alleging he had been unfairly dismissed and not paid notice of terminate, on of employment. The claimant referred to having been remanded in custody and having been dismissed without a disciplinary hearing taking place.

2. The respondent entered a response denying the claimant had been dismissed and asserting the contract of employment had been frustrated in circumstances where the claimant had been remanded in custody. The respondent, in the alternative, argued the reason for the dismissal was conduct and that the dismissal had been fair.

3. Mr Mays, at the commencement of this Hearing, confirmed the respondent no longer sought to argue the contract had been frustrated or that there had been a repudiatory breach by the claimant. He further confirmed the respondent conceded the dismissal, for reasons of conduct, had been (procedurally) unfair in circumstances where there had been no disciplinary hearing.

4. The parties agreed the issues for the Tribunal to determine were:-

   - the likelihood of dismissal taking place if a fair procedure had been followed and

   - whether any award of compensation should be reduced because of contributory conduct.

5. I heard evidence from Ms Elaine Maxwell, Personnel Adviser in the respondent's Employee Relations team; and from the claimant. I was also referred to documents in a jointly produced bundle. I, on the basis of the evidence before me, made the following material findings of fact.

Findings of fact

6. The claimant commenced employment with the respondent on 2 December 2013. He was employed as a Caretaker and earned £308.08 gross per week, giving a net weekly take home pay of £270.40.

7. The claimant's duties included general cleaning of the building, foyer and lifts, health and safety inspection of common areas and reporting of issues/faults. The claimant would have contact with residents living in flats where he worked when they reported faults to him either directly or by telephone.

8. The claimant reported to Mr Danny McAllister, but he also maintained informal contact with his previous line manager Mr Jamie Gemmell.

9. The claimant did not report for work on Tuesday 21 June 2016 because he had been detained by the Police in custody, following an argument with his partner. He was subsequently charged with domestic assault.

10. The claimant pled not guilty to this charge, and was granted bail following a Court appearance on 22 June. The bail conditions were that he was not to have contact with his partner.

11. The claimant made contact with Jamie Gemmell on 22 June to inform him what had happened, and the claimant asked Mr Gemmell to inform Ms Gill Hood, Housing Services Manager.

12. The claimant (whose partner did not agree with the bail conditions) was contacted on 23 June by his partner and asked to visit to collect his clothes. The claimant complied with this request and was subsequently arrested for breaching his bail conditions.

13. The claimant pled guilty to this charge and was fined £120. The bail, with conditions, continued.

14. The claimant visited his doctor on 27 June and obtained a Fit Note (page 36) confirming he was unfit for work due to nervous debility. The Fit Note confirmed the period of absence would be from 27 June until 11 July.

15. The claimant's mother, who is an employee of the respondent, handed the claimant's Fit Note in to the respondent.

16. Ms Hood contacted the claimant on 11 July to make enquiries regarding a return to work. The claimant informed Ms Hood he was still unfit for work and that intended to visit the GP again.

17. The claimant's mother handed in the second Fit Note (page 40) on 27 July. The Fit Note noted the claimant had been seen on 26 July and was unfit for work due to nervous debility. The Fit Note covered the period from 7 July until 23 August.

18. The claimant was contacted by his partner's father on 20 July and asked if he could look after his partner's son. The claimant's partner is an alcoholic. The claimant, understanding that a third party would be present to hand over the child, agreed.

19. The claimant attended at his partner's home to collect her son, and found his partner drunk on the pavement. The claimant tried to get his partner up from the ground. The Police saw the situation and, having made checks, they arrested the claimant for breaching his bail conditions.

20. The claimant was very distressed at what had happened. He had left his house without money, and was unable to contact anyone. The claimant attended Court on 21 July and was ordered to be held on remand at Barlinnie prison until the trial on 13 August. The claimant was charged with breaching bail conditions and assault (it being alleged he spat on his partner).

21. The claimant's brother heard of the situation and visited him on Saturday. The claimant asked his brother to contact Jamie Gemmell to let him know what had happened. The claimant understood his brother did this and was told by Mr Gemmell that the respondent already knew where he was, that his job was safe and he was not to worry.

22. The trial was postponed until 22 August. The claimant was admonished in respect of the breaching of bail conditions; a not guilty plea was accepted in respect of the assault charge and, in respect of the initial assault charge arising out of an argument with his partner, the claimant was fined £200.

23. Ms Hood wrote to the claimant (at Barlinnie prison) on 2 August (page 39) acknowledging she had received a Fit Note which covered the period 7 July to 23 August. Ms Hood noted she was aware the claimant was currently in custody, on remand, and therefore unable to fulfil his contractual duties. Ms Hood confirmed the claimant's salary would be stopped with effect from the date of his incarceration.

24. A further letter dated 3 August (page 41) was sent to the claimant (at Barlinnie prison) in the following terms:

> *"As a result of you being remanded in custody, the Council have treated this as gross misconduct amounting to a repudiation/breach of contract by you.*
>
> *As you were remanded in custody on 20 July 2016 your pay has been stopped with effect from that day. Your employment with South Lanarkshire has been terminated with effect from 20 July 2016 on the grounds of gross misconduct."*

25. The letter concluded by advising the claimant he was not entitled to the payment of notice. The letter further informed the claimant of his right to appeal against the decision to dismiss.

26. The claimant's brother contacted the trade union and they submitted a notification of appeal on 12 August (page 43). The grounds of the appeal were that the claimant had not been notified of any hearing where dismissal was to be considered; he was not able to participate in the investigatory process; he was not afforded the right to a fair hearing and the Council had acted in breach of the Disciplinary Procedure.

27. An appeal hearing was arranged and took place on 4 October. A note of the Hearing was produced at page 49. The appeal was heard by the respondent's Appeals Panel comprising three elected councillors. Ms Eileen McPake, HR Business Partner, presented the case for the respondent and the claimant was present and represented by a trade union representative.

28. Ms Elaine Maxwell, Personnel Adviser, was also present. Her duties included liaising with both sides prior to the appeal hearing to ensure everyone had the correct documents. Ms Maxwell was also responsible for preparing a summary report for the appeal panel and briefing them prior to the hearing. Ms Maxwell provided advice to the appeal panel and she was present when the decision making process was discussed.

29. The appeal panel had before it four documents, being a fact finding report compiled by Ms Amanda Morrison (page 32); an email dated 12 July from Ms Hood to Ms Lang (page 37); a Fit Note dated 27 June (page 36) and an email dated 25 July from Ms Hood to Ms James, Administrator at Barlinnie, confirming the claimant was being held on remand (page 38).

30. The Fact Finding report was dated as having been completed on 1 August. The report noted the allegations as being "*unauthorised absence from 21 June until 24 June due to being in police custody; charged with domestic assault on the 21 June; breach of bail conditions on 23 June and fined £120 and being held in custody on remand since 20 July and failure to contact his employer*". The Report noted the allegations should be considered in

accordance with the Council's following Policies – Discipline and Grievance; Maximising Attendance; Code of Conduct and Domestic Abuse policy.

31. Ms Morrison noted she had had regard to an email from Mr Gordon Bain, team leader, dated 24 June (page 30); and email from Ms Gill Hood dated 12 July (page 37); medical certificates from 27 June (page 36) and an email from Barlinnie prison dated 25 July (page 38).

32. Ms Morrison set out her findings regarding the claimant's arrest on 21 and 23 June. Ms Morrison noted the claimant had made contact on 22 June and had been reminded of the need to inform his employer of his availability for work.

33. Ms Hood had had contact with the claimant on 27 June when he reported unfit for work and on 11 July when his Fit Note expired and she understood a further Fit Note was to be provided to cover ongoing absence. The Fit Note was not received until 27 July.

34. A Fact Finding investigation had been initiated on 20 July regarding the claimant's unauthorised absence, being charged with domestic assault and breach of bail conditions.

35. Ms Hood reported she had been informed by a colleague that the claimant had been remanded in custody and, upon contacting Barlinnie prison, this had been confirmed. Ms Hood, in her email, asked "*if someone could contact me to arrange either a meeting or telephone conversation with Mr Edgar*". The Email response noted Ms Hood could make contact with the claimant by writing to him.

36. The Fact Finding Report concluded the claimant (i) had been on unauthorised absence on 21 to 24 June; (ii) had breached the Council's Domestic Abuse Policy by being charged with domestic assault; (iii) had informed his employer of both the assault charge and breaching bail conditions and (iv) had, notwithstanding the Fit Note covering the period of

absence, been on unauthorised absence during the period on remand and that he had failed to inform his employer of the reason for this absence.

37. The appeal panel heard from Ms Annette Finnan, Head of Service, who had taken the decision to dismiss the claimant. She referred to the allegations, to the claimant's role which involved contact with residents, to the fact the claimant had not been available to interview and to her understanding the case needed to be dealt with timeously. She was satisfied the claimant's actions had breached the Council's Code of Conduct and Domestic Abuse policy and that the claimant had been unavailable for work. She concluded, given the serious nature of the incidents, that the claimant's actions amounted to gross misconduct, and she decided he should be dismissed.

38. The claimant had an opportunity to address the appeal panel. He confirmed he had not been convicted of assault and had been admonished for breaching bail conditions. He had asked his brother to make contact with the respondent to advise of the circumstances. The claimant had not been in trouble previously and had been "suicidal" when held on remand at Barlinnie.

39. The claimant's trade union representative detailed the breaches of the Council's Disciplinary procedures and the ACAS Code of Practice. He also made reference to the fact the claimant had been dismissed within 2 days of the fact finding investigation and he questioned why there had been such a rush to make a decision to dismiss.

40. Ms Maxwell was present during the appeal panel discussions regarding the appeal. The appeal panel questioned the Fit Note being handed in after the claimant had been remanded in custody and they questioned whether this had been done to try to cover up the real reason for the absence. They further noted the Domestic Abuse policy sets out a zero tolerance approach to domestic abuse and the Code of Conduct sets out the standards of behaviour expected of employees and this includes that charges and convictions must be notified to the respondent immediately.

41. Ms Maxwell noted that being detained is classed as unauthorised absence from work. If an employee who is detained fails to make contact with the Council, a standard letter is issued giving 7 days for contact to be made; and if there is no response to this letter, a further letter is sent giving a further 7 days to reply. If there is still no contact a Hearing will be arranged to consider termination of employment. This process usually takes up to 4 weeks to complete.

42. Ms Maxwell had prepared, for the appeal panel, a list of employees who had been charged and or convicted and the action which the council had taken (which ranged from a warning to dismissal). Ms Maxwell suggested the appeal panel had been concerned that the claimant had failed to notify the Council of criminal charges and had been detained.

43. The appeal panel decided (by a majority) to uphold the decision to dismiss.

44. The respondent learned, in September 2016, the claimant had previously, on 22 August 2015, been charged with having a class A drug in his possession. He pled guilty to this charge and was fined £130.

45. The claimant was in receipt of Employment Support Allowance from 10 August 2016 until 17 November 2016 at the rate of £73.10 per week. The claimant found alternative employment for a period of 5 weeks (from 18 November until 23 December) for which he earned a total of £740.31. The claimant left this employment because he found it too strenuous.

46. The claimant has been in receipt of Employment Support Allowance from 24 December until 3 April. He then moved to be in receipt of Jobseekers Allowance.

47. The claimant has been applying for jobs in cleaning, with First Bus and at a Steel Mill. The claimant had not been successful in his applications for work.

48. The claimant wished the remedy of reinstatement if successful with his claim. He had enjoyed his work and he had not had any disciplinary issues with the respondent prior to this. The claimant noted there had not been any suggestion the residents where he worked knew of the charges, and he therefore saw no difficulty returning to his role.

49. Ms Maxwell confirmed the respondent would have undertaken a recruitment exercise following the claimant's dismissal. She understood the role had been filled. The respondent was also running with surplus staff in most departments, including the claimant's department.

Credibility and notes on the evidence

50. I found the claimant to be, on the whole, a credible witness and I accepted that these events had been an ordeal for him. The claimant had been in a volatile relationship with his partner, who is an alcoholic. The first altercation between the claimant and his partner, which led to his arrest on 21 June had concerned her drinking.

51. The claimant's representative had, in preparation for this Hearing, obtained a lengthy letter from the solicitor representing the claimant in connection with the criminal matters (page 80). The solicitor provided the following explanation in that letter regarding the charges and the claimant's background:-

> *The claimant's partner had never been supportive of the bail conditions that had been imposed and she had written to the solicitor and to the Procurator Fiscal asking that the conditions be removed.*

> *The solicitor further explained that on 20 July the claimant had gone to his partner's home to collect her child, and that he had understood the child would be handed over by a third party. However, when the claimant arrived, he found his partner sitting on the pavement in a*

distressed state. He approached her because he was concerned for her welfare, and wholly denied the charge of assault. The solicitor noted the claimant's partner was supportive of his position.

The letter noted the claimant's mother, who is a social worker of 13 years' experience and who is employed with the respondent, had not been aware of the extent of the claimant's domestic difficulties and was "horrified" that he had got himself into this situation. The claimant has a mild learning difficulty and dyslexia.

The claimant had not previously been in custody either on remand or by way of a custodial sentence.

The claimant's solicitor agreed with the Procurator Fiscal that a guilty plea would be accepted in respect of the breach of bail conditions charge, and a not guilty plea would be accepted in respect of the assault charge. A full plea in mitigation was entered in respect of the circumstances of the offence and the claimant's personal circumstances. The claimant's explanation that he now understood that he should have contacted a third party or called for medical assistance, rather than approaching his partner was accepted. Further, in light of a lack of any substantial record, the attitude of his partner and the time he had spent on remand, the Sheriff admonished the claimant in respect of the breaching bail conditions charge.

The claimant, with regards to the initial charge of domestic assault, had entered a guilty plea to behaving in a threatening or abusive manner by shouting and swearing at his partner. This offence was committed in the context of an argument between him and his partner when his partner was being physically and verbally abusive towards him. In light of these circumstances the claimant was fined the sum of £200.

52. I noted there was no dispute regarding the fact the claimant contacted his employer on 22 June. I accepted the claimant's evidence that he subsequently asked his brother to contact his employer to inform them of his arrest on 23 June, and that the claimant understood his brother had made this contact. I noted an email from the claimant's brother had been produced in the documents (page 74) confirming that the claimant had asked him to make contact with Jamie Gemmell, and that he had done so.

53. I also accepted the claimant's evidence that he had, following his arrest on 20 July, asked his brother to inform the respondent of his whereabouts.

54. The respondent invited me to find the claimant's evidence regarding the second Fit Note lacked credibility in circumstances where the claimant could not explain why it was dated 26 July (when he was being held on remand) or why it appeared to have been back dated to cover the period from 7 July. The claimant rejected the respondent's suggestion that his mother had been colluding with him to cover up the real reason for his absence.

55. The claimant, when questioned about this, explained that he had not been "*thinking straight*" whilst in prison; that his mother had not known he was in prison and that the Fit Note was a "*repeat*". I accepted the claimant, when questioned, was unable to properly explain how the Fit Note had been obtained or the dates on it. However, I did not form any impression that the claimant was trying to cover up the fact he was in prison. I accepted that being held on remand in Barlinnie must have been very difficult for the claimant and that in those circumstances, his recollection of events may have been impaired. I could not, for these reasons, accept the respondent's submission that the claimant's credibility was an issue.

56. I considered I was supported in that conclusion by the fact the respondent (Ms Hood) accepted she had been told by a colleague that the claimant was being held on remand (this accords with the claimant asking his brother to inform Mr Gemmell of the circumstances). Further, Ms Maxwell gave the

impression that this had been the subject of office-gossip. I considered the suggestion, given those circumstances, that the claimant had sought to cover up his whereabouts, to be wholly undermined.

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57. There was a dispute between the evidence of Ms Maxwell and the claimant regarding the reporting of the 2015 conviction to the employer. The claimant`s position was that he had reported it to his line manager and heard nothing further. Ms Maxwell`s position was that the respondent had been unaware of this matter. I, in considering this matter, noted there was no evidence to suggest the respondent had carried out any investigation to establish whether the claimant had informed his line manager. I formed the impression that Ms Maxwell`s evidence was based on the fact she had been unaware of this conviction, and there had been no reference to it in any of the paperwork prepared for the appeal.

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58. I, on the other hand, had no reason to disbelieve the claimant`s evidence on this matter. Equally, however, I accepted that even if the claimant had informed his line manager of the conviction it had gone no further. I was, therefore, satisfied the respondent, at the time it took the decision to dismiss the appeal, was not aware of the earlier conviction.

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59. I found Ms Maxwell to be a credible witness albeit the evidence she could provide to the Tribunal was limited.

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<u>Respondent's submissions</u>

60. Mr Mays submitted the reason for the claimant's dismissal was conduct in terms of Section 98(2)(b) Employment Rights Act. The respondent conceded the dismissal was procedurally unfair because there had been no disciplinary hearing. The issues for the Tribunal to determine were the likelihood of dismissal if a fair procedure had been followed, and whether any compensation should be reduced because of contributory conduct.

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61. Mr Mays referred to Ms Maxwell's evidence regarding the appeal procedure before the Appeals Panel, which had heard evidence from the claimant. Mr Mays accepted the appeal process had not remedied the earlier defects in the process. He invited me to note that certain facts were not in dispute: the claimant had criminal convictions; he had unauthorised absence and he had been imprisoned. Mr Mays submitted that given those facts, dismissal was likely if a fair procedure had been followed.

62. The respondent has a zero tolerance policy regarding domestic abuse. The charges of breach of the peace and domestic assault were related to domestic abuse.

63. The respondent takes very seriously all criminal behaviour and also unauthorised absence. Ms Maxwell gave evidence regarding the procedure to be adopted in cases of unauthorised absence, and the fact that it normally took 4 weeks to follow the procedure. Mr Mays submitted that if dismissal was likely had a fair procedure been followed, then any award should be limited to 4 weeks pay.

64. Mr Mays referred to the evidence of Ms Maxwell to the effect the appeal panel had not been satisfied that the claimant had reported his confinement from 20 July onwards, and that they had considered the Fit Note an attempt to cover up the real reason for the absence. It was submitted this was a breach of trust compounded by the fact the claimant had not been able to explain how his mother had obtained a Fit Note whilst he was in prison. Mr Mays suggested there had been an irretrievable breakdown of trust and that the respondent would have dismissed the claimant for this alone.

65. Mr Mays submitted there had been contributory conduct insofar as the claimant had not reported the charges and confinement, and with regard to the second Fit Note. There had been repeated breaches of failing to report and criminal behaviour whilst in a role which required public contact. It was, it was submitted, inappropriate for someone with this level of criminal conduct to be in such a role.

66. It was submitted the drug offence (August 2016) was relevant to consider in relation to contributory conduct. The claimant would, had the respondent known of the issue, been subject to an investigatory meeting.

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67. Mr Mays referred to the spreadsheet produced by Ms Maxwell which showed the action the respondent had taken in other cases where employees had criminal charges or convictions. He submitted a significant number of other workers had been dismissed even where they had not been detained in custody. This, he submitted, supported the respondent's case that the claimant would have been dismissed if a fair procedure had been followed.

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68. Mr Mays submitted there were issues of credibility regarding the claimant's evidence and that this would have been apparent during the disciplinary process. There was a lack of candour and the claimant had sought to minimise the seriousness of the situation.

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69. Mr Mays accepted there was no issue with the claimant's calculations on the schedule of loss. He took issue with a period of 52 weeks being used to calculate future loss and future pension loss because this was too high.

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70. Mr Mays noted the claimant had included a 25% uplift in the schedule and he submitted this was too high in the circumstances.

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71. Finally Mr Mays noted the claimant sought reinstatement, but he invited the Tribunal not to grant reinstatement because it was not practicable for the respondent to comply. The claimant's post had been filled, and there were no vacancies: in any event, the respondent had surplus employees. Mr Mays submitted it would not be appropriate to order reinstatement in circumstances where the claimant had criminal convictions and there had been a breakdown in trust.

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72. Mr Mays invited the Tribunal to find the claimant was dismissed for reasons of conduct; that he would have been dismissed if a fair procedure had been followed and that the basic and compensatory awards should be significantly reduced because of the contributory conduct of the claimant.

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Claimant's submissions

73. Ms Osborne noted there were two complaints before the Tribunal for determination: a complaint of unfair dismissal and a complaint of breach of contract in respect of the payment of notice.

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74. Ms Osborne further noted the respondent conceded dismissal had been unfair. The respondent's position at this Hearing was that the reason for dismissal was conduct, and albeit the dismissal was unfair, the Tribunal should assess the chance of dismissal occurring if a fair procedure had been followed, and whether compensation should be reduced because of contributory conduct.

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75. Ms Osborne submitted the dismissal of the claimant was procedurally and substantively unfair. Ms Osborne referred to the ACAS Code of Practice, at paragraph 31, where it was stated that a criminal conviction in itself was not a reason for dismissal and that an employer was required to consider the impact this had on an employee's job. The respondent had not led any evidence to suggest they had considered this matter, and Ms Maxwell could only speculate on this and on what might have happened if a disciplinary hearing had been held.

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76. The claimant, in his evidence to the Tribunal, referred to a number of factors he would have raised if such a hearing had been held: for example, his health, the medication he was taking; the difficult relationship with his partner and his own abuse at the hands of his partner.

77. Ms Osborne noted there had been no suggestion by the respondent that the residents where the claimant worked were aware of these events, or that the claimant would have been unable to carry out his duties.

78. Ms Osborne noted Ms Maxwell had produced a spreadsheet showing that some, but not all, employees had been dismissed for criminal charges/convictions. Ms Osborne submitted that if there had been a hearing at which all the evidence could have been placed before the respondent, the claimant could also have been afforded an outcome of not being dismissed. Furthermore, the respondent is a large employer, employing over 15,000 employees, and in those circumstances, it would have been reasonable for the employer to consider redeployment.

79. Ms Osborne submitted there were no reasonable grounds to sustain a belief in misconduct. The respondent had not shown the reason for dismissal in this case and accordingly the dismissal was unfair. Furthermore, there could be no question of contributory conduct in circumstances where the employer had not shown the reason for dismissal.

80. Ms Osborne referred to Ms Maxwell's evidence where she stated she had told the appeals panel the claimant was dismissed for being detained, and for unauthorised absence. The respondent, it was submitted, did not lead any evidence to demonstrate how these matters would lead to a finding of gross misconduct.

81. There had been no evidence regarding how the appeal panel had reached its decision.

82. Ms Osborne noted, with regard to the alleged unauthorised absence, that the claimant had spoken to the respondent on 22 June, to inform them of his situation. He had thereafter submitted Fit Notes. The respondent had no basis upon which to conclude there had been an attempt to conceal his

imprisonment. The letter from the claimant's criminal solicitor referred to the claimant's mother not knowing of what had happened to him.

83. The claimant's evidence that he had asked his brother to make contact with the respondent after 20 July could not be disputed in circumstances where the respondent had not investigated this. Ms Maxwell's evidence was to the effect the respondent did know, through gossip, of the claimant's whereabouts.

84. The claimant's evidence that he had informed his manager of the subsequent charge of possession could not be challenged by the respondent because they had not done any investigation into the matter. There was no basis, in those circumstances, to question the claimant's honesty.

85. Ms Osborne submitted the claimant was in an abusive relationship with his partner, who was an alcoholic. His partner was not supportive of the bail conditions. The claimant was over-whelmed by being held in prison, and in those circumstances it was not surprising he had contacted a criminal solicitor before asking his brother to contact the respondent.

86. Ms Osborne submitted that if her primary position that the respondent had not shown the reason for dismissal, was not accepted by the Tribunal, then her secondary position was that compensation should not be reduced. The claimant sought the remedy of reinstatement or re-engagement. This remedy was practicable because there was no issue of contributory conduct rendering it unjust. The fact the respondent had replaced the claimant was not relevant. Ms Maxwell had referred to trust being broken, but this had not been raised previously and had not been established by the respondent. The claimant's conduct had been careless, and he regretted it.

87. If the Tribunal was not minded to order reinstatement or re-engagement, then the claimant sought an award of compensation. A schedule of loss had been produced and the respondent had agreed the calculations set out in

the schedule, albeit the respondent did not agree with the future loss set at 52 weeks. There had not been a failure to mitigate.

88. Ms Osborne submitted there should be no reduction to compensation because the respondent had not demonstrated the claimant would have been dismissed if a fair procedure had been followed, and it would not be just and equitable to reduce compensation for contributory conduct in the circumstances. The article regarding the charge for possession had only emerged just prior to this Hearing. Furthermore, there had been mitigating circumstances regarding this matter insofar as the claimant's wedding to his partner had just been cancelled. A friend had been offered the claimant the drugs and he had put them in his pocket: that was the extent of the offence.

89. Ms Osborne submitted there had not been gross misconduct in this case and accordingly the claimant was entitled to payment of four weeks' notice of termination of employment.

Discussion and Decision

90. I had regard to Section 98 Employment Rights Act which provides that it is for the employer to show the reason, or if more than one, the principal reason, for the dismissal, and that it is a reason falling within Section 98(2). The respondent in this case initially sought to defend the claim on the basis there had not been a dismissal in circumstances where the contract of employment had been frustrated. The respondent withdrew from that position and, at the commencement of this Hearing, Mr Mays confirmed the respondent's position was that the claimant had been dismissed for reasons of conduct.

91. Section 98 makes clear that it is for the respondent to show the reason for dismissal and that it is one of the potentially fair reasons set out in Section 98(1) or (2), and was capable of justifying the dismissal of the employee. The burden of proof on the employer at this stage is not a heavy one: a

reason for dismissal has been described as a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee (***Abernethy v Mott, Hay and Anderson [1974] ICR 323***). In cases of dismissal for misconduct, it is sufficient that the employer genuinely believed on reasonable grounds that the employee was guilty of misconduct: an honest belief held on reasonable grounds will be enough, even if it is wrong.

92. I next had regard to the evidence before me regarding the reason for dismissal. The Fact Finding Report completed on 1 August 2016 referred to four allegations: (i) unauthorised absence from 21 to 24 June due to being detained in police custody; (ii) charged with domestic assault on 21 June; (iii) breach of bail conditions on 23 June and fined £120 and (iv) being held in custody on remand since 20 July and failure to contact his employer.

93. The letter of dismissal dated 3 August (page 41) was entitled "Summary Dismissal – Repudiation/Breach of Contract" and informed the claimant that "*as a result of your being remanded in custody, the Council have treated this as gross misconduct amounting to a repudiation of contract by you."* The letter referred to the claimant having been remanded in custody on 20 July and to his employment being terminated, with effect from 20 July on the grounds of gross misconduct.

94. The note of the appeal hearing referred to the Fact Finding Report and, in the summing up (page 51) there was reference to the claimant having been unavailable for work from 21 to 24 June and to him having been held in custody twice in connection with domestic assault and to the claimant not informing the Council of having been remanded in custody on 20 July. It was noted that Ms Finnan had viewed the claimant's failure to inform the Council very seriously and, after taking advice, she had decided to dismiss him.

95. Ms Maxwell, in her evidence to this Tribunal, was not asked specifically regarding the reason for dismissal. She referred to the appeal panel

discussions following the hearing and to the fact there was reference to the claimant being unable to attend work due to being in custody and to their concern that the second Fit Note had been provided to try to conceal the claimant's whereabouts. There was also reference to the fact the Council treats being detained in custody as unauthorised absence.

96. I concluded, having had regard to the above factors, that the terms of the letter of dismissal were clear, and that the reason for dismissal was the fact the claimant was remanded in custody on 20 July. The Council treated this as gross misconduct. I acknowledged the fact finding investigation had regard to other allegations. However, the Dismissing Officer had this report before her, and made no reference to the matters contained within that report. Furthermore, in the note of the appeal (page 54) the Panel was advised that *"part of the investigation had looked at S Edgar's absence over the 4 day period in June 2016, however, it had been the serious nature of his absence from July 2016 that had been the main issue of concern – S Edgar had provided no notification to his employer as to where he was or why he was unavailable – it was the fact that S Edgar had been found to be detained that was the serious misconduct issue."* This explanation plus the terms of the letter of dismissal led me to conclude that the fact the claimant was remanded in custody on 20 July was the reason for the claimant's dismissal.

97. I accepted Ms Maxwell's evidence that the respondent regards detention in custody as unauthorised absence. There was, however, no evidence before me to clarify whether it was the mere fact the claimant had been detained in custody which the respondent considered amounted to gross misconduct, or whether it was the fact this was unauthorised absence.

98. Ms Osborne invited me to find the respondent had not shown the reason for dismissal. I could not accept that submission in circumstances where there was a set of undisputed facts known to the employer which caused it to dismiss. The respondent dismissed the claimant for gross misconduct, being the fact he was detained in custody on 20 July, and held n remand.

99. I was satisfied the respondent had shown the reason for dismissal was conduct, which is a potentially fair reason for dismissal.

5 100. The respondent conceded the dismissal of the claimant was not fair, because it had failed to follow a fair procedure when dismissing the claimant. The respondent argued that even if it had followed a fair procedure, the claimant would still have been dismissed. I now turned to consider that argument.

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101. There was no dispute regarding the fact the claimant did not appear for work on 21 June, because he had been arrested following a domestic incident where he and his partner had been shouting and swearing at each other. The claimant was charged with domestic assault and was bailed on
15 22 June on condition he did not approach or have contact with his partner.

102. The claimant made contact with Ms Gill Hood, Housing Services Manager, on 22 June to explain what had happened. The claimant also informed Ms Hood that he did not feel well and that he would be going to visit his doctor.

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103. The claimant was arrested on 23 June for breaching the bail conditions by visiting his partner’s home, at her request, to uplift clothing. The claimant attended Court the following day where he pled guilty and was fined £120.

25 104. The claimant provided the respondent with a Fit Note covering the period 27 June to 11 July.

105. Ms Hood spoke to the claimant on 11 July to ascertain his fitness for work. Ms Hood was informed by the claimant that he remained unwell and that he
30 would submit a further Fit Note.

106. The respondent did not (immediately) receive a further Fit Note from the claimant, and had no further contact with him. The respondent instigated an investigation on 20 July.

107. The respondent's investigation did no more than establish the facts of what had happened to the claimant and when he had made contact with Ms Hood. The respondent did not endeavour to make contact with the claimant to speak to him or invite him for interview to give his side of the story. The respondent learned the claimant had been remanded in custody at Barlinnie prison, and they received an email from an Administrator at the prison confirming they could write to the claimant. The respondent did write to the claimant at Barlinnie to inform him his pay had been stopped, and that he had been dismissed: they did not write to him to ascertain how long he was to be held on remand, or when he may be able to attend an investigatory interview.

108. The fact finding report noted the claimant had not informed the respondent of being detained on remand. I accepted that Ms Hood may not personally have been informed of the claimant's whereabouts, however, there appeared to be no dispute regarding the fact the respondent knew informally of the claimant's whereabouts. The fact there was office gossip about the claimant`s detention and that Ms Hood was advised by a colleague of the claimant`s whereabouts tended to support the claimant`s evidence that he had asked his brother to make contact with Mr Gemmell and inform him of the situation. The respondent's failure to speak to the claimant as part of their investigation meant they were unaware of this.

109. The respondent's investigation included the fact the claimant had been remanded in custody on 20 July and the fact the claimant's mother had, on 27 July, handed in a Fit Note covering the period 7 July until 23 August.

110. The employee carrying out the investigation did not speak to the claimant's mother to ascertain the circumstances in which a Fit Note had been obtained and why it was apparently being handed in weeks late. The

claimant's mother is an employee of the respondent and could have been contacted easily.

111. I considered the respondent's complete failure to attempt to contact the claimant to interview him as part of the investigation and their failure to interview the claimant's mother were fundamental flaws in the investigation. A reasonable employer, carrying out a reasonable investigation, would have endeavoured to gather as much information as possible before making a decision, and this would have included not only factual information but also information helpful to the claimant. The respondent's error was compounded by the fact the appeals panel drew an adverse inference from the fact the second Fit Note had been handed in on 27 July, and they did so without this matter having been investigated.

112. The claimant, had he had an opportunity to put his side of the story to the investigating officer, would have been able to explain the nature of his difficult relationship with his partner and the fact she is an alcoholic. He would also have had an opportunity to explain the circumstances leading to his arrest on 21 June, whereby it would appear the claimant and his partner were shouting and swearing at each other.

113. I acknowledged the respondent has a Domestic Abuse Policy (although I was not referred to the actual Policy during the course of this Hearing) which provides that misconduct inside and outside of work is viewed seriously by the Council and can lead to disciplinary action. However, in order for the respondent to assess the seriousness of the situation, and whether disciplinary action was appropriate, they would require to investigate and understand what had happened. The respondent in this case appeared willing to describe the situation as "very serious" notwithstanding the fact they did not know the details of what had happened between the claimant and his partner.

114. The claimant would also have had an opportunity to make the respondent aware of the circumstances in which the bail conditions were breached, his

partner's role in this and his reasons for behaving as he did. The letter from the claimant's criminal solicitor makes clear there were strong mitigating circumstances which it would have been appropriate to consider.

115. He would also have had an opportunity to inform the respondent of his medical condition, the medication he was taking and the effect these events had had on him.

116. The fundamental flaws in the investigation were compounded by the fact the respondent did not convene a disciplinary hearing.

117. The respondent did allow the claimant to appeal against the decision to dismiss. Mr Mays acknowledged the appeal hearing did not cure the earlier defects in the process. The appeal hearing could not cure the earlier defects in circumstances where the focus of the appeal was on process, that is the respondent's failure to hold a disciplinary hearing and the failure to allow the claimant to participate in the investigation process, and did not provide an opportunity for the claimant to state his case or argue mitigating circumstances.

118. I must consider the chance the claimant would still have been dismissed even if the respondent had followed a fair procedure. I could not accept Mr Mays' submission that it was a "near certainty" the claimant would have been dismissed even if a fair procedure had been followed, because I was not at all persuaded, on the evidence before me, that it was a near certainty. In fact, I concluded there was only a small chance the claimant would have been dismissed if a fair procedure had been followed, and I reached that conclusion for a number of reasons: firstly, the respondent took no steps to commence disciplinary proceedings against the claimant in respect of the initial incidents until the claimant had been detained on remand on 20 July. It was this second incident on 20 July which the respondent regarded as being serious. This would infer that the earlier incidents were less serious in nature.

119. Secondly, if the respondent had carried out a reasonable investigation, disciplinary hearing and appeal hearing, it would have learned all of the information available at this Hearing, regarding the events which led to the claimant being arrested, the nature of his relationship with his partner, his health and other mitigating factors. It would also have been able to clarify the circumstances in which the second Fit Note was obtained and whether the claimant's brother had made contact with the respondent to inform them of the situation.

120. Third, there were very strong mitigating factors regarding all of the incidents, but particularly the incident which led to the claimant being detained on remand (page 81). These mitigating factors (the claimant's explanation, his lack of any substantial record and the attitude of his partner) led to the claimant being admonished.

121. Fourthly, the claimant was described as being in a "*frontline*" role in his job as a Caretaker. Ms Maxwell's evidence was to the effect the claimant's role was described as "*frontline*" because he had contact with members of the public. The daily work record (page 66) for a Caretaker listed duties which were exclusively cleaning and tidying, with one exception which was to log and report any issues. The claimant's evidence, which was largely unchallenged, was to the effect that his contact with residents was limited to residents reporting, or phoning to report, issues to be logged.

122. There was no evidence to suggest why the claimant could not have continued in that role. He had been employed as a Caretaker for almost 3 years, and there had been no issues with his work and no disciplinary issues prior to these events.

123. I balanced the above factors by also having regard to the fact the claimant had breached the Council's code of conduct, and its policy regarding unauthorised absence and Domestic Abuse. Ms Maxwell had produced a

document showing the disciplinary outcome in cases where other employees had been charged or convicted. The document showed many employees had been dismissed, but some had not.

5 124. I considered that although the claimant had not been dismissed for these earlier matters, they were matters to which the respondent would have had regard when making a decision. I also considered that notwithstanding the document produced by Ms Maxwell, the mitigation in the claimant's case was compelling and would also have had to have been considered by the
10 employer if a fair procedure had been followed.

125. I, having had regard to all of these factors, decided that if the respondent had carried out a fair procedure, there was a 10% chance the claimant would have been dismissed. I reached that decision primarily be cause of
15 the strong mitigating factors present in the claimant`s case. The effect of my decision is that the compensatory award will be reduced by 10%.

126. I next considered the respondent's submission that the basic and compensatory awards should be reduced because the claimant, by his
20 conduct, contributed to his dismissal. Mr Mays referred to the contributory conduct as (i) being the fact the domestic assault and breach of bail conditions related to "*domestic abuse*" to which the respondent has a zero tolerance policy; (ii) failing to report his detention on remand; (iii) the circumstances relating to presenting a Fit Note whilst on remand and (iv)
25 the subsequent drugs charge.

127. I had regard to the terms of Sections 123(6) Employment Rights Act which provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce
30 the compensatory award by such proportion as it considers just and equitable having regard to that finding.

128. The Court of Appeal, in the case of ***Nelson v BBC (No 2) [1980] ICR 110*** said that three factors must be satisfied if the Tribunal is to find contributory

conduct: (i) the relevant action must be culpable or blameworthy; (ii) it must have actually caused or contributed to the dismissal and (iii) it must be just and equitable to reduce the award by the proportion specified.

129. The term "*culpable or blameworthy*" includes conduct which was "*perverse or foolish*", "*bloody minded*" or merely "*unreasonable in all the circumstances*".

130. Mr Mays submitted the subsequent drugs charge was a factor to which the Tribunal could have regard when considering contributory conduct. I could not accept that submission in circumstances where there was no dispute regarding the fact that charge post-dated dismissal. The charge could not, therefore, have been a factor which caused or contributed to the claimant's dismissal. I return to deal with this matter below.

131. I considered the starting point for examining the issue of contributory conduct must be the reason for dismissal. I found (above) that the respondent had shown the reason for dismissal was conduct, and the misconduct in this case related to the fact the claimant was remanded in custody, on 20 July 2016. The claimant clearly contributed to this by the fact he was detained in custody. The question, accordingly, for this Tribunal is whether it would be just and equitable to reduce the compensatory award.

132. I decided it would not be just and equitable to reduce the compensatory award for contributory award in the circumstances of this case because (i) the respondent knew the whereabouts of the claimant; (ii) the respondent could have made contact with the claimant to ascertain what had happened and how long he was likely to be on remand, but they failed to do so; (iii) the claimant was admonished after the full details had been considered by a Sheriff; (iv) Ms Maxwell told the Tribunal that detention in custody is usually treated as unauthorised absence by the Council. She outlined the procedure the Council would usually follow in such cases, and confirmed this procedure would usually take up to 4 weeks to complete. If the Council had adopted this approach, it would have learned more information before

taking a decision regarding the claimant's future employment and (v) the ACAS Code, to which I was referred by Ms Osborne, makes clear that detention is rarely a reason for dismissal without firstly understanding the surrounding circumstances.

133. I accordingly concluded that the claimant had not caused or contributed to the dismissal. The Council acted with undue haste when it dismissed the claimant upon the conclusion of a one-sided investigation and without a disciplinary hearing.

134. Mr Mays, in his submission, also referred to breaches of the Council's domestic abuse policy; failing to report being detained on remand and presenting a Fit Note while on remand as being factors which caused or contributed to the claimant's dismissal. I could not accept that submission for two principal reasons: firstly, as set out above, I found the reason for the claimant's dismissal was because he was detained on remand on 20 July. Accordingly, the other factors referred to by Mr Mays did not cause or contribute to that reason for dismissal. Secondly, the respondent did not know the circumstances relating to the submission of the Fit Note.

135. I decided, for all the reasons set out above, that it would not be just and equitable to reduce the compensatory award because of contributory conduct.

136. I next had regard to the terms of Section 122(2) Employment Rights Act which provides that the basic award may be reduced if the employee's conduct before dismissal makes such a reduction just and equitable. The claimant, prior to his dismissal, had had a period of unauthorised absence from 21 to 24 June and he had been charged with domestic assault and breaching bail conditions. The claimant had, by those actions, breached the Council's Code of Conduct and its Domestic Abuse policy. I asked myself whether the claimant's basic award should be reduced for these reasons.

137. I set out (above) my conclusion that the reason for dismissal was the fact the claimant was remanded in custody on 20 July. I referred to the fact the respondent took no immediate action to address the fact the claimant had had a period of unauthorised absence from 21 to the 24 June, or that he had been held on a charge of domestic assault and breaching bail conditions. The respondent did not initiate an investigation until 20 July, being the day the claimant was held on remand, and 9 days after the claimant's initial Fit Note had expired.

138. I decided, having had regard to the fact the claimant was not dismissed for the earlier matters (unauthorised absence, domestic assault and breaching bail conditions) and the fact the respondent did not act immediately to address these earlier matters, that it would not be just and equitable to reduce the basic award in the circumstances.

139. The claimant sought the remedy of reinstatement or re-engagement. Section 116 Employment Rights Act provides that when considering whether to make an order for reinstatement or re-engagement, Tribunals have a specific duty to consider whether the employee wants an order to be made, whether it is practicable for the employer to comply and whether it would be just to make either type of order where the employee's conduct caused or contributed to some extent to his dismissal. Furthermore, the Tribunal should look at the circumstances of the case and take a broad common sense view of practicability.

140. Ms Maxwell argued it would not be practicable for the respondent to reinstate the claimant because the respondent *"would have"* carried out a recruitment exercise and "*would have*" replaced the claimant. Ms Maxwell also referred to the council having a surplus number of employees. I was not persuaded by Ms Maxwell's evidence because it appeared she spoke to what "*would have*" occurred rather than what had occurred. Furthermore, having a replacement employee in the post does not of itself make reinstatement not practicable.

141. The claimant has, since his dismissal, been charged with possession of a class A drug (cocaine). The claimant explained the circumstances leading to this charge, however this incident is a further breach of the council's code of conduct. I considered this further charge rendered reinstatement not practicable: it tipped the balance against reinstatement and introduced issues regarding trust and confidence in the claimant and his future conduct. I, for these reasons, decided not to order reinstatement.

142. The claimant is entitled to an award of compensation.

Basic Award

The claimant had completed two years of service, and is entitled to a basic award of £616.16 (being 2 x £308.08 per week).

Compensatory Award

Section 123(6) Employment Rights Act provides that a Tribunal must award compensation that is "just and equitable". I set out above the fact the claimant's post-dismissal charge (possession of a class A drug) could not be contributory conduct, however, it is appropriate to have regard to that matter when calculating compensation. I had regard to the case of ***W Devis and Sons Ltd v Atkins [1977] ICR 662*** where the House of Lords upheld a Tribunal's decision that it was not just and equitable to award any compensation in circumstances where the employer had learned, after dismissing the employee, that he had been involved in conduct which was wholly inappropriate. The House of Lords stated it was clear, on the basis of the information that subsequently came to light, the employee could have been fairly dismissed if the employer had known about this conduct.

143. I, as set above, was satisfied that notwithstanding the fact the claimant may have informed his line manager of the earlier conviction, the respondent`s employees who carried out the investigation and took the decision to dismiss, HR and the appeal panel were not aware of the fact of this earlier

conviction. I accepted the respondent learned of the earlier conviction after the claimant had been dismissed and after conclusion of the appeal process. The respondent learned of the earlier conviction through a newspaper article dated 28 September 2016 which referred to the claimant having been found with possession of cocaine on 22 August 2015.

144. Ms Maxwell's evidence was that someone had brought this to her attention after the conclusion of the appeal hearing. The appeal hearing took place on 4 October and the letter informing the claimant of the outcome was dated 5 October.

145. I next had regard to Ms Maxwell's evidence to the effect that if the claimant had been in the employment of the Council when this matter came to light, there would have been an investigation and disciplinary hearing and it was likely the claimant would have been dismissed.

146. I accepted Ms Maxwell's evidence regarding the likelihood the claimant would have been dismissed for this offence, because there was evidence to suggest the respondent had dismissed other employees for the same/similar offence.

147. I concluded that if the respondent had become aware of this subsequent charge prior to the conclusion of the appeal process, there would then have followed an investigation and disciplinary process. Ms Maxwell suggested this process would take 4 weeks to complete, which I have calculated to be 12 November. I accordingly decided that it would be just and equitable to limit any compensation to 12 November.

148. The claimant lost wages in the period 3 August 2016 to 12 November 2016. This is a period of 14 weeks. I have reduced this period to 10 weeks because I have awarded four weeks' notice (below). I calculate the claimant has had loss of earnings of £2,704 (being 10 weeks x £270.40 net per week).

149. I also award the claimant £350 for loss of statutory employment rights.

150. The claimant has lost £13.24 per week in respect of pension loss. I award 14 weeks of this loss, which I calculate to be £185.36.

151. There is no award of future loss in circumstances where I have limited losses to 12 November 2016.

152. The compensatory award is £3,239. I must reduce that sum by 10% to reflect the fact I decided there was a 10% chance of dismissal if the employer had followed a fair procedure. I calculate £3,239 less 10% is £2,915.

153. Ms Osborne submitted an uplift should be applied to the award because the respondent failed to comply with a material provision of the ACAS code of practice. I decided to apply a 25% uplift to the award in circumstances where there was a failure by the respondent to carry out a reasonable investigation and a wholesale failure to hold a disciplinary hearing. I calculate this to be £3,206 (being £2,915 + 25%).

154. I, in conclusion, find the claimant was unfairly dismissed and I order the respondent to pay to the claimant a basic award of £616.16, and a compensatory award of £3,206.

155. The claimant has been in receipt of Employment Support Allowance and Jobseekers Allowance and the award of compensation will be subject to the Recoupment Regulations, the effect of which is explained in the attached Note.

156. The claimant also made a claim in respect of the payment of notice. The respondent denied payment of notice was due to the claimant because he had been dismissed for gross misconduct. I was entirely satisfied that merely being detained is not, of itself, an act of gross misconduct. I accordingly found the breach of contract claim well founded and I ordered

the respondent to pay to the claimant the sum of £1,081.60 in respect of four weeks' notice.

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Employment Judge: Lucy Wiseman
10 Date of Judgment: 19 April 2017
Entered in register: 20 April 2017
and copied to parties