



EMPLOYMENT TRIBUNALS

Claimant: Mr F Clayton
Respondent: Royal Mail Group Limited
Heard at: Sheffield **On:** 14 and 15 March 2018
Before: Employment Judge Little

Representation

Claimant: Mr J Grainger, Solicitor (Grainger Appleyard Solicitors)
Respondent: Mr I Hartley, Solicitor (Weightmans LLP)

RESERVED JUDGMENT

My Judgment is that the Claimant was not unfairly dismissed and so the Claim fails.

REASONS

1. The complaint

In a claim form presented on 20 May 2017 Mr Clayton complained that he had been unfairly dismissed. When the claim was presented there was an additional claimant, Neil Skirrow, who had been dismissed in circumstances which were similar to those of the claimant. The respondent believed that both Mr Clayton and Mr Skirrow had been abusing and bullying a colleague, Mr Chris Edwards.

In July 2017 Mr Skirrow withdrew his claim and a Judgment was issued on 14 July 2017 dismissing his claim on that basis.

2. The issues

These were defined at a preliminary hearing for case management which I conducted on 11 September 2017 and for ease of reference those issues are replicated here:-

- 2.1. Can the respondent show the potentially fair reason of conduct?
- 2.2. If so, was that reason actually fair having regard to the statutory test in the Employment Rights Act 1996 section 98(4)?
- 2.3. Did the respondent actually believe that the claimant was guilty of misconduct (alleged harassment and bullying of a colleague)?
- 2.4. Did the respondent have reasonable grounds on which to base that belief?
- 2.5. Had the respondent carried out as much investigation as was reasonable in the circumstances?
- 2.6. If so, was the sanction of dismissal within the band of reasonable responses?
- 2.7. If the claimant's dismissal is found to be procedurally unfair, would a fair procedure have made any difference and if so what?
- 2.8. If the claimant was unfairly dismissed did he contribute to that dismissal and if so to what extent? How should that be reflected in terms of remedy?

As the case has been presented before me the following additional themes or issues have emerged:-

- Were the interviews conducted by Mr Fox, the dismissing officer sufficiently robust and probing or were questions left unanswered by witnesses?
- Was it fair for Mr Fox to restrict the number of witnesses put forward by the claimant to three, so that those were equal to the witnesses against the claimant (three each)?
- Were the allegations against the claimant based on general or vague allegations rather than specific allegations?
- Should the respondent have acceded to such request as the 'victim', Mr Edwards, was making for mediation rather than pursuing the matter as a disciplinary issue?
- Did Mr Fox's conclusions include contradictory findings or conclusions?
- Did the respondent fail to take into account alleged contradictions in the accounts given by Mr Edwards?
- With regard to screenshots of Facebook entries, had the respondent provided one version in the initial part of the investigation but then a different version later?
- Had the respondent failed to take into account the allegations of bad behaviour by Mr Edwards which the claimant was making?
- Were any shortcomings or unfairness in respect of Mr Fox's decision cured by the re-hearing conducted by Mr Hulme?

- Was it unfair for Mr Hulme to obtain further witness statements after the appeal hearing but not permit the claimant to comment on those statements before making his decision?
- Was the claimant being targeted (as an anonymous grievance – page 102) alleged?
- Did the respondent have insufficient regard to the claimant's length of service (21 years) as a mitigating factor?

3. Evidence

The respondent's evidence has been given by Mr Steven Fox, delivery office manager Barnsley and dismissing officer and by Mr Philip Hulme, independent casework manager and appeal officer.

4. Documents

I have had before me an agreed bundle running to 316 pages.

5. Findings of fact

- 6.1. The claimant's employment by the respondent commenced in October 1995. At the material time he was employed as an Operational Postal Grade (OPG) or post person. That was at the Rotherham delivery office.
- 6.2. At the material time the claimant had a clear disciplinary record.
- 6.3. One of the claimant's colleagues at the material time was another OPG, Chris Edwards. Until 2014 or thereabouts the claimant and Mr Edwards were close friends. The claimant helped Mr Edwards with work on his kitchen and with his car. Outside of work the claimant and his wife socialised with Mr Edwards and his then long-term partner. Mr Edwards subsequently left his long-term partner but the claimant and his wife kept in contact with her. Part of the socialising between the claimant and Mr Edwards had included playing football and badminton together but there came a time when all of that ceased. The claimant's understanding is that Mr Edwards felt that the claimant was taking sides as between Mr Edwards and his former partner and Mr Edwards felt that the claimant was offering unwanted advice about Mr Edwards' child with the former partner.
- 6.4. On an unknown date in 2014 somebody wrote derogatory comments such as "tossers" on Mr Edwards' personal mail. Mr Edwards suspected it was the claimant and made a complaint. The claimant was spoken to but eventually it was discovered that another employee was responsible, Mark Savage. From this point onwards, although working in fairly close proximity, the claimant and Mr Edwards ceased to speak to each other or have anything to do with each other.
- 6.5. There may have been subsequent complaints by Mr Edwards to the effects that the claimant was purposely mis-sorting his parcels or letters.
- 6.6. On or about 6 October 2016 Mr Edwards made a formal complaint against the claimant and his friend and work colleague Mr Neil Skirrow. I have not been shown the formal written complaint

(if there was one) but the tenor of the complaint can be gleaned from a statement which Mr Edwards made on 10 October 2016 (pages 90 to 92 in the bundle). He began by referring to the mis-sorting or misplacing of parcels and letters which he suspected the claimant had been doing. Although not making any reference to Mr Savage in his statement, Mr Edwards implied that he believed that the claimant had been responsible. Mr Edwards went on to say that after that sarcastic comments would be made to him occasionally but he chose to ignore them. However recently it had been brought to his attention that over the past 8 to 10 months he had been subjected to verbal abuse and what he described as general taking the Mickey. He had been told about this by a colleague called Rob Brown who said that the claimant and Mr Skirrow were constantly making sarcastic and crude comments about him. Another colleague, Paul Carver told him that comments about being scruffy and smelly were being levelled at Mr Edwards and comments to the effect that he bought his clothes from charity shops.

- 6.7. He was told that it was the claimant and Mr Skirrow who were making these comments. Mr Carver had also told him about entries on social media – Facebook - and Mr Edwards said that when he decided to look for himself he was distraught to find out that it was true. He believed that he had been nicknamed ‘El Pongo’. Mr Edwards went on to explain that he was very embarrassed about that and shocked to think that grown men could write such comments. He felt that he was a laughing stock at work. He now didn’t want to go into work and it was affecting his sleep and appetite and his relationship with his girlfriend. He had been feeling really down and depressed and had had to take a few days off as special leave to clear his head.
- 6.8. On 6 October 2016 the claimant was called into a fact finding interview with a Mr Ian Pilmore. Mr Pilmore was a delivery manager. The note of that interview is at pages 83 to 84. The claimant was represented by a Mr Colin Richardson of the CWU. The claimant was asked whether he had made any derogatory comments about a member of staff or colleague on the Rotherham sorting floor. The claimant replied that he had a laugh and a joke and he had banter with staff members but he had not spoken to Chris (Edwards) for over two years. He was asked whether he had made any derogatory comments about a fellow colleague on social media and the claimant said that he had not. When asked if there had been any allegations of bullying or harassment against him previously the claimant referred to the complaint that Mr Edwards had made in or about 2014, although he pointed out that the culprit had been found to be Mr Savage. The claimant went on to say that he had not done anything wrong. He had participated in office banter but had not spoken to Mr Edwards for two years and Mr Edwards isolated himself at work. At the conclusion of the interview the claimant was told that he would be sent home for what was described as a cooling off period.
- 6.9. However on the following day, 7 October, Mr Reynolds the Rotherham delivery office manager wrote to the claimant confirming

that he was in fact on what was described as precautionary suspension with pay. (See page 86).

- 6.10. I was not told the precise circumstances in which Mr Edwards made his statement of 10 October to which I have already referred, but on the following day Mr Edwards was interviewed by Mr Pilmore. A copy of those notes are at pages 97 to 99. When asked how long he had been experiencing issues at work he said for the last two to three years. He identified the claimant and Mr Skirrow as the employees who had been making comments which had caused those issues. When asked what comments had been made against him Mr Edwards replied that they were childish comments such as 'scruffy', 'smelly' and cuckoo noises had been made. Mr Edwards believed that the latter was because he was on anti-depressant medication. Mr Edwards went on to say that the comments were always made loudly, not to his face but loud enough so that he could hear what was being said and it was clear that the comments were being directed at him. He said that comments were not made every day but were on most days of the week and that he had been going on for two to three years. When asked what he thought might have led to the alleged behaviour towards him Mr Edwards replied that he, the claimant, and Mr Skirrow all used to be friends and go out in groups together but after the split with his girlfriend Mr Edwards thought it best to distance himself from the group. He said that from that point on the comments started and had never stopped.
- 6.11. The Facebook comments which he was concerned about were not on his or the claimant's Facebook page, but on that of another colleague and friend Jamie Schofield. When asked if there was anything else he wanted to ask Mr Edwards said that it had been going for a long time and he just wanted the comments to stop so he could come to work and carry out his job without feeling that he was being bullied and harassed.
- 6.12. The claimant was then invited to a further fact finding meeting (page 105) and that meeting took place on 18 October 2016. Again it was conducted by Mr Pilmore and on this occasion the claimant was accompanied by Mr Steve Warren of CWU. The notes of that meeting are at pages 109 to 111. The claimant confirmed that he had definitely not made any comments towards Mr Edwards. He was asked why Mr Edwards was complaining that he had. The claimant did not know. The claimant participated in banter with people around him but not with Mr Edwards as they didn't speak. He did not ever aim banter towards him. When asked whether he had ever referred to Mr Edwards as El Pongo, scruffy or smelly the claimant replied that he had not, but that was what people called him – the claimant.
- 6.13. The claimant was then asked about any derogatory comments on social media. He denied that he had made any. The claimant was then shown a screenshot of a Facebook account. The claimant contends before me that what he was shown on this occasion was not the same as the screenshot which is now at page 72 of the bundle. The claimant contends that what he was actually shown was the screenshot which is at page 81 in the bundle. He contends that a

significant difference between these two is that on the latter Mr Edwards is shown as “liking” the comment made. Another difference is that “smiley faces” which the claimant has entered onto the page are more numerous on page 81 than on page 72. We have had some discussion as to whether, if these were screenshots taken from different devices (which it seems they were) that would account for these differences.

- 6.14. Returning to the 18 October meeting, the claimant pointed out that in any event the screenshot was not of his Facebook account but rather Jamie Schofield’s. The claimant accepted that he had made the comments shown on that screenshot. The smiley faces on page 72 are from a conversation taking place on Facebook in September 2016. Mr Skirrow asked Mr Schofield:

“R U taking some clothes pegs for ur nose n plenty of fly repellent”.

During the interview Mr Warren pointed out that Mr Edwards had “liked” the comments and suggested that he could not like it and then feel bullied and harassed. The claimant said that those comments were aimed at himself and what he described as Jamie’s friends from Maltby. I was told that Mr Schofield was a heavy metal aficionado and that the reference to fly repellent referred to what apparently maybe the practice at heavy metal gigs of bottles of urine being thrown into the audience.

The claimant said that he had never made any comments about Mr Edwards.

- 6.15. Mr Pilmore took statements from other colleagues during the course of his investigation. Robert Brown was interviewed on 6 October 2016 and the note of that is at page 82. The claimant has expressed concern that this statement is timed at 10am – at which time Mr Brown should have been on his walk. However in a statement which Mr Brown subsequently gave to Mr Hulme (page 231) Mr Brown confirmed that he had not personally typed up the statement and the respondent’s suggestion is that the 10am relates to the time that it was typed up. In any event Mr Brown signed his 6 October statement. In it he says that on numerous occasions he had witnessed the claimant and Mr Skirrow bullying Chris Edwards and using derogatory remarks towards him and about him. He had witnessed them calling him a scruff and mental and he had also heard both of them making cuckoo noises towards him. They had made fun of Mr Edwards for taking up running and had mimicked this. He had also been passed packets by Mr Skirrow with the comment that he should give that to his scruffy friend – Mr Edwards. He referred to Mr Skirrow and the claimant constantly niggling Mr Edwards and that the claimant encouraged others to bully the claimant such as Mark Savage and Mr Skirrow although he did not believe that Mr Savage had done any bullying. He believed that others such as Mr Carver, Kyle Taylor and Mr Savage had witnessed the bullying. He believed that Mr Edwards’ mental health had been affected and it had put pressure on Mr Brown because he did not

want to tell Mr Edwards the things that he heard because he didn't want to hurt his feelings.

- 6.16. Kyle Taylor made a statement on 10 October 2016 (page 93). He said that on a number of occasions he had overheard and seen examples of what he described as bad verbal treatment. For reasons best known to himself he described Mr Edwards as the 'Plaintiff' and the claimant, Paul Clayton, the claimant's brother (also employed by the respondent) and Mr Skirrow as 'aggressors'. He was aware of there being personal history between the claimant and Mr Edwards. They had previously been friends and now there was a level of animosity from the claimant towards Mr Edwards. Mr Taylor went on to refer to what he had heard Mr Skirrow calling Mr Edwards – scruffy and dirty but said that this had actually been towards other members of staff although within earshot of Mr Edwards.
- 6.17. Mr Paul Carver prepared what he described as a 'statement of truth' on 11 October 2016 (page 94). He said that he too had been a witness to bullying and harassment of Mr Edwards on a number of occasions. That had been through social media and verbally shouting comments across the office about Mr Edwards. He said that the main culprits he knew of were Mr Skirrow and the claimant. He had heard comments from the claimant calling Mr Edwards 'El Pongo' and 'scruffy'. Mr Skirrow had referred to Mr Edwards as 'scruffy' and 'scruffy mate'. He also said that he had heard the claimant making racist remarks towards a Mark Strawbridge.
- 6.18. Unsurprisingly the claimant was particularly concerned about this allegation of racial remarks when he was notified of it. In subsequent interviews he was at pains to tell Mr Fox that he would not make such comments and that various members of his family were of mixed race. The respondent's case has been that they did not pursue this matter as it did not relate to the complaint that was being dealt with as brought by Mr Edwards. Although subsequently Mr Strawbridge would be one of a number of people the claimant would ask Mr Hulme to interview (see page 230), he was not interviewed and apparently was on annual leave at the time Mr Hulme was carrying out his other interviews in March 2017.
- 6.19. On 7 November 2016 Mr Fox wrote to the claimant inviting him to a formal conduct meeting. A copy of that letter is at pages 122 to 123. The "conduct notification" or charges against the claimant were described as:
- "1. Over a period of approximately two years you have been making inappropriate comments towards Mr Edwards, you have regularly shouted words like scruffy, mental, El Pongo and made cuckoo noises towards this employee. These comments have been heard by a number of employees. This is unacceptable and deemed as bullying and harassment.
2. You have also used Facebook to continue to make inappropriate comments towards Mr Edwards. Over the last six months you have posted comments on Jamie Schofield's Facebook page aimed at Mr Edwards. The comments are consistent with those

that you have used in the office referring to this employee using similar terms such as “your scruffy mate”.

6.20. This letter is perhaps not expressed in the clearest terms and if the part of the letter to which I have just referred is read in isolation it could be thought that these are conclusions rather than charges or allegations. However on the second page of the letter it was explained that those formal notifications were being “considered as gross misconduct” – which is again perhaps not the clearest expression although no doubt Mr Fox meant considered that they *could* be gross misconduct as opposed to considered that they *were*. However the letter goes on “if the conduct notification is upheld, one outcome could be your dismissal without notice.”

6.21. In paragraph 25 of his witness statement the claimant contends:

“It was however clear from the letter that there was already a finding of fact against me and that position is made clear in the opening paragraph.”

The claimant goes on to say that he was not being given the opportunity to defend himself but only the opportunity to put forward mitigation. As was put to him during cross-examination, the claimant was clearly informed in the letter that at the meeting “you will be given every opportunity to fully explain your actions and present any evidence or points of mitigation in relation to your case, before a decision is made.” (See page 123).

Accordingly whilst the respondent’s letter is not written in the clearest terms, I find that it is disingenuous for the claimant now to contend that a decision had already been paid. That is all the more so because following this letter there was of course the conduct meeting itself and in due course an appeal hearing conducted over some four hours.

6.22. Initially it had been proposed that the formal conduct meeting would take place on 11 November 2016 but this was moved to 17 November 2016.

6.23. This meeting was conducted by Mr Fox and the claimant was again accompanied by Mr Warren of the CWU. The respondent’s notes of that meeting are at pages 133 to 139. Subsequently the claimant would set out two pages of handwritten proposed amendments (pages 140 to 141). The evidence of Mr Fox was that he accepted those handwritten amendments as being part of the record, but the formal typed notes were never amended to actually include those comments. In any event, during cross-examination the claimant accepted that most of the amendments were relatively minor such as a reference to ‘bubble hair’ should have been ‘baby hair’ (apparently one of the claimant’s nicknames). There was in the amendments an allegation that Mr Savage should be interviewed again, because some of his statement appeared to be missing.

6.24. Mr Savage had been interviewed by Mr Pilmore on 12 October 2016 and the notes are at page 100. In that statement Mr Savage denied that he had ever been approached by any members of staff and

asked to make derogatory comments towards another member of staff. He accepted that he had been responsible for the writing of comments on what were described as the Christmas cards of Mr Edwards, but also of Mr Brown and another employee some two years ago. He said that no further action had been taken against him because they were “taken in the spirit that was intended”. Mr Savage said that banter on the shop floor was always going backwards and forwards but he had never heard anything that he would say was derogatory or aimed at causing offence. He expressed the opinion that he felt that it was unfair the claimant and Mr Skirrow were not at work whereas Mr Edwards still was. Mr Savage has signed that statement as being a true record of the interview. It is difficult to understand why Mr Warren believed that some of the statement appeared to be missing. Perhaps he was suggesting that Mr Savage should have been asked some further questions, but those are not clarified in the claimant’s amendment.

- 6.25. Returning to the 17 November 2016 formal conduct meeting, the notes show that Mr Fox read out the conduct notification and told the claimant that if they were proven that would constitute gross misconduct which could result in his dismissal. It appears that the union representative gave to Mr Fox a copy of a letter dated 13 October 2016 (which is at pages 102 to 104 in the bundle). That letter is anonymous in the sense that certainly in the copy in the bundle there is no signature. However during the course of this hearing I have been told that it was a grievance by Mr Shane Scott a manager. One of his matters of concern was “being instructed to discipline front line employees who were seen as problematic by higher management. The individual employees concerned include Francis Clayton, Paul Clayton, Gary Barratt, Glyn Pearson and Roy Corbett.” It may be that that letter had been provided to Mr Fox prior to this meeting because there is reference to HR or legal advice which the respondent may have obtained about it which, according to Mr Warren, was that it did not hold any water because it was not signed. Mr Fox is recorded as saying that that would not form part of the investigation.

The claimant was then asked some questions about Mr Fox and he said that he got on fantastically with his colleagues except for Mr Edwards to whom he no longer spoke.

There was discussion of what is described as ‘evidence piece 1’, which is the screenshot of the Facebook entry which is at page 72. The claimant said that the smiley faces icons he had put on that were in respect of Mr Schofield’s gang going to a gig – the gang being described as a heavy metal gang. The claimant was also asked about what is described as ‘evidence piece 2’ which is the Facebook screenshot shown on page 73. Again this appears to be the Facebook page of Mr Schofield but with contributions from both Mr Skirrow and the claimant. Mr Skirrow makes the comment:

“Was that ur scruffy mate” - to which the claimant responds:

“Oooooops charity shop” - followed by a series of smiley faces.

To this Mr Skirrow responds “picked up out of a blue bag on delivery” - to which the claimant responds:

“Aaahhhh of course”.

During the course of cross-examination, it was put to the claimant that the reference to “on delivery” suggested a work context. It was also put in cross-examination that as Mr Skirrow refers to ‘scruffy mate’ in the singular that made it less probable that Mr Skirrow was talking about Mr Schofield and his heavy metal mates.

There was then discussion of what is described as ‘evidence piece 9’, which is a photograph of someone leaning against a cliff top rock, the individual probably being Mr Schofield. Mr Skirrow has added the comment “are you looking for ur scruffy mate under that rock” and the claimant has added the comment “bender”. It appears that during the course of the disciplinary hearing it was clarified that the reference to ‘bender’ was not to a homosexual person but rather to someone who may be under the influence of drink having gone on a bender. The bender allegation was not therefore pursued against the claimant.

There was then discussion of the mis-sorting of parcels and the claimant explained that that had been investigated at the time by Mr Scott who had found a different employee to be responsible.

The claimant challenged the evidence that had been given by Mr Carver because he had only worked in the claimant’s section (the S61 postcode area) on the day in each week that the claimant did not work. In those circumstances the claimant queried how Mr Carver could have heard what it is alleged the claimant had been saying. The claimant went on to say that it was he himself who got called nicknames including gypsy and what in the minute is referred to ‘bubble hair’ although as mentioned above the claimant clarified that to ‘baby hair’. The claimant said that his brother may have called him ‘El Pongo’ once.

The claimant then went on to seek to discredit Mr Edwards by contending that he had put objectionable material on social media and that some of his colleagues had blocked him. Further he contended that Mr Edwards could not have heard anything at work because he routinely wore headphones. He alleged that the only person who made cuckoo noises in the workplace was a Steve Quarton.

On behalf of the claimant, Mr Warren referred to the second page of Mr Edwards’ statement, where there is reference to the El Pongo nickname and asked where was the evidence of that. (Clearly the answer to that question is that it was contained in Mr Carver’s 11 October 2016 statement (page 94)). Mr Warren went on to say that although Mr Edwards had made the “grown men” comment, Mr Edwards had been guilty of inappropriate comments on Facebook as well.

Mr Fox invited the claimant to comment on Mr Taylor’s statement (page 93) and the claimant challenged it on the basis that how could Mr Taylor know what had taken place in the past.

When Mr Carver's evidence was discussed the claimant said that Mr Carver and Mr Edwards were best friends. However he accepted that his own relationship with Mr Carver was good. Mr Fox pointed out that it was Mr Carver who made the reference to the claimant calling Mr Edwards 'El Pongo'. Mr Fox noted that the same name was referred to on Facebook.

Mr Brown's statement was considered and the claimant denied that he had ever called Mr Edwards either scruffy or mental and that it had only been Mr Quarton who had made cuckoo noises.

The claimant referred to the statement which Ryan Wilde had given to Mr Pilmore (see page 113 to 114) in which he alleged that the claimant had been called names in a joking way as part of office banter but he had never heard the claimant referred to as either scruffy, smelly or El Pongo. It appeared that when Mr Skirrow had been interviewed as part of the disciplinary investigation against him he had contended that the reference to scruffy, smelly or El Pongo were references to Mr Clayton, the claimant rather than Mr Edwards. However Mr Wilde said that he was not aware that the claimant had any of those nicknames.

Towards the end of the meeting Mr Warren gave the names of various people who ought to be interviewed because they were willing to give statements. Those were Lee Bolton, Tracey Appleby, Gary Barrett, Mark Strawbridge, Steve Quarton, Martin Earnshaw, Ian Barnett, Paul Clayton and Trudie Degan. Mr Warren said that all of those people would say that Mr Edwards had made comments about them.

- 6.26. Applying what seemed to be his own principle that the number of witnesses on one side should be balanced by the number of witnesses on the other side, Mr Fox only conducted interviews with Mr Barratt (16 December 2016 - 162 to 163); Mr Quarton (16 December 2016 - 167 to 168) and Mr Earnshaw (also 16 December 2016 - 169 to 170), although he did also re-interview Mr Carver, presumably on the basis that it was alleged that something had been missing from his statement. That interview was conducted again on 16 December 2016 and the resultant notes are at pages 165 to 166.
- 6.27. Mr Barratt told Mr Fox that everyone did banter and that some people called the claimant's brother 'skeleton'. They all did it and there was no harm in it. Mr Skirrow was called 'Bigfoot'. None of the banter was threatening. Mr Barratt said he had been upset by a picture that Mr Edwards had sent him on Facebook referring to Mr Barrett as 'Quasimodo'. It appears that Mr Barrett may have had some physical impairment. In amendments which Mr Barrett made to his statement (page 164) he said that he had referred to the claimant and Mr Skirrow (not Mr Quarton) as not having bad bones in their body. There had also been no reference in the typed version to an allegation that Mr Barrett had apparently made that there was a witch hunt and that he had blocked Mr Edwards on Facebook due to what he described as his obscene pictures.

- 6.28. In Mr Quarton's interview he informed Mr Fox that the banter in the office was good natured. Mr Quarton identified the claimant Mr Skirrow, Mr Savage, a Mr Holmes and Jamie Schofield as those who participated in the banter. He said that comments weren't aimed at anyone and it was like being in a pub. He felt that it would be a shame if the office lost two of its best sorters – the claimant and Mr Skirrow.
- 6.29. Mr Earnshaw was also asked what the banter was like. He said that it was on a daily basis and people did get singled out. Some of it got quite offensive but it would also be aimed at "the Claytons" (a reference to not only the claimant but his brother and his wife working for the respondent).
- 6.30. In the further interview with Mr Carver (pages 165 to 166) he explained that the atmosphere at work had changed in recent weeks and now no one spoke to him. The word 'scab' had been used. He went on to say that all he had done was to confirm what he had heard being said and he had said that it wasn't right what had been going off. He felt that Mr Edwards took things personally and that he shouldn't have to come to work to be treated like that.
- 6.31. On 9 December 2016 Mr Fox interviewed Mr Edwards. Mr Edwards was accompanied by a Mr Richardson described as a workplace friend. The notes of this meeting are at pages 151 to 153. At our hearing it was clarified that what appears to be a further meeting on 16 December 2016 (documented at pages 159 to 161) is in fact a duplicate – albeit with different dates – of the 9 December 2016 meeting.

At the meeting Mr Edwards told Mr Fox that he was still on sick leave and he had been offered a temporary move to the Maltby section which was part of the same office, but some distance away from the claimant's S61 section. Mr Fox asked Mr Edwards what had changed over the last two to three years in the unit and Mr Edwards again raised the misplacing of parcels issue. He reiterated that he had heard sarcastic comments being made but had chosen to ignore them. Recently Mr Carver had told him what other people had been saying about him. Mr Brown had also told him of this. Mr Brown had not really wanted to get involved but he could not believe how childish everyone was being. Mr Fox asked Mr Edwards why he hadn't heard the comments, but the recorded reply is not really very clear because it is - that some people did hear the comments and knew that they were aimed at him. There was reference to Facebook entries and Mr Edwards accepted that he had had some counselling from the respondent to try to help him with his anger issues.

He was asked why he had not reported any problems previously and replied that he was trying to distance himself from the others. When asked whether he had heard cuckoo noises from either the claimant or Mr Skirrow he replied that he had heard stupid noises "more like mental type noises" and that was mostly from the claimant.

- 6.32. At some point Mr Fox was in receipt of a statement from a Mr P M Hicks. This was a statement which apparently the claimant

had sought from Mr Hicks and there is a copy at pages 95 to 96. Mr Hicks said that he often witnessed banter between colleagues but he never thought that any comments were serious and they were usually taken in good spirit. He had heard Mr Edwards making derogatory comments towards Mr Skirrow and the claimant.

- 6.33. A Ms Harrison and Mr I Barnett apparently prepared a voluntary statement or reference in respect of both the claimant and Mr Skirrow and Mr Fox received that on 8 November 2016 (see pages 125 to 126). Both these individuals had worked with the claimant and Mr Skirrow and they had never heard either of them make any malicious or derogatory comments to anybody. The claimant and Mr Skirrow were very friendly, helpful and genuine.
- 6.34. On 9 December 2016 Mr Fox interviewed Mr Schofield and a copy of those notes are at pages 154 to 156. Mr Schofield was asked whether his Facebook friends included the claimant, Mr Skirrow and Mr Edwards. He said that that had been the case until recently when he had 'unfriended' Mr Edwards because he had let him down when they were supposed to be attending a heavy metal gig together.
- 6.35. Mr Fox then went on to ask Mr Schofield if he remembered a night out earlier in the year at a pub called the Masons when the claimant and Mr Skirrow had been in attendance. It appears that the claimant had raised this issue with Mr Fox to explain the references to 'scruffy' etc on Facebook. Mr Schofield said that two of his friends had attended the pub in their work clothes but it was the sort of pub where you would dress up. He said that the claimant, his brother and Mr Skirrow were all making a big deal out of the fact that those two people had come to the pub in their work clothes looking rather scruffy.

Mr Schofield was then asked about the Facebook conversations between himself and Mr Skirrow that included such phrases as 'scruffy', 'fly repellent' and 'mental'. Mr Schofield said that that was a reference to a recent concert and those comments could be aimed either at him or Mr Edwards. That was because "you can get very sweaty when at a concert". Mr Schofield was asked about a Facebook comment at page 75 where Mr Skirrow enquired "is ur scruffy mate going?" Mr Schofield replies "no he's still poorly pal." Mr Fox asked whether that was a reference to Mr Edwards because he had been on sick leave. Mr Schofield said that it was about nobody in particular and he had said the first thing that came into his head.

Asked about the general banter at work he said that some of it was close to the knuckle but it was meant in good humour. He went on to say that he had heard Mr Quarton making cuckoo noises. He acknowledged that he may have heard references to 'scruffy mate' and that could have been after the comments on Facebook.

- 6.36. On 30 December 2016 Mr Fox conducted a further interview with Mr Edwards. On this occasion he was accompanied by a Mr McBride of the CWU. The notes of this meeting are at pages 171 to 174. This meeting had in fact been requested by Mr Edwards himself on the

basis that “his head had not been in the right place” at the time of the 9 December interview. Mr Edwards gave a further account of his former friendship with the claimant and Mr Skirrow and how that had come to an end. He went on to refer to a group of people who called him ‘weirdo’ and said that he wasn’t wired up right. He was not asked whether that group of people included the claimant. Whilst Mr Edwards went on to make further complaints or comments about Mr Skirrow, little was said about the claimant until towards the end of the interview when Mr Edwards is recorded as saying “everything to do with Fran Clayton was a piss take”. It appears therefore that in relation to the case against the claimant this interview had not progressed matters any further.

6.37. On 15 January 2017 Mr Edwards sent an email to Mr McBride of the CWU who appears to have forwarded it to Mr Fox. It is at page 181. In it Mr Edwards says that he would like to try to resolve the bullying and harassment case against Mr Skirrow and Mr Clayton via mediation rather than ‘conduct’ and he didn’t wish those colleagues to remain on suspension. He would said he would like formal apologies but he concluded his email by saying that he was concerned about repercussions from Mr Skirrow and the claimant and others in the office that are close to them if they did return to the Rotherham delivery office.

6.38. Mr Fox’s evidence to me was that he did not consider that mediation was the way forward. He felt that mediation was being suggested to the claimant by others, but it looked as though Mr Edwards was not convinced himself particularly because of the concern about repercussions.

On 19 January 2017 Mr Fox wrote to Mr McBride (page 180) saying that as the case had been progressed to second line level conduct and was nearing conclusion he felt that mediation was not appropriate at that point. He referred to the repercussions concern of Mr Edwards.

6.39. On 17 January 2017 Mr Fox wrote to the claimant and with that letter were enclosed copies of the various statements which Mr Fox had taken since the date of the formal conduct meeting in November. Although that letter refers to Mr Fox continuing with his investigation, it was confirmed at our hearing that in fact by then Mr Fox had concluded his investigation.

6.40. On 2 February 2017 Mr Fox wrote to the claimant again. He informed him that he was now in a position to make a decision on the case and he would like to deliver that to the claimant face to face. The claimant was therefore invited to attend a meeting on 7 February 2017 at the Sheffield Central Delivery Office, Pond Street, Sheffield.

6.41. It appears that the claimant and his union representative duly attended that meeting although there are no notes of it. The claimant was informed that Mr Fox’s decision was that the finding of gross misconduct was made out and sanction was to be summary dismissal. Mr Fox wrote a letter of dismissal on the same date

(pages 193 to 194) and he enclosed with that letter his decision report which is at pages 195 to 206.

7. Mr Fox's decision report

- 7.1. The decision report which was enclosed with the dismissal letter is at pages 195 to 206. It summarises the history of the matter and the investigations which had been conducted.
- 7.2. The report is interspersed with conclusions about various matters and one of those is the Facebook evidence showing smiley faces emanating from the claimant. At the foot of page 199 Mr Fox begins by saying that when reviewing the commentary on the relevant Facebook screenshots he was unable to determine if the smiley faces were aimed at anyone specific. However he goes on to state that looking at the evidence and how the general conversation reads in those threads, the smiley faces made by the claimant could be in response to comments aimed at Christopher Edwards. Mr Fox believed that Mr Skirrow had been aiming his comments at Mr Edwards too.
- 7.3. With regard to Mr Carver's evidence, Mr Fox was satisfied that even though he and the claimant did not work the S61 section together – because of days off – it would not be impossible for comments made by the claimant and others to be heard by Mr Carver when he was instead working on the S60 area because that was in close proximity.
- 7.4. Mr Fox went on to conclude from the evidence of three witnesses that on numerous occasions the claimant had made inappropriate comments towards Mr Edwards and that was over a sustained period of time. He was confident that there was sufficient evidence to support that and it was totally unacceptable and not a behaviour endorsed by Royal Mail (see top of page 201).
- 7.5. Mr Fox concluded that what had been described as banter within the S61 section was wholly unacceptable and that supported the evidence of inappropriate direct and indirect comments being made towards Mr Edwards.
- 7.6. Mr Fox had taken into account what the claimant had said about Mr Edwards' own behaviour to others, but Mr Fox noted that none of the witnesses raised those issues and in any event that would not excuse the way he believed that the claimant had behaved towards Mr Edwards.
- 7.7. Any suggestion that Mr Edwards would not have heard comments made because he habitually wore headphones at work demonstrated to Mr Fox that the claimant was not denying that comments had been made, but instead was being dismissive of the serious nature of them.
- 7.8. Based upon primarily Mr Carver's evidence, Mr Fox was confident that the 'El Pongo' phrase had been used indirectly towards Mr

Edwards – that is not said in his hearing but in the hearing of others (page 202).

- 7.9. Mr Fox noted that in Kyle Taylor's statement he had described the claimant as one of the aggressors.
- 7.10. Mr Fox appeared to accept the possibility that as Mr Carver and Mr Edwards were "best friends" they could have got their heads together and discussed the alleged bullying (see foot of page 202). However he went on to say that there was also the evidence from Mr Taylor and Mr Brown. It appears therefore that Mr Fox took the view that the allegations against the claimant were corroborated.
- 7.11. In another part of the report, page 203, it appears that Mr Fox also considered that the similarity of the phrases used on Facebook and those allegedly used in the workplace were corroborative. If there was an issue as between what the claimant said and what Mr Brown said, it is clear that Mr Fox preferred Mr Brown's evidence – for instance to the effect that he had heard the claimant refer to Mr Edwards as scruffy or mental.
- 7.12. The claimant's willingness to embrace banter in the workplace, including, he alleged, himself being called 'peg leg', was a matter of concern to Mr Fox who felt that what the claimant might deem as acceptable banter might not be treated in the same way by the recipient or others who heard it. Mr Fox acknowledged the claimant's length of service and that his record was clear, but that did not change the fact as Mr Fox found it that the claimant had participated in office banter on a daily basis. Length of service did not make that conduct any more acceptable.
- 7.13. In his summary which is at pages 205 to 206, Mr Fox acknowledged that it had been a difficult case. It was clear how distressing and upsetting matters had been for Mr Edwards. The case had also identified what Mr Fox describe as a major issue within the Rotherham delivery office, with a complete lack of dignity and respect particularly in the S61 section, because of the daily banter.
- 7.14. The evidence of Mr Carver, Mr Taylor and Mr Brown had clearly supported the complaint by Mr Edwards. Mr Fox had observed what he described as a complete disregard from the claimant in terms of the comments that he was alleged to have made. The claimant and Mr Skirrow had taken banter one step further making it personal and so amounting to bullying and harassment of Mr Edwards. Mr Fox believed that not only was the claimant making comments about Mr Edwards, but he was encouraging others to do the same. He referred to it as a breach of the code of business standards.
- 7.15. In terms of penalty Mr Fox had considered action short of dismissal, such as suspended dismissal or a disciplinary transfer, but because the respondent did not tolerate bullying or harassment in any form he did not have confidence that the claimant would not engage in similar behaviour whatever the location of his work. Mr Fox had considered the conduct code which stated that in cases of gross misconduct, if proven summary dismissal would be warranted even for a first

offence. He considered that the claimant's case fell into that category.

- 7.16. The code of business standards to which Mr Fox referred is the document entitled "Our Code: Code of Business Standards" which is in the bundle at pages 35 to 56. In Part 2 of that document which deals with personal behaviour – "How we interact with our colleagues" - behaviour is described as not acceptable if it involves demeaning or ridiculing someone or involves jokes and banter of a derogatory nature (page 50). At page 52 under the heading "working with colleagues", the code states that high standards of behaviour and respect between colleagues is required at all times and so colleagues must not be abused either in speech, writing or social media nor should colleagues engage in, encourage or condone bullying, intimidation, harassment, unlawful discrimination or abuse of any kind.
- 7.17. The code of conduct to which Mr Fox referred is the Royal Mail Group Conduct Policy, which is in the bundle at pages 57 to 62. Within the non-exclusive definition of gross misconduct at page 60 is 'Abusive behaviour to... colleagues'.
- 7.18. The claimant lodged an appeal against dismissal on 7 February 2017 (see page 207). The grounds of appeal were stated as:
- "I will be appealing because all evidence and mitigation has been taken into account when making this decision".
- Presumably the claimant meant 'has not' rather than 'has'. I have not been shown any more detailed grounds of appeal. In any event the respondent's procedure is for appeal to be a re-hearing.
- 7.19. Mr Hulme, an independent casework manager, was appointed as the appeals manager. On 23 February 2017 Mr Hulme wrote to the claimant advising him that the appeal would be heard on 2 March 2017 (the letter is at pages 208 to 209). Enclosed with this letter was an appeal bundle which comprised the disciplinary paperwork to date and further copies of the witness statements/interviews which had been before Mr Fox.
- 7.20. The minutes of the appeal hearing are at pages 218 to 227. The claimant was accompanied by a Mr G Hodgkinson, a North-East Divisional Representative of the CWU. Subsequently, once the claimant had been sent a copy of Mr Hulme's minutes or notes of that meeting, he made various amendments and these are in the document at page 230-1 to 230-11. The amendments are marked in green on that copy. During our hearing the claimant accepted that most of these amendments were to correct such things as names being spelt incorrectly or typographical errors.
- 7.21. The appeal hearing took some four hours 20 minutes to complete. The claimant and his representative made reference to the incident some two years prior when ultimately it was discovered that Mr Savage, not the claimant, had been writing on Mr Edwards' letters. Although at the end of that exercise the claimant and Mr Edwards had shaken hands they had never spoken again. The claimant

sought to distance himself from the comments on Facebook because it was not his account but that of Mr Schofield. There had been no investigation of others who might have been calling Mr Edwards names. As Mr Edwards had described the comments being made as childish, that, it was argued, must mean that they were not particularly offensive or malicious. In any event the claimant contended that any comments on Facebook had been aimed either at him or Mr Schofield's friends from Maltby. Reference was made to the 'anonymous grievance' and the reference to the claimant as a perceived problematic employee. The claimant contended that the charity shop reference on Facebook had been directed at Mr Schofield and his friends, not Mr Edwards.

- 7.22. As to the evidence of Mr Carver the claimant again contended that Mr Carver had only worked on the S61 section on days when the claimant had not been working.
- 7.23. The claimant went on to refer to what he believed was objectionable behaviour by Mr Edwards on Facebook which had led to him being blocked by some colleagues. Mr Hodgkinson referred to Mr Wilde's evidence as presented to Mr Fox. Mr Wilde had not heard anything and that underlined the view that there was just general banter.
- 7.24. It appears that the claimant was asked about the evening at the Masons pub, which was the claimant's explanation for the 'scruffy' references on Facebook. The claimant explained that it was not so much that the friends of Mr Schofield were dressed scruffily but it was where they were from, Maltby which the claimant described as a scruffy area. However they may have been wearing work clothes and perhaps it was only one friend not two.
- 7.25. Mr Hodgkinson also referred to the evidence which Mr Earnshaw had given to Mr Fox to the effect that some the banter was quite offensive and aimed at the claimant and his brother and wife. Mr Earnshaw had also sought to amend his statement to the effect that there had been a witch hunt.
- 7.26. Mr Hodgkinson believed that Mr Fox had incorrectly recorded that the claimant had not denied making comments because he always had done. He had not for instance said that it was alright to say things because Mr Edwards could not hear them as he wore headphones.
- 7.27. Mr Hodgkinson did not consider Mr Carver's evidence could have any credibility because he had not been working in S61 when the claimant was there and it was not accepted that he would have been able to hear comments from elsewhere in the office. Concern was again expressed about Mr Brown's statement being timed at 10am. Reference was made to various errors which the claimant and Mr Hodgkinson believed Mr Fox had recorded – for instance attributing comments to the wrong witness. Reference was made to a typographical error (see page 225).
- 7.28. Mr Hodgkinson ventured that in his experience he had seen 'alleged worse cases' where the outcome had not been summary dismissal and in the union's opinion the outcome was excessive. The matter

should have been nipped in the bud and kept within the unit rather than having been escalated. There had been little consideration of the claimant's length of service and clear record.

- 7.29. At the top of page 226 the claimant referred to the suggestion of mediation which had come from Mr Edwards, or at least his union representative. When the claimant had been told about the mediation suggestion by his union representative he said that he was not happy as he didn't think he'd done anything wrong. However he would speak to anyone. This would appear to support Mr Fox's decision that this was not an appropriate case for mediation.
- 7.30. The claimant was asked, presumably by Mr Hulme although the notes are not clear (page 227), whether Mr Carver had any grudge to bear against the claimant. The claimant accepted that Mr Carver talked to his brother but it seems that the claimant's main objection to Mr Carver's evidence was that because he was in another section he could not have heard.
- 7.31. The claimant was asked the same question about Mr Brown and the claimant replied that again as far as he was aware there were no issues. The claimant contended that Mr Taylor did have a grudge against anyone who worked full-time. The claimant went on to make various criticisms of Mr Taylor's work. He said that he had not been employed for long so how would he know what the situation was between the claimant and others at work. The claimant considered that he did hold a grudge because Mr Taylor could not be trusted, was not well liked and wanted to be a manager.
- 7.32. At some point during this hearing (although it does not seem to be minuted) the claimant gave Mr Hulme a list of witnesses that he wanted Mr Hulme to interview. That list is on page 230. There are 11 names. Following the 2 March appeal hearing Mr Hulme interviewed or re-interviewed six of those named and in addition he re-interviewed Messrs Brown, Carver, Taylor, Hicks, Griffiths, Schofield, Wilde and Reynolds. He also interviewed Mr Pilmore who had carried out the initial investigation and he re-interviewed Mr Edwards. That was the fifth time that Mr Edwards had been interviewed or given a statement within the disciplinary process.
- 7.33. The proposed claimant witnesses who were not interviewed were a Tracey Appleby – who was not interviewed because she was on maternity leave; Mr Gary Barrett who was on sick leave, Mr Mark Strawbridge who was on annual leave at the material time, the claimant's brother Paul, Nicola Mitchell and Trudie Degen.
- 7.34. In summary the further evidence which Mr Hulme gathered from these additional or re-interviewed witnesses was as follows:-

Robert Brown

- 7.35. Mr Hulme interviewed Mr Brown on 26 March 2017 and the note of the interview is at pages 231 to 233. Mr Hulme asked Mr Brown whether he was friends with Mr Edwards and Mr Brown replied that he wouldn't say friendly although they had worked together. He hadn't spoken to Mr Edwards since he Mr Edwards had moved to the

Maltby section. Mr Brown acknowledged that he may have incorrectly thought that Mr Skirrow was making cuckoo noises but he believed that some noises had been made - directed at Mr Edwards. He confirmed that both the claimant and Mr Skirrow had made comments about Mr Edwards' depression. Mr Hulme went on to ask Mr Brown about the timing of his earlier statement (on 6 October 2016 at page 82 where the time of 10 o'clock is given). Mr Brown said that he had not typed up the statement. He had answered questions and was then given the statement. He went on to say that he had not really wanted to get involved because he had nothing against the claimant or Mr Skirrow and got on well with them. However he had heard them pass comments about Mr Edwards. He confirmed that both the claimant and Mr Skirrow would hand packets to him saying – 'can you pass that to your scruffy friend'. Mr Brown accepted that Mr Edwards had made some derogatory comments towards the claimant and Mr Skirrow. He explained that the claimant and Mr Skirrow had 'taken the mick' when Mr Edwards took up distance running. Returning to the original statement he had given, Mr Brown confirmed that he had read it through before signing it.

Paul Carver

7.36. The notes of Mr Hulme's interview with Mr Carver are at pages 234 to 235. They are not dated but the interview took place in March 2017. He was asked why he made his original statement and said that it was something that he kept hearing. He knew both Mr Edwards and the claimant and he didn't have anything against them. Mr Carver said he didn't like bullying or abusive comments. Whilst you got banter it could go too far and he described Mr Edwards' treatment as having gone on for years. He did not think that it was right, as he saw how Mr Edwards was affected and how upset and stressed he was. He confirmed that the bullying was being done by Mr Skirrow and the claimant. He was asked whether he could be mistaken. He replied that he did not lie and he did not accept that others wouldn't have heard it as it was shouted across the office. He said that he had been on other sections and heard stuff. He described the atmosphere as like being at school. Mr Edwards was not involved with the banter and he kept himself to himself. Mr Hulme put to Mr Carver the point raised by the claimant that Mr Carver only worked on the S61 section on the day when the claimant had his day off. Mr Carver explained that the S61 section was busy. You could tell when they'd gone out (on their deliveries) as it was quiet. They could be heard across the office. Mr Carver moved around the office covering duties and in any event he did not only work on S61 when the claimant was off. He had heard the claimant lots of times. Mr Carver was asked if he had anything to add and said that the truth had come at a great cost to him. He had had to think long and hard about making his statements and since then he had had comments in the office and had been moved off S61. He was now being blanked but he knew he'd done the right thing. He had had funny looks and comments such as he needed to be careful what he said. He was asked whether he wanted to progress a complaint. He said he did not. He hadn't lied and he had reported everything he heard.

Kyle Taylor

7.37. Mr Taylor's statement to Mr Hulme is at page 236 and although not dated was taken in March 2017. Mr Taylor explained that having made his earlier statement he had to bear the brunt of anger and he likened it to school yard tactics. The claimant's brother would no longer speak to him and would say things in his direction like 'grass' or 'snitch'. He believed that what he had done was right and Mr Edwards "had been getting crap off them for a while". Mr Taylor accepted that he had not heard the claimant make comments although he had witnessed the claimant laughing when Mr Skirrow would speak to Mr Brown and say 'pass that to your scruffy mate'. Mr Hulme put the point raised by the claimant that as Mr Taylor was a deputy manager, if he had witnessed inappropriate comments he should have done something about it. Mr Taylor replied that he had spoken to Mr Skirrow in the canteen but had thought whether he should have done more. However if he had got involved he believed he would have had a target on his back and to some extent he had now. Mr Taylor confirmed that he did not bear a grudge against either the claimant or Mr Skirrow. Mr Taylor did not like the way he had been treated by the claimant's brother for some years but he said that the claimant has always been alright and in fact he liked him.

Paul Hicks

7.38. Mr Hicks' interview, again in March 2017 is at page 237. He was asked how he had come to write his initial statement (that is the statement on page 95 – a "to whom it may concern" letter which had been apparently obtained by the claimant's wife and given to Mr Hulme at the appeal hearing). Mr Hicks said that the situation on the floor was that there was banter flying around and you brushed it off and had a laugh although that was until it got serious like this. He himself got called baldy. If people were being singled out he said that half the office could end up being dismissed. Mr Hicks went on to say that Mr Edwards had referred to the claimant and Mr Skirrow in derogatory terms. That would happen when the claimant and Mr Skirrow had in Mr Hicks' words been "a bit boisterous". Mr Hicks had not heard the claimant or Mr Skirrow direct any comments against Mr Edwards. He did not work near them and when he was in S61 he was in a different part of the section.

Dave Griffiths

7.39. Mr Griffiths gave a brief statement at page 238, undated but assumed to be March 2017. He confirmed that S61 was the most boisterous/loud section in the office. He was asked whether he had ever had cause to challenge inappropriate behaviour in S61 and replied that he would always challenge inappropriate behaviour but nothing sprang to mind.

Mark Savage

7.40. The notes of this interview are on page 239 and it took place on 27 March 2017. Mr Hulme asked whether Mr Savage had spoken to the claimant with regards to Mr Edwards' behaviour towards him. He

said he had not and went on to say “You know what banter’s like, some of the stuff that has gone on in the past, it was a different environment.” His view was that Mr Edwards was unhappy that he and the claimant were no longer friends and he took the view that Mr Edwards was part of the banter and not just some quiet lad on the periphery. Although the claimant and Mr Skirrow were both chatty, when the claimant and Mr Edwards were near to each other they would go quiet.

Steve Quarton

7.41. Mr Quarton was also interviewed on 27 March 2017 and the note of his interview is at page 240. Mr Hulme said that he had a copy of the interview conducted by Mr Fox with Mr Quarton (see page 167) and Mr Quarton said that initially he wasn’t happy with that note because there was a paragraph in it that wasn’t what he’d said. He was asked to look at the statement and explain. He said there was a bit where he said that Mr Skirrow got involved with banter but Mr Quarton went on to say that he didn’t really and it would only be to a certain degree. He felt that the matter should have not have become a conduct matter and it should have been stopped by the manager. Mr Quarton accepted that he called the claimant ‘baby hair’. He had not called him ‘El Pongo’, ‘scruffy’ or ‘smelly’. He had never heard the claimant say those words either. He had not heard the claimant calling Mr Edwards those names. He was then asked whether he Mr Quarton made cuckoo noises. He said that it was not ‘cuckoo’ but ‘uhoo’. He said that he did that when he was on sorting which was pressurised and he did it to de-stress. It was not aimed at anyone but it was instead of swearing or taking it out on someone. It wasn’t aimed at Mr Edwards as he used to get on with him and he had not heard the claimant or Mr Skirrow making those noises.

Ryan Wilde

7.42. This undated statement is at pages 245 to 246. He had not heard the claimant being called ‘scruffy’ or ‘smelly’ or ‘El Pongo’. He had heard people calling each other names but no offence was intended. Mr Wilde agreed that the claimant and Mr Skirrow did not really speak to Mr Edwards. He had never heard anything directed at Mr Edwards and Mr Edwards had not raised anything with him. Mr Wilde was asked about the allegation made by Mr Scott in his grievance that the claimant amongst others has been seen as problematic and that management had taken the opportunity to remove him. Mr Wilde said that he was not aware of anyone being singled out or having been pursued following Mr Scott’s complaint.

Kevin Reynolds

7.43. Mr Reynolds was interviewed on an unknown date in March 2017 by Mr Hulme and the notes are at pages 249 to 250. It was to Mr Reynolds that Mr Edwards had first come with his complaint. The advice Mr Reynolds had received from HR was that as there was

evidence of inappropriate behaviour it should be progressed straight to a fact finding rather than through the bullying and harassment policy. Mr Reynolds was asked about the grievance raised by Mr Scott and he explained that those allegations had been investigated by an Erica Wilkinson and the outcome was that they were unfounded. Mr Reynolds, as the Rotherham delivery office manager accepted that managers would have heard some banter and that Mr Griffiths had commented about monkey noises. Mr Reynolds acknowledged that whilst there were worse things that people could be called this had gone on for some time and it was disappointing that a manager hadn't been aware that this was happening. He accepted that in Mr Edwards deciding to complain there must have been what he described as some breaking point which may have been seeing the comments on Facebook. He disagreed that banter was acceptable particularly if people were being referred to as scruffy or smelly.

Jamie Schofield

7.44. Mr Schofield was interviewed on or about 28 March 2017 and the notes of that interview are at pages 258 to 260. He was asked about his original statement in which he had said that the terms scruffy, fly repellent and menthol could have been aimed at either himself or Mr Edwards. Mr Schofield said that when interviewed by Mr Fox he did not have a note taker and he suggested that Mr Fox had made an inaccurate record. What Mr Schofield had actually said was that he had gone to the heavy metal cocert and so that comment could have been aimed at any one of the thousand or so people who had gone. Mr Skirrow did not like that kind of music. Mr Schofield was asked about the Facebook comment made by Mr Skirrow -

“your scruffy mate” - to which Mr Schofield had replied “still poorly pal”. It was put to Mr Schofield that that suggested that it was a comment about Mr Edwards who at that time was off work. Mr Schofield denied that and said it was just a coincidence and when replying to Mr Skirrow he had just been making up stuff. Mr Schofield's version of the Masons pub incident was that the claimant and Mr Skirrow had been present and Mr Schofield had seen two of his friends who were still in their work gear and so looked out of place in that pub because it is one where people usually dress smartly. He did not believe that the comments on Facebook could be about Mr Edwards. Mr Schofield said that Mr Edwards had passed comments with regard to the claimant and Mr Skirrow loads of time calling Mr Skirrow ugly, retard and a freak.

Lee Bolton

7.45. Mr Bolton was interviewed on an unknown date in March 2017 and the notes are at page 261. He confirmed that he had blocked Mr Edwards from Facebook because of an obscene comment he had made.

Chris Edwards

7.46. On or about 27 March 2017 Mr Hulme interviewed Mr Edwards. This was the fifth occasion when Mr Edwards had been interviewed during this process. He was accompanied by Mr McBride a CWU area

representative. Notes of the interview are at pages 251 to 257. Mr Edwards was asked how the complaint had arisen and he replied that originally he had spoken to Mr Scott. At this stage he was referring to the 2014 issue. Mr Edwards disagreed that his complaint was malicious or a personal vendetta against Mr Skirrow as Mr Skirrow had alleged. Mr Edwards confirmed that his relationship with the claimant had been damaged after Mr Edwards had split up with his long-term partner and the claimant had tried to get involved with what Mr Edwards should do with regard to his child of that relationship. Mr Hulme put to Mr Edwards the apparent contradiction between his statement on 10 October 2016 and his statement on the following day as to whether he had simply been told by others of the comments or whether he had heard them himself for some two to three years. Mr Edwards said that it was both. He acknowledged that he had his earphones in a lot of the time but he was told that in his absence when Mr Skirrow was covering his walk the claimant would say "Are you on smelly's walk?" and Mr Skirrow would reply - "yes it stinks of shit". He said that Mr Brown had told him about comments of mental being made. At first he did not realise that they were aimed at him because he was on anti-depressants. He alleged that in the knowledge that he had been for counselling and on anti-depressants the claimant and Mr Skirrow would make what he described as 'mental noises' and say that Mr Edwards was not wired up right. When asked why he had not complained sooner Mr Edwards said that it had got to the point where he just thought enough was enough and the managers to whom he had already complained such as Mr Scott did not seem to do anything. In fact Mr Scott had told him that he was just being paranoid and he should 'get on with it'. He had not approached the claimant and Mr Skirrow directly as that would just have made matters worse. Mr Edwards accepted that the 'bender' comment (the caption to the photograph on page 80) had not been directed at him, but the scruffy comment was.

- 7.47. There was discussion about the possibility of mediation and Mr Edwards said that that had been discussed in the interview with Mr Fox. Mr McBride suggested that everyone had wanted mediation apart from Royal Mail. He suggested that this was because "the business wanted some scalps from the start to make an example". Mr Edwards said that some people had said it could have been dealt with through mediation.
- 7.48. Mr Edwards denied that anyone had blocked him on Facebook or that he had made derogatory comments about the claimant and Mr Skirrow. He was asked about an apparent reference to Mr Barrett as Quasimodo and an image of a dog. He was also asked about a picture he had taken of somebody's mail. These matters which had been raised by the claimant and Mr Skirrow prompted the comment from Mr Edwards that "looks like they've gone searching through everything to try and find something against me." The meeting concluded with Mr McBride expressing concern that mediation had not been undertaken. Mr Edwards was now back on medication and he believed the way he was being looked at was because he had

cost people their jobs. Mr McBride believed that it would have been better to re-educate staff.

- 7.49. It is to be noted that Mr Hulme did not provide the claimant or his union representative with copies of any of these statements taken after the 2 March appeal hearing and so there was no opportunity for the claimant to comment.
- 7.50. Having conducted the interviews referred to above Mr Hulme prepared his appeal decision document which is at pages 263 to 284. Having reviewed the evidence in detail Mr Hulme set out his conclusions (pages 280 to 284). He noted that Mr Carver and Mr Brown had been very clear and in no doubt that the claimant had directed comments at Mr Edwards. He acknowledged however that the various interviews had not produced unanimous accounts of the claimant having made such comments. However, and referring to Messrs Carver, Brown and Taylor, Mr Hulme had considered why those three individuals would, as it was alleged, fabricate malicious statements. None of those witnesses said that they had ill feeling towards the claimant.
- 7.51. Mr Hulme was sceptical of the accounts given by the claimant and Mr Schofield with regard to the meeting at the Masons pub. There had been inconsistency about what the joke concerning Mr Schofield's friends had been. Was it what they were wearing or was it because they were from Maltby? Mr Hulme believed that the marked disparities significantly undermined the credibility of the assertion that the social media comments had been directed at Mr Schofield's friends. He believed that that had been a deliberate attempt to mislead both the conduct and the appeal investigations (see page 281). He felt that Mr Schofield's loyalties would lie more with the claimant than Mr Edwards because he acknowledged that he was no longer on friendly terms with the latter.
- 7.52. Mr Hulme accepted that banter between colleagues was understandable and that in the vast majority of cases it was taken in the right spirit. However the crucial issue was the relationship between the respective parties and the impact on the recipient. A comment such as 'scruffy' or 'smelly' passed between colleagues who were on friendly terms could perhaps be seen as innocuous, but the same comment made by someone to another where there was clear enmity could be highly offensive. If that continued over a period of time it would be demeaning, upsetting and have a significant impact on undermining the confidence and self esteem of the recipient (see page 282).
- 7.53. Mr Hulme went on to deal with the allegation that Mr Edwards himself had made inappropriate comments. Whilst not condoning the language which had allegedly been used, he did not consider this surprising having regard to the sort of treatment he had received. However he felt that any comments made by Mr Edwards were of a different type to what he described as the sustained abuse that Mr Edwards had been subjected to. Mr Hulme also noted that some members of staff had blocked Mr Edwards on Facebook because of

comments he had made. However as Mr Fox had noted, those individuals had not made complaints against Mr Edwards. Even if they had that would not necessarily detract from or mitigate the claimant's behaviour.

- 7.54. Mr Hulme then went on to consider the mediation issue (page 282). Mr Hulme did not think mediation would have been appropriate. The claimant had made derogatory comments towards Mr Edwards and that was a type of behaviour considered to be serious misconduct. The business clearly had a responsibility to take such behaviour seriously and take proportionate action. He believed that in the circumstances dealing with the situation informally or via mediation would have been wholly inadequate. In addition for mediation to succeed there needed to be a recognition that there was an issue and a firm commitment on the part of both parties to resolve it. He noted that the claimant said that he was not happy about mediation as he did not think he had done anything wrong and he believed that Mr Edwards' allegations were fabricated and malicious. In those circumstances it was difficult to see how mediation could be appropriate or will be likely to succeed. He was mindful that Mr Edwards' motivation in suggesting mediation may have been informed by the potential of attracting further unfavourable treatment.
- 7.55. Mr Hulme then went on to deal with the allegation which had been contained in Mr Scott's "anonymous" grievance to the effect that the process was being used as an excuse to target and dismiss the claimant. Mr Hulme said that he had spoken to Erica Wilkinson who had handled the investigation of Scott's treatment (I am not aware of any note of this interview) and she had confirmed to him that none of the allegations made were supported and the grievance was not upheld. In addition the conduct case had been passed to Mr Fox who was from a different delivery office (Barnsley) and so removed from the Rotherham office.
- 7.56. At page 283 to 284 Mr Hulme sets out his decision and the reasons for it. He referred to the Code of Business Standards and the Conduct Code. He considered that the claimant was culpable of making inappropriate comments towards Mr Edwards over a sustained period of time and that he had posted similar comments on social media in the knowledge that Mr Edwards would have seen them. He considered that those matters were sufficiently serious to constitute gross misconduct.
- 7.57. Mr Hulme then gave consideration to mitigating factors such as the claimant's lengthy service and clear conduct record. However he noted that throughout the disciplinary process the claimant had consistently denied acting inappropriately and so had shown no remorse and accepted no responsibility. There was evidently the possibility of recurrence. Accordingly Mr Hulme believed that any action short of dismissal would not have the required corrective impact.
- 7.58. On 9 April 2017 Mr Hulme wrote to the claimant (see page 262 – 1). He informed the claimant that his decision was that he had been

treated fairly and reasonably and so the original decision of dismissal without statutory notice was appropriate. He enclosed with that letter the report referred to above. The claimant's appeal was therefore rejected.

8. The parties' written submissions

8.1 Claimant's Submissions

Mr Grainger begins his written submission by noting that the respondent is a large organisation and well resourced so that the enquiry and process it conducted should have been of the highest standard.

There follows a detailed analysis of the evidence which was before the respondent. There are references in the submissions to matters which I do not recollect being raised in evidence, such as that Mr Edwards language and attitude towards the claimant and others 'was bordering on feral' (paragraph 7). Further I do not recollect the point that the claimant's sickness absence meant that he could not have said anything about the claimant's frame smelling (paragraph 12) being put to the respondent's witnesses.

In any event Mr Grainger is critical of the evidence which the respondent had before it. It is contended that the various accounts given by Mr Edwards were contradictory and that he had ducked questions put to him. Mr Edwards evidence is described by Mr Grainger as being totally unsatisfactory. He is also critical of the three main witnesses against the claimant, Messrs Brown, Taylor and Carver.

Mr Brown's statement is said to be very general and it is suggested that in his second statement he withdrew the allegation that the claimant had encouraged others to bully. I note that the question put by Mr Hulme was 'You also suggested FC encouraged others, Neil and Mark Savage?' Mr Brown's reply is 'Mark is a mate of mine, I wouldn't say encourage him to bully but he would mickey take.'

In relation to Mr Taylor's statement, Mr Grainger accepts that he had indicated that there was a level of animosity from the claimant towards Mr Edwards but goes on to say that no specific allegations were made against the claimant.

In relation to Mr Carver's statements, the contention is that there was only one sentence in his first statement that could be seen as a specific allegation against the claimant although it is accepted that that was to the effect that he had heard comments from the claimant calling Mr Edwards 'El Pongo' and 'scruffy.'

Mr Grainger contended that the **Burchell** test had not been met. A finding of fact against the claimant could only have been reached by ignoring the contradictory and incorrect evidence against him and ignoring numerous other witnesses.

In any event, it was contended that a reasonable employer would not have considered the allegations against the claimant to constitute gross misconduct. Witnesses had described the conduct as childish and so it was certainly not vindictive. The claimant should not have been singled out for disciplinary sanction.

The respondent had been wrong to reject mediation

Mr Grainger described Mr Fox's decision document as one which contained illogical conclusions. Reading and making sense of it was difficult.

Whilst Mr Hulme's appeal process could have corrected that, it had not. The further statements he had taken were not shown to the claimant.

In paragraph 37 of the written submission Mr Grainger complains that it was very relevant to the procedure and the outcome of the appeal that none of the statements given by Mr Skirrow had been disclosed to the claimant. I must confess that I do not recollect that point being put to respondent's witnesses either.

At paragraph 40 of the written submission Mr Grainger returns to the decision made by Mr Fox and is critical of his insistence on limiting the witnesses interviewed by him at three to balance the number of witnesses overall. That was fundamentally wrong.

The submissions conclude with a reference to the issue of contribution.

I should also mention that in paragraph 3 of the written submissions Mr Grainger refers to the claimant continuing to receive counselling every 3 to 5 weeks. I do not recollect that evidence. Further he goes on to say that that should be taken into account when considering the claimant's answers to questions put to him in cross examination. Mr Grainger does not identify which answers, although he says that some of those answers were obviously contrary to the case that he was putting forward. I must record that at the hearing I was given no indication that the claimant's evidence might be affected by health issues.

8.2 Respondent's Submissions

Mr Hartley begins his submissions by setting out the relevant law and he then goes on to review the facts. He points out that in cross examination the claimant accepted that there was no bad feeling between him and the three chief witnesses against him in the disciplinary process - Robert Brown, Kyle Taylor and Paul Carver.

Throughout the claimant's interviews he had been consistent in asserting he had done nothing wrong and the allegations against him were fabricated.

Mr Fox had carried out a substantial investigation and Mr Hulme had then conducted a lengthy appeal. Mr Hulme interviewed a substantial number of additional witnesses. I was reminded that Mr Hulme's evidence was that he had not subsequently shared those statements with the claimant because throughout the claimant had maintained his innocence and so Mr Hulme had taken the view that the claimant's comments on those statements would make no difference to his deliberations and the final outcome.

It was submitted that the respondent had reasonable grounds for it's belief that the claimant was guilty of misconduct. In addition to the lack of animus from Brown Taylor or Carver, I was reminded of Mr Carver's evidence given to Mr Hulme that the truth had come at great cost to him, he had had to think long and hard about making a statement and there had then been adverse comments against him at work - but he knew he done the right thing.

Mr Hartley observed that overall the respondent had taken 31 statements from 20 witnesses during the disciplinary process.

Mr Hartley contended that there was no real inconsistency in the various statements which Mr Edwards had given.

The decision to dismiss and the procedure followed had both been within the reasonable band. Even if Mr Fox's investigation was insufficient, a much wider investigation had been carried out by Mr Hulme. It was necessary for the tribunal to look at the entirety of the disciplinary procedure.

Mr Hartley disagreed that the invitation to the disciplinary hearing had been worded in such a way as to suggest that the disciplinary hearing was prejudged.

The submissions go on to deal with the issues of contribution and Polkey, should those be relevant.

9. My conclusions

9.1 Has the Respondent shown a potentially fair reason?

The respondent seeks to show that the reason for dismissal was conduct. The Employment Rights Act 1996 s.98 (2) sets out the potentially fair reasons and those include a reason which relates to the conduct of the employee. I am satisfied that the respondent has shown this potentially fair reason.

Whilst the claimant contends that his dismissal may have been influenced by the alleged targeting referred to in Mr Scott's grievance, that is a matter which I deal with under the following heading – actual fairness.

9.2 Was the dismissal actually fair?

Fairness embraces both procedural and substantive issues. The statutory test or standard is contained in the Employment Rights Act 1996 s. 98(4). In a conduct case that standard is to be applied taking into account the guidance given in the leading case of **BHS v. Burchell**. It is necessary to determine whether the employer believed that the employee was guilty of misconduct; whether it had in mind reasonable grounds upon which to sustain that belief and at the stage at which that belief was formed on those grounds that it had carried out as much investigation into the matter as was reasonable in the circumstances.

9.2.1 Investigation

One of the relevant factors under s98(4) is the size and administrative resources of the employer's undertaking. Clearly this respondent is a very large employer with commensurate resources. However that does not mean that it was required to carry out the type of investigation which would have been necessary in, for instance, a criminal case. Instead the requirement is that the investigation is reasonable. I take the view that the scrutiny which the claimant and his solicitor bring to this employer's investigation is excessive. The respondent was not required to be satisfied beyond reasonable doubt that Mr Clayton had been bullying and harassing Mr Edwards. It only had to be satisfied on the balance of probabilities.

That is not to say that Mr Fox's exercise was beyond reproach. It is frustrating to the reader, especially if he or she is a lawyer, that often witnesses interviewed by Mr Fox do not give a proper, or sometimes any, answer to the question they have been asked. However the end user of those statements was not a lawyer but instead, in Mr Fox's case, a delivery office manager.

It is perhaps equally frustrating that the complainant Mr Edwards does tend to give statements where at least some of the detail is contradictory.

Mr Fox's decision to only interview three potential witnesses put forward by the claimant to balance out the three witnesses he had interviewed for the management case is regrettable. Clearly a reasonable employer would simply interview all those persons who could give relevant evidence and if any limits were to be imposed to achieve proportionality that would be best not achieved by the rather crude method Mr Fox employed.

It would also probably have been best for Mr Fox to have either recorded the interviews by way of audio recording or to have had a note taker.

Although there were these shortcomings, that does not mean that Mr Fox's decision to dismiss was fatally flawed. He or Mr Pilmore had obtained persuasive evidence from Mr Brown (page 82), Mr Taylor (page 93) and Mr Carver (page 94).

In any event I am satisfied that such shortcomings as there were had been cured by the appeal before Mr Hulme which proceeded as a rehearing. He acceded the claimant's request to interview other individuals and of his own motion re-interviewed key witnesses who had given statements to either Mr Pilmore or Mr Fox. That included clarification of the time noted on Mr Brown's original statement – 10.00am -as the time that was typed up rather than made. It may be thought that the claimant was clutching at straws in contending that Mr Brown's statement could not be genuine as it appeared to have been given at the time when he would have been out delivering mail.

Viewed as a whole I am satisfied that the investigation carried out by this employer was reasonable and all that was required.

9.2.2 Reasonable grounds for belief?

Both Mr Fox and Mr Hulme had evidence before them which contained some contradiction. There was also Mr Edwards tendency to begin every interview conducted with him by referring back to the 'comments on parcels' issue in 2014. Mr Grainger has sought to suggest that Mr Edwards was fixated on that issue and appeared not to accept that the culprit on that occasion was Mr Savage and not either claimant or Mr Skirrow. However that would be to ignore that during the course of the five interviews or statements that Mr Edwards gave he went on to deal with his more recent experience of the claimant and what had been reported to him of things said or done by the claimant as directed at him.

Whilst the claimant has contended that the allegations against him were general or vague I am satisfied a reasonable employer was entitled to conclude that there were enough specifics. In any event what was being complained of was not one or two discrete matters but rather a course of conduct, which the claimant referred to as banter.

There were certainly the specifics in terms of the names which it was said the claimant had been called or referred to as in the presence others. I find that a reasonable employer was entitled to be sceptical of the claimant's alternative explanation for the appearance on Facebook entries of language and terms identical to, or similar to, the language and terms which witnesses had reported to be used against or about Mr Edwards by the claimant.

Further substantial support for the conclusion reached by both Mr Fox and Mr Hulme was that the claimant was forced to accept that neither Mr Brown nor Mr Carver had any grudge against the claimant and so had no axe to grind. The most he could say about Mr Taylor was that he held a 'general grudge' against all full-time employees. A reasonable employer was entitled to conclude that that added significantly to the credence of the accounts given by those three. That is underlined by the evidence obtained by Mr Hulme when he interviewed Mr Carver who told him that the truth had come at great cost to him. He had had to think long and hard about making his statement and he went on to refer to the adverse treatment he had received since making his statement – being blanked. However he knew that he had done the right thing.

In the context of that type of voluntary evidence given at personal cost, the claimant's argument (based on Mr Scott's grievance) that the respondent had pursued Mr Edwards' complaint in a formal conduct procedure as a way of targeting the claimant is exposed as flimsy.

I accept that the claimant's criticism of certain aspects of Mr Fox's rationale in his Decision Report is valid. There is some contradiction and it is not always clear why Mr Fox has preferred one person's evidence over another's. However again when the standard of what is expected of a reasonable employer is applied I do not consider that the report and decision to dismiss is without sufficient evidential foundation.

As with the investigation, any shortcomings in the Fox decision and rationale are in my judgement cured by the approach taken by Mr Hulme at the appeal. In his conclusions he acknowledged that interviews conducted during the course of the conduct and appeal investigations had not necessarily provided unanimous accounts of the claimant making bullying and harassing comments. Mr Hulme poses the rhetorical question – why three individuals would have fabricated what the claimant contended were malicious allegations against him. (See paragraph 4.2 on page 280.)

The claimant has also criticised the respondent's rationale and decision for failing to give sufficient weight to things which Mr Edwards may have said about the claimant, Mr Edwards Facebook etiquette and other alleged

misdemeanours by Mr Edwards. It seems clear that the claimant during the course of the disciplinary process was anxious to put before the respondent as much negative material about Mr Edwards as he could.

During the course of our hearing, Mr Grainger has referred to Mr Edwards as 'no angel'. However being an angel is not the qualification for protection from bullying and harassment by others. It is clear from Mr Hulme's rationale that he did not consider on the evidence before him that it was 'six of one and half a dozen of the other'. He accepted that Mr Edwards may well have been less than charitable in his view of the claimant in the face of the comments that were being made or reported. Mr Hulme also drew the distinction between banter or insults between two colleagues who were in fact on friendly terms as opposed to so-called banter and insults from a colleague towards another colleague from whom he was estranged.

I am satisfied that the respondent having carried out a reasonable investigation had more than sufficient grounds for believing the claimant was guilty of the charges against him.

9.2.3 Failure to proceed by way of mediation

It would appear that the CWU, who by separate representatives were supporting the claimant, Mr Skirrow, Mr Edwards and various witnesses may have been the instigator of the idea that mediation was the way forward. The respondent's rationale for rejecting that option is one which I find a reasonable employer could reach. Mediation had ostensibly but it seemed rather half-heartedly, been put forward by the victim Mr Edwards and whilst the claimant indicated he would go along with it, that was nevertheless on the basis that he had done nothing wrong. That is hardly a good starting point for a mediation process. Moreover the respondent considered that the matter was sufficiently serious that it needed to be dealt with through a formal disciplinary procedure rather than what was likely to be a more informal mediation process.

9.2.4 Mr Hulme's failure to provide the claimant with the additional witness statements

It is certainly unfortunate that Mr Hulme did not send to the claimant or his representative the statements obtained from the interviews conducted following the appeal hearing on 2 March 2017. I have above set out his rationale for that approach. It must be borne in mind that little new evidence was obtained in the sense that essentially what was achieved was confirmation or clarification of what had already been said and shared.

Did this cause procedural unfairness? I am mindful that the so called 'no difference rule' was swept away by the House of Lords decision in **Polkey v. AE Dayton Services Limited 1988 ICR 142** but with the proviso that a Tribunal could still conclude that a procedural failing would not render a dismissal unfair if complying with the relevant procedure would be 'utterly useless' or 'futile'. For the reasons given by Mr Hulme, I accept that this case comes within that relatively rarely applied exception.

9.2.5 Mitigation and sanction

Obviously the claimant had lengthy service and a 'clean' record. I am satisfied that these factors were properly taken into account by the respondent when considering the appropriate sanction (see for instance Mr Hulme's observations in paragraphs 5.2 and 5.3 in the Appeal Decision Document (page 284).) Dismissal was, in the circumstances, a sanction which a reasonable employer could impose.

It follows that for all these reasons I find the dismissal to be fair and so the Claim fails.

Employment Judge Little

Date 9th April 2018