EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Eaton	**v**	Fenland District Council
Heard at: Cambridge		**On:** 25 and 26 July 2018
Before: Employment Judge G P Sigsworth		

Appearances
For the Claimant: Mr B Jones, of Counsel
For the Respondent: Ms R List, Solicitor

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant was unfairly dismissed by the Respondent.

2. There was a 25% chance of a fair dismissal or a resignation if a capability procedure had been followed.

3. The Claimant contributed to his dismissal to the extent of 50%.

4. The Respondent was not in breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures.

RESERVED REASONS

1. The Claimant's claim is for unfair dismissal. The dismissal is admitted by the Respondent, and the reason for it is averred to be conduct, a potentially fair reason. Unfairness is denied. The Tribunal heard oral evidence from the Claimant. Called for the Respondent were three witnesses. These were Ms Anna Goodall, head of governance and legal services; Ms Annabel Tighe, environmental health manager; and Ms Carole Pilson, corporate director and monitoring officer. The Tribunal was referred to an agreed bundle of documents of some 330 pages, and read

documents that were indicated and were relevant and relied upon by the parties. At the end of the evidence, there was insufficient time for the parties' representatives to make oral submissions. As a result, they were asked to provide written submissions and the decision was reserved.

Findings of Fact

2. The Tribunal has made the following relevant findings of fact:

2.1 The Claimant was employed by the Respondent as a mechanic / crew member on pilot boats at Port Sutton Bridge and Wisbech – on the tidal river Nene – cargo boats coming into these docks. The Respondent council has a statutory responsibility to guide such boats into ports on the river. The unchallenged evidence on this point of Ms Pilson was that the Claimant assisted the driver of the pilot boats, he maintained equipment and buoys on the river and in the Wash, deploying life rafts if necessary. He also undertook dry side work, such as boat maintenance and repair. The Claimant began his employment with the Respondent on 8 December 2003. He was dismissed summarily for alleged gross misconduct on 16 December 2016, having been off work on sickness absence since an accident at work on 23 February 2016. He was 62 years old at the date of dismissal. The accident concerned a cargo ship of some 4,000 tonnes coming through the Cross Keys bridge, and smashing into the Claimant's pilot boat. The Claimant was just able to jump off onto a pontoon and then onto the bank. He was thereafter signed off sick with a back injury, pain and (initially) post traumatic stress disorder. Fit notes were received on a regular basis by the Respondent from the Claimant's GP – on 10 March, 7 April, 5 May, 3 June, 4 July, and thereafter (see below). After the first few, the sick notes did not specify PTSD as a reason for absence from work, but back pain only. The Claimant's evidence was that he had told his GP to omit PTSD from the fit notes after a period of time. Therefore, he was able to influence the GP on what was put into the fit note. The Claimant also saw a physiotherapist on some four occasions, between March and July 2016. It is recorded in the 8 July assessment that he had a fall that week which had aggravated his previous lower back symptoms. Up to that point, the medical position had been confident in a reasonably early return to work. The Claimant was also referred to occupational health by the Respondent, and there are reports from 6 April and 4 May – and later reports (see below). Again, the early occupational health reports anticipated an early return to work. In May, the Claimant had some minor discomfort in his back but was not taking any medication, and was able to undertake all his normal daily activities. He could stand, sit and walk for long distances. His shoulder and neck injuries had fully recovered. The physio said that the Claimant was looking to return to work in the next two weeks, and that then there would be no need for any restrictions on

his return. However, the physio report of 7 May paints a rather different picture. The Claimant felt stiff and restricted in bending, and could not bend forward quickly or without pain. He had tried gardening the previous week and the pain had got worse after doing any physical activity. On 11 June, the report said that walking and light physical activities made the pain worse for no obvious reason. He was not fit for responding to emergency situations while being on board a boat. He then had the fall, referred to above. On 25 July 2016, the Claimant wrote to Ms Sam Anthony, at the Respondent's HR, and said that he was not having any more physio appointments, and that he had been in contact with the hospital, but could not get an appointment for some ten weeks, and he asked the Respondent to see if they could assist the process. It appears that there was no positive response to this request to help speed up the referral.

2.2 The Respondent's sickness absence policy, agreed with Unison, provides that the employee has certain responsibilities. They will attend work whenever able, proactively manage their own health and well-being to reduce sickness absence, maintain regular contact with their line manager throughout any periods of absence, and refrain from activities that would delay their return to work – among other responsibilities. The policy provides that managers will investigate all absences and explore opportunities for early return where possible, keep in regular contact with employees who are absent due to sickness, to keep them up to date of support and monitor their progress – again, among other responsibilities. It seems that the Claimant's sickness management was not actively managed by his line manager, which the Respondent told the Tribunal was due to staff shortages, and the line manager being over stretched and not able to deal with the Claimant's position as would have been wished. There was, therefore, some HR input instead. The Respondent's sickness pay scheme provides that, in the normal run of things, employees with five years' service are entitled to six months full pay and six months half pay when on long term sickness absence. Here, however, in his ten month sickness absence, the Claimant was paid full pay throughout. Clause 10.10 of the scheme provides that if an employee abuses the sickness scheme or is absent on account of sickness due to, or attributable to, deliberate conduct prejudicial to recovery or the employee's own misconduct or neglect or active participation in professional sport or injury while working in the employee's own time on their own account for private gain or for another employer, sick pay may be suspended. The authority shall advise the employee of the grounds for suspension, and the employee shall have a right of appeal to the appropriate committee of the authority. If the authority decides that the grounds were justified, then the employee shall forfeit the right to any further payment in respect of that period of absence. For repeated abuse of the sickness scheme, it shall be dealt with under the disciplinary procedure.

2.3 The Claimant's position is that he wanted to return to work, but he wanted to know exactly what he would be expected to do because of the bad experience he had had previously. He underwent an operation for bowel cancer sometime in 2006, and returned to work on the basis of a phased return to light duties. However, claims the Claimant, he was treated appallingly. He was asked to move full sized railway sleepers, concrete paving, and pull out brambles. He did not want to do anything that would make his condition worse on this occasion. The GP fit note of 22 August 2016 states that the Claimant is not fit for light duties as the current employer in the past has reneged on doctor's advice and made the Claimant do heavy duties after the previous operation. The Claimant is exercising as has been advised by the GP and the physio. This includes walking. The Claimant is currently awaiting to see a back specialist. So states the fit note. Thus, it appears that the Claimant did not suggest to the GP that he might be fit for light duties, or ask the GP to authorise a phased return or trial period, despite a letter to him from the Respondent dated 1 August 2016. In that letter from Ms Anthony of HR, she stated that the Respondent understood the Claimant was seeing his GP that week, and the Council was keen to facilitate a return to work, and were therefore still keen to provide him with any variation of light duties on reduced hours that may be appropriate. Ms Anthony went on to say that the light duties could be office based to suit his health needs, or even redeployment to a suitable alternative role. She asked the Claimant to discuss this with his GP to determine if it could be accommodated. It is clear to me, from the fit note of 22 August and from what the Claimant told the Tribunal, that the Claimant obstructed this process of return to work suggested by Ms Anthony and did not ask his GP to consider whether light duties might assist a phased return, and indeed may have positively asked his GP not to suggest this.

2.4 The Respondent received a complaint from a member of the public (anonymous so far as this Tribunal, and indeed all the Respondent's decision makers, is concerned). A member of the public alleged that they had videoed the Claimant on their mobile phone, walking across a ploughed field carrying a shotgun (the Claimant is a keen shooter of foxes, rabbits, etc.). The whistle blower's statement said that the Claimant was seen to climb up and down from a combine harvester whilst it was moving, on each occasion with a gun over his shoulder. He was seen to stand for a significant length of time at the end of each harvest line waiting for foxes to run out of the oil seed rape to shoot. He was also seen climbing in and out of his truck to relocate to the next combine harvester line. The complainant observed the Claimant for over an hour and he was still there shooting when the complainant left. He appeared to the complainant to be active at all times and not to be in any pain. The complaint and the video recording was received by the Respondent on 26 July 2016. This led to a fact finding or

investigation meeting with Ms Goodall, on about 10 August, at which the Claimant was represented by his union. On the face of the written record, presumably taken by the HR representative present at the meeting, albeit not signed by the Claimant as accurate, the Claimant admitted walking on the grass headland with a shot gun, but not across the field or up and down the combine. He said it was him in the video apparently walking on the field. However, at the appeal hearing, Ms Goodall accepted that the Claimant had been sitting in the vehicle, as the Claimant had said that, and that he was not the man in the field. I find that, on the evidence available to the Respondent, the Claimant was conclusively sitting in the vehicle on the headland, and walked on the headland with his shot gun, but he was not conclusively the man in the field or climbing up and down the combine.

2.5 Thus, in August 2016 the position was this. The Respondent had the mobile phone video, which was at least suggestive that the Claimant was engaging in relatively physical activity, such as walking on a headland with a shot gun. The medical evidence was that he was unfit to work, and awaiting a consultant's report, and apparently not willing to suggest to his GP that he might try light duties. The Claimant knew that those light duties were on offer, including office based light duties or maintenance work – they are referred to in the meeting minutes, even if such duties were not specified in detail. There are no meeting notes to indicate that there was a discussion between the Claimant and his line manager or HR about such light duties on any previous or further occasion. However, I find that the Claimant was reluctant to return to work on light duties because of his previous experience in 2006. There was therefore some stalemate on the position at this point.

2.6 On 10 August 2016, the Claimant was invited by HR to attend a disciplinary investigation meeting on 17 August. It was said that he was, on 26 July, certified not fit to return to work by his GP due to back pain, and that he was observed and filmed undertaking pursuits which were likely to delay his return to work and further aggravate his condition. He had refused the Council's offer to return to work, on light duties, due to his ongoing back pain and PTSD. The Respondent's letter said that this amounted potentially to breaches of the disciplinary policy – namely, (1) defrauding the Council's sick pay scheme, and (2) serious failure to comply with the Council's standing orders, financial regulations, equal opportunities policy, conduct or other Council policies and procedures. It was said that, if proven, those allegations could potentially be deemed to be gross misconduct. The meeting on 17 August did not go ahead, apparently because of HR staff shortages – sick leave, maternity leave, etc., and the meeting was delayed until 15 December 2016. Nevertheless, the Respondent decided to further investigate and commissioned a private investigator's report. This led to filmed surveillance of the Claimant over two days, on

16 and 24 November 2016. It was clear to the investigator that the Claimant was an active man, according to Ms Goodall not living the lifestyle that one would expect of someone with a back injury. On both days he was seen to get up early and drive and carry out heavy duty tasks, including lifting heavy items (sacks of potatoes), cleaning the windows, carrying bowls of water and bending down very quickly. He was able to return home at lunch to prepare dinner and seemed to exhibit no signs of apparent hindrance or signs of pain getting in and out of his vehicle. He spent a lot of time driving to Proctor's Farm, where he was seen carrying out manual tasks at a good pace and was also seen on one occasion running to his vehicle. This activity, the Respondent believed, was inconsistent with what was being stated in the medical evidence that had been provided and obtained.

2.7 Further occupational health evidence was obtained by the Respondent. Dr J R Blankson, consultant in occupational medicine, saw the Claimant on 5 September 2016 and assessed his medical position. The Claimant told Dr Blankson that he was able to undertake all his day to day activities without assistance. He could sit for up to two hours, but had difficulty getting into the erect position due to back pain. He could walk for an unlimited distance with intermittent breaks and there was no restriction with standing. In Dr Blankson's opinion, the Claimant could return to work probably at the beginning of October when the current fit noted expired. He should be restricted to a suitable, alternate, non-physically demanding role (light duties) until his symptoms improved. Dr Blankson also referred to the previous bowel cancer, and the importance of excluding that as a contributor to the back pain, and his opinion was that the Claimant could return to work in October on light duties in a graduated manner if the bowel surgeon did not report any abnormal pathology concerning his persistent lower back symptoms. There was thereafter no referral by the Respondent to that bowel surgeon. There then followed fit notes on 20 September, 17 October and 17 November 2016. All said that the Claimant was unfit for work because of back pain. There was no reference by the GP to any consideration of Dr Blankson's recommendation of a return to work on light duties at the beginning of October. The Respondent also referred the Claimant to Ms Hilary Horton, a specialist practitioner in occupational health, formerly with the RAF, who viewed the video footage from the anonymous complainant and, with her knowledge of country pursuits and field activities, commented that carrying a shot gun plus ammunition etc across fields etc., requires physical agility and strength and firm footing. Ms Horton's view was that the person carrying the gun in such circumstances would be more than capable of working in a sedentary office or waterside duties of light labour at his place of work. She went on to say that she had worked with many similar cases where the employee had not attempted work on any level. Barriers preventing such a return

might be that the employee is not motivated to return to work, and habits having changed while absent and there was secondary gain while remaining absent, and the employee may have a negative recovery expectation; the employee's attitude of resentment towards the employer with historical grudges was supported by GP advocacy in this case, and reluctance to view a return to work as part of the recovery / rehabilitation process. Ms Horton's report is criticised by the Claimant, and perhaps does not add that much to the private investigator's report, where the Claimant is seen lifting and carrying sacks of potatoes (said by the Claimant to be half sacks only) and cleaning windows and so on, without apparent difficulty. On 3 October 2016, the results of the Claimant's MRI scan were that he had no bony injury to the back. There was marked degenerative change in the spine, with multi-level disc bulges appearing to impinge on nerve roots, etc.

2.8 There was a three month delay brought about by the further investigation, and then the Respondent made the Claimant a renewed invitation to a disciplinary hearing – by letter of 21 November 2016. Therein it was said that the investigation had now been completed and he was being asked to attend a disciplinary hearing on 15 December 2016. In fact, that investigation had not been completed, because there was still a further one day's filming by the private investigator to come, and the conclusion of the private investigator's report. The Respondent now added a further allegation to the existing two allegations – namely, that the Claimant was guilty of serious inappropriate behaviour inside or outside work which could bring the Council's name into disrepute. It is noted that these three allegations are specifically referred to in the gross misconduct examples in the disciplinary procedure. Further, that at a lower level of misconduct, examples of simple misconduct are given in the procedure – such as: engaging in activity which can damage the Council's reputation, both in and out of work; engaging in unauthorised work for another organisation during working hours; unauthorised absence from work, including failure to comply with the rules of the sick pay scheme.

2.9 Ms Tighe was the chair of the disciplinary hearing, with Mr Mark Matthews as another panellist, and Ms Anthony of HR giving advice. Ms Tighe clarified for this Tribunal what the disciplinary charges in fact meant. The allegation of defrauding the sickness absence scheme was an allegation of a failure on the Claimant's part to be pro-active, rather than an act of misleading or dishonesty. There was no evidence, said Ms Tighe, to show that the Claimant had lied, but he did not actively seek work. Colleagues who are off sick for a long period typically came in to keep in touch, and showed a determination to come to work, and she gave an example of someone with a broken leg coming in to man the telephones. The Claimant received a longer period of full pay and this, if widely known, could bring the Council into disrepute, if the Claimant was in

fact fit to work and had not returned to work. Further on the disrepute allegation, Ms Tighe did not know who the anonymous complainant was, but said that it was a small community where everybody knew everybody and people would have known about the Claimant's position. So far as the failing to comply with the various policies was concerned, then the Claimant failed to take all steps to make the situation better and not make it worse, and the Respondent believed that he was undertaking activities that could make his back condition worse. Ms Tighe was insistent that this was a misconduct case, not a sickness absence / capability case. That was why the capability procedure was not followed. At the hearing on 15 December, Ms Tighe concluded that the man in the video was the Claimant, who was walking across a field carrying a shot gun. She found that light duties, but only generic ones, had been offered to the Claimant, and he failed to talk to his GP to see what specific adjustments were needed, and if he had done the Respondent would have then offered duties on the basis of the GP's recommendation. The Claimant was not engaging with the process to return back to work. The evidence suggests that the medical situation frequently changed, but the GP fit notes did not reflect that. The Respondent wanted the Claimant to attend the premises with a fit note to discuss what he could do, but he did not and he was therefore not actively pursuing his return. Although the Respondent could have gone down a capability route, and Ms Tighe's hands were not tied in any way, she felt that the Claimant was deliberately stalling, which meant that colleagues had to pick up his work and this had a significant impact on them over a period of time. Thus, dismissal, not a final written warning, was appropriate. It was also noted that the Claimant was employed by a local farmer to help him out. When he was off sick with the Respondent, he said that he did not work for the farmer although, apparently, he continued to be paid by him (and this was confirmed by the farmer in writing). The Claimant visited the farm daily to check his chickens and ferrets which were kept there. The Claimant had received no home visits, contrary to policy, and had just one meeting with HR at Fenland Hall on 14 September – with a pilot and HR, but there were no minutes of this meeting. The Claimant said at the disciplinary hearing that he could not do office work, prevented by the telephone and the computer. He said the port was an unsafe environment, even though the meeting minutes indicate that he was reassured that the position would not be as it had been on the previous occasion. There was a different management team and different roles were being considered. It was noted that the Claimant had been further signed off from work on 7 December 2016 for eight weeks. The comment on that fit note was that the advice as per NICE guidelines was to remain active, walking etc., no heavy lifting. The sick pay to that date was £17,836.44.

2.10 The disciplinary hearing was adjourned so that the panel could reach their conclusions. On 16 December 2016, the Respondent wrote to the Claimant with the outcome of the disciplinary hearing. All the allegations were found to be established. On a balance of probabilities, the Claimant was found not to have fulfilled his obligations to his employer to actively return to work and as a result had defrauded the Council's sick pay scheme. The video evidence suggested that the Claimant was fit and able to return to work on light and / or adjusted duties, but the Claimant had refused this offer from the Council. Further, the Claimant did not accept responsibility for managing his own health and well-being to enable a return to work, and he did not proactively engage with medical practitioners to explore and expedite an effective return to work. On the disrepute allegation, it was said that the sick pay arrangements for local government employees are widely known, and that a member of the public would be aware that Council staff who were signed off sick would be in receipt of full pay. In a time of austerity, continuing to pay someone who is very physically active is unlikely to rest well with the public, it was said. Many members of the marine services team were also aware of the current situation and the Claimant's abilities, and the Claimant gave no thought as to how this impacted on them or the team or the service.

2.11 In accordance with the procedure, the Claimant appealed the decision to dismiss him, on 30 December 2016. He set out some 16 grounds of appeal. These grounds denied the finding that the Claimant was the person in the field, and the matter was inconclusive; the cost to the Council was never mentioned in the appeal hearing and should not have been part of the decision; he never had a home visit from anyone in breach of the sick policy; he had not defrauded the Council; there was no policy for allowing private surveillance; he had not brought the Council into disrepute; etc. Ms Pilson was asked to conduct the appeal, as she had experience with dealing with such matters, and was in a different sector of the Respondent's organisation and therefore was more independent. Further, she had been on maternity leave throughout the relevant period, and so had that further degree of detachment. Mr Richard Cassidy was also on the panel, and there was HR advice and support. The appeal hearing was on 23 January 2017, and the Claimant was represented by his Unison representative. Further grounds of appeal were not added to the 16 existing grounds, and so they became the focus of the appeal. The Respondent's case was that the video footage in the field only kick-started the investigation and it was the private investigator's report that the dismissal was based on. The activities shown in the private investigation footage were those that the Claimant could have undertaken with the same level of physical effort on a phased return to work. The Claimant could move freely, walk, lift, and maintain a daily routine. He could therefore return to work for the Respondent in some capacity. The cost of the Claimant's sickness absence was

not a significant impact on the decision to dismiss. Back to work options had been discussed in the investigation meeting and in the email of 1 August 2016. The Respondent took legal advice before the private investigator's investigation. Ms Pilson found that the Claimant had not fulfilled his obligations to the Respondent in actively seeking a return to work when able to do so, and had therefore defrauded the sick pay scheme. Although the farmer's letters indicated that the Claimant was not working for him but was still being paid, the Claimant was still undertaking activities on the farmer's land which required physical effort. The whistleblower's evidence supported the finding that the Respondent was brought into disrepute by the Claimant's activities. Ms Pilson found that the original decision to dismiss was a safe one. Mr Ged Wilde, the union representative, confirmed that the Claimant had had a fair hearing. The appeal was dismissed and the Claimant received a letter to that effect dated 24 January 2017.

The Law

3. 3.1 By section 94(1), of the Employment Rights Act 1996, an employee has the right not to be unfairly dismissed by his employer.

3.2 By section 95(1)(a), for the purposes of the unfair dismissal provisions, an employee is dismissed by his employer if the contract under which he is employed is terminated by the employer, (with or without notice).

3.3 By section 98(1)&(2), it is for the employer to show the reason (or if more than one, the principal reason) for the dismissal, and in the context of this case that it relates to the conduct of the employee. That is the reason relied upon by the Respondent. In Abernethy v Mott, Hay and Anderson [1974] IRLR 213, CA, it was held that the reason for a dismissal is a set of facts known to the employer or believed by him that cause him to dismiss the employee. In Trust House Forte Leisure Ltd. v Aquilar [1976] IRLR 251, EAT, it was held that whilst the employer's description of the reason for dismissal is by no means conclusive and the employment tribunal must look into the matter and determine what was the real reason, there is no burden on the employer to show that the reason was well judged and justified.

3.4 By section 98(4), where the employer has shown the reason for dismissal, the determination of the question of whether the dismissal is fair or unfair having regard to that reason:

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

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

3.5 The law to be applied to the reasonable band of responses test is well known. The tribunal's task is to assess whether the dismissal falls within the band of reasonable responses of an employer. If the dismissal falls within the band, then the dismissal is fair. If the dismissal falls outside the band, it is unfair. I refer generally to the well known case law in this area, namely: Iceland Frozen Foods Ltd. v Jones [1982], IRLR 439, EAT; and Foley v Post Office; HSBC Bank Plc v Madden [2000], IRLR 27, CA.

3.6 The band of reasonable responses test applies equally to the procedural aspects of the dismissal, such as the investigation, as it does to the substantive decision to dismiss – see Sainsbury's Supermarkets Ltd. v Hitt [2003], IRLR 23, CA. In so far as the investigation is concerned, and the formation of the reasonable belief of the employer about the behaviour, conduct or actions of the employee concerned, then I have in mind, of course, the well known case of British Home Stores Ltd. v Burchell [1978], ICR 303, EAT. Did the Respondent have a reasonable belief in the Claimant's conduct, formed on reasonable grounds, after such investigation as was reasonable and appropriate in the circumstances?

3.7 In Taylor v OCS Group Ltd. [2006], ICR 1602, CA, it was held that if an early stage of a disciplinary process is defective and unfair in some way, then it does not matter whether or not an internal appeal is technically a rehearing or a review, only whether the disciplinary process as a whole is fair. After identifying a defect, the tribunal will want to examine any subsequent proceeding with particular care. The purpose in so doing would be to determine whether, due to the fairness or unfairness of the procedure adopted, the thoroughness or lack of it in the process and the open mindedness (or not) of the decision maker, the overall process was fair, notwithstanding any deficiencies at an early stage.

4. The Claimant's counsel referred to a number of authorities in his written submissions.

4.1 He relies upon Mitchell v Arkwood Plastics (Engineering) Ltd. [1993] ICR 471, EAT, as apparently a factually similar case to this one. It was an ill health capability dismissal case, but the Claimant relies upon it as containing legal propositions that are of direct, as well as of general, relevance. The employee sustained an injury at work (tibial fracture), and was signed off sick. There was little communication between the employer and the employee for four months, at which point the employer enquired about his condition.

The employee saw his doctor and wrote back noting that he could not provide a return to work date pending a forthcoming consultation with a consultant. He was dismissed by the employer as a result of that failure to provide a return to work date and the tribunal, upholding the decision of dismissal as fair, said that there was a duty on an employee to inform their employer of their progress in recovery from ill health which it was said he had failed to comply with; and secondly, the employer had considered that lighter work might have been available, but the employee was at fault for not having taken any steps to pursue alternative light duties. The EAT allowed the employee's appeal. It said: *"We think the criticism is correct that there is certainly no equivalent duty by an employee to indicate to the employer his prospects of recovery."* Also: *"The second criticism is that there was a failure to provide or offer light work. We found that this is a somewhat more difficult problem. Looking at the evidence, it is difficult to see whether it has been said that there was light work available, or that he would have been considered for light work. We have also had the assistance of Mr Woodford, a director of the employers, who appeared before us and endeavoured to help us upon that aspect. We think, however, that in the event the criticism made of the tribunal's decision was again well founded and this was a further error in the decision."*

4.2 In East Lindsey District Council v Daubney [1977], IRLR 181, EAT, it was held that, unless there are wholly exceptional circumstances, before an employee is dismissed on grounds of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. Discussions and consultations will often bring to light facts and circumstances of which the employer was unaware and which will throw new light on the problem.

4.3 In McAdie v Royal Bank of Scotland [2007], IRLR 895, CA, it was held that where an employee's ill health is caused by the employer's actions, this offers a justification for a tribunal requiring the employer to demonstrate extra care and concern before implementing a dismissal. It may, for example, be necessary in such a case to go the extra mile in finding alternative employment for such an employee, or to put up with a longer period of sickness absence than would otherwise be reasonable. It should be noted that in the case of Mr Eaton before this tribunal, there is no evidence that the employer was responsible for the accident that caused the Claimant's sickness absence. Indeed, I am specifically asked by the Claimant not to make any findings of fact on that matter, as such might prejudice any proceedings being brought for a personal injury claim against the employer.

5. The Respondent's solicitor also referred to case law.

5.1 The first was the case of Trust House Forte Leisure Ltd. v Aquilar – see above. Also referred to were other authorities, including the unreported case of Ajaj v Metroline West Ltd., UK EAT/0185/15/RN. There, the employment judge assessed the employer's genuine belief in the employee's misconduct by reference to capability considerations that were irrelevant and impermissibly substituted his known view. Further, having concluded that the employee exaggerated the effects of his injury and accident, and that this was culpable and misleading, it was perverse for the employment judge to hold that the dismissal was unfair and wrongful.

6. The compensation provisions of the Employment Rights Act 1996 are at sections 118-124A.

6.1 This is a hearing on liability only, and remedy will be determined at a future hearing. However, I am at this hearing making findings and conclusions relating to contributory fault, so-called Polkey matters, and ACAS uplift.

6.2 Section 122(2) provides that where the tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal should reduce, or further reduce, that amount accordingly.

6.3 Section 123(1) provides that the amount of the compensatory award shall be such an amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

6.4 Section 123(6) provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it finds just and equitable having regard to that finding.

6.5 In Polkey v A E Dayton Services Ltd. [1987] IRLR 503, HL, it was held that, in considering whether an employee could have been dismissed if a fair procedure had been followed, there is no need for an all or nothing decision. If the tribunal finds there is a doubt whether or not the employee would have been dismissed this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have left his employment.
The Polkey effect has relevance to all unfair dismissals, not just procedurally unfair ones. The tribunal must consider what might have happened if there had been a fair process or, as in this case, another process such as a capability process.

6.6 In Nelson v BBC (No 2) [1979] IRLR 346, CA, it was held that, in determining whether to reduce an employee's unfair dismissal compensation on the grounds of his fault, then the employment tribunals must make three findings. First, there must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy. Second, there must be a finding that the matters to which the complaint relates were caused or contributed to, to some extent, by action that was culpable or blameworthy. Third, there must be a finding that it is just and equitable to reduce the assessment of the employee's loss to a specified extent.

6.7 Section 207A of Trade Union and Labour Relations (Consolidation) Act 1992 provides that where there is a failure to comply with a relevant code of practice – here the ACAS Code on Disciplinary and Grievance Procedures – then in a case such as unfair dismissal, if the employer has failed to comply with a Code in relation to a matter to which the Code applies and that failure was unreasonable, then the tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

Conclusions

7. Having regard to my findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties' representatives, I have reached the following conclusions:

7.1 The Respondent has established the reason for dismissal. It was conduct. The conduct of the Claimant was in the mind of the Respondent as the reason, and they clearly did not regard it as simply a capability issue. The Respondent's case, put simply, is that the Claimant deliberately avoided a return to work and thereby received sick pay to which he was not entitled, and misled his GP into signing fit notes that stated that he was unfit to return to work, even with adjustments, when the Claimant was capable of normal day to day activities such as walking, lifting weights, carrying objects, driving, etc. On that basis, says the Respondent, the Claimant was able to do light duties for the Respondent, particularly after the occupational health report of 5 September 2016, which said that he could return to work at the beginning of October. I conclude that the Abernethy test is satisfied.

7.2 I turn to procedural matters. I conclude that the allegations were reasonably clear – as set out in the invitation to disciplinary hearing letter of 21 November 2016 and in the disciplinary outcome letter of 16 December 2016. The allegations have been helpfully characterised by the Claimant's counsel in his written submissions

as the fraud allegation, the exacerbation allegation and the disrepute allegation. Whether the evidence obtained and relied on by the Respondent was sufficient for them reasonably to conclude that the allegations had been established is another matter. I accept the Claimant's submissions that the Respondent's procedure was bizarre in certain instances. For example, the Claimant was twice told that the investigation into his alleged misconduct was complete – once on 18 August 2016 and again on 20 November 2016 – when in fact it was ongoing on both those dates. Also, the original disciplinary investigation focused on the video recording in the field, but that appears to have been abandoned at the end of the process as being relied upon to a significant extent. However, I also accept the Respondent's submissions that, following receipt of the occupational health report from the consultant of 5 September 2016, which suggested that the Claimant was fit to return to work on light duties at the beginning of October, which was then unhelpfully contradicted by the GP fit notes of 17 October and 17 November, the Respondent was entitled to obtain further evidence as it saw fit. A private investigator's report was decided upon, rather than a meeting with the Claimant to determine the nature of the light work being offered or a further occupational report (see below). The fact is, the private investigator's report was available to the Claimant and his union representative before the disciplinary hearing, even if the time scale was short. Mr Wilde appeared to accept that the disciplinary hearing had been conducted fairly – *"I think we are good."* So far as the appeal is concerned, then no doubt the Claimant raised all matters of concern in his appeal letter and they were all dealt with comprehensively at the appeal hearing, again as conceded by Mr Wilde. There was an investigation, a disciplinary hearing with two panel members and HR support, an appeal hearing likewise, and the process was in line with the Respondent's disciplinary process as agreed with Unison. Having regard to the case of Taylor v OCS Group Ltd., I conclude that overall the disciplinary procedure was fairly conducted, with all allegations presented and every opportunity given to the Claimant and his union representative to have their say. I note further that any procedural defect is not specifically pleaded in support of the unfair dismissal case in the claim form.

7.3 However, I now turn to consider the Burchell test and whether the Respondent has satisfied it. Did the Respondent have a genuine belief on reasonable grounds after such investigation as was reasonable in all the circumstances in the misconduct alleged? I turn first to the so-called fraud allegation. The essential problem for the Respondent here is that the Claimant was covered at all material times by a GP fit note, saying that he was not fit for work, even light duties, even if the occupational health report of September 2016 suggested that he would be fit for light duties by early October 2016. In the light of the East Lindsey District Council

case, the Respondent, even in a case of alleged misconduct such as this, should have obtained up to date evidence of the medical position ahead of the disciplinary hearing and indeed carried out further investigations and processes. There should have been a meeting with the Claimant to set out the light duties available and expected of him. A further occupational health report should have been obtained specifically on the issue, namely what light duties were actually available, and those that the Claimant was fit for. Even though the Respondent says GPs are not generally co-operative with them, they made no attempt to approach the Claimant's GP, with his permission, to seek his/her agreement that the Claimant was fit for light duties. Clause 10.10 of the sick pay scheme itself states that the sanction for abuse of the scheme is initially suspension of sick pay, subject to the employee's right of appeal. Only where there is repeated abuse, presumably after this process has been carried out, should the employee be dealt with under the disciplinary policy. I conclude that the situation got nowhere near to a misconduct allegation of fraud, which imputes a dishonesty requirement. Indeed, on the Respondent's own case as set out at this tribunal, the Claimant was not dishonest and did not lie. If he was not dishonest and did not lie, then there is no basis on which he can be said to be guilty of fraud. I ignore the case of McAdie, because it has not been established in these proceedings that the accident was the Respondent's fault and, indeed, I have been asked by the Claimant to make no findings on this issue. Although it appears that the Claimant received his normal salary from Mr Proctor during the relevant period, Mr Proctor's written evidence was that the Claimant was not undertaking normal duties for him, as he was unfit for work. The Respondent was bound to take that written evidence at face value, if they chose not investigate it further. In short, a reasonable employer would have treated this as a medical capability case. To elevate it to 'fraud' and 'gross misconduct' was unreasonable and unjustified, as to do so was outside the band of reasonable responses. The Respondent cannot even identify how these allegations came to be made in the first place, and it would appear that I have not heard from relevant members of the Respondent's management on this. It seems to have been a knee jerk reaction to a complaint from a member of the public and a concern that the Claimant was being paid in full for not working – see disrepute allegation, below. I conclude that the Respondent has not satisfied the Burchell test here, there being no reasonable evidential basis for the allegation made. Further, there is insufficient evidence even to establish a lesser misconduct allegation.

7.4 The exacerbation allegation. This overlaps to a large extent with the first allegation. There is no medical evidence in support of what activities the Claimant was carrying out that were prejudicial to his return to work, and further it was not identified what the precise duties were going to be on his return to work, so a comparison

between the two cannot be made. The fact that the Claimant was undertaking normal day to day activities does not automatically mean, and is not automatically the same as saying, that he was fit for a return to work. There is simply no evidence that the Claimant was engaging in activities that might prolong his absence, as was submitted by the Respondent's solicitor. There was an absence of evidence on the basis of which the Respondent could determine that the allegation had been made out. The Respondent therefore has failed to establish that the Burchell test has been satisfied. For example, the occupational health report in September had said that the Claimant was capable of day to day activities but was not fit to return to work until October 2016. Thus, even on the Respondent's case as set out in that occupational health report, being able to do day to day activities is not the same as being fit to return to work.

7.5 The disrepute allegation. The decision on this is based on one anonymous member of the public's complaint, whose motive for making the video and for making the complaint is unknown. The Claimant's physical activities, for Mr Proctor or otherwise, might or might not be regarded unfavourably by the public at large. However, there is no evidence, apart from this one person whose identity and therefore motives are not known, that they were. It would be impossible for the general public to really know the medical ins and outs of the Claimant's position. Indeed, the Claimant was not precluded by the Respondent's policy from going out and about as advised by his doctor. No evidence has been produced that the Claimant's activities were like for like with his duties for the Respondent. Further, there is no evidence that members of the public generally were aware of the Claimant's terms and conditions of employment. There was no press interest or reporting of the matter. I conclude that the Respondent has not satisfied the Burchell test here either.

7.6 The sanction of dismissal. There is no evidence in the dismissal letter of independent thought given to the appropriate sanction. It seems to be the case that the Respondent believed that, as gross misconduct had been made out, therefore they must dismiss. The significant impact on colleagues of the Claimant's prolonged absence was something that was important in the Respondent's mind. However, Ms Tighe admitted that there was no dishonesty. The allegations that were made may have been better suited to misconduct rather than gross misconduct, which would have no doubt given the Respondent pause for thought as to the appropriate sanction, if allegations of mere misconduct had been established rather than those of gross misconduct. Further, the Respondent failed to have regard to the Claimant's substantial mitigation – his 13 years' service, his lack of any previous disciplinary history, and (as the Claimant says) where the allegations were ultimately related to passive breaches of policy. The easiest way of dealing with the matter from the Respondent's point of view would have been simply

to stop paying sick pay, as they were perfectly entitled to do if they believed that there was an abuse of the scheme. Further, as stated above, the Respondent has not established a sufficient evidential basis on which to find the Claimant guilty of the allegations made. In all the circumstances, I conclude that the dismissal was outside the band of reasonable responses and therefore unfair.

7.7 I turn to the question of potential for contributory fault. I am required to find culpable and blameworthy conduct on the part of the Claimant causative of his dismissal, and that it would be just and equitable to reduce compensation accordingly. I conclude that there was such conduct. Under the sickness absence policy, the Claimant was under a clear obligation as an employee to actively seek to return to work, and he notably failed to do this. He was, I conclude, fit for light duties at least from the beginning of October 2016. Yet, in circumstances where he admitted being able to influence the GP on the content of the fit note, he and his GP did not suggest that, given the level of activity elsewhere, he might be fit for light duties. Fit notes following the consultant's report of 5 September resolutely ignore that reference and continue to state that he is not fit for any type of work. While I recognise that the onus is mainly on the employer, the fact is that the Claimant did not chase up his line manager or the Respondent's HR to arrange a meeting to discuss a potential return to work (even when he said that he wanted to return to work), as is required by the procedure. Rather, he was content to sit back, do nothing and take the money. I note that he was 62 years of age when he was dismissed, and perhaps therefore looking towards retirement from the Respondent's employment. It is clear that part of the Claimant's reluctance to return to work was due to a bad experience in 2006, but he had been reassured at the investigation meeting that there was a different management and that this would not be repeated. He ignored that assurance. This is not a one way street, even if the employer has the greater responsibility in getting the employee back to work. I conclude that the Claimant deliberately took advantage of the Respondent's poor sickness absence management to ensure that he did not return to work for as long as possible. I conclude that, in all the circumstances, the Claimant was culpable and blameworthy in this context and such was causative of his dismissal. It is clearly just and equitable to reduce his compensation accordingly, as not to do so would be unfair to the Respondent and prejudicial to them. The fact is that the Claimant could have prevented his dismissal by a reasonable approach to communication with the Respondent and appropriate conversations with his GP. I conclude that there is a very substantial element of fault in this case on the part of the Claimant, and the appropriate reduction in his compensation for contributory fault should be 50%.

7.8 I now turn to the Polkey issue. Although the result of the MRI scan does show degenerative change to the Claimant's back, nevertheless as of 16 December 2016 when he received his hospital letter, not disclosed to the Respondent, the Claimant was not in need of hospital surgical intervention and was referred back to his GP. He was therefore fit to return to work, presumably, at that date if not earlier. However, his failure to disclose that letter is a clear indication that he was reluctant to return to work at all. He had been absent for 10 months and he was now aged 62. It may well be that he would have been able to access some or all of his local government pension at this age and at this date. He would no doubt have continued to work for Mr Proctor. I conclude that there was a good chance that he would have continued to be uncooperative with any attempt to return him to work, and a capability process would then have ensued, leading to a fair dismissal shortly thereafter. I conclude that there is a possibility that the Claimant would have resigned if he was being required to return to work and in circumstances where he did not wish to. There had been a breakdown, on his part anyway, in his trust and confidence in his employer, as a result of what he regarded as the previous handling of the situation in 2006. I conclude that there was a 25% chance of the Claimant leaving the Respondent's employment in circumstances where there was no unfair dismissal. Compensation should be reduced accordingly.

7.9 The Claimant seeks an uplift in his compensation for breach of the ACAS Code, under the provisions of the Trade Union Labour Relations (Consolidation) Act. However, the Claimant's evidence and submissions do not identify a breach of any specific provision of the ACAS Code on Disciplinary Procedures. I have concluded that the procedure was overall fair. Just because the sanction of dismissal has been found to be inappropriate and unfair and outside the band of reasonable responses does not mean there has been a breach of the Code. If it did so, every unfair dismissal found would result in an ACAS uplift, and they do not. In those circumstances, there is no ground on which to order an uplift in compensation for any breach of the ACAS Code.

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Employment Judge Sigsworth

Date: 2 October 2018……..

Sent to the parties on: 12 October 2018

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For the Tribunal Office