

# THE INDUSTRIAL TRIBUNALS

CASE REF: 1157/08

**Claimant:** Henry Hamilton  
**Respondent:** Lisburn City Council

## DECISION

The unanimous decision of the industrial tribunal is that the claimant was not unfairly dismissed. Further the tribunal finds that the respondent was in breach of contract in failing to dismiss the claimant with notice and orders the respondent to pay the claimant the sum of £3702.24 in lieu of notice.

### **Constitution of Tribunal:**

Chairman: Miss E McCaffrey

Members: Mrs S Doran  
Mr J Patterson

### **Appearances:**

**The claimant was represented by Mr G Daly of Francis Hanna and Company Solicitors.**

**The respondent was represented by Mr K Denvir BL instructed by Campbell Stafford Solicitors.**

### **The Issues:**

This was a claim of unfair dismissal brought by the claimant against the respondent. The issues for decision by the tribunal were

1. What was the reason for the claimant's dismissal and was the dismissal a fair one in all the circumstances?
2. Given that there was an allegation of misconduct by the claimant, was the investigation carried out by the respondent into this allegation a reasonable investigation in all the circumstances?
3. At the time when the claimant was dismissed, was there a reasonable belief on the part of the respondent that the claimant was guilty of misconduct ?

4. Did the respondent's action in dismissing the claimant fall within the range of reasonable responses open to a reasonable employer ?
5. Was the investigation flawed by reason of delay?
6. Did Mr Gilpin, the respondent's employee who carried out the disciplinary hearing, have authority to dismiss the claimant ?
7. Was the claimant entitled to notice pay?

## **2. The Facts**

- 2.1 The tribunal heard evidence from the claimant and from a number of employees of the respondent: Mr Gregg, who carried out the investigation, Mr Billy Gilpin, who was the disciplinary officer and Mr Rose, the Director of Culture and Leisure Services, who heard the claimant's appeal against dismissal. We were also referred to quite a number of statements and documents by both parties. On the basis of the evidence received we make the following findings of relevant facts.
- 2.2 The claimant was employed as a gravedigger by the respondent Lisburn City Council. The respondent has some 450 permanent staff and casual staff as well. They maintain a Human Resources department, whose task it is to advise on HR issues and ensure a consistent approach across the different departments within the respondent organisation. The claimant commenced employment in 1984 at the age of 17, and although there was a break in his employment, he then returned to work with the respondent in November 1995 as a groundsman and greenkeeper and later as a gravedigger. He continued in that post until he was dismissed on 22<sup>nd</sup> May 2008. At the date of dismissal the claimant was earning, according to the response lodged by the respondent, £457.49 per week gross, £308.52 Nett. The dismissal was conceded and therefore the tribunal has to consider whether the dismissal was a fair one in all the circumstances of the case.
- 2.3 The claimant frankly admitted in his evidence to the tribunal that he is an alcoholic and this has caused him considerable difficulties in maintaining his attendance at work over a lengthy period of time. He had a number of warnings in relation to his poor attendance at work due to his drinking. He was given a final written warning on 6<sup>th</sup> March 2007, effective for 24 months. There was a further disciplinary hearing in April 2007 in relation to his absence from work in late January/early February 2007, which related to an absence predating the final written warning. His final written warning was extended on 7<sup>th</sup> November 2007 until 6<sup>th</sup> September 2009. It was therefore still in effect when another matter arose.
- 2.4 On 18<sup>th</sup> August 2007, the claimant was involved in preparing a grave for a lady who had died, Mrs Henderson, at the new Blaris Cemetery. At the funeral there was a difficulty in that the coffin was too large for the grave and therefore stuck when it was being lowered into the grave. There was also

concern that at the interment, a member of the cemetery staff used “insulting and bad language.”

2.5 Following the burial a letter of complaint was received from Mrs Henderson’s son, dated 21<sup>st</sup> August 2007. This letter made two complaints. First of all, Mr Henderson expressed “disgusted and dismay” at the behaviour of one of the council’s employees during the committal. Secondly, he indicated the distress caused to members of the family by virtue of the fact that the casket had been stuck and took a long time to lower into the grave. Mr Hamilton indicated that one of the grave diggers had decided to express his frustration “with some insulting and bad language, in full view and within earshot of both the Minister and the mourners around the graveside.”

2.6 Mr Mark Gregg, a Parks Officer, was nominated to investigate these two complaints. Mr Gregg had been on holiday and received this request on his return at the end of August. He made enquiries about both matters with a number of staff. The issue in relation to the size of the casket (“the coffin issue”) had in fact been raised by council staff with the undertaker on a number of occasions before the burial. The outcome of Mr Gregg’s investigation was that council staff had done everything they could to ascertain the correct measurements of the coffin and ultimately the measurements had been supplied by the undertakers and proved to be inaccurate. However, the issue in relation to the use of insulting and bad language (“the bad language issue”) ultimately concerned the claimant and the tribunal most.

2.7 Mr Gregg had made efforts to contact various members of staff in relation to both issues early in September. He received statements from the claimant, from Glenn Thompson, another grave digger who was present on the site and from Gary Turpie, a contract worker who was also one of the cemetery staff. Only Mr Thompson’s statement is dated, and it is dated 5<sup>th</sup> September 2007. Mr Thompson indicated in his statement that the coffin did indeed stick as it was being lowered into the ground. His statement continues:

“Henry (the claimant) then took both sets of tapes at the feet of the coffin and had to “jiggle” it a bit to get the coffin lowered into the grave. Once we had the coffin lowered I heard the word “F” being said but as I had already walked to the background, I do not know who said it or the exact way it was said. After the funeral had taken place, one of the mourners came to Henry and asked for a word with him, he said certainly and put his arm around her, she said that he should show more respect at a graveside and another woman agreed with this. I then went to section to help Gary again as we were short staffed that day.”

2.8 Mr Turpie’s statement simply refers to the claimant asking Mr Turpie to get Glenn Thompson to help him with the lowering down of the coffin. Mr Turpie indicated that he had gone and spoken to Glenn Thompson, who was digging a grave at the time so Mr Turpie finished digging the grave on his behalf. He said that he then went over towards the claimant and Glenn. The last sentence of his statement reads:

“I saw a woman mourner talking to Henry, after which she proceeded to speak to the funeral directors.”

The claimant’s statement refers only to the issue of the size of the coffin and its measurements and does not refer at all to the issue of insulting and bad language.

- 2.9 Mr Gregg subsequently carried out interviews of council staff in relation to both the “coffin issue” and the “bad language” issue. The interviews of the claimant, Mr and Mrs Thompson were carried out on 18<sup>th</sup> October 2007. He subsequently saw other members of staff in relation to the “coffin issue” on 7<sup>th</sup> November 2007.
- 2.10 In relation to the bad language issue, Mr Gregg specifically asked the claimant at his investigation meeting whether anything had been said at the graveside during the lowering of the coffin. The claimant answered “No.” Mr Gregg asked if the claimant or anyone else had used foul language and the claimant’s answer was, “No, I did not use foul language and did not hear anyone else.”
- 2.11 In his interview, the claimant gave a detailed account of the issues in relation to the digging of the grave, the information he had been given regarding the measurements of the coffin and the work done in relation to the opening of the grave. Mr Thompson’s interview notes again gave detail in relation to the lowering of the coffin and the issue of it getting stuck. He however indicated that he had heard a curse word as he lifted the bearers from the coffin. He said that he heard “the F word” but didn’t know who said it as he had his back turned. He was asked whether it could have been one of the mourners and Mr Thompson answered that it could have been. Mr Gregg asked Mr Thompson if any of the mourners or undertakers had approached him or any of the council staff. Mr Thompson’s reply was, “A mourner came over to Henry Hamilton, Henry went to put his arm around her but she was raging, she said to him about language and he should be a bit more respectful around a graveside.” There was no further discussion on this matter.
- 2.12 Mr Gregg indicated in his evidence that he had attempted to contact Mr Turpie to interview him, but had found it difficult because of the fact that Mr Turpie was a contract worker for the respondent rather than a full-time employee. He did not make any contact with Mark Henderson, who had made the complaint to seek further information from him, or try to identify the lady mentioned in Glenn Thompson’s statement. Following these interviews, Mr Gregg wrote to the undertakers involved in the funeral of Mrs Henderson, Elwood and Capper, on 17<sup>th</sup> November 2007. In that letter, Mr Gregg specifically asked whether the undertaker or any of their staff witnessed any foul or inappropriate language after the committal and if so, if they could identify this person as being a member of Lisburn City Council staff. No reply was received and a reminder was subsequently sent on 10<sup>th</sup> December 2007. Mr Elwood replied on 17<sup>th</sup> December 2007 and the relevant part of the letter reads as follows:-

“Unfortunately I am forced to confirm that I did witness foul language during the committal (but not after as your letters asks!) and I can identify the culprit of this foul language as being a member of the Lisburn City Council staff.”

- 2.13 Mr Gregg’s evidence was that he did not receive this letter before he had prepared his investigation report, which covered both issues. The report was submitted to the respondent’s Human Resource Department by email on 7<sup>th</sup> January 2008. He indicated that this was the usual sequence of events. The investigation report apparently was sent to the Human Resources Department, so they could check that the proper procedures had been followed at the Human Resource Clinic. Mr Gregg’s report was subsequently returned to him early in February 2007 without any suggestions for amendment and at that stage, he emailed the report to Mr Roy Hanna, Assistant Director of Environmental Services. That report recommended disciplinary action be taken against the claimant. However, nothing appears to have happened to this report until 10<sup>th</sup> March 2008, when a hard copy of the investigation report was sent to Mr Hanna by Mr Gregg. Mr Hanna subsequently advised Human Resources to proceed to arrange a disciplinary hearing and nominated Mr Gilpin to deal with the disciplinary hearing.
- 2.14 On 15<sup>th</sup> April 2008, the respondent sent a letter to the claimant asking him to attend a disciplinary hearing later in April. That hearing was postponed at the request of the claimant’s representative and the disciplinary hearing subsequently took place on 15<sup>th</sup> May 2008. Mr Billy Gilpin, who is an Operations Manager with the respondent and a middle manager, was to conduct with the disciplinary hearing .
- 2.15 The disciplinary procedure sets out a number of stages to be followed, depending on the seriousness of the alleged misconduct. Paragraph 8 of the procedure states as follows:
- “The council wishes to make it clear that an employee subject to disciplinary warning for any reason is liable to further disciplinary action at the next stage of the procedure irrespective of the nature of the subsequent disciplinary offence.”
- 2.16 The formal stages of the procedure are set out at section 10 of the disciplinary procedure. This makes it clear that the authority to issue warnings, whether verbal or written, is delegated by the Chief Executive/Directors. The procedure sets out the appropriate disciplinary authority in the case of recorded verbal written warnings and final warnings. In the case of a final warning, the disciplinary authority is the Assistant Director or a senior representative “specifically nominated for the purpose.” In the case of punitive action (i.e action imposing a financial penalty and or relocation of the employee or termination of employment), section 12 of the procedure makes it clear that punitive action may only be taken by the Chief Executive/Director or a senior nominated representative, following the full enquiry and interview which shall, from the Council’s side, also be attended by the Assistant Director of Corporate Service (Human Resources) or his or her senior

nominated representative. In this case, the procedure makes it clear that the disciplinary authority is the Chief Executive/Director or a senior representative specifically nominated for the purpose. The procedure also makes clear that the employee has the right to be represented and can appeal a decision to the Chief Executive/Director.

- 2.17 In the claimant's case, the nomination was made by Mr Hanna the Assistant Director of the claimant's department and he nominated Mr Gilpin who was a middle manager to deal with the disciplinary hearing. The procedure does not make clear who should nominate the senior representative and who has authority to make such nomination. The claimant's case was that as the procedure said that the disciplinary authority would be the Chief Executive/Director "or a senior representative specifically nominated for the purpose" the nomination should be made by the Chief Executive or Director. The case was made that as Mr Gilpin was nominated by Mr Hanna, an Assistant Director rather than a Director, the nomination had been incorrectly made and Mr Gilpin did not have the authority to dismiss the claimant. However, this is not stated explicitly anywhere in the actual disciplinary procedure. The only evidence which the tribunal heard on this matter was from Mr Rose, who ultimately dealt with the appeal. When asked specifically who had power to nominate a senior representative, Mr Rose indicated that he could not answer that question specifically, but he knew that it was normally done by an Assistant Director or Director.
- 2.18 We have however also taken into account the documentation in relation to the claimant's final written warning which was put before us. In such a case, the disciplinary authority is stated in the policy as being the Assistant Director "or a senior representative specifically nominated for the purpose." In that particular situation, it was Mr Gregg, the Parks Officer, who was the disciplinary officer. He had been nominated by an Assistant Director and it was he who gave the final written warning. He also gave the extension to the final written warning received by the claimant. Potentially, that further disciplinary hearing could have resulted in the claimant's dismissal and accordingly we find that as the procedures are silent on the point, there was a custom and practice that the Disciplining Officer was nominated either by the Assistant Director or the Director, but that there is no specific rule as to who should make the nomination. We accept Mr Rose's evidence that the nomination was usually made by someone at the level of Assistant Director or Director.
- 2.19 The claimant was invited to a disciplinary meeting, originally scheduled for 24<sup>th</sup> April 2008. In the letter inviting him to that meeting, he was advised that Mr Gregg has recommended that a disciplinary hearing be convened to consider the allegation that the claimant had showed a lack of courtesy (foul language) to members of the public. He was advised of his right to be accompanied at the disciplinary hearing by a trade union representative or a work colleague. The letter also advised him that as he currently had a final written warning on his record, he should be aware that if the allegation was proved, it may merit the penalty of dismissal. The claimant was provided with a copy of the investigation report, a copy of the council's disciplinary

procedure and a copy of the disciplinary hearing procedure. The disciplinary meeting was subsequently reconvened for 15<sup>th</sup> May 2008 and again, the same information was provided to him in that letter. No issue was raised by the claimant in relation to the procedure followed in relation to the actual conduct of the disciplinary meeting.

- 2.20 At the disciplinary hearing, notes of which were provided to the tribunal, Mr Gregg attended to present the case. The claimant was accompanied by his union representative. It was only at this meeting that the letter from the funeral directors was produced to the meeting. The claimant's union representative asked if the minister conducting the funeral had been questioned and pointed out that the claimant had not been specifically identified by the undertaker. The union representative stated at the disciplinary hearing that he had a problem with the time scale and wanted it noted that it was unreasonable. Mr Gregg had noted that it was a complicated investigation, with a large number of interviews to carry out. The representative from Human Resources also noted that the disciplinary hearing was arranged as soon as the investigation was completed and that the first date did not suit the union representative and that it had been re-arranged accordingly.
- 2.21 The outcome of the disciplinary hearing was set out in Mr Gilpin's notes dated 21<sup>st</sup> May 2008. His conclusion was that, on the balance of probabilities, the claimant did use foul language and in so doing showed a lack of courtesy to members of the public during Mrs Henderson's funeral on 18<sup>th</sup> August 2007. He noted that this was deemed misconduct by the respondent. He concluded, "Given that Mr Hamilton is currently on an extended final written warning and was informed in writing that any further breaches of council policies may result in dismissal, I would recommend that the penalty of dismissal be applied in this case."
- 2.22 Mr Gilpin's evidence to the tribunal was that he had considered the accounts given by Mr Thompson and the claimant. Mr Thompson had clearly said in his statement that he did not use the F word, but had heard it being used. He had also observed the conversation between the claimant and one of the female mourners, who had challenged him about lack of respect at the graveside. The claimant denied he had used foul language and had no recollection of the conversation with the lady at the funeral. However, the undertaker had stated in his letter that a member of Lisburn City Council staff had used foul language at the Henderson funeral and a member of the public had complained about it. He noted that there were only two members of the Lisburn City Council staff at the graveside, namely the claimant and Mr Thompson. No-one had suggested that Mr Thompson had used the F word and Mr Gilpin's evidence was that he did not believe the claimant's denials. He had therefore concluded that the claimant had indeed used the "F- word" at the burial of Mrs Henderson and so had shown discourtesy to members of the public, namely the mourners at the graveside.
- 2.23 The claimant was advised by Mr Gilpin at a meeting on the 22<sup>nd</sup> May 2008 that he would be dismissed. A letter was given to the claimant setting out the

reasons for the dismissal and setting out his right of appeal. The claimant lodged an appeal against dismissal on 27<sup>th</sup> May 2008. The appeal letter set out the grounds of the appeal in ten paragraphs as follows:-

“I wish to appeal the dismissal on the following grounds:-

1. The severity of the disciplinary action is unreasonable in all the circumstances;
2. All material facts where (sic) not supplied in good time prior to the disciplinary hearing;
3. The disciplinary hearing was not carried out in accordance with Lisburn City Council’s disciplinary procedures (I believe that Mr Gilpin does not have the power to dismiss);
4. I believe given the time scale of the alleged matter and the date of dismissal, it is an unreasonable delay for the council to dismiss;
5. That the Disciplinary Officer failed to consider my length of service or my previous record in determining his final decision;
6. Failure to obtain sufficient proof of the charge;
7. I believe the anonymous letter sent for the attention of Colin McClintock and received on 20<sup>th</sup> August 2007 was a deliberate attempt by persons unknown to have my employment terminated. I believe there is a clear link between the Henderson issue and the anonymous letter;
8. All my previous warnings where (sic) under the council’s policy who were managing attendance;
9. The decision to dismiss me without appropriate notice after 15 years employment is unlawful and would be determined to be wrongful dismissal in a tribunal;
10. I would dispute the investigating officer’s report.

Finally, I would like to take this opportunity to say again that at no time have I ever used foul language or ever shown a lack of courtesy to members of the public during any funeral.”

- 2.24 There followed an exchange of emails between Directors and Human Resource staff within the respondent’s organisation as to the appropriate Director to hear the dismissal. Mr McClintock, to whom the letter of appeal was addressed, suggested that he should not hear the appeal because there had been an anonymous letter sent to Mr McClintock, which the claimant was alleged as part of an attempt to get his employment terminated. The Chief Executive was asked to nominate an appropriate person and Mr Davidson (the Chief Executive) nominated Jim Rose Director of Leisure Services to progress the matter on 12<sup>th</sup> June 2008. Caroline Magee of the Human Resources Department emailed Mr Rose the same day to ask if he could deal with the matter and giving him a choice of dates. The appeal hearing took place on Friday 20<sup>th</sup> June and was conducted by Mr Rose.
- 2.25 At the appeal hearing, which started at 2.40pm and concluded at 3.30pm, Mr Rose was accompanied by Mrs Magee from Human Resources, Mr Gilpin the Disciplinary Officer attended and the claimant attended with his union representative Mr Jim Donnelly. Mr Rose outlined the purpose of the meeting

and then invited Mr Gilpin to present his reasons for the disciplinary action, which Mr Gilpin did. Mr Rose invited the claimant and Mr Donnelly to ask questions and Mr Donnelly then presented his case by going through the letter of appeal and dealing with each point in turn. The notes of this were produced to the tribunal. A number of issues were clarified at the appeal hearing. When the claimant's union representative raised the issue of the anonymous letter, Mr Gilpin stated that he didn't even realise that there was an anonymous letter until he received the letter of appeal and indicated that he had "no idea" about this. Mr Gilpin also conceded that he had wrongly referred to the alleged misconduct as gross misconduct whereas his report referred to it as "misconduct." Both Mr Gilpin and Mr Donnelly were invited to sum up, then Mr Rose asked everyone to retire so that he could consider if there were any further questions. Mr Rose asked the claimant if anyone had approached him directly after the committal and the claimant's reply was that he had "no recollection" of someone coming over to him.

- 2.26 Following that hearing and as he was due to go on holiday, Mr Rose decided that he would ask the Human Resources Department to write once again to the funeral directors in relation to the events of August 2007 and asked specifically if they could identify the member of staff and if not, could they describe the individual concerned. Mr Elwood of Elwood and Capper replied on 4<sup>th</sup> July 2008 and said that:

"As to confirmation to the identity of the individual in question, it is my understanding that they are no longer under the employment of Lisburn City Council."

He continued by indicating that neither he or any member of his staff would be prepared to attend a former or informal hearing or appeal hearing which may be arranged as a means of proving or disapproving this individual's guilt. He indicated that as far as he was concerned, the matter was closed.

- 2.27 On his return from holiday, Mr Rose prepared a report on the disciplinary appeal hearing dated 17<sup>th</sup> July 2008. In his report, Mr Rose dealt with each of the points which were raised by the claimant's representative at the appeal. In particular, he dealt with the issues of the nomination of Mr Gilpin, the allegation of delay in dealing with the matter, the anonymous letter issue and the appropriateness of the decision to dismiss. Regarding Mr Gilpin's nomination, Mr Rose indicated he was satisfied that Mr Gilpin had been correctly nominated to deal with the disciplinary hearing and confirmed this in his oral evidence to the tribunal. He confirmed that he was satisfied that the respondent's disciplinary procedures and practices allowed an Assistant Director to make such a nomination and there was no evidence to the contrary. He specifically indicated that the anonymous letter sent to Mr McClintock played no part in the decision of the disciplinary officer and accordingly he did not take it into account. In relation to the length of time taken for the alleged matter and the date of dismissal, he was not of the view that there had been unreasonable delay relating to the decision to dismiss.

- 2.28 In relation to the allegation that there had been a failure by the respondent to obtain sufficient proof of the charge, Mr Rose indicated that he was satisfied “it had been reasonably established that it was Mr Hamilton who uttered the swear word at the graveside during the Henderson funeral.” In the light of this, Mr Rose’s opinion was that the decision of the disciplinary officer was reasonable and was upheld.
- 2.29 Before issuing his report, Mr Rose had emailed it to Human Resources asking for their specific confirmation that the extended final written warning letter issued to the claimant previously had advised that any further breach of council disciplinary procedures may result in dismissal. The final appeal report set out the specific content of the extended final written warning letter of 7<sup>th</sup> November 2007. The outcome was that Mr Rose upheld the decision to dismiss the claimant.
- 2.30 Following his dismissal, the claimant had a very strong adverse reaction and in his own terms he said that he was devastated and relapsed back into alcoholism “big time.” He gave evidence that when he received the final written warning in March 2007, that it was a wake up call and he was concerned that he was “going to lose everything.” He did his best after this to “keep on top of things” and in fact his last day of absence on the sick was for a period of nine days in late January/early February 2007.
- 2.31 The claimant gave evidence that since losing his job, he had not worked. He had to go and get help from different people and had gone to an addiction clinic in Newry. He had left there a week before the hearing, having been there for seven weeks. The claimant wanted to be reinstated to his job and to go back to work. At the date of the hearing, he was currently certified as unfit by his doctor and was in receipt of incapacity benefit and disabled living allowance. However, the claimant was confident that if he was reinstated to his post he would be able to cope with the responsibility of his job. He accepted that if he was reinstated to work, he would still be subject to a final written warning and that it would be entirely his own fault if he let himself down by his behaviour. In his evidence to the tribunal, the claimant maintained that he had not used “the F word” at the Henderson funeral and maintained that he did not recall any member of the public approaching him after the committal. He conceded however that he had been aware when he received the final written warning that if there was any further disciplinary procedure, that he could lose his job.

### **3. The Law**

- 3.1 The law in relation to unfair dismissal is to be found in the Employment Rights (Northern Ireland) Order 1996 as amended and in relevant case law. Article 126 of the Employment Rights (Northern Ireland) Order 1996 (“the 1996 Order”) states that the employee has a right not to be unfairly dismissed by his employer.
- 3.2 Article 130 of the 1996 Order states that the onus is on the employer to show that the reason (or the principal reason if there is more than one reason) for

the dismissal falls within Article 130 (2) “or for some other substantial reason.” In this case the reason falls within Article 130 (2) (b), in that the respondent claims that the reason for the dismissal was the conduct of the claimant.

- 3.2 If the respondent succeeds in discharging the requirement of Article 130 (2)(b), then under Article 130 (4) it is for the tribunal to decide whether the dismissal is fair or unfair, depending on whether in the circumstances the employer acted reasonably or unreasonably in treating the claimant’s misconduct as sufficient reason for dismissal. This is to be determined in accordance with equity and the substantial merits of the case.
- 3.3 This case raises issues in relation to the fairness of the investigation and also in relation to the fairness of the procedure followed, specifically Mr Gilpin’s authority to dismiss and the delay between the incident, the investigation and the disciplinary proceedings taking place. In relation to the issue of the fairness of the investigation, the tribunal must consider the case law and in particular the decision of the Employment Appeal Tribunal in **British Home Stores –v- Burchell [1978] IRLR 379**. That case sets out a three fold test which may be summarised as follows. First of all the employer must demonstrate that they believed that the misconduct had occurred. Secondly, the employer must show reasonable grounds on which to sustain that belief and thirdly, at the stage when the employer formed the belief on those grounds, the employer must demonstrate that he had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.
- 3.4 If the tribunal is satisfied as to the reasonableness of the process carried out, it must then go on to consider whether the respondent acted reasonably or unreasonably in treating the conduct of the claimant as a sufficient reason to justify dismissal. The tribunal must not substitute its own decision for that of the employer. The tribunal is conscious in this regard of the decision in **Iceland Foods Limited –v- Jones [1982] IRLR 439**. In that decision the court confirmed that the tribunal must consider the reasonableness of the employer’s conduct, not whether the tribunal itself considered the dismissal to be fair. It was also stated that in many, although not all, cases there would be a reasonable band of responses to the employee’s conduct within which one employer may take one view and another quite reasonably take another. This approach has been confirmed by the Court of Appeal for England and Wales in **Foley v Post Office and HSBC Bank plc v Madden [2000] ICR 1283**.
- 3.5 On the question of delay in applying the investigation and disciplinary procedure, the tribunal was referred to the statutory procedures as set out in Schedule 1 to the Employment (Northern Ireland) Order 2003 (the 2003 Order) which give the minimum requirement for dismissal and disciplinary procedures. These consist of three steps : a written statement sent by the employer to the employee, setting out the allegations of misconduct and inviting the employee to a meeting to discuss the matter; a meeting at which the employee has an opportunity to give a considered response to the allegations, after which the employer must inform the employee of his decision and the employee’s right to appeal; an appeal which takes the form

of a further meeting, after which the employer must advise the employee of the outcome. Paragraph 12 of the Schedule stipulates that each step and action under the procedure must be taken without unreasonable delay.

3.6 The issue of what constitutes unreasonable delay was considered in **Selvarajan v Wilmot and Others [2008] IRLR 824**, where the Court of Appeal for England and Wales considered whether a delay of four months in dealing with an appeal constituted an automatic unfair dismissal. It was suggested that there had been procedural unfairness on the employer's part in not completing the applicable statutory procedure within a reasonable time. The Court of Appeal found that there was a distinction between non-completion of a procedure and non-compliance with it and that the delay in completing the procedure did not mean the procedure was incomplete, thus rendering the dismissal automatically unfair. They did not make any comment on the delay in that particular case and its impact on the fairness of the procedure as a whole. The claimant's representative referred the tribunal to the case of **R v Gorman [2003] NICC 9**, where the issue of a delay in bringing criminal proceedings was considered. The delay in that case was between nineteen months and almost two years, depending on how one viewed it. Smyth J, having considered the jurisprudence of the European Court of Human Rights, concluded that the delay in that case did not, in his view, affect the defendant's right to a fair trial under Article 6 of the European Convention on Human Rights. He added that one of the major matters which had influenced him in reaching this conclusion was that while the defendant had had this matter hanging over his head, he had been on bail throughout and not in custody.

3.7 Both parties referred the tribunal to **Taylor v OCS Group Ltd [2006] IRLR 613(EWCA)** where procedural fairness and in particular, whether a defect in the disciplinary process could be cured on appeal, was considered. The Court of Appeal emphasised that the task of Employment Tribunals was to apply the statutory test, set out in s.98(4) of the Employment Rights Act 1996 ( the equivalent of our Art. 130(4), see above). They continued,

“In doing that, they should consider the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in doing so will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to fairness or unfairness of the procedures adopted.....the overall process was fair, notwithstanding any deficiencies at the early stage. ....[T]hey should consider the procedural issues together with the reason for the dismissal as they have found it to be. The two impact upon each other and the ET's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.” (paras. 48 and 49)

## 4. Decision

### The Burchell Test

- 4.1 The Tribunal has considered first of all, whether the investigation was a reasonable one and whether, at the time of dismissal, the respondent had a reasonable belief that the claimant was guilty of misconduct. We are satisfied that on balance, the investigation was a reasonable one. Mr Gregg requested statements from all the relevant staff members involved within a week of being instructed to commence the investigation, judging from the date on Glenn Thompson's statement. While there was a delay of a further 6 weeks before the staff were interviewed, this does not seem unreasonable, given that Mr Gregg had other pressing work to deal with and had to carry out quite a number of interviews.
- 4.2 The claimant's representative suggested that the complainant, Mr Henderson should have been interviewed. We can see why that suggestion was made and it would have been open to Mr Gregg to pursue that avenue. He said in his experience that it would have been distressing to the family, but that should not in our view have stopped him from at least writing to Mr Henderson to ask if he would meet Mr Gregg to discuss the matter. That said, Mr Gregg did write to the undertakers, who were independent in the matter, and Mr Elwood confirmed that he had heard bad language at the graveside and that it had come from a member of Council staff, but he did not specifically identify the claimant as the source of the bad language. Mr Gregg formed the opinion, on the basis of the information he had, that the claimant had been guilty of discourtesy, involving the use of bad language and recommended disciplinary action. Mr Gilpin, who conducted the disciplinary hearing, found on the balance of probabilities, that the claimant had used the "F- word" at the interment of Mrs Henderson and found that this constituted misconduct. Given that the claimant was already on a written warning for poor attendance, and that this warning had been extended because of further absence, Mr Gilpin took the decision to dismiss. There was no issue raised in relation to the conduct of the disciplinary hearing: the claimant was properly notified of the meeting and of the issues at stake and he was accompanied at the hearing by his union representative, who was given the opportunity to raise points on the claimant's behalf.
- 4.3 Our task is to consider whether, having carried out a reasonable investigation, the employer had a reasonable belief that the claimant had been guilty of misconduct. In this case, we accept that there was such a reasonable belief on the part of Mr Gilpin, who took the decision to dismiss. The next issue to consider is whether the decision to dismiss was reasonable in all the circumstances. It is not for us to substitute our own view for that of the employer, the issue is whether dismissal was within the band of reasonable responses open to the employer? The claimant was on a final written warning for poor attendance, which had already been extended because of further unauthorised absence. The respondent's disciplinary policy stated that an employee subject to a disciplinary warning for any reason would be liable to

further disciplinary action at the next stage of the procedure, irrespective of the nature of the subsequent disciplinary offence. The claimant's representative argued that the respondent should not have dismissed, because the misconduct was of a different nature to that for which the final written warning had been given and because the claimant's attendance had improved markedly up to the date of dismissal. There is no doubt that the claimant had made great progress in this regard: he had not had a day off work due to his drinking from February 2007 until the date of his dismissal in May 2008 and he is to be commended on this. These are certainly factors the employer could have taken into account, but we must not substitute our views for that of the employer. Accordingly, we find that the decision to dismiss was within the band of reasonable responses open to the employer.

#### **4.4 Was the investigation flawed by reason of delay?**

The claimant argued that the respondent's disciplinary procedure was flawed by reason of delay, in that the incident complained of occurred in August 2007 and the disciplinary hearing took place only in May 2008. However, the investigation was started promptly, within about ten days of receiving Mr Henderson's complaint. It did take some four months to complete, which seems to us unnecessarily long, and once Mr Gregg's report was submitted to Human Resources for checking at the Human Resources Clinic, it inexplicably took a further two months for the matter to reach Mr Hanna, who then nominated Mr Gilpin to conduct a disciplinary hearing. The claimant's representative made some play of the involvement of the Human Resources Department and in particular, the "HR Clinic", suggesting that this was outwith the disciplinary procedure and tainted the process. The evidence did not bear this out: the respondent's witnesses confirmed that the purpose of matters being referred to the HR clinic was to ensure that procedures had been correctly followed and to ensure consistency of approach, which seems desirable to us, especially in an organisation with several hundred staff. What does seem bizarre is that Mr Gregg emailed his report to Mr Hanna early in February 2008, but no action was taken by Mr Hanna until he received a hard copy of the report on 10 March 2008.

- 4.5 Once the matter was referred to Mr Gilpin in March 2008, it progressed at a reasonable pace and indeed the disciplinary hearing was delayed from April to May to accommodate the claimant's trade union representative, who was not available on the original date. Once the claimant lodged his appeal, it was dealt with promptly, and Mr Rose wrote up his report almost immediately on his return from holidays, which had occurred just after the appeal hearing. The claimant's argument was that the delay between the date of the complaint and the dismissal rendered the dismissal unfair. We certainly agree that the delay in this matter was lengthy and that it was quite undesirable for such a long period of time to elapse without those involved being made aware of what action, if any, is to be taken. Especially when the employee is already under a warning, or where he or she has been suspended, it is in the interests of all concerned to have matters dealt with promptly. However, the greatest part of the delay occurred between the date of the complaint and the start of the disciplinary stage of the process in March 2008. We can appreciate that Mr

Gregg had other responsibilities apart from dealing with this investigation. He concluded his interviews of staff in November 2007, but his report was not sent to Human Resources until 7<sup>th</sup> January 2008. He wrote to the undertakers only in November 2007 and again in December, but apparently had not seen their reply when he finalised his report. This clearly caused a delay and while we agree that it was quite right to seek the undertakers' account of the Henderson funeral, we are most surprised that this was not done much earlier.

- 4.6 The question for us to consider is whether this renders the disciplinary process unfair, whether because it breaches the statutory disciplinary procedures, the respondent's own disciplinary procedures or because it affects the claimant's right to a fair hearing and thus breaches his human rights. The statutory disciplinary procedures do not set out precise timescales; the only stipulation is that the steps set out in Schedule 1 to the Employment (NI) Order 2003 are followed "without unreasonable delay". The statutory procedure makes no mention of the length of time taken to complete an investigation before the decision to have a disciplinary hearing is taken. This may be because the legislators decided that this was not appropriate, but it may also be simply that the statutory procedures are the minimum prescribed by law. We cannot say that there has been a breach of the statutory procedures, because they do not mention the length of time taken to carry out an investigation. Equally, the respondent's own procedures do not stipulate a time frame for any stage of the disciplinary procedure, apart from appeals. The only mention of investigations is at paragraph 6 of the procedure, which states that

"A thorough investigation of all the circumstances of the case should be made before a course of disciplinary action is commenced."

- 4.7 We agree that the investigation should be thorough and that timescale of an investigation will vary from case to case. In this case, we are not persuaded either that the respondent's own procedures were breached or that the claimant's right to a fair hearing has been affected. We reach this conclusion with some hesitancy, given that we consider it is desirable and in keeping with the LRA Code of Practice that disciplinary procedures should be carried out expeditiously. In accordance with the principles set out in **R v Gorman**, we have taken into account that in this case, statements were requested from the relevant staff within a short time of the complaint being received and they were interviewed within another six weeks. No oral evidence was taken at the disciplinary hearing, except for the claimant's submissions and the written evidence was not dependent on human recollection. Further, the claimant was working throughout the period, was not suspended and did not suffer any financial loss.

#### 4.8 **Did Mr Gilpin have authority to dismiss?**

Given our findings of fact in relation to this matter, we find that Mr Gilpin had authority to dismiss the claimant. We find that the procedure overall was a fair

one and that the decision to dismiss was within the band of reasonable responses. Accordingly, we find that the claimant was not unfairly dismissed.

#### **4.9 Was the claimant entitled to notice pay?**

Under Article 118 of the 1996 Order, an employer must give an employee a minimum period of notice, which will be from one to twelve weeks, depending on length of service. Either party may waive their right to a period of notice and accept a payment in lieu instead (Art. 118(3)). The only exception, which is widely recognised, is in the case of gross misconduct, when an employee may be dismissed without notice. This was not a case of gross misconduct however: lack of courtesy to members of the public and /or staff is categorised as misconduct in the respondent's disciplinary procedure and Mr Gilpin agreed that it was misconduct. Accordingly we find that the claimant should have been dismissed with notice and the respondent's failure to do so is a breach of contract. He was entitled to 12 weeks' notice as he had twelve years service and his nett pay was £308.52 per week. We order the respondent to pay the claimant the sum of £ 3702.24 in lieu of notice.

This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1996.

**Chairman:**

**Date and place of hearing:** 2-6 March 2009, Belfast,

**Date of Decision entered in the register and issued to the parties:**