JB1

EMPLOYMENT TRIBUNALS

Claimant: Mr T Horton

Respondent: Minearc Systems Pty Limited

Heard at: London Central **On:** 20, 24, 25, 26 and 27 April 2017

Before: Employment Judge Wade

Members: Mr P Secher
Ms M Jaffe

Representation

Claimant: Mr A Roberts, Counsel
Respondent: Ms J Russell, Counsel

JUDGMENT having been sent to the parties on 28 April 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant brings an unfair dismissal claim under Section 98 of the Employment Rights Act 1996, a wrongful dismissal claim and a claim of detriment under the Part Time Workers Regulations. He also claims for unpaid holiday and expenses.

The evidence

2. We heard evidence from the claimant. For the respondent, we heard from Messrs Ness and Geldart, Managing Director and International Head of Sales respectively.

The facts

3. The Respondent is an Australian company specialising in the manufacture and supply of emergency refuge chambers and related safety equipment, especially in the mining and tunnelling industry. It is based in Perth, Australia where Mr Paul Ness, Managing Director, and Mr Geldart, International Head of Sales reside.

4. On 21 October 2013, the Claimant started working in London for the Respondent as its only European Business Development Manager. Under his contract he had no right to performance-related pay or a pay rise; it was the case that business development managers were generally required to prepare a weekly activity report although this was not always done.

5. In the year 2014/15, the Claimant's target was 4.4 million but he achieved 3.4 million. He did not receive a salary increase in that year, but he was not specifically sanctioned although that aspect of his work was marked down in his appraisal.

6. From the 9th February 2015, Mr Geldart began to manage the Claimant directly. In April 2015, the Claimant told Mr Ness that he wanted to do a part time MBA and that he would like to reduce his hours to four days a week. He assured him that this would result in minimum change and that he would do his best to keep any disruption to a minimum.

7. A couple of months later, in June 2015, four senior managers discussed the Claimant's request and voted on whether to allow it. By a majority they agreed that he would be allowed to work part time so that he could study for his MBA. Mr Ness and Mr Geldart were both in favour, but were clear that they would have preferred him not to work part time as this was not in the interests of the business, particularly as Mr Ness thought that an MBA was not a particularly useful qualification compared to learning on the job.

8. The reason why they said yes was that the Claimant had a valuable relationship with one of their key European clients, Herrenknecht, and they

had invested in him and so wanted to develop and retain him; they also had respect for him and the MBA was clearly important to him.

9. So, in summary, the Respondent was content if not happy for the Claimant to drop one day a week and move to part time work. There is no evidence that this request turned them against him or that they turned against him thereafter. We take the "yes" at face value as it would have been easier to have said no and think they were realistic to worry about a possible detrimental effect upon the performance of European sales, which at that time relied entirely upon the Claimant.

10. Also in June 2015, the Claimant's annual review took place and some performance issues were raised. He received quite a few low marks but the assessment was not all bad and it appears to us that it was well evidenced and thorough. For example, whilst he received the mark of 2 in relation to his performance against budget, he received a mark of 3.5 out of 5, which was between satisfactory and above average, on his sales performance.

11. At that annual review, the Claimant reiterated his wish to study for the MBA and his request to work part time was granted. He advised that the MBA he had applied for was due to start in January 2016 so if successful his salary would be cut by 20% from then on. The Claimant was warned, and it was recorded in his appraisal, that his employment would be under review if his study workload became detrimental to the business and we see no inherent problem with that approach. The review was written up and given to the Claimant on 16 July.

12. At this stage the part time work arrangement was some six months away and theoretical only which might explain why the Respondent did not issue any written confirmation of change to his terms and conditions. The Claimant raised no objection to this or indeed to the new terms that had been discussed. In fact, no written confirmation was ever issued.

13. Mr Geldart and Mr Ness said in their live evidence to us, but not in the ET3 or in their statements, that in order to deal with the 20% reduction in the Claimant's working days, they would:

a. Recruit extra staff; or
b. Reorganise the support he received in Australia; and
c. That the budget was heavily weighted towards the first half of the year, so he would only be expected to hit 40% in the second half of the year; and
d. That the Claimant himself had written a budget plan showing no variation in performance so none was expected.

However, we find that this rationale was ex post facto and for our benefit and that little or no planning had taken place since, because the Claimant did not ask, the Respondent thought it unnecessary. This was not best practice but, as recorded below, the Claimant left the Respondent's employment within three weeks of the start of his part time work and so there were in practice no adverse consequences from the lack of planning.

14. The Claimant says that the Respondent "started to treat him in a way that made him feel extremely uncomfortable and that his job was at risk". It is not surprising that the Claimant felt that he was under scrutiny as he had just had a rather negative appraisal, but we make no connection between that and his part time work because of course the company had agreed to that request. The Claimant reports that Mr Ness told him that "if we had known you were planning on doing this, we would not have hired you". Mr Geldart agrees that Mr Ness may well have said that and Mr Ness agrees that he would not have wanted to hire a part time manager. Their main concern was that they did not want any impact on the Claimant's productivity or on the target.

15. Accompanying the review was an email from Mr Ness which alluded to the Claimant considering his future career with the Company. Mr Ness confirmed that he meant just that: the Claimant had had a poor annual review and was an average performer so he needed to decide on his future and should be careful not to put his performance at risk by going part time. This may have been said in a relatively trenchant manner but it was a fair comment to make.

16. On 17 November 2015, the Claimant received a final written warning for unprofessional and unsatisfactory conduct and this was to be in place until 18 February 2016. In the meeting to discuss the warning the Claimant agreed that he had recently "dropped the ball". He responded in writing to the final warning on 9 December 2015 and in a three-page document he accepted some of the points that were made against him, but challenged others saying that they were in part unfair. He was confident to challenge what he did not agree with so it is instructive that he did not challenge the Respondent's attitude to his forthcoming part time work, or complain that it had failed to make the correct arrangements. This could have been done at that time if this was in fact a concern.

17. The warning was issued before he had won a place on the course, so when he was full time and before part-time work was a reality, and it was unlikely that it was influenced by the fact that part time work had been agreed in principle.

18. In December 2015 the Claimant visited Australia for work purposes and he stayed in Mr Ness' house and spent time with him and his family. He told Mr Ness that he had been accepted onto the MBA Course and so, at last, he would be a part time worker from 16 January 2016. It is interesting, as an aside, that having recently received a final written warning he had decided to pursue this arrangement and do the MBA.

19. Mr Ness' response was apparently "well that's shit for us, but I suppose congratulations". There has been speculation as to whether that was a flippant comment. It may have been flippant and the Claimant may have taken it not to be flippant; we would want to see something more tangible flowing from it if we are to see this as evidence of a desire to treat a part time worker less favourably. That tangible evidence is not available. We also note that Mr Ness had a positive enough attitude towards the Claimant at exactly this time as he offered him accommodation in his own home and they had a sociable time together.

20. We also think it is important to say that we were struck by the fact that both Mr Ness and Mr Geldart wore their disregard for the MBA and their concern about the Claimant working part time on their sleeves, so to speak. As such they were less likely to be hiding deeper negative views. Their obligation was not to like the situation treat but to refrain from treating the claimant less favourably than a comparator. In this case the comparator was claimant when he was full time.

21. On about 20 December, Mr Geldart told the Claimant that he was pleased that he was doing well. Mr Geldart said that this was to encourage him and not to cancel the warning which was of course in place as a final written warning until 18 February. This shows an open mind and that Mr Geldart was not unremittingly against the Claimant; we would expect that he would not have been encouraging if the company had turned against the Claimant now that he was about to start part time work.

22. Also in December, the key client Herrenknecht asked the Respondent, through the Claimant, for a requote on a project known as "Follo". Mr Ness and Mr Geldart were very frustrated in their relationship with Herrenknecht, which appeared to be a particularly difficult client and they did not like the way it was making them do business. They wanted to sort the relationship out in general as they had quite a few projects at the time with Herrenknecht, not just the Follo project. In other words, a strategy was needed to tackle the overall relationship between the Respondent and Herrenknecht.

23. Meanwhile, and as an aside, in December 2015 the Respondent started a recruitment process in the European region which they had been discussing for some months. They were running this out of Perth and were looking to recruit new business development managers, possibly to work in a variety of different European countries such as Spain and Turkey. We are not concerned that the failure to involve the Claimant in the process from the beginning was less favourable treatment because he worked part time, not least because he did not yet work part time. The reason was that they were recruiting somebody of equivalent seniority to the Claimant and therefore it

was not appropriate for him to have a lead role, although he was asked to be on the panel for two of the recruitment exercises so he was not fully excluded.

24. On 15 January 2016, Mr Geldart telephoned the Claimant and said something like "you need to be really mindful about your performance, it will be highly scrutinised by Paul now that you are working a shorter working week". Mr Geldart did not deny that he might have said something like that and this is the sort of thing a manager would say when a staff member under a final warning is dropping their hours.

25. The Claimant started to work part time on 16 January 2016. He was to work four days a week and his salary was reduced by 20%. He says that at this point he was made to feel extremely uncomfortable and undermined, particularly when Mr Geldart asked him to write an activity report which was the first time that he had ever been asked to write such a report while he was in the company of a senior manager. Mr Geldart says this was not unexpected given that his performance was under review and he agrees that he said something to them like "you know Paul is over all you at the moment so to avoid pissing him off just write him the report".

26. The Respondent agrees that they were scrutinising the Claimant, they had given him targets following the final warning, they wanted his performance to improve and they did not want him to leave because he had an important relationship with their key European clients. However, the increased scrutiny was not surprising as the Claimant had been told in the warning that he needed to provide evidence of certain activities so of course he needed to write reports. Therefore, we do not regard this request for a report as disproportionate or less favourable treatment.

27. When the Claimant started to work part time on 16 January his targets and his workload were not adjusted to reflect the change. During the hearing, we were concerned that this was not a fair approach to take, however our conclusion is that there was no detriment. The Claimant had left before a tangible detriment crystallised and, surprisingly, the evidence shows that at

the time he had not been upset by the lack of adjustments. Distress can of course be a detriment but the Claimant appeared to be content with the plan.

28. On 2 February 2016 Mr Geldart decided that he needed to speak to his client Herrenknecht about their relationship but the problem was that they were avoiding him. They had asked for the requote in December and on 5 February the requote was prepared for both Herrenknecht and Geller, who were working in partnership on the Follo project. The quote was sent to Geller but not Herrenknecht.

29. Herrenknecht had said that the deadline was Friday 5 February as they were choosing their supplier in the following week and so there was approximately a five-day window, it could have been a bit less, for the quote to be submitted. However, on 5 February Mr Geldart instructed the Claimant by telephone, on behalf of himself and Mr Ness, to hold off sending the quote to Herrenknecht until after Mr Geldart had had the conversation that he was actively trying to fix up. He and Mr Ness believed that the only way to achieve some leverage over Herrenknecht was to withhold the quote. This might bring it to the table and they needed this so that they could explain that whilst their technology might be more expensive than that of their rivals, it was tried and tested.

30. The Claimant says that he both agreed to this instruction and understood it although he had some concerns about it. The quote was accordingly not sent on 5th February and at that point the Claimant and Mr Geldart both knew that the deadline had been missed and that the forthcoming week was an important one for the future of this project. Our conclusion is that the instruction not to send out the quote without authority from Mr Geldart or Mr Ness was very clear and it was not conditional or contingent on any other event.

31. On Monday 8 February, Mr Geldart made yet another attempt to open a discussion with Mr Gruseck of Herrenknecht. Mr Geldart and the Claimant had a conversation and the instruction not to send the quote was repeated.

The Claimant says that the instruction was not black and white but we disagree and he was not able to explain to us why. The precise words used were unimportant.

32. Mr Geldart was in Australia on 8 February waiting for news. Perth is eight hours ahead of the UK and he emailed the Claimant to tell him that it was fine to telephone him up to 10pm Australian time. He was therefore clearly prepared to be contacted at home, and late, because this was a critical situation and he was waiting to see if he could force Herrenknecht to speak to him. We do not agree with the Respondent that this was not an important and high risk situation which is why Mr Geldart specifically told the Claimant that he was available late into the evening.

33. That same day, 8 February, at around noon, the Claimant spoke to Mr Huber from Herrenknecht's partner company, Geller. Mr Huber told the Claimant firstly that the Respondent was too expensive compared to other quotes and so their competitors were likely to win. Secondly, he gave the Claimant information about the competitor's technical progress that made him believe that the Respondent was much more at risk of losing the deal than had originally been thought. To his surprise, the competitor had made much more progress on, and had possibly achieved, the cheaper alternative cooling technology which Geller were looking for.

34. At this point the Claimant says he thought that it was necessary to send the quote to Herrenknecht in order to keep the possibility of the deal alive and to help fight off the competing bid. This was despite the facts that the deadline had passed and he had been told that it was likely they had already lost the deal. The Claimant tells us that the goal posts had changed significantly and there had been a major change since the time he was instructed not to send the quote. The Respondent says the shift was minor, that there was time for the Claimant to speak to his managers and that nothing had changed regarding the need for the Respondent's senior managers to talk to Herrenknecht about their overall relationship.

35. We think that the situation had changed in a way that was quite significant but not urgent and therefore the Claimant committed a serious error by sending the quote to Herrenknecht at 15.22pm, some 3½ hours after the conversation with Mr Huber. The Claimant was not able satisfactorily to explain to us why the quote had to be sent that day, before he got permission from his senior managers, particularly because Herrenknecht where going to decide that week, but not that afternoon.

36. He then equally inexplicably sent an email to Mr Geldart which looked as if the quote had *not* been sent and that he expected developments the next working day. This was at 15.23, again 3½ hours after the conversation with Mr Huber and at 11.23pm Australian time. He said that he had a "beyond urgent" concern about the likelihood of the Follo project succeeding. The Claimant says that he actually sent the email to Mr Geldart before he sent the email to Mr Huber.

37. Whichever order the emails were sent in, they were sent in very quick succession and the quote was sent without Mr Geldart giving permission and without the Claimant either waiting for or trying to get instructions to send it. Also, whichever way around the way the emails were sent, the Claimant's inaccurate email to Mr Geldart was a page long and it would have taken some time to draft and so he must have been planning it before he sent the quote.

38. The Claimant could have spoken to Mr Geldart before 10pm if he had moved faster after the noon conversation, and he had an obligation to move fast because he knew that his senior managers were 8 hours ahead. Indeed, it must have been part of his role to factor that in when thinking about his business decisions. Also, he could have tried to ring Mr Geldart, or at least emailed him, before he sent the quote at 15.22 even though it was 11.30pm at night, but he did not do so and does not claim that he tried to do so. He said he had been instructed not to ring him after 10 o'clock which is not the sense that we gained from Mr Geldart's email of 8 February at all.

39. In his email to Mr Geldart the Claimant failed to say that he had, or was seriously considering, sending the quote and so he concealed what he had done and appeared to suggest that it would be fine to speak the next morning. So, he wrong-footed Mr Geldart, who did in fact respond very promptly at about 6am UK time on the 9th February, saying that he was happy to discuss because at that stage he thought there was something left to discuss.

40. The Claimant also did not try to contact Mr Ness. Mr Ness says he could and should have contacted both of them and that the Claimant had in the past contacted them quite late as this was the nature of the business of an Australian Company trying to expand in Western Europe. The Claimant's argument that he was expected to work autonomously and not to bother Mr Ness is not one that we understand in these circumstances.

41. On 9 February, after Mr Geldart had responded that he was waiting to discuss the situation with the Claimant, Mr Horton telephoned and told him that he had in fact already sent the quote and this was because the position had changed. Mr Geldart was taken aback by the Claimant defying instructions and said that he would speak to Mr Ness.

42. On hearing the news, Mr Ness decided that the Claimant had deliberately and wilfully acted contrary to instructions. He was quite upset, to say the least, and said that he wanted more information from Mr Horton. It appears that there was, in theory at least, a plan to give the Claimant the chance to explain himself further, but in the end this was not offered and Mr Ness accepts that in an ideal world, and with the benefit of hindsight, he would have conducted the process that followed differently.

43. A call was arranged between the three men. In anticipation, the Claimant emailed to explain why he had sent the quote, in his words "contrary to instructions", so his email is evidence that he understood that he was acting contrary to instructions. He said "I understood at the time that this was contrary to your instructions as the higher-level problems we have with Herrenknecht remain unresolved. However, I was worried that without this

deal I had no chance of reaching my budget and would have my job at risk anyway." That phrase "at risk anyway" tells us that the Claimant did know at that time that his job was now at risk. This email was as close as the process got to the Claimant being allowed to explain what he had done and why and the Respondent relies on it to say that the Claimant had been given that opportunity to state his case.

44. We do not understand the Claimant's rationale because it is obvious that sending the quote put him at a far greater risk than not sending it without permission, resulting perhaps in a small delay. This is particularly odd because:

a. there is no evidence that the Claimant's job would be on the line if he did not hit budget, it had not been on the line in June 2015 although he was marked low on that aspect of his performance and

b. we do not understand why he might think that he would be at risk if the reason that they lost the work was because he followed instructions from his two most senior managers, indeed it suggests an alarming lack of trust on the Claimant's part.

There is a possibility that the reason the Claimant gave was not actually his main reason and the Respondent's witnesses both think that he acted because he was put under pressure by the customer, but we will never know.

46. Later on 9 February, the Claimant was asked by Mr Geldart to do a list of his current jobs; that is a rather ominous sign that an employer is preparing to dismiss somebody and indeed Mr Geldart agreed that although no decision had yet been made the dismissal was likely.

47. The Respondent tries to argue that the Claimant had failed to make contact to provide further explanation, but a call had been set up by that time and the Respondent offered no mechanism for any further enquiry when it was their responsibility to set out the framework for the disciplinary.

48. On 11 February a telephone call between the Claimant, Mr Ness and Mr Geldart took place. Mr Ness told the Claimant at the start of the hearing that he was dismissed; his words were "we have made it official. We are obviously going to dismiss you for gross misconduct". In evidence Mr Ness said that it was 99% certain until the end of the conversation that the Claimant was going to be dismissed, in other words there was a 1% chance that there was not going to be a decision to dismiss. That is obviously a very slight chance but we do not think that even that is the correct characterisation. We find that the decision had 100% been made and that there was perhaps a small chance there might be a change of mind, but that is very different from not having made the decision. We think that perhaps the Claimant's best strategy would have been to have apologised for what had happened and the Respondent was influenced by the fact that he did not apologise but instead tried to justify what he had done.

49. A letter of dismissal followed and the Claimant was said to be dismissed for gross insubordination. The Claimant's position is that given his dilemma and his aim to assist the Respondent by securing a deal, his action in sending the quote should not have been treated as serious. Mr Ness' response is that the Respondent had completely lost faith and trust in him and so had to dismiss him. They were concerned that he could act against their wishes at any time again and that was particularly so because he did not think that he had been wrong.

50. Following the dismissal there was a failure to offer an appeal.

51. Those are our findings of fact on the dismissal. We have of course asked ourselves whether the real reason for the dismissal and the lack of due process was that the Claimant was part time. We find that the dismissal was solely caused by the Claimant's conduct in breaking a management instruction not to send the quote. One of our reasons for that conclusion is that if the Respondent had been trying to engineer a dismissal for other reasons it would not have reacted in anger as it did causing itself some difficulty as I will describe in a moment, but in a more prepared and organised manner.

52. We make findings in relation to holiday and expenses. The Respondent has conceded that the Claimant is entitled to five days' accrued holiday pay. The Claimant has a claim for unpaid expenses and with some reluctance, and after some discussion, we have decided that he has established that he did have a contract with the Respondent to pay his accountancy expenses. He has told us so in sworn evidence and has shown that his initial expenses of his accountancy fees were paid. The Respondent has not provided us with any evidence to rebut that. So, on that basis we decide that the Respondent has broken the contract and the claimant is entitled to be paid for the accountancy fees.

Conclusions

Detriment

53. In relation to part time work detriment, firstly we accept that a dismissal can be a detriment. Had we found that the dismissal was less favourable treatment because of the Claimant's part time status we may have given that point more thought that we did, but for the purposes of this decision that is what we find.

54. The three detriments alleged are firstly that the Claimant was subjected to disproportionate scrutiny. We found that the scrutiny was not disproportionate. The Claimant had had a barely satisfactory appraisal and was on a final written warning and therefore the scrutiny was proportionate.

55. Secondly, the Claimant says that he suffered less favourable treatment by not having his workload or target pro-rated. We have found that although that would be unfair in principle, there was in this particular case no detriment.

56. Finally, the Claimant says that the disciplinary process, the dismissal and the failure to offer him an appeal was less favourable treatment. Our conclusion is that there were some significant performance problems and

the final straw was not because he was part time but due to his failure to follow his manager's instructions. What is more, the Respondent had recently agreed that he would work part time when it could have said no. The same managers who had said yes, albeit with some reluctance, were not likely to have treated him less favourably just a few weeks later because of his part time work. He was on the final written warning which had not been revoked and the permission to work part time could have been revoked when the final written warning was issued, but it was not. So, the Respondent was still prepared to accommodate the Claimant's four-day week even though he had some performance problems and it was too early to know whether the part-time work would cause problems.

57. Of course there was a coincidence in timing in the Claimant moving to part time work between the final written warning and the incident that caused his dismissal, but we find this to be indeed a coincidence as the Respondent's reasons for dismissing him were not connected to his part time status.

Unfair dismissal

58. In terms of the dismissal, we find that the Respondent failed to follow key procedures. The Respondent did do enough to establish the facts because they were very simple, however it did not follow most of the rest of the ACAS Code, the Code being place not just for the sake of procedure but also for the sake of fairness and justice. They did not:

    a. tell the Claimant of the case against him in writing,
    b. tell him that he faced dismissal although he did suspect that.
    c. offer him the right to be accompanied and
    d. a meeting; we accept that this might have been a virtual meeting by Skype or whatever, but such an important event needed to take place in a more formal and organised manner than just a phone call.

59. Of course the meeting was absolutely not sufficient because it took place by telephone *after* the decision to dismiss had already been made. The fact that the Claimant put his case to some extent on 9 February was simply not

enough for us to conclude that he had been offered a fair opportunity to put his case, and the Respondent did not offer him the opportunity to appeal.

60. Our conclusion is that these failings were not just failings in procedure but that they went to the heart of the obligation of an employer to be just and fair with their employee. The extent of the failings mean that we cannot say that it would have been futile to go through a process, although we have made substantial reductions to the compensatory award. It was important to explore the Claimant's motive as it was hard to understand; the Respondent's witnesses both thought that customer pressure was the reason, but the Claimant said he did it was because otherwise he might get criticised for losing a deal.

61. There was also an important failure to look at any possible mitigation, the Claimant's mitigation being that what he had done was for the benefit of the Respondent. Therefore, we find that the dismissal was unfair because of those substantial failings to offer him a just process.

62. However, I am sorry to say that we do not accept his submissions on substantive unfairness. We have looked at the list provided in the Claimant's closing submissions at paragraph 24 and think it is already clear from our findings of fact that we do not agree with those propositions. To pick out just a few, we have found that the direction not to send the quote was entirely clear and that the Claimant was quite wrong not to try to contact the Respondent during the critical day on 8 February. Also, the fact that he left it so late (Australian time) before he sent the quote was his choice and it is really not a good point to make that he was expected to use his initiative to try to contact the Respondent after 10pm whereas he was dismissed for using a similar initiative by sending the quote. To us the two do not bear comparison, but given the time I am not going to go through the whole of the list, save to say that there are no points that we agree with.

Contributory fault

63. The Claimant is in principle subject to a substantial contribution under Section 123(6) of the Employment Rights Act 1996. Where the dismissal

was to any extent caused or contributed to by any action of the complainant, the Act says that we shall reduce the amount of award by such proportion as we consider just and equitable having regard to that finding.

Polkey

64. We have also decided that it is appropriate to make a Polkey reduction. We think it is possible that the Claimant's mitigation might have convinced the Respondent that what he did was not deliberate and wilful insubordination. However, the Respondent would have concluded that because trust and confidence had collapsed, especially because the Claimant had shown no remorse and because there was now a cumulative pattern of poor performance, a capability dismissal would follow.

65. The capability dismissal would be a dismissal on notice, and that of course deals with the wrongful dismissal claim. Therefore, we award six weeks' loss of earnings, two weeks to allow for the completion of a fair procedure and one month that would be notice pay. In the circumstances, we will not make a further reduction for contribution because it would not be just and equitable to reduce the compensation below that point.

66. We also award a basic award and we have decided that in view of the small award that we are making it is not just and equitable to reduce that, although we have the power to do that under Section 122.

Holiday pay and expenses

67. We award five days' holiday and we award the expenses.

ACAS uplift

68. We award the Claimant an "ACAS uplift" in respect of the unfair dismissal and we award that at 25%. It was unreasonable of the Respondent not to follow the ACAS code; it is a relatively small company but it does have an HR function and access to UK specialist advice and so we do not think that the size and administrative resources of the Respondent are a mitigating factor. It would have been very easy to have got it right and it is just and

equitable to uplift by 25% as the uplift under Section 207A of TULR(C)A 1992 is there precisely for situations like this. If the code is breached unreasonably and an unfair dismissal ensues from that breach, as it has here, we cannot think of a reason to award less than 25%. The breach of the Code is the epicentre of the Respondent's unlawful behaviour and the code was not only breached, but breached substantially, in a number of key respects.

Calculations

69. The Tribunal awards compensation as follows:-

Basic award	£ 950.00
Compensatory award of six weeks' net pay at £701.56	£4,209.36
Pension loss for six weeks	£ 484.62
Compensation for loss of statutory rights	£ 500.00
Sub-total compensatory award and basic award	**£6,143.98**
ACAS uplift of 25%	£1,536.00
Total compensation payable in respect of unfair dismissal	**£7,679.98**
Compensation for holiday pay of five days from which tax and national insurance is to taken	**£1,072.80 gross**
Expenses	**£6,034.80**

Costs

70. The Tribunal makes an award of £1,200.00 costs in respect of the Tribunal's fees since although the Claimant only partially won these fees would be payable in respect of the unfair dismissal claim alone.

71. In relation to costs of the unless order, the Tribunal awards £938.40 inclusive of VAT. The Claimant's schedule of costs in respect of the unless order is accepted apart from the preparation item of 3 April 2017 which is reduced from 24 units to 15 units.

72. The only remaining issue is the question of costs in relation to the adjournment on 23 November 2016. Since the Claimant's evidence is not agreed a hearing will have to be listed and the parties have been ordered to provide dates to avoid for that purpose.

Employment Judge Wade
31 May 2017