EMPLOYMENT TRIBUNALS

Claimant: Mr R Sumner

Respondent: Cable-Tec Cables and Controls Ltd

Heard at: Nottingham

On: 14 June 2017 and 7 July 2017
Reserved - in Chambers: 19 July 2017

Before: Employment Judge Milgate (sitting alone)

Representation
Claimant: Mr J Howlett of Counsel
Respondent: Miss R Christou, Solicitor

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.

2. Any basic or compensatory award shall be reduced by 100% under sections 122(2) and 123(6) Employment Rights Act 1996.

REASONS

1. **Claims and issues**

1.1 By his Claim Form presented to the Tribunal on 20 February 2017 the Claimant brings a claim of unfair dismissal.

1.2 It is agreed by the parties that the Claimant was summarily dismissed by the Respondent on 9 November 2016. There were therefore two issues for determination so far as liability was concerned. The first was to establish the reason for the Claimant's dismissal. The Respondent's case was that the Claimant was dismissed for gross misconduct. However, that was contested by the Claimant, who alleged that there was a witch-hunt against him or alternatively that he was dismissed for performance issues. The second issue was whether the dismissal was fair within the meaning of Section 98(4) of the Employment Rights Act 1996. In this regard, the Claimant argues that;

i. he was set up to fail, with the result that the dismissal process was a sham;
ii the process adopted by the Respondent was unfair in a

number of respects, including that having been given a final written warning on 8 November 2016, he was then dismissed without further investigation on 9 November 2016;

iii. he was never given an opportunity to respond to allegations of dishonesty against him even though these formed part of the reason for dismissal.

2. Evidence

2.1 I heard evidence from the Claimant on his own behalf. For the Respondent, I heard from Mr Kevin Whincup, the Respondent's General Manager and Mr Jim Worley, the owner of the business. Each of the witnesses had prepared written statements which were taken as read.

2.2 I also had before me an agreed bundle of some 232 pages. At the start of the hearing the Claimant's applied to admit two further documents in evidence. These were (i) an email of 12 June 2017 sent from Mr Creegan, a customer of the Respondent to Mr Worley, and (ii) a pricing document showing the price of a casings adjuster. Mr Howlett, on behalf of the Claimant, objected to the application, although he did not dispute these documents were relevant to the issues for determination. Instead his concern was the weight that could properly be attached to them and the fact they had been produced so late in the day. I decided to admit the documents. They had been disclosed to the Claimant in sufficient time for Mr Hewlett to consider them and take instructions and submissions on weight could be made in due course.

2.3 Evidence was heard over 2 days. Oral submissions were made on behalf of both parties. Judgment was reserved as there was insufficient time to deliver the judgment at the hearing.

3. Findings of fact

Backround

3.1 The Respondent is a manufacturer and supplier of control cables designed for specialist applications in a number of industries, including the construction and automotive industries. The owner of the Company is Mr Jim Worley. At the time of the events in this case the Respondent had a turnover of £1.5m and was profitable. It employed about 15 people and did not have any in house human resources advice.

3.2 The Claimant, who was 48 at the relevant time, had worked in the cable industry throughout his career. His employment with the Respondent began on 13 July 2009 when he was appointed as a sales engineer, He lived in Cheshire and initially was based full-time at the Company's Ellesmere Port factory. However, from 2013 he started to work several days a week at the Company's head office in Sutton in Ashfield in Nottinghamshire. Until the events in this case, the Claimant had a clean disciplinary record and had not been subject to any formal performance process.

3.3 At the time of the events in this case Mr Worley was involved in the day to day running of the company. On 4 April 2016 he appointed Mr Kevin Whincup as General Manager. Mr Whincup was effectively a new

broom, charged to improve and grow the business with a view to acquiring it himself in due course. The Claimant answered directly to Mr Whincup and the two men interacted on a daily basis.

The Respondent's disciplinary policy

3.4 Shortly after Mr Whincop joined the company the Claimant signed a written contract of employment. This incorporated the Respondent's disciplinary procedure which applied at the time of the events in this case. The relevant parts of the policy were as follows:

> "*Minor cases of misconduct and most cases of poor performance may be dealt with by informal advice, coaching and counselling. An informal oral warning may be given…*
> *If there is no improvement or the matter is serious enough, you will be invited to a disciplinary meeting at which the matter can be properly discussed… The outcome of the meeting will be communicated to you.*" (para 17.2)

The procedure then sets out a number of possible outcomes, namely a formal verbal warning, a written warning, a final written warning and dismissal. The disciplinary procedure also explains that certain conduct will normally lead to dismissal. The list includes "serious insubordination".

3.5 Where the employer is contemplating dismissal, the procedure sets out a number of safeguards to ensure a fair process. (In this respect the draftsman appears to have used the statutory dismissal procedures as a model, perhaps not realising that these were abolished in 2009.) Accordingly step one of the procedure provides:

> "*The employer will set out in writing your alleged conduct, characteristics or other circumstances which lead him/her to contemplate dismissing or taking disciplinary action against you. The employer will inform you, in the written statement of the basis on which he has made the allegations against you. If possible the employer will provide you with copies of any relevant evidence against you. The employer will invite you to a hearing to discuss the matter.*" (para 23)

3.6 Step two provides:

> *"The meeting will be held without undue delay but only when you have had a reasonable opportunity to consider your response to the employer's written statement and any further verbal explanation the employer has provided.*" (para 24)

3.7 The procedure also provides for a 'modified dismissal procedure' to the effect that '*In a few cases of gross misconduct, the employer may be justified in dismissing immediately without conducting an investigation*'.

The Claimant's relationship with Mr Whincup

3.8 Within a week of his arrival, Mr Whincup began making changes. Previously the Claimant had been involved to some extent in production, but Mr Whincup now wanted him to focus exclusively on sales and in particular the acquisition of new business. He asked him to report to him on a weekly basis.

3.9 These changes did not go down well with the Claimant. For his part, Mr Whincup became increasingly concerned at the Claimant's attitude, believing that he had been given too much leeway in the past and that he was now 'taking the mickey'. Accordingly on 3 May 2016, he drafted an email to the Claimant, picking him up on a number of matters including being late for work. However Mr Whincup was aware that he needed to tread carefully at this early stage and so he submitted the email to Mr Worley for approval. Mr Worley approved the email and it was duly sent to the Claimant.

3.10 Mr Whincup had also become concerned that the Claimant was using his personal mobile for work purposes. Accordingly at the start of May 2016 he gave him an informal warning that this practice was unacceptable. He also put up notices around the Nottingham office stating that "*any member of staff seen using a mobile phone during working hours will be subject to disciplinary action no exceptions no excuses* ". The notice made clear that personal phones could only be used during lunch breaks and that repeated offences could lead to dismissal. In cross-examination the Claimant accepted that he had been aware of the notice and that he knew he should not use his personal mobile in working time.

<u>The verbal warning</u>

3.11 By the beginning of July 2016, matters between the Mr Whincop and the Claimant had deteriorated. Mr Whincup was becoming increasingly concerned that the Claimant was failing to follow instructions, was not focusing exclusively on his sales role and was underperforming. He decided action needed to be taken. On 12 July 2016 he therefore drafted another email to the Claimant informing him that he needed to investigate his ability to perform his role and warning him that if the investigation found there was a case to answer, then the Claimant would be invited to a formal disciplinary hearing. As before, he sent the email to Mr Worley for approval.

3.12 After discussion between Mr Worley and Mr Whincup an expanded version of the email was sent to the Claimant on 28 July 2016, shortly after the Claimant's return from a short period of sick leave. The email confirmed the need for an investigation but the subject matter had now broadened significantly beyond that contained in the draft. As a result the Claimant was informed that the investigation was to consider not only his ability to perform his role but also his failure to follow management instructions and his continued 'carrying and use of his personal mobile phone involving work related projects and jobs'. The email also made it clear that a major concern was that instead of following Mr Whincup's instructions and focusing on sales, the Claimant had 'gotten involved with other jobs… causing errors and confusion' and was performing tasks 'outside his mandate'. He was also told that he was being issued with a verbal warning and given examples of incidents where his performance was said to be wanting.

Changes to the Claimant's working conditions

3.13 Around this time, Mr Whincup implemented a series of changes to the Claimant's working conditions which made significant inroads into the Claimant's autonomy. Previously, emails to the Claimant had gone directly to his personal work email account. In the future they were all to go through the general email account, allowing them to be monitored by Mr Whincup. In addition the Claimant was given access to a phone line on which he could only make outgoing calls and the Company mobile he had been using was put in a downstairs office. The effect was that, if a customer rang for the Claimant, he or she would speak to Mr Whincup or one of the other workers in the office in the first instance and the Claimant would then receive an email message to call the customer back. It also had the added advantage in Mr Whincup's eyes that the Claimant could not use incoming calls as an excuse for not getting on with his work. The Claimant was also warned once again that he should not use his personal mobile for work matters. These changes clearly gave Mr Whincup considerable control over the Claimant's activities and enabled him to monitor the Claimant's performance closely. Unsurprisingly the Claimant was unhappy with the situation. As he explained in his evidence, the changes made him feel like a 'naughty school boy'.

Further deterioration in relations

3.14 On 14 August 2016 the Claimant sent a 3 page letter to Mr Whincup responding in detail to the allegations against him and the issue of the verbal warning. He made it clear that having had 33 years in the cable industry he regarded any suggestion that he was not capable of performing his role as an insult. However this did nothing to satisfy Mr Whuncup who remained deeply frustrated by what he saw as the Claimant's poor attitude and his failure to follow management instructions. He was particularly angered by the fact that the Claimant had failed to provide him with a weekly sales report, despite a specific request for such a report on 12 August 2016. Accordingly he replied to the Claimant on 31 August 2016, pointing this out and making more general criticisms as follows:-

"*Your letter does nothing to change the facts which led to your verbal warning, or how you are perceived or presently operate within the business. You have created an air of mistrust that you now resent and suggest it is a management "witch hunt" or "victimisation". However, it is clear that you and your actions have created a situation of mistrust and poor performance, that requires close management and while I appreciate it is not welcomed by you, it is necessary. Unfortunately it is both time consuming and costly for the business. .... The business cannot operate effectively and efficiently whilst there is a member of staff that is not performing their duties and cannot work well with colleagues. Your results present and past speak for themselves, are documented, and show your performance and attitude in a very poor light.*"

3.15 Mr Whincup told the Claimant that he would be required to attend a disciplinary hearing in due course and that unless he changed his ways "disciplinary action was certain to follow". He also raised the issue once again of the Claimant's use of his personal mobile at work, claiming that

despite being issued with an informal warning about the matter and despite there being 'signs throughout the building', the Claimant was continuing to make and receive calls from Cable-Tec customers on his personal phone. He warned that the Claimant would face disciplinary action if the practice continued.

3.16 By the beginning of September 2016, Mr Whincup had become totally frustrated by the Claimant's attitude. He therefore asked Wendy Melanaphy, another employee of the Company, to update him on a number of matters being dealt with by the Claimant. Her response highlighted a number of errors which she attributed to the Claimant. This confirmed Mr Whincup's view that the Claimant was failing to follow Company processes and procedures. Mr Whincup was also concerned that, contrary to instructions, the Claimant was still getting involved in production. On 20 September 2016 Mr Whincup therefore emailed the Claimant to tell him he should not get involved in the production of cables or samples and warning him that any breach of that instruction would be regarded as a disciplinary matter.

3.17 Subsequently on 5 October 2016, Mr Whincup contacted Mr Worley by email. By this stage, he was at the end of his tether with the Claimant, complaining in the email that the Claimant was '*totally retarded or not capable of doing his job (or both)*' and that conversations with him were like '*speaking to a 5 year old*'. He went on:-

> "*After all the mistakes, cock-up's and hassles over the last 7 months that he has caused, he still will not do things properly. And it's getting worse ... Do you think spending a week with him will help? Or is he just not up to this? ... The guy is a total liability Jim ... I've held off on a written warning and tried to give him a chance but the minute you let up he's back to the old way. I firmly believe he needs a written warning to bring into line.*"

3.18 A few weeks later, on 28 October 2016, having received what he regarded as a totally unsatisfactory sales report from the Claimant (which I accept was the only one he ever received), Mr Whincup drafted a further email to the Claimant and, as he had done previously, sent it to Mr Worley for his approval. The draft email detailed the shortcomings in the Claimant's sales report and concluded:-

> "*This is the final straw as regards my concerns about your skills and your ability to do this job ... The volume of work you handle is simply not sufficient to warrant the position. And this week you have made every attempt to delay submitting this report. What you have done is to pass me information not conducive to the sales information I need to assess our market position. ... Upon your return from holiday, we need to sit down and reassess your position within the business and place you in a position you are comfortable and can be of benefit to the business.*"

Mr Worley approved the draft and it was sent to the Claimant just over an hour later in virtually the same terms.

3.19 The Claimant then went on holiday and whilst he was away Mr Whincup drafted another email to the Claimant of some 2 pages in length. On 2 November 2016 he sent it to Mr Worley for approval. The

draft stated that the Company continued to have serious concerns about the Claimant's ability to perform his role and informed the Claimant that he was to be given a final written warning. The draft reiterated Mr Whincup's concern that the Claimant was continuing to ignore his instructions, was failing to generate new business and was continuing to perform functions outside his role, despite being told directly at the end of September 2016 that this must stop. Whilst Mr Whincup gave evidence that this was simply a 'template', I did not find this to be credible. The email had clearly taken some considerable time to draft and, given the demands of Mr Whincup's role, it was unlikely that he would have undertaken this exercise unless he was intending to give the warning to the Claimant, come what may.

Disciplinary hearing on 8 November 2016

3.20 The Claimant was subsequently invited to a disciplinary hearing on his first day back from holiday on 8 November 2016. Only the Claimant and Mr Whincup were present. No minutes were taken and there was no evidence of any meaningful interaction, leading me to conclude that Mr Whincup was simply going thorough the motions. Later that day an email was sent to the Claimant, issuing him with a final written warning. This was in almost identical terms to the draft sent to Mr Worley on 2 November 2016. Two further aspects of the email are worthy of note. Firstly the email highlighted the Claimant's unauthorised use of his personal mobile "*for which you have received no fewer than 18 previous warnings, in the form of memo and verbal, including one such warning from the Managing Director*". Secondly the email warned that "*a further warning will result in dismissal".*

3.21 Later that afternoon the Claimant was seen using his personal mobile by two fellow employees. On being informed that this was the case, Mr Whincup confronted the Claimant who had his personal mobile about his person. On inspection it was found to contain 9 missed calls from the Respondent's customers. (In cross-examination the Claimant denied that he had used the phone in the afternoon, explaining that the phone had been in his vehicle. However this evidence was unconvincing and at odds with the documentary record, which included a number of references to the Claimant's use of the phone on the afternoon in question. In addition there was no reference to the Claimant's explanation in his witness statement and it was never put to Mr Whincup in cross-examination, as might have been expected given the importance of the mobile phone issue to the Claimant's case.)

3.22 When speaking to Mr Whincup the Claimant did not attempt to deny he had been acting in breach of instructions. Mr Whincup regarded this as the last straw, his patience had run out. Despite all the warnings not to use his personal phone for business purposes, the Claimant had continued to do so and had done so flagrantly on the very afternoon he had been given a final written warning which had covered such conduct and had included a warning that 'a further warning would result in dismissal'. He therefore told the Claimant there would be a further disciplinary hearing the next morning (9 November 2016) at 8.30 am. The Claimant was not given a written invitation to the meeting or told of his right to be accompanied. Nor was he given written confirmation of the charges against him. No statements were taken from the members of staff who had reported the Claimant using his mobile phone.

3.23 Around this time Mr Whincup became aware that the company had discovered some emails which suggested that the Claimant had been receiving payment from a customer for items that were not going through the company books. Investigations into this matter began. In light of this and the fact that the Claimant had continued to use his personal mobile phone for work related purposes in spite of repeated instructions not to do so, Mr Whincup formed the view that in all likelihood the Claimant was involved in private deals with customers for his own personal gain.

Disciplinary hearing on 9 November 2016

3.24 The disciplinary hearing went ahead as planned, chaired by Mr Whincup. At the start of the meeting the Claimant was asked if he wished a member of staff to be present. The Claimant told him he did not. As with the disciplinary meeting the day before, the Claimant and Mr Whincup were the only people present and no minutes were taken. There was very little discussion. The meeting lasted just 5 minutes and resulted in the Claimant's summary dismissal. There was no evidence that Mr Whincup considered any alternative sanctions. (Although Ms Christou suggested in submissions that at this point Mr Whincup was following the modified procedure set out in the Respondent's disciplinary procedure, Mr Whincup gave no evidence to that effect and I was not persuaded that he had consulted any particular policy or procedure before taking the decision to dismiss.)

3.25 Having been told he was to be dismissed, there was then a discussion about Mr Whincup's concerns that the Claimant had been accepting payments for Company goods directly into his personal bank account. To Mr Whincup's surprise, the Claimant admitted he had done so.

3.26 The Claimant's dismissal was subsequently confirmed in writing by Mr Whincup. The letter stated that the Company had become dissatisfied with the Claimant's conduct and performance and in particular that he had been witnessed making and receiving phone calls and messages from customers on his personal mobile. The letter also stated that:

> "*Following our meeting it was found that you have been accepting payments from customers to supply material from the business without authorisation.*"

The letter concluded:

> "*I have decided that your conduct constitutes gross misconduct and that your explanation was not acceptable. Having taken all of the facts and circumstances into consideration, I have decided to summarily dismiss you from your employment with immediately effect.*"

The Claimant was informed of his right to appeal against his dismissal and that any such appeal would be heard by Mr Worley.

3.27 The same day the rest of the staff were informed that the Claimant had been dismissed for reasons relating to "*trust, performance ... gross*

insubordination and other more serious matters pertaining to gross misconduct ..." In view of the reference to 'more serious matters' in this staff announcement and the contents of Mr Whincup's memo to Mr Worley (discussed below) I concluded that the Claimant's dealings with customers were taken into account by Mr Whincup when taking the decision to dismiss.

The appeal process

3.28 The Claimant subsequently appealed and an appeal hearing was arranged for 9.30 am on Friday 25 November 2016 at the Company's Nottingham office. Ahead of the hearing Mr Whincup emailed Mr Worley on 22 November 2016 explaining his decision to dismiss the Claimant:-

'*It is important that [the Claimant understands that he has not been 'accused' of stealing at this stage, otherwise the police would have been involved, however the missing stock, payments into his personal account… and his admission of all of the above during our meeting have all been taken into account when the decision was made to dismiss*.'

He also highlighted the Claimant's 'insubordination' and 'ignoring instructions and requests' – including the making and receiving of customer calls on his personal mobile – as being influential in the decision.

3.29 The Claimant subsequently contacted the Company, explaining that it was impossible to travel from Cheshire to attend a meeting at 9.30am as he did not have a vehicle and he could not travel by public transport for such an early start.

3.30 By now, for the first time, the Respondent had obtained some external advice and it is noticeable that after this point the tone of the Company's response is far more measured. Accordingly the Company offered to hold the appeal hearing later in the day or to provide the Claimant with transport, so that there would be no cost in attending. The appeal hearing was also postponed to 2 December 2016 to give the Claimant more time to prepare.

3.31 The Claimant then asked for the appeal to be on "neutral territory". The Company was not prepared to accede to that request but reiterated its offer of transport toNottinghamshire. The appeal hearing was then postponed for a second time to 12 December 2016 to give the Claimant further opportunity to attend. In the event, the Claimant declined to attend, having no confidence that he would get a fair hearing.

3.32 In the meantime, Mr Whincup had prepared a briefing note for Mr Worley for his consideration at the appeal. It emphasised that the Claimant had not been accused of stealing from the Company. However it went on to state that a number of items had been 'taken into account' when the decision to dismiss was made. He stated that these included missing stock, payments into the Claimant's personal account, phone calls to the Claimant's phone from Martin Creegan, and the Claimant's 'admission of all of [these] during our meeting'. As a result of this memo I did not accept Mr Whincup's evidence that his suspicions that the Claimant had been dealing directly with customers had nothing to do with the decision to dismiss. The memo says the exact opposite.

3.33 The appeal hearing on 12 December 2016 went ahead without the Claimant. Mr Worley confirmed the decision to dismiss and the Claimant was informed of the outcome by letter of 15 December 2016.

4. The relevant law

Unfair Dismissal

4.1 The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 ("ERA 1996"). Section 94(1) provides that an employee has the right not to be unfairly dismissed by the employer. Section 98(1) provides that in determining whether the dismissal of an employee is fair or unfair it is for the employer to show the reason (or if more than one the principal reason) for the dismissal and that it is one which the law regards as being potentially fair.

4.2 A list of potentially fair reasons is set out in Sections 98(1)(b) and 98(2) of the ERA 1996. This includes a reason which "relates to the capability… of the employee for performing work of the kind the employee is employed to do" (section 98(2)(a)) and a reason that relates to the "conduct of the employee" (section 98(2)(b)). It is well established that section 98(1) is concerned with the reason that was present in the employer's mind at the time of the decision to dismiss.

4.3 If the employer can show that there is a potentially fair reason then the Tribunal has to consider whether the decision to dismiss for that reason was fair within the meaning of section 98(4) ERA 1996. This section provides as follows:

"*The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)*

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

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

The effect is that in a misconduct dismissal case the Tribunal is engaged in evaluating the employer's conduct in dismissing the employee; it is not concerned with whether the misconduct actually occurred (see Rawson v Robert Norman Associates EAT/0199/13, summarising well established principles). The burden of proof on the issue of fairness within section 98(4) is neutral.

4.4. In this context it is important to appreciate in line with the reasoning in such cases as Iceland Frozen Foods -v- Jones [1982] IRLR 439, Foley -v- Post Office [2000] ICR 1283, Sainsbury's Supermarkets -v- Hitt [2003] IRLR 23 and Turner v East Midlands Trains [2013] IRLR 107 that when considering the employer's conduct under Section 98(4) the Tribunal has to recognise that different employers may reasonably react in different ways to a particular situation. This means that the Tribunal must not ask what it would have done had it been in the Respondent's shoes and then substitute its own view for that of the Respondent. Instead the question is whether the Respondent

acted within the range of reasonable responses open to a reasonable employer both in terms of the actual decision to dismiss and the procedure by which that decision is reached. As Lord Justice Elias made clear in the Turner case, the range of reasonable responses test is not a subjective test, it is an objective assessment of the employer's behaviour, always remembering that just because an Employment Tribunal might have reached a different conclusion to that of the employer does not necessarily mean the dismissal was unfair.

4.5 In determining whether the decision to dismiss fell outside the band of reasonable responses the Tribunal has to judge the employer's decision at the time it was taken and in light of all the circumstances at that stage: Newbund v Thames Water Utilities Ltd [2015] IRLR 73 .

4.6. Where the reason for dismissal is conduct the Tribunal is also guided by the case of British Home Stores -v- Birchell [1978] IRLR 379, EAT. In that case a Tribunal is advised when coming to its decision on the fairness of the dismissal to consider in particular (i) whether the employer had a genuine belief in the guilt of the employee at the time of the decision (ii) whether that belief was based on reasonable grounds and (iii) whether those grounds were arrived at after such investigation as was reasonable in the circumstances. Those guidelines were recently quoted with approval in Orr v Milton Keynes Council [2011] IRLR 317, CA.

4.7. It is also clear from the case of Taylor v OCS Group Limited [2006] IRLR 613 that an appeal can cure a defect in a disciplinary hearing if the appeal is sufficiently comprehensive. However the essential question when deciding whether a dismissal is fair always remains whether the employer acted reasonably within section 98(4) ERA 1996.

5. **Applying the law to the facts of the case**

The principle reason for dismissal

5.1 As set out above, the Respondent's argues that the principal reason for the Claimant's dismissal related to his conduct. By contrast Mr Howlett, on behalf of the Claimant, submits that the principal reason was either that Mr Whincup took against the Claimant from the outset and so conducted a witch-hunt to get him out of the business or alternatively dismissed him for poor performance.

5.2 I have decided that the Respondent has satisfied the burden of proof on this issue and I am persuaded that the principal reason for the Claimant's dismissal related to his conduct. Although Mr Whincup had a number of issues with the Claimant's performance, and indeed doubted that the Claimant was up to his job, it was the Claimant's attitude in repeatedly failing to comply with management instructions that carried the most weight, particularly the absence of weekly sales reports and the Claimant's repeated use of his mobile phone. Mr Whincup genuinely believed that the Claimant was deliberately 'taking the mickey' and was 'out of line'. I therefore find that this was not a malicious witch-hunt or that the Claimant was set up to fail as Mr Howlett suggested. On the contrary it was clear from Mr Whincup's demeanour when giving evidence and also from the documentary record that Mr Whincup was deeply frustrated at the Claimant's failure to adopt a more productive attitude, despite repeated requests to do so. The last straw was the

Claimant's use of his personal mobile on the afternoon of the 8 November – only hours after receiving a final written warning for ignoring management instructions - which Mr Whincup regarded as a flagrant act of gross insubordination. It was that misconduct, coupled with Mr Whincup's suspicions that the Claimant was using his phone to do illicit deals with customers, that constituted the principle reason for dismissal.

Was the dismissal fair within Section 98(4) of the Employment Rights Act 1996?

5.3 As noted above I do not accept that Mr Whincup conducted a witch-hunt against the Claimant. However, I do accept that the decision to dismiss fell outside the band of reasonable responses in the following respects:-

(i) the Claimant was given less than 24 hours notice of the disciplinary meeting on 9 November 2016. This was wholly inadequate, giving him little time to prepare for a meeting that was to consider the los of his job. As such it constituted a breach the ACAS Code on Disciplinary and Grievance Procedures ('the ACAS Code') which sets out basic standards of fairness when dealing with disciplinary situations in the workplace. In particular it breaches paragraph 11 which provides that employees should have 'reasonable time to prepare their case';
(ii) he was not given any written indication of the charges against him, in clear breach of the Respondent's own disciplinary procedure and paragraph 9 of the ACAS Code on Disciplinary and Grievance Procedures. Moreover, although the Claimant was no doubt aware from the events on the 8 November 2016 that the continued use of his mobile phone was to be a matter for discussion at the meeting the following morning, he was not given any indication that allegations of illicit dealings with customers were also to be considered. Nor was he given any details of the Respondent's investigations into the customer dealing allegations prior to the meeting, in breach of the most basic standards of fairness;
(iii) Nonetheless Mr Whincup took the Claimant's dealings with customers into account when taking the decision to dismiss - even though investigations must still have been at a very early stage at this point and even though the Claimant was never given the chance to address the issue before the decision was taken. As Mr Whincup confirmed in his evidence, it was only *after* the Claimant was told that his employment was to be terminated that the subject was even mentioned.
(iv) Mr Whincup was not sufficiently detached from the events in this case to be able to act impartially and keep an open mind. By the end of October 2016 he had formed the view that the Claimant was not up to his job, and thereafter the Claimant stood little chance of a fair hearing. Indeed the disciplinary meeting held on 8 November 2016 was no more than a charade – the final written warning issued at that meeting had been drafted by Mr Whincup some days beforehand and there was little if anything the Claimant could have said to get him to change his mind. The mobile phone incident on the afternoon of 8 November 2016 – coupled with suspicions that the Claimant was engaged in illicit dealings with clients - persuaded Mr Whincup that the Claimant would have to go and there was nothing the Claimant could have said to change that. The fact that the meeting on 9 November 2016 was over in 5 minutes, without consideration of any alternatives to dismissal, demonstrates that the decision had already been made – Mr Whincup's mind was made up

before he set foot in the meeting.

(v) Mr Worley was not sufficiently impartial to conduct the appeal, and his involvement at the appeal stage was therefore in breach of paragraph 27 of the ACAS Code which states that an appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case. Like Mr Whincup, Mr Worley had been closely involved in the disciplinary process from the outset and had approved the issue of both the verbal and the final written warnings. His ability to bring an independent mind to the matter was therefore completely compromised. (Although this was a relatively small company, I do not accept that it would have been impractical or unduly onerous to find an independent person to conduct the appeal.)

5.4 The Claimant was therefore unfairly dismissed.

6. Matters relevant to remedy

6.1 Although I did not hear detailed evidence on remedy, the parties addressed me on a number of matters relevant to remedy, including the extent to which the Claimant had contributed to his dismissal.

Contributory conduct

6.2 The relevant statutory provisions in relation to contributory conduct are found in section 122(2) and 123(6) ERA 1996. These sections are worded slightly differently. Section 123(6), which applies to the unfair dismissal compensatory award, provides that where the Tribunal finds the dismissal was to any extent caused or contributed to by any action of the Claimant then it has to reduce the compensatory award by such proportion as it considers just and equitable. Case-law has established that the Claimant's actions must be culpable or blameworthy to bring the section into play.

6.3 In my view, the Claimant's actions in continuing to flout the instructions of a senior manager, including his continued use of his mobile phone, were both culpable and blameworthy. As the Claimant admitted in cross-examination, the instruction not to use the phone was a reasonable one. However I am persuaded (on the basis of both the documentary record and the Claimant's inconsistent evidence on the matter in cross-examination) that he nonetheless repeatedly and deliberately flouted that instruction from May 2016 onwards. I also accept that (with one exception) he failed to provide Mr Whincup with weekly sales reports in defiance of Mr Whincup's clear instructions, even though this was a reasonable and fairly standard request of a salesman. Moreover it was the Claimant's reckless use of his mobile phone on the afternoon of 8 November 2016 that provided the catalyst for the disciplinary hearing on the morning of 9 November 2016. It also gave rise to the suspicion in Mr Whincup's mind that the Claimant was dealing directly with customers for personal gain. The Claimant was therefore the master of his own misfortune. In my view his behaviour was such that it would be just and equitable to make a 100 per cent reduction to the compensatory award.

6.4 I also considered whether to reduce the basic award under section 122(2). This section allows a reduction where the Tribunal considers that any conduct of the Claimant prior to dismissal is such that it would be just and equitable to make a reduction. The section gives the Tribunal wide

discretion and I decided that a reduction of 100 per cent was also appropriate here for the reasons set out in the preceding paragraph.

6.5 Finally it should be added that the Claimant maintained in evidence that Mr Worley had known that he was making cash sales to customers for some time and was complicit in the practice. However the evidence on the issue of customer dealings was confusing and far from clear. Given my findings on contributory conduct it has not been necessary for me to make any findings on this issue.

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Employment Judge Milgate

Date: 16.10.17

JUDGMENT AND REASONS SENT TO THE PARTIES

19/10/17.....

S.Cresswell.....
FOR THE TRIBUNAL OFFICE