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EMPLOYMENT TRIBUNALS

Claimant: **Mr S Davies**

Respondent: **Cyprus Fisheries Ltd**

Heard at: **East London Hearing Centre** **On: 4 January 2018**

Before: **Employment Judge Brown**

Representation

Claimant: Mr T Perry (Counsel)

Respondent: Mrs A McCullough (Representative)

JUDGMENT

It is the judgment of the Employment Tribunal that:-

1. The Respondent expressly dismissed the Claimant.

2. The Respondent dismissed the Claimant unfairly.

3. The Respondent dismissed the Claimant in breach of contract, in that the Respondent did not pay the Claimant his minimum notice pay.

4. The Respondent failed to give the Claimant written reasons for dismissal in breach of *s92 Employment Rights Act 1996*.

5. The Respondent had, by the time proceedings were commenced, given the Claimant particulars of employment, so no award is made under *s38 Employment Act 2002*.

6. The Respondent dismissed the Claimant in breach of the ACAS Code of Practice and compensation for unfair dismissal shall be uplifted by 25% accordingly.

7. If the Respondent had acted fairly, there was no likelihood that the Claimant would have been fairly dismissed. No Polkey deduction is appropriate.

8. The Claimant caused or contributed to his dismissal in the order of 20%. The basic and compensatory award for unfair dismissal shall be reduced by 20% accordingly.

9. The Claimant did not mitigate his losses after 8 December 2017.

10. The Respondent shall pay the Claimant a total of £ 11,653.60 in compensation for unfair dismissal, made up as follows: basic award £1,173.60 and compensatory award £10,480.

11. The Respondent shall also pay the Claimant £ 342 gross for wrongful dismissal in breach of contract.

12. The Respondent shall also pay the Claimant £ 978 for failure to provide written reasons for dismissal.

13. The Respondent shall also pay the Claimant £ 798 gross for accrued holiday pay.

REASONS

Preliminary

1. The Claimant, a fish porter at Billingsgate Market, brought complaints of unfair dismissal, wrongful dismissal, unreasonable failure to provide true or adequate written reasons for dismissal under *s92 Employment Rights Act 1996*, failure to provide written statements of terms of employment in breach of *s38 Employment Act 2002*, against the Respondent, his former employer.

2. The Claimant had also brought a claim for failure to allow the Claimant to be accompanied to disciplinary hearing under *s10 Employment Relations Act 1999*, but the Claimant withdrew that claim at the start of the hearing. The remaining claims were therefore heard by a Judge sitting alone. Both parties alleged that the other had acted in breach of the ACAS Code of Practice. The Claimant said that the Respondent had dismissed him without any procedure and had denied him an appeal. The Respondent said that the Claimant had failed to lodge a grievance in respect of the matters about which he was complaining.

3. The Respondent defended the claims and contended that the Claimant had resigned, rather than being dismissed. It contended that the Claimant had been employed on a casual basis from February 2015 and on a permanent basis from June 2015. The parties agreed that the effective date of termination was 13 April 2017.

4. The parties agreed the issues for determination at the start of the hearing. These were:

4.1. Was the Claimant dismissed or did he resign?

4.1.1. What were the words used by the Respondent and the Claimant? Was there an express dismissal? Was there an express resignation?

4.1.2. If ambiguous words were used, what was the objective meaning of the words used in all the circumstances, including the nature of the workplace? How would a reasonable employer or employee have understood the words in the circumstances?

4.1.3. Was there an enforced resignation (resign or be dismissed)?

4.1.4. If the Respondent gave notice to terminate, did the Respondent give a date of termination or material from which the date could positively be ascertained?

4.2. If the Claimant resigned, did the Respondent act in such a way, without reasonable or proper cause, as was calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee, by swearing and shouting at the Claimant in front of the staff and public and making it clear that the Claimant was not wanted and saying *"You can finish on Saturday"*?

4.3. If so, did the Claimant resign in response to the breach?

4.4. Did the Claimant affirm the contract?

4.5. If the Claimant was dismissed, either expressly or constructively, has the Respondent shown the reason for dismissal and that it was a potentially fair reason? The Respondent contended that the potentially fair reason for dismissal was conduct, in the Claimant telling his employer that he was going to talk to people regardless of how busy the employer was.

4.6. If the Respondent has shown a potentially fair reason for dismissal, did the Respondent act fairly, applying a neutral burden of proof and *s98(4) Employment Rights Act 1996,* in dismissing the Claimant for that reason?

4.6.1. Had the Respondent reasonable evidence of the misconduct in question?

4.6.2. Had the Respondent carried out a reasonable investigation before dismissal?

4.6.3. Was dismissal a reasonable sanction?

4.7. ACAS Reduction or Increase. Should any award made to the Claimant for unfair dismissal be increased or reduced for failure to follow the ACAS Code of Practice? Did the Claimant fail to use the Respondent's grievance procedure? Did the Respondent breach any provisions of the Code of Practice?

4.8. Did the Respondent act in breach of *s92 Employment Rights Act 1996*? Did the Claimant make a request for a written statement of particulars of the reasons for the employee's dismissal under *s92(2) ERA 1996*? Did

the employer unreasonably fail to provide a written statement under *s92,* or were the particulars of reasons given in purported compliance with that section inadequate or untrue for the purposes of *s93(1) Employment Rights Act 1996*?

4.9. Did the Respondent fail to provide the Claimant with a statement of employment particulars before the commencement of these proceedings?

Wrongful dismissal

4.10. The Respondent conceded that, if the Claimant was constructively dismissed, then the Claimant was entitled to be paid notice pay.

4.11. Did the Claimant act in such a way as to entitle the Respondent to dismiss the Claimant without notice?

5. The parties agreed that the holiday year started in January each year and that the Claimant had taken statutory holidays, only, in the holiday year before the effective date of termination. The parties agreed that the Claimant was paid in full for the week in which his employment ended and that he was also paid his net pay for the following week. The parties agreed that, if the Claimant succeeded in his wrongful dismissal claim, he was entitled to be paid the balance of his two weeks' notice pay, as well as his accrued holidays in the holiday year from 1 January to 13 April 2017.

6. The parties agreed that selling fish and general activity in Billingsgate Market is conducted at a fast pace and that there is everyday swearing in the market. They agreed that other employers, for example Roger Barton (a previous employer of the Claimant), spoke to his employees in a manner that included shouting and swearing and that such employers conduct their business at a fast pace.

7. The parties agreed that, if the Claimant succeeded in his case, he was entitled to a basic award of £1,467, calculated as 1.5 x 2 x £489 (the statutory cap for a week's wage). The parties agreed that, up to the week of the Claimant's dismissal, the Claimant and other fish porter employees had been paid £450 net per week by the Respondent. The Claimant contended that, from that week onwards, all fish porter employees were paid £480 net by the Respondent.

Findings of Fact

8. The Respondent is a company based in Billingsgate Market, Docklands, London. It employs 13 workers, 3 of whom are fish porters. It rents selling space on the floor of Billingsgate Market and sells fish to retailers and the public.

9. The Claimant was employed by the Respondent from 2015 as a fish handler/porter. He has worked as a fish porter for nearly all of his working life. He was employed as a fish porter in Billingsgate from 1981 until 2012 and during that time he worked for 14 to 15 years for a trader, Roger Barton. In 2012, new working practices were brought in at Billingsgate and around half of the fish porters accepted redundancy payments. The Claimant was one of those who accepted a redundancy payment. Thereafter he worked intermittently for some other companies in Billingsgate.

10. In February 2015, Mr Kenny Tsindides, Director of the Respondent, asked the Claimant to work for him. The Claimant said to Mr Tsindides that the Claimant always took a 3 week holiday at Christmas and asked whether that would be a problem. Mr Tsindides said it would not and the Claimant accepted the job.

11. The Respondent told me that the Claimant had been employed on a casual basis in February 2015, but the Respondent did not say, for example, that the Claimant worked intermittently after February 2015. The Respondent did not produce any records of payments made to the Claimant from February 2015. The Claimant told me that he started employment with the Respondent in February 2015 and worked from 2am to 9am or 9.30am, from Tuesday to Saturday, from the start of his employment. The Claimant told me that he had worked casually for the Respondent before February 2015, covering holidays for other fish porters.

12. I accepted the Claimant's evidence about the circumstances in which he came to be employed by the Respondent and about the fact that he worked, starting from February 2015, from 2am to 9 or 9.30am, Tuesday to Saturday every week, thereafter.

13. In about June 2015 the Respondent gave the Claimant a contract of employment. The Claimant said that he did not need to sign it. He told the Tribunal that he had never had a contract when working as a fish porter. The Respondent offered the Claimant a further contract in December 2016, but, again, the Claimant declined to sign it. Nevertheless, he continued to work for the Respondent, working the same shifts as previously.

14. On 10 June 2015 the Claimant signed a P46 form. The second page of the P46 form, to be completed by the employer, giving employee's details and when the employment started, was not in the bundle. The Claimant confirmed in writing on the P46 that it was his first job since 6 April 2015. The Claimant, in evidence, explained that he had said in the P46 that it was his first job since April 2015 because he assumed that he had been offered a job in February, and that he was being employed.

15. The parties agreed that the week coming up to Easter each year is a busy week at Billingsgate Market. In 2017, Easter Sunday fell on 16 April. On Thursday 13 April 2017 the Claimant was working as a fish porter. Mr Tsindides was also at Billingsgate that day. The market was busy and Mr Tsindides was helping to deliver the fish that had been brought to the car park. It is not in dispute that, at about 4am that day, Mr Tsindides saw the Claimant in the car park when the Claimant was talking to other fish porters. Mr Tsindides shouted across the car park at the Claimant, saying, "Jap [the Claimant's nickname] back to work".

16. Mr Tsindides was irritated by the fact that the Claimant appeared to be talking when the market was so busy and Mr Tsindides, himself, was having to help out. The Claimant was, likewise, annoyed by being shouted at by Mr Tsindides across the car park. The Claimant considered that after 30 years working as a fish porter, he knew when he could take a break and when he could not.

17. The Claimant went back to work, but shortly afterwards he and Mr Tsindides crossed paths. In his witness statement to the Tribunal, Mr Tsindides said that, as he encountered the Claimant, Mr Tsindides asked the Claimant, *"What do you think you are playing at, what the fuck do you think you are doing?"*. Mr Tsindides said that the

Claimant responded, *"I'm not being funny but if someone stops to talk to me, I am not gonna ignore them and if you have a problem with that that is your fucking problem"*. The parties agreed that Mr Tsindides said to the Claimant *"You are here to fucking working not to fucking talk"*.

18. There was a dispute of evidence between the parties as to what was said next. There were no witnesses to this particular exchange. The Claimant said that Mr Tsindides then said to him *"You can finish Saturday"*. The Claimant told the Tribunal that he understood that Mr Tsindides was telling him that he was being dismissed as from Saturday. The Claimant told the Tribunal that he thought that Mr Tsindides had said it in the heat of the moment.

19. Mr Tsindides told the Tribunal that, instead, what had happened was that the Claimant had said to the Mr Tsindides *"If you are not happy with me and want me to leave, I will leave?"*. Mr Tsindides said that he responded the Claimant could do whatever he wanted, but he was being paid to work, not talk. In his witness statement, Mr Tsindides said that it was completely untrue to suggest that Mr Tsindides had told the Claimant that he would be finishing on Saturday or words to that effect.

20. In oral evidence to the Tribunal Mr Tsindides repeated that the Claimant had raised the issue of leaving. Mr Tsindides told the Tribunal that Mr Tsindides put his hands up in the air and went away. He said that he had no idea where the idea of leaving had come from, because the Respondent was extremely busy and Mr Tsindides had not got time to argue. Mr Tsindides said that he just walked away.

21. Mr Tsindides also told the Tribunal that he was quite excitable. He said *"My policy is: If you want to work, work; if you don't want to work, there's the door"*. Mr Tsindides was, indeed, quite animated during his evidence. He became apparently quite angry when giving his evidence about events of 13 April 2017.

22. The Claimant by contrast was more measured and calm when he recalled the events. He told the Tribunal that he thought that Mr Tsindides' words had been said in the heat of the moment and that, later, towards then end of his shift, at about 9 am, he therefore went to the Respondent's office at Billingsgate, to find out where he stood. The Claimant told the Tribunal that he went into the office and asked Mr Tsindides "How do we stand Ken?" and that Mr Tsindides replied, repeating what he had said earlier, *"You're finishing Saturday"*. The Claimant told the Tribunal that, as Mr Tsindides had confirmed that the Claimant was not going to work after Saturday, the Claimant said that, if that was the case, he would rather go immediately. Mr Tsindides said *"Ok"* and, after the Claimant had had a shower, Mr Tsindides paid the Claimant for his work and the Claimant left.

23. Mr Tsindides' account of the office conversation was somewhat different. Mr Tsindides said that the Claimant had come to the office and asked Mr Tsindides *"Where do we stand?"*. Mr Tsindides said he replied, *"If you want to leave, leave on Saturday"*.

24. There was a witness to the conversation in the office. Greg White, sales manager for the Respondent, told the Tribunal that the Claimant came to the office alone and spoke first. Mr White said that the Claimant said something along the lines of "What's happening then Ken?", to which Mr Tsindides responded, *"Well, do you want*

to work until the end of the week or go now?". Mr White said the Claimant then said *"I would rather go now"*.

25. On 20 April 2017 the Claimant wrote to Mr Tsindides. He said he had been advised to write to him and said that, whether or not he or Mr Tsindides were right or wrong, the Claimant could not believe that such a trivial thing had led to all of this. The Claimant said, *"I would like to appeal your decision of terminating my employment with Cyprus Fisheries over…such a trivial matter"*. The Claimant asked that, if after reading the letter Mr Tsindides was standing by his decision, then could Mr Tsindides give the Claimant the reasons for the decision, as the Claimant needed a letter to show the employment office (pages 82-84). Mr Tsindides replied on 25 April 2017 saying briefly, *"Thank you for your letter. I don't understand the content of your letter as you clearly resigned"*. Mr Tsindides said that if the Claimant had questions he should not hesitate to contact Mr Tsindides on the work telephone number (page 89).

26. It was not in dispute between the parties that, on around 25 April 2017, Mr Gary Durden, a fish porter and friend of the Claimant's who was still employed by the Respondent, approached Mr Tsindides and asked if he could sort things out with the Claimant. It was not in dispute that Mr Tsindides declined to do so. Mr Tsindides said to Mr Durden that he would not take the Claimant back and that things had gone too far. He said that the Claimant's behaviour was going one way only.

27. Commenting on his reluctance to take the Claimant back to work, during his evidence at the Employment Tribunal, Mr Tsindides said, "90% of porters would know not to talk when this is busy. You are insulting the company, insulting the firm".

28. The Claimant did not call Mr Tsindides. He wrote again on 29 April 2017, saying that he was very surprised to see that that Mr Tsindides was saying that he resigned. The Claimant said,

> *"You clearly stated twice, once on the market floor and the other in your office in front of other people that you did not want me working for you after Saturday 15th April. Your actual words were 'You can finish on or you're finishing on Saturday'. You basically forced me into a position where I said 'If that's the case make my money up and I will go now'. …You know fully well that I did not resign voluntarily. We had a row over nothing which resulted in you saying 'You can finish up Saturday'."* (Pages 90-92.)

29. Mr Tsindides replied once more on 9 May 2017. He said that the Claimant knew full well that if the Claimant had changed his mind and wanted to keep working, he could have approached Mr Tsindides either by telephone or letter to say that (page 96).

30. On all the evidence, I decided that I preferred the Claimant's version of the second exchange on the market floor between the Claimant and Mr Tsindides and of the brief conversation in the office on 13 April. I found the Claimant to be a more credible witness than Mr Tsindides. The Claimant was measured and reflective in his evidence. Mr Tsindides was still animated and angry about what had happened on 13 April 2017. He said a number of things in his evidence which indicated to me that he was incensed by the Claimant talking to other porters on 13 April, to the extent that Mr Tsindides considered that the Claimant was insulting him and his company, so Mr Tsindides did not want the Claimant to continue working. Furthermore, I concluded

that Mr White's evidence corroborated the Claimant's evidence. Mr White said that when the Claimant asked Mr Tsindides, in the office, what was happening, Mr Tsindides simply asked the Claimant whether he wanted to work until the end of the week, or go immediately. Mr White did not corroborate Mr Tsindides' version that Mr Tsindides had said that, only if the Claimant wanted to go, then he should go on Saturday. In addition, I consider that Mr Durden's evidence that Mr Tsindides had refused to countenance the Claimant returning to work was further evidence that Mr Tsindides, himself, had decided that the Claimant should leave.

31. On all the evidence, I found that Mr Tsindides said to the Claimant *"You're finishing Saturday"* on the shop floor. The Claimant had not invited him to do this and did not say that, if Mr Tsindides was unhappy with his work, he would leave. I found that Mr Tsindides later repeated the assertion that the Claimant was leaving on Saturday when the Claimant came up to the office to check what Mr Tsindides intended.

Relevant Law

32. By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer

33. *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*. Conduct is a potentially fair reason for dismissal.

34. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

35. In considering whether a conduct dismissal is fair, the Employment Tribunal is guided by the principles set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379, affirmed by the Court of Appeal in *Post Office v Foley* [2000] ICR 1283.

36. Under *Burchell* the Employment Tribunal must consider whether or not the employer had an honest belief in the guilt of the employee of misconduct at the time of dismissal. Second, the Employment Tribunal considers whether the employer, had in its mind, reasonable grounds upon which to sustain that belief. Third, the Employment Tribunal considers whether the employer, at the stage at which he formed the belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

37. The Employment Tribunal also considers whether the employer's decision to dismiss was within a range of reasonable responses to the misconduct.

38. In applying each of these tests the Employment Tribunal allows a broad band of reasonable responses to the employer, *Iceland Frozen Foods v Jones* [1982] IRLR 439.

39. If the Tribunal determines that the dismissal is unfair the Tribunal may go on to consider the percentage chance that the employee would have been fairly dismissed,

Polkey v AE Dayton Services Limited [1988] ICR 142.

40. In *Gover v Propertycare Limited [2006] ICR 1073*, the Court of Appeal held that the *Polkey* principle does not only apply to cases where the employer has a valid reason for dismissal but has acted unfairly in its mode of reliance on that reason, so that any fair dismissal would have to be for exactly the same reason. Tribunals should consider making a *Polkey* reduction whenever there is evidence to suggest that the employee might have been fairly dismissed, either when the unfair dismissal actually occurred or at some later date. In making an assessment, Tribunals should apply the principles set out in *Software 2000 Limited v Andrews* [2007] ICR 825.

41. By *s122(2) ERA,* where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, the Tribunal shall make such a reduction. By *s123(6) ERA*, where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. *Optikinetics Limited v Whooley* [1999] ICR 984: it is obligatory to reduce the compensatory award where there is a finding of contributory fault. The reduction may be 100% - *W Devis & Sons Limited v Atkins* [1977] ICR 662.

42. In *Nelson v BBC (No 2)* [1980] ICR 110, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:
(a) The relevant action must be culpable and blameworthy
(b) It must actually have caused or contributed to the dismissal
(c) It must be just and equitable to reduce the award by the proportion specified.

43. It is open to a Tribunal to make deductions both for *Polkey* and contributory fault. The proper approach of tribunals in these circumstances is first to assess the loss sustained by the employee in accordance with *s123(1) ERA 1996*, which will include any percentage deduction to reflect the chance that he would have been dismissed in any event. The tribunal should then make the deduction for contributory fault, *Rao v Civil Aviation Authority* [1994] ICR 495. However, in deciding the extent of the employee's contributory conduct and the amount by which it would be just and equitable to reduce the award for that reason under *s123(6)*, the tribunal should bear in mind that it has already made a deduction under *s123(1) ERA 1996.*

44. In *RSPCA v Crudden [1986] ICR 205* it was held that, in light of the similarity in the provisions of *ss122(2) & s123(6) ERA 1996,* only in exceptional circumstances would deductions to the compensatory and basic awards differ.

45. By *s207A TULRCA 1992* in a claim to which the ACAS Code of Practice 1 Disciplinary and Grievance Procedures (2015) applies, where an employer or employee has unreasonably failed to comply with the Code, the Tribunal may increase or decrease (as the case may be) any award it makes to the employee by up to 25%, if it considers that it is just and equitable to do so. Such an increase or reduction is to be applied before any reduction for contributory fault, *s124A ERA 1996.*

S108 Employment Rights Act 1996

46. In order to bring a claim for ordinary unfair dismissal, an employee must have

been continuously employed for not less than 2 years ending with the effective date of termination, *s108 ERA 1996*.

Dismissal

47. Where the fact of dismissal is in dispute, the burden of proof falls on the employee to show a dismissal.

48. In general, unambiguous words of dismissal or resignation may be taken at face value without the need for any analysis of the surrounding circumstances – *Sothern v Franks Charlesly & Co* [1981] IRLR 278, CA.

49. Whether ambiguous words amount to a resignation, or a dismissal, as the case may be, is to be determined objectively. All the surrounding circumstances and the nature of the workplace should be considered. If the words are still ambiguous, the Tribunal should ask itself how a reasonable employer or employee would have understood them in the light of those circumstances, *Chapman v Letheby and Christopher Limited* [1981] IRLR 440.

50. If an employee is told that he or she has no future with an employer and is invited to resign ("resign or be dismissed"), the employee is to be regarded as having been dismissed, *East Sussex County Council v Walker* [1972] ITR 280, NIRC. The test in such cases was stated in *Martin v Glynwed Distribution Limited* [1983] ICR 511, CA, "Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who really terminated the contract of employment?"

51. Notice to terminate a contract must either state the date of termination or contain material from which the date can be positively ascertained, *Morton Sundour Fabrics Limited v Shaw* [1966] 2 KIR 1, Div Ct.

Wrongful Dismissal

52. Where an employee has committed a repudiatory breach of contract, the employer can accept the repudiation, resulting in summary dismissal.

53. The degree of misconduct necessary in order for the employee's behaviour to amount to a repudiatory breach is a question of fact for the Tribunal to decide. In *Briscoe v Lubrizol Ltd* [2002] IRLR 607, the Court of Appeal approved the test set out in *Neary v Dean of Westminster* [1999] IRLR 288, ECJ, where the Special Commissioner held that the conduct, "must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment."

Statement of Reasons for Dismissal

54. By *s92(1)&(2) ERA 1996* an employee is entitled to be given a written statement

of reasons for dismissal if he makes a request for one. The employer is required to provide the statement within 14 days of the request. If the employer fails to do this, the Employment Tribunal is required to make an award of two weeks' pay to the employee, *s93 ERA 1996*.

Discussion and Decision

55. I decided that the Claimant was employed by the Respondent from February 2015 and had, therefore, worked for 2 years continuously before the effective date of termination of his contract.

56. On all the evidence, I found that Mr Tsindides said to the Claimant *"You're finishing Saturday"* on the shop floor. The Claimant had not invited him to do this and did not say that, if Mr Tsindides was unhappy with his work, he would leave. I found that Mr Tsindides later repeated the assertion that the Claimant was leaving on Saturday when the Claimant came up to the office to check what Mr Tsindides intended.

57. I concluded that Mr Tsindides dismissed the Claimant expressly, without notice. The words, "You're finishing Saturday," were an unambiguous statement that Mr Tsindides was dismissing the Claimant from his employment from the following Saturday.

58. I decided that the parties then agreed that the Claimant could leave work on Thursday 13 April 2017 and would not be required to work his notice.

59. Mr Tsindides dismissed the Claimant when the Claimant had had no previous written warnings about his work, although the Claimant and Mr Tsindides had had a brief argument in which both had sworn.

60. It was agreed between the parties that shouting and swearing was normal in the Billingsgate workplace.

61. I found that the Respondent had shown that the Claimant was dismissed for conduct; that is, for talking to other porters and then saying to Mr Tsindides that he would talk if people spoke to him and that, if Mr Tsindides did not like that, that was his *"fucking"* problem.

62. I decided, however, that the Respondent dismissed the Claimant unfairly, even applying a broad band of reasonable responses. This was the Claimant's first matter of misconduct. He had had no previous warnings. Swearing was common in the workplace. It was well outside the band of reasonable responses to dismiss the Claimant for this first offence. Mr Tsindides also swore at the Claimant, indicating that he accepted that such language was appropriate in the workplace. Mr Tsindides conducted no investigation. He gave no opportunity for the Claimant to explain himself, or to offer mitigation before he decided to dismiss the Claimant. The dismissal was procedurally and unsubstantively unfair.

63. The Claimant had the two years' continuous service required in order to bring a claim for unfair dismissal. Given that I considered that dismissal was outside the band of reasonable responses, I concluded that, even if the Respondent had conducted a

reasonable investigation and had given the Claimant an opportunity to explain himself, the Respondent would not have dismissed the Claimant fairly, following a fair procedure.

64. Nevertheless, I concluded that the Claimant did contribute to his dismissal in small part. The Respondent gave the Claimant an instruction not to talk, but to work, and the Claimant strongly objected to this. The Respondent was entitled to require the Claimant to work. The Claimant contributed to his dismissal by arguing with the Respondent about talking in the workplace. His actions were culpable and blameworthy and did give rise to the dismissal. It is clear, however, that the Claimant carried on working for the rest of the day. So, while he had a brief argument with Mr Tsindides, the Claimant indicated that he was willing to comply with instructions. The Claimant's actions were also in the context of a workplace where swear words and strong language were used and people shouted at each other on a regular basis. The Claimant's conduct, in those circumstances, was mildly culpable. I decided that it was appropriate to reduce his compensatory and basic award by 20%.

65. The Respondent failed to comply with any of the provisions of the ACAS Code of Practice 1 when it dismissed the Claimant. It also failed to give him written reasons for his dismissal when the Claimant wrote, asking for reasons. Mr Tsindides wrote back, saying that the Claimant had resigned. That was not true or accurate. The Respondent breached *s92 ERA 1996.*

66. The Respondent also failed to give the Claimant notice of dismissal. Mr Tsindides said that the Claimant should leave on 15 April 2017. The Claimant was entitled to 2 weeks' notice under *s86 ERA 1996.* I concluded that the Claimant's actions were not so serious as to justify the Respondent dismissing him without notice. As stated above, I found that the Claimant's actions were mildly culpable.

67. The Respondent did provide the Claimant with a written statement of employment particulars on two occasions during the Claimant's employment. No award is appropriate under *s38 EA 2002.*

Remedy

68. The Claimant told the Tribunal that he believed that he was not entitled to Jobseeker's Allowance because he has savings of more than £16,000. He gave evidence that, since his dismissal, he has worked at Billingsgate Market for a total of about ten weeks for various employers. He said that he had asked all the employers there to keep him in mind. The Claimant told the Tribunal that he only knows the market. He has no other qualifications or experience. The Claimant told the Tribunal that he went on holiday to Mexico for 3 weeks at Christmas 2017, as he does this every year. He agreed, however, that Christmas and Easter were very busy times of year. The Claimant said that he had not attended the jobcentre, but that he was hoping to get back to work down at the market, because it was all he knows. He said that he would need certificates for driving work. He had not applied for supermarket work and physically could not undertake removal work.

69. I concluded that it was reasonable for the Claimant to seek to gain employment as a fish porter in Billingsgate following his dismissal. He had some success in doing so, in that he has been employed for about ten weeks. However, I considered that he

failed to mitigate his loss when he went on holiday for three weeks over the Christmas period, when he could have obtained portering work in Billingsgate during the very busy Christmas time. I considered that this might well have led to him being employed on a more regular basis in Billingsgate, if he had shown his Christmas employer that he was an experienced and useful member of staff.

70. Accordingly, I considered that the Claimant did mitigate his loss up until the beginning of December 2017, but that he failed to mitigate his loss when he went on holiday, rather than seeking work in the market. I also considered that, seeing that he had not obtained any permanent work in the market by Christmas 2017, the Claimant ought reasonably to have looked for work elsewhere, including in supermarkets and driving light goods vehicles.

71. I therefore awarded him compensation for unfair dismissal from the date of his dismissal until 8 December 2017. I did not award him compensation after that date, because I considered that he had failed to mitigate his loss after that date.

72. The Claimant was also entitled to be paid unpaid holiday pay and two weeks' notice pay.

73. The parties agreed that the Claimant was paid in full for the week in which his employment ended and that he was also paid his net pay for the following week. The parties agreed that, if the Claimant succeeded in his wrongful dismissal claim, he was entitled to be paid for the balance of his two weeks' pay, as well as his accrued holidays in the holiday year from 1 January to 13 April 2017.

74. The parties agreed that, if the Claimant succeeded in his case, he was entitled to a basic award of £1,467, calculated as 1.5 x 2 x £489 (the statutory cap for a week's wage).

75. The parties agreed that, up to the week of the Claimant's dismissal, the Claimant and other fish porter employees had been paid £450 net per week by the Respondent. The Claimant contended that, from that week onwards, all fish porter employees were paid £480 net by the Respondent. The Respondent denied that the Claimant would have been paid £480 per week.

76. I decided that I could not be certain that the Respondent would have paid the Claimant £480 per week after 15 April 2017, even if some other porters were given a pay rise. I heard evidence that different porters worked with different types of fish and doing different tasks. I decided that they would not necessarily all have been paid the same.

77. I awarded the Claimant compensation calculated on the basis of £450 net per week (£1,950 net per month and £23,400 per year). The parties did not agree gross pay and I assessed it as £570 per week, or £29,640 gross per year.

78. I awarded the Claimant an uplift on compensation under *s207A TULRCA 1992.* The Respondent failed to comply with any of the provisions of the ACAS Code before dismissing the Claimant and failed to entertain his appeal. The Claimant clearly asked for an appeal in his letter of 20 April 2017. I rejected the Respondent's argument that the Claimant's award should be reduced for failure to submit a grievance. It seemed to

me that, in his letters of 20 and 29 April 2017m the Claimant was complaining about the treatment that the Respondent had given him, but that the Respondent refused to investigate or engage with the Claimant's complaints at all.

79. The Claimant's basic award of £1,467 (1.5 x 2 x £489) needed to be reduced by 20% for contributory fault and was therefore £1,173.60.

80. The Claimant was entitled to be paid for 2 weeks notice until 27 April 2017. He was paid until the week ending 24 April 2017. He was not paid for Tuesday 25 – Thursday 27 April 2017, 3 days. The Respondent shall pay the Claimant 3/5 of a week's pay: 3/5 x £570 gross = £342 gross.

81. The Claimant's compensatory award has been calculated net from 28 April 2017 – 8 December 2017, 32 weeks. £450 x 32 = £14,400. The Claimant's schedule of loss stated that he earned £2,350 for 6 weeks' work in mitigation, £392 per week. In evidence, the Claimant said that he had worked for 10 weeks. He did not produce payslips. I calculated that the Claimant would have earned £3,920 by way of mitigation in 10 weeks. His net loss was therefore £10,480.

82. £10,480 x 1.25 (25% ACAS uplift) = £13,100. Less 20% (contributory fault) = £10,480. The compensatory award for unfair dismissal was £10,480.

83. The total award for unfair dismissal was £1,173.60 + £10,480.00 = £11,653.60.

84. There were 105 days in the holiday year before the Claimant's dismissal. 105/365 x 28 = 8 days' holiday accrued. There had been 1 public holiday in that time. The Claimant was entitled to be paid for 7 days' accrued holiday. £570 / 5 x 7 = £798 gross.

85. The Claimant was also entitled to two week's pay under *s93 ERA 1996.* 2 x £489 (maximum amount of week's pay) = £978.

Employment Judge Brown

21 February 2018