EMPLOYMENT TRIBUNALS

Claimant: Mr J Cornthwaite

Respondent: W. E. Couplings Limited

Heard at: Manchester **On:** 9 May 2018

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: Miss R Jones, Counsel
Respondent: Mr P Hart, Managing Director

JUDGMENT

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

2. The respondent is ordered to pay to the claimant compensation for unfair dismissal in the sum of £7,074.77, made up of a basic award of £3,423.00 and a compensatory award of £3,651.77.

3. The recoupment regulations do not apply.

REASONS

1. I delivered judgment orally with reasons at the end of the hearing. The respondent requested written reasons.

Introduction

2. By a claim form presented on 5 January 2018 the claimant complained that he had been unfairly dismissed from his post as a coded welding technician with the respondent with effect from 17 October 2017. That was the date on which he received a letter terminating his employment, following a disagreement with the

Managing Director, Mr Hart, on 9 October 2017 and subsequently two days of sickness absence. The narrative attached to the claim form made clear that the claimant's case was that the dismissal was automatically unfair for health and safety reasons, but failing that unfair as an “ordinary” unfair dismissal for misconduct.

3. In its response form of 8 February 2018 the respondent resisted the complaint, arguing that there had been a fair dismissal for gross misconduct. Reference was made to the disagreement on 9 October 2017, and to the claimant having left work without authority on 11 October 2017 and failing to attend on 12 October 2017. The response form asserted that after the incident of 9 October 2017 the claimant had been placed on a probationary period, and that it was fair to terminate his employment when he was absent from work without authority.

Issues

4. The issues for me to determine were as follows:

   (a) What was the reason or principal reason for dismissal? Was it a health and safety reason falling within section 100 Employment Rights Act 1996 (“ERA”), rendering dismissal automatically unfair, or was it a potentially fair reason relating to the claimant’s conduct?

   (b) If a potentially fair reason was shown, was the dismissal fair or unfair under section 98(4)?

   (c) If the dismissal was unfair, what was the appropriate remedy by way of a basic award and compensatory award? Issues to be determined included any reduction for contributory fault, a reduction to the compensatory award on the basis that a fair procedure would have resulted in a fair dismissal in any event, and the question of an uplift because of an unreasonable failure by the respondent to comply with the ACAS Code of Practice.

Evidence

5. The parties had agreed a bundle of documents running to 74 pages. One additional document was added to that bundle at the start of the hearing by consent, being a reference from 2013 which the claimant had disclosed late. Any reference to page numbers in these reasons is a reference to that bundle of documents unless indicated otherwise.

6. Mr Hart gave evidence for the respondent. The respondent also relied on four signed written witness statements from individuals who did not give evidence in person. They were John Storton, Ian Edwards, Nathan Sherrington and James Nevins, all of whom were employed by the respondent in October 2017. I attached less weight to their statements than if they had attended in person to give evidence.

7. The claimant gave evidence himself but did not call any other witnesses.

Relevant Legal Principles - Liability

8. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 100 renders a dismissal automatically unfair if the reason or principal reason is within the following:

> **(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—**
>
> **(a) …...**
>
> **(b) …..**
>
> **(c) being an employee at a place where—**
>
> **1. there was no such representative or safety committee, or**
>
> **2. there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,**
>
> **he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety…."**

9. The reason or principal reason for dismissal is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

10. Where the claimant contends for a reason which would be automatically unfair but the respondent contends for a fair reason, the proper approach is set out in paragraph 47 of the decision of the EAT in **Kuzel v Roche Products Limited [2007] ICR 945**, approved by the Court of Appeal at **[2008] ICR 799.**

11. If the reason or principal reason is not an automatically unfair reason, the primary provision is section 98 which, so far as relevant, provides as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal and**
>
> **(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this sub-section if it … relates to the conduct of the employee …**
>
> **(3) …**

> **(4) Where the employer has fulfilled the requirements of sub-section (1), 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 it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case".**

12. If the employer fails to show a potentially fair reason for dismissal (in this case, conduct), dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

13. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. The most important point is that the test to be applied is of the range or band of reasonable responses, a test which originated in **British Home Stores v Burchell [1980] ICR 303**, but which was subsequently approved in a number of decisions of the Court of Appeal. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief? If the answer to each of those questions is "yes", the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band falls short of encompassing termination of employment.

14. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice.

15. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

Relevant Findings of Fact

16. This section of the reasons summarises the broad chronology of events for the purposes of the unfair dismissal claim. Any primary findings of fact required in relation to remedy will be addressed in the remedy section.

Background

17. The respondent is a small manufacturing company with about 19 employees which specialises in the manufacturing of bespoke hoses and fittings. A key part of its operation concerns welding. It is on an industrial estate in Chorley in Lancashire. Mr Hart is the proprietor and Managing Director.

18. Having previously worked for the respondent for some seven years, the claimant was re-employed in June 2010. He was a skilled and experienced welding technician and held in high regard by Mr Hart for his work.

19. In January 2017 a written statement of the main terms of employment was issued to him (pages 57-66). It drew attention to the employee handbook which contained the disciplinary procedure. An extract from the disciplinary procedure appeared at page 32: it gave examples of what would be considered to be gross misconduct, including:

> **"Serious insubordination e.g. refusal to follow reasonable instructions given by those with authority to give such instructions, except where the employee's safety may reasonably be endangered by the instruction."**

7 and 8 October 2017

20. Over the weekend of 7 and 8 October Mr Hart and his manager, Ian Edwards, reorganised the units so as to improve efficiency and safety. Previously some welding had been done in the "clearway" down the middle of the unit. However, there were three orders from three different clients being worked on at that time and Mr Hart wanted to reorganise matters so that welding was done in the side bays not using part of the clearway. This would not only improve efficiency but also be safer, because a welder wearing a welding mask had no peripheral vision and there was a risk that a forklift truck transporting a length of piping down the clearway could cause an injury to someone undertaking welding. Mr Hart and Mr Edwards moved equipment around so as to keep the clearway clear for Monday morning.

Monday 9 October 2017

21. At about 9.00am Mr Hart approached the claimant and explained to him how he now wanted the work to be done. Mr Edwards was not in that day. There was an eight inch pipe to be worked on and a disagreement arose in which the claimant was resistant to doing what he had been told. Mr Hart formed the view that the claimant was not resisting the instruction for any good reason: although the change would make it a little more laborious for the claimant to get the pipe to be welded into position, it was still something which could be done using a forklift truck and/or a small crane and would not require any manual lifting.

22. The discussion ended with what Mr Hart regarded as a "toe to toe shouting match", culminating in Mr Hart shouting at the claimant and telling him to go home. In his witness statement Mr Hart said that he told the claimant he was not sacked but was only suspended.

23. Mr Hart said in evidence that on the evening of 9 October he had decided that he could not tolerate the behaviour from the claimant that morning, and would have dismissed him had it not been for the fact that the company was particularly reliant upon the claimant at the time because the other coded welder was on sick leave following an injury. The claimant was not told that his dismissal had been contemplated.

Tuesday 10 October 2017

24. The following morning the claimant was handed a letter which appeared at page 33. It was headed "Work suspension – disciplinary action 09-10-2017". It made clear that the claimant would be paid for the previous day although he had been suspended. It said that the "toe to toe shouting match" in the middle of the workshop had created an extreme disruptive tension, and that the claimant had been asked to leave the premises because he had been guilty of gross misconduct. The letter made the point that any new work structure was to be completed in the way management had set it to be done even if the workforce thought there was a better way.

25. The letter ended with the following:

> **"This letter is to be read prior to a meeting that will be held before Jamie is allowed to start work. A written warning will be given in view of the negative disruptive outburst, discourtesy and disrespect from** [the] **morning of the 9th. Jaime is to pick a work college in which** [sic] **to attend the meeting, when possible before 10.00am. The meeting is not a disciplinary meeting, but if no respect is shown to the problem it could be changed as such."**

26. After being handed the letter the claimant attended a meeting at 10.00am. Mr Hart was accompanied by Darren Boardman and the claimant by Gareth Grady. There were no notes kept of the meeting but the gist of what was discussed was that Mr Hart said the claimant could not carry on in employment with the attitude he had displayed the previous day. The claimant apologised for how he had behaved. The upshot was that employment would continue. It was made clear that any repetition would result in dismissal.

27. This was confirmed by a letter of 10 October 2017 at page 40 headed "written warning" which said that immediate improvement in behaviour was required. The letter said:

> **"There was a mixed reaction to the meeting which means there will now be a probationary period."**

28. The letter went on to reserve the right to impose further disciplinary actions up to and including termination of employment.

29. Mr Hart said that the probationary period had been discussed and agreed in the meeting; the claimant said it had not. On balance I accepted the claimant's evidence. The wording of the letter suggested that the probationary period was imposed only because of the reaction to the meeting itself. The letter did not say that a probationary period had been agreed. Nevertheless it was clear that Mr Hart regarded the claimant as on a form of probation thereafter.

Wednesday 11 October 2017

30. On Wednesday the claimant was in work but at about 11.45am he went to speak to Mr Hart to ask if he could leave to go to a doctor's appointment that afternoon. Mr Hart was on the telephone when the claimant put his head round the office door. There was a dispute about whether he authorised the claimant to leave or not. What was clear, however, was that the claimant said he had a doctor's

appointment that afternoon when in fact that was not true. He wanted to go home because he had been feeling anxious since the incident on Monday and he wanted to try and get a doctor's appointment. The claimant said in his oral evidence that the reason he told Mr Hart that he already had an appointment was because he did not want to be questioned about the need to leave.

31. Mr Hart's case was that he had not had a chance to discuss this with the claimant properly because he was on the telephone and the claimant gave him no chance. He did not believe that the claimant had a doctor's appointment that afternoon. He thought it very unlikely that such an appointment could be obtained so quickly. His suspicions were later strengthened when John Storton told him that around lunchtime the claimant said to Mr Storton that although he had said to Mr Hart he was going to the doctor, that was not really the case[1]. Mr Hart formed the view that the claimant just did not want to carry on working under the new arrangements and had used this as an excuse to leave.

Thursday 12 October 2017

32. The claimant was due in work at 8.30am on Thursday. He rang at about 8.40am and Mr Hart took the call. The claimant said that he had a doctor's appointment that afternoon. Mr Hart asked the claimant if would come in before it in return for a lift to the doctor's but the claimant refused. He asked if the claimant would come in after the appointment but the claimant said no. He did not know what advice the doctor would give him. Mr Hart was suspicious about this appointment because of what Mr Storton had told him and because it seemed to have been obtained very quickly.

33. At shortly before 4.30pm the claimant's mother rang to say that he was going to be on sick leave for seven days self certified. That was confirmed in an email a few minutes later at page 43. The email said that the claimant had been:

> **"Advised by my doctor to sign myself sick for the next seven days and to return to my doctors next week for a follow up appointment."**

Tuesday 17 October 2017

34. The claimant was off work on Friday 13 October and Monday 16 October. On the morning of 17 October he received a dismissal letter dated 16 October (page 55). It said that his employment and probationary period had been terminated as a result of recent events. The letter went on as follows:

> **"Your employment was terminated on Monday 9 October but it was agreed during a long meeting on Tuesday 10 October that your employment would restart for a probationary period in order to give you ample time to change your attitude and make improvements. You were handed a written warning at the end of the day which detailed what was expected of you, a copy of which is attached.**
>
> **Unfortunately, your response to this was to dismiss yourself from work at very short notice on 11 October and without following company policy regarding medical appointments, forcing the whole work structure to be reorganised. This is a clear breach of your terms of employment. The employee handbook clearly states the**

[1] Not in Mr Hart's witness statement but in paragraph 16 of the attachment to the response form. Mr Hart confirmed on oath that the facts in that document were true as well.

> **procedure regarding medical appointments: *'Time off work to attend medical appointments must be authorised by the employee's line manager in advance. In any event, unless there are exceptional circumstances, no more time than is reasonable should be taken off work for any one appointment.'***
>
> **There was no apology or explanation the day after and you made yourself unavailable for work for a second day on 12 October at very short notice again, without an apology or explanation, knowing how much work had to go out of the door, again causing a restructure of planned work. This was not the response that was expected having agreed during the meeting on 10 October what was required. We were then informed at 4.30pm, several hours after your doctor's appointment at 11.30am, that you had signed yourself off sick for seven days. We have therefore decided not to continue your probationary period as of immediate effect. The main reason for your dismissal on 9 October was gross misconduct in relation to the events mentioned above. It should also be noted however that the following issues have contributed to the decision not to continue your probationary period: gross insubordination, disobeying instructions regarding work tasks, countermanding direct instructions to others, breaching your terms of employment regarding medical appointments, talking during work time thereby reducing productivity, spending an unreasonable amount of time away from your workstation."**

35. The letter ended making arrangements for the collection of personal belongings, but it made no mention of any right of appeal.

36. On 17 October 2017 the claimant was issued with a fit note from his doctor confirming that he was unfit for work due to anxiety between 12 and 26 October 2017. His employment had already ended by then and he did not send the fit note to the respondent.

37. The claimant did not seek to pursue any appeal against dismissal. He contacted ACAS to initiate early conciliation on 19 December prior to issuing his claim form.

Submissions

38. At the conclusion of the evidence each party made an oral submission. Miss Jones had also helpfully prepared a written skeleton argument.

Claimant's Submission

39. As to the reason for dismissal, Miss Jones submitted that this issue all began when the claimant raised health and safety concerns on Monday 9 October 2017. It was therefore automatically unfair under section 100(1)(c).

40. Insofar as the respondent sought to argue that the reason was a fair one related to conduct, she submitted that it could not be the events of 9 October because that had been addressed by a written warning; nor could it be the absence for medical appointments on 11 and 12 October: the diary notes made by staff did not record that the claimant left work without permission on 11 October. The dismissal was not reliable because it gave a confusing set of reasons. The pleaded case in the response form (paragraph 20) was that there had been dismissal not because of the absence of consent to attend the medical appointment but because of his attitude.

41. As to fairness, Miss Jones submitted that dismissal was plainly procedurally unfair. There had been significant failures to comply with the ACAS Code of Practice. As to substance, the claimant was a longstanding employee with a clean disciplinary record and it was outside the band of reasonable responses to dismiss him. The behaviour on 9 October had been dealt with and a failure to comply with sickness procedures was only misconduct not gross misconduct in the policy at page 32.

42. If the dismissal was unfair Miss Jones sought an increase of between 15% and 25% in relation to the ACAS Code, but resisted any suggestion there should be a contributory fault reduction. The only contributory fault was on 9 October and that was addressed by means of the written warning; nor was any reduction appropriate pursuant to **Polkey** because this dismissal was substantively unfair.

Respondent's Submission

43. I assisted Mr Hart by taking him through the matters to be decided.

44. In relation to the reason for dismissal he emphasised that it was not a health and safety reason. He was committed to safety in the workplace. The principal reason for his letter of 16 October was that he did not believe that the claimant had a doctor's appointment on Wednesday 11 October and the claimant had not made himself available for work on Thursday 12 October. He was desperate to find a way to keep the business going and the claimant was the only coded welder available at that time.

45. In relation to fairness Mr Hart emphasised that he followed as much procedure as he could and had not been aware of the ACAS Code of Practice. He was not helped by the absence of Mr Edwards, his manager. He rejected the suggested that in truth the claimant had been dismissed because he was off sick. No cause for the sickness had been given and Mr Hart believed that he claimant had lied to him about the appointment on Wednesday afternoon. There was nothing physically wrong with the claimant that would prevent him coming into work.

46. In relation to remedy issues he resisted any uplift for a breach of the ACAS Code because any failings were reasonable in all the circumstances, and he said that there should be a contributory fault reduction because of the claimant's behaviour on Monday 9 October.

47. If the dismissal was found to be procedurally unfair, a fair procedure would have taken only a few days because he liked to get things done quickly, as evidenced by the meeting on 10 October after the events the previous day.

48. In closing Mr Hart emphasised that he had lost an exceptional welder that he had helped train up. He had not been looking to get rid of the claimant but just the contrary: his aim had been to take the business forward and generate bonuses for the staff. He had not had to deal with an issue like this in 33 years.

Claimant's Reply

49. In reply Miss Jones pointed out that there was nothing to suggest that at the time Mr Hart had formed the view that the claimant had lied about the medical

appointment: the point made in the dismissal letter was about the absence of authority to attend it.

Discussion and Conclusions - Liability

Reason for Dismissal

50. My task was to identify a set of facts or beliefs in the mind of Mr Hart when he decided to terminate the claimant's employment.

51. There was an issue about when the decision to dismiss was taken. Mr Hart relied on there having been a dismissal on 9 October 2017 and re-employment. I rejected this. It was not tenable as a matter of law to argue that the claimant was dismissed on 9 October; he was never told that he was being dismissed, as Mr Hart's witness statement recognised. The reality was that the claimant was suspended (as the letter at page 33 made clear), and then given a written warning about his attitude and behaviour (page 40). Dismissal occurred in this case when the letter of 16 October was received.

52. The question therefore for the Tribunal was: what was the principal reason in the mind of Mr Hart when he wrote the letter of 16 October at page 55?

53. There were three possible reasons for dismissal raised in this case. Only one of them could be the principal reason.

54. The first reason was the claimant's concerns about safety matters which the claimant maintained he raised on 9 October. I rejected this. The events of 9 October resulted in a written warning. The claimant was not dismissed because of that discussion on 9 October. It was at best part of the background. Therefore, the complaint that dismissal was automatically unfair for health and safety reasons under section 100 of the Act failed.

55. The second reason was the claimant's behaviour on 9 October in engaging in what Mr Hart described as a "toe to toe shouting match". I was satisfied that was not the principal reason for his dismissal in the letter of 16 October. Although it still played on Mr Hart's mind, it had been dealt with by way of the written warning.

56. The third reason was the events of 11 and 12 October 2017. The letter of dismissal at page 55 made clear that these were the reason, albeit in legally incorrect language relating to probationary period (because Mr Hart wrongly believed that there had already been a dismissal on 9 October). After summarising the events of those two days (see the third paragraph quoted in paragraph 34 above) the letter said (emphasis added):

> **"We have <u>therefore</u> decided not to continue your probationary period as of immediate effect."**

57. Those were effectively the words of dismissal and the word "therefore" indicated that they were a consequence of what appeared above.

58. The letter went on to record other issues that contributed, including countermanding instructions given to others, talking during work time and thereby

reducing productivity and spending an unreasonable amount of time away from the workstation, but I was satisfied they were neither the sole nor principal reason, even though they may have contributed.

59. I also took account of paragraph 20 of the response form which Miss Jones emphasised. It said that the dismissal was due to gross misconduct on 9 October, but it is clear that it referred to the dismissal on 9 October, a dismissal which in fact and in law never happened.

60. In summary my finding was that the principal reason for dismissal was Mr Hart's beliefs about the claimant's conduct on 11 and 12 October. A reason relating to conduct is a potentially fair reason.

61. However, before considering fairness it is necessary to be precise about what Mr Hart believed about those events at the time. I was satisfied that the best guide to that was the letter of dismissal. From the letter of dismissal I concluded that there were three elements to Mr Hart's belief about what was happening.

62. The first element, recorded in the third paragraph of the dismissal letter, was that the claimant had left on Wednesday 11 October to go to a doctor's appointment without permission to do so. Mr Hart believed that he had not had a chance to discuss it because he was on the telephone to a client, and that in effect the claimant simply told him he was going and left. He was also told by Mr Storton that the claimant admitted there had not really been a doctor's appointment. I accepted that the diary entries which Mr Hart asked to be made did not record that the claimant had left without authorisation but Mr Hart did not make those entries personally. I was satisfied that there would have been no need for diary entries if he had genuinely consented to the claimant leaving.

63. The second element was that there was no good reason for the claimant to refuse to come in either before or after his doctor's appointment on Thursday 12 October. Mr Hart had suspicions about whether the self certified sick leave was genuine because had been told by Mr Storton that the claimant had said he was not really seeing the doctor on Wednesday afternoon, and the claimant gave no reason for his sickness absence when his mother called or the email was sent that afternoon. Therefore Mr Hart formed the belief that the claimant just did not want to be in work for no good reason.

64. The third element was that the claimant had signed himself unfit for work for seven days when for the same reasons there was a suspicion about whether that was genuine or not.

Fairness

65. The test to be applied by the Tribunal is set out in section 98(4) of the Act and it is convenient to adopt the **Burchell** test which has three stages:

(1) To decide whether there was a genuine belief the claimant was guilty of that misconduct;

(2) To decide whether that belief was formed on reasonable grounds; and

(3) To decide whether that belief was formed following a reasonable investigation and a reasonably fair procedure.

66. If so, then the fourth question which arises is whether it was within the band of reasonable responses to dismiss the claimant for that reason.

67. I was satisfied that Mr Hart genuinely believed that the claimant was guilty of misconduct in relation to the events of 11 and 12 October as summarised in paragraphs 62-64 above.

68. I was also satisfied that there were reasonable grounds for that belief. The claimant had been given what was effectively a final written warning because of his behaviour on Monday 9 October. His dissatisfaction with the new arrangements in the workshop was clear. Mr Hart had been told by Mr Storton the claimant had said that he did not really have a doctor's appointment on Wednesday afternoon. There were grounds for suspicion that the claimant had misled him and grounds to think, as Mr Hart did, that he had not authorised the claimant to go. There was no real discussion because Mr Hart was on the telephone to a client when approached. Further, the claimant did not give any explanation for his sick leave when his mother rang or in the email about self certification. In the light of that suspicion there were reasonable grounds for Mr Hart to consider the absence was not medically genuine, and that the claimant was just finding a way to avoid coming into work.

69. Was this conclusion was reached following a reasonably fair investigation and procedure? In this respect the respondent's position was fundamentally flawed. There were a number of clear breaches of the ACAS Code of Practice. Paragraph 9 of the ACAS Code requires an employer considering a disciplinary process to inform the employee of the issue and to provide enough information to the employee to prepare and then to invite him to a meeting. Paragraph 11 requires a meeting to be held at which the employee can have his say before a decision is taken. Paragraph 23 emphasises that a fair disciplinary process should be followed even in cases of apparent gross misconduct. Paragraph 26 requires an opportunity to appeal the decision to dismiss. None of these basic procedural safeguards or investigatory steps were provided to the claimant, and on that ground alone the dismissal was unfair. Just to issue a letter when the claimant had been absent for three working days, ostensibly self certified, without any chance for the claimant to respond and to provide evidence of his doctor's appointment, for example the text at page 74, was wholly unfair.

70. Overall therefore I concluded that the dismissal was unfair because although there were reasonable grounds for Mr Hart's genuine belief the claimant had committed misconduct, the respondent failed to act fairly in the way it investigated the matter and in its failure to follow any procedure before dismissing the claimant because of the events of 11 and 12 October.

Remedy

71. I had heard submissions on the first three remedy issues before giving oral judgment on liability and those three issues. We then addressed the calculations of the basic and compensatory awards.

ACAS Uplift

72. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 empowers a Tribunal, if it considers it just and equitable, to increase any compensatory award by up to 25% because of an unreasonable failure by an employer to follow the ACAS Code of Practice.

73. I took account of the fact that the respondent was a small employer with no previous experience of disciplinary matters, but even so there was a wholesale failure to comply with even the most basic requirements of fairness in the ACAS Code of Practice. In relation to the events of 11 and 12 October the claimant was effectively dismissed by a letter out of the blue. In those circumstances I was satisfied that the it was just and equitable to impose an increase of 20%.

Contributory Fault

74. A reduction because of contributory fault by the employee can apply both to the basic award and to the compensatory award by virtue of differently worded provisions in sections 122 and 123 respectively:

> **"Section 122 (2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly….**
>
> **Section 123 (6) 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."**

75. As to what conduct may fall within these provisions, assistance may be derived from the decision of the Court of Appeal in **Nelson v BBC (No 2) [1980] ICR 110.** It can include conduct which is culpable, blameworthy or sufficiently unreasonable.

76. Mr Hart argued that contributory fault by the claimant took place on 9 October. I was satisfied that the claimant was at fault on that occasion, but I did not consider any reduction to be just and equitable. That behaviour was addressed by the written warning. The claimant apologised for how he had behaved. The reason for dismissal was the events of 11 and 12 October. I rejected the argument of Mr Hart that there should be any reduction to the compensatory or basic award because of contributory fault.

Polkey Reduction

77. Any compensatory award for unfair dismissal under section 123(1) of the 1996 Act must be of an amount considered just and equitable:

> **"(1) Subject to the provisions of this section and sections 124 and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."**

78. It has been established since **Polkey v A E Dayton Services Limited [1988] ICR 142** that in considering whether an employee would still have been dismissed even if a fair procedure had been followed, there is no need for an all or nothing decision. If the Tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment. Although this inherently involves a degree of speculation, Tribunals should not shy away from that exercise. A similar exercise was also required by what was then section 98A(2) (part of the now repealed statutory dispute resolution procedures), and the guidance given by the Employment Appeal Tribunal in paragraph 54 of **Software 2000 Limited v Andrews [2007] IRLR 568** remains of assistance, although the burden expressly placed on the employer by section 98A(2) is not to be found in section 123(1).

79. This exercise required me to assess whether, had there been a fair investigation and procedure, it would have been within the band of reasonable responses to dismiss the claimant for these matters rather than impose a lesser disciplinary punishment, and, if so, how likely that outcome was.

80. I was satisfied that if instead of dismissing the claimant by a letter of 16 October Mr Hart had invited him to a meeting, and explained that he had a concern that the absence on 11 and 12 October was not genuine, the claimant would have had a chance to provide the text at page 74 which, on the face of it, confirmed his doctor's appointment on the afternoon of 12 October, and the fit note which was issued when he saw his doctor the following week on 17 October which confirmed that he was unfit for work due to anxiety from 12 October onwards. That would have alleviated any concerns about 12 October but there would still have been in Mr Hart's mind a real concern about the events of 11 October when the claimant misled Mr Hart about a doctor's appointment. Mr Hart would still have reached the conclusion the claimant left work on that occasion without authority to go to that medical appointment.

81. Had that been the position, in my judgment it would have been reasonable to have dismissed the claimant. He was on what was effectively a final written warning for gross misconduct on 9 October. If there was a reasonable conclusion he had misled Mr Hart and been absent for no good reason that would be enough to justify dismissal. It would have been within the band of reasonable responses to have taken account of the written warning from 9 October even though that warning was imposed in a way which was procedurally flawed. The reality was that as Managing Director involved in the incident Mr Hart was entitled to take the view that the claimant's conduct towards him on 9 October was insubordination and therefore gross misconduct which could have warranted dismissal in its own right. A further instance of deception and (as Mr Hart reasonably believed) leaving work on a pretext without authority could reasonably have resulted in dismissal.

82. How likely was that? Evidence of genuine medically-certified illness from 12 October might have swayed Mr Hart towards leniency, especially given his positive view of the claimant's abilities. In those circumstances I concluded that even if a fair procedure had been followed there was still a 50% chance that the claimant would have been dismissed within a few days (bearing in mind, as Mr Hart explained, that it

would have taken only a few days to get the claimant to a meeting). The compensatory award will be reduced by 50% to take account of that likelihood.

Calculation of the Basic Award

83. There was a difference between the claim form and the response form in relation to gross and net weekly pay, but the respondent's figures were based on ignoring overtime worked by the claimant because it had been provided as a gesture of goodwill. I was satisfied that the overtime should still be taken into account for both gross and net pay purposes and therefore used the figures on the Schedule of Loss which were derived from the previous 13 weeks' pay.

84. The basic award amounted to seven weeks' pay at £489, a total of £3,423.00.

Calculation of the Compensatory Award

85. In relation to the compensatory award the net weekly pay figure was agreed to be £436.80, with pension loss agreed at £5 per week based on the employer's contributions to auto enrolment.

86. There was no issue as to mitigation of loss in the period up to the date of the Tribunal hearing. Mr Hart accepted that the claimant had net earnings from his new job which created a loss of £81.94 each week. Accordingly I awarded the claimant the following sums as loss of earnings in two periods.

87. Firstly between 17 October and 5 November 2017 the claimant had no income from state benefits or earnings and his losses in that period of three weeks were £1,310.40 plus pension loss of £15.00 making a total of £1,325.40.

88. Secondly between 6 November 2017 and the Tribunal hearing on 9 May 2018 (26 weeks) the claimant was employed by Leach Steel and claimed a net weekly loss of £81.94. Mr Hart did not dispute that figure. That produced a loss of £2,130.44.

89. An award of £500 for loss of statutory rights was also agreed.

90. That left the question of future loss. The claimant sought losses for a further 18 months on the basis that he was in a new role with Leach Steel and had been told that if he stayed for three years he had the prospect of becoming a welder inspector on a higher rate of pay than he would have received with the respondent. Mr Hart argued that the claimant should be looking for better paid jobs rather than take such an assurance at face value.

91. I heard further oral evidence on oath from the claimant, who answered questions from Mr Hart. Based on that oral evidence I found as a fact that the claimant had unsuccessfully applied for a better paid job with Langfields immediately before starting with Leach Steel but had been told he was not qualified. He had not been seeking other work since starting at Leach Steel because he wanted to work his way up and become a welding inspector.

92. I concluded that the claimant had taken reasonable steps in staying there until now. Mr Hart had not produced any evidence of any other vacancies (apart from the Langfields vacancy) for which the claimant could have applied if acting reasonably.

93. For future loss, however, it seemed to me that it would be just and equitable to limit the period to 26 weeks rather than the 78 weeks sought by the claimant. As Mr Hart pointed out, employers can promise things without meaning it and staying in a lower paid job without looking for better paid work for such a period would not be something for which compensation could justly be awarded. Restricting the period of future loss to a period of 26 weeks meant that the award for future loss was a further £2,130.44.

94. This meant that the total compensatory award was £6,086.28. That had to be reduced by 50% because of **Polkey**, leaving £3,043.14. That figure had to be increased by 20% because of the unreasonable failure to follow the ACAS Code of Practice, adding £608.63. This produced a total compensatory award of £3,651.77.

95. The claimant did not receive any relevant state benefits and the recoupment regulations did not apply.

Summary of Awards

96. A summary of the compensation awarded is as follows (all figures in £s):

Basic Award	
7 weeks x 489 =	**3,423.00**
Compensatory Award	
Lost earnings 17/10 – 5/11/17	1,325.40
Lost earnings 6/11/17 – 9/5/18	2,130.44
Future loss 26 weeks x 81.94	2,130.44
Loss of statutory rights	500.00
Total before adjustments	6,086.28
Less 50% Polkey leaves	3,043.14
Add 20% ACAS uplift	608.63
Total Compensatory Award	**3,651.77**

Employment Judge Franey

18 May 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

15 June 2018

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2400074/2018

Name of case(s): Mr J Cornthwaite v W. E. Couplings Limited

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 15 June 2018

"the calculation day" is: 16 June 2018

"the stipulated rate of interest" is: 8%

MISS H KRUSZYNA
For the Employment Tribunal Office