THE EMPLOYMENT TRIBUNAL

SITTING AT:	**SOUTHAMPTON**
BEFORE:	**EMPLOYMENT JUDGE M EMERTON**
MEMBERS:	**MS A SINCLAIR, MR P FLANAGAN**

BETWEEN:

Mr G P B Mauluka

Claimant

AND

IDT Systems Ltd

Respondent

ON:	**30-31 July 2018** **16 August 2018 (in chambers)**

APPEARANCES:

For the Claimant:	**Mr W Bryce (lay representative)**
For the Respondent:	**Mr R Morton (Solicitor)**

RESERVED JUDGMENT - REMEDY

The unanimous decision of the tribunal is as follows:

1. The claimant is entitled to a basic award for unfair dismissal of £1,956.00.

2. The above sum is not liable for further adjustment.

3. The respondent is ordered to pay the claimant a compensatory award for unfair dismissal of £5,858.40. This sum is made up as follows:

    a. £300.00 representing the loss of statutory rights.

    b. Loss of earnings of £4,582.00.

    c. An uplift to these sums of 20% because of the respondent's unreasonable failure to comply with the ACAS Code, increasing the sums to £360.00 and £5,498.40 respectively, giving a total compensatory award of £5,858.40.

4. The recoupment regulations do not apply.

REASONS FOR REMEDY JUDGMENT

Summary

1. This is a case where the tribunal found that the claimant was unfairly dismissed, and delivered an oral judgment and reasons as to liability. A liability judgment was sent to the parties on 10 August 2018. This sets out that the claim of protected disclosure is not well founded, but that the claim of unfair dismissal is well founded.

2. Written reasons were not requested for the liability judgment.

3. Because there was very limited time to complete the hearing (see below), the tribunal needed to reserve its judgments as to liability. This is the reserved judgments and reasons as to remedy.

The hearing

4. The case was originally listed for a three-day hearing (liability and remedy). Unfortunately, the hearing length was reduced to two days, despite the latter time being insufficient to resolve all matters. It was heard on 30 and 31 July 2018. The tribunal heard evidence as to liability and remedy, and then closing submissions on both. The judge indicated to the parties that it would be likely that the tribunal would be in a position to deliver oral Judgment only as to liability, but the timings would probably preclude delivering oral judgment as to remedy. In the event, as expected, having delivered oral liability judgment on the afternoon of the second day, the tribunal reserved its judgment as to remedy.

5. At the start of the hearing, and on completion of delivering the oral judgment and reasons as to liability, the judge explained to the parties in some detail the arrangements for publishing judgment and reasons online (subject to Rule 50, which does not apply in this case). After the liability judgment was delivered, dismissing the claim for protected disclosure detriment as being without merit, and finding that the dismissal was procedurally unfair, the judge pointed out that one of the main issues remaining, upon which the tribunal was reserving Judgment, related to the *Polkey* argument. He pointed out that in view of the significant procedural failings, and based on the respondent's case that the claimant would rightly be dismissed after a fair procedure, it was likely that the tribunal would make criticism of both parties. As the tribunal was reserving its judgment adds to remedy, the judgment would be accompanied by reasons, which would be in the public domain. The tribunal had noted that the schedule of loss was not claiming particularly excessive sums in relation to the unfair dismissal, and the respondent had effectively conceded the basic award, and that a

procedurally fair dismissal would have taken at least another four weeks, and that there should be some ACAS increase to the compensatory award. Relatively small sums appeared to be in dispute.

6. The judge had in mind the terms of rule 3 of the 2013 Rule of Procedure, which provide that, “A Tribunal shall wherever practicable and appropriate encourage the use by the parties of the services of ACAS, judicial or other mediation, or other means of resolving their disputes by agreement”. In the circumstances, this appeared to be the type of case where the parties should have very little difficulty in settling the case in respect of remedy. In the alternative, it would be open to the parties to agree the quantum of any remedy awarded, and the tribunal could issue a remedy judgment by agreement.

7. In light of the fact that the parties would be unlikely to want to receive a judgment and reasons criticising them, and the likelihood and ease of agreeing the amount of damages at a sensible and proportionate level, both parties were advised that should they settle the case they should inform the tribunal forthwith. If that was the case the tribunal could use its scarce resources to deal with other cases, and would not need to meet in chambers to determine the outcome, and issue a judgment and reasons.

8. The tribunal expected that the parties would avail themselves of the opportunity to settle the case, which would plainly be a sensible outcome.

9. As it transpired, however, the parties were unable to agree the case and both parties confirmed to the tribunal the day before the reserved judgment discussions in chambers, that they had not settled the case and there appeared to be little prospect of doing so. In consequence, tribunal went on and reached the conclusions set out in the judgment above, and explained in the reasons below.

10. It is not necessary to set out all the tribunal’s conclusions, only those directly relevant to the amount of any damages payable.

11. It should be noted that the liability judgment left matters that the dismissal was plainly procedurally unfair, on any analysis. The tribunal expressly reserved its opinion as to whether there was any basis for adjusting the compensation by reason of breaches of the ACAS Code (which had been taken to account in determining the unfairness of the dismissal) and in respect of *Polkey* and contributory conduct.

12. The precise amount of the compensation remained in dispute, including questions of loss of earnings and mitigation of loss. At the start of the hearing, the tribunal confirmed it would hear evidence and submissions on liability and remedy together, and in fact it went on to do so and heard closing submissions on both.

The issues

13. It was agreed that the issues in the case were those set out in the Case Management Summary sent out by the tribunal following the Preliminary Hearing for Case Management on 1 February 2018. These were subject to further clarification during the hearing.

14. It was not in dispute that the claimant was an employee, that he was expressly dismissed and that he had sufficient continuous employment to be protected from unfair dismissal under the Employment Rights Act 1996. The claim of unfair dismissal was brought solely under Section 98 of the Act.

15. The issues in relation to unfair dismissal are set out at paragraphs 19 – 25 of the Case Management Summary. The issues in relation to remedy were summarised at paragraphs 24 and 25, confirming that the claimant was seeking only compensation, and not reinstatement or re-engagement. The respondent raised the following issues in respect of remedy:

    1) The conduct of the claimant prior to his dismissal was such that it would be just and equitable to produce any basic award pursuant to Section 122(2) of the Employment Rights Act 1996;

    2) The claimant was put to strict proof as to mitigation of loss;

    3) If the dismissal was procedurally unfair, remedying such defects would have made no difference to the ultimate outcome – namely the claimant's dismissal – and so the compensatory award should be reduced or extinguished to reflect this (Section 123 of the Employment Rights Act 1996); and

    4) The conduct of the claimant was such that it caused and/or contributed to his dismissal and any compensatory award should be reduced/extinguished by virtue of Section 123(6) of the Employment Rights Act 1996.

16. At the start of the hearing it was also confirmed that the parties agreed that the question of an adjustment by reason of breaches of the ACAS Code was in issue, whereby the claimant was claiming that the breaches were such that an uplift of 25% should be applied, whereas the respondent, without conceding any breaches, suggested that any uplift should be no more than 10%.

17. Mr Morton confirmed that whilst the respondent continued to rely on contributory conduct in respect of the compensatory award (the contributory conduct in question being his attitude in addressing his performance issues), the respondent was no longer arguing that the basic award should be reduced. In respect of the *Polkey* argument, if the tribunal was to find that the dismissal was procedurally unfair, the respondent would argue that a fair procedure would have taken up to four weeks, after which there was 100% chance of dismissal.

18. The tribunal went through the Schedule of loss, set out at pages 160 and 161 of the bundle, and confirmed that the basic award was agreed and that the net weekly earnings and loss of earnings was also agreed, subject to a dispute as to how much credit should be given for sums received from the respondent (albeit the facts did not appear to be significantly in dispute). There was a dispute over mitigation of loss, and how far any loss of earnings should be continued into the future (if at all), as to whether account should be given to any likely future pay rise which the claimant might have received in early 2018, and the amount of any loss of statutory rights (although the latter is very much within the discretion of the tribunal).

19. It was also clarified that although the respondent was relying on capability in terms of the potentially fair reason for dismissal, in respect of any subsequent dismissal they would rely in the alternative on some other substantial reason, namely that the respondent had lost confidence in the claimant's ability to carry out his duties; ie: breach of mutual trust and confidence.

<u>Closing submissions as to remedy</u>

20. Both parties presented written and oral submissions. What appears below is intended to be a broad overview of the salient points of those submissions in respect of remedy, rather than intending to be a comprehensive summary of all the arguments put forwards.

21. Mr Morton, on behalf of the respondent, provided four pages of written submissions. He invited the tribunal to make adverse credibility findings in respect of the claimant and suggested that various findings of fact were made in the respondent's favour. He conceded that there were a number of procedural issues relating to the dismissal, but contended that the claimant had been warned on a number of occasions by the respondent about his poor performance, and would have been fairly dismissed by the respondent for that reason notwithstanding the procedural issues, within a period of about four weeks. Any compensation should therefore be limited, and it was asserted that the claimant had failed and continued to fail in his duty to take reasonable steps to mitigate his loss. In oral submissions, Mr Morton expanded upon his arguments and reiterated that the documents in the bundle confirmed that the claimant had been warned, in particular in November 2016 (by the Managing Director) in respect of his performance prior to events of March and April. He submitted that the claimant had never been told by the respondent that he would not receive a reference, and if the claimant sought to rely on that as an excuse for delay in finding other work, then he should not be permitted to do so. He had in fact never asked for a reference. The claimant had been given opportunities to improve his performance in the job, and the respondent had made its best attempt to provide a procedure for dismissal and had also attempted to settle the matter with the claimant to avoid the need for an express dismissal. He confirmed that although the respondent's pleaded reason for dismissal was

capability, he was also relying on breakdown of the relationship and loss of trust in the claimant as some other substantial reason, were the Tribunal to consider that there may be a fair dismissal at a later stage. He invited Mr Bryce to respond to this point in his oral submissions. In essence, the respondent was not confident that the claimant could or would perform his role in future. He reiterated that the respondent would dispute any ACAS uplift as high as 25%, and pointed out that the claimant had miscalculated loss of earnings, because it was clear from the documents provided that the claimant was in fact paid until 7 April 2017. Any compensation for loss of earnings should not commence, as inaccurately asserted in the Schedule of Loss, on 3 April 2017.

22. Mr Bryce was encouraged by the tribunal to make oral submissions in response. He chose not to do so, which was unfortunate, as it denied the tribunal the opportunity to hear what the claimant would submit in response to points made by the respondent.

23. Mr Bryce relied solely upon his written submissions, which may be summarised as follows.

24. The submissions on behalf of the claimant dealt only with liability issues in respect of unfair dismissal (and did not deal with the protected disclosure issues). Despite Mr Bryce being reminded of the need to make closing submission in respect of remedy, and being given the opportunity to reply to Mr Morton (including such points as a subsequent “some other substantial reason” dismissal), he failed to deal with these points, save for the assertion that there were no written warnings against the claimant prior to his dismissal and that the claimant would not have been dismissed had a proper procedure been followed. It is perhaps somewhat surprising that the claimant was unable to agree compensation with the respondent, when his representative had chosen not to reply to the respondent’s submissions as to remedy.

The Facts

25. Although both parties suggested the other party was not credible, and invited the tribunal to make findings of fact in their favour, the tribunal considers that in reality few of the primary facts were in dispute, and it was rather that the interpretation upon those facts which was contested. The tribunal found the claimant’s evidence to be broadly credible, even though he perhaps had an inflated view of his own professional expertise which was plainly not shared by his managers. Similarly, the tribunal found that Mr Morgan’s evidence on behalf of the respondent was also broadly credible. The tribunal found Mr Morgan’s evidence to be honest, and he also made various concessions as to how he might have handled things better, but notes that there were nevertheless flaws in the evidential basis of the case as presented by the respondent.

26. The main problem with the respondent’s evidence was that Mr Morgan’s

background, as being the manager in charge of finance and other support services such as HR, was that he had no day-to-day hands-on involvement in the IT and technical aspects of the management of the business. Mr Morgan made it clear that the CEO of the Company, Mr Peter Woodd, was extremely hands-on. This being a small Company, with some 25 employees, Mr Woodd had a detailed overview of the day-to-day workings of his business, and of the various projects the business was undertaking. It became increasingly clear to the tribunal, during the course of the evidence, that all the key decisions in the business were taken personally by Mr Woodd. It was also clear that the circumstances of the claimant's dismissal were very much a reflection of the view which Mr Woodd had taken, and had discussed with Mr Morgan. Mr Morgan was then deputed to complete the HR-related issues, to put Mr Woodd's conclusions into practice. It was also notable that Mr Morgan conceded that although the Company had policies covering various matters (see below), in previous dismissals they had also failed to follow adequate procedures, but had resolved matters by reaching a financial agreement with the employee in question as to the terms of their termination. That was doubtless a factor which played a significant role in the claimant's case, noting also that this was a small and informal business, in a sector where the tribunal would take judicial notice of the facts that it is not unusual for people to move on after a relatively short period. Noting that many of the IT related projects which the business was engaged in were of a short-term duration, it would not have been surprising to third parties if the claimant's employment had ended anyway. In those circumstances, it would not be at all surprising if the parties had reached some sort of mutual agreement as to the terms of the claimant's departure, on the understanding that he would receive a sum of money and would be expected to find a new job relatively quickly.

27. This case very much turns upon its own facts, and those facts include the matters referred to above, noting the particular significance of this being a small business, of there being a very hands-on CEO, and of it becoming increasingly clear that CEO had lost confidence in the claimant's abilities.

28. The Tribunal makes the following findings of fact upon a balance of probabilities:

29. The respondent described itself as, "*A leading IT systems provider focussed on delivering complete 3D and 2D surface decoration solutions for most materials across all industries"*. The Company included a Senior Management Team with such people as an Operations Business Manager (who was the claimant's line manager, but management became generally involved under the close supervision of the CEO, Mr Peter Woodd). Mr Tom Morgan is the Chief Financial Officer of the Company, and also had various other management and supervisory responsibilities.

30. The claimant commenced employment on 1 September 2014 as a Design Assistant, following on previous service dating back to January 2013. His role included working with the IT and Production Teams on agreed tasks,

and his contract of employment required him to take on additional duties. This is what happened.

31. The claimant had a contract of employment, set out in relatively conventional terms, which made reference (amongst other things) to performance appraisals, arrangements for termination, and to disciplinary and grievance procedures. The latter was set out in the Company handbook, which is expressly stated to be non-contractual.

32. The Company handbook did not contain any express provisions relating to performance-management or capability, despite there being arrangements for annual appraisals (which it would appear either did not occur, or nothing of any particular significance was dealt with at such appraisal meetings). The handbook did not have a capability procedure, but the wording of the disciplinary procedure (not dissimilar from the ACAS Code of Conduct) plainly made it clear that the disciplinary procedures relating to dismissal and appeal would be followed in the circumstances other than strictly disciplinary/conduct matters. The disciplinary procedure confirmed that "*it may not be necessary to resort to formal procedures, in which case the Company will discuss the matter with the employee suggesting areas for improvement*" but also set out a relatively conventional arrangement for warnings and for disciplinary procedures and an appeal process including the right to an appeal hearing. The warnings included an oral warning, which would remain on the record for disciplinary purposes for six months, and the procedures also provided for written warnings and final written warnings which would remain on the record for disciplinary purposes for twelve months.

33. It is not in dispute that the claimant had access to the Company handbook, and indeed, when he appealed, he made express reference to its contents.

34. From time to time the claimant ran into various difficulties in his employment, albeit none of them, until his dismissal, warranting formal disciplinary action resulting in any formal written warning. It is clear that the procedures were relatively informal, and the tribunal draws the inference that the respondent generally relied upon the part of the disciplinary procedures suggesting that matters could be dealt with informally. In a small and informal Company, this is not surprising.

35. There were a number of occasions when a file note was taken of a meeting with the claimant, when concerns as to his conduct or performance were discussed with him, and set out in that note, but these are not expressed to be in any sense a formal oral or written warning within the disciplinary procedures. If they *did* amount to oral warnings under the procedure, then (although they could be kept in the record for other purposes) their currency as a disciplinary warning would be restricted to six months.

36. During his employment, the claimant carried out various roles, and was promoted in 2013 to Production Manager. In 2014 he was promoted to

Design and E-Commerce Assistant. He was plainly expected to carry out a range of tasks, and in September 2016 was asked to lead on a project involving the design of a user interface, and supervising a subcontractor, to produce a mobile phone and tablet App. This went beyond his previous areas of specialist expertise, and was more akin to project management. It would build on the claimant's existing areas of expertise, and would require him to ensure that contractors provided the necessary input into the App for which he was personally responsible.

37. Although the claimant has tried to suggest to the tribunal that he was being used on tasks outside his competence, it is plain that this was precisely the sort of task which he could be asked to do. The tribunal also notes that at the time he made no objection to taking on this new task. He accepted the Project Management role, clearly on the basis that it was a matter that he would, or should, be capable of carrying out sufficiently competently. The tribunal was unimpressed with the suggestion that the claimant was unfairly required to carry out a role outside his job description.

38. The tribunal notes that prior to this, the claimant had received a number of informal warnings on various matters, involving the claimant being required to adopt a more professional attitude, and to work better within the team. There were recorded issues in relation to the way he conducted himself in the workplace, and liaised with clients, and such matters as rudeness had been raised. These do not reflect well upon the way the claimant performed his duties.

39. There was no suggestion that there were ongoing serious matters, but it is a matter of record that the claimant was from time-to-time taken to task, because there were areas with which management were unhappy, and where the claimant was required to improve.

40. When the claimant agreed to carry out the work on the App in the summer of 2016 (with work commencing in September of that year), he was fully aware that the App was due to go live before the end of December 2016. He was also aware that he was personally responsible for ownership and delivery of this project.

41. Matters did not go entirely according to plan.

42. In November 2016, the CEO expressed his concerns directly to the claimant by email, copied to others in the management team. For example, on 1 November 2016 the CEO reinforced the importance of the claimant taking ownership of the project in relation to the "look book" related to the App. The CEO expressly queried whether the claimant was making sufficient commitment, was thinking, and suggested that he was causing additional work for others. The rather blunt email of that date raised various matters of concern, and asked the claimant to "*work on a revised written content review again and discuss with me tomorrow*". This did not appear to be a matter of significant concern, but certainly indicate that the CEO was not

entirely happy with the claimant's performance, and was prepared to intervene if he was not satisfied.

43. Of perhaps greater concern, was that on 23 November 2016 the CEO again felt it necessary to email the claimant in relation to the look book, relating to the App, and was again fairly blunt in expressing his concerns as to the way the claimant had been handling the issues. He stated, "*It lacks any commitment from you whatsoever. You have just copied and pasted everything from others and wasted ten days*". The email went on to say, "*There are no excuses anymore. You have been given so many opportunities to show you care about what you do. You still don't appear to be committed. Your track record is very poor. We have given you many chances. We need committed people that wish to succeed and understand it requires effort*".

44. Notwithstanding the lack of any formal appraisal process to register concerns, the tribunal considers that it was self-evident from the email referred to in the previous paragraph that the CEO, who was in a strong position to have an overview of the work of the Company and of individual employees, was far from satisfied with the claimant's attitude or performance, and required significant change from the claimant. This was doubtless in the context of the need to deliver the App by the end of the following month, with concerns that the claimant did not appear to be in a position to deliver what was required of him.

45. The claimant was required to attend a meeting the following morning. The tribunal has seen the record of that meeting, described (perhaps incorrectly) as "disciplinary meeting," which sets out in more detail areas where the claimant failed to reach the required standard in going to the launch of the app and lack of effort he had put in and an unwillingness to work beyond standard hours. The CEO confirmed to the claimant that he had a responsibility "*to keep everyone informed on the progress and the development, and to flag any concerns and roadblocks*". The note (which the tribunal accepts as being broadly accurate) records that the claimant acknowledged that his performance as a Project Manager needed to improve in order to deliver the App to the deadline of 31 December 2016, and stated that he would work harder to achieve these goals.

46. It is clear that, for whatever reason (and in cross-examination the claimant accepted at least partial responsibility), there were delays in delivering the App, and the deadline was moved to new year, and later to April. The claimant continued to work on the App. Matters came to ahead in mid-March 2015. At this point the App was still not ready to be launched.

47. At this point went on a two-week holiday. Prior to going on holiday, although the claimant suggested that matters are in dispute, in fact it would appear to be common ground that the claimant held a meeting with other staff on 15 March 2017, in order to hand over the App project and to inform colleagues as to the state of play and work needing to be done. The tribunal accepts

the respondent's evidence (with which the claimant appears to agree) that during the meeting he reassured colleagues that everything was on track and almost ready to go, with limited further work needed.

48. The tribunal considers it is entirely clear from the respondent's evidence that what in fact happened was as follows. After the claimant departed on holiday, at which point the CEO was satisfied (from what the claimant had said) that the work was apparently all on track, in fact the IT team tasked with finishing off the work discovered that things were far from satisfactory, and that the claimant had plainly exaggerated the extent to which his work had been completed. It is clear that the CEO was extremely dissatisfied, and he considered that the claimant had put in very poor performance and had misrepresented the extent of the work to be done. That work then had to be carried out by other colleagues, who had other work to complete and who were plainly not expecting to have to take over the claimant's incomplete work in his absence.

49. Although the tribunal has not heard from Mr Woodd, It is clear from Mr Morgan's evidence that M Woodd was extremely dissatisfied with the claimant, especially in the light of warnings previously given by email and at the meeting in late November. The tribunal accepts that Mr Woodd had entirely lost trust in the claimant's ability to carry out his role, to contribute to the business and to properly communicate with colleagues as to his work. Although the tribunal was told that, technically, no decision to dismiss was taken by Mr Woodd, it is clear from the content and tone of Mr Morgan's evidence that he was left in no doubt in the second half of March 2017 that the CEO considered that the claimant was no longer fit to remain an employee, and that the parting of the ways was inevitable.

50. It would appear the App went live in late March 2017. The evidence was unclear and Mr Morgan did not, unfortunately, appear to have any clear understanding as to the actual sequence of events in respect of launching the App, and was unable coherently to rebut the claimant's evidence on the point. No doubt, had the CEO troubled to give evidence, he could have dealt with the point. But he chose not to attend the tribunal, and left Mr Morgan to struggle to deal with matters outside his own personal knowledge. The tribunal does accept, however, from Mr Morgan's evidence, that it was clear that the CEO and the claimant's technical colleagues formed a clear and informed understanding that the claimant had left the App with significant bugs, which took other employees a considerable amount of work to resolve.

51. Between them, Mr Morgan and Mr Woodd came up with a letter of allegations to send to the claimant.

52. Although what Mr Morgan and Mr Woodd drew up was in some respects looking like arrangements for a disciplinary hearing, to do with conduct matters, the tribunal accepts was at heart a matter relating to capability. In order, no doubt, to emphasise the difficulty that the claimant was in, this

letter referred to every matter which had previously caused concern, including relatively minor and informal warnings given in the past and such issues as booking leave, making travel claims, and returning equipment. Mr Morgan was however, clear that the key underlying allegation which caused concern in relation to the claimant's future employment, was that he had failed to progress the App as he should have done, and that when he handed it over before going on holiday, he had provided a misleading picture to colleagues and management.

53. It is unfortunate that the letter which Mr Morgan signed, having agreed it with the CEO, was not well-worded. It did not sufficiently explain the precise allegations, did not warn the claimant he might be dismissed, nor tell him he could bring a colleague with him. Although this is not strictly a matter to do with remedy, the tribunal has accepted that through no fault of Mr Morgan it turned out the claimant had not (as expected) received the allegation letter in advance.

54. At the start of the meeting on 3 April 2017, which Mr Morgan held with the claimant, it was immediately clear to Morgan that the claimant had no knowledge whatsoever as to the contents of the letter, nor the precise allegations against him. Mr Morgan sensibly drew the meeting to an early close. Somewhat unwisely, however, he failed to address his mind as to the appropriate way ahead.

55. It would appear that Mr Morgan was to a large extent side-tracked by his hope that, as had happened on previous occasions with other employees, some form of accommodation could be reached whereby the way ahead could be agreed probably with the claimant resigning on the basis of being paid a small lump sum, with an agreed reference. Whatever precisely was said to the claimant, it is clear that the claimant, who was no doubt distracted from focussing on the precise details by the knowledge that his employment was about to end, was left with the distinct impression that he was being sacked, albeit Mr Morgan had indicated that an express dismissal could be avoided if he agreed to various matters (which would include an agreed reference). Although the claimant asserts that he was told that if he did not agree to a settlement he would not receive a reference, the tribunal considers that the facts would appear to be somewhat more nuanced. If the claimant believed that he would not be given a reference if he did not "sign up", that was not in fact what Mr Morgan said. The tribunal accepts Mr Morgan's evidence that he did not say to the claimant that if the claimant was expressly dismissed he would not receive a reference, but he evidently sought to encourage the claimant to reach an accommodation, which would include an agreed reference.

56. Matters following that meeting became somewhat confused as although the claimant had been left with the clear understanding that his employment would end, he was then told by Mr Morgan that he would be suspended, no doubt pending discussions as to reaching agreement. When no agreement was reached, the claimant was then in fact expressly dismissed by email on

6 April 2017.

57. The claimant was paid up to Friday 7 April 2017, and although it has no significant effect on remedy, the tribunal would note that 6 April 2017 would appear to be the effective date of termination: this is the day that the email from Mr Morgan to the claimant confirmed that his employment was terminated. Although the claimant had been informed of the clear *intention* to dismiss him (at least if no settlement could be reached) at the meeting of 3 April 2017, this was only made final on 6 April. However, any loss of earnings would not commence until after the week ending Friday 7 April, and the claimant was also paid a month's pay in lieu of notice, to which he was entitled under his contract of employment.

58. The claimant attempted to appeal, but that that matter came to nothing and further exchanges in relation to settling the matter also came to nothing.

59. The claimant sought other work, and although the parties appeared to be in disagreement, the reality in the tribunal's view is that in fact the claimant made reasonable efforts to find new work. Just over three months after dismissal the claimant secured new employment, which he commenced on Monday 17 July 2017. This was on a similar, but slightly lower, salary.

60. The Tribunal considers that three months is not an unreasonable period commence new work, even if there is a reasonable amount of work within the sector. It would be unreasonable to expect the claimant necessarily to be able to commence new employment before that date, or indeed necessarily to match his previous salary from day one. In the event, the tribunal does not need to deal with evidential matters further, but would observe (on the mitigation of loss point) that there is some force in the respondent's arguments that, with time, the claimant could expect to improve his salary either within his new Company, or by applying for more senior jobs elsewhere, but that in fact he chose not to do so.

61. It is also unrealistic to assume that the claimant would have been entitled to a £1,000 salary increase the following year, had he not been dismissed, nor that he could not reasonably expect to receive an annual rise from his new employer, along the lines of what he might have received had he not been dismissed. However, these are not matters which the tribunal needs to consider further.

<u>Conclusions as to Remedy</u>

62. This is a case where the Recoupment Regulations do not apply, because the claimant was not in receipt of job seekers or other allowances, and the compensation falls to be considered as purely financial compensation for unfair dismissal. The claimant is not seeking reinstatement or re-engagement.

63. In respect of the <u>basic award</u>, it is not in dispute between the parties that the

claimant is entitled to a basic award of £1,956. Although it had originally been identified as an issue that contribution should be applied to this sum, this argument was abandoned by the respondent at the hearing. The tribunal considers the respondent was right to abandon any such argument.

64. In respect of the compensatory award, the Tribunal considers that the appropriate sum for loss of statutory rights is £300. In respect of the loss of earnings, the tribunal notes that the schedule of loss is in error, as it fails to acknowledge that the claimant was paid up to the end of the week commencing 3 April, and it purports to argue that the loss of earnings commenced on 3 April 2017 and that it continued for fifteen full weeks until new employment started on Monday 17 July 2017.

65. The tribunal agrees with the respondent that it is clear from the evidence that the loss of earnings only commenced after the end of that week, and the tribunal considers that (effectively) the loss of earnings lasted for *fourteen* weeks from Monday 10 April 2017 to the commencement of new employment on 17 July 2017. This was at a rate of £463 per week (net), amounting to £6,482. Credit needs to be given for the pay in lieu of notice of £1,900 (net), meaning that there was a total loss of earnings from dismissal to commencing the new employment of £4,582.

66. That figure above is, on the face of it, a theoretical sum. This is because before the Tribunal can ascertain loss of earnings it must address its mind to the question of any adjustments to the overall figure.

67. The initial point to consider is contributory conduct. Although this was abandoned in respect of the basic award, it was pursued by Mr Morton in respect of the compensatory award, on the limited basis of the claimant's attitude towards performance issues. This argument was never satisfactorily developed, and the tribunal considers that in a case where the dismissal was for capability, with an alternative argument that dismissal could have been for loss of confidence in the claimant (breach of mutual trust confidence), this is somewhat stretching the potential scope of section 123(6) of the Employment Rights Act 1996. The tribunal must consider "*whether dismissal was to any extent caused or contributed to by any action of the complainant, where if that is the case the tribunal shall reduce the amount of compensation as such proportion as it considers just and equitable having regard to that finding".* The tribunal considers that this is much more properly considered as a *Polkey* reduction under Section 123(1), in respect of what sum is just and equitable. In any event, even if a "attitude" is strictly speaking relevant to a capability dismissal, it was made clear by the Court of Appeal in the case of *Nelson v BBC (2) [1980] ICR 110*, that the relevant action must be culpable or blameworthy, it must have actually caused or contributed dismissal and also, it must be just and equitable to reduce the award by the proportion specified. The tribunal considers that on the facts of this case, relating to the claimant not working hard enough to carry out his tasks and maintain that the confidence of his managers, this falls below what could properly be described as "culpable or blameworthy".

In any event, it would not be just and equitable to penalise a claimant in a capability dismissal, where the respondent's principal argument is that they could have carried out a fair dismissal. This point is more appropriately considered under the more general "just and equitable" Polkey arguments. The tribunal declines to make any reduction to the compensatory award by reason of contributory conduct.

68. In relation to the breaches of the ACAS Code in respect of dismissal, the tribunal had regard to significant breaches in considering liability, and considers that these are also significant matters which should affect the compensatory award by reference to Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. The tribunal takes into account, however, that this was a relatively small and informal Company, and in the same way as when it considered liability it took into account the size and administrative resources of the Company, considers that the extent of the departure from the ACAS Code of Conduct should take the circumstances into account. The Company also had no in-house legal or HR expertise, and at the relevant time it would appear very little external advice (albeit that position appears subsequently to have been remedied).

69. The essence of the unfairness includes that the claimant had faced a number of allegations, albeit there was only one core area that the respondent in fact relied upon as justifying dismissal, but matters came to a head without him being given the opportunity to see a coherent case against him, to see the supporting evidence or to allow him any real opportunity to test that evidence or respond with his own case, nor to appeal it. That is a very significant breach. However, against the background of this being a small and informal Company, and of Mr Morgan perhaps getting somewhat out of depth and distracted by the hope that the matters could be amicably settled, the tribunal notes that this is not a case where *no* procedures were followed. The employer did have procedures, albeit not dealing expressly with capability matters, in the staff handbook. Mr Morgan did at least start out by attempting, if somewhat ineffectually, to adhere to those procedures. The initial letter was defective, and in breach of the ACAS Code, because Mr Morgan had not sufficiently carried out an initial investigation or reflected that in writing, because he took on trust what the CEO had orally told him. No doubt the CEO could have put this in writing, to support the case against the claimant, had he thought fit to do so or been requested to by Mr Morgan. This was in breach of paragraph 5 of the ACAS Code on disciplinary and grievance procedures 2015.

70. It was correctly decided by Mr Morgan and the CEO that, as there was a case to answer, the claimant should be informed of this in writing. However, the letter sent was in breach of paragraph 9 of the ACAS Code of Practice in that it did not contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the claimant to prepare to answer the case at a disciplinary meeting. Furthermore, it would have been appropriate to provide copies of written evidence, including witness statements, but this was not done. When the claimant made it clear

he had no knowledge on any such letter or allegations, Mr Morgan did not, as he should have done, seize the opportunity to provide an immediate duplicate letter and reschedule a meeting after the claimant had time to consider his position. The letter also breached paragraph 10 because it did not inform the claimant of his right to be accompanied. There was breach of paragraph 11 because in fact there was never any adequate meeting, and the meeting which was started was brought to a swift close once Mr Morgan realised the claimant was upset and had no knowledge of the allegations against him. The considerable muddle, in respect of whether or not the claimant had been dismissed, or whether they were pursuing alternative avenues, is not expressly in breach of the Code, but the tribunal considers that the failure to offer the claimant the right to appeal, and then when he did so (albeit perhaps not in the clearest of terms) to offer an appeal hearing, was also in breach of the ACAS Code (paragraph 22 and paragraphs 26 – 29).

71. The tribunal considers that these provisions were breached without reasonable excuse, but some credit should be given for the employer having a policy, even if that was not properly followed, and at least some sort of an attempt to start to follow the policy, even if that was subsequently derailed and ignored. The tribunal considers that in those circumstances, this is not the worst case of a failure to follow procedure and it would not be just and equitable to apply the highest adjustment of 25%. It is not, however, far below that level, and there were steps which could easily have been taken but which were ignored. The tribunal considers that an appropriate adjustment is 20%. The compensatory award should therefore be increased by 20% by virtue of Section 207A of the 1992 Act.

72. One of the more significant disputes in the case, and which is particularly relevant to the question of remedy, is the question of whether a fair procedure would have resulted in dismissal, and if so how long such procedure would be (the *Polkey* point).

73. This is an area where the tribunal has heard only limited evidence, not assisted particularly by the claimant's perhaps refusal to accept what others evidently thought of him, and his pious belief that a proper investigation would plainly have cleared him and have upheld his competence as an employee. This was not a realistic view.

74. The tribunal considers that it is abundantly plain, from previous warnings and in particular the CEO's email of 23 November 2017, that the CEO was far from happy with the claimant's performance, and had made it abundantly clear that there must be very significant improvement. It is also abundantly clear that even if the CEO had been lulled into a sense of security, that the events of March 2017 led him to conclude that in fact the claimant had not made the progress hoped for, and had significantly misrepresented the position to colleagues when handing over the App before going on holiday.

75. The tribunal also considers that, from the evidence called at the tribunal hearing, it is clear that the CEO of this small Company, had (by the middle of march 2017) come to a very clear conclusion that whatever the precise rights and wrongs of various incidents in the past, things were not looking good for the claimant. A combination of the warnings delivered in November 2016, of subsequent delays in the claimant delivering the App he was project managing, and of matters that came to light after the claimant went on leave in March 2017, led the CEO inescapably to the view that he could no longer trust the claimant. To put it another way, the claimant had behaved in a way which had completely undermined the trust and confidence of management in his ability, going forwards.

76. A complication in this case is that the respondent, justifiably, relies on the principal reason for dismissal as being capability, which the tribunal has accepted. But the respondent has also argued, from a logical basis, that a subsequent dismissal may well have been for breach of mutual trust and confidence. This makes the equation more complex, a complexity which is not assisted by the lack of express capability procedures in the staff handbook. One might expect a prescribed capability procedure in, for example, a large public sector employer, who might well have processes for formal capability meetings and warnings, with matters such as a three month review. The respondent had no such procedures in place, and can be expected to have adopted any such procedures with a degree of formality, and would be unlikely to have had a long-drawn-out procedure. No would a fair capability process necessarily require complex and lengthy procedures.

77. The respondent has conceded that a fair process would have taken up to four weeks. The tribunal agrees that a large part of that period would in any event be necessary, to ensure that a proper investigation or report was prepared, accompanied by a properly drafted letter setting out the allegations with supporting evidence, allowing the claimant to know precisely why it was that the respondent was considering dismissing him and allowing him sufficient time to prepare his defence, taking advice as necessary and being accompanied by an employee or union representative (which might itself have required a postponement to a suitable date). The tribunal recognises where trust and confidence is undermined, it may well be that it would not be necessary to provide an opportunity for improvement as that further delay and warnings would not necessarily be a matter which would assist once that essential trust and confidence has been lost. However, as the respondent was at least initially relying on capability, the tribunal considers that a fair process should have at least acknowledged and provided the claimant a greater opportunity to attempt to show that either his capability had improved or that he had learnt his lesson such that his capability could be relied upon in the future. The tribunal notes that the respondent did have an appraisal system, albeit it does not appear to have been used for this purpose, and it would not have been difficult to have set out in writing precisely what the concerns were and as well as having allegations to which the claimant could respond before dismissal, to give him some opportunity to show that he had the necessary capability and

attitude to succeed.

78. In the absence of such a policy, it is difficult for the tribunal to know how long a fair procedure should have taken, as the position at the beginning of April 2017 was that the respondent was of the view that capability procedures were needed, but then wholly mishandled those procedures. Even though dismissal, on balance, would have been more likely to have been for mutual trust and confidence, at this point the respondent was choosing to treat it as capability. The tribunal does not know what procedure the respondent would have adopted, and indeed the respondent has not itself set out precisely how it would have handled matters. The claimant himself has also not made any suggestion, perhaps because he unfortunately continues to dispute that there was any real cause for concern. The claimant's case is not helped by the failure of Mr Bryce to make coherent submissions on remedy.

79. Noting various factors, including the claimant's continuing argument that he had nothing to answer because he had done nothing wrong, and that he was a good employee, plainly that was not the view taken by management and in particular by a hands-on CEO who plainly knew what was going on in his Company. The tribunal takes a realistic and pragmatic view, and while it considers that a proper procedure would have taken some weeks, considers that Mr Morgan's evidence makes it clear that there was a settled view from the CEO, based on what the CEO was himself observed and considered. Whilst complete clarity would have required more detailed evidence from the respondent, the tribunal also found the claimant's evidence to be somewhat unhelpful and unrealistic on the point, and on balance takes the view that the CEO would have been unlikely to change his underlying view, and that view was rational, and was that the claimant could no longer be trusted to carry out his duties as an employee.

80. The tribunal considers that it is clear from the records, and from what Mr Morgan said in evidence, that there had been from November 2017 onwards considerable concerns about the claimant and that the CEO felt undermined by the claimant's inadequate handover before going on holiday. The fact that the claimant continues to dispute this, does not assist his case, because the tribunal considers that would have added weight to the respondent's view that this was an employee who had breached their trust, and (importantly) had failed to learn his lesson. There was clear evidence that things would be unlikely to improve. It is reasonable to assume that as the lack of any acknowledgement of fault was the attitude which the claimant continued to express at a tribunal hearing (more than a year after his dismissal), it is almost inevitable that he would have continued to argue a similar point at the time (as reflected in his letters of appeal). It is abundantly clear this argument would have been rejected by the respondent, and that there was little or no chance that the respondent would have been persuaded to give the claimant another chance.

81. The tribunal considers that the most equitable way to approach this issue, is

to proceed on the basis that a fair procedure would have taken some weeks, possibly as long as three months or so (until the date that the claimant in fact obtained alternative employment on 17 July 2017).

82. There would in any event have needed to be some delay to recast the letter of invitation to the capability meeting, set out in a better formal, with the right information, enclosing proper supporting evidence. There should also have been a proper investigation (or a report of the information relied upon). The claimant would also have needed time to prepare for the meeting (perhaps with the final meeting following an earlier investigatory meeting). Had that happened, it might be that the respondent would still not necessarily have dismissed the claimant fairly at that point. That said, there would be a strong possibility that the respondent could have done so. The tribunal considers that the longer the period of preparation went on, the more likely it was that the respondent would have assembled a relatively cast-iron case against the clamant, particularly in view of an increasing focus on breach of mutual trust and confidence and the lack of realistic likelihood that the claimant would have been able to raise any matter which would have changed the respondent's initial view.

83. The tribunal cannot sail upon a sea of speculation, but what it must do is to draw reasonable inferences from what evidence it has been provided with. That evidence indicates that whilst not all employers would necessarily have chosen to dismiss after a fair process, there was evidence which was available or could have been obtained which would have led managers reasonably to conclude that the claimant should be dismissed, probably for "some other substantial reason" namely breach of trust and confidence.

84. The tribunal considers that the fairest way to approach this question would be to take the view that a fair process would have taken around or just over three months after which it is likely on balance that the claimant would have been dismissed, within the band of reasonable responsibilities. Whilst the tribunal cannot be sure either way, it considers it sufficiently likely that there should be a one hundred percent reduction in any ongoing compensation after that period. But it would be just and equitable to compensate the claimant on the basis that employment would have continued until the working week before he commenced his new employment, and that the claimant could at that point have been fairly dismissed. The dismissal would have been with the same period of one month's pay in lieu of notice (noting that the claimant would not have completed a further year's service).

85. The effect of the conclusion above, would therefore be that the claimant falls to be compensated for all loss of earnings up to the end of the week prior to his new employment, as well as his pay in lieu of notice.

86. As indicated in the findings of fact, the tribunal considers that the argument over mitigation of loss turn out to be somewhat arid. It would certainly be theoretically possible that the claimant might have found new employment quicker, and on a slightly higher salary. He might have misunderstood or

mishandled the issues of references (albeit there is merit in his concern that he believed he would not receive an adequate or any reference from the respondent). The reality is, however, that the tribunal considers that the claimant found himself a reasonable job, on a reasonable salary within what must be a reasonable period of time of only just over three months.

87. As indicated above, the tribunal considers that compensation for loss of earnings should be restricted to the period up to but not beyond the claimant commencing new work. If the tribunal had taken a different view, and if it had considered that any ongoing loss of earnings might be justifiable, it is worth commenting that the tribunal would in any event have found a high probability that the claimant would have been dismissed. The claimant would also be expected, after a relatively short period of time, to further mitigate his loss by achieving a higher salary with the same employer or continuing to look for higher level jobs of which he claims to have been capable with other employers. On any analysis, the loss of earnings element of the compensatory award, would have been very similar, and the tribunal has in any event considered the evidence in the round, rather than seeking to come up with a precise mathematical figure.

88. In light of the matters set out above, the tribunal considers that the sum representing loss of earnings should be £4,582, and to this should be added the sum of £300 representing the loss of statutory rights. These figures are not liable to any further reduction under the Section 123 of the Employment Rights Act 1996, as they reflect the *Polkey* adjustment, and no contributory fault adjustment is appropriate.

89. As indicated above, the tribunal has found that an uplift of 20% to the compensator award would be appropriate as a result of the unreasonable failure to comply with the ACAS Code. That increases the compensatory award to the sum of £5,858.40. This latter sum is therefore the compensatory award which the respondent is ordered to pay to the claimant.

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Employment Judge Emerton
Date: 9 October 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

11 October 2018

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **1401192/2017**

Name of case(s): **Mr GP Mauluka** v **IDT Systems Ltd**

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: **11 October 2018**

"the calculation day" is: **12 October 2018**

"the stipulated rate of interest" is: **8%**

MISS Z KENT
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/collections/employment-tribunal-forms

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.