EMPLOYMENT TRIBUNALS

Claimant: Mr JL Howard

Respondent: Protector Trading Limited

HELD AT: Manchester **ON:** 4 October 2018

BEFORE: Employment Judge Franey (sitting alone)

REPRESENTATION:

Claimant: Mr C Howard (Claimant's Brother)
Respondent: Mr D Mather (Director)

WRITTEN REASONS

1. These are the written reasons for the judgment given orally with reasons at the conclusion of the hearing on 4 October 2018, and sent out to the parties in writing on 22 October 2018. Written reasons were requested by the claimant on 24 October 2018[1].

Introduction

2. On 23 February 2018 the claimant presented his first claim form in case number 2404282/2018. He maintained that he had been employed by the respondent since September 2009 as a General Machinist, and he brought complaints of unlawful deductions from pay, of a failure to give him a written statement of the main terms of employment or payslips, and complained about tax and national insurance deductions not having been forwarded to the appropriate authorities. The claim was rejected because the early conciliation details were incorrect, but this was rectified and the claim accepted with effect from 27 February 2018.

3. The respondent did not receive the claim form and notice of hearing when first sent to him, and prior to his response form being filed the claimant lodged his second

[1] The claimant also requested a "certified copy of the judgment" but there is no provision in the Tribunal rules for that.

claim on 27 May 2018 under case number 2411358/2018. He brought a complaint of unfair dismissal arising out of the termination of his employment in early May.

4. The response form in both cases was filed on 17 July 2018. It asserted that the claimant had been self-employed prior to April 2017, although an employee after that date. It denied that any money was due to the claimant and said he had been fairly dismissed for gross misconduct.

5. The case had been listed as a final hearing to deal with all matters. By letter of 28 September 2018, however, the parties were informed that the preliminary issue of employment status would be addressed first. I explained that to the parties at the start of the hearing.

6. These reasons are therefore in two parts. Part One contains the reasons for my decision that the claimant was an employee. Part Two contains the reasons for my decisions on his substantive complaints.

Evidence

7. The claimant had prepared two witness statements and I heard oral evidence from him. For the respondent I heard from Mr Mather. He had not done a witness statement but confirmed that the contents of the response form were true, and gave oral evidence in response to questions from the Tribunal and from Mr Howard.

8. The claimant had produced a bundle of documents running to just over 200 pages. Mr Mather did not have any documents to add to that bundle save for two pages of photographs. Any reference in these reasons to a page number is a reference to that bundle unless otherwise indicated.

Part One: Employment Status

9. The issue to be determined was whether the claimant had been an employee prior to April 2017, and, if not, whether in that period he was nevertheless a "worker" entitled to complain about a failure to pay the National Minimum Wage.

Relevant Legal Principles – Contract of Employment

10. The definition of an employee appears in section 230(1) of the Employment Rights Act 1996:

> **"(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.**
>
> **(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."**

11. The statutory definition simply incorporates the common law concept of what is a contract of service or a contract of employment, traditionally distinguished from a contract for services which is a contract for a self-employed arrangement. There is a wealth of decided cases on what will amount to a contract of employment, beginning

with the well-known summary in **Ready Mixed Concrete (South East) Limited v Ministry of Pensions and National Insurance [1968] 2 QB 497**:

> **"The contract of service exists if these three conditions are fulfilled:**
>
> **(1) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.**
>
> **(2) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.**
>
> **(3) The other provisions of the contract are consistent with it being a contract of service."**

That remains the starting point even though, of course, the language of master and servant seems outdated now.

12. More recently in **Carmichael v National Power Plc [1999] ICR 1226** the House of Lords confirmed that there is an "irreducible minimum of mutual obligation necessary to create a contract of service". It follows, as was confirmed in **Montgomery v Johnson Underwood Ltd [2001] ICR 819**, that unless there is mutuality of obligation and a sufficient degree of control, there cannot be a contract of employment.

13. If those irreducible minimum requirements are met, the other considerations include how the parties have labelled or characterised their relationship, which is relevant but never in itself conclusive, the treatment of tax and national insurance, and any other matters that form part of the working relationship. Ultimately the task for the Tribunal is to look at all the relevant factors and form an impression, looking at the picture as a whole, as to whether the contract in question is one of employment or not.

Findings of Fact

14. This section of my reasons records the facts relevant to the employment status issue. To a significant extent these were not in dispute. However, some factual matters which were in dispute will be resolved in the discussion and conclusions section below.

<u>1989-2002</u>

15. In 1989 the claimant first began to work as an employee of a company called Protector Lamp & Lighting. The company was based at Unit B at a business park in Eccles in Manchester. The claimant remained working at that unit right up until 2017 when the operation moved to smaller premises on the same business park.

16. The claimant was an employee of that company. His unchallenged evidence (page 18) was that he received sick pay and holiday pay. He worked 39 hours per week.

17. Mr Mather became involved when he bought the company in 1997. There was no change to the arrangements. The company became insolvent in early 2002 and the claimant was paid a redundancy payment.

2002-2008

18. On 22 February 2002 the claimant was employed by a company called Protector Lamp at the same unit, still working for Mr Mather. He was a full-time employee of that company until it went into insolvency in October 2008. Again the claimant received redundancy payments at that time.

19. In November 2008 the claimant was employed by a company called GS Engineering (North West) Limited, owned by Graham Silver. That company had taken on the making of miner's lamps, which was the work the claimant had been doing since 2002. It now provided that work to Mr Mather and employed the claimant for that purpose. A payslip appeared at page 33. The claimant was still working at Unit B on the same business park using the tools and equipment which had been provided by Protector Lamp from 2002, if not earlier. Mr Mather paid GS Engineering, not the claimant.

September 2009 - 2017

20. In September 2009 Mr Silver died. The claimant carried on doing the work directly for Mr Mather. He was still at Unit B working 38.5 hours per week between Monday and Friday. He received net wages from Mr Mather's company of £190 per week, at first paid by cash and then from 1 October 2010 paid into his bank account. He did not receive any payslips and nor was there any written record of the terms upon which he had been taken on.

21. It was the claimant's case that he became an employee of the respondent at that time, because he was told by Mr Mather that he would be taken on working on the same basis as he had been working for Mr Silver. It was Mr Mather's case that the claimant was engaged on a self-employed basis, not as an employee. Because nothing was put in writing this issue was not addressed properly at the time.

22. There was no change in the work the claimant did over the next few years. He received pay increases from time to time and by April 2016 was receiving £275 per week net. No payslips or P60s were provided.

23. The operation moved from Unit B to an office nearby in 2017, but nothing else changed apart from the size of the premises.

August 2017 Discussions

24. It was common ground that there were discussions about changes in August 2017, but there was no agreement as to what was discussed.

25. Mr Mather's evidence was that he told the claimant that the work was reducing, and gave the claimant the choice of remaining self-employed or becoming an employee on a guaranteed two days' work each week. He said that the claimant chose to become an employee, and from September 2017 was paid for two days of work each week. It was agreed that this change in status would be backdated to

April 2017. Tax and national insurance money started to be deducted and forwarded to the appropriate authorities.

26. The claimant's account was quite different. He said that he was just told at the end of August 2017 that his hours would be reducing to 16 per week in September. There was no consultation with him. There was no mention of his employment status. He wrote a letter on 6 September 2017 (page 30) asking for his P60s and payslips, and says in response Mr Mather told him on 14 September 2017 (for the first time) that he was self-employed.

<u>September 2017 – May 2018</u>

27. On 23 September 2017 (page 31) the claimant asked for a written statement of his employment status, and on 6 November 2017 (page 32) he wrote again regarding that and asking for confirmation of PAYE contributions and P60s. None of this was provided.

28. The claimant was given a payslip in January 2018 (page 34). It showed him being paid £120 for 16 hours per week at the National Minimum Wage of £7.50, with holiday pay for the year added making a gross total of £133. No deductions were shown on the payslips.

29. The first written indication that the claimant was an employee was in an email sent to the Tribunal by Mr Mather on 26 April 2018.

30. On 2 May 2018 the claimant was dismissed by letter. The letter appeared at page 36. It referred to the termination of his employment. A P45 was issued (page 39). On 10 July there was a final letter about money due to the claimant accompanied by a payslip (pages 45 and 46).

<u>Day to Day Arrangements from 2009</u>

31. The claimant's evidence was that he had to do the work himself. Mr Mather said that the claimant had the right to send someone else to do the work, but he accepted that in fact the claimant had never done that.

32. The claimant said that he could not refuse to do the work but had to attend Monday through to Friday on hours set by Mr Mather. Mr Mather said that the claimant did not have to attend if he did not want to as he was being paid to get the work done whenever he chose during the week: it was only his choice that he worked those hours.

33. It was common ground, however, that the work the claimant had to do was set by Mr Mather based on the orders the company had which needed to be despatched in that week. It was also common ground that all the tools and equipment were provided by the company, not by the claimant personally.

34. It was not in dispute that the claimant did not have any other job, although it was also agreed that when the hours reduced to 16 per week there was a discussion about the claimant finding another part-time job.

35. The claimant maintained that he worked the hours required, being in by 8.00am and leaving at 4.30pm. Mr Mather disputed this and said that on some occasions in 2015 when he was working in Yorkshire he had come into the unit before travelling over at 8.00am and had found the claimant was not there. He had also been to the unit at 4.30pm and found the claimant not there. He said there were also some occasions on which the claimant was not in the unit at all during the ordinary working day. It was common ground the claimant was never challenged about this, because from Mr Mather's perspective he was self-employed and therefore there was no problem with it.

36. There were two specific disputes about holiday pay and other work.

Holiday Pay

37. The first concerned payment for holidays. The claimant produced holiday records showing the dates of his holidays and the dates on which he was paid by the company. The records for 2012 appeared on page 75. By way of example, on 2 August 2012 the claimant went on holiday to Egypt, not returning until Thursday 16 August. In that month he was paid on Wednesday 1 August (£345), and then £200 on 9, 16 and 23 August (all Thursdays), and a final payment of £200 on Friday 31 August. He had been paid £200 in each of the four weeks in the previous month. He maintained that this showed that he was paid holiday pay. Mr Mather disputed this and said that the regularity of the payments reflected the fact that sometimes the claimant would do more work than was ordinarily required, but these additional payments would be spread out so as to maintain an even cashflow. I will return to this in my conclusions.

Work for Sister

38. The other dispute was about other work the claimant did in the form of chopping wood for his sister's wood burning stove between autumn and spring. There was sometimes unused wood available from a neighbouring business. It was common ground that the claimant would regularly chop up enough wood to fill eight or 12 bags, and that he would store these at the respondent's premises until his sister collected them. The dispute was whether this happened before and after his working hours, as the claimant maintained, or whether on occasion he would do it during core working hours. Mr Mather's evidence was that he did on occasion find the claimant chopping that wood during the normal working day, but that did not matter to him because the claimant was self-employed and it was his own business as to when he carried out the work. Either way it was common ground that Mr Mather never challenged the claimant about doing that work. I will return to that issue in my conclusions.

Submissions

39. Each party made a brief oral submission at the end of the evidence.

40. For the claimant Mr Howard submitted that he was an employee. There was no way the claimant would have taken on the burden of being properly self-employed. Nothing had changed about the organisation of his work going right back to 1989. I was invited to accept the factual account given by the claimant. The

dispute about whether the claimant was on the premises during days in 2015 was of limited relevance because Mr Mather had not specified which days in question. This was not a situation where the claimant was getting paid for blocks of work. It was an employer/employee relationship.

41. On behalf of the respondent Mr Mather said that he maintained the claimant had been self-employed before April 2017. He emphasised that he had no problem before that with the claimant spending time chopping wood for his sister. He said that the claimant did not have to turn up on any specific day: it was up to him when he got the work done.

Discussion and Conclusions on Employment Status

42. The definition of an employee is found in section 230(1) of the Employment Rights Act 1996 but simply refers to the concept of working under a contract of employment. The question of what will be a contract of employment (as opposed to a contract for services, or self-employment) has been the subject of a lot of case law, but essentially the principles are as follows:

(1) Under a contract of employment the claimant will work for the respondent in return for pay;

(2) The respondent will exercise a degree of control over the claimant, and the claimant will be subordinate to the respondent;

(3) The claimant will have to do the work himself, not being allowed to send along a substitute but still get paid;

(4) There must be mutuality of obligation, meaning that the claimant must be obliged to turn up and do the work and the respondent must be obliged to pay him; and

(5) The other provisions of the arrangement must be consistent with there being a contract of employment.

43. It is necessary for the Tribunal to take a broad view of all the relevant factors in the working relationship. No one factor on its own is determinative. In particular the Tribunal is not bound by the parties' own views as to the nature of the relationship, by the content (or the absence) of any documents, or by the labels which have been attached. Nor is it bound by the treatment of tax and national insurance or the provision of tools and equipment by the respondent. All those things are relevant but none of them give an answer to the question which has to be approached looking at everything in the round.

44. The claimant's case that he was an employee of GS Engineering North West Limited between 2008 and September 2009 was consistent with the payslip from that company (page 33) and was not challenged by the respondent. In September 2009 the proprietor of that company died and the claimant began to work directly for the respondent doing essentially the same work as he had previously done.

45. Neither the claimant nor Mr Mather gave evidence of any discussion at that stage as to employment status, and I was satisfied that both of them assumed the

claimant would carry on as before. There was no substantive change to his work, save that of course his instructions came from Mr Mather not via Mr Silver, and he was paid by the respondent direct rather than through Mr Silver's company. It is apparent with hindsight that there may have been a misunderstanding at this stage. Mr Mather thought that the claimant was stepping into Mr Silver's shoes as an independent contractor, whereas the claimant thought that Mr Mather was stepping into Mr Silver's shoes as his new employer. Either way there was no written record of any understanding at that time, and it is necessary for the Tribunal to look at the underlying reality of how the work was organised in the years that followed.

46. It is clear from the evidence in my hearing that Mr Mather did exercise control over the work the claimant did and direct him as to what work was to be done each week. The claimant was working a full 38.5 hours' working week until September 2017, when it dropped to 16 hours a week. As a matter of fact, the claimant never sent anyone else to do the work on his behalf and nor did he decline to attend for work to do something else instead. The tools and equipment he used to do the job were all provided by the respondent. He was economically dependent on the respondent. These factors taken together pointed strongly to the claimant having been an employee.

47. Mr Mather said that the claimant could have sent someone else to do the work or not come in himself to do the work, and that would not have been a problem. However, that never happened and there is no evidence from Mr Mather that it was ever discussed and agreed with the claimant. It may have reflected his arrangement with Mr Silver but it formed no part of his direct arrangement with the claimant. I found as a fact the claimant was obliged to do the work personally and to turn up when he was expected.

48. Two further matters were disputed. The first was about the wood chopping which the claimant did for his sister from time to time. The claimant said that when that wood chopping was done he would do it either before he started work or after it, and he accepted that he used the respondent's premises to store the bags of wood before they were taken away. In contrast Mr Mather said that on occasion he found the claimant doing this during working hours, but did not mind because on his case the claimant was self-employed. Mr Mather did not identify any clear dates for this to have happened, which is understandable given that it was not a significant matter in his mind at the time. However, even if I accepted Mr Mather's evidence that the claimant did do this wood chopping on occasion during hours when he would otherwise be working for the respondent, that it not necessarily inconsistent with him being an employee. This was, after all, a very small employer. The claimant had been working at that premises since 1989 and with Mr Mather from 1997 if not earlier, and there was clearly some degree of trust in the claimant's skills and commitment otherwise he would not have lasted as long as he did. It seems to me that this was properly characterised as managerial indulgence towards a long-serving employee.

49. The second dispute was in relation to holiday pay. As summarised in paragraph 37 above, the payments for summer 2012 were of regular amounts despite a two week holiday. Mr Mather did not have any records of these payments but suggested that the payments during the annual leave absence represented payments for extra work done before the claimant went on holiday which were

evened out for cashflow purposes. I did not find that a convincing answer. It was clear that the payments were increased in late July and early August to reflect extra work done in July (to £230 a week and then £345 a week) but then reduced to the standard rate of £200 a week thereafter. I was satisfied that in reality the claimant has shown that he was paid holiday pay in that sample in 2012 and on other occasions. Payment of holiday pay was an indication that he was not self-employed.

50. There was one final point of significance. When giving his evidence about the change in employment status to becoming an employee in 2017, Mr Mather said that apart from the difference in the treatment of tax and national insurance, nothing changed. That was significant because if the claimant met the legal test for being an employee from April 2017 onwards, yet nothing had changed apart from the treatment of his tax and national insurance, it is very likely he must have met that test before April 2017.

51. Overall I concluded on the balance of probabilities that the claimant was working under a contract of employment from September 2009 onwards, and therefore entitled to bring all the claims which he does in these proceedings.

Part Two: Substantive Complaints

Introduction

52. Following delivery of judgment on employment status we discussed the complaints pursued. In the course of that discussion the claimant withdrew his complaint that there had been a failure to pay him the National Minimum Wage. He explained that he had been more concerned with ensuring that proper deductions for tax and national insurance had been forwarded to HMRC, a matter which he could pursue (along with his concern about his auto-enrolment pension) through other channels. Those complaints were therefore dismissed.

53. That left three remaining complaints which I will address in turn.

Itemised Pay Statements

54. It is clear that payslips were not provided save for one each in the months of January, May and July 2018 and I made a declaration that the respondent failed to provide itemised pay statements.

55. I also had the power under section 12 of the Employment Rights Act 1996 to order the respondent to reimburse the claimant for any unnotified deductions made in the 13 weeks before the presentation of the claim form, which in this case was the end of February 2018. The HMRC record produced by the claimant shows that a total of £73.32 was forward to HMRC as national insurance deductions in that period. No tax was due because the claimant was below the threshold at which tax became payable. Mr Mather said that it is possible that these were actually credits rather than payments but did not have his relevant records with him. Even so, he agreed that it was proportionate to go ahead and decide this rather than resume the hearing on another date on this point alone.

56. Based on the HMRC letter which said that these amounts were paid I found that they were deducted from the claimant's gross pay in the 13 weeks before his

first claim form was presented, and therefore I ordered the respondent to reimburse the claimant the sum of £**73.32**.

Unlawful Deductions from 2017

57. My task was to determine what amount was properly payable under the claimant's contract from September 2017 onwards, and then to determine whether the respondent had paid less than the amount properly payable. That turned upon a dispute of fact as to whether the claimant had agreed to change his hours to 16 hours per week over two days, or whether that was a change unilaterally imposed upon him by Mr Mather.

58. It was common ground that there was a discussion in August 2017 about the work reducing and that the claimant was told, accurately, that he would face the prospect of getting less work or even losing his job, or he could agree to proceed on a fixed 16 hours per week going forward. Clearly that put the claimant in a very difficult position and he was conscious that if he did reject the proposal of 16 hours then he might face difficulties claiming state benefits if he left employment. Understandably, if reluctantly, he agreed to that change.

59. However, even though the claimant was in reality faced with a very difficult situation, that still represented consent for contractual purposes to his contract being changed. The economic pressures he felt fell short of being economic duress in the legal sense (as in the line of commercial law authorities beginning with **Occidental Worldwide Investment Corporation v Skibs A/S Avanti [1976] Lloyd's Rep 293**) which would be sufficient to invalidate his consent to the new arrangement. I also noted that the claimant did not protest the change in writing even though he wrote three letters to the company between September and November 2017 about other matters.

60. My conclusion was that the claimant did, even if reluctantly, agree to a change in his contract to 16 hours per week from September 2017 as the lesser of two evils, There was no failure to pay him the amount properly payable, and the unlawful deductions claim for this period failed and was dismissed.

Unfair Dismissal

<u>The Law</u>

61. The claim was is brought under Part X of the Employment Rights Act 1996. Section 98 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 reasonable 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".**

62. The claimant accepted that the respondent had a potentially fair reason for dismissing the claimant, namely a reason relating to his conduct (as the respondent saw it) in deliberately delaying delivery of a letter from the Tribunal dated 26 March 2018.

63. The test of fairness appears in section 98(4). It requires the Tribunal to have regard to the size and administrative resources of the employer's undertaking and the Tribunal must ask itself whether the employer acted reasonably or unreasonably in treating that reason as sufficient to dismiss the employee. Under section 98(4)(b) that is to be determined in accordance with equity and the substantial merits of the case.

64. In misconduct cases the test usually applied is that derived from **British Home Stores v Burchell [1980] ICR 303**, which involves considering whether there was a genuine belief that the employee was guilty of misconduct, whether that belief was based on reasonable grounds and whether the employer carried out an investigation that was reasonable in the circumstances of the case, and an investigation in this kind of case includes the procedure by which the decision was taken. The Tribunal can have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 (see section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992). Since **Burchell** was decided the burden on the employer to show fairness has been removed.

65. Importantly the Tribunal must not fall into the trap of substituting its own decision for that of the employer. Following **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23** the Tribunal must apply the test of the band or range of reasonable responses to all aspects of the dismissal process, including the procedure adopted and whether the investigation was fair and appropriate.

66. In gross misconduct cases the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and then whether it acted reasonably in going on to decide that dismissal was appropriate rather than a lesser disciplinary punishment: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854**.

Facts

67. The claimant had been employed by the respondent since September 2009 and was the only employee. He had a clean disciplinary record.

68. He was the only person at the premises on the days he worked but the proprietor, Mr Mather, did attend once or twice a week. There were half a dozen other firms in the same building.

69. When the post was delivered it was generally left on the back staircase which led up to the respondent's offices, although the upper floor was also used as a canteen by one of the other firms in the building. On occasion, however, it was not always the same postman delivering the mail and sometimes it was left in the front reception area which is the main entrance for one other firm in the building and used by the public, but to which other firms in the building also have access.

70. The claimant lodged his Tribunal claim in late February 2018. By a letter of 26 March 2018 the claimant wrote to the respondent notifying it of the claim and requiring a response to be filed by 23 April 2018.

71. On 25 April 2018 Mr Mather went to the respondent's premises and found a pile of post in the office, amongst which was the Tribunal's letter. It was in an envelope stamped "private and confidential" but it had been opened and the contents put back into the envelope. This was two days after the time for the response form had elapsed.

72. Mr Mather did not discuss this with the claimant at all but instead he formed the view that the claimant must have deliberately delayed the mail so as to prejudice the respondent's position in these proceedings by making it miss the deadline for its response to be submitted. Rather than hold any discussion with the claimant he issued a dismissal letter on 2 May which the claimant received the following day, terminating his employment although also paying him in lieu of notice.

Conclusion on Fairness

73. I was satisfied that Mr Mather genuinely and reasonably believed that the claimant was guilty of misconduct. No-one else would have any reason for interfering with post from the Tribunal, and there had been no previous problems of this kind. It was reasonable to regard this as gross misconduct, and given that the claimant was the only employee and had to work directly with Mr Mather it was also reasonable to conclude that dismissal was appropriate.

74. The real issue, however, was a procedural issue: was it outside the band of reasonable responses for Mr Mather to decide to dismiss the claimant without even discussing the matter with him first?

75. I took into account the fact that the respondent was effectively a sole proprietor and the claimant was the only other employee. Nevertheless, the ACAS Code of Practice at paragraph 23 says that a fair disciplinary process should always be followed even for suspected gross misconduct. Despite the very small size of the respondent, but taking into account the claimant's length of service, in my judgment it was unfair not to have spoken to the claimant to ask him about this prior to taking

any decision. That is a very rudimentary requirement of a fair procedure and the failure to do it in this case took the procedure outside the band of reasonable responses. I rejected Mr Mather's argument that this was one of these exceptional cases where it was reasonable not even to bother speaking to the employee.

76. For those reasons I found that this was an unfair dismissal and the claim succeeded.

Remedy for Unfair Dismissal

77. There were two issues affecting the assessment of compensation for unfair dismissal.

78. The first was the question of what would have happened if a fair procedure been followed. That is often called the "Polkey" principle (after **Polkey v A E Dayton Services Limited [1988] ICR 142)** and it arises because section 123(1) of the 1996 Act requires the Tribunal to make such compensatory award as is just and equitable, and that includes assessing what might have happened if a fair procedure had been followed, even though that is inherently speculative.

79. It seemed to me that if Mr Mather had called the claimant in to discuss the post issue with him before taking a decision it is inevitable that he would have taken the same decision. In my judgment Mr Mather would and could reasonably have rejected any other explanation. Holding a meeting with the claimant would only have taken a day or two but it could still have resulted in a fair dismissal for gross misconduct which would have deprived the claimant of any notice pay.

80. Therefore, I was satisfied that a 100% Polkey reduction was appropriate to the compensatory award as had a fair procedure been followed the claimant would have been dismissed without notice in any event. I declined to make any compensatory award in favour of the claimant.

81. The second issue was "contributory fault". It can result in a reduction to both the basic and the compensatory award. The basic award is a mathematical formula based upon length of service and gross weekly pay at the time of dismissal. However, under section 122(2) the basic award can be reduced if the claimant is wholly or partly to blame for the dismissal.

82. I rejected Mr Howard's argument that the claimant was not to blame in any way. In my judgment the claimant was guilty of culpable and blameworthy behaviour by not taking the Tribunal letter up to the respondent's office when he saw it in the general reception area about two weeks before it was eventually opened by Mr Mather. The letter was marked "private and confidential". He may or may not have known that it related to his own Tribunal case, but to leave that letter lying around in the common areas when it was clearly something the company needed to have was culpable and blameworthy, and it contributed significantly to dismissal. Had the letter been taken upstairs by the claimant when it arrived Mr Mather would have seen it within the time limit and could have lodged his response form, and this dismissal would never have happened.

83. Therefore although I rejected Mr Mather's primary contention that the claimant deliberately delayed that letter, knowing that doing so would take the response

outside the time limit, I was satisfied that he was guilty of culpable and blameworthy conduct in not taking the post upstairs to the respondent's offices as soon as he saw that it had arrived downstairs. In my judgment a 50% reduction in the basic award was warranted by section 122(2).

Written Statement of terms

84. That left the award for a failure to provide a written statement of the main terms of employment. Mr Howard did not seek to argue for anything beyond an award of two weeks' gross pay.

Calculation of Awards

Unfair Dismissal

85. It was agreed that the figure for a week's gross pay should be that taken from the response form in case number 2411358/2018, namely £138.84. The figure given on the claim form was based on the premise that the claimant was contractually entitled to work 38.5 hours a week at the time of dismissal, which I rejected for reasons set out in paragraphs 57-60 above.

86. At dismissal the claimant was aged 45 with nine complete years of service, meaning the basic award was £1,388.40, but the 50% reduction by way of contributory fault left a basic award of £**694.20**. There was no compensatory award.

Written Statement of terms

87. The award of two weeks' pay for failure to provide a written statement of terms was £**277.68**.

Total

88. Added to the sum of £**73.32** for unnotified deductions (see paragraph 56 above) the total amount awarded was £**1,045.20**.

Employment Judge Franey

2 November 2018

REASONS SENT TO THE PARTIES ON

6 November 2018

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.