EMPLOYMENT TRIBUNALS

Claimant:	**Mr K McAllister**	
Respondent:	**European Metal Recycling Limited**	
Heard at:	**Newcastle (sitting at Teeside Magistrates Court)**	**On: 21 January and 6 February 2019**
Before:	**Employment Judge Martin**	

Representation:
Claimant: In person
Respondent: Ms Henderson (Solicitor)

RESERVED JUDGMENT

The Claimant's complaint of unfair dismissal is well founded and the Claimant is awarded compensation in the sum of £4326.67

REASONS

Introduction

1. The Claimant gave evidence on his own behalf. Ms Louise Galey, Transport Manager and Mr Thomas Watts, Area Manager for Scotland both gave evidence on behalf of the Respondents. The Tribunal were provided with a bundle of documents marked Appendix 1.

The Law

2. The law which the Tribunal considered was as follows:

3. Section 98(1) Employment Rights Act 1996 "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) Section 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 for some other substantial reason which could justify the dismissal of an employee holding the position which the employee held

   Section 98(2) "a reason falls within this sub section if it:-
   (c) relates to the conduct of the employee.

   Section 98(4) ERA 1996 "the determination of the question whether the dismissal is fair or unfair having regard to the reasons shown by the employer
   (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and
   (b) shall be determined in accordance with equity and the substantial merits of the case.

4. Section 122(2) of the Employment Rights Act 1996 "where the Tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly.

5. Section 123(1) ERA 1996…. The amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer"

6. Section 123(4) "in ascertaining the loss referred to in sub section 1 the Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales.

   Section 123(6) "where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall

reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

7. The case of ***British Home Stores Ltd -v- Burchall*** **[1978] IRLR 378** where the EAT held that in the cases of misconduct - first the employer must establish the fact they believe that the employee did commit an act of misconduct, secondly that it must be shown that the employer had reasonable grounds upon which to sustain that belief and thirdly that the employer did as much investigation as was reasonable in all the circumstance.

8. The case of ***Sainsbury's Supermarkets Ltd -v- Hitt*** **[2003] IRLR 23** where the Court of Appeal held that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss.

9. The case of ***Iceland Frozen Foods Ltd -v- Jones*** **[1982] IRLR 439** where the EAT held that the function of the Employment Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the bands the dismissal is fair; if the dismissal falls outside the band it is unfair.

10. The well-known case of ***Polkey -v- AE Dayton Services Ltd*** **[1987] IRLR 503** where the House of Lords said the Tribunal had to consider whether an employee would still have been dismissed even if a fair procedure had been followed. In considering that the Tribunal had to consider what was the chance of the employee being dismissed or over period might an employee have been fairly dismissed if fair procedure had been followed.

11. The case of ***Nelson -v- BBC No.2*** **[1972] IRLR 346** where the Court of Appeal held that, in considering issues of contributory fault, the Tribunal had to consider whether conduct on the part of the employee was culpable or blameworthy and secondly whether that conduct had caused or contributed to some extent to the Claimant's dismissal and then consider whether it was just and equitable to reduce any award.

12. The case of ***Hollier -v- Plysu Ltd*** **[1983] IRLR 260** where the Court of Appeal held the Tribunal's function is to take a broad approach in relation to reduction of any compensation on the grounds of contribution and look at how much the employee's own conduct might have contributed or caused his dismissal and then consider the apportionment of responsibility for the dismissal.

The issues

13. The Tribunal had to consider what the reason for dismissal whether it was for conduct or for some other substantial reason.

14. If the dismissal was for misconduct the Tribunal had to consider whether the Respondent believed that the Claimant had committed an act of gross misconduct; whether they had reasonable grounds to believe that the claimant had committed an act of misconduct; and whether they had undertaken a reasonable investigation.

15. The Tribunal also had to consider whether the Respondent had followed a fair procedure and whether dismissal was a reasonable response in the circumstances of the case.

16. In relation to remedy, the Tribunal had to consider what was the Claimant's loss; what was the period of any loss; whether the claimant had acted reasonably in mitigating his loss; whether he had contributed in any way to his dismissal and, if so, to what extent? The Tribunal also had to consider whether there was procedural failing and whether he might have been fairly dismissed in any event and, if so, when that might have occurred or what was the chance of that happening.

17. Finally the Tribunal had to consider whether there should be any increase or decrease in any award for failure to follow the ACAS Code of Practice.

Findings of Fact

18. The Respondent is a business specialising in recycling of scrap metal through a nationwide network of depots.

19. The Claimant is a welder by trade and was employed at the Respondent's depot in Hartlepool as a welder from September 2001.

20. The Claimant was the only welder at that depot. He says that others did welding from time to time. The Respondent says that the Claimant was the only qualified welder and that no-one else was authorised to weld.

21. The Tribunal has summarised what it understands to be tacking and welding from the evidence given by both parties, namely tacking is a short form of welding which uses the same equipment and same electrical current at the same temperature. Welding itself is putting together the final product.

22. The Respondent's disciplinary procedure is at pages 26 – 29 of the bundle. It sets out examples of gross misconduct. At page 29 it includes any serious breach of the Respondent's and legislative health and safety regulations.

23. The Respondent says that they made some changes to their health and safety procedures in or around 2014. This included introducing some new procedures. They also brought in an employee to manage health and safety a Mr Calvin Ellis.

24. The Respondent's safe working procedure in relation to welding is at page 37 of the bundle. It states that only persons who are competent are authorised and must have completed the competency test. The Claimant has signed that working procedure at page 41 of the bundle.

25. The Respondent also undertook risk assessments as part of their health and safety procedures in relation to particular tasks. In January 2017 a risk assessment was undertaken in relation to the construction of box frames using welding equipment. That risk assessment has been signed by the Claimant as is noted at page 45 to 46 of the bundle.

26. In evidence to the Tribunal the Claimant confirmed that the task which he was undertaking on 6 April 2018 (being the date of the incident for which the Claimant was subsequently dismissed) was the construction of a frame. The maintenance task log for that job is at page 53 of the bundle and shows that it is subject to the same risk assessment which the Claimant signed in January 2017 namely at pages 45 to 46 of the bundle.

27. The Claimant undertook competency training as a welder with an organisation called Weldcare, an external welding company. This took place in September 2017. He was the only person at the Respondent's depot who undertook that competency training, which he passed.

28. The Claimant said in evidence that, after an incident in 2013 when he left the site with another employee, he was punished by Mr Paul Stocks and stopped getting overtime. The Claimant said that, although he sometimes got overtime, he did not get the same level of overtime after 2014. He said that at that same time Mr Stocks, the Depot Manager, brought in sub-contractors to undertake welding on Saturdays and Sundays.

29. The Claimant also said in evidence that, in January 2017, other employees at the site got a pay rise but that he received a lower pay rise than his colleagues. He said that he only received 12p an hour. He raised the matter with HR, but was told to see his manager who authorised pay rises. The Claimant said that he went to see Mr Stocks, who told him that he was not welding as much which was why he did not get the pay rise.

30. The Claimant said that a few weeks later, in around January 2017, Mr Stocks called him into the office and told him that he was changing his contract from welder to yard operative and that the Respondent wanted to make all of their employees' yard operatives. The Claimant said that he was

told that if he did not agree that the change would be imposed on him anyway within 12 weeks. The Claimant said that he got advice about the matter. He was told to put in a grievance letter which he did and which he handed to Mr Stocks. The Claimant said in evidence that in that the letter he had stated that he was a welder and employed as a welder and was not going to agree to a change to his contract of employment. The Claimant says that a few weeks later Mr Stocks said that everything was staying as it was and no changes were then made to the Claimant's contract of employment.

31. The Respondent said that they were not aware of the letter. The Claimant did not keep a copy of it, so no copy was produced to this Tribunal. Mr Stocks did not give evidence to the Tribunal.

32. In March 2016 the Claimant was issued with a written warning in relation to an incident with a fork lift truck. He appealed against that decision, but was unsuccessful.

33. In August 2017 the Claimant was issued with a further written warning for failure to attend work on a Saturday. He appealed against that decision which was also rejected.

34. At the same time that he appealed that later decision, he also raised a grievance about his pay rise in January 2017, which was heard by and rejected by the Commercial Manager.

35. In September 2017, the Claimant was issued with a final written warning again for failing to attend work on a Saturday. He appealed against that decision, which was heard by the Area Manager and rejected.

36. Mr Sean Cafferkey a Yard Operative had been assisting the Claimant with tasks at the depot for a number of years and had been keen to learn welding. The Claimant said that he had trained other colleagues in welding in the past. The Respondent says that the Claimant was not an authorised trainer. They said that since 2014 they had become more pro-active in health and safety matters and that the Claimant was not thereafter involved in training any other people in welding.

37. The Claimant said that he told Mr Cafferkey that he, Mr Cafferkey, would have to ask the manager if he wanted to learn welding. The Claimant said that he told Mr Brayfield, the foreman that Mr Cafferkey wanted to learn to weld and if it was OK he would need to get him a welding mask. The Claimant said Mr Brayfield said that that was OK and he then got Mr Cafferkey a mask. The Claimant said that this happened in about December 2017. The Claimant said that, in order for Mr Cafferkey to learn to weld, he would have to watch first and then start doing some tacking to learn to weld.

The Claimant said that he understood that he had permission to train Mr Cafferkey to weld from that discussion with Mr Brayfield, who had authorised him to obtain a welding mask for Mr Cafferkey. The Claimant said that Mr Cafferkey was watching him weld and learning how to weld with him over the following weeks. The Claimant said that there was no point in Mr Cafferkey watching him weld if he was not there to learn how to weld.

38. The Claimant said that, sometime in December 2017, an incident occurred with Calvin Ellis who was walking past and noticed that Mr Cafferkey was welding and queried if he was welding. The Claimant said that in fact Mr Cafferkey was not welding. The Claimant says that Mr Ellis told Mr Cafferkey to see Mr Stocks if he wanted to weld. The Claimant says that sometime later there was another job which he was doing with Mr Cafferkey, who said that he was going to go to the office to ask Mr Stocks about learning to weld. The Claimant said that when Mr Cafferkey came back he told the Claimant that it was OK and that Mr Stocks would get it sorted to put him through the test. The Claimant said in evidence that he understood that meant he could continue to teach Mr Cafferkey to learn to weld. The Claimant did not check the position with Mr Stocks as to whether or not Mr Stocks had authorised Mr Cafferkey to learn to weld. The Claimant said in evidence that, unless he believed he had been authorised to teach Mr Cafferkey to weld, he would not have done so, because at that stage he was on a final written warning. He had not checked the position with Mr Stocks.

39. On 6 April 2018 Mr Cafferkey was doing a job with the Claimant. The job was fabricating a box. The Claimant said that Mr Cafferkey had watched him many times doing this task and allowed him on this occasion to start to do some tacking. The Claimant left Mr Cafferkey alone for a period of time to do the tacking, while he undertook another task.

40. The incident was reported to Mr Stocks ,who then watched it on CCTV for 20 minutes. Mr Stocks said this was to identify that Mr Cafferkey was the person who was doing the welding.

41. The Claimant says that he was called into Mr Stocks office when he was suspended for letting Mr Cafferkey weld. The Claimant said that he told Mr Stocks at the time that he had authority from Mr Brayfield and that other fitters had on several occasions been doing jobs with portable welding equipment which Mr Stocks knew about.

42. Mr Cafferkey was also suspended.

43. The Respondent's wrote to the Claimant to confirm his suspension. They informed him that there would be an investigation into allegations that he had seriously breached company safe working procedures when he allowed

Mr Cafferkey to operate the welding equipment. The Respondent stated that the welding area was the Claimant's area of responsibility and that Mr Cafferkey was neither authorised nor trained to use such equipment. The letter is at page 75.

44. Mr Gavin Longley was appointed to undertake the investigation. He interviewed Mr Stocks, Mr Calvin Ellis, Mr Cafferkey and the Claimant.

45. In the interview with Mr Stocks, he stated that Mr Brayfield had come in and told him that he had seen Mr Cafferkey welding. Mr Stocks said that he then viewed the incident on CCTV for about 20 minutes. He said that he had not seen the Claimant in the workshop for much of the time that Mr Cafferkey was working. He said that he considered this to be a serious health and safety issue and both employees were suspended Mr Stocks said that Mr Cafferkey knew that he should not be welding, as he had been told after he requested it in January 2018, that the company had no use for another welder to be trained and that he would have to go on a course and be competent. The notes of that interview are at page 76 to 77 of the bundle.

46. In his interview, Mr Ellis indicated that he had seen Mr Cafferkey welding in late December 2017 and told Mr Cafferkey to see Mr Stocks. He said that they went to see Mr Stocks and he said no.

47. Mr Cafferkey was also interviewed and said that he was not welding but tacking. He said that Mr Stocks had said that he would get him trained. He said that this was the first time that he had tacked. He said that Mr Stocks had not come back to him after he had requested to be trained to weld. His interview notes are at pages 80 to 81 of the bundle.

48. The Claimant was also interviewed as part of the investigation. He said that Mr Cafferkey was tacking and not welding. He said that tacks were short welds. He said that he had not been told that Mr Cafferkey could not weld or be trained. He also said that Steve Arkwright, the fitter was not a qualified welder but had used welding equipment. He also said that that another employee Alfie Wilson also used to tack and weld and he was also not a welder. The Claimant said that, although he had signed the risk assessment form, he said that what happened in practice was that Mr Ellis filled it in for him and he just signed it.

49. The Claimant said that Mr Cafferkey had said that Mr Stocks said that he would get him trained.

50. The Claimant also said in his interview that he had showed Mr Alfie Wilson how to tack, and that he used to weld although he acknowledged it was about 18 months earlier. The Claimant admitted during the course of the

interview that he had left Mr Cafferkey for a period of time. The notes of that interview are at pages 82 to 85 of the bundle.

51. Mr Longley undertook some further investigation with Mr Stocks regarding Mr Alfie Wilson being trained to weld and being paid for welding. Mr Stocks said at that interview that, after 2014 when the training matrix was introduced, employees had to be authorised to do certain tasks. He said that all welders were trained and authorised. He said that Alfie Wilson had been stopped welding.The notes of that interview are at page 86 of the bundle.

52. The Claimant was invited to a disciplinary meeting on 23 April 2018. The invitation is at page 87 of the bundle. The Claimant was informed that the allegation was that he had breached health and safety of working practice and exposed others on site to potential harm when he allowed Mr Cafferkey to use welding equipment that the latter was neither trained nor authorised to carry out welding tasks. He was provided with the Respondent's disciplinary policy; investigatory interviews; maintenance log; and the safe working practice on welding; and photographs of the weld in question. He was informed in the letter that this could amount to gross misconduct and could result in his dismissal. He was informed that he had a right to bring a representative.

53. The disciplinary hearing was undertaken by Louise Giley and took place on 30 April 2018. The notes of that meeting are at pages 89 to 93. The Claimant attended but did not bring a colleague or representative.

54. In the disciplinary hearing, the Claimant said that he did not agree the notes from the investigatory interview. He said there was no reference to Keith Wakefield in the notes of the meeting. He also said that, in the notes of the meeting with Mr Ellis, that it indicates that both of them went to see Mr Stocks. The Claimant he stated that he did not go to see Mr Stocks, but that it was only Mr Cafferkey. He said he had also made it clear that Mr Brayfield had authorised a screen for Mr Cafferkey.

55. During the course of the disciplinary hearing, the Claimant said that Mr Cafferkey had said that he was going to be put through the test for welding and that Mr Brayfield had authorised Mr Cafferkey to weld. The Claimant said that he did not know that Mr Cafferkey was not authorised to weld. He said that Mr Brayfield had authorised the purchase of a welding screen. In the disciplinary hearing the Claimant acknowledged that he had not been there all the time that Mr Cafferkey was tacking.

56. During the course of the disciplinary hearing the Claimant raised a concern that if this was a serious health and safety issue he questioned why Mr

Stocks watched the CCTV for 20 minutes and allowed the situation to continue for that long.

57. The Claimant was referred to an incident concerning Mr Ellis in December 2017 when the matter was raised with Mr Cafferkey about welding. The Claimant said that Mr Ellis told Mr Cafferkey to go and see Mr Stocks as is noted at page 91 of the bundle.

58. The Claimant accepted during the course of the disciplinary hearing that he did not ask Mr Cafferkey on that day if he had been authorised to weld, but said that Mr Cafferkey had told him that he had been to see Mr Stocks to be trained and that Mr Stocks had said yes. The Claimant said that Mr Brayfield had also authorised it. During the course of the disciplinary meeting, the Claimant raised a concern about HR trying to push him out.

59. The disciplinary meeting was adjourned.

60. Ms Galey undertook some further investigation especially with regard to Mr Wakefield. She said that she spoke to Mr Stocks regarding the situation with Mr Wakefield as to whether or not he was welding. She said Mr Stocks said that Mr Wakefield was not welding on site, because he had not undertaken the refresher training. Ms Galey said that she also undertook some investigation into the difference between tacking and welding with an experienced welder at another depot and did some research on the internet herself. She concluded that tacking was welding. She said that she also spoke to HR and was told that it was up to her make her own decision.

61. The disciplinary meeting was then reconvened. Ms Giley dismissed the Claimant for gross misconduct. She informed him that he had a right of appeal as is noted at page 93 of the bundle.

62. The Respondent wrote to the Claimant to confirm his dismissal. The letter of dismissal is at page 94 to 96 of the bundle. In the letter, Ms Galey confirmed that the Claimant was dismissed for breaching the company safe working procedures in allowing a colleague to use the welding equipment to weld and leaving him unattended whilst doing so. She indicated this was a potential health and safety risk. She noted that the Claimant took Mr Cafferkey's word for it that he was OK to weld and did not check it with the manager on site or the safety co-ordinator. If he had done so, he would have been advised that Mr Cafferkey was not authorised to weld. She indicated that the provision of the welding mask was for him to learn and watch, but it did not give him authorisation to weld or authorisation for the Claimant to permit it. In her evidence she said that the Claimant had said in the disciplinary hearing that the welding mask had been given to Mr Cafferkey to watch. In evidence she wasn't really able to explain the purpose of Mr

Cafferkey watching if it wasn't to learn, or why a screening mask would have been given to Mr Cafferkey if it wasn't for him to learn.

63. The Claimant appealed against the decision. His letter of appeal is at pages 97 to 99 of the bundle. The basis of his appeal was basically threefold: - Firstly that the incident was based on a misunderstanding based on historical practice. He understood that he was authorised by Mr Brayfield to teach Mr Cafferkey to learn to weld. Secondly he referred to the safety culture at the depot. In that regard he referred to the fact that Mr Stocks who, although he considered this to be a serious health and safety issue, allowed Mr Cafferkey to carry on welding for a significant time after having been told that he was doing so. He said it raised concerns as to whether or not it really was a serious health and safety issue. Thirdly he said that his line manager was basically conspiring to dismiss him. He referred to the proposed change to his contract of employment and other incidents. In the letter he also raised a number of other queries and was told to make a subject access request.

64. An appeal hearing was convened. Mr Thomas Watts the Area Manager heard the Claimant's appeal. The Claimant was offered the opportunity to attend with a representative, but attended alone.

65. The notes of the appeal hearing are at pages 101 to 104 of the bundle.

66. Mr Watts said that the Claimant was reluctant during the course of the appeal hearing to go into details about his grounds of appeal.

67. In the appeal hearing, the Claimant said that he believed that he was authorised by Andrew Brayfield to teach Mr Cafferkey to weld because he had authorised the purchase of a screening mask. The Claimant also complained that Mr Stocks had watched the incident for 20 minutes and did not take any action, which suggested that it was not a serious health and safety incident. The Claimant also referred, during the course of the appeal hearing, to the incident with Mr Ellis. He said that only Mr Cafferkey went to see Mr Stocks. He said that he understood Mr Stocks said that it was OK for Mr Cafferkey to learn to weld and that he would put him through the test. The Claimant also mentioned the other matters he had raised.

68. During the course of the appeal hearing, the Claimant made the point that no-one had said to him that Mr Cafferkey could not weld and that Mr Brayfield knew about the welding mask having been purchased for Mr Cafferkey. The Claimant said that if Mr Cafferkey was not allowed to learn to weld then why had Mr Brayfield purchased the mask. The Tribunal noted that when that question was put to Mr Watts on cross-examination, Mr Watts was not able to answer the question, even though he spoke to Mr Brayfield after the appeal hearing.

69. During the appeal hearing Mr Watts asked if the Claimant wanted to add anything else on a number of occasions. He asked about Alfie Wilson and went through each of the points of the Claimant's appeal giving the Claimant the opportunity to respond.

70. During the appeal hearing the Claimant referred to his concerns about his reduced pay increase in comparison to other colleagues and the proposed change to his contract of employment from welder to yard operative.

71. The appeal hearing was adjourned.

72. In his evidence to the Tribunal Mr Watts said that he had some sympathy for the Claimant's position with regard to the situation. He said that he did make some enquiries with Mr Brayfield and Mr Stocks about the provision of the welding mask to Mr Cafferkey, but it was not clear from Mr Watt's evidence what the outcome of that discussion was. No notes were made of his further discussions in particular with Mr Brayfield. From his evidence it does not appear that Mr Watts pursued this issue as to why a welding mask was purchased for Mr Cafferkey if there was not some form of implied authorisation to allow the latter to learn to weld. There is no evidence of any reasonable explanation having been given by Mr Brayfield to that question. Mr Watts said that he also spoke to HR about the Claimant's issue with regard to the change of contract and was told that there was no documentation. It was not clear from Mr Watt's evidence how much the issue about the proposed change of contract, and the position taken by Mr Stocks regarding the same, was fully explored with either Mr Stocks or HR. Mr Watts indicated that he effectively dismissed those issues because they were not relevant to the issue at hand and different people had been involved in earlier process regarding the issue about the pay increase and other disciplinary actions taken against the Claimant.

73. The appeal by the Claimant was dismissed.

74. The Respondent wrote to the Claimant to confirm the outcome of his appeal which was not upheld. The letter dismissing the appeal is at pages 110 to 116 of the bundle. In the letter dismissing the appeal, Mr Watts indicated that he believed that the Claimant was fully aware he was not authorised to allow Mr Cafferkey to weld. He indicated that, at the disciplinary hearing, the Claimant had indicated that the screen was purchased so his colleague could watch him weld. He said that the Claimant had taken his colleague's word for it that he had had permission to weld. Mr Watts did not accept the allegation with regard to the safety culture. He indicated that Mr Stocks had indicated that he had reviewed the CCTV footage over a longer period of time to check who was undertaking the welding. He concluded that the decision to dismiss should be upheld.

75. The Claimant' indicated that his gross weekly wage was £443.25.His net average pay was £410.53. This is based on an average of the previous 12 weeks' pay, as his pay due to overtime would be different in different weeks. During his suspension, the Claimant was not receiving overtime, so the Respondents have calculated what his average net pay would have been over that period taking account of the preceding 12 week period. They have calculated his net pay as if he had not been suspended. The Respondent has calculated that his net pay on that basis would have been £404.41. The Claimant accepts those figures.

76. The Respondent introduced a pay rise, which the Claimant says was 2%. The Claimant's pay would on that basis have increased his weekly wage by an extra £12 on the basis that he had received that pay rise.

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77. After the Claimant's employment ended he signed on for Job Seekers Allowance/Universal Credit. He undertook a training course for 4 weeks to improve his chances of obtaining work. A few weeks after completing the training course, the Claimant found alternative employment. He commenced alternative employment on 26 June 2018. He is earning £490.82. The Claimant says that his basic pay is less but he is undertaking overtime and therefore earning more. He says that he is not receiving holiday pay. As a matter of law, one would expect him to be entitled to holiday pay.

Submissions

78. The Respondent says that the Claimant was dismissed for gross misconduct which they say is a fair reason for dismissal. They assert that the Respondents believe the Claimant had committed an act of gross misconduct, based on reasonable grounds and that a reasonable investigation was undertaken. They say that dismissal was a reasonable response in the circumstances of the case bearing in mind that this was a matter of health and safety.

79. If the dismissal is found to be unfair, the Respondent submits that the finding in relation to defects in the investigation would be procedural alternatively they submit that the Claimant contributed to a very large extent to his dismissal. They also submit that the Claimant was on a final written warning so on just and equitable grounds any award to which he is entitled to for either a basic or compensatory award should be reduced.

80. The Claimant submits that there was another reason for his dismissal. He says that he is concerned that there was a concerted effort on the part of the Respondents to dismiss him. He refers to the reduction in his overtime; the lower pay rise given to him; and attempts to change his contract of employment and other warnings issued to him.

81. He also submits that the investigation into the disciplinary hearing incident was not adequate and that others were doing welding work at the depot. He submits dismissal was not a fair response in the circumstances of the case.

Conclusions

82. This Tribunal finds that the Claimant was dismissed for allowing an unauthorised person to weld in the workshop and for leaving that person unattended in the workshop. That could amount to gross misconduct as a breach of the Respondents health and safety regulations.

83. Misconduct is a fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.

84. This Tribunal does not find that the Respondent undertook a reasonable investigation into the allegations. The Respondent appeared to be looking for evidence to support the allegations, but did not properly consider any evidence that might have exonerated the Claimant.

85. The Claimant raised concerns about others doing welding work and not being disciplined. Although the Respondent undertook some investigations into what work was being undertaken by those people, they did not make enquiries in relation to Steven Arkwright, the fitter. Further, their enquiries were limited to making enquiries with the Depot Manager (whom it was suggested had issues with the Claimant) and not with the persons who were alleged to be undertaking that work.

86. Of more concern, the Claimant stated throughout that he had been authorised by the Foreman to obtain a welding mask for the other employee. He was effectively saying that there was an implied agreement on the part of the Foreman that the other employee could learn to weld. No enquiries were made with the Foreman as part of either the investigatory or disciplinary process, although investigations were made at the appeal hearing stage. However, that issue was never properly explored with the Foreman namely to ascertain exactly why; and on what basis; and for what reason a welding mask was provided to that other employee, if he was not allowed to weld or learn to weld. This was not a procedural failing, but a substantive failing that went to the substance of the allegations.

87. Further, no proper enquiries were made as to what was being alleged by the Claimant about attempts by the Respondents to get rid of him. Although at the disciplinary hearing he only referred to HR, he made it clear by the time of the appeal that the concerns related to Mr Stocks and there were a number of them and potentially a pattern of behaviour. The Appeal Officer made no proper enquiries to ascertain what if any, issues there might have

been between the Claimant and Mr Stocks. He simply accepted the comments made by HR that there was no documentary evidence. He did not check whether attempts had in fact been made to change the Claimant's contract of employment, which were not followed through.

88. Dismissal was not a reasonable response in the circumstances of this case, bearing in mind the Claimant's period of service. No consideration was given to alternatives to dismissal. Further, although the Tribunal acknowledge this could have been considered a serious health and safety issue which warranted immediate dismissal, the Tribunal does not accept that it was considered to be in the circumstances of this case. Firstly because when there was a concern that this might have been happening in December no warning or action was taken on that occasion. Further, if this was considered such a serious health and safety issue which warranted immediate dismissal, it is unclear why it was not stopped immediately rather that allowed to continue for a further 20 minutes before being stopped. Furthermore dismissal was not a reasonable response in the circumstances where there was no proper consideration or investigation made to ascertain whether others (without the appropriate authorisation) were still welding, bearing in mind that it was considered so serious as to warrant the immediate dismissal of the Claimant when he was found to have allowed another employee to learn to weld.

89. For those reasons this Tribunal finds that dismissal was unfair. Accordingly the Claimant's complaint of unfair dismissal is upheld.

90. The Claimant acted reasonably in mitigating his loss.

91. However it is quite clear that the Claimant substantially contributed to his own dismissal. He did allow Mr Cafferkey to weld, although he knew under the safe working procedures that he was not allowed to do so. He relied on what Mr Cafferkey had told him, but made no attempt at any stage to make proper enquiries with the Depot Manager, as to whether or not Mr Cafferkey was permitted to weld. This was despite the fact that this exact issue was raised by Ellis with Mr Cafferkey in front of the Claimant in an incident only a few months earlier. Even if he thought the situation had changed, he did not make proper enquiries to check whether that was the case. He was after all the senior person and the one who had sole responsibility for welding at the depot. The onus was on him to make proper enquiries, which he failed to do.

92. Moreover the Tribunal has noted that although this was the first occasion that Mr Cafferkey was allowed to weld, the Claimant left Mr Cafferkey alone to weld, even though the Claimant's evidence was that he understood he was teaching Mr Cafferkey to weld.

93. For those reasons this Tribunal considers that the Claimant has substantially contributed to his own dismissal. The Tribunal considers that he has contributed to the extent of 70% to his dismissal.

94. The Tribunal has considered whether it is just and equitable for both his compensatory and basic award to be reduced to that extent. The Tribunal considers that, bearing in mind the Claimant was on a final written warning, the same reduction should be made to both his basic and compensatory award in that amount.

95. Accordingly the Claimant is awarded compensation for unfair dismissal as follows:-

Basic award 16 years x 1.5 weeks' pay rate of £443.25. Less deduction of 70% for contribution.	£10,638	 £3191.40
Compensatory Award Immediate loss x 8 weeks at 410.53	£3284.24	
Loss of statutory rights Subtotal	£500 £3784.24	
Sub total		**£3784.24**
Future Loss No ongoing future loss as Claimant's new salary equates to his previous salary even with pay rise. Less contribution at 70% Total Compensatory Award	 £2648.97	 £1135.27
Total award on compensation for unfair dismissal		**£4326.67**

The Employment Protection (Job Seekers) Regulations 1996 apply to this award. The prescribed period 1 May 2018 to 4 July 2018. The prescribed amount is £4326.67.

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Employment Judge Martin
Dated: 28 March 2019

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2501505/2018**

Name of case(s):	**Mr K McAllister**	v	**European Metal Recycling Limited**

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

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

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

"the relevant decision day" is: **1 April 2019**

"the calculation day" is: **2 April 2019**

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

MISS K FEATHERSTONE
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/publications/employment-tribunal-hearings-judgment-guide-t426**

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.