Case number: 2600132/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
	and	
Mr A Holburn		Beedspeed Limited (in Liquidation)

At a Final Hearing

Held at: Lincoln On: 28 March 2019.

Before: Employment Judge Clark (Sitting Alone)

REPRESENTATION
For the Claimant: In Person
For the Respondent: Mr Howson, Consultant

RESERVED JUDGMENT

1) The claim of unfair dismissal **succeeds**. The respondent shall pay to the claimant compensation assessed in the sum of £1,362.90 being:

   a) A basic award of: £1,275.12
   b) A compensatory award of: £ 256.40
   £1,531.52

2) The Recoupment Provisions apply to the above award of compensation for unfair dismissal: -

   a) Monetary Award: £1,531.52
   b) Prescribed Element: £256.40
   c) Period to which (b) relates: 24/11/2017 –28/3/2019
   d) Excess of (a) over (b): £1275.12

3) The claim of breach of contract **fails and is dismissed**.

4) The claim for accrued but unpaid holiday pay succeeds. The respondent shall pay the claimant the gross sum of **£1,194.14.**

5) The claim for unauthorised deduction from wages succeeds. The respondent shall pay the claimant the gross sum of **£268.80.**

REASONS

1. Introduction

1.1 This claim relates to the circumstances of Mr Holburn's summary dismissal effective on 24 November 2017 and associated claims relating to money outstanding at the date of dismissal. After discussion with the parties at the outset, the live claims for me to determine are: -

a) Unfair dismissal.

b) Wrongful dismissal. That is, breach of contract relating to contractual notice.

1.2 The claims for sums outstanding at termination are now agreed, partly it seems because there is both a final payslip and a subsequent email promising to pay these sums which have not been paid and the claims were bound to succeed. They are: -

a) Holiday in the gross sum of £1,194.14 (142.16 hours x £8.40 per hour)

b) Unlawful deduction from wages in the gross sum of £268.80 (32 hours x £8.40)

2. Preliminary Matters

2.1 The respondent is in voluntary creditors' liquidation. The effect of that is that there is no moratorium on proceedings but the directors relinquish control of the company to the insolvency practitioner. I was assured by Mr Howson and Mr George that the respondent's continued participation in this hearing was proper. The respondent's sole director was a Victoria Burton. Mr Holburn had believed there was a second director, a Mr D Burton, and had sought to bring a claim against him as a second respondent which was not accepted due to him not being named in early conciliation. Such a person does exist but, following a deed poll, he is now known as Daniel George and he gave evidence before me. He has never been a director of the respondent but was the general manager. It is clear he had practically exclusive day to day responsibility for the respondent's business, a small business described by Mr Howsam as "not quite, but close to, a one-man-band". It is Mr George who has instructed the representatives, Peninsula, to act for the respondent today. That is notwithstanding its liquidation and the reason they continue to act was because, he tells me, he was ready to attend the first listing of this hearing which was postponed last December.

2.2 The respondent remains a legal entity in that it has not been dissolved.

3. Issues

3.1 The issues on the outstanding matters were agreed as: -

a) Whether the respondent can prove a potentially fair reason for dismissal. It relies on conduct.

b) If so, did it act reasonably in all the circumstances of the case in relying on that as a sufficient reason to dismiss the claimant and was summary dismissal within the range of reasonable responses.

c) If the dismissal was unfair, did the claimant contribute to his dismissal by his own conduct and if so to what degree.

d) Should there be any *Polkey* reduction to any award of compensation, either because the dismissal was procedurally unfair or for any other circumstance from which it is just to limit the recovery of losses.

e) Was the claimant guilty of conduct amounting to a repudiatory breach prior to the dismissal and entitling the respondent to dismiss without notice.

f) Remedy by way of damages and compensation.

4. Evidence

4.1 For the Claimant, I heard from Mr Holburn only. For the Respondent, I heard from Mr George only. All witnesses adopted on oath a written statement and were questioned.

4.2 I received a small bundle running to 123 pages which I read.

4.3 Both Mr Holburn and Mr Howson made closing submissions.

5. Facts

5.1 It is not the function of this tribunal to resolve each and every last dispute of fact between the parties but to make such findings as are necessary to determine the issues and to place them in their proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

5.2 The respondent was a small retail business selling scooter parts through a shop and online. The business continues today in the same way albeit under a new legal entity, BSL UK Limited with which the claimant has no legal connection. The business was long standing. In its original form, it was run by a Mr and Mrs Beedham. They traded as a partnership before the business was first incorporated in 2013 in the form of the Respondent. In 2016, the Beedhams sold the business to Victoria Burton. She took over as shareholder and director. The business employed between 9 and 13 employees.

5.3 The claimant was employed by the respondent from 11 September 2006. He was employed as telesales manager. At the date of his dismissal he earned £336 per week gross / £289 per week net. I find the title “manager” was more of a courtesy title. Although there

were others involved in online sales and although there was some interchanging of roles and cover between them, I do not find this was a formal organisational structure whereby the claimant was responsible for a team.

5.4 Victoria Burton did not feature in this matter and has not given evidence. In fact, she seems to have next to nothing to do with the day to day management of the business. I am told she and Mr George are related and he seems to have been the person that dealt with all the affairs of the business. He was certainly the person to go to about any employment issues including wages.

5.5 I find this employer had very limited employment policies and under developed procedures, even for a small business of this scale and nature. Those that did exist were unsophisticated.

5.6 The claimant's employment was subject to a written statement. The first version was issued by the Beedhams when the business entity was a partnership. A second was reissued when the business was incorporated. That is the latest version issued on 30 March 2013 [33-38] and is described as a "Renewal and Continuation of Employment Contract". So far as is relevant for these proceedings, it covers: -

a) The relevant notice provisions, adopting the statutory scheme.

b) That pay would be paid weekly in arrears.

c) That the hours of work were 40 per week, between 9:30 and 5:30 over 5 of the 6 days between Monday to Saturday.

d) That holiday entitlement was 20 days plus bank and public holidays. There was a relevant agreement that all accrued but untaken holiday at termination be paid by the employer.

e) There is a contractual disciplinary procedure which essentially imports what was, at the time, the standard and modified disciplinary and dismissal procedures from the now defunct dispute resolution regulations. In the absence of any subsequent contractual variation, the contractual version of that procedure has survived the demise of the statutory regulations and continues to exist as between the parties in a contractual term.

5.7 The contract had not been varied when the business was acquired by Victoria Burton, nor was any revised statement issued. The disciplinary procedure identifies by name the individuals with authority to undertake disciplinary and appeal hearings as Sylvia and Alan Beedham.

5.8 If find there were no relevant employment policies. There was no staff handbook. I find there was no policy on the use of computers or the internet whilst at work.

5.9 The claimant had his own office although others could use it from time to time. Similarly, he might work on other computers. I find there were no individual log-in

procedures. However, other than absences, I find the claimant's computer was only used by him.

5.10 Friday each week was pay day. On Friday 17 November 2017, the claimant did not get paid. There had never been an issue with the payment of wages in the past. The claimant generally kept a credit balance in his bank account and he did not immediately notice the fact he had not been paid.

5.11 The claimant was at work as normal the following week commencing Monday 20 November. On the evening of Wednesday 22 November, the claimant was occupied arranging the renewal of his car insurance. This gave him cause to check the funds available in his bank account. He noticed he had not been paid. He did not have sufficient funds to pay for his car insurance renewal. He realised he could not insure it and would have to refrain from driving his car on the public highway and also suffer a period where he knew it was uninsured. It was a concerning thought for Mr Holburn and he was undoubtedly annoyed by the situation.

5.12 I find Mr George was the correct, and indeed the only, person to go to with pay queries. He organised the payroll and provided basic information to the book keeper. The book keeper, in return, informed him of the weekly net wages to be paid. He then executed the weekly bank transfers to staff each Friday. I find there were two members of staff whose wages did not get paid that particular Friday. The others did get paid as expected. Mr George says, and I accept, that when he did the wages he had made an error in sending the claimant's money through the bank transfer. He did not realise his error until the claimant raised it with him.

5.13 The claimant tried to contact Mr George that Wednesday night. He tried to telephone him around 9:30 pm. Mr George did not answer. The claimant both rang and tried to contact him through "facetime" on two more occasions. He tried to contact Mr Wright, the warehouse manager, also without success. Mr George became aware of the claimant trying to contact him and the reason for it and responded to him by text message. Mr George says he did so in that way because he was out with his family at the time and he could do no more than say he would look into the problem the next day. Only part of that text is available. The part that can be read says: -

"…..but will look at this first thing in the morning. All wages were paid on Friday approx 3pm. Speak in morning"

5.14 In response, the Claimant sent a text message back to Mr George. It read (as written): -

"Mine • Graham's were not. This is not acceptable in any respect: if I this any more this week: I will check my account before 9 tomorrow, if unsatisfactory we will see each other os."

5.15 I find the Claimant did get paid first thing on Thursday morning.

5.16 I find Mr George was concerned about the claimant's text which he interpreted as a threat. I find the word or phrase "os" was not a phrase that was used in the workplace and had no particular local meaning. Mr George understood it to mean "outside" as in "let's take this outside" and that it was some sort of threat or invitation to violence. Mr George is in his 20's. Mr Holburn is in his 50's. There is no evidential basis for concluding Mr Holburn had any reputation for violent tendencies. Equally, there is no basis for concluding that Mr George knew one way or the other of the likelihood Mr Holborn carrying out such a threat.

5.17 Mr George resolved to speak with the claimant about it in a formal context.

5.18 I find this all occurred at a time when the claimant, unknown to him, was already in the employer's focus for an unrelated issue. I find there had been some concern voiced to Mr George by an unidentified colleague about Mr Holburn's performance and use of work computers. This concern had been raised at some point over the previous week or two. Nothing had happened until the week commencing 20 November when Mr George had begun to view the claimant's computer and, in particular, the browsing history.

5.19 I find that use of the internet was a legitimate part of Mr Holburn's role. This would manifest itself in viewing a range of sites that may not immediately look like they were work related. For example, Google and Google Maps were legitimately used to identify correct delivery addresses. YouTube was legitimately used to view product reviews by manufacturers and others. There were numerous chat room forums related to scooters, the subscribers to which were very likely to be customers or potential customers of the respondent's business and their content was often relevant to product sales and networking. There was also no policy restriction on him using the internet outside his working day or during breaks during which time he might view news sites or perform searches in respect of other personal interests such as music and lyrics. I would go as far as to say that even during working hours, there could be quiet periods where he was not dealing with any customers and he might engage in web browsing during that time.

5.20 As a result of exploring the browsing history, Mr George became concerned about the Claimant's inappropriate use of the internet at work.

5.21 On the morning of Thursday, 23 November 2017, the claimant was called into an investigation meeting with Mr George. Mr White, the warehouse manager, attended to take notes. The accuracy of the notes is disputed by Mr Holburn. In some cases, he denies it records what he said and sometimes that it has been paraphrased although having explored with Mr Holburn the areas of dispute, it seems to me that the notes are a generally fair representation of the topics discussed. On the issue of his explanation of the meaning of os, I find he said "off site".

5.22 Mr Holburn did not have anyone accompanying him. He did not explicitly ask to be accompanied. He was not told in advance what would be discussed at this meeting or its purpose.

5.23 Two issues were put to him during this meeting. The first was to explore his browsing history. The browsing history was said to contain "indecent images". The respondent had

secured a list of his browsing history between 3 October and 21 November. The list contains approximately 3000 URL addresses and the dates and times each website was accessed. Most were visited once, some multiple times. It is clear in some cases a large number of websites were accessed within the same minute. In some respects, the history of one website can explain or indicate the reason for the subsequent websites being viewed. That browsing history gathered by the respondent was not given or shown to the claimant. He was instead shown only nine printouts of images from web pages within that browsing history. The printouts contain mainly pictures of females. Four are "stock images" available for purchase online. They are entitled "Fashion model in feather bra and panties in studio", "lady in blue panties", "Athletic girl" and "pretty teenage girl". Two are from a website called "gymslip connoiseur". One of which depicts a young woman dressed in a pinafore dress, shirt and tie. The other is a head shot showing an older male and the head of what appears to be a plastic manikin wearing a similar outfit. Two further printouts show the results of a google search on the terms "gymslips and legs". The final shows the results of a google image search on the terms of "forced penetration". The claimant is recorded in the meeting as explaining why they might be there, that they could be pop-ups, that he was waiting for the server to catch up on the sales website and there was no harm in personal browsing.

5.24 The second issue was the terms of the text message that had been sent to Mr George the previous evening. Mr Holburn is recorded as replying this was not a threat, only an implication. He was recorded as explaining that "os" meant "off-site" and not "outside".

5.25 Mr George did not raise any complaints from others about performance.

5.26 The outcome was that the claimant was suspended in order for Mr George to undertake further enquiries on both matters and take advice on how to deal with the claimant's conduct.

5.27 There was no letter or other written record of the outcome of that meeting.

5.28 The following morning, Friday 24 November 2017, the claimant did not attend work in accordance with his suspension. I reject Mr George's account that he sent an email inviting the claimant to a disciplinary hearing. There is no email before me, Mr Holburn was adamant that he received a telephone call requesting him to attend work in the next 30 minutes for another meeting and during evidence Mr George wavered in his own recollections. I find there was no written communication setting out the disciplinary matter in any form, the process or the consequences of the outcome of the meeting. If the notes of the previous day's investigation meeting had been typed up by then, they were not provided to the claimant and he had no opportunity to comment on their accuracy. The fruits of such investigation as there was in reviewing the claimant's browsing history was not provided to him.

5.29 The claimant attended the meeting without knowing its purpose and without a companion. He was not told of his right to be accompanied but, as before, did not explicitly raise it himself. Mr George chaired the meeting and Mr White again took notes. I find that no further investigation had in fact taken place between then and the day before.

5.30 In almost all respects, the meeting was simply a repeat of the meeting held the day before. The images were again presented and described as indecent pictures. The claimant

did not answer whether he thought viewing this material was acceptable. The claimant maintained his position that the text message was not a threat. The parties covered the same ground in respect of what "os" meant. It is significant in my view that for a second time the notes read that the claimant explained it meant "off-site" and not outside. In neither meeting was it recorded that the claimant explained it as meaning "on-site".

5.31 At the end of the meeting Mr George announced his decision. There was no adjournment, he had formed the view that this was gross misconduct and that the claim was being dismissed. The meeting then concluded with a curious statement that the claimant had two options. He could either sue the company for what he was owed or leave quietly and be paid for his work and holidays due.

5.32 Later that day, following some research on line, the claimant emailed the respondent challenging the decision Mr George had made. The email does not use the word "appeal" but he had not at that point been told he had a right of appeal. Despite its brevity it is, however, in every other respect in the nature of an appeal. He challenged three points of the employer's decision. The first was inadequate notice, which I find to mean advance notice of the meetings as opposed to contractual notice of termination. The second was lack of impartial representation. The third was gross misrepresentation of the facts.

5.33 On Tuesday 28 November 2017, the respondent sent a letter confirming the outcome of the disciplinary hearing the previous Friday. In it, the charges were described as: -

a) Misuse of company property by accessing inappropriate sexual content via the internet in work time.

b) Harassing and acting in a threatening way towards me as your line manager via text message.

5.34 The letter did two further things which I have struggled to understand. The first is that Mr George dealt summarily with his response to the claimant's email of 24 November challenging the decision. In respect of each of the three challenges raised, Mr George dismissed his concerns. I find Mr George dismissed it because he took the view that it was a case of cut and dried gross misconduct under the contract of employment. I find the approach he took to this indicated he had formed his view of the situation from the moment the issues arose and this necessarily closed his mind to anything Mr Holburn could say to him in response. However, having rejected the points of challenge, he then indicated to the claimant that he had a right to appeal this decision. The process for the appeal was for the claimant to write to him. The letter indicated that the appeal would be considered by an external advisor.

5.35 None of the evidence relied on in reaching the decision was included in the dismissal letter.

5.36 I explored why Ms Burton, the respondent's director, was not involved at the appeal stage. She appeared to be the obvious person to replace Mr Beedham in the contractual disciplinary policy for conducting appeals. Mr Holburn described his understanding of her as a

"sleeping partner" and that she was not involved in the business. He had not met her during the time she had owned it and he was not aware that she had ever visited the business.

5.37 Mr Holburn did not write again, save in respect of chasing outstanding payments. Despite the Respondent's dismissal of his challenges he was cross examined on why he did not appeal against the decision. I find he took a reasonable view that the respondent had made it clear what view it took and any attempt to appeal would have been futile.

5.38 I accept Mr George's evidence that the respondent appointed a replacement called Wayne, who started as Telesales Manager the following January.

5.39 Thus far, I have made findings primarily as they unfold in respect of the employer's handling of these allegations. I must now revisit the allegations themselves, more directly, and make my own findings of what happened as is necessary for other aspects of the claim.

5.40 I was not impressed with the respondent's attack on Mr Holburn in cross examination for viewing sites such as buzzfeed, facebook, BBC and wikipedia even though it appeared clear these were not work related matters that were occupying his time during working hours. Whilst it might be a question of conduct, it was not the conduct that led to dismissal and in the absence of any policy or rules governing use of the internet does not lead me to any conclusions of misconduct sufficient to repudiate the contract.

5.41 However, that is not the real issue. Mr Holburn denied knowingly viewing any of the images said to be inappropriate save for the websites relating to "Gymslips". He explained his reason for accessing them on the basis of buying a present. I found that an unlikely explanation for the purchase of an item of school clothing which might be more likely nowadays to be described as a pinafore dress, even if technical correct to referred to it as a gymslip. Even so, it does not explain the fact that the browsing history shows the search criteria was not gymslip but both "gymslip" and "legs". The images returned, whilst not sexually explicit or pornographic, are of a type typical of the St Trinian's school imagery. Indeed, some of the images returned on that search may even be stills from that film franchise.

5.42 I do not find that any of the images could be accurately described as pornographic or explicit and not all of them could be described as sexually inappropriate as the respondent labelled them. I do find, however, that some of the images do contain a sexual reference and all of them have a connotation in the circumstances which is disturbing.

5.43 I find on the balance of probabilities that Mr Holburn was responsible for inputting the search terms including "gymslip and Legs" and also "forced penetration". The results of those website searches are as a result of his deliberate search criteria. They cannot be explained as pop ups or other such means as he advanced, by which pages may automatically load in the background during other legitimate website use. I did not accept his plea that computers were anathema to him. Elsewhere in his evidence, he was able to articulate or understand various computer concepts including algorithms, the effect of pop-ups and videos rolling over in a sequence

5.44 I am satisfied that Mr Holbun's office computer was used to access web pages containing these images. Having heard the claimant give evidence on how he used his PC, his acceptance of visiting some of the websites and his account of why some were visited, I am satisfied on the balance of probabilities that these websites were visited by him. I cannot say that they were all visited at a time when he should have been working, as opposed to being accessed before or after work or during lunch and other breaks, but some clearly were.

5.45 In the hearing before me, Mr Holburn advanced a case explaining the use of "OS" in his text to mean "on-site". He could not explain why he had abbreviated it to OS rather than spelled out on-site. He accepted that there was no local jargon used by staff to give it a local meaning, such as to refer to being at the workplace as "on-site". As all staff seem to only work at the one premises, OS would therefore seem to have been an unnatural meaning anyway. His explanation was that Mr George was also involved in some property development and there was, therefore, a construction "site", hence reference to meeting on-site. Even so, he then accepted he did not believe Mr George to be on site that week and had not intended the message to mean the two would meet on the construction site, but at the normal workplace. I have to say, I found Mr Holburn's explanation to be strained. Whilst he did not accept the notes of the meeting were accurate, he could not suggest any reason why two sets of notes should have misstated his explanation as off site and not on site. Had his explanation of the meaning of onsite been logical or credible, I may have accepted there was room for some error in the notes. As it is, I am inclined to accept the account given at the time was that he explained it as meaning off site, as recorded in the notes on both days.

5.46 I am therefore satisfied that the alternative explanations for the meaning of OS do not have credibility. The context for the use of OS in the text was immediately following the phrase "if unsatisfactory" which suggests there was a condition to meet, that condition is the resolution of his wages being paid to his satisfaction, followed by a consequence if that condition was not met. That consequence is "we will see each other OS". I am satisfied that Mr George's interpretation that this was a threat was not only a reasonable one for him to draw, but in the evidential landscape presented to me, it seems to be the only way to make sense of the phrase. I conclude this was a threat, even if it was a most unlikely one to come from Mr Holburn and the prospects of him actually carrying it out were slim.

6. Unfair Dismissal

6.1 Section 98 of the **Employment Rights Act 1996** ("the 1996 Act") states, so far as relevant:

> ***"(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 subsection if it—***

(b) relates to the conduct of the employee,

(4) Where the employer has fulfilled the requirements of subsection (1), 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."

6.2 As to how that test is to be applied generally, I have had regard to the observations of Browne-Wilkinson P in **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** and Mummery LJ in **Post Office v Foley [2000] IRLR 827**

6.3 The approach to be adopted by an ET where an employee is dismissed on the ground that the employer had entertained a suspicion or belief of misconduct by the employee was explained in **British Home Stores Ltd v Burchell [1978] IRLR 314**. In summary, what is needed is a genuine belief in the misconduct; reasonable grounds upon which to sustain that belief and that it was based on having carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

6.4 In **Sainsbury's Supermarkets Ltd v Mr P J Hitt [2002] EWCA Civ 1588** Mummery LJ made clear that it is necessary to apply the objective range of reasonable responses test not only to the decisions reached, but also the steps taken to reach those decisions.

The Reason for Dismissal

6.5 During the hearing, I explored with the parties the possibility that there was an alternative reason lurking behind what on the face of it appears to be the two matters relied on by the employer. The first such contention came from the claimant. He says he is long serving and would be expensive to make redundant. I dismiss this as a realistic possibility as there was no other concern about the claimant's work and the Respondent did in fact continue to need his role performing and replaced him after he was dismissed. There is simply no evidence to support this as the reason for dismissal.

6.6 I have also considered, on my own analysis of the chronology, whether the claimant's challenge to his wages not being paid was the reason or in any way influenced the reasoning. This could of course engage the automatically unfair dismissal provisions as it could amount to the assertion of a relevant statutory right. I reject this too. Firstly, it is not a contention the claimant himself advances. Secondly, I have accepted there was an error in the pay run and 2 of the 13 staff did not get paid. Thirdly, the response from Mr George was courteous, if to the point, and he followed it up by correcting the error immediately making prompt payment and the money was in the claimant's bank account first thing on the following morning.

6.7 The remaining factors are that there was already some suspicion that the claimant's time was being diverted from his work due to him browsing the internet. Secondly, and perhaps the immediate catalyst for disciplinary action, the text of Wednesday 22 November.

6.8 I have come to the conclusion that, notwithstanding a number of concerns I have about the respondent's approach, it has satisfied me that those matters are the real reason for dismissal. I am also satisfied they are both, individually and collectively, matters that fall within "conduct" as a potentially fair reason for dismissal even though they are two unrelated matters of an entirely different nature to each other. So much of the requirement that falls to the respondent to prove the reason therefore has been proved and I must now turn to the second question under section 98(4), for which the burden is neutral, the reasonableness of dismissing the claimant for those reasons.

The Reasonableness of the Dismissal

6.9 I start with the procedure adopted. There are two sources relevant to determining what is a fair procedure. One is the contractual disciplinary procedure, the other is the ACAS Code of Practice No 1 on Discipline and Grievance Procedures (2015). There are a number of aspects where I am satisfied the procedure adopted by the respondent did not comply with the minimum expectations of either or both of those sources. They are: -

a) The allegations were not reduced to writing. The ACAS code requires the employer to notify the employee in writing. The contract refers to an employer's "written statement".

b) There was no supporting evidence given to the claimant. In this case he obviously had his own copy of the text message he sent and there can be little to criticise that part of the allegations. However, in terms of the internet use there was a substantial volume of information contained in the extensive browsing history relied on. It is entirely possible, as was spontaneously demonstrated during the evidence in the hearing before me, that challenges or explanations might arise from the timing of the browsing, what else was happening at the time, who else was around and in some cases from the trail of websites viewed and the nature of websites. It does seem to me to be possible that understanding the journey of "clicks" from one website to another could have been relevant to explain why the claimant ended up at certain websites.

c) There was no statement reminding Mr Holburn of his right to representation. Had there been he would certainly have considered it and is likely to have taken it up and in those circumstances, the dynamics of the two meetings, certainly the latter for which the right engages, would have been different. There is less likely to have been a dispute over the notes.

d) The advance notice of the meetings was extremely short and, had the full investigation information been provided to the claimant as it reasonably should have been, would have been insufficient for him to prepare adequately.

e) The respondent is confused whether it gave the claimant an opportunity to appeal or dealt with his challenges summarily in the outcome letter. To the extent that it was dealt with summarily, it was dealt with without a hearing and by the original decision maker, Mr George, when there were alternative options available (Ms Burton or the independent person).

6.10 The cumulative effect of those deficiencies is such that I am satisfied that the process by which the Respondent came to its decision was not procedurally fair. When dealing with a small employer such as this with little professional support, there is a significant margin given in how the procedure may still satisfy the general test of fairness. In this case, the procedural failings exceed that margin and there comes a point where even the smallest of employers has to maintain a basically fair process. This did not happen in this case and fell outside the range of reasonable responses of the hypothetical employer in similar circumstances. To his credit, Mr George acknowledged on more than one occasion how in hindsight things could have happened differently and that he had learned from this experience.

6.11 That conclusion renders the dismissal unfair. Mr Holburn therefore succeeds in that claim. Any remedy, however, has to take into account the consequences of two further matters. The first is the effect of section 123 of the Employment Rights Act 1996 in the assessment of an overall just and equitable compensatory award. The second is the extent to which Mr Holburn's own conduct contributed to his dismissal and/or that it is just and equitable to reduce the basic and/or compensatory award under sections 122 and s.123(6) of the 1996 Act.

6.12 As to the just and equitable reduction, the statutory provision is guided by the principles found in the case of **Polkey – v – AE Dayton Services Ltd [1988] ICR 142**. There are two aspects to this assessment. One is the extent the circumstances can be reconstructed such that, had a fair procedure been adopted, it is possible to assess the chances that the outcome would have been the same. There is, secondly, a wider application of the just and equitable principle insofar as the evidence in any given case shows there was a prospect of the employment coming to an end in any event at a later date. In this case, I am satisfied the employment would have continued for a sufficient period into the future for that to have no effect on the claimant's future loss. My focus is therefore on the first aspect of the test.

6.13 On the issue of the text message alone, there is little in the procedural failings which goes to the conclusions reached on this allegation. Remedying all of the failings would have no meaningful effect on the likely outcome of that decision. The highest that can be said is that an appeal heard by the proposed independent person *could* have taken a more lenient view on the sanction to be imposed in response. However, the liability part of that process is unlikely to be disturbed by applying any different procedure and I have to conclude that the prospects of an appeal then deciding to reduce the sanction, when it sits alongside the second allegation, has to be limited.

6.14 On the website usage, there is some prospect that had Mr Holburn been given the underlying information of his browsing history and been given more time to prepare for the hearings, he would have been in a much better position to prepare a full response. The

failure to adopt that approach deprived him of that opportunity. He was undoubtedly bounced into both hearings and may have given some responses off the cuff. The further analysis of the progress of his web browsing said to be inappropriate and the dates and times during which it was said to have occurred could have led to a more considered response and explanation. However, I need to consider the question of "what might have been" in response to those particular procedural failings at the time against what has now happened before me. Mr Holburn has now had the missing information for many months and has had ample time to analyse any elements which would have supported his defence. The time he had to consider any such arguments has not in fact led to any meaningful submission based on the times the websites were accessed or the genesis of his particular browsing sessions, nor that they were accessed on days or times when he was not at work or not on duty. I have to conclude, therefore, that had the respondent provided the underlying information and given greater notice of the hearings and longer time to prepare, little would have changed in the response given by Mr Holburn save for the limited points raised before me. Indeed, some concessions were made before me that were not made to the employer at the time. Again, therefore, the prospect of these matters leading to a different outcome, whilst not impossible, remain slim.

6.15 Turning that assessment into a percentage chance is not an exact science and does not admit of precise quantification. I apply a broad brush with which I do my best to put a numerical figure on the prospects. I have said twice, the prospects of a different outcome is not high and there is a real likelihood that the same outcome would have arisen despite those procedural failures. I have therefore concluded that it is appropriate to reduce compensation under s.123 of the 1996 Act by 80%.

6.16 I then must turn to the second matter of the claimant's conduct under both sections 123(6) and 122(2) of the 1996 Act respectively. The approach to the former was set out in **Nelson v BBC No 2 [1980] ICR 110**. There must be culpable conduct by the claimant, that must have contributed to the dismissal and it must be just and equitable in the circumstances to make a reduction. The test under s.122(2) is slightly different but the relationship between the two tests was set out further in a four stage test by Langstaff J in **Steen v ASP Packaging Ltd - [2014] ICR 56.**

6.17 In this case, the conduct relied on by the respondent is both the text threat to Mr George and Mr Holburn's access to the various inappropriate websites viewed. In both cases, that is conduct I have found happened in fact. The second question is then whether that conduct is blameworthy. I am satisfied it is. Both arise as considered choices of the claimant as opposed to matters of incompetence or negligence. Both are ill advised. Both would naturally lead to censure. The third question is whether that conduct caused or contributed to the dismissal. This question relates only to any reduction to the compensatory award under s.123. In analysing the reason for dismissal, I eliminated various other alternative explanations for it. Having done so, it remains the case that the conduct did contribute to the dismissal in that, without it, I can conclude there would not have been a dismissal. That, however, does not lead to a 100% reduction as there were other factors leading to the dismissal, most notably, Mr George's settled conclusion that this was an open and shut case of gross misconduct entitling him to dismiss the claimant and which necessarily closed his

mind to any measured approach to the process and issues. Nevertheless, I am satisfied the contribution was significant. Finally, I have to ask whether, and if so to what extent, it is just and equitable to reduce compensation in respect of both statutory provisions (although the test is slightly different, the practical application will often be the same for both). I have decided it is just and equitable to make a reduction to both the basic award and the compensatory award. In both cases it seems to me there is nothing that calls for a different approach. There are two matters of conduct that the claimant was responsible for and which would go to undermine an employment relationship, whatever view of seriousness an employer like the respondent may have taken of those actions. I have decided this reduction, too, should be at the level of 80%.

6.18 The consequence of those conclusions is that the basic award will be reduced by 80%. The compensatory award will be reduced by 80% of 80%. I must then turn to quantify the awards.

6.19 The basic award is formulaic. The claimant was employed for 11 years and his age at dismissal entitled him to 1.5 weeks' pay for each completed year of service. His unadjusted basic award is therefore 11 x 1.5 x £336 resulting in a figure of £5544. Adjusted in accordance with section 122(2) this reduces to £1108.80.

6.20 The compensatory award requires further findings of fact. The first is that the claimant remained unemployed following his dismissal until 12 February 2018 when he obtained new employment and has remained employed since. That subsequent employment has been paid at a lower rate than he previously enjoyed with the respondent. I am satisfied he took reasonable steps to find alternative employment and that the opportunities in his geographic area are not plentiful and he is restricted geographically due to him becoming reliant on public transport. I am satisfied that the claimant has continued to look for alternative work since obtaining his new employment albeit that he has, perhaps understandably, put reduced effort into that job search than was first the case on being dismissed. Whilst the opportunities are not plentiful, I am satisfied they do exist and by the date of the final hearing it was reasonable for the claimant to have obtained employment in circumstances that fully mitigated his losses. I therefore conclude the respondent's continuing liability for the claimant's losses ends then.

6.21 His financial losses are therefore the net loss of income until obtaining new employment from 12 February 2018 with an agency called Staff Force. That is £289 per week for a total of 11 weeks resulting in an unadjusted figure of £3179. There is then the remaining period of from 12 February during which the claimant has a shortfall in his earnings. I accept his evidence that throughout that period he has worked either for the agency or, for a short spell directly for an employer that went into liquidation at which point he returned to work for the agency. Throughout that period, he has earned net wages of £254.24 per week. That is a shortfall of £34.66 per week which continued for a further 59 weeks before the respondent's liability for his losses ceases. That results in a figure of £2,044.94. Mr Holburn is also entitled to a notional award in respect of the loss of his statutory rights which I award in the sum of £350. The total unadjusted financial loss is therefore £5,573.94.

6.22 The adjustments arising from sections 122 and 123 of the 1996 act reduce this figure significantly. Applying 80% of 80% of that unadjusted figure results in an award of £222.96.

6.23 The total award thus far is, therefore, £1331.76 (£1108.80 + £222.96). I am satisfied that it is just and equitable to make a further adjustment to that award under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 in respect of the failure in compliance with the ACAS Code. I did not find the respondent's submission that the claimant should suffer a reduction for failing to appeal an attractive or persuasive one. On the contrary, there were clear failings on the part of the respondent. Those failings were in part of the ACAS procedure and not all of it and the overriding justice and equity of this situation does not call for anything approaching the maximum increase, but an increase of 15% is appropriate. The award will therefore be increased by that to £1531.52 (£1275.12 + £256.40).

7. Breach of Contract

7.1 There is no dispute that the contract of employment entitled the claimant to notice of termination in accordance with the statutory regime. In his case, that amounted to 11 weeks. The claimant was dismissed summarily. That dismissal is therefore prima facie in breach of the contractual term as to notice unless that dismissal was in itself in response to the claimant's own repudiation of the contract. The legal burden therefore falls to the respondent to show that there was a repudiatory breach of contract by the claimant prior to 24 November 2017 in order to avoid liability for what would otherwise be a breach of contract.

7.2 The only question before me, therefore, is whether the respondent was entitled to dismiss without notice. If I am satisfied on the balance of probabilities that the claimant was guilty of a repudiatory breach, his claim fails. It does not matter whether or not that misconduct, or the full nature or extent of it, was known to the respondent at the time of dismissal (**Boston Deep Sea Fishing And Ice Co V Ansell (1888) 39 ChD 339**). If the respondent fails to satisfy me of that, then the breach of contract claim succeeds in full.

7.3 The necessary conduct entitling the employer to dismiss summarily is usually restricted to conduct said to amount to gross misconduct. The classic statement of what constitutes gross misconduct is that of Lord Jauncey in **Neary v Dean of Westminster [1999] IRLR 288** where it was said that the conduct in question: -

> ***'must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment'****.*

7.4 It is therefore a matter for me to assess whether the allegations against the claimant are, firstly, made out in fact such that I accept them on the balance of probabilities and, where they are made out, that their nature and gravity is such as to fall within the ambit and meaning of gross misconduct.

7.5 There are two elements to the respondent's allegation. The alleged threatening text and the use of the internet. They have both been dealt with in the same dismissal process but the nature of each is so distinct, that I do not see there is scope for the two to combine to amount to gross misconduct where, individually, neither does. Consequently, I approach this

question on the basis that unless either does amount to a breach of contract, there is no scope to stand back and take a cumulative view of the two matters together.

7.6 I am satisfied the text was sent. It was sent in a moment of frustration and anger, no doubt fuelled by the impression he had gained that his calls were being ignored and aggravated by the frustrating situation he found himself in with his car insurance. That context did not arise in the disciplinary considerations because it was defended as an innocuous “see you later” comment. That background context would not have been to the claimant’s favour as the context renders it entirely consistent, if not likely, that what was said was meant to contain a threat – even an empty one. The text as a whole has the feel of having been composed quickly and in the moment. It says what it says.

7.7 I have found that the offending phrase, in its full sentence, does import a threat. I found the fact it was conditional on a satisfactory resolution had the effect of removing any possibility this was simply a benign sign off to the effect of “see you at work”.

7.8 Having got that far, I must now turn to whether that amounts to gross misconduct. The following factors appear to me to be relevant. The relative position of the parties involved a long serving member of staff and the person who he regarded to be his employer. In any event, he was certainly his superior. The comment can only be reasonably interpreted as a threat. The likelihood of the threat being carried out is of very little weight and in this case, the mere fact of the relative ages of the individuals is not at all determinative. The fact that Mr George’s knowledge of Mr Holburn is relatively recent and based on work contact only renders it reasonable for this to be taken seriously. In any event, it is the sense that it is permissible to say it that is at stake, the relative risk of it being carried out merely aggravates it. It is also relevant that the response was not to explain the circumstances and apologise for his error of judgment, but to advance an alternative meaning which did not stack up. Had the conduct been explained in context and remorse shown, the gravity may properly be reduced but even then, there remains the fact that a subordinate made such a threat to his superior. An employer is entitled to have regard to its need to maintain internal discipline and there is nothing to suggest this sort of behaviour was common placed and brushed aside in the culture of this work environment. Weighing those factors, I have come to the conclusion that this is something that does amount to a repudiatory breach of contract and would entitle the employer to accept the breach and dismiss summarily.

7.9 It is not, therefore, strictly necessary for the second allegation to amount to a repudiatory breach. For completeness, however, I have considered the relevant factors and have come to the conclusion that it falls short of a repudiatory breach. The relevant factors leading to that conclusion are these. The respondent does not have a policy on internet use and what will or will not amount to misconduct in respect of internet use. There was a legitimate reason for the claimant having free access to search various websites which in themselves may not seem to be work related but were relevant to his role. There was no restriction on general use of the internet before or after work, or during lunch or other breaks. Indeed, there was nothing to limit its use during slow periods when no other work was to be done. All of those are relevant factors which, nevertheless, I accept could be swept aside in an instant if illegal or even obscene images were being viewed and that is likely to include

pornography. The possibility of it being inadvertently viewed by customers, members of the public or other staff has not been advanced in evidence before me. In this case, the claimant has not viewed such graphic material. It is true that what he has viewed has a disturbing undercurrent to it and has, or is capable of having, some sexual context but it is better described as the employer eventually described it as inappropriate as opposed to indecent or explicit. That does still amount to misconduct but its gravity and nature is not, in my judgment, to be sufficient to ignore the other surrounding factors which put things in context. In isolation, I am not satisfied this misconduct amounts to a repudiatory breach.

EMPLOYMENT JUDGE R Clark

DATE 1 May 2019

JUDGMENT SENT TO THE PARTIES ON
……...……..

AND ENTERED IN THE REGISTER
……...……..
FOR SECRETARY OF THE TRIBUNALS