EMPLOYMENT TRIBUNALS

Claimant: Mr A Mundy

Respondent: Goyt Kitchen Fabrications Limited

Heard at: Manchester **On:** 30 and 31 July 2019

Before: Employment Judge Ainscough

REPRESENTATION:

Claimant: Mr J Heard (Counsel)
Respondent: Ms C Elvin (Litigation Consultant)

JUDGMENT

The judgment of the Tribunal is that:

1. The claim of unfair dismissal is well-founded.

2. The Respondent shall pay to the Claimant a Basic Award of £6161.40 and a Compensatory Award of £33,658.04.

3. The Employment Protection (Recoupment of Benefit) Regulations 1996 do not apply to this award.

REASONS

INTRODUCTION

1. The claim was brought by way of a claim form dated 13th June 2018 in which the claimant complained of unfair dismissal from his role as an electrician from the kitchen manufacturing company with effect from 14th March 2018.

2. The response form of 20th July 2018 defended the proceedings. It stated that the claimant was dismissed for gross misconduct and the dismissal was fair in all the circumstances.

ISSUES

The issues to be determined were agreed to be the following.

3. Can the respondent show that the reason for the dismissal relates to the conduct of the claimant in accordance with Section 98(2)(b)?

4. If so, in the circumstances, did the respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant in accordance with Section 98(4)? Specifically, did the respondent, following a reasonable investigation, have reasonable grounds for sustaining that belief? Was the dismissal within the range of reasonable responses available to the respondent?

EVIDENCE

5. The parties agreed a joint bundle of written evidence running to 130 pages and the Tribunal was asked to view CCTV footage that was played on a laptop. The claimant brought a cardboard box containing a PAT tester and other related items to which he referred during the course of the witness evidence.

6. The claimant gave evidence and the respondent called five witnesses. Marc Kenney was the claimant's line manager who questioned the claimant about the alleged theft; William Benn the Managing Director who chaired the disciplinary hearing and dismissed the claimant; John Barraclough a Charge Hand who investigated the allegation of theft; Daniel Benn a colleague who gave evidence about the absence of the claimant's own personal PAT tester and John Derwin another colleague who also gave evidence about the presence of the claimant's personal PAT tester.

RELEVANT LEGAL PRINCIPLES

7. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

8. The primary provision is section 98 which, so far as relevant, provides as follows:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal and

(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this sub-section if it … relates to the conduct of the employee …

(3) …

(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case".**

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

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

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

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

RELEVANT FINDINGS OF FACT

Background

13. The respondent operates a kitchen manufacturing company supplying trade kitchens to those in the food industry. The claimant worked as a senior electrician for the respondent in both the workshop and on site during installations.

14. The respondent employed a small number of staff including a newly qualified electrician trained by the claimant. The claimant and his colleague were allowed to bring their own tools into the workshop to use during the working day. The respondent also provided tools for use on each job.

15. The respondent maintained a general store into which parts were ordered and removed depending on the requirements of each job. There was no booking in and

out system and no specific store manager who kept track of the stock. The claimant was responsible for ordering the electrical parts for each job.

16. Prior to the 27th February 2018 the Claimant brought his own personal PAT tester into work. During a discussion, the claimant advised Daniel Benn that it needed calibrating, as would Daniel's own personal PAT tester and he, (the claimant) would obtain a competitive price for the work.

Events of 27th February 2018

17. On 27th February 2018 during the working day, the claimant took a cardboard box to his car. On his return he was approached by Marc Kenney who told the claimant he could not take unpaid leave and that he had been seen carrying a cardboard box to his car.

18. The claimant told Marc Kenney the box contained his own personal PAT tester that he had forgotten to take home the day before. The claimant offered to take Marc Kenney to the car to show him the box, but Marc Kenney declined the offer.

19. Marc Kenney spoke with William Benn and informed him of his suspicions. Marc Kenney then approached the claimant on a second occasion and asked him why he had brought his own PAT tester into work. The claimant explained he had brought it in to show his colleagues as it had additional features to the testers supplied by the respondent.

20. Marc Kenney then spoke with William Benn and informed him that he was unhappy with the explanation given by the claimant. After approximately thirty minutes of deliberation, William Benn instructed Marc Kenney to ask the claimant to show him the box that was in the boot of the claimant's car.

21. Marc Kenney approached the claimant for a third time and asked to see the box. The claimant agreed and both walked out of the workshop towards the claimant's car. On reaching the car the claimant told Marc Kenney he had to go and got in his car and drove off before Marc Kenney had an opportunity to look at the box in the boot of the car.

22. The claimant returned to the workshop later that same day and found that his coat and tool box had been taken to the office of the Managing Director. The claimant spoke to William Benn and explained he had driven off in the heat of the moment. William Benn refused to shake the claimant's hand and the claimant was asked to leave the premises.

Discipline investigation

23. Between 27th February 2018 and 1st March 2018 William Benn took advice from a relative who worked in Human Resources and made a call to ACAS. The relative provided William Benn with a list of questions to ask the claimant during an investigatory meeting. The consultant who had advised the respondent on such matters, had stopped working for the respondent at Christmas 2017.

24. William Benn asked John Barraclough to conduct the investigation into the claimant's conduct. Michael Bentley, the works manager and the next in managerial seniority to William Benn, was on holiday. John Barraclough was given the list of questions and told not to deviate from the same. John Barraclough had never before conducted a disciplinary investigation.

25. John Barraclough was not given any remit to go beyond the typed questions. Neither Daniel Benn or John Derwin were asked to provide statements. John Barraclough said the claimant advised him that Marc Kenney was giving him grief: "pecking my head". John Barraclough did not know if any stock was missing.

26. On 1st March 2018 the claimant was suspended on full pay. On 6th March 2018 the respondent wrote to the claimant and invited him to a disciplinary hearing on 9th March 2018. The claimant was provided with a copy of the notes of the investigatory meeting, a still from the CCTV and a statement from Marc Kenney.

Disciplinary hearing

27. On 9th March 2018 the claimant attended a disciplinary hearing chaired by William Benn. At this time the respondent did not know if any stock had been taken from the workshop. Both PAT testers were still on the premises but the open store policy meant that, unless the respondent undertook a two-three day stock take, it was not possible to identify any missing stock.

28. William Benn formed the view that by driving off, the claimant had denied himself the opportunity of exoneration. William Benn did not accept the claimant's version of events and took the decision to dismiss the claimant. The claimant was informed of this decision by way of letter on 12th March 2018.

29. Prior to the conclusion of the disciplinary hearing William Benn showed the claimant two photographs of work completed by a competitor. William Benn told the claimant that it looked like his work. The claimant admitted doing work for a competitor in his own time, but had understood that the respondent had no objection. The claimant asked William Benn if he thought the claimant had taken parts from the respondent to complete that job. William Benn said "I don't know, you tell me". The claimant offered to ring the competitor to obtain confirmation that he had purchased the materials for the job. The claimant showed William Benn the invoice. The meeting was then concluded.

30. The claimant provided a response to the letter of 12th March 2018 but was not offered an appeal meeting.

SUBMISSIONS

Claimant's submissions

31. Mr. Heard, on behalf of the claimant, submitted that this was an A v B [2003] IRLR 405 type case. Mr. Heard submits that there should have been an investigation that allowed for evidence that exculpated the claimant but instead was an investigation of evidence that pointed to a theft of property by the claimant.

32. Mr. Heard reminded the Tribunal of an employer's need to act reasonably in all the circumstances and conduct a fair investigation in light of the gravity of any charges and the potential effect the outcome could have on the employee's future employment prospects as outlined in Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721

33. Referring to the test in Burchell, Mr Heard submitted that the respondent had no evidence of any property that had gone missing and to conclude that the claimant was guilty of theft was outside the range of reasonable responses. Mr. Heard submits none of the requirements of the Burchell test have been satisfied.

34. It is submitted that the respondent had no evidence other than a suspicion, but the decision to dismiss was taken when the claimant's belongings were packed up and taken to the Managing Director's office.

35. It is further submitted that the claimant has a plausible explanation that was not investigated. The claimant submits that the respondent dismissed him for another reason.

36. Mr. Heard submits the claimant would not have been dismissed in any event had the respondent followed a fair process. A fair process would have involved a half day stock take at the end of which it would have been established that there was no property missing. Mr. Heard submits there should be no reduction in accordance with Polkey v AE Dayton Services Ltd [1988] ICR 142.

37. In regard to contributory fault, Mr. Heard submits that the claimant was off site for 2 hours and his actions were in the heat of the moment and not sufficient to amount to misconduct for which there should be a reduction for contributory fault.

38. Mr. Heard submits that paragraphs 6, 9 and 26 of the ACAS Code of Practice on discipline and grievance procedures (2015) have not been adhered to by the respondent. It is submitted that in reality there were not different people conducting the investigation and the disciplinary hearing and the claimant was not provided with specific details of the charges he faced. The claimant's right to appeal was denied.

39. Mr. Heard concludes that the claimant was a credible witness and unlike Marc Kenney, has provided consistent evidence.

Respondent's submissions

40. Miss Elvin reminded the Tribunal of the test in Burchell. The Tribunal were also reminded of the wording of Section 98(4) and to take account of the size and resources of the respondent.

41. Miss Elvin asked the Tribunal not to substitute its own view for that of the employer.

42. It was submitted that the respondent met the necessary tests and had a genuine belief that theft had occurred. The CCTV showed the claimant waiting for John Barraclough to leave and leaving with items disguised in a cardboard box in the middle of the day to avoid being seen.

43. The claimant's explanation of what was in the box were doubtful. His colleagues had no reason to look at a PAT tester. The crate and cardboard box were excessive for the transport of a PAT tester.

44. The respondent did not badger the claimant. Questions were asked of the claimant that were reasonable and non intrusive. There was no argument or dispute between the claimant and Marc Kenney. The claimant had raised no previous grievance about Marc Kenney.

45. The claimant's decision to drive away was not the behaviour of an innocent man and by driving away the claimant removed all opportunity to prove his innocence. The Tribunal should accept the respondent had a genuine belief.

46. The respondent was aware that the claimant did "foreigner" jobs and formed the view that it was more probable than not that the claimant stole parts for these jobs.

47. The respondent operates an open store and cannot easily identify missing stock. The respondent operates business on trust and the claimant knew this and took advantage.

48. Miss Elvin submitted that the procedure followed by the respondent was fair and reasonable. William Benn was impartial and made sure the investigation was carried out independently.

49. The decision to dismiss was not easy in light of claimant's length of service. The respondent is a small employer with limited administrative resources. A stock take is an onerous task. The respondent did not have access to Human Resources advice.

50. The respondent invited the Tribunal to reduce any award made to the claimant by 25% because the claimant did not seek to appeal his dismissal in accordance with Barker v Birmingham Metropolitan College [2011] ET1301355/11. An appeal allows an employer an opportunity to rectify any defects and this was denied in this matter.

51. The respondent contends the claimant would have been dismissed in any event even if Daniel Benn and John Derwin had been interviewed.

52. The respondent further contends that the claimant contributed to his dismissal by driving away. The respondent submits that but for driving away the claimant would not have been dismissed.

DISCUSSION AND CONCLUSIONS

Reasonable Investigation

53. At the time of the incident on 27 February 2018, Mr Barraclough was the only suitable manager available to carry out an investigation. He gave evidence that he had no training and felt restricted to the questions that had been given to him by Mr Benn. Mr Barraclough could not go beyond this remit; something Mr Benn confirmed during his witness evidence.

54. The claimant was told at the end of the meeting on 1 March 2018, that the matter would pass to Mr Benn to investigate further. There was no remit for Mr Barraclough to do any further investigation in light of the answers that had been given by the claimant in that meeting, which included the alleged difficulties he had with Mr Kenney. The only statement that was taken between 1 March 2018 and 9 March 2018 was from Mr Kenney. There was no statement from Chris Winter, (nor before the Tribunal); no statement from Mr Benn and no statement from Mr Darwin in that period.

55. Mr Benn took informal HR advice. He made one call to ACAS but it is not clear what he was advised. In Mr Benn's evidence he said he did not accept the claimant's version of events, and this was the reason that witnesses were not spoken to.

56. Between 27 February and 9 March there was no stock check. Given the gravity of the allegations and the impact on the claimant, the investigation demanded more.

Genuine Belief

57. The respondent had a genuine belief that the claimant was guilty of misconduct. It is not accepted that the claimant was dismissed because of Marc Kenney's wrongly held views of the claimant.

Reasonable Grounds

58. The disciplinary meeting was chaired by Mr Benn and it was clear from the answers Mr Benn gave during evidence that he was involved in the incident on 27 February 2018; he in fact instructed Mr Kenney to go and look in the box. The Tribunal does not accept that Mr Benn was impartial when dealing with the disciplinary meeting on 9 March.

59. The Tribunal has not heard any evidence why it was not possible, for example, for Mr Bentley to deal with the disciplinary hearing; it took place on 9 March 2018 almost two weeks later, but there has been no evidence as to whether Mr Bentley was in fact back in the business by this date.

60. It is the Tribunal's finding from the evidence that Mr Benn had a closed mind: it was impossible for him to have anything else when he was so involved in the incident on 27th February 2018.

61. The claimant's previous record and length of service were not considered when the decision was taken to dismiss. The only influence they had on Mr Benn was that he found it a difficult message to convey to the claimant given the passage of time between the two during their friendship.

62. Mr Benn accepted the evidence of an employee who had been at the company for six weeks, over the claimant who he had known for 15 years and had a clean disciplinary record. The claimant had told Mr Benn on 27th February 2018 and Mr Barraclough on 1 March 2018 that he had problems with Mr Kenney.

63. Whilst the claimant did not appeal in accordance with the request set out in the dismissal letter, he did send his thoughts on the dismissal letter, but they were ignored. In any event it is highly likely that any appeal would not have overturned the decision made, because Mr Bentley was junior to Mr Benn.

64. It follows that although there was a genuine belief that the claimant was guilty of misconduct, the respondent's investigation fell below what was required by an employer acting within the band of reasonable responses for an allegation of theft. In any event, there were no reasonable grounds for the conclusion that the claimant was guilty because the respondent had not established that any stock was missing. The dismissal was therefore unfair.

REMEDY

65. There were three remedy issues which arose: a **Polkey** reduction, the ACAS Code of practice, and contributory fault.

Polkey

66. The first arose because of the nature of a compensatory award for unfair dismissal under section 123(1) of the 1996 Act:

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

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

> **"(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.**
>
> **(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee**

himself. (He might, for example, have given evidence that he had intended to retire in the near future).

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) The s.98A(2) and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

(7) Having considered the evidence, the Tribunal may determine

(a) That if fair procedures had been complied with, the employer has satisfied it - the onus being firmly on the employer - that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).

(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.

(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

68. This is a small company with limited resources and the Tribunal takes the view that the company itself would not have been in a position to run a fair procedure. However, had the respondent been able to run a fair procedure the respondent would have concluded that it could not prove that there was actually any stock missing. In such circumstances, the Tribunal cannot see how the respondent could then have reasonably formed the view that the claimant was guilty of theft.

69. The Tribunal does not find that any reduction should be made to any financial award that is made to the claimant on the basis of **Polkey**.

ACAS Code of Practice

70. Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides the Tribunal with the power to increase any award made to an employee in unfair dismissal proceedings, by no more than 25%, if just and equitable in all the circumstances, if the employer has unreasonably failed to comply with the ACAS Code of Practice on disciplinary and grievance procedures (2015).

71. Paragraph 6 of the Code of Practice provides:

> **"In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing";**

72. Paragraph 9 provides:

> **"If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."**

73. Paragraph 26 provides:

> **"Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing."**

74. The respondent did have a HR Consultant up until the end of 2017 but, the handbook had no procedure within it that would apply in such circumstances.

75. Misconduct, and particularly misconduct that alleges theft, requires a serious and impartial investigation. When the evidence is not incontrovertible and there is a dispute of fact it has to be done properly.

76. The appeal process was unlikely to rectify any issue that the claimant raised because Mr Bentley was junior to Mr Benn. Mr Benn did say he spoke to ACAS and he was told that he had followed the right procedure, but Mr Benn only made this call after he had decided upon and started the procedure. Therefore, the Tribunal finds that there should be a 20% uplift on the compensatory award that is made to the claimant for the unreasonable failure to follow the ACAS Code of Practice.

Contributory Fault

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

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

78. As to what conduct may fall within these provisions, assistance may be derived from the decision of the Court of Appeal in **Nelson v BBC (No 2) [1980] ICR 110** to the effect that the statutory wording means that some reduction is only just and equitable if the conduct of the claimant was culpable or blameworthy. The Court went on to say (*per* Brandon LJ at page 121F):

> **"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."**

79. In **Steen v ASP Packaging Ltd [2014] ICR 56**, Langstaff P provided the following guidance when applying sections 122 and 123:

> **"11. The application of those sections to any question of compensation arising from a finding of unfair dismissal requires a tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy.**
>
> **12. It should be noted in answering this second question that in unfair dismissal cases the focus of a tribunal on questions of liability is on the employer's behaviour, centrally its reasons for dismissal. It does not matter if the employer dismissed an employee for something which the employee did not actually do, so long as the employer genuinely thought that he had done so. But the inquiry in respect of contributory fault is a different one. The question is not what the employer did. The focus is on what the employee did. It is not on the employer's assessment of how wrongful that act was; the answer depends on what the employee actually did or failed to do, which is a matter of fact for the employment tribunal to establish and which, once established, it is for the employment tribunal to evaluate. The tribunal is not constrained in the least when doing so by the employer's view of the wrongfulness of the conduct. It is the tribunal's view alone which matters.**
>
> **13. (3) The tribunal must ask for the purposes of section 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent, there can be no reduction on the footing of section 123(6), no matter how blameworthy in other**

respects the tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent, then the tribunal moves to the next question, (4).

14. This, question (4), is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so.

15. In any case, therefore, a tribunal needs to make the findings in answer to questions (1), (2), (3) and (4) which we have set out above. …"

80. The Tribunal does find that the claimant did contribute to his dismissal. The act of driving off caused the respondent to form the genuine belief that there was misconduct. The duration between the claimant leaving and returning to work was unhelpful and only sought to cement the respondent's suspicions, and for this, the Tribunal finds that the claimant was blameworthy. In regard to any award that is made to the claimant, the Tribunal finds that there should be a 30% reduction.

81. The Basic Award was agreed between the parties to equate to £8802 based on 18 weeks pay at £489.

82. The 30% reduction for contributory conduct reduces the Basic Award to £6161.40

83. The Compensatory award of 102 weeks pay at £525.85 net weekly basic pay equated to £53636.70 and with the addition of £450 for the loss of statutory rights, equated to £54,086.70. The claimant will earn £9818 during that period so the compensatory award equates to £44,268.70.

84. The 30% reduction for contributory conduct reduced the Compensatory Award to £30,988.09.

85. The 20% uplift for failure to follow the ACAS Code of Practice increased the compensatory award to £37,185.70.

86. The statutory cap was applied as 52 weeks x £647.27 of the claimant's gross weekly pay equated to £33,658.04

Employment Judge Ainscough

Date: 22nd August 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 September 2019

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

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

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2411580/2018**

Name of case(s): **Mr A Mundy** v **Goyt Kitchen Fabrications 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: 9 September 2019

"the calculation day" is: **10 September 2019**

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

MISS H KRUSZYNA
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.