CASE NO: 2600244/19

EMPLOYMENT TRIBUNALS

Claimant:	Mr M Taylor
Respondents:	1. David Allkins t/a MG Rover Mechanics 2. Kayleigh Allkins t/a MG Rover Mobile Mechanics
Heard at:	Nottingham
On:	Wednesday 24 July 2019
Before:	Employment Judge Victoria Butler (sitting alone)

Representation
Claimant: In person (assisted by his mother)
Respondents: Mrs H Barney, of Counsel

JUDGMENT

The judgment of the tribunal is that:

1. The claims against the First Respondent, David Allkins trading as MG Rover Mechanics, are dismissed.

2. The complaint of unfair dismissal against the Second Respondent (sections 94 and 98 of the Employment Rights Act 1996) succeeds.

3. The Claimant contributed to his own dismissal to the extent of 100% by reason of his culpable and blameworthy conduct. Any basic award and compensatory award are nil.

5. The complaint of failure to pay the claimant's holiday entitlement is not well-founded and is dismissed.

REASONS

1. **<u>Background to this claim</u>**

1.1 The Claimant presented his claim to the tribunal on 25 January 2019. In the Claim Form he says that he was employed as a Mobile Mechanic with the Respondents from 14 June 2014 until his summary dismissal on 18 September 2018. His claim form listed the following complaints:-

- unfair dismissal
- wrongful dismissal
- unpaid holiday pay
- unpaid wages.

1.2 At a telephone preliminary hearing on 26 June 2019 before Employment Judge P Britton, it was determined that the wrongful dismissal and arrears of pay claims could not be pursued as they were the subject of a counterclaim against the First Respondent in County Court proceedings. Accordingly, the claims before me were confined to <u>unfair dismissal</u> and non-payment of <u>holiday pay</u>.

1.3 The Claimant has named the businesses of both David and Kayleigh Allkins as Respondents as it is his case that he worked for them both. In his view, the two businesses were effectively one and the same and interchangeable. He says that he was employed as a Mobile Mechanic starting on 14 June 2014 but denies ever seeing the contact of employment in the bundle of documents. His job entailed carrying out repairs for customers at their premises and he was given the use of a company van to do this.

1.4 It is the Claimant's case that the Respondents had no fair reason to dismiss him and that his dismissal was procedurally unfair. In February 2018, Mrs Allkins advised the Claimant that she could not cover him as named driver on her insurance policy. However, she would contribute £400 towards his own insurance policy on the understanding that it covered him driving her van too. The Claimant asserts that he had always worked on the assumption that he was *self-employed* and this is the basis on which his motor insurance policy covered him. When he received a letter on 17 September 2018 from Mrs Allkins issuing him with a written warning, he says this was the first time he realised that he was considered an *employee*. However, because his motor insurance only covered him on a self-employed basis and the company van was not covered, his dismissal for driving a Company vehicle without insurance and misappropriating the £400 is, in his view, unfair. He gave evidence that he had paid Mrs Allkins the £400 back in cash before he was dismissed.

1.5 The Respondents' cases are somewhat different. The First Respondent asserts that the Claimant was not employed by it at the material time. By way of background, the Claimant began working for the First Respondent on a part-time basis in April 2016. At his request, he left the First Respondent and began working for the Second Respondent with effect from 3 September 2016 until his dismissal. I am satisfied that the Claimant was employed by the Second Respondent so the proceedings against the First Respondent are dismissed.

1.6 Mrs Allkins confirmed that the Claimant was issued with a contract of employment, which he refused to sign. The working relationship was initially good but against the background of marital difficulties, the Second Respondent says that the Claimant's work became substandard, his timekeeping poor and his appearance unprofessional. Furthermore, she was beginning to suspect that the Claimant was not accounting for all the money paid to him by customers and that he was stealing stock.

1.7 The Claimant was issued with a written warning on 17 September 2018 and the following day he advised Mrs Allkins that her van was not covered under his insurance policy. His failure to cover the Company vehicle meant that he had been driving without insurance, therefore illegally, or had removed the van from his insurance rendering him unable to drive legally and carry out his duties going forward. Mrs Allkins dismissed him for gross misconduct.

2. **The issues**

2.1 The Claimant contends that his dismissal was unfair for the purposes of sections 94 and 98 of the Employment Rights Act 1996 (ERA). The tribunal needed to consider the following:

(a) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the ERA? The Second Respondent asserts that it was a reason relating to the Claimant's conduct.

(b) If so, was the dismissal fair or unfair in accordance with section 98(4) ERA and, in particular, did the Second Respondent in all respects act within the so-called "band of reasonable responses"?

(c) If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604.

(d) Would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

(e) Did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and, if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

(f) Unpaid annual leave – Working Time Regulations. When the Claimant's employment came to an end, was he paid all of the compensation he

was entitled to under regulation 14 of the Working Time Regulations 1998.

3. **The hearing**

3.1 The Claimant is dyslexic and the Respondents had provided him with a copy of the trial bundle on pink paper at his request. He also used a pink film to assist with his reading. The Claimant was advised to let the tribunal know if he needed any additional support.

3.2 At the outset of the hearing, the Claimant produced additional documentation that had not been disclosed to the Respondent until that morning. He wanted it to be included in the bundle at pages 236 onwards. The hearing was adjourned for 20 minutes to allow Counsel for the Respondents to peruse the documents and raise any objections.

3.3 Mrs Barney objected to the inclusion of the documents at such a late stage but, on balance, I felt that the documents may be relevant to the issues that I had to decide and that the Respondents were well able to deal with them during the hearing, without any prejudice. As such, I allowed the documents to be included in the bundle.

4. **The evidence**

4.1 The Claimant gave evidence and he provided a witness statement for Anthony Cooper. Anthony Cooper attended the hearing but Counsel confirmed that she did not wish to challenge his evidence so I accepted the evidence contained within his witness statement as unchallenged without the need for further oral evidence.

4.2 For the Second Respondent, I heard evidence from Mrs Kayleigh Allkins, Nicola West and Ben Whiley-Farenden.

4.3 Where there was a conflict in the evidence, I preferred the evidence of the Second Respondent's witnesses, most particularly Kayleigh Allkins. I was satisfied that she was consistent, credible and reliable. The same could not be said for the Claimant, who was evasive and changed his case with some regularity during the hearing. By way of example, he gave conflicting evidence about the number of hours he worked each week – one account was full time Monday to Friday, another was 24 hours per week. When challenged on cross-examination, his recollection of events was inconsistent and appeared to change to suit his case. He also failed to deal with any of the issues I was required to consider in his witness evidence, mainly attempting to put his case across whilst cross-examining the Second Respondent's witnesses. His statement does not reference his dismissal, why he considers it to be unfair or the amount he is claiming in respect of holiday pay.

5. **The facts**

5.1 Both Respondents run MG Rover Specialist Mechanic Repair Services. The First Respondent is garage based, whereas the Second Respondent arranges

repairs to customer's vehicles off site, primarily at their homes. Both businesses share the same trading address, but they operate independently of each other, having their own stock and account, HMRC registration numbers, insurance, lease arrangements and so on. These are two distinct businesses, even though David Allkins and Kayleigh Allkins are seen to their customers and friends as "Kayleigh and Dave", a husband and wife team. Each business employs its own staff or uses self-employed mechanics. As such, they are separate business entities.

5.2 In the summer of 2014, the Claimant began doing casual work for the First Respondent. He accompanied Mr Allkins to jobs and helped with repairs, sometimes taking parts in exchange for any work that he did. At this stage the First Respondent was not a registered business, Mr Allkins treated it more as a hobby. The Claimant was not employed by the First Respondent at this time.

5.3 In or around March 2016, Mr Allkins registered his business and he employed the Claimant on a part-time basis from April 2016. However, in late August 2016, the Claimant told Mr Allkins that he no longer wanted to work at the garage but would prefer to be mobile as it gave him more freedom.

5.4 Mr Allkins and the Claimant approached Mrs Allkins and asked if he could undertake mobile repairs for her, which would be convenient as it would supplement his own work through his business "Taylor's Autos". He wanted a regular income but, equally wanted to spend time on his own business. Accordingly, he left the First Respondent on 31 August 2016 and commenced employment with the Second Respondent on 3 September 2016. His continuous service with the Second Respondent was 3 September to 18 September 2018. Accordingly, the Claimant was not employed by the First Respondent at the time of his dismissal, nor did his service with it count towards continuous service with the Second Respondent.

5.5 Shortly after the Claimant commenced employment with the Second Respondent, Mrs Allkins gave the Claimant a contract of employment, which can be seen at pages 33 – 48 in the bundle. The Claimant refused to sign the contact but continued to work regardless. Accordingly, I find that he worked under its terms until his summary dismissal. I also find that the Claimant was aware that his relationship with the Second Respondent was one of employment. He was paid a salary on monthly basis which did not vary, regardless of the number of jobs he did. He was also paid holiday and sick pay in accordance with the contact of employment.

5.6 The Claimant was allocated jobs by Mrs Allkins and he would attend the customers' premises to carry out the repairs. After completing the work, the customer would pay him directly and he was required to account for that money to Mrs Allkins.

5.7 Initially, there was a good working relationship between the Claimant and Mrs Allkins, but this started to unravel in early 2017 when the Claimant was having personal issues, namely the breakdown of his marriage. Mrs Allkins was flexible with the Claimant, allowing him to attend various personal appointments. However, he then became increasingly unreliable, his attitude

deteriorated and Mrs Allkins began to receive customer complaints. Mrs Allkins tried to address these matters with the Claimant but when she did, he would deny any wrongdoing or threaten not to attend pre-booked jobs, which Mrs Allkins could not afford to risk. The Claimant was given a number of verbal warnings although these were not documented.

5.8 The Claimant was involved in a series of motor accidents during his employment with Mrs Allkins. As a result, Mrs Allkins decided that she could no longer risk having the Claimant as a named driver on her business vehicle insurance policy. Further, the insurer would not cover the Claimant's personal vehicle because the engine had been modified.

5.9 Consequently, Mrs Allkins told the Claimant that he would have to obtain his own insurance but she would make a financial contribution if the policy would cover the use of her van.

5.10 The Claimant found an appropriate policy covering the van. On 16 February 2018, Mrs Allkins paid £400 to the Claimant as a down payment on the £1,500 quoted policy. The Claimant sent Mrs Allkins a screenshot confirming that the van was covered on his policy – p.81.

5.11 In June 2018, Mrs Allkins became aware that the Claimant had poached a job from her business Facebook page and had used her parts to carry out the work. She was advised that there were issues with the work he had done and when the customer asked him to remedy the problem he had threatened to cause damage to the customer's house. Mrs Allkins confronted the Claimant about the matter but he denied all knowledge.

5.12 Thereafter, it was becoming apparent that there were discrepancies in the amount that customers were being charged and the sums being given by the Claimant to Mrs Allkins. Stock was also going missing from the garage. Mrs Allkins decided to investigate further with the assistance of Ms Nicola West who worked for the First Respondent but had agreed to help. Mrs Allkins informed the Claimant that she was investigating these matters and he became abusive, threatening not to attend any more jobs and said that he would "leave [her] in the shit". He denied any wrongdoing.

5.13 Over the summer period, Mrs Allkins received customer complaints resulting in her having to offer refunds and/or having to ask her husband to rectify the repairs. Matters came to a head in September 2018. Mrs Allkins had numerous concerns about the Claimant's work and invited him to attend a disciplinary hearing on 11 September 2018 – page 101 in the bundle. The letter confirmed as follows:

"As you are already aware, we have received numerous complaints about your conduct, lack of communication, cleanliness and attitude towards your work, along with accusations of theft of my stock (and working on other MG Rover cars cash in hand, despite this being forbidden by myself), accusations of such, made by random members of the public. You and I have sat down together and had quite a few in depth discussions at work over this, over the course of the last 12 months more-so and yet these issues still continue with no visible

effort or change despite your promises otherwise and my continuous verbal warnings, therefore I am requesting that you attend a meeting to discuss these concerns again on 11th September 2018 at 9.30am……..”

5.14 The Claimant met with Mrs Allkins on 11 September and the meeting did not go well at all. The Claimant walked in and said “*I want to talk to you NOW’* and demanded to know when repayments he had been making would come to an end. He was argumentative and verbally aggressive, threatening not to attend pre-booked appointments. Mrs Allkins said she would check about the repayments as she did not have the information to hand and felt very intimidated by his behaviour generally. The Claimant walked out of the office to attend a job and Mrs Allkins was not able to discuss her concerns with him.

5.15 Thereafter, Mrs Allkins considered the Claimant’s conduct and the evidence before her and advised the Claimant by way of letter on 14 September 2018 that she would be ‘following up her concerns with a written warning’. On Monday 17 September 2018, the Second Respondent arranged for the written warning to be delivered to the Claimant’s home address that evening – pages 103 & 104.

5.16 The letter said the following:

“As you are aware, after having numerous verbal warnings, I have now been left with no choice but to follow up with a written warning based on your conduct & various customer complaints. Below is a brief list of just a few which have been received recently:

1. *Mark arrived looking very unprofessional, dirty and unkempt. This does not give a good impression of your company, and is very offputting if one cannot keep himself clean, it leaves me concerned about keeping my property clean.*
2. *Mark showed no respect for my property or surrounding area, and left the ground littered with cigarette butts & continuously smoked over and around my vehicle during the work process which I was severely disgusted with.*
3. *Mark was in a rush to leave and made excuses not to repair my car on the day, he did not appear to be interested in completing the work and his mind appeared to be elsewhere.*
4. *Mark spent most of the time on his phone, discussing personal issues and arguing with others, very unprofessional.*
5. *Mark was expected to arrive between 9am and 11am, he arrived after 2pm with no contact prior to explain he was delayed or stuck in traffic. Inconvenient!*
6. *Mark spent most of his time bragging about his personal life, issues and jobs he completes for customers “out of hours, cheap”. Not a very loyal employee.*
7. *You are already aware of the complaint from Mr Miller, which we hopefully have resolved with an apology and a refund, and will hear no more of, and you were made aware of a second demand for a refund made by Mr Svelkonin yesterday evening (17/09/2019).*

Unfortunately, I have also noticed your attitude towards your job, towards fellow staff, towards work vehicles supplied to you free of charge, your lack of respect for people and your lack of respect for my authority. When questioned about poor customer feedback or other problems, you deny all responsibility, you argue back, you accept no fault for your actions and expect everyone else to sort things out for your jobs rather than putting in a little extra time to sort your parts out and ensure that you have everything you need, to do your job, and earn yourself money. You are on your phone when driving, which is not only against the law, but also puts our van at risk of damage. You are asked to keep it clean, but you do not do this, you allow your personal life to get in the way of work. We have on a number of occasions requested that you do not add our customers to Facebook, you ignore this, we have asked you to refrain from offering customers cash in hand work, to return unused stock, again you ignore these requests. We have asked you to contact your customers when you're delayed out of courtesy, you do not do this, we have asked you to be more presentable and attend jobs in a clean manner, yet you still arrive dirty, smelly and unwashed.

You are a reflection of our company and are giving a poor impression of us, as well as making it difficult to book you work without concern for what you're going to do wrong next or which customer is going to be next to demand a refund and complain about you. Yes, we receive good feedback too, but unfortunately in business it's the bad feedback that does the damage, and when you refuse to take responsibility, it makes the situation worse.

If I receive anymore serious complaints, you will leave me with no choice but to terminate your employment with immediate effect and ask you to return our work vehicle and person car to us."

5.17 The Claimant received the letter that evening.

5.18 That same evening, Mrs Allkins was contacted by one of her customers to say that the Claimant had approached him to try and poach his work from her.

5.19 The following morning, 18 September 2018, the Claimant sent a text message to Mrs Allkins saying:

"please be advised that as you have now confirmed that I am employed by you as per the letter of the 18th September. My traders policy does not cover me to drive you [sic] vehicle whilst working for you, therfor [sic] I would be grateful if you could arrange with your insurance for me to drive company vehicles in order for me to complete the Leicester job. Please send confirmation of insurance as soon as possible as I can not start my journey until I have sight of insurance cover".

5.20 The Claimant had either failed to obtain the insurance in the first place or had obtained the policy and subsequently removed the business cover, rendering him uninsured to drive the van. Consequently, he had been driving Mrs Allkins' van illegally or, alternatively, he had removed the vehicle from his insurance policy rendering him unable to drive the vehicle legally going forward. Either

way, the Claimant had taken £400 from Mrs Allkins and not used it for the purpose it was given.

5.21 This was the final straw for Mrs Allkins and she considered that his actions amounted to gross misconduct. She reacted immediately to the Claimant's admission that he had been, or would be committing a criminal offence and, additionally, had taken £400 of her money. Accordingly, she terminated the Claimant's employment with immediate effect by text message:

"………….. *I also want this week's job money and you just admitted to me that you've been driving my van and car illegally uninsured and therefore due to this gross misconduct I have no choice but to terminate your employment with immediate effect. I have contacted the gentleman in Leicester and rearranged the job. I expect my van to be complete with my belongings and stock*".

5.22 Mrs Allkins confirmed the Claimant's summary dismissal by way of letter dated 19 September 2018 as follows:

"Ref: Termination of employment with immediate effect.

With reference to your message this morning at 7.31am, admitting that you are uninsured to drive my vehicles, despite the fact that you were recently removed from my motor trade insurance and had set up your own motor trade policy up, which was to cover you for doing work under your my company and covering yourself for doing your own work (non mg) work under your own self employed business "Taylors Auto Services", you have left me with no choice but to terminate your employment with immediate effect. Driving my car and vans illegally is gross misconduct and you have only notified me of this because of the written warning I issued you with yesterday. I will ensure that the relative agencies are notified of your dismissal today and your P45 will be emailed to you". P.109

5.23 After Mrs Allkins dismissed the Claimant, she received a telephone call from the Claimant's ex-wife informing her that the Claimant had stolen parts from her whilst he was employed and had stored them at their home.

Holiday pay

5.24 I accept Mrs Allkin's evidence about the Claimant's holiday accrual and the days taken. The Claimant was entitled to 14 days' annual leave and up to the point of his dismissal he had taken, and been paid for 14 days'.

6. **The law**

6.1 The claim of unfair dismissal is made under s.98 of the Employment Rights Act 1996 ("ERA").

"***98 General****.*

(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 subsection (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—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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 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 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 When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Burchell 1980 ICR 303, as explained in Sheffield Health & Social Care NHS Foundation Trust v Crabtree [2009] UKEAT 0331, the Tribunal must consider a threefold test:

a. The employer must show that he believed the employee was guilty of misconduct;

b. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and

c. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

6.3 The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures which sets out the basic requirements of fairness that will be applicable in most cases.

6.4 In Polkey v Dayton Services Ltd [1988] ICR 142, it was stated that if an employer could reasonably have concluded that a proper procedure would be "utterly useless" or "futile", he might be acting reasonably in ignoring it.

6.5 In A v B [2003] IRLR 405, the Employment Appeal Tribunal said that the gravity of the charges and the potential effect on the employee will be relevant when considering what is expected of a reasonable investigation. See also: Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402. However, it is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation. In Sainsburys Supermarkets v Hitt [2003] IRLR 23 the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.

6.6 Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. See: Iceland Frozen Foods v Jones [1982] IRLR 430; Post Office v Foley [2000] IRLR 827.

Compensation

6.4 Section 118 provides that where a Tribunal makes an award for unfair dismissal the award shall consist of a basic award and a compensatory award. Both the basic and compensatory awards may be reduced under sections 122 and 123 ERA 1996 by reason of contributory conduct on the part of the employee. In University of Sunderland v Drossou (UKEAT/0341/16) the EAT has recently made it clear that whilst the statutory provisions for the reduction of the basic and the compensatory awards are slightly different, the percentage reduction should generally be the same.

6.5 ***Basic award***

Section 122(2) of ERA 1996 deals with reductions of the basic award for contributory conduct and states: -

"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.

6.6 ***Compensatory award***

Section 123(1) and (6) ERA 1996 state:

"(1) Subject to the provisions of this section and sections 124, 124A 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.

(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."

6.7 There are three stages to the Tribunal's assessment of the compensatory award:

- A factual quantification of the losses claimed
- The extent to which any or all of those losses are attributable – as a direct and natural link – to the dismissal or action taken by the employer
- Having regard to the above, what compensation is just and equitable? Even if the loss arising from the dismissal is substantial, the Tribunal can still award no compensation if it would be unjust or inequitable for the employee to receive it. This might be the case where acts of misconduct discovered after the dismissal means that it would not be just and equitable to award compensation; see: W Devis & Sons Ltd v Atkins [1977] IRLR 314.

6.8 Before making such a deduction, the Tribunal must make three findings:

- That there was conduct on the part of the Claimant in connection with his unfair dismissal which was culpable or blameworthy to the extent that it was perverse, foolish, bloody-minded or unreasonable in the circumstances;
- That the matters to which the unfair dismissal complaint relates were caused or contributed to some extent by the Claimant's action (or inaction) that was culpable or blameworthy;

- That it is just and equitable to reduce the assessment of the Claimant's loss to a specified extent.

See: Nelson v BBC (No.2) [1979] IRLR 346, CA

6.9 In Hollier v Plysu Limited [1983] IRLR 260, the EAT suggested that the level of contribution should be assessed broadly and generally fall within the following categories: -

- Wholly to blame for misconduct:100%
- Largely to blame:75%
- Employer and employee equally to blame: 50%
- Slightly to blame: 25%

6.10 A Tribunal may also reduce the amount of compensation, by the appropriate percentage, to reflect the possibility that the employee might have been dismissed fairly in any event even if procedurally unfair – the so-called '*Polkey*' principle (see Polkey v AE Dayton Services Ltd [1987] UKHL 8). Such a reduction is only applicable to the compensatory award. There is no reason why an award may not be reduced for both *Polkey* and contributory conduct (see Robert Whiting Designs Limited v Lamb [1978] ICR 89).

6.11 In Hill v Governing Body of Great Tey Primary School UKEAT/0237/12 the Employment Appeal Tribunal held that the assessment of a "Polkey deduction" is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. The question as to what a hypothetical fair employer would have done is not the test: the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.

Holiday pay

6.12 Regulations 13, 13A and 16 of the Working Time Regulations read together provide that a worker is entitled to 5.6 weeks (up to a maximum of 28 days) paid leave in any leave year. A worker's contract may provide an entitlement in excess of this statutory minimum. Regulation 14 provides that a worker is entitled to be compensated for accrued but untaken leave upon termination of his employment.

7. My conclusions

7.1 I am satisfied that the Claimant was employed by the Second Respondent, Kayleigh Allkins t/a MG Rover Mobile Mechanics, from 3 September 2016 until 18 September 2018. He was not employed by the First Respondent at the

material time and I have no jurisdiction to hear the claim against it. Accordingly, the claims against the First Respondent are dismissed.

7.2 I am satisfied that the Claimant's gross misconduct was the reason for his dismissal. Mrs Allkins referred to the Claimant's actions in respect of his insurance as the "final straw …… on top of the serious and gross misconduct he had committed in previous weeks he was now admitting that he had taken £400 from me to insure his vehicle and had either not done so or had removed the insurance rendering himself unable to perform his duties and driving illegally". His conduct in that matter alone was sufficiently serious to destroy the relationship of trust and confidence between the Claimant and Second Respondent. The Claimant gave evidence that he had taken the insurance policy out on the basis that he was a sole trader - he had not appreciated that he was an employee until he received the written warning on 17 September 2018. I find his evidence to be incredible. He provided no evidence or reasonable explanation as to why he could possibly think that this he was a sole trader pre-17 September 2018. His claim form refers specifically to his 'employment' with the Respondents and he does not set out his case on this basis in the detail. The Respondent gave clear evidence that the Claimant was an employee, despite his refusal to sign a contract of employment.

7.3 Whilst the Claimant did not tell Mrs Allkins whether the company vehicle had ever been insured or removed with effect from 18 September, either way I am satisfied that Mrs Allkins acted reasonably in treating the Claimant's conduct as a sufficient reason for dismissing him. I am satisfied that she believed that the Claimant was guilty of gross misconduct. I am further satisfied that she had reasonable grounds for sustaining that belief on receipt of the text message from him on 18 September 2018.

7.4 Turning to the procedure adopted by the Second Respondent, I accept that it is an exceptionally small business. I also accept that Mrs Allkins felt intimidated by the Claimant's previous behaviour, particularly at the meeting on 11 September 2018. However, whilst it is understandable that she was reluctant to engage with the Claimant in person about his conduct and dismissal, no procedure was followed. She dismissed him by text message followed by confirmation in a letter. The Claimant was not advised that disciplinary action was being considered before he was dismissed, nor given the opportunity to make any representations or appeal. I am, therefore, not satisfied that Mrs Allkins had formed that belief having carried out as much investigation into the matter as was reasonable. The investigation did not fall within the range of reasonable responses that a reasonable employer might have adopted, and the lack of procedure renders the Claimant's dismissal procedurally unfair.

7.5 I have considered s.122(2) and the Claimant's conduct before his dismissal. His conduct in the months prior to his dismissal may well have led to dismissal itself. However, the final straw for the Second Respondent was the Claimant's text message stating that the company van was not covered under his insurance policy, despite Mrs Allkins giving him £400 to cover the cost of insuring it. I am entirely satisfied that the Claimant was wholly to blame for his dismissal and that his conduct on 18 September 2018 was appropriately regarded as gross misconduct. He had been, or would have been, driving

illegally despite assuring Mrs Allkins that he was covered to drive her van and her payment to ensuring the same. As such, his contribution to his dismissal was 100% by his culpable and blameworthy conduct and any basic award is reduced to nil.

7.6 I have also considered section 123 of the ERA 1996 and I am satisfied that the Claimant was wholly to blame for his misconduct and that it would be just and equitable to reduce any compensatory award by100%.

7.7 In light of the fact that the any basic award and compensatory award have been reduced to nil, I do not have to make any findings in accordance with the *Polkey* principles. However, in the event that I was not satisfied that it was just and equitable to reduce any compensatory award by 100%, I would have been satisfied that having considered the *Polkey* principles the Claimant would in all probability have been dismissed fairly in any event because of his conduct. Accordingly, any compensatory award would have been reduced by 100%.

Holiday pay

7.8 In respect of the Claimant's claim for non-payment of holiday, he has failed to address this point sufficiently in oral evidence or indeed at all in his witness statement. Mrs Allkins gave evidence that she had gone back through her correspondence with the Claimant and was confident that no further payments were due. I am satisfied that her evidence throughout this case has been credible and the Claimant has failed to satisfy me that he is due any money in this regard. Accordingly, his claim fails.

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Employment Judge Victoria Butler
Date: 18/09/2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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