Case Number: 2416417/2018

THE EMPLOYMENT TRIBUNALS

Claimant: Mr J Devoy

Respondent: Eriks Industrial Services Limited

Heard at: Carlisle **On:** 9 and 10 September, 2019

Before: Employment Judge Nicol

Representation

Claimant: Mr Kitson, Counsel
Respondent: Miss Garner, Counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that

1 the claimant's summary dismissal by the respondent was unfair but that dismissal with notice would have been fair so that any compensation should be limited accordingly and be further reduced to take into account the findings below

2 the claimant's complaint that he was unlawfully dismissed is well founded

3 the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations, 1996, do not apply to this award

and the respondent is order to pay the claimant in respect of his unlawful dismissal the agreed sum of **£3377.82** which extinguishes any remedy to which the claimant might have been entitled in respect of his unfair dismissal

RESERVED REASONS

1 These are complaints by James Devoy, the claimant, against Eriks Industrial Services Limited, the respondent, arising from his employment with the respondent as a regional account manager. The claimant's employment with the respondent commenced on 1 April, 2012, and the effective date of termination was 11 July, 2018, when he had been in continuous employment for six complete years.

2 The claimant alleges that he was unfairly dismissed. The respondent admits that the claimant was dismissed but denies that the dismissal was unfair. The claimant also alleges that he was wrongfully dismissed, which is also denied by the respondent. At the start of the hearing, the parties submitted an agreed list of issues that was accepted by the Tribunal.

3 The events referred to below alsorelate to two other employees of the respondent who were disciplined at the same time as the claimant. Whilst it is necessary to refer to those employees and to some of the evidence relating to them, it was agreed that it was not appropriate or necessary for the Tribunal to make any findings concerning the disciplinary action taken against the other employees.

4 The Tribunal heard evidence from the claimant and from Brian Peat, former colleague, on his behalf and from David Bolland, regional sales manager, and Joseph Parkes, group HR director, on behalf of the respondent. All of the witnesses gave their evidence in chief by reading statements and answering supplementary questions, when permitted by the Tribunal. All witnesses were cross-examined. The Tribunal had before it a bundle of documents produced by the respondent, marked 'Exhibit R1'. Both parties made oral closing submissions. From the evidence that it heard and the documents that it saw, the Tribunal finds the following facts.

5 Among other things, the respondent provides engineering services to various companies in the United Kingdom. It is part of a multi-national group operating in various countries.

6 The respondent operates with various divisions. Employees include sales units, engineering support units and engineering units. There are also geographical divisions.

7 The Tribunal accepted that the respondent takes the health and safety of its employees and customers extremely seriously and has various procedures in place to try to ensure that employees work safely and in safe environments. The Tribunal was shown various documents that emphasise the respondent's attitude to health and safety. For example, the respondent has six 'golden safety rules' which every employee must follow. Also, all employees, whether engineers or not, are issued with red 'stop cards'. These show that the employee is authorised to stop any work that it is considered to be unsafe. If the card is used the employee carrying out the work must stop until a safe system of working can be adopted.

8 At the relevant time, the respondent had a disciplinary procedure, a copy of which was included in the bundle. The Tribunal was concerned with the section of the procedure headed 'procedure for formal investigation'. It was accepted by the respondent that the drafting of this section is extremely poor.

9 The procedure required that a formal investigation should be carried out, that statements should be obtained and that evidence should be preserved. A report then had to be prepared setting out the facts of the case. It was disputed by the claimant whether the investigating officer should include any comments in the report which

amounted to more than a simple statement of facts. In the experience of the Tribunal, it is not unusual for the investigating officer to include comments on the quality and nature of the evidence and, in some cases to make a recommendation as to whether further action would seem appropriate, which is then considered by the manager to whom the report is submitted and who makes any decision that is necessary at that stage, rather than the investigator.

10 The procedure requires that the report is submitted via HR to the appropriate manager who decides whether further action is required.

11 The procedure then suggests that where misconduct or serious misconduct is suspected, it would be appropriate to hold 'an investigatory hearing' where the employee has the right to be represented. At this hearing it may be decided whether not to take any further action, recommend counselling or to proceed to a disciplinary hearing. The employee was to be informed of the decision in writing.

12 At first sight, this would seem to be a self-contained part of the procedure, after which there would be a further hearing. However, by this stage there has been a 'full presentation of the facts and the opportunity afforded to the employee to state his side of the case'. It is difficult to believe that there would be an expectation that this process would be repeated to have a full disciplinary hearing.

13 However, the procedure goes on to state that after the investigatory hearing 'it may be appropriate…to adjourn proceedings whilst necessary arrangements are made for a representative to attend…at the request of the employee'. Presumably, the investigatory hearing could be immediately followed by the disciplinary hearing, if further representation is not required, the sole purpose of which could only be to impose a sanction since those conducting the hearing have already decided on guilt. It also presumes that written notice of the earlier decision will be provided whilst the hearing continues.

14 The Tribunal considered that the procedure as written did not make sense and was unlikely to be followed. It would make sense if the paragraphs were slightly reordered to allow for an investigation, a decision on whether to proceed further and then a disciplinary hearing. In reality, it was necessary for the procedure that was followed to comply with the relevant ACAS code.

15 It is understood that the procedure has now been changed but a revised copy was not produced to the Tribunal.

16 The claimant was originally employed as a business developer. The job title was changed but the work remained the same. The claimant was expected to liaise with existing clients and seek out new ones with a view to increase the respondent's turnover. In effect, he was a sales representative who did not have engineering experience

17 One of the claimant's clients was the Centre Parcs site near Penrith. The respondent's work there included the repair, sometimes off-site, and reinstallation of

pumps. The claimant developed a good relationship with Sean Mullett, Centre Parcs' assistant technical manager. The claimant was expecting to maintain and increase business with this customer.

18 A problem arose at the site because of a defective pump. The pump had been repaired by the respondent and returned to the site with a one year warranty. As it was not needed immediately, it was stored until it was required to replace another pump. It was brought back into use after the warranty had expired. Centre Parcs sought to argue that the pump should be repaired under warranty as it had not been in use for a year before the fault developed.

19 Mr Mullet contacted the claimant and asked him to organise the remedial action necessary. The claimant contacted Mr Peat, an engineer but currently employed in a sales support role which did not require him to undertake actual engineering work, who in turn contacted the respondent's product business unit in Gateshead, which had carried out the original repairs, but the unit was not prepared to assist because it considered that the pump was out of warranty and also queried how it had been used. Accordingly, a dispute arose as to who should be responsible for the cost of repairs.

20 The claimant asked Mr Peat to escalate the matter because of increasing pressure from Mr Mullet. In relation to subsequent matters, the claimant raised an issue relating to whether the claimant had been trained in escalation procedures. However, it appeared to the Tribunal that this was mostly a matter of common sense and, anyway, the claimant was clearly aware of the possibility of doing this.

21 Mr Peat took the opportunity of a meeting with Graeme Fullerton, director, to raise the issue. Mr Fullerton instructed that the pump should be repaired and any dispute over cost should be dealt with afterwards. A new seal kit was to be ordered and was to be installed by the respondent. The work would be undertaken by an engineer, Neil Burtoft, who had experience with the type of pump in question but Mr Peat would be present, if he was available.

22 Once the order for replacement parts was placed and Mr Burtoft was involved, Mr Peat thought that his involvement in the matter was over. He arranged an appointment in Inverness for when the work was to be done.

23 The repair would require work on the pump that meant that it had to be realigned using specialist equipment operated by person trained in its use. This part of the repair would be carried out by another engineer. Although from a different geographical area, Richard Thompson was the alignment specialist and Neil Burtoft was to be the main engineer. Of those two, it was not clear who would lead but it appeared that the replacement work would be done by Mr Burtoft and Mr Thompson would then carry out the realignment. It was agreed that the work would be carried out on 21 June, 2018.

24 Under the respondent's procedures, a risk assessment and method statement ('RAMS') should have been prepared and agreed with the customer before work actually commenced. This should ensure that all necessary safety precautions were in

place, that a safe system of work would be used and that the customer was happy with the proposed work. This would require input from the engineer responsible for the work being the person with the knowledge and experience to put the RAMS in place. From the information available to the Tribunal, it appeared that it was probably Mr Burtoft who should have been responsible for this but Mr Thompson should have been involved and, at very least, have understood what would be happening on site. However, although he only cancelled his attendance late in the day, Mr Burtoft had not done any of the required preparatory work.

25 On 20 June, 2018, Mr Burtoft informed the claimant that he would not be able to attend on site the next day. The claimant was aware of the problems that this would cause with the customer and that there could be difficulties in getting Mr Thompson back on site quickly so he did not want to put off the work. He contacted Mr Peat and asked if he would be attending the site and could cover for Mr Burtoft. Mr Peat had intended to be visiting a customer or a potential customer some distance away from Penrith and, on the face of it, was not available.

26 It is at this point that things started to go wrong. The claimant, if he was to be involved, should have escalated the matter to higher authority, either through his own chain of command or through that of Mr Burtoft. Although an engineer, Mr Peat was not, at that time, in an engineering job for the respondent in the same way that Mr Burtoft was. Mr Peat had the experience and knowledge to give engineering advice but he was engaged in an advisory and/or a sales position. He may have been capable of doing the work but that was not his function within the respondent.

27 The claimant applied pressure to Mr Peat who eventually changed his commitments and agreed to do the work in place of Mr Burtoft.

28 The claimant then contacted the customer by email to confirm who would be attending and to ask that someone would be there to meet them. When he did not get a response, he telephoned Mr Mullet and told him. He then told Mr Peat and Mr Thompson to report to the technical services office at the site to get their permits to work on the site. Although the claimant appeared to be co-ordinating the work, he did not ensure that all of the preparatory steps had been taken or who would be actually leading the engineering work.

29 When he arrived on site, Mr Thompson obtained his work permit from the customer but Mr Peat did not. Their accounts of why this happened varied but even if Mr Peat asked Mr Thompson to add him to the existing work permit, this was not done. In any event, the permit expired long before the work on the day was completed. It did not appear that the claimant took any interest in this.

30 At the start of the work, neither Mr Thompson nor Mr Peat had the necessary piece of kit to lock off the motor isolator. Normally, the respondent expected its engineers to use this, even if one had been put in place by the customer. Mr Peat contended that he was not aware of the respondent's requirements and was not usually involved with electrical isolation.

31 Another of the respondent's engineers was also visiting the site the same day to carry out unrelated tasks. Because of a technical emergency, none of the customer's engineers were available on site and so this engineer contacted the claimant who then went to the site to show the engineer round. This took most of the day. It was not suggested that the claimant was covered by any work permit or that he undertook any work with this engineer. However, he was now on site and in touch with Mr Peat and Mr Thompson.

32 Mr Peat was unable to remove part of the pump cover and needed to contact Mr Burtoft for advice. Problems were also encountered because it appeared that there was more wrong with the pump seals than had been anticipated. At about 16.00, Mr Peat informed the claimant of this and that the pump would have to be removed and taken off site, which had been agreed by the customer, who would provide a replacement from its stock of spares. Even if a RAMS was in place, which it was not, this was a complete departure from what was expected.

33 The manner of the removal of the pump and the positioning of its replacement required equipment that neither Mr Thompson nor Mr Peat had. The customer provided some pieces of wood and wedges that were used when replacing a pump and a hoist with slings to move it. The claimant was involved in obtaining the hoist from the customer. The manner in which the wood was used appeared to the Tribunal to be a somewhat makeshift way of working that could have been potentially unsafe. It may be that there was actually minimal risk to an experienced engineer but nothing was done to assess the risk. Moving the pump with the hoist was also hazardous and required two people to move the hoist and to steady the pump in its slings. Again, nothing was done in the way of risk assessment.

34 What was clear was that the two engineers required an extra pair of hands. The claimant was in the vicinity and was asked to assist. Precisely what he did was unclear but he admitted steadying the pump as it was lowered into position, to holding an airline and fetching a container to collect oil drained from the pump. During this, he wore a pair of blue latex gloves.

35 When the replacement pump was being fitted, Mr Thompson undertook the alignment work and fitted his equipment to the pump. Mr Peat needed to charge the pump with water and, with the claimant, ascertained from the customer how this was usually done. Mr Peat then started the procedure to do this without realising that it would cause the pump mechanism to turn. When he did realise, it was too late and the alignment equipment was projected from the pump. Fortunately, it did not do any damage to anything but itself and could not be used to complete the alignment process. As Mr Thompson could not use it to complete his work, he was not sufficiently satisfied that the pump was in a fit state to be used.

36 A 'near-miss' report needed to be completed and it was agreed that this would be done by Mr Thompson.

37 Attempts to inform the employees of the customer failed and it was decided to leave the pump as it was with a note on to say that it was not ready for use but would be commissioned the next day. The isolator was still not locked off and the safety guard around the pump was left off. In the view of the customer, the pump was not left in a safe condition and it depended on the note being in place to stop the pump being used.

38 The next day the claimant sent an email to Mr Mullett confirming that the replacement pump had been fitted but required to be aligned. He did not indicate the reason that this work had not been completed before.

39 Mr Mullett sent an email complaining about the way in which the site had been left with the pump not working and not fully switched off. Although the customer was clearly dissatisfied with the way the pump had been worked on, it did not appear that any action was threatened or that the customer indicated that it was considering moving its business elsewhere.

40 Mr Fullerton directed that John Cunningham, regional engineering manager, should carry out an investigation involving the claimant, Mr Peat and Mr Thompson.

41 When the claimant was interviewed by Mr Cunningham, he was asked if he took control of organising the job and replied that he did 'with obvious direction from CM'. However, he stated that he did not get involved in asking for any RAMS and did not ask for them. He thought that Mr Thompson and Mr Peat had work permits. He admitted 'holding the lift from swinging' and putting a container under the pump to catch oil. The claimant accepted that he was present when the alignment equipment was damaged. He also accepted that the guard was left off the pump and that the pump was not locked off, which was the reason for the note.

42 Mr Cunningham commented on the interview that the claimant's intentions were admirable but he questioned why the claimant took control of the task and whether he was qualified to do so. He commented that there were failures on the day but whether the claimant did any work in relation to the pump was a 'grey area'. The leaving of the note was not ideal but it did work.

43 When Mr Peat was interviewed by Mr Cunnigham he confirmed that he was not safety passport trained with the respondent's system.

44 Mr Thompson told Mr Cunningham that Mr Peat, the claimant and himself 'were all actively helping'. He said that the claimant used an airline to cool a shaft down.

45 Christopher Adams, the Carlisle manager, told Mr Cunningham that the claimant's safety passport was out of date.

46 Mr Cunnigham's notes were passed to Mr Bolland, who was the claimant's line manager. He considered that all three of those involved should be the subject of separate disciplinary hearings.

47 By a letter dated 5 July, 2018, the claimant was invited to a disciplinary meeting to be held by Mr Bolland on 10 July, 2018, with Timothy Pool, HR business partner, acting as notetaker. The claimant attended with Mr Adams as his companion.

48 At the disciplinary hearing, the claimant confirmed that he was the job co-ordinator. Despite this, the claimant did not consider that it was his responsibility to deal with the RAMS. He accepted that he knew that the pump was not locked off. The claimant stated that he wrote the note left on the pump. The claimant agreed that he had helped move the pump and obtained the container for the oil. He disputed that he had actually used the airline but admitted holding it. Although denying that he was working with the two engineers, he admitted that he was wearing blue gloves whilst moving the pump.

49 The claimant described what happened when it was found that the pump that was being worked on needed to be replaced. He went with Mr Peat to see a representative of the customer who agreed that the pump should be replaced with the spare one. The claimant asked the representative what he wanted done and he said to effect the replacement. The claimant then said 'right then get on with it do what you need to do'. However, he did not know what was required and left it to the others to complete the work.

50 The Tribunal was satisfied that the claimant was aware of the nature of the allegations being made against him and of their serious nature. Also, that the claimant was given the opportunity to raise all of the matters that he wished and to put his case forward.

51 At his disciplinary hearing, Mr Thompson was asked who took the decision to start work without any of the customer's engineers present. He said that 'could have been JD or all of us – JD was leading'. He also stated 'you need to understand the scenario – consider this – JD was taking Kyle CM around. [The claimant] not qualified to do CM but obviously thinks he is. Does the lead need to be technically qualified?' When asked if the claimant should have been involved in the work, Mr Thompson said 'no, however how many able bodied men watch colleagues sweat and toil'. Mr Thompson had wanted to get away from the job for a social event but the claimant put him under pressure to stay for a further two hours.

52 At his disciplinary hearing, Mr Peat stated '[the claimant] called me in a panic to get seal fixed, shifted diary around. Went to site, it should not have been me but I have a good relationship with Sean Mullett'. He agreed that the claimant helped him steady the pump. When asked whose decision it was to leave the note, Mr Peat stated that it was written by the claimant who was asked to contact the customer the next day. Mr Peat also said that there was not any ownership of the job but the claimant was trying to co-ordinate it. Mr Peat was helping the claimant but was not the right person for the job. His representative said that Mr Peat had not had enough training.

53 When considering his decision in respect of the claimant, Mr Bolland did consider the range of sanctions that he felt were open to him. He accepted that the claimant's

actions came from a desire to get the job done to the customer's satisfaction but that this had clouded his judgment to the extent that he did not have proper regard to health and safety.

54 By a letter dated 13 July, 2018, Mr Bolland confirmed the outcome of the disciplinary hearing. He decided that

54.1 It was his reasonable belief that the claimant failed to follow the correct commercial process to engage the correct resource to complete the job correctly

54.2 Whilst the claimant had claimed to have played a 'minimal part' in the engineering activity on the day, in his position, the claimant should not have been involved in any aspect of the installation because he was not trained to do this, which was considered to be a serious failure to observe the respondent's health and safety rules, in particular a breach of golden rule number 4. Further, with his length of service, he was well aware of how seriously the respondent takes health and safety issues and he would be expected to be aware of the golden safety rules

54.3 It was his belief that the claimant's actions seriously damaged the respondent's reputation with the customer.

He decided that the claimant's actions constituted gross misconduct and that his mitigation was not appropriate or acceptable. The sanction was summary dismissal. The claimant was informed of his right to appeal.

55 By a letter, the claimant exercised his right of appeal and challenged the three findings of Mr Bolland.

56 By a letter dated 20 July, 2018, the claimant was invited to an appeal hearing on 26 July, 2018. The hearing took place as planned and was conducted by Mr Parkes and Richard Parkin, COO D & E. The claimant chose to attend the hearing without a representative.

57 At the start of the hearing, it was explained to the claimant that the purpose of the hearing was to understand the grounds of appeal, to consider whether the process was fair and was the outcome of the disciplinary hearing fair in terms of the severity of the outcome but those hearing the appeal would not be going over the detail that was heard previously. The claimant accepted this.

58 The claimant explained that he had not been well since his dismissal because of the effect that the decision had had on him. In particular, his appeal letter had been written when he was at a low state and under the influence of drugs designed to help him. This was accepted by those hearing the appeal and the claimant was allowed to further explain his grounds of appeal. The claimant was allowed to raise all the issues that he wished and at the end of the hearing he said that he nothing else to say.

59 The Tribunal was satisfied that the claimant was given a fair chance to challenge the decision to dismiss him and to put all of the points that he wished.

60 Appeal hearings also took place in respect of Mr Peat and Mr Thompson, who had both been dismissed.

61 In a long letter of 10 August, 2018, which needs to be read for its full terms and effect, Mr Parkes summarised the claimant's grounds of appeal and set out the conclusions reached in dismissing the appeal.

62 The claimant contends that he was unfairly dismissed and that the allegations against him did not amount to gross misconduct. The respondent had failed to follow its disciplinary procedure and the sanction was, in any event, inappropriate. Further, that he was wrongfully dismissed. The respondent contends that the dismissal was not unfair as it followed a reasonable procedure to reach an appropriate conclusion and the dismissal was within the band of reasonable responses open to it. The respondent also denies that the claimant was wrongfully dismissed.

63 Section 98(1) of the Employment Rights Act, 1996, as amended, ('the Act') states that:

> "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."

Conduct is a ground that may found a fair dismissal.

64 Where the reason for dismissal has been established, then the task for the Tribunal is set out at section 98(4) of the Act. That provides:

> "... 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 the 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."

65 It is well-established law that the Tribunal in a case of unfair dismissal is not entitled to ask itself what it would have done in the circumstances: we are only entitled to ask whether the employer acted reasonably or unreasonably. Also, the Tribunal is not required to decide whether the claimant did what he was alleged to have done, unless it is necessary to consider the issue of contributory fault.

66 The Tribunal finds that the principal reason for the claimant's dismissal was conduct. There was nothing in the evidence before the Tribunal to suggest any other reason.

67 The respondent was entitled to reach the conclusions that it reached on the basis of the information before it as to the claimant's conduct. It was entitled to find that the claimant, whatever his motives, had co-ordinated work on a customer's site to such an extent that the leadership of the work was uncertain with the result that various health and safety measures were overlooked or ignored. By putting pressure on his colleagues to complete the work, he created a situation where mistakes were made and equipment was damaged, narrowly avoiding injury or, possibly, loss of life. He should have known that he was not qualified to lead the job and have put the problem of who should do the work to someone who could make an informed decision. Whilst Mr Peat had an engineering background, it is open to question whether he had the experience and knowledge to do the required work on this occasion. The claimant was aware that equipment had to be borrowed and that a safe system of work had not been established. He was in a position to stop the work at any time but did not exercise this option. Accordingly, in all of the circumstances, the respondent's decision that the claimant had committed a disciplinary offence related to these matters was within the range of options open to it.

68 The Tribunal was satisfied that the procedure that the respondent followed was reasonable and was ACAS compliant. At all times, the claimant was aware of the allegations being made against him and was allowed to raise all of the issues that he wished at the disciplinary hearing. Although, as mentioned above, the respondent may not have followed its disciplinary procedure, the procedure was poorly drafted and it is difficult to see how it could have been used in practice. Even if the respondent had followed its procedure more closely, the Tribunal was satisfied that the finding that the claimant had committed a disciplinary offence would have been the same.

69 Even if, which the Tribunal does not accept, the procedure up to and including the disciplinary hearing was not followed properly, it is well established that errors can be corrected at an appeal hearing. In this instance, the appeal hearing was well conducted. The claimant was allowed to expand his grounds of appeal and was given a full and fair hearing at which he was allowed to raise all of the points that he wished. Again, the decision that the claimant had committed a disciplinary offence was within the band of reasonable responses open to those conducting the appeal hearing.

70 With regard to the sanction, the Tribunal recognised that the actions of the claimant, as found by the respondent, could have had serious consequences. However, the Tribunal did not consider that the respondent, either at the disciplinary hearing or

the appeal, had properly considered the appropriate sanction. It was clear that there was a conflict between trying to satisfy the customer and complying with all of the respondent's procedures. For whatever reason, the claimant was seeking to ensure that the respondent remained a credible supplier to the customer and retained its goodwill. He became too deeply involved in the job with the result that others, who should have known better, did not properly comply with the respondent's health and safety and operating procedures. The claimant was not involved in engineering activities and left it to others to comply with these matters without checking that they had. Nevertheless, he was probably entitled to rely on their technical and professional expertise to do the work correctly. Undoubtedly, he did get involved in some of the work but it is highly unlikely that he would just stand and watch if his colleagues required assistance that he was able to give and were more akin to labouring than undertaking engineering work. Had he not done so, certainly in respect of moving the pump, another dangerous situation could have arisen. He was not involved in any work of a technical nature that required engineering expertise. Whilst the customer was clearly annoyed with what had happened, there was not any evidence to suggest that the respondent would not be allowed back on site to correct the situation with the pump or that it was at risk of losing future work. In the circumstances of this case, the Tribunal finds that, in terms of conduct, the claimant's conduct should not have been found to amount to gross misconduct but was more an error of judgment in failing to anticipate the consequences of his actions that might have been addressed as a training need. The Tribunal finds that the reasonable range of responses was quite wide and ranged from training to dismissal with notice but did not extend to summary dismissal. Accordingly, the decision to dismiss was within the range of reasonable responses but only if coupled with the giving of notice or a payment in lieu of notice and the Tribunal finds that the sanction of summary dismissal was outside the band of reasonable responses.

71 Accordingly, the respondent's summary dismissal of the claimant was unfair but there were adequate grounds to fairly dismiss the claimant with notice. On this basis, the claimant is only entitled to recover the losses that arose because of the way in which he was dismissed, that is compensation for the notice pay that he would have received if he had been dismissed in accordance with the terms of contract of employment. However, please see below with regard to the claimant's losses.

72 Having regard to the above and to equity and the substantial merits of the case, the Tribunal finds that the claimant was unfairly dismissed but that if the respondent had acted fairly, the claimant would have been dismissed at the end of his notice period.

73 With regard to remedy, having regard to the conduct of the claimant and the fact that he would have been dismissed in any event, it is not just and equitable that he should receive a basic award (Section 122 of the Act).

74 Having regard to the compensatory award that the claimant is entitled to, the Tribunal finds that it should be restricted to the losses flowing from the termination of his employment without notice. This would be not greater than the notice pay that the claimant would have been entitled to receive.

75 With regard to the allegation that the claimant was wrongfully dismissed, the Tribunal finds that the claimant did not fundamentally breach his contract of employment so that the respondent was entitled to dismiss him without notice. Whilst the claimant had committed an act of misconduct, it was not so serious that the respondent could treat it as a fundamental breach of the claimant's contract of employment. There was not any evidence to suggest that the claimant intended such a breach and, indeed, it would appear that the claimant was intending to act in the best interests of the respondent, whatever the consequences actually were. In any event, having regard to the facts set out above, the respondent was not entitled to find that that the claimant had committed such a breach.

76 Accordingly, the claimant's complaint that he was wrongfully dismissed is well founded.

77 The claimant is entitled to compensation based on the notice pay that he would have received had he been given notice or a payment in lieu of notice by the respondent. After discussion with the parties, they agreed that the appropriate sum to be awarded to the claimant was £3377.82.

78 Accordingly, the Tribunal orders the respondent to pay the claimant in respect of the claimant's wrongful dismissal the agreed compensatory award of £3377.82.

79 As this is the maximum amount that the claimant would have been awarded as a compensatory award for his unfair dismissal and covers the same period. The award in respect of the wrongfully dismissal extinguishes the compensatory award that would otherwise have been made.

80 The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations, 1996, do not apply to this award as the claimant did not receive a relevant benefit.

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Employment Judge Nicol

Date 7 October, 2019

JUDGMENT AND RESERVED REASONS SENT TO THE PARTIES ON

.29 October 2019

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FOR THE TRIBUNAL

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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): **2416417/2018**

Name of case(s): **Mr J Devoy** v **Eriks Industrial Services Ltd**

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: **29 October 2019**

"the calculation day" is: **30 September 2019**

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

MRS L WHITE
For the Employment Tribunal Office