EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr M Case		**Eagle Aero Engineering Ltd**

Heard at: London South Employment Tribunal **On:** 14 October 2019

Before: Employment Judge Hyams-Parish (sitting alone)

Representation:
For the Claimant: **Mr D Welch (Counsel)**
For the Respondent: **Ms E Sole (Counsel)**

RESERVED JUDGMENT

1. **The unfair and wrongful dismissal claims are well founded and succeed.**

2. **There shall be a reduction to the compensatory and basic awards of 45% on account of the Claimant's contributory fault.**

3. **The issue of remedy shall be considered at the hearing that is listed on 10 January 2020.**

REASONS

Claims

1. By a claim form presented to the Tribunal on 27 August 2018, the Claimant brings claims of unfair and wrongful dismissal against the Respondent.

Relevant legal principles

2. The right not to be unfairly dismissed is set out in s.94 Employment Rights Act 1996 ("ERA"). The right to bring a claim for unfair dismissal is conditional upon an employee having two years' continuous service unless the reason for dismissal is one of those for which no minimum service is required.

3. The test for determining the fairness of a dismissal is set out in s.98 ERA which states the following:-

> ***(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.***

4. In the case of **British Home Stores v Burchell [1978] IRLR 379 EAT**, the court said that a dismissal for misconduct will only be fair if, at the time of dismissal: (1) the employer believed the employee to be guilty of

misconduct; (2) the employer had reasonable grounds for that belief; and (3) at the time it held that belief, it had carried out as much investigation as was reasonable.

5. The employer bears the burden of proving the reason for dismissal whereas the burden of proving that the dismissal was fair or unfair is neutral.

6. The burden of proof on employers to prove the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. As Lord Justice Griffiths put it in **Gilham and ors v Kent County Council (No.2) 1985 ICR 233** "*The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [S.98(4)], and the question of reasonableness*".

7. In the case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT**, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair.

8. In the case of **Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23 CA**, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal.

9. The Tribunal is mindful of not falling in to a substitution mindset. The Court of Appeal in **London Ambulance NHS Trust v Small [2009] IRLR 563** warned that when determining the issue of liability, the Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct. In **Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82** the court said it is irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "*substitute its view*" for that of the employer.

10. Whether an employee's behaviour amounts to misconduct or gross misconduct can have important consequences. Gross misconduct may result in summary dismissal, thus relieving the employer of the obligation to give notice or pay in lieu of notice. Exactly what type of behaviour amounts to gross misconduct is difficult to pinpoint and will depend on the facts of the individual case.

11. In **Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09** the EAT summarised the case law on what amounts to gross misconduct and found that it involves either deliberate wrongdoing or gross negligence. In cases of deliberate wrongdoing, it must amount to a wilful repudiation of the express or implied terms of the contract (**Wilson v Racher [1974] ICR 428 (CA)**). It is generally accepted that it must be an act which fundamentally undermines the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract).

12. The ACAS Code on Disciplinary and Grievance Procedures ("the ACAS Code") states that the employer's disciplinary rules should give examples of what the employer regards as gross misconduct, i.e. conduct that it considers serious enough to justify summary dismissal (see paragraph 24 of the Code). The Code suggests this might include theft or fraud, physical violence, gross negligence or serious insubordination. Although there are some types of misconduct that may be universally seen as gross misconduct, such as theft or violence, others may vary according to the nature of the organisation and what it does. A failure to list certain types of behaviour as gross misconduct may mean that the employer cannot rely on them to dismiss summarily ***(Basildon Academies v Amadi EAT 0343/14*).** Conversely, a dismissal will not necessarily be fair, just because the misconduct in question is listed in the employer's disciplinary policy as something that warrants dismissal.

13. In **Sandwell**, the EAT held that the Tribunal must consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case. On the facts of **Sandwell**, the EAT held that the employee's breach of her employer's policy did not necessarily amount to gross misconduct simply because the employer's disciplinary code stipulated that it would. When considering whether conduct should be characterised as gross misconduct, employers should bear in mind that:

    a. The conduct must be so serious that it goes to the root of the contract, that is, the conduct must be repudiatory, entitling the employer to dismiss with immediate effect; and

    b. The conduct must be a deliberate and wilful breach of the contract or amount to gross negligence.

14. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought, compensation is awarded by means of a basic and compensatory award.

15. Section 123(1) provides that the compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer (**Polkey v A E Dayton Services Limited [1988] ICR 142**).

16. The basic award is a mathematical formula determined by s.119 ERA.

Under section 122(2) it can be reduced because of the employee's conduct:

> ***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.***

17. A reduction to the compensatory award is primarily governed by section 123(6) as follows:

> ***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……***

18. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in **Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 111**. It said that the Tribunal must be satisfied that the relevant action by the Claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

Evidence

19. The Tribunal heard evidence from the Claimant, and on behalf of the Respondent, the following witnesses:

- Richard Gibson (Director of Finance, Marketing and Administration)
- James Giller (Managing Director).

20. Before the hearing started, the Tribunal was given three bundles. One bundle was the main bundle of agreed documents which was used during the hearing. There was another bundle marked "*Bundle B – Explicit Documents*" which contained the pornographic images relating to one of the allegations of misconduct. Thirdly there was a small bundle of additional documents provided by the Claimant.

Findings of fact

21. The following findings of fact were reached by the Tribunal, on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, together with the documents referred to by them. Where the Tribunal's findings on disputed fact reflect those represented by one party, it is because the Tribunal preferred the evidence of that party. It has not been necessary to determine each and every fact in dispute where it is not necessary to do so for the purposes of answering the questions dealt with under the section headed "Conclusions and analysis" below.

22. The Respondent is a small business which specialises in aircraft maintenance. It employs 5 full time staff.

23. The Respondent company is currently jointly owned by Mr Giller and Mr Gibson. It was set up in 2009 by the Claimant's father (Simon Case) and Mr Giller and incorporated in 2011. Mr Giller owned 25% and Mr Case (senior) owned 75%. In November 2011, the Claimant became a director of the Respondent. In 2016 Mr Giller's shareholding increased to 33%, resulting in the shareholding of Mr Case (senior) reducing to 67%. In December 2017 Mr Giller announced to a client that he would be resigning from the Respondent. Once this news filtered through to his fellow directors, there were several discussions about what options were open to them. That ended in an agreement that Mr Case (senior) would sell his shareholding. By this stage Mr Gibson had become involved in the Respondent company, as had another shareholder, Andrew Twemlow. In February 2018, it was agreed that Mr Case (senior) would sell his shares to Mr Gibson and Mr Twemlow, resulting in their shareholding in the company becoming 33% and 34% respectively. In August 2018, Mr Twemlow sold his shares to Mr Giller and Mr Gibson so that they now own 50% each.

24. Upon Mr Gibson joining the Respondent, it was agreed as part of the transfer in ownership of the Respondent that the Claimant would be seconded to, and eventually formally work for, a subsidiary company of the Respondent called AT Aviation Ltd. However whilst the Claimant did work for AT Aviation Ltd under the management of Mr Twemlow, the arrangement was never formalised and the Claimant continued to be employed, and paid by, the Respondent up to and including the date of the termination of his employment.

25. Upon joining the Respondent, Mr Gibson was surprised by the unprofessionalism of the Claimant, particularly that the Claimant, in Mr Gibson's view, was incapable of acting appropriately in front of customers and clients. Mr Gibson approached Mr Giller in April 2018 regarding the Claimant's behaviour and said he was concerned about three things in particular, which were:

    a. The Claimant's behaviour towards colleagues, customers and other directors was completely unacceptable;

    b. That on three occasions the Claimant had gone absent without notifying anyone, or alternatively, had provided a text message a few days before taking a week off without any authority to do so;

    c. That he had entered the Respondent into a lengthy and expensive (in the Respondent's view) mobile phone contract that was outside of his role as a sales agent for AT Aviation Ltd. In addition the phones were delivered to his home address and Mr Gibson was not able to identify who had use of the phones.

    d. The Claimant made a claim for the same invoice twice from the Respondent.

26. Mr Gibson informed Mr Giller at the above meeting in April 2018 that he had

lost confidence in the Claimant, both as a director and employee, and that formal action was required to deal with him. Mr Gibson therefore proposed that formal disciplinary action was started against the Claimant. Prior to doing so, however, it was agreed that they would seek independent HR advice from a specialist HR consultant.

27. When Mr Gibson joined the Respondent, one of his main goals was to make the Respondent what he described in evidence as "*more professional in its day to day running*". Mr Gibson signed the Respondent up to the Federation of Small Businesses ("FSB") in late February/early March 2018. One of the benefits of signing the Respondent up to the FSB was that it provided standard precedent workplace policies and procedures, including a disciplinary procedure. The policies and procedures which the Respondent said that they implemented, including a disciplinary procedure, were included in the hearing bundle.

28. The Tribunal noted that there was nothing about the policies and procedures which suggested or confirmed that they belonged to the Respondent, for example they were not branded and had no reference to the name of the Respondent on them at all. There was also no reference to the FSB or any indication that the documents had been produced by them. Infact, the disciplinary procedure contained a note at the end which said:

> ***Please note: LHS Solicitors owns the copyright in this document. You must not use this document in any way that infringes the intellectual property rights in it. You may download and print this document which you may then use, copy or reproduce for your own internal non-profit making purposes. However under no circumstances are you permitted to use, copy or reproduce this document with a view to profit or gain. In addition you must not sell or distribute this document to third parties who are not members of your organisation, whether for monetary payment or otherwise.***

29. The Tribunal finds that none of the policies referred to in the hearing bundle had been implemented prior to the Claimant's dismissal. The Claimant had not seen the disciplinary policy, or indeed any policy, prior to his dismissal.

30. On 29 May 2018, the Claimant was invited to attend a meeting at the Respondent's premises on 30 May 2018 with Mr Gibson and Mr Giller. At that meeting the Claimant was provided with a letter inviting him to a disciplinary meeting on 5 June 2018 to answer fourteen allegations of misconduct. The letter said as follows:

> ***Dear Matt***
>
> ***Since the change of ownership of the Company we have been monitoring your work performance, decisions, attitude and associated work matters in the business. Having investigated a number of matters we have decided that we want to discuss these with you at a formal disciplinary hearing.***
>
> ***The reason for the disciplinary hearing is to discuss the following allegations:***

- ***racist comments made to a customer/supplier***
- ***Allegations of bad manners, offensive and inappropriate remarks to Lydd Airport staff***
- ***Complaints about your behaviour and attitude at work by colleagues and customers***
- ***These comments bring the company name into disrepute***
- ***Using foul and abusive language to directors***
- ***Making comments about the Company to customers that are untrue and potentially sensitive***
- ***Falsifying expenses by attempting to claim the same expense against two companies***
- ***Not in contact with the office so whereabouts unknown***
- ***Informing the office that you were on holiday without any prior approval***
- ***Taking out an insurance policy with NFU without agreement***
- ***Committing the company to a mobile contract with three phones and three phones were dispatched your home address, one is with a non-business member and one is unaccounted for***
- ***Mobile phone excess charges of over £200 per month***
- ***Various transactions since February 2017 that are unaccounted for***
- ***That we are losing trust and confidence in your work***

> ***These are serious allegations and we deem them as gross misconduct. Please note that if these are proven it could lead to your dismissal without notice from the company.***
>
> ***We, therefore, invite you to attend a disciplinary hearing on the 5th June 2018 at 14:00 hours.***
>
> ***The hearing will take place at…..***

31. The Respondent gave the Claimant three working days to prepare himself for the hearing, in circumstances where he had not at that stage been given any information or evidence in support of the allegations, other than a list of headings.

32. Upon being given the letter inviting him to a disciplinary hearing, the Claimant was suspended. He was told that he could no longer use his company car, which he was required to return immediately. In evidence, Mr Gibson said that he went out to the car park as he had been told that the Claimant was upset. Mr Gibson said that the Claimant said "*I fucked up this time. How can I make it better to come back?*" The Claimant denies making this comment. On balance, the Tribunal prefers the Claimant's account that he did not make the above comment. Firstly, the Tribunal found this a

strange comment to make, given that the Claimant had not been given any evidence to support the misconduct allegations and therefore he could not assess how strong they were. Such a comment, in the Tribunal's view, would be more likely to be made in circumstances where an employee knew that the evidence against them was such that their job was in jeopardy. Secondly, the Tribunal observes that Mr Gibson prefaces the above comment in his witness statement with the words "*to the best of my recollection*" which leaves open the possibility that the recollection may not be accurate. Generally, the Tribunal was concerned by the lack of detail that Mr Gibson was able to give in many respects during his evidence relating to the allegations, together with the complete lack of care and attention in documenting the investigation that he conducted. There was no contemporaneous note available to support the allegation that the Claimant had made this comment and there were no notes available at the hearing showing a log of who was spoken to during the investigation and when. The Tribunal considered such a note to be important bearing in mind there were 14 allegations and necessitated various different lines of enquiry, documents to be considered and witnesses to be spoken to.

33. On 1 June 2018, the Claimant wrote to Mr Gibson asking for further details of the allegations, referring to his rights under the ACAS Code.

34. The Claimant was sent further information about each of the allegations on a word document of 5 pages plus one email. There were no witness statements, notes of meetings and interviews, or documents enabling the Claimant to know precisely what allegations he faced or to properly prepare for the hearing.

35. During the period between 1-5 June 2018, Mr Giller found pornographic images on the Claimant's computer. These were images and some videos of the Claimant and his partner. The Claimant was not given advance notice that these images would form the basis of an additional allegation of misconduct to be raised at the disciplinary hearing but he was asked questions about them nonetheless and they were relied upon as one of the reasons justifying dismissal.

36. On 4 June 2019, the Claimant emailed Mr Gibson asking for the disciplinary hearing to be postponed to 11.00 on 6 June 2018. The Respondent agreed to the postponement and the disciplinary hearing went ahead as rescheduled.

37. The disciplinary hearing lasted 40 minutes, which the Tribunal observed was a very short time bearing in mind there were 15 allegations of misconduct to discuss. At the disciplinary hearing, Mr Gibson and Mr Giller went through each of the allegations but because limited detail was provided by the Respondent about the allegations, the Claimant's responses were understandably short.

38. There were no minutes or notes produced as a record of what was said at the disciplinary hearing. The only record was the dismissal letter itself, in

which the Respondent summarised the Claimant's alleged replies.

39. The evidence against each of the allegations was limited, in many cases only consisting of the information in italics below each of the following allegations:

(a) Racist comments made to a supplier customer/supplier

"On 6 March at 14.00 with Hani Mutlaq, London Ashford Airport Finance and HR Manager. Mr Mutlaq reported to Mr Gibson verbally that Mr Case had referred to him with a racist comment"

No witness statement was produced from Mr Mutlaq as part of the disciplinary process, neither was any contemporaneous note (or indeed any note) taken of any conversation with Mr Mutlaq detailing the allegations made. The Tribunal notes that the information provided to the Claimant, consisting only of the above, did not even specify the racist comment allegedly made.

In the dismissal letter, the Respondent records the Claimant's response as follows: "*Whilst you stated that you did not recollect this incident, upon investigation of the matter, I do believe that Hani Mutlaq, was offended and personally hurt by your language and behaviour*".

In evidence before the Tribunal, the Respondent divulged for the first time what the racist comment was that the Claimant was alleged to have said. Mr Gibson said that two terms were used, one was "raghead". He could not recall the second term. When it was put to Mr Gibson that it was the first time that the Claimant had heard the comment alleged to have been made, Mr Gibson said "*from an investigation perspective, I went to see a number of people and spoke to them"*. Mr Gibson referred to Mr Mutlaq having raised these concerns in the past; he was not able to provide any detail and had no notes of such meetings to assist him or give credibility to what he was alleging.

(b) Allegations of bad manners, offensive and inappropriate remarks to Lydd Airport Staff

"Since Eagle Aero Engineering was set up numerous complaints have been made to James Giller, Managing Director of Eagle Aero Engineering Ltd, relating to Matthew Case, his language, attitude and at times aggressive behaviour. These complaints have been made by Eagle customers and staff members, as well as Lydd Airport Ltd Management and staff.

Independent verification of some of these claims occurred during meetings and conversations between aggrieved individuals and Mr Gibson. Examples given included: swearing, sexist comments, aggressive language and aggressive body language. One airport employee is writing a statement for Monday morning.

Following a visit to Biggin Hill on 7 March, the Chief Engineer spoke to Mr Giller to comment on the approach and language used by Matthew Case in his visit to their facility.

Following the visit to Goodwood on 4 April, the Chief Engineer spoke to Mr Giller to comment on the overtly aggressive approach and assumptive manner taken by Matthew Case in his visit to their facility.

By customers

Matthew Case, having been told not to be involved with the sale of G-AXBJ (the owner's request due to previous experiences of his manner) and specifically told by the owner that he was not to 'test fly' the aircraft, he came into the Eagle Facility, on 10 May, with the intention of flying G-AXBJ"

The above information was the only information provided to the Claimant. The Tribunal notes the lack of detail behind these allegations. The dismissal letter records no response recorded by the Claimant to these allegations. Mr Gibson wrote in the dismissal letter "*these complaints have been made by Eagle customers and staff members, as well as Lydd Airport Management Ltd and staff. Some of these claims occurred during meetings and conversations between the aggrieved individuals and myself"*

This comments suggests that there were a number of conversations with people, yet there were no witness statements or contemporaneous notes available which were provided to the Claimant as part of the disciplinary process.

(c) Complaints about your behaviour and attitude at work by colleagues and customers

"All of the Eagle staff have commented on inappropriate behaviour; aggressive attitude and language. Also inappropriate remarks of other people; of customers, of suppliers, and fellow employees"

The above statement was the only information provided in support of this allegation. No other evidence was provided; no witness statements or contemporaneous notes. Not surprisingly, in the Tribunal's view, the dismissal letter records that the Claimant was not able to recollect any of these incidents.

(d) These comments bring the company name into disrepute

No additional information was provided but the Tribunal concluded that this referred to other allegations.

(e) Using foul and abusive language to directors

"This occurred on the evening of the 9 May 2018 when Matthew Case told Mr Gibson to "f" off, the language was challenging (mostly swearing) and

aggressive, i.e. "I might as well drop the keys off and 'f'….off. "I will tell customer there is no point and not to bother"

No other information was provided. In the dismissal letter, the only comment is from the Respondent to say "*you did not comment on this incident and have not apologised for your behaviour*".

(f) Making comments about the company to customers that are untrue and potentially commercially sensitive;

"It was reported to Mr Giller on return from leave that on 16 April 2018 Matthew Case was in the Eagle hanger at Lydd. He informed members of staff that AT Aviation were purchasing Aeros Aircraft Engineering at Gloucester. On the same day, whilst speaking to an Eagle customer (Mr Brian Cox) on the telephone, he was overheard informing him of the same information which was untrue."

No account was provided by Mr Cox or the person who overheard the conversation. In the dismissal letter, the Claimant is recorded as saying that he did not recall the incident but that he would not have made a comment of that sort to a customer in any event.

(g) Falsifying expenses by attempting to claim the same expense against two companies

"A payment was made on 24 April 2018 from the 'old' eagle bank account to Matthew Case for Juke Repair for £250.00. A credit card receipt (not a VAT receipt) exists within his expense claims. An attempted claim was made for the same repair from AT Aviation two weeks later."

The dismissal records the Respondent having said during the disciplinary hearing "*we had a considerable paper (email) trail of this accusation*" but none of this was provided to the Claimant during the disciplinary process. The Claimant gave evidence that the expense had to be resubmitted to the Respondent for payment because AT Aviation did not have the funds to pay it at the time.

(h) Not in contact with the office so whereabouts unknown

"On many occasions Matt has disappeared off radar – particular with family related issues that were conducted in work time and example questioning attached text from 24 Feb 07-48".

The Respondent produced a text from Mr Twemlow which said *"As we are at the critical start point it is essential that I can get hold of you not been able to do so since PM yesterday – appreciate the issues with family but need you to focus".*

This was the extent of the allegation. There was no evidence produced to provide any context to this, or indeed any explanation from the Claimant

which might have provided an innocent explanation of his whereabouts at that time.

(i) Informing the office that you were on holiday without any prior approval

"On two occasions holidays were taken without reasonable notice; the first with no approval with AT only finding out about the week off from another member of staff, the second by a text message which was provided just a few days prior to the said holiday (see attached)".

The text from the Claimant said "*Hello matey as discussed remember I'm away next week mon to Friday with kids. Thought I would remind you*".

The Tribunal pointed out to the Respondent during the Tribunal hearing that the text referred to it being a reminder, suggesting that Mr Twemlow had previously been informed about the holiday. In relation to the first allegation, there was no information provided to the Claimant to enable him to respond. The Respondent was not able to provide any information about this matter at the Tribunal hearing. The Claimant, on the other hand, maintained that he had discussed the matter with Mr Twemlow. There was no statement or any evidence from Mr Twemlow at the disciplinary hearing or at the Tribunal hearing to contradict what the Claimant said.

(j) Taking out an insurance policy with NFU without agreement

The Claimant was alleged to have purchased a personal car insurance policy when he should have enquired whether the insurance could have been purchased at a cheaper rate.

The Claimant is recorded as saying at the disciplinary hearing that he obtained the cheapest quote (£1,135.19) and that he had obtained other quotes, one of which was £3,000. He said that his quote represented the cheapest available. The Claimant said in evidence, and the Tribunal accepts, that Mr Twemlow wanted the Claimant out on the road as soon as possible. What is more, Mr Twemlow knew about the policy that the Claimant had purchased and had no issue with it.

(k) Committing the company to a mobile contract with three phones and one is unaccounted for

The Claimant was informed that he had renewed a mobile phone contract without discussion and therefore without agreement, committing the Respondent to a two year contract which they said would cost them approximately £3,000 to terminate. The Respondent alleged that it was not their intention to renew that contract as it was expensive and the Claimant was aware of that. It was alleged that the new contract included a telephone and number for the Claimant's father, Simon Case. The Respondent alleges that three phones were provided as part of the contract: one for the Claimant, one for his father and one which was unaccounted for.

The dismissal letter records the Claimant as saying that he had only done what he had done previously. In the hearing, the Claimant said that he had discussed it with Mr Twemlow and that Mr Twemlow had agreed to him taking out the contract. He said in his evidence that it was intended that his father should have a phone, for what he described as "cross fertilisation purposes" which the Tribunal interpreted to mean that the Claimant's father still had some value to the business and that it was intended that he would be in some way active in assisting the company generate business. The Tribunal did not hear evidence from Mr Twemlow and therefore the Claimant's evidence could not be contradicted.

(l) Mobile phone excess charges of over £200 per month

The Respondent alleged that telephone call and data charges for the Claimant were excessive, being £183.15 in January; £182.26 in February; £198.65 in March; £328.33 in April; and £326.86 in May.

The Claimant was not provided with the relevant bills and could therefore not query whether they were correct or seek to analyse the calls or data to provide an explanation as to how the cost had been incurred or indeed why it had been incurred.

(m) Various transactions since February 2017 that are unaccounted for

The Respondent alleged that there were unexplained expenses paid to the Claimant. They said that since 1 February 2018, £3575.94 had been paid to the Claimant in expenses whereas the receipts on file amounted to less than £900.00.

The dismissal letter records that the Claimant claimed £2,354.20 of expenses and that all receipts had been submitted. In evidence he maintained that the expenses were properly incurred and accounted for and that he sought authority from Mr Twemlow.

No documents or records of expenses were provided to the Claimant prior to the disciplinary and the Tribunal concludes that there would have been limited opportunity for the Claimant to prove his innocence. Because the Claimant was not interviewed about this allegation during the investigation, they were not able to investigate his responses. There is no evidence that any further investigation was carried out after the disciplinary hearing to check whether what the Claimant was saying was correct. It appears to the Tribunal that with so many of the allegations, the Respondent went into the hearing with a closed mind and had little interest in considering or further investigating any explanation that the Claimant gave in order to check whether it was in fact correct.

(n) Evidence of pornography on your work laptop

During the period of suspension, the Respondent found pornographic images of the Claimant and his partner on his computer, together with some videos of them.

At the disciplinary hearing the Claimant is recorded as saying that the computer was his personal computer that was replaced by the Respondent previously when his was damaged. In evidence the Claimant repeated that the computer was his which he used for business purposes. He said that the computer was password protected and therefore someone would only be able to access the computer if he allowed them access. The Claimant said that the images were stored in a file and were not readily visible to someone going on his computer unless someone went looking for them.

The Tribunal accepts what the Claimant said on this issue. It finds that the images would not have been discovered had the Respondent not gone looking for them. The Tribunal accepts that the images are explicit but they only contain imagery of the Claimant and his partner.

There was no policy or guidance in place at the time which stated what could or could not be held on a computer. There was no procedure in place that stated what the Claimant had done was an act of gross misconduct.

It is clear that no advance warning was given that this allegation would be dealt with during the disciplinary hearing. The Claimant therefore had little opportunity at the hearing to prove or adduce evidence to support his position regarding ownership or related to accessibility of the photos.

Although it became clear during the hearing that the Claimant had used his computer to email certain images to his partner, the issue of emailing the images was not listed as an allegation, raised during the disciplinary hearing or mentioned in the dismissal letter.

(o) That we are losing trust and confidence in your work.

This allegation, rather than a free standing allegation, related to the other allegations which, as a result, left the Respondent, on their account at least, with no trust and confidence in the Claimant.

40. Following that meeting, Mr Gibson and Mr Giller took advice from their HR consultant and had a telephone call with their fellow director, Mr Twemlow, during which the three of them made the joint decision to dismiss. In a letter dated 7 June 2018 to the Claimant, Mr Gibson said:

> ***"…..I do feel that the majority of the allegations have been substantiated. The nature of some of the allegations in their own right are deemed gross misconduct and therefore as I feel that they have been substantiated I have no alternative but to dismiss you from your position for Gross Misconduct."***

41. Notwithstanding the above reference in the dismissal letter to 'some of the allegations' being gross misconduct in their own right, the letter did not go on to state which allegations Mr Gibson was referring to.

42. The letter set out the Claimant's right of appeal but the Claimant chose not to do so.

Submissions by the parties

43. The parties made oral submissions to the Tribunal which the Tribunal considered carefully in reaching its conclusions below.

Analysis and conclusions

44. Turning now to answer each of the questions at paragraph 2 above, the Tribunal's conclusions are set out below.

Did the Respondent believe the Claimant was guilty of misconduct and was this the reason for dismissal?

45. The Tribunal is satisfied that the Respondent did believe the Claimant to be guilty of misconduct. The above allegations, on their facts, do amount to misconduct, and the Tribunal accepts they were the reason for dismissal. Accordingly, the Tribunal is satisfied that the Respondent has discharged the burden of proving the reason for dismissal under s.98(1) ERA.

Was that belief based on reasonable grounds? At the time of forming that belief, had the Respondent carried out as much investigation as was reasonable in the circumstances?

46. The Tribunal had little difficulty in concluding that the investigation fell far short of what a reasonable employer would have conducted in the circumstances; in fact the Tribunal would go so far as to say that it was woefully inadequate in many respects.

47. The Tribunal concludes that whilst Mr Gibson said he was tasked with the investigation, in reality this involved Mr Giller at certain points as well (for example, it is Mr Giller who found the pornographic material which formed the basis of one allegation against the Claimant). The Tribunal concludes that neither Mr Giller nor Mr Gibson approached the investigation with an open mind. Mr Gibson said in his witness statement that he approached Mr Giller in April 2018 and said that he had lost trust and confidence in the Claimant's role as both a director and an employee and that a formal process should therefore be started. The Tribunal concludes that their minds were made up at that stage. This view seriously infected the fairness of the investigation because they closed their minds to the possibility of any innocent explanation for many of the allegations and it therefore became an exercise, in the Tribunal's view, of simply searching for evidence that pointed to the Claimant's guilt. They did not pursue, neither did they appear to want to pursue, lines of enquiry that might have assisted the Claimant,

whether because it pointed to his innocence or because it would have provided evidence of mitigation.

48. The Claimant was not interviewed as part of the investigation and therefore lines of enquiry which might have been helpful to the Claimant were not even identified. There are a number of allegations, which it became clear during the hearing that the Claimant had an explanation for, which had Mr Gibson and Mr Giller properly investigated and heard from the Claimant, may have resulted in the allegations not being put to the Claimant in a disciplinary hearing at all. The ACAS code anticipates that this will be required in some cases. Paragraph 5 of the ACAS code states:

> ***It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.***

49. Mr Gibson was asked in evidence whether he was familiar with, and had read the ACAS code, which he said he had. The Tribunal accepts that the Respondent was advised and supported by an HR expert throughout the process up to and including the decision to dismiss.

50. The fact that the Respondent was advised and supported is all the more surprising given that the investigation, the Tribunal concludes, was unstructured, chaotic and very unfair to the Claimant. There are no notes of the investigation, particularly important where a large number of allegations are being investigated, showing what the investigating officer looked at, who he spoke to and when. It was clear from the Tribunal that a number of people were interviewed and documentary evidence considered, yet even by the end of the hearing, the Tribunal was not clear who all those people were or what evidence was considered. The Tribunal concludes that only a fraction of that material was given to the Claimant prior to the disciplinary hearing and not much more was provided for consideration at the Tribunal hearing given that the Respondent was defending a wrongful dismissal claim in addition to an unfair dismissal claim.

Was the dismissal procedurally fair?

51. The Tribunal concludes that the procedure adopted by the Respondent fell significantly short of the procedure a reasonable employer would have adopted and considerably outside the band of reasonable responses. The most significant shortcomings are set out below at paragraphs 52-55.

52. There was no division of responsibility between the investigation and the disciplinary hearing which resulted in the persons who conducted the investigation (mainly Mr Gibson, but also Mr Giller) were also jointly responsible for the decision to dismiss. This was an opportunity for those leading the disciplinary to step back and take a more objective view. Mr Gibson was a witness to one of the allegations and therefore the disciplinary

hearing had no sense of impartiality or objectivity.

53. Mr Twemlow was jointly involved in the decision to dismiss (albeit by telephone) yet he was not at the disciplinary hearing. He was also a witness to some of the allegations. The Claimant's defence to certain of the allegations was that Mr Twemlow was fully aware and had sanctioned the very matters the Claimant was accused of. Mr Twemlow was therefore directly conflicted.

54. The Claimant was not given sufficient information about most of the allegations to know precisely the allegations laid against him and allowing him time to prepare.

55. The Claimant was not given any advance warning of the pornography allegation and therefore was required to comment on this without any notice that it was to be put as an allegation.

Did the dismissal fall within the range of reasonable responses open for the Respondent to take? Did the Respondent act reasonably in treating the allegations as acts of gross misconduct?

56. These two matters go hand in hand but in light of what is said above, it is difficult to conclude how the dismissal of the Claimant fell within the band of reasonable responses open to the Claimant.

57. In assessing the fairness of the dismissal the Tribunal had due regard for the fact that the Respondent is a small business and there are, of course, practical challenges in seeking to discipline or dismiss a fellow director. As a small business, the Tribunal had regard for the fact that it does not have a HR department. However, it became clear during the evidence that the Respondent took advice along the way from a HR consultant who apparently guided the Respondent through some of the process. It also had access to legal support if it needed it.

58. The Tribunal concludes that the fact of the Claimant being a director does not mean he should be denied a fair process and the Tribunal considers that many of the failings above were unnecessary, even for a small business. A reasonable employer of the size of the Respondent would have ensured that each part of the process was carried out by a different person, even bringing in third parties to assist, which is not uncommon with small businesses.

59. The Tribunal also notes that there were no policies in place at the time that defined what gross misconduct meant to the Respondent and which types of misconduct could lead to dismissal.

Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the Respondent to summarily terminate the contract?

60. The test for determining a wrongful dismissal is different to that of an unfair dismissal because rather than looking at the actions of the employer and deciding whether that was reasonable, a wrongful dismissal claim requires the Tribunal to decide whether the Claimant did breach his contract of contract of employment.

61. The lack of direct evidence to support the allegations, whether by witness statements or documentary evidence leaves the Tribunal unable to satisfy itself on the could and on the balance of probabilities, that the Claimant did in fact do what he is alleged to have done.

62. The only allegations the Tribunal is satisfied, on the balance of probabilities, are as alleged by the Respondent are those at paragraphs 39(e) and (n). With regards 39(e), Tribunal accepts that the incident happened broadly as it is described by Mr Gibson. With all of the other allegations, the lack of documentary or direct evidence from witnesses (whether in the form of witness statements or emails) was completely absent.

63. The Tribunal therefore considered whether by virtue of allegations 39(e) and (n) the Claimant had wilfully and deliberately breached the express terms of his contract of employment but the Tribunal concluded that he had not. The Tribunal then considered whether the misconduct was such that demonstrated that he had breached the implied term of mutual trust and confidence and that what he did went to the root of the employment relationship. The Tribunal concluded that it did not. The images were private images, not downloaded, and were stored on a computer which the Tribunal finds was the Claimant's computer which he used for work purposes. The Claimant did not intend for anyone to look at them; he had stored them in a folder and the computer was password protected. It may be considered to be misconduct, albeit there is no procedure or policy which says so, but it is not sufficiently serious, to entitle the Respondent to bring the contract to an end. The Tribunal considers that the evidence given during the hearing that the Claimant had also emailed some pictures to his partner, does not alter the above view that the Claimant had not breached the implied term of mutual trust and confidence so as to entitle the Respondent to bring the contract to an end.

64. The Tribunal took a similar view to the allegation at 39(e) except to note that the Respondent did not deal with that incident at the time. The Tribunal finds that it was a heated discussion during which the Claimant used words that were unacceptable but it was not so serious so as to entitle the Respondent to treat the Claimant's employment as at an end.

Should there be a "Polkey" reduction in the compensation awarded and if so, by how much?

65. The Tribunal considered whether to make a *Polkey* reduction but the process was so fundamentally flawed that the Tribunal found it impossible to assess what the position might have been had the allegations been investigated fairly and a fair disciplinary process conducted. Because the Tribunal could not conclude on the evidence provided by the Respondent that the Claimant did what was alleged, save for those matters set out at paragraphs 62-64, it was also not impossible to assess how long the Claimant might have continued to be employed had he not been dismissed and therefore the Tribunal was unable to make a *Polkey* reduction on this basis either.

Did the Claimant contribute to the dismissal and if so, by how much, if any, should the basic and compensatory awards be reduced?

66. The Tribunal finds that a reduction on the grounds of contributory conduct is appropriate in this case. Firstly it is clear that the Claimant did have pornographic images on his computer and secondly the Tribunal finds, on balance, that the confrontation with Mr Gibson did occur broadly according to the account given at paragraph 39(e) above. The Tribunal assesses contributory fault at 45% (35% for the allegation at paragraph 39(n) and 10% in respect of the allegation at paragraph 39(e)) affecting both the basic and compensatory awards. In reaching the level of contributory fault in respect of the allegations of having pornography on his computer, the Tribunal took into account the finding of fact that the Claimant had emailed some images to his partner using his work computer.

<u>Remedy hearing</u>

67. A remedy hearing has been listed for 10 January 2020 at 10am unless agreement can be reached between the parties beforehand.

Employment Judge Hyams-Parish
6 December 2019