EMPLOYMENT TRIBUNALS

Claimant: Mr M McKeswick

Respondent: Bolton Brothers Ltd

RESERVED JUDGMENT

Heard at: North Shields **On: 23 October 2019**

Before: Employment Judge Sweeney

Representation:

For the claimant: Mr R Gibson, solicitor
For the respondent: Mr J Jenkins, counsel

The Judgment of the Tribunal is as follows:

1. **The Claimant's claim of unfair dismissal is well founded and succeeds.**

2. **The Claimant's claim of wrongful dismissal is well founded and succeeds.**

3. **The Respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. The awards in respect of unfair dismissal and wrongful dismissal are increased by 20%.**

4. **The Claimant contributed towards his own dismissal and the basic and compensatory awards are reduced by 25%.**

5. **The Respondent is ordered to pay the Claimant:**

   5.1 In respect of the claim of unfair dismissal the sum of £27,734.13
   5.2 In respect of the claim of wrongful dismissal the sum of £4,578.05

6. **For the purposes of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 Regulations the Prescribed Period is 07 December 2018 to 23 October 2019. The Total Award payable is £32,312.18 and the Prescribed Element is £11,747.43**.

REASONS

The Claimant's claims

1. By a Claim Form presented on 21 December 2018, the Claimant brought claims of unfair dismissal and wrongful dismissal arising out of the summary termination of his employment on 14 September 2018. The Respondent denied unfairly dismissing the Claimant. It maintained that it dismissed him for a reason related to conduct and that it acted reasonably in treating that reason as a sufficient reason for dismissing him. The Respondent further contended in paragraph 21.6 of its Grounds of Resistance that, in the event that the dismissal might be found to be unfair due to procedural or other failings, the Claimant would have been dismissed in any event (relying on what is generally referred to as the 'Polkey' point). It also contended that the Claimant's actions were culpable, blameworthy and entirely causative of his dismissal (paragraph 21.7). Thus, maintained the Respondent, the Claimant's compensation should be reduced to zero.

The Hearing

2. The claimant was represented by Mr Robert Gibson, solicitor and the Respondent by Mr Jamie Jenkins of counsel. There was an agreed bundle of 463 pages and an additional remedies bundle (numbered **pages 457 – 542**). The vast majority of the documents (from **page 82** onwards) related to mitigation of loss and remedy. The parties had also prepared an agreed list of issues, which are annexed to these reasons and against which I have inserted answers to the questions in bold.

3. The Respondent called three witnesses:

   (1) Mr Jonathon Bolton, Director (Mr Bolton dismissed the Claimant)
   (2) Mr Tony Chisholm, Director (Mr Chisholm heard the Claimant's appeal against dismissal)
   (3) Mr Alan Irving, a colleague of the Claimant's (Mr Irving was called as a witness to the event which resulted in the Claimant's dismissal).

4. The Claimant gave evidence on his own behalf. He also called his daughter, Laura Barnett (as a witness to a telephone call between the Claimant and Mr Bolton).

Findings of fact

5. The Claimant was employed by the Respondent (a manufacturer of specialist footwear) as a Surgical Footwear and Appliance Technician (also referred to as a Machine Operative) from 03 November 1975 until his dismissal on 14 September 2018, his whole working life. At the time of the events with which these proceedings are concerned, Mr Chisholm was the second director. As at the date of hearing the only director of the company was Mr Jonathon Bolton. The company employs about 26 employees including 18 on the shop-floor and 3

receptionists. Mr Bolton deals with HR matters, about which he has learned over his years in business. Other than having to dismiss employees by reason of redundancy, he has never dismissed anyone for conduct or any other reason. He knew about the ACAS code of practice and the Respondent obtains advice through its insurers on HR matters.

The date of dismissal

6. Rather surprisingly for something that ought to have been easily ascertainable there was no agreement as to the date of the Claimant's dismissal. It was common ground that the Claimant was dismissed in September 2018 on the first day back after a holiday. In the Claimant's Claim Form and witness statement he identified that day as 14 September 2018, which was a Friday. In paragraph 2 of the Grounds of Resistance and in paragraph 2 of Mr Bolton's witness statement the Respondent gave the date of dismissal as being 18 September 2018, which was a Tuesday. The Claimant's P45 [**page 82**] gave the date of 13 September 2018, which was a Monday. At **page 48** of the bundle is a hand-written note of the Claimant's giving dates at the bottom of '*7th to 14 September*'. The Claimant in evidence said that the 7th was the first day of his 5 day holiday and the 14th was the first day back after that holiday.

7. No-one had suggested that the Claimant was dismissed on Thursday 13 September, therefore the date on the P45 must be wrong. Further, it was agreed that the Claimant did not return back from holiday on a Tuesday, which ruled out the Respondent's date of 18 September as being the date of termination. Mr Bolton did not suggest in evidence that the date of dismissal was Monday 17 September 2018. That left only the Claimant's evidence that it was Friday 14th September 2018 and Laura Barnett's evidence that he was off until 13 September 2018. The Respondent never disputed that the Claimant had taken 5 days leave. I accepted the Claimant's evidence that he took a five day holiday commencing on Friday 07 September and that he returned on Friday 14 September 2018 on which day he was summarily dismissed.

Disciplinary Procedures

8. At **pages 59 – 63** there is a document headed 'Disciplinary Procedure'. The document does not really assist in determining the issues in this case and in light of the Respondent's concession that the dismissal was unfair they assume even less importance. Suffice to say that the document does not set out what the actual disciplinary procedure is, other than to identify and categorise the types of conduct which might result in one of the sanctions outlined in the document. It was not given to the Claimant in advance of either the administering of the final written warning or his dismissal, but would not in any event have told him a great deal as to how the employer would set about investigating and conducting a disciplinary exercise.

Final Written Warning – March 2018

9. The Claimant had been absent from work for two days in March 2018. The reason for his absence was that he was too ill to work following excess alcohol consumption. That was the explanation he gave to Mr Mark Bolton ('MB'), the factory manager) when he spoke to him on the second day of that absence. When he returned to work the following day, Mr Jonathon Bolton told the Claimant that he was being given a final written warning.

10. Mr Bolton did not undertake any investigation before issuing the final written warning. He did not notify the Claimant in advance of any disciplinary allegation. He did not invite him to a hearing at which he could be accompanied by a work colleague. He simply told the Claimant he was being given a final written warning. He did not offer him any right of appeal and he did not provide the Claimant with a copy of the written warning. The written warning at **page 46** was not signed either by Mr Bolton or by the Claimant. The first time the Claimant saw the written warning was during the meeting with Mr Chisholm on 27 September 2018 when he appealed the decision to terminate his employment.

11. I pause to note that Mr Bolton said that he had provided the Claimant with a copy of the written warning. He also said that the Claimant had not called at the time to tell MB about his absence or the reason for it. I accept the Claimant's evidence both that he called and spoke to MB and that Mr Bolton did not in fact give the Claimant a copy of any written warning. In his oral evidence in answering questions from Mr Gibson, Mr Bolton first said that when he returned to work after the two days sick leave the Claimant never mentioned that he had spoken to MB. Mr Bolton then changed his evidence to say that that the Claimant had mentioned this and that he (Mr Bolton) went to speak to MB to verify the account. Mr Bolton gave two inconsistent answers on this. I reject his evidence and I accept the Claimant's account that he explained his absence to MB and that he had relayed this to Mr Bolton. The Claimant was candid enough to say to his boss that his absence had been due to excess alcohol consumption. I could see no reason for the Claimant to invent the further explanation that he had spoken to MB to tell him this the day before when he was repeating the same thing to Mr Bolton. The Claimant was consistent on this point whereas Mr Bolton was not. Had the Claimant been given a copy of the warning at the time, he would not have become upset upon seeing it when presented with it at his appeal against dismissal by Mr Chisholm (see below).

12. I find that the final written warning was administered to the Claimant without even the semblance of a fair procedure, much as he was dismissed by Mr Bolton without even the semblance of a fair procedure, which I address below. Mr Bolton simply told the Claimant he was on a final written warning with scant regard to due process or procedure and having carried out no reasonable investigation and failing to afford the Claimant a hearing.

The Claimant's work place

13. The Claimant worked from 8am to 4.30pm, Monday to Thursday and 8am to 3.30pm on Friday. He worked on the shop-floor. Mr Bolton said in evidence that Friday is the busiest day as medical footwear needs to be sent out to hospitals in a timely manner ready for patients' appointments. The Claimant gave evidence that Fridays are no busier than the other days and if anything are less busy, as it is a short day. I reject Mr Bolton's evidence that Fridays are particularly busier than other days such that any kind of practical joke is going to impact more severely on the business. Mr Bolton did not say that Friday was the only day that footwear is sent out. It was never made clear why it should be and the Claimant did not agree. I concluded that the Respondent was exaggerating the importance of this day being a Friday in order to justify the severity of the sanction of summary dismissal.

14. The Claimant operated a machine which had to be cleaned at the end of each week. If the machine is not cleaned it could get clogged up which would affect its performance. There are about 6-7 machines which require cleaning of which the Claimant's was one. One of the Claimant's colleagues, John Dougherty also worked on the shop floor on a machine which also required cleaning. The Claimant had on occasions relied on Mr Dougherty to clean his machine for him. This was an arrangement between the two of them, of which Mr Bolton was unaware. The Claimant had asked Mr Dougherty to do this as he (the Claimant) had difficulty in bending down to do it himself.

15. Mr Alan Irving also works on the shop floor. He had never noticed Mr Dougherty cleaning the Claimant's machine. He could not say either way whether Mr Dougherty had or had not cleaned it for the Claimant.

16. There is no rule prohibiting the taking of personal calls while on the shop floor although they are a rare occurrence. Use of mobile phones is not allowed when working. If someone calls to speak to an employee on the shop floor they must first go through reception. The receptionist then transfers the call and announces over the tannoy who it is for. The employee will then stop working on the machine and walk to the phone which is located on the shop floor.

What happened during the Claimant's first day of holiday - 07 September

17. On 07 September 2018 the Claimant made three telephone calls to work. The precise times can be seen from page **48B**:

    (i) 11.00 - duration of 2 minutes
    (ii) 11.03 - duration of 1 minute
    (iii) 11.40 - duration of 13 seconds

18. On the first call he asked the receptionist to put him through to Mr Irving. The receptionist did not ask who was calling. She rang through to the shop floor announcing a call for Mr Irving. Mr Irving went to the phone. When he picked up he pressed the wrong button on the phone. He could not hear anyone. After a while he put the receiver down and returned to his machine. On the other end of the line, the Claimant heard the phone ringing without answer.

19. The receptionist, on realising that the Claimant still on the line, said she would try Mr Irvine again. She did, and Mr Irving answered again. However, this time he simply picked up the receiver and hung up. The two occasions when he answered were in fact during the one call (the first at 11am).

20. Mr Irving did not speak to the Claimant, nor did he hear the Claimant's voice. The Claimant did not hear Mr Irving.

21. In all, Mr Irving had been away from his machine for about 3-4 minutes. He was irritated by the disruptions. He was concerned that his employer might reprimand him for not undertaking his work. Mr Irving did not complain to anyone about what had happened. However, he was able to complete all his work. There was no failure to meet any delivery that day. There was a disruption to his work but no more than if he had to leave his workplace to go to the toilet.

22. On the second call, the Claimant spoke to a different receptionist. He says he was told that Mr Irving had just popped out and asked if she could take a message to which he responded no, he would call back later. Mr Irving said that he had heard that the Claimant had done this sort of thing before, about 6 months earlier. He assumed it was the Claimant making a prank call, wasting his time.

23. During the first call (when Mr Irving had answered twice), Mr Bolton had been on the shop floor. The second call was not put through to the shop floor. By the time of the third call he had returned to his office upstairs. Mr Bolton answered the phone. He heard the Claimant on the other end as he described it, speaking in a funny voice. He was immediately furious with the Claimant, convinced that the Claimant was playing a prank. He said that he knew it was the Claimant and that he was a fucking tosser. Mr Bolton told him to fuck off and then hung up. Mr Bolton does not deny swearing at the Claimant. The call was witnessed by the Claimant's daughter.

24. The Claimant and his daughter both said that the Claimant was not wearing his false teeth at the time of the call and that if Mr Bolton believed he was 'putting on a funny voice' that this might explain why he sounded different. In cross examination Mr Jenkins asked why the Claimant did not mention the false teeth during his appeal. He said that no-one at the appeal mentioned that he was putting on a funny voice and all he was doing was explaining what he did at the time.

25. I accept the Claimant's evidence and that of his daughter that when the Claimant spoke to Mr Bolton he was not wearing his false teeth. I reject the suggestion that he was 'putting on a funny voice'. That was an immediate assumption of Mr Bolton's which he made when he was, on his own account, in a fit of pique. The Claimant hardly spoke during that conversation. The call lasted 13 seconds and was mostly Mr Bolton speaking to the Claimant and swearing at him. Mr Bolton hung up on the Claimant. His daughter confirmed this and said in evidence that she heard the three beeps as he did this.

26. At this juncture I need to resolve a factual dispute between the parties. The Respondent's case is that the Claimant made prank calls on 07 February and that Mr Dougherty knew the Claimant was going to do this.

27. At 12.14 on 07 September 2018, the Claimant received a message via the Messenger app which is at **page 48A** of the bundle, saying:

"*I've had me phone on charge m8 I'll clean your machine out bud, n thanks for the laugh Alan was doing his nut*"

28. There was no earlier message that could be seen on Messenger from the Claimant to Mr Dougherty where the Claimant asks him to clean his machine. In his witness statement the Claimant said, at paragraph 5, that he had tried to call Mr Dougherty earlier in the morning on his iPad using the Facebook 'Messenger' app but he could not get through to him, which is why he called the factory at 11am.

29. Mr Jenkins put to the Claimant that he must have got a message through to Mr Dougherty somehow because the response says 'I'll clean your machine out bud'. The Claimant agreed but could not explain how that message had been delivered. He surmised that the message might have been deleted. However, he accepted that he did not delete it and that the document in the bundle was from his Messenger account.

30. There is then an exchange between Mr Dougherty and the Claimant which appears on the Messenger account from 12.34 to 14.02 as follow:

'Did you tell him'? (Claimant to Mr Dougherty)
'I haven't told him' (Mr Dougherty to Claimant)
'Why' (Claimant to Mr Dougherty)
'you want me to' (Mr Dougherty to Claimant)
'yes' (Claimant to Mr Dougherty)
'I've told him' (Mr Dougherty to Claimant)
[thumbs up sign] (Claimant to Mr Dougherty)

31. Mr Jenkins put to the Claimant that this exchange demonstrated that Mr Dougherty thought the call was a prank call. The Claimant said that Mr Dougherty may have thought that. Mr Jenkins also suggested that the Claimant was here

telling Mr Dougherty to tell Mr Irving that it was a prank call. The Claimant denied this. He said that he was telling Mr Dougherty to tell Mr Irving that it had been him who had called. The Claimant said that when he made the second call the receptionist told him that Mr Irving had popped out. However, Mr Irving's evidence, which I accept, was that he returned to his workstation. There was only 3 minutes between the first and the second calls. Quite how Mr Irving could have popped out and how the receptionist would have known this is difficult to understand and was not explained. I reject the Claimant's evidence that the Claimant told him this.

32. I do not accept the Claimant's evidence on this. From a combination of the Claimant's evidence, that of Mr Irving and the documentary evidence on **page 48A** I conclude that the Claimant was indeed playing a prank on Mr Irving. I also conclude that the Claimant was genuine in saying that he required Mr Dougherty to clean his machine. After all, the note from Mr Dougherty on **page 48A** says '*I'll clean your machine out bud'*. It is more likely than not that the Claimant did require Mr Dougherty to clean his machine and had asked him to do this (either the previous day or earlier that morning). However, he also took the opportunity to have a laugh at Mr Irving's expense. It was, as has been described by everyone, a prank.

33. The written exchange between Mr Dougherty demonstrates that Mr Dougherty found the event funny; that Mr Irving was agitated; that Mr Dougherty felt it necessary to seek confirmation from the Claimant to tell Mr Irving something. What is telling is the question from the Claimant: '*Did you tell him"*? If Mr Dougherty was in the dark, so to speak, the natural response would have been '*tell him what?*'. The Claimant confirmed that he had not been in contact with Mr Dougherty that day before that point in time, which can only mean that there had been some prior contact, which can only have been on the Thursday before the Claimant left work to take his holiday.

Friday 14 September 2018

34. The Claimant returned to work after his 5 day break. When he arrived in the morning, Mr Bolton asked to have a word with him. He asked the Claimant if he wanted anyone with him. The Claimant said no. The Claimant was not told why Mr Bolton wanted to speak to him and had no reason to request anyone to accompany him.

35. Mr Bolton asked the Claimant to explain himself. The Claimant asked what about, and whether it was about his telephone calls. Mr Bolton asked why he had called the factory 4 times and attempted to disguise his voice and why he had hung up on Mr Bolton. The Claimant said that he had not disguised his voice, had called 3 times and had called to ask Mr Dougherty to clean his machine. He said he did not hang up on Mr Bolton. He denied that he was playing a prank. His denial irritated Mr Bolton further and contributed to Mr Bolton's decision to terminate his employment. The denial infuriated Mr Bolton.

36. Mr Bolton told the Claimant that he was wasting everyone's time; that he had had a final warning a few months earlier and he was sacking him this time. He told the Claimant that if he wanted to appeal he had to go to Mr Chisholm. Mr Bolton then escorted the Claimant from the premises. The Claimant was given no written confirmation of his dismissal or the reasons for it.

37. In his witness statement at paragraph 12, Mr Bolton says that he explained to the Claimant that his actions had the potential to stop the Respondent from their reliable service to the NHS; that if deadlines were missed it could lose the NHS business along with incurring costs incurred for patient re-appointments costing £475 per patient, ambulance costs and patients being put backdown the NHS waiting lists. He said that if deadlines were missed then hospitals would no longer deal with the Respondent's business. I reject this evidence. At no point in the very brief exchange on 14 September 2018 did Mr Bolton say any of this to the Claimant. The document at **page 49** (see below) which Mr Bolton went to the trouble of typing out makes no reference to any of this. I have no doubt that this appears in Mr Bolton's witness statement in this form as an attempt to retrospectively justify the decision. He embellished his statement to have the Tribunal believe that he actually said these things to the Claimant at the time when in fact he did not.

38. In his evidence Mr Bolton said that while he referred to the fact that the Claimant was on a final written warning, in fact this did not feature in his thinking when he decided to dismiss the Claimant. He said that he dismissed him because of the events of 07 September in their own right and that the final written warning did not matter to his decision.

Appeal hearing - 27 September 2019

39. The Claimant did appeal and his appeal was heard by Mr Chisholm. The Claimant was accompanied by his son-in-law, Jason Barnett. Mr Chisholm was accompanied by Phil Glover, who took some notes found at **pages 50 – 51** of the bundle. Mr Chisholm had known in advance of 14 September 2019 that Mr Bolton was going to speak to the Claimant on his return from work. Mr Chisholm had spoken to Mr Bolton between 07 and 14 September 2018. It was clear to Mr Chisholm that Mr Bolton was livid with the Claimant. He said that Mr Bolton told him that he was going to give the Claimant either a warning or was going to dismiss him for gross misconduct, and that the decision was to be Mr Bolton's.

40. Mr Chisholm was given a copy of the document at **page 49** of the bundle. It is headed 'Notification of Concern'. It gives the date of warning as the 18th September 2018.

41. The account given in the document is factually incorrect. Mr Irving did not get out of his seat to answer the phone 4 times. In evidence he said that he picked up

the receiver twice and that in all, he was away from his machine for about 3-4 minutes.

42. Mr Chisholm also had a copy of the warning at **page 46**. He handed this to the Claimant at the appeal meeting at which point the Claimant became upset and asked for a short adjournment. This was the first time the Claimant had seen this document. He disagreed with its content on the basis that he said he had called to speak to MB. When he and Mr Barnett returned to the meeting, they asked for a copy of the disciplinary procedures and policies and said that they were going to speak to ACAS. Mr Chisholm did not have a copy of the disciplinary procedure. He said he would send it, which he subsequently did. The hearing never resumed. The Respondent did not contact the Claimant again to reconvene the hearing. The Claimant did not contact the Respondent to ask for it to be reconvened. Nothing was sent in writing to the Claimant.

Legal principles

Unfair dismissal

43. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section 98(2) or that it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The reference to the 'reason' or 'principal reason' in section 98(1)(a) and s98(4) is not a reference to the category of reasons in section 98(2)(a)-(d) or for that matter in section 98(1)(b). It is a reference to the actual reason for dismissal (**Robinson v Combat Stress** UKEAT/0310/14 unreported). The categorisation of that reason (i.e. within which of subsection 98(2)(a)-(d) it falls) is a matter of legal analysis: **Wilson v Post Office** [2000] IRLR 834, CA.

44. A reason for dismissal 'is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA. In a more recent analysis in **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240, CA, Underhill LJ said that the 'reason' for dismissal connotes the factor or factors operating on the mind of the decision maker which causes them to take the decision. It is a case of considering the decision-maker's motivation.

45. In a 'misconduct' dismissal, the employer must also show that the principal reason for dismissal relates to the conduct of the employee. If it is established that the reason for dismissal relates to conduct the next question is whether the employer has acted reasonably in treating that reason as a sufficient reason for dismissal – s98(4) ERA 1996. The burden here is, of course, neutral. It is not for the employer to prove that it acted reasonably in this regard. The Tribunal must not put itself in the position of the employer. The Tribunal must confine its consideration of the facts to those found by the employer at the time of dismissal and not its own findings of fact regarding the employee's conduct.

46. Section 98(4) poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. It requires the Tribunal to apply an objective standard to the reasonableness of the investigation, the procedure adopted and the decision itself. However, they are not separate questions – they all feed into the single question under section 98(4). Whilst an unfair dismissal case will often require a tribunal to consider what are referred to as 'substantive' and 'procedural' fairness it is important to recognise that the tribunal is not answering whether there has been 'substantive' or 'procedural' fairness as separate questions.

47. The approach to be taken when considering s98(4) is the well-known band of reasonable responses, summarised by the EAT in **Iceland v Frozen Foods Ltd v Jones** [1983] I.C.R. 17. The Tribunal must take as the starting point the words of s98(4). It must determine whether in the particular circumstances the decision to dismiss was within the band of reasonable responses which a reasonable employer might have adopted. In assessing the reasonableness of the response it must do so by reference to the objective standard of the hypothetical reasonable employer (**Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387, CA @ para 49). The Tribunal must not substitute its own view as to what was the right course of action.

48. In misconduct cases, the approach which a Tribunal takes is guided by the well known decision of **British Home Stores v Burchell** [1978] IRLR 379, EAT. Once the employer has shown a valid reason for dismissal the Tribunal there are three questions:

    (i) Did the employer carry out a reasonable investigation?

    (ii) Did the employer believe that the employee was guilty of the conduct complained of?

    (iii) Did the employer have reasonable grounds for that belief?

49. In gross misconduct unfair dismissal cases, in determining the question of fairness, it is unnecessary for the Tribunal to embark on any analysis of whether the conduct for which the employee was dismissed amounts to gross misconduct. However, where an employer dismisses an employee for gross misconduct, it is relevant to ask whether the employer acted reasonably in characterising the conduct as gross misconduct – and this means inevitably asking whether the conduct for which the employee was dismissed was capable of amounting to gross misconduct – see **Sandwell & West Birmingham Hospitals NHS Trust v Westwood** (UKEAT/0032/09/LA) [2009] and **Eastland Homes Partnership Ltd v Cunningham** (EAT/0272/13). This means asking two questions:

    (1) is the conduct for which the employee was dismissed conduct which, looked at objectively, capable of amounting to gross misconduct, and

(2) Did the employer act reasonably in characterising the conduct as gross misconduct?

Fair procedures

50. A dismissal may be unfair because the employer has failed to follow a fair procedure. In considering whether an employer adopted a fair procedure, the range of reasonable responses test applies: **Sainsbury plc v Hitt** [2003] I.C.R. 111, CA. The fairness of a process which results in dismissal must be assessed overall.

Previous written warnings

51. In **Wincanton Group plc v Stone & Another** [2013] IRLR 178, Langstaff P said at paragraph 37:

"A tribunal must always begin by remembering that it is considering a question fo dismissal to which section 98, and in particular section 98(4) of the ERA 1996 applies. Thus the focus…is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently."

Polkey

52. What is known as 'the Polkey principle' (**Polkey v AD Dayton Services** [1988] I.C.R. 142,HL) is an example of the application of section 123(1). Under this section 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. A tribunal may reduce the compensatory award where the unfairly dismissed employee could have been dismissed fairly at a later stage or if a proper and fair procedure had been followed. Thus the 'Polkey' exercise is predictive in the sense that the Tribunal should consider whether the particular employer could have dismissed fairly and if so the chances whether it would have done so. The tribunal is not deciding the matter on balance. It is not to ask what it would have done if it were the employer. It is assessing the chances of what the actual employer would have done: **Hill v Governing Body of Great Tey Primary School** [2013] I.C.R. 691, EAT.

53. Whilst the Tribunal will undertake the exercise based on an evaluation of the evidence before it, the exercise almost inevitably involves a consideration of uncertainties and an element of speculation. The principles are most helpfully summarised in the judgment of Elias J (as he was) in **Software 2000 Ltd v Andrews** [2007] I.C.R. 825, EAT (paragraphs 53 and 54).

Contributory conduct

54. If a dismissal is found to be unfair, under section 123(6) ERA where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding even in cases where the parties do not raise it as an issue (**Swallow Security Services Ltd v Millicent** [2009] ALL ER (D) 299, EAT). The relevant conduct must be culpable or blameworthy and (for the purposes of considering a reduction of the compensatory award) must have actually caused or contributed to the dismissal: **Nelson v BBC (No2)** [1980] I.C.R. 110, CA. Langstaff J offered tribunals some guidance in the case of **Steen v ASP Packaging** [2014] I.C.R. 56, EAT, namely that the following questions should be asked: (1) what was the conduct in question? (2) was it blameworthy? (3) did it cause or contribute to the dismissal? (for the purposes of the compensatory award) (4) to what extent should the award be reduced?

55. There is an equivalent provision for reduction of the basic award, section 122(2) which states that '*where the tribunal considers that any conduct of the complainant before the dismissal…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*'. The tribunal has a wider discretion to reduce the basic award on grounds of any conduct of the employee prior to dismissal. It is not limited to conduct which has caused or contributed to the dismissal.

Wrongful dismissal – breach of contract

56. If an employee is dismissed with no notice or in adequate notice in circumstances which do not entitle the employer to dismiss summarily, this will amount to a wrongful dismissal and the employee will be entitled to claim damages in respect of the contractual notice.

57. An employer is entitled to terminate a contract without notice in circumstances where the employee has committed an act of gross misconduct. It is for the employer to prove on the balance of probabilities whether the employee has committed gross misconduct. Whether an employee has committed gross misconduct entitling the employer to terminate summarily is a question of fact in each case. However, the courts have considered when 'misconduct' might properly be described as 'gross': **Neary v Dean of Westminster** IRLR [1999] 288 (para 22). In **Neary**, Lord Jauncey of Tulichettle rejected a submission that gross misconduct was limited to cases of dishonesty or intentional wrongdoing.

ACAS Code of Practice and section 207A Trade Union and Labour Relations (Consolidation) Act 1992

58. An employer is expected to have regard to the principles for handling disciplinary and grievance procedures in the workplace set out in the ACAS Code on Disciplinary and Grievance Procedures (the "Code"). The Code is relevant to liability and is considered when determining the reasonableness of the dismissal. If a dismissal is unfair, the Tribunal can increase an award of compensation by up to 25% from unreasonable failure to follow the Code if it considers it just and equitable to do so.

59. The Code sets out the basic requirements for fairness that will be applicable in most conduct cases. It is intended to provide a standard of reasonable behaviour in most instances. The Code sets out the steps employers must normally follow.

Submissions

60. After the close of evidence, and prior to Mr Gibson beginning his submissions, Mr Jenkins conceded that the dismissal was unfair and that the focus of his submissions would be on Polkey and Contributory conduct. This was a sensible concession on the facts, about which I say more below. Mr Jenkins submitted that there should be a reduction for 'Polkey' and contributory conduct but not at the level of 100% as originally set out in the Grounds of Resistance.

Claimant's submissions

61. Mr Gibson handed up written submissions. In addition to criticising the reasonableness of the Respondent's procedures and failure to investigate, he also submitted that (although not accepting that the Claimant had been playing games when he called the factory) at worst the Claimant had engaged in a harmless prank – that this is how a reasonable employer would have viewed his and that no reasonable employer would have dismissed him because of this. He submitted that it was highly debatable that it even merited a sanction at all and that nothing more than a 'word to the wise' was merited.

62. In respect of the final written warning Mr Gibson made representations in his written submissions (paragraphs 12-18). It was accepted by Mr Jenkins that the submissions in paragraphs 12-17 (dealing with the final written warning issue) had been overtaken by the evidence in the sense that Mr Bolton was clear that the final written warning played no part in his thinking – thus Mr Gibson relied on paragraph 18 of his written submissions. Mr Jenkins, whilst accepting Mr Gibson's submission on this point, submitted that the final written warning was still relevant, however, to the Polkey issue.

63. On the subject of Polkey, Mr Gibson submitted that here the failings of the Respondent were so great that there could be no meaningful attempt to reconstruct things and that it was inappropriate to consider making any reduction. It would be difficult for any judge to speculate what would have happened had a fair process been followed; there had been no investigation at all; the key witness (Mr Bolton) sat in judgment; the appeal was never concluded. These are not just technical breaches but are manifest breaches.

64. In respect of contributory conduct, Mr Gibson submitted that, where the Tribunal to conclude that the Claimant had engaged in a prank, the basic and compensatory awards should be reduced by no more than 10%.

Respondent's submissions

65. Mr Jenkins began his submission with a couple of additional concessions. He submitted that if I were to find that the decision to dismiss was 'substantively' unfair then his Polkey argument 'goes out the window'; that if I were to conclude that there were no reasonable grounds and that the sanction was not within a range of reasonable responses, that this kills off any Polkey argument. However, he submitted that if I find that the decision to dismiss was procedurally unfair, I must consider the final written warning in my assessment of what the Respondent would have done.

66. Mr Jenkins relied, in particular, on the passage cited by Mr Gibson in **Wincanton Group plc v Stone & Another** [2013] IRLR 178 (paragraph 51 above). Having conceded unfair dismissal (and recognising that the final written warning played no part in the decision to dismiss) Mr Jenkins submitted that I should, nevertheless, apply the 'manifestly inappropriate' approach when carrying out the Polkey assessment. In other words, had the Respondent acted reasonably and fairly, submitted Mr Jenkins, it could properly (and would properly) have taken into account the final written warning when considering what sanction to apply and that I must proceed on that basis unless I conclude that it would have been manifestly inappropriate to do so, which he submitted is a high bar. I asked Mr Jenkins whether, in his submission, in carrying out the Polkey exercise I had to have regard to the final written warning where the evidence of Mr Bolton was that he did not in fact have regard to the warning. If, when acting unreasonably Mr Bolton did not have regard to the final written warning, why should I conclude that it would play a part if he had been acting reasonably? Mr Jenkins' submission was essentially that I must approach the exercise in that way; that even though Mr Bolton said the warning did not feature in his decision making, when reconstructing events and considering what Mr Bolton would have done had he been acting fairly and reasonably I must consider whether and to what extent he would fairly and reasonably have taken into account the final written warning.

67. When I asked what I was to make of the fact that the final written warning was in respect of a different subject matter, Mr Jenkins submitted that this was a factor but no more than that. However, even though it was a different subject matter, the fact that it was a final warning was relevant to the Polkey assessment. Mr Jenkins submitted that it is difficult to see how misconduct would not have been found had the Respondent acted fairly and reasonably. What was more difficult was to see how that finding would play out and whether the finding would have justified dismissal – whether it would have warranted a finding of gross misconduct. He submitted that the Polkey reduction should exceed 50%.

68. As to the seriousness of the conduct and the reasonableness of the sanction, Mr Jenkins referred me to the evidence of Mr Bolton, the owner of the business. He was angry and the reason for his anger was the disruption caused to his business by the Claimant's conduct. Mr Jenkins referred me to the Messenger exchanges at **page 48A**. He submitted that this was a problem for the Claimant which he could not explain away and that this was a real difficulty for him. It simply must be the case, he submitted, that he was playing a prank.

69. As regards contributory conduct, the conduct was culpable and blameworthy. He suggested that Mr Gibson's assessment of 10% reduction was too low and that a reduction of 50% was suitable.

70. In terms of ACAS uplift, Mr Jenkins submitted that I should have regard to the size and resources of the Respondent. He said there were discussions regarding the Claimant's conduct prior to the dismissal. He said there was an appeal albeit it was not concluded.

71. Mr Jenkins confirmed that he was not taking any point on failure by the Claimant to mitigate his losses.

Conclusions and reasons

Reason for dismissal

72. The Respondent dismissed the Claimant because Mr Bolton believed he made prank telephone calls on 07 September 2018 and had disguised his voice. I have no doubt that this was the genuine reason for dismissing the Claimant. Mr Gibson did not dispute this in any event. The reason for dismissal was, therefore, a reason related to conduct and a potentially fair reason for dismissal.

Reasonableness of decision to dismiss – investigation and procedure

73. As stated above, section 98(4) poses a single question: whether the employer acted reasonably or unreasonably in treating the principal reason for dismissal as a sufficient reason for dismissing the employee. Although it is helpful to consider substantive and procedural aspects of the dismissal separately, I must must stand back and look at the overall picture to answer that single question. Mr Jenkins rightly conceded that the dismissal was unfair.

74. No reasonable employer would have acted as Mr Bolton did on 07 September 2018. He was angry with the Claimant and considered that he had wasted his time and that of others. His whole approach to the issue was contrary to the ACAS Code of Practice and the ACAS guide. It was not just his total failure to carry out an investigation, he failed to apply anything resembling a procedure. He simply called the Claimant to a meeting without any forewarning of what it was about and dismissed him there and then, infuriated by the Claimant's denial that he had been playing a joke and not putting on a 'funny voice'.

75. As he had done nothing to investigate these matters, he had at the time of dismissal no reasonable grounds on which to sustain his belief that the Claimant had played a prank and disguised his voice. He had followed no procedure whatsoever prior to making his decision to dismiss. Further, the final written warning which had been administered in March 2018 did not feature in his decision-making. The sanction of dismissal was outside the band of reasonable responses. In so far as he regarded the Claimant's actions as gross misconduct I conclude that he acted unreasonably in so characterising it. Further, Mr Bolton did not have any regard to the Claimant's 43 years' of service. All of this leads me to the conclusion that the dismissal was substantively and procedurally unfair. However, as I have directed myself, I must stand back and look at the section 98(4) question as a single question. I am clear that the Respondent acted unreasonably in treating the reason for dismissal (the making of prank telephone calls) as a sufficient reason for dismissing the Claimant.

76. I now turn to other aspects: Polkey and Contributory Conduct

Polkey

77. I was acutely conscious of Mr Jenkins' submission that his Polkey argument 'goes out the window' if I were to conclude that the Claimant's dismissal was substantively unfair. However, I do not agree that an employment tribunal is precluded from considering whether any compensation should be reduced in circumstances where it concludes that a dismissal was 'substantively' unfair. As set out above, there is a single question to be answered under section 98(4) which does not distinguish between 'substantive' and 'procedural' unfairness. When assessing compensation under section 123(1) the amount of compensation 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. A tribunal should consider whether the particular employer could have dismissed fairly and if so the chances whether it would have done so. There is no bright line between procedural and substantive unfairness.

78. I must consider whether the Respondent could have <u>fairly</u> dismissed had it acted as a reasonable employer would have, and what are the chances that it would have fairly dismissed the Claimant. In doing so, I accept Mr Jenkins' submission that I should have regard to what role the final written warning could and would have played in the disciplinary exercise, proceeding on the assumption of the Respondent acting reasonably.

79. I take into account Mr Gibson's submission that it is very difficult for any judge to embark on a reconstruction of events in circumstances where there have been such serious failings as there have in this case. However, all Polkey exercises are difficult and involve elements of speculation. It is just that some are more difficult than others. But that is no reason not to at least attempt to carry out the exercise.

80. I have considered whether the Respondent could have fairly dismissed the Claimant had it acted reasonably. What would acting reasonably have involved? I find it would have involved the following:

    (1) Arranging for someone other than Mr Bolton to carry out an investigation;
    (2) Speaking to witnesses to establish the facts;
    (3) Speaking to the Claimant, having informed him of the issue, giving him proper and advance warning of the issue, in order to ascertain his position;
    (4) Providing the Claimant with the relevant disciplinary procedures,
    (5) Providing the Claimant with a written account of the statements of any witnesses;
    (6) Reducing the allegations to writing so that the Claimant understood the nature of the allegations against him;
    (7) Afforded the Claimant the opportunity to call or present any evidence of his own;
    (8) Hold a disciplinary meeting, chaired by an impartial decision maker;
    (9) Give due consideration to the Claimant's explanations, to the Claimant's length of serious, to the actual level of disruption caused by the conduct,
    (10) Give due consideration to the circumstances of the final written warning, acknowledging that it had not been provided to the Claimant in writing, that it had not been issued following any investigation, that it had not been issued following a hearing at which the Claimant could have provided his version of events,
    (11) Send any outcome in writing giving reasons for the decision;
    (12) Afford the Claimant a right of appeal;

81. I have considered all of the above in the context of the Respondent having led no evidence on what a fair procedure would have looked like, or as to how it would have gone about a fair procedure. That is probably explained by the fact that the Respondent had, up until closing submissions, maintained that the decision to dismiss was fair.

82. It was very tempting to accede to Mr Gibson's submission that I should not undertake the Polkey exercise because it is too speculative. However, I must look at all the evidence. Had a reasonable investigation been carried out, the Respondent would have spoken to Mr Dougherty and Mr Irving. Applying the steps in (1) to (7) above, the Respondent could have and in my judgment would have concluded that the Claimant had been playing games on 07 September 2018. However, it probably would also have concluded that the Claimant had been in the habit of relying on Mr Dougherty to clean his machine and that he genuinely required him to clean his machine on 07 September 2018 (see Mr Dougherty's Messenger message on **page 48**).

83. That leads on to what the Respondent could and would have done with that finding. I accept Mr Jenkins' submission that I should consider what it could and would have done in light of the fact that there was an outstanding final written

warning. I conclude that it would have looked at the warning but would have recognised that it had been administered in circumstances which did not afford the Claimant the right of a hearing or an appeal. The Respondent, acting reasonably in September 2018 would have recognised that the Claimant had never been provided with a copy of the written warning, even though he had been told by Mr Bolton that he was giving him a final warning. It would have recognised that it was for a different subject matter and that the procedure adopted at the time prior to telling the Claimant he was on a warning was itself unreasonable. I conclude that the Respondent would not have taken the warning into account.

84. I do not accept Mr Jenkins' submission that in light of the existence of the warning, the chances that the Respondent would have dismissed the Claimant fairly are over 50%. He advanced no evidence as to what the Respondent acting fairly would have done. As to the submission that I must approach the Polkey assessment by asking whether the giving of the final written warning was 'manifestly inappropriate' I believe this is going too far. When considering fairness under section 98(4) the Tribunal is considering whether the Respondent acted reasonably or unreasonably by reference to what it actually did in arriving at its decision to dismiss. This may in appropriate cases require a tribunal to consider whether the employer acted reasonably in having regard to an extant warning when deciding whether to dismiss the employee. I have in mind those cases where the final written warning tips the balance towards dismissal in the mind of the employer. In those circumstances a tribunal should be careful before re-opening earlier warnings. Provided the warning has not been issued for an oblique motive or has not been manifestly inappropriately issued, the employer and the employment tribunal is entitled to regard it as valid for the purposes of any dismissal arising from subsequent misconduct provided that the subsequent misconduct is such that when taken together with the final warning a dismissal, or the decision to dismiss, is a reasonable one.

85. However, the fairness or unfairness of the dismissal in these proceedings does not depend on what this employer did with the final written warning of March 2018. The Tribunal knows that the Respondent did not have regard to it – Mr Bolton said as much and this was conceded by Mr Jenkins. I am being invited to look at this issue in the different context of section 123(1). In considering what the Respondent <u>would</u> have done with that final written warning had it acted fairly and reasonably I must look to the evidence. I cannot pluck an assessment out of thin air. I can do no better than look at the evidence of Mr Bolton himself. His evidence was that he did <u>not</u> have regard to the final written warning. At no point did he say in evidence that he would have done so had he gone about matters differently and fairly. The point emerged for the first time in Mr Jenkins' submissions – after the concession on unfairness had been made.

86. Given that the evidence of Mr Bolton was that he did not in fact have regard to the warning (whether or not it was manifestly inappropriate to issue it) I have asked what evidence is there that he (or someone else in the company who might have chaired the disciplinary meeting) could and would fairly and reasonably

have taken it into account. I have concluded that there is no evidence that can properly lead me to conclude that they would have done. I only have Mr Jenkins' submission.

87. Even if I am wrong about that and the Respondent would have taken into account the final written warning when considering whether to dismiss the Claimant, I conclude that taken alongside the conduct of the Claimant in September 2018, the Respondent would still not have acted reasonably in dismissing the Claimant. The question is whether the Respondent could and would have fairly dismissed the Claimant. I have made findings that the Respondent has exaggerated the effects of the Claimant's prank. Had it acted reasonably throughout it would not have exaggerated the effects. It would have recognised that the disturbance, while not approving of it, was minor; that the amount of time that was wasted in the day was no more than 3-4 minutes; that all work was completed. It would have recognised that the Claimant had been employed for 43 years and that the subject matter of the final written warning was very different. Looked at objectively and on the evidence before me, a reasonable employer (in addition to recognising the serious procedural flaws of the final written warning) would not have applied the sanction of dismissal in these circumstances.

88. In conclusion on the Polkey issue, I have carefully considered whether the amount of the compensatory award should be reduced to allow for the possibility that the Respondent might fairly have dismissed the Claimant. I can only go on the totality of the evidence before me. I conclude that there should be no Polkey reduction for the reasons given above. My conclusion should come as no surprise to the Respondent in light of its submission that were I to find the dismissal substantively unfair there should be no Polkey reduction.

Contributory conduct

89. I conclude that there should be a reduction under section 123(6), however. I have found that the Claimant did take the opportunity of playing a prank – even though he genuinely required Mr Dougherty to clean his machine. He knows from his long experience that personal calls are rare on the shop floor. He knew that this would be a disruption, requiring Mr Irving to down tools and go to the phone and that it would be an irritant to him. To this extent the conduct is blameworthy and it contributed to his dismissal.

90. I take account of the fact that the disruption was minor but nevertheless it was a disruption to activities which require employees to be at their machines. Mr Gibson submitted that it warranted no more than a 10% reduction. I might have agreed to that but for the Claimant's denial that he called the factory to play a game on Mr Irving. I am entitled to take account of this denial particularly as I have found that it contributed to Mr Bolton's decision to dismiss and that he had indeed been carrying out a foolish prank. I assess the level of contribution of the Claimant's overall conduct of making the prank calls and denying that he had

done so to be 25% and make a reduction in that percentage of both the basic award and the compensatory award.

Wrongful dismissal

91. Was the Claimant guilty of repudiatory conduct? In my judgment he was not. Mr Jenkins did not submit that the claimant's conduct was repudiatory such as to justify summary dismissal. He played a prank. No more than that. The evidence does not demonstrate that he evinced an intention no longer to be bound by the essential terms of the contract. Mr Jenkins no doubt for understandable reasons did not seek to persuade me that the Claimant was guilty of a fundamental breach of contract.

ACAS uplift

92. I have already found that the Respondent was lacking in its procedures. That is to put it mildly. The question is whether the failures were unreasonable. I take account of the size and administrative resources of the Respondent. However, the fact that an employer is small is not a green light to avoid basic procedures. In any event, Mr Bolton said that he was aware of the ACAS Code. He has been in business for some time.

93. The Respondent failed to observe the following paragraphs of the Code of Practice: 5, 9, 10, 11, 12, 18, 29. If anything, its actions showed a total disregard for the most basic elements of the Code. The failures were without doubt unreasonable. I take account of the fact that there was at least an attempt at an appeal hearing. However, the Claimant was provided with nothing in advance of it. Mr Chisholm did not follow it up after the Claimant asked for an adjournment (upon becoming distressed on seeing the final written warning) and asking for copies of the disciplinary procedures. Mr Chisholm sent the disciplinary procedure but did nothing to follow this up or seek to reconvene the hearing. The Claimant cannot be criticised for failing to contact the Respondent after the catalogue of unreasonable failures leading up to this. Nevertheless I allow some discount in the uplift to reflect the attempt at an appeal. In all the circumstances, I consider it just and equitable to increase the basic and compensatory awards, and the damages for breach of contract by 20% in accordance with section 207A Trade Union & Labour Relations Act 1992.

REMEDY

94. Mr Jenkins confirmed that the Respondent was not taking any point on the Claimant's attempts to mitigate his losses (in respect of which it had originally reserved its position in 21.11 of the Grounds of Resistance). The Claimant has only ever had one job in his whole working life prior to the termination of his employment by the Respondent. Although he has secured part-time work it will take him some time to build up to the level of earnings he enjoyed with the Respondent. In the circumstances, considering that the Claimant has taken

reasonable steps to mitigate his loss to date, and in light of the difficulties he will face in securing other better paid employment, I award him losses of 12 months at the rate set out in the Claimant's schedule of loss. In my judgment he is likely to have secured similarly paid employment by then. The Tribunal makes the following awards.

Wrongful Dismissal Award

95. It is agreed that the Claimant's notice entitlement was 12 weeks (up to 07 December 2018) consisting of 12 x £306.92 plus 12 x £11 = £33815.04.

96. This stands to be increased by 20% under section 207A resulting in an award of **£4,578.05**.

Unfair Dismissal Award

(1) Basic Award

97. The Basic Award is not subject to any uplift under section 207A. It is calculated as per the Claimant's schedule of loss as £10,680.70.

98. There is a reduction of 25% for contributory conduct, reducing the amount to **£8,010.53**.

(2) Compensatory Award

Immediate loss of earnings:

99. Losses from 07 December 2018 (expiry of notice period) up to the date of hearing, 23 October 2019:

    a. 45.5 weeks x gross weekly pay of £306.92 = £13,964.86
    b. 45.5 weeks x £11 pension contributions = £500.50
    c. Less sums earned in mitigation of £1,412.66 = **£13,052.70 (a)**

Future loss of earnings:

100. Future losses of £209.50 a week (plus pension contributions of £11 a week) from 23 October 2019 to 23 October 2020 = **£11,466 (b)**

101. Loss of statutory rights: **£350 (c)**

102. (a) + (b) + (c) = **£24,868.70**

103. £24,868.70 x 20% (ACAS uplift, section 124A(b) ERA) = £29,842.44.

104. £29,842.44 x 75% (on account of 25% contributory fault) = **£22,381.83: statutory cap applied: £19,723.60**

105. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 Regulations do not apply for damages for wrongful dismissal. However, they do apply to the compensatory award in respect of loss of earnings from the period ending with the period covered by the award of damages (07 December 2018) to the date of the hearing (23 October 2019). The recoupment provisions do not apply to the award for loss of statutory rights. I have applied the Regulations as follows:

a. Prescribed Period: 07/12/2018 to 23/10/2019;
b. Prescribed Element: **£11,747.43**;
c. Total Award: £32,312.18
    i. Basic Award: £8,010.53
    ii. Compensatory Award: £19,723.60 (statutory cap)
    iii. Breach of contract/notice: £4,578.05

106. The Prescribed Element is calculated as follows:

a. Loss of earnings from 07/12/18 to 23/10/19 = £13,052.70;
b. £13,052.50 increased by 20% under section 207A TULR(C)A = £15,663.24;
    i. £15,663.24 reduced by 25% for contributory conduct = £11,747.43

Employment Judge Sweeney

Signed: 28 November 2019

ANNEX

LIST OF ISSUES

1. Can the Respondent show that the reason or principal reason for the dismissal was a potentially fair reason under section 98(1) of the Employment Rights Act 1996 ('ERA') namely, conduct? **[YES]**

2. It being agreed that the Claimant was dismissed on the grounds of conduct:

    a. What was that conduct? **[MAKING PRANK CALLS AND DISGUISING VOICE]**
    b. Did the employer carry out as much investigation as was reasonable in the circumstances? **[NO]**
    c. Did the employer believe that the employee was guilty? **[YES]**
    d. Did the employer have in its mind reasonable grounds, based on the investigation, for holding that belief? **[NO]**

3. Was that conduct sufficiently to justify dismissal and was dismissal a fair response to the misconduct in question, i.e. was the dismissal within the range of reasonable responses which a reasonable employer might have adopted? **[NO]**

4. To what extent did the Respondent rely upon the Final Written Warning when dismissing the Claimant? **[NOT AT ALL]**

5. Was the Final Written Warning manifestly inappropriate in the circumstances? **[NOT RELEVANT TO FAIRNESS; CONSIDERED IN RELATION TO POLKEY]**

6. If the Claimant was unfairly dismissed, should any award be reduced on the following grounds and, if so by how much:

    a. Should the basic award be reduced because, due to the Claimant's conduct before the dismissal, it would be just and equitable to reduce it (under s122(2) ERA)? **[YES BY 25%**]
    b. Should the compensatory award be reduced on grounds of contributory fault (under s123(6) ERA)? **[YES BY 25%]**
    c. Should the compensatory award be reduced on grounds of *Polkey* and/or *Software 2000 v Andrews?* **[NO]**

7. Did the Respondent unreasonably fail to follow ACAS Code of Practice? If so, should any award be increased and, if so, by what percentage (up to 25%)? **[YES BY 20%]**