EMPLOYMENT TRIBUNALS

Claimant: Mr J Wilhelm

Respondent: Stoodley Vehicle Auction Ltd

Heard at: Manchester **On:** 30 January 2020

Before: Employment Judge Dunlop
(sitting alone)

REPRESENTATION:

Claimant: Mrs S Wilhelm (Wife)
Respondent: Mr T McGowan (Manager)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim that he was unfairly dismissed contrary to s.94 Employment Rights Act 1996 ("ERA") succeeds.

2. The claimant's compensation will be determined at a remedy hearing on 30 April 2020. No reduction will be made from compensation in respect of either contributory fault (under s.122(2) and/or s.123(6) ERA) or under the principles set out in **Polkey v AE Dayton Services Ltd [1998] AC 344**.

3. The claimant's claim for a redundancy payment under s.135 ERA fails.

4. The claimant's claim for breach of contract in relation to notice pay succeeds. The appropriate award in respect of the notice pay claim will also be determined at the remedy hearing on 30 April 2020.

REASONS

Introduction

1. The respondent is a small family business which operates car auctions. The claimant began working for the respondent on 5 June 2010 initially as a Driver/Yard

Person although later promoted to Yard Foreman. The claimant was summarily dismissed for alleged gross misconduct on 15 July 2019. This claim is concerned with that dismissal.

The Tribunal Hearing

2. The hearing took place on 30 January 2020. The claimant was represented by his wife, Mrs Wilhelm. He gave evidence on his own behalf and Mrs Wilhelm also gave evidence. There were two additional supporting witnesses: Mr Stone who is the claimant's stepson who also worked for a period with the respondent, and Mr Thomas, another former employee of the respondent. In addition, the claimant asked me to have regard to the written witness statement of Mr Lee Worthington. There was an additional written statement prepared from a Mrs S King but ultimately Mrs Wilhelm decided this statement was not relevant and I was not asked to read or have regard to it.

3. The respondent was represented by Mr McGowan who is the respondent's Auction Manager and who was the claimant's direct line manager. Mr McGowan gave evidence as did Mr Stoodley, who is a director of the business and acts as its Managing Director. The respondent also asked me to have regard to a written witness statement from another employee named Julie Jordan. I did read this statement.

4. I gave limited weight to the evidence contained in the statements of both Mr Worthington and Ms Jordan given that they were not in attendance. In any event, I found that the matters discussed in those statements were of very minor relevance to the issues to be decided by the Tribunal.

5. Each party had prepared a separate bundle of documents, although there was considerable overlap between the two bundles. For the purposes of this Judgment, references including the letter "C" are to the claimant's documents, and references including the letter "R" are to the respondent's documents.

6. The claimant also brought along a USB stick containing a video recording of a meeting between the claimant and Mr Stoodley during which he was suspended. This recording had been made covertly on the claimant's phone. Mrs Wilhelm had brought along a laptop on which the recording could be played, and it was in fact a very short file comprising just over a minute of audio and video footage. Although he was keen to emphasise that the recording had been made covertly, Mr McGowan for the respondent agreed that the file should be played and that the Tribunal should have regard to this evidence,.

7. I duly watched the video twice before the start of evidence and refer to it further below. It was also viewed by Mr Stoodley in giving his evidence and he was asked to comment on certain parts.

The Issues

8. This is a claim of unfair dismissal and the first issue is the reason for dismissal. The respondent contends that the reason for dismissal was the claimant's conduct, which is a potentially fair reason within section 98(2) Employment Rights

Act 1996 ("ERA"). The claimant contends that the real reason for dismissal was redundancy, which is also a potentially fair reason within that subsection.

9. The next issue for the Tribunal is whether in the circumstances of the case, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating this as a sufficient reason for dismissing the employee (s.98(4) ERA).

10. In a conduct dismissal that will involve applying the test set out in **British Home Stores v Burchell [1980] ICR 303**, namely whether the employer had a genuine belief that the misconduct had been committed, whether that belief was reasonable and whether it was supported by a reasonable investigation. The Tribunal will then consider whether the sanction was within the band of reasonable responses available to the employer and whether the dismissal was procedurally fair.

11. Applying the s.98(4) test to a redundancy dismissal involves at looking at whether the appropriate procedural steps have been taken, namely whether there has been adequate warning and consultation, whether there has been an appropriate selection for redundancy and whether the employer has looked at alternatives for suitable alternative employment.

12. If the claimant is successful in his claim for unfair dismissal it may be open to the respondent to argue that compensation should be reduced either on the principles set out in **Polkey** or on the basis that he was at fault in a way which contributed to the dismissal. These matters were not pleaded but I raised them at the outset with the parties, which I considered appropriate as both parties were unrepresented. The respondent confirmed that in the event it was unsuccessful in the unfair dismissal claim it would invite the Tribunal to make a reduction to compensation on one or both of these grounds.

13. The claimant confirmed at the outset of the hearing that he did not seek reinstatement or re-engagement and was only seeking compensation if he was successful in his unfair dismissal claim.

14. The claimant seeks a redundancy payment under section 135 ERA. The claimant also seeks unpaid notice pay as he was summarily dismissed.

Findings of Fact

15. The respondent is a small business with around 26 employees and appears to be operated in a relatively informal way.

16. Mr Wilhelm commenced work in summer 2010 as a Driver/Yard Person. He was issued with a written statement of employment which confirmed the terms and conditions under which he would work, however he was not issued this until a later date. It is signed on 20 April 2013.

17. In 2012 a company handbook was produced which contains policies in respect of various HR matters including, for example, holiday pay and equal opportunities. This also contains a section related to disciplinary and grievance procedures, which sets out a fairly typical disciplinary process and disciplinary rules.

It also includes, as is common, a non-exhaustive list of matters which would normally be considered to be gross misconduct.

18. Mr McGowan appeared unfamiliar with the handbook documentation, initially stating that he had looked at it for the purposes of these Tribunal proceedings and prior to that three or four years earlier on a health and safety point. He later suggested that he had looked at it during the proceedings relating to the dismissal of Mr Wilhelm. When required, the company takes HR advice from its accountant and/or its company secretary. Neither of these individuals are claimed to be HR specialists.

19. There is a record (which I understand is an extract from the respondent's 'SAGE' software package) of Mr Wilhelm receiving a verbal warning in February 2012 (R59) in relation to an incident when he was found carry petrol cans to his car. Although there is no recorded 'expiry date' for this warning, I am satisfied that no account can be taken of a warning from so long ago and therefore, in effect, Mr Wilhelm is to be considered as having a clean disciplinary record.

20. Mr McGowan and Mr Stoodley both gave evidence that Mr Wilhelm had had a number of verbal warnings for various matters, and that the frequency of this had increased in the period before his dismissal. Ms Jordan's evidence went to one of those matters, although Mr Wilhelm had his own account of that incident. Mr Wilhelm's supporting witnesses suggested that he was always being called into the office to be 'shouted at' for things that were not his fault. Mr Wilhelm is adamant that he had not committed any act of misconduct. I need not make any findings as to the rights and wrongs of these earlier incidents. I do find, however, that while Mr Wilhelm may have been shouted at, he was not given any disciplinary warning in the general understanding of that term. Nor was he provided with the procedural safeguard which would attach to such a warning (including under the respondent's own policy) e.g. a chance to attend a hearing and state his case, and a chance to appeal. In these circumstances, the assertions about earlier incidents do not change the position that Mr Wilhelm is to be regarded as having a clean disciplinary record.

21. At some point Mr Wilhelm was promoted to the position of foreman. He was not issued with a new contract and both parties seemed very unclear as to when this promotion had actually taken place, however he had occupied the role for several years at the time of his dismissal. In this role he had the benefit of access to a company van. The van was often kept at the claimant's home, which was very close to the company premises, and he used it, with the knowledge and permission of Mr McGowan and Mr Stoodley, overnight, at weekends and even whilst on holiday.

22. Relations between Mr Wilhelm, Mr McGowan and Mr Stoodley were unproblematic for many years. Towards the end of 2018 or start of 2019, however, that situation began to deteriorate. Mr Wilhelm was unhappy that some of the hourly-paid drivers were, he believed, earning more than he was. The respondent sought to point out that these individuals may have been working longer hours and also did not have the security of employment that Mr Wilhelm. That may well have been the case, but in any event I find that the claimant developed a sense of grievance about the situation. I find that he had conversations with Mr McGowan and Mr Stoodley about this and it was not resolved to his satisfaction. One of the matters that was raised in these conversations was the fact that Mr Wilhelm's role came with the

additional benefit of use of the van. There was some discussion during the hearing about whether or not this was a "contractual benefit". According to Mr McGowan, it was not, and this seemed to be related to his understanding that if it had been then tax adjustments would have been required to Mr Wilhelm's pay. There was right to use the van set out in Mr Wilhelm's contract (which had never been updated following his promotion). There could have been an implied (unwritten) contractual term to that effect, but, for the purposes of these proceedings, I find it irrelevant to determine whether that was the case. The fact is, in practice he had unrestricted access to, and use of, the van outside of work as well as within work.

23. At some point in spring 2019 a fault warning light began to show on the van. Mr Wilhelm was upset and in his discussions around his wages pointed out that if the van was not able to be driven he was unable to take advantage of that benefit that came with the role of being foreman.

24. Also in the spring of 2019, Mr Wilhelm suffered some very difficult family circumstances, unrelated to his employment, which I need not set out. He subsequently went on a holiday to Dorset with his family. There was some dispute as to whether this was an appropriate time for him to have taken holiday, but in any event the holiday was authorised in view of his family circumstances, and I do not need to resolve the issue between the parties as to whether it was appropriate for him to have gone away at this time, or whether he had gone away at that time in previous years. Mr Wilhelm took the van on his holiday.

25. The respondent's position is that it did not know that Mr Wilhelm had taken the van on holiday, although he had done so in the past. Mr McGowan did not expect him to do so given that he had been refusing to drive the van with the warning light on it and given that the journey to Dorset would take several hours. Therefore, when the van could not be found at the workplace or at the Mr Wilhelm's home a call was placed to Mr Wilhelm to see if he knew its whereabouts. Mr Wilhelm's position is that it would have been obvious that he had taken the van on holiday because he always took the van on holiday, and that there was no need for such a call to be made. However, it is common ground that the respondent in the call did not ask for the van to be returned. They simply established that Mr Wilhelm had the van.

26. The next day Mr Wilhelm took it upon himself to drive back to the workplace and return the van, returning to his family holiday in another vehicle. I find that it was Mr Wilhelm's choice to do this, and it had not been required or expected by the respondent. However I also find that Mr McGowan and Mr Stoodley were unhappy both about the holiday having been taken and about Mr Wilhelm having taken the van. The previously good relationship had by this point significantly deteriorated.

27. Matters came to a head on Saturday 13 July. That was a day on which the claimant was working and the respondent was holding a car auction at noon. Some time between 10.00am and 11.00am Mr McGowan asked the claimant to drive another employee to the bank to deposit cash and cheques from the business. There is some dispute, which I need not resolve, as to what passed between the claimant and Mr McGowan, but he was unwilling to go. He states, and I accept, that his reason for being unwilling to go was that the auction was imminent, the casual staff that helped with running the auction were due to arrive at 11.00am and if he was not there to supervise them they would wait for his return and nothing would be

prepared. Mr Wilhelm instead asked two other members of staff to complete the task. I accept that he had delegated the job in this way on other occasions in the past and that that had been accepted by Mr McGowan. Indeed it was not always Mr Wilhelm's job to take the cash to the bank: this was done by a variety of employees at the direction of Mr McGowan. However, Mr Wilhelm did not tell Mr McGowan that he had delegated the task. The two other employees went into the office to collect the money and were stopped by Mr McGowan who, after enquiring as to what they were doing, told them to put the money back and that the matter would be dealt with when Mr Stoodley arrived.

28. Mr Stoodley arrived in the office and Mr Wilhelm was called into his office to see him. Mr Wilhelm anticipated, in view of the deteriorating relationships and his past experiences of being called into the office to be 'shouted at', that Mr Stoodley and Mr McGowan were going to take issue with the incident that had occurred in relation to the bank run. Mr Wilhelm therefore walked into Mr Stoodley's office with his mobile phone sticking out of his chest pocket, filming the meeting without Mr Stoodley's knowledge or consent. The recording shows Mr Wilhelm entering the office and leaving it - the meeting lasted less than a minute. Mr Stoodley's first words are not easy to decipher and although there was some dispute between the parties as to exactly what was said, he is clearly raising the issue about Mr Wilhelm's refusal to do the bank run. He then informs Mr Wilhelm that he is suspended until further notice and should leave the site. He says he is going to speak to HR and he will let him know. Mr Wilhelm then leaves.

29. That was the only meeting that occurred with Mr Wilhelm as part of this disciplinary and dismissal process. Mr McGowan and Mr Stoodley then met and decided that it was appropriate to dismiss Mr Wilhelm for gross misconduct. Having made that decision together, Mr McGowan then wrote a letter which was sent to Mr Wilhelm on 15 July informing him that he was summarily dismissed.

30. The letter makes no reference to the disciplinary policy contained in the handbook. Specifically it makes no reference to the list of matters that would be considered to be gross misconduct set out on page 17 of the handbook. Mr McGowan told me that he had had regard to that part of the handbook in making the decision and in writing the letter. I am unable to accept his evidence in that respect because the letter, and indeed the whole process, bears no relation to what is envisaged by the handbook.

31. The letter (C1) does not directly refer to the bank run incident. It states:

> "*This letter is further to your refusal to carry out regular duties and usual additional reasonable duties asked of you, your noted inability over the last year to regularly carry out your duties, your reluctance to comply with reasonable and agreed instructions made during numerous meetings and disciplinary meetings between ourselves and yourself, threatening behaviour towards senior managers when advised of such shortcoming in performance and consequences of such shortcomings when reminded and instructed to comply with company requirements. Your absences from the premises without prior arrangements plus further that we are aware of customers in return for payment being offered documents for police seizure vehicles for which we are instructed must not be passed on yet still occurs*."

32. Mr McGowan stated that he did not expressly refer to the bank run issue because Mr Wilhelm knew he had been suspended over that and in essence would know that was what the letter was about. Indeed it is possible to read the first line in relation to a refusal to carry out regular duties as referring to the refusal to do the bank run. However, it is difficult to understand where the rest of that first paragraph comes from. For example, Mr Stoodley explained in evidence that the reference in the last couple of lines is to the fact that the respondent is sometimes contracted to sell on vehicles previously seized by the police and that the terms of the contract require such vehicles to be sold without any ownership documentation and any documents found in the vehicle should be destroyed. However, passing on such documents for payment was never an allegation against Mr Wilhelm as far as I am aware, it is not mentioned in any other document, nor in the respondent's witness statements and, in questioning, Mr Stoodley did not assert that Mr Wilhelm had done this or condoned it. He could not really explain why it was mentioned in the letter.

33. The letter goes on to say that Mr Wilhelm is being dismissed for gross misconduct, asks for the return of various items and to say that outstanding sums will be paid at the next payroll date. The final line is:

> *"If you wish to discuss this matter further or appeal my decision please contact me in writing*."

34. Mr Wilhelm duly wrote back in a 2½ page letter dated 18 July 2019. In the first paragraph of that letter Mr Wilhelm states that he is not happy with the decision and asks for various pieces of documentation and then says, "*I have been advised to appeal your decision on the following grounds*". He sets out his position on both the incident on 13 July and also the earlier events leading up to it including in relation to the holiday and the van. He ends by saying:

> "*I don't wish any hard feelings towards anyone I just want to work my job and provide for my family at the end of the day and I have put up with a lot of issues at work for this reason. I don't understand why it has come to this without first being spoken to in a proper manner and come to an agreeable understanding of duties. I wouldn't have even minded being demoted rather than losing my job altogether. I hope this can be resolved in a more amicable way and I await your reply*."

35. Contrary to the company's disciplinary policy and to the ACAS Code of Practice on Disciplinary and Grievance Procedures, and general good practice, no appeal meeting was offered or held. Instead Mr McGowan replied on 3 August. That reply was brief and simply reiterated that the company considered that Mr Wilhelm had committed acts of gross misconduct. Again, this decision was a joint decision between Mr McGowan and Mr Stoodley with Mr McGowan taking responsibility for formulating that decision in writing. Therefore, both the decision to dismiss and the decision to uphold the dismissal was made by the same decision makers: that is Mr McGowan and Mr Stoodley acting jointly.

36. Following this there was some further correspondence in relation to documentation that Mr Wilhelm wished to obtain from the business. Although there was some dispute around the rights and wrongs of this, none of that is relevant to the claims that Mr Wilhelm now seeks to make.

37. The respondent's position – which I accept – is that the duties undertaken by Mr Wilhelm as foreman were essential to the business and that other people had to take them on following his dismissal. I further accept that several employees working in the yard were tasked with taking on various parts of his duties and that within a few months a permanent appointment was made of a Mr McGovern, who had been working as a driver, to the role of foreman. He may have continued with some driving duties and may not have performed the role in exactly the same way as Mr Wilhelm, but that was how the respondent dealt with the gap left by Mr Wilhelm's departure.

Relevant Legal Principles

38. The respondent bears the burden of proving, on the balance of probabilities, that the claimant was dismissed for a potentially fair reason: s. 98 (1) ERA. In this case, the respondent says that the reason for dismissal was a reason related to conduct – namely Mr Wilhelm's refusal to do the bank run. Mr Wilhelm says that the real reason for dismissal was redundancy, and that the respondent took advantage of the issue over the bank run to avoid making a redundancy payment. Both are potentially fair reasons.

39. Consideration must then be given to the general reasonableness of that dismissal under s.98(4) ERA. Section 98(4) ERA provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing him. This should be determined in accordance with equity and the substantial merits of the case. The questions the tribunal will ask to determine whether the dismissal was reasonable – and therefore fair – will be different depending on whether the reason was conduct or redundancy.

40. Under s. 139 ERA, a dismissal will be on the grounds of redundancy where the dismissal is wholly or mainly attributable to the fact that the requirement of the business for employees to carry out work of a particular kind has ceased or diminished. (There are other circumstances which give rise to redundancy, but they are not relevant to this case).

41. As I conclude below that this was not a redundancy dismissal, I have not set out the relevant law and authorities relating to the fairness or unfairness of such dismissals.

42. In considering the question of reasonableness, the I have had regard to the decisions in **British Home Stores v. Burchell [1980] ICR 303**; **Iceland Frozen Foods Limited v. Jones [1993] ICR 17**; **Foley v. Post Office and Midland Bank plc v. Madden [2000] IRLR 82.**

43. In summary, these decisions require that I focus on whether the respondent held an honest belief that Mr Wilhelm had carried out the acts of misconduct alleged, and whether it had a reasonable basis for that belief. I must not however put myself in the position of the respondent and decide the fairness of the dismissal based on the what I would have done in that situation. It is not for me to weigh up the evidence as if I was conducting the process afresh. Instead, my function is to determine

whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses open to an employer.

44. In conduct cases, when considering the question of reasonableness, I am required to have regard to the test outlined in the **Burchell** case. The three elements of the test are:

a. Did the employer have a genuine belief that the employee was guilty of misconduct?

b. Did the employer have reasonable grounds for that belief?

c. Did the employer carry out a reasonable investigation in all the circumstances?

45. It was confirmed in **Sainsbury's Supermarket v Hitt 2003 ICR 111** that the 'band of reasonable responses' test applies equally to the employer's conduct of an investigation as it does to the employer's decision on sanction. Whilst an employer's investigation need not be as full or complete as, for example, a police investigation would be, it must nonetheless be even-handed, and should focus just as much on evidence which exculpates the employee as on that which tends to suggest he is guilty of the misconduct in question.

46. Section 123(6) ERA provides that: 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. S.122(2) makes a similar provision in respect of the basic award.

47. Under the principle in **Polkey v A E Dayton Services Ltd 1988 AC 344** the Tribunal may reduce the amount of compensation payable to the claimant if it is established that a fair dismissal could have taken place in any event – either in the absence of any procedural faults identified or, looking at the broader circumstances, on some other related or unrelated basis.

Submissions

48. Mrs Wilhelm and Mr McGowan made submissions. I invited them both to comment on the reason for dismissal i.e. whether it was Mr Wilhelm's conduct or redundancy, on whether the dismissal was fair or unfair, and (if it was unfair) on whether any compensation should be reduced due to any culpable conduct on the part of Mr Wilhelm or in accordance with the principles in **Polkey**.

49. Mrs Wilhelm's submissions were that Mr Wilhelm had done nothing wrong. She said the dismissal was unfair and highlighted that the process had not been followed according to the company handbook. In terms of redundancy, she said that because Mr McGovern was working as the foreman and having previously been an HGV driver that meant that the position had not been filled and showed that there was a redundancy.

50. Mr McGowan emphasised that the business is a small family run company, that they have many long-serving employees and that they try to treat them well. He

reiterated that this was the reason for the lack of any formal prior disciplinary warning. He described the event on 13 July as being the "last straw" that meant that dismissal was inevitable. He refuted the argument that the role was redundant, empasising that the foreman's position was a key position.

Discussion and Conclusions

51. I find that the reason for dismissal was Mr Wilhelm's refusal to do the bank run on 13 July set against the backdrop of deteriorating relations between himself, Mr Gowan and Mr Stoodley. This is a reason relating to Mr Wilhelm's conduct and therefore a potentially fair reason within section 98(2).

52. I reject the suggestion that the role was redundant. For the role to be redundant that would require a diminishing need for the respondent to employ employees to carry out that work. The fact that the position was filled by an internal appointee and that the work may have been covered in the interim by other internal appointees does not mean that the need for that work had diminished.

53. A failure to carry out a reasonable management instruction can amount to misconduct and, in some instances, would be sufficient to justify dismissal. However, in this case I find that the respondent fails on the first part of the **Burchel**l test. I find that Mr Stoodley and Mr McGowan did not have a genuine and reasonable belief that misconduct had occurred. Mr Wilhelm had not simply refused to go to the bank: he had delegated other workers to do that. That was something which the parties agreed he had done on previous occasions and was also in line with the practice that Mr McGowan would ask a variety of employees to undertake this task. Therefore, although Mr Wilhelm's conduct on the day was the immediate trigger for dismissal, it was only seized upon by Mr McGowan and Mr Stoodley because of the deteriorating relationship that I have referred to. It may be that there were elements of misconduct on Mr Wilhelm's part which had contributed to that deteriorating relationship, but in the absence of any documented disciplinary processes being followed or warnings being given I am unable to assess that.

54. I also find that the employer fails on the second and third limbs of the **Burchell** test. The incident on 13 July is not one which would have required extensive investigation and certainly not in the context of a small business such as this. However, it was at the very least necessary for Mr Wilhelm to have the opportunity to put his version of events forward and for any discrepancies to be considered and resolved, for example it may have been appropriate to speak to the employees that Mr Wilhelm had delegated the task to. As no investigation stage took place, and as Mr Wilhelm was not offered the opportunity to put forward his version of events at a disciplinary hearing or even at an appeal hearing, this critical step was entirely missing from the process. Further, the dismissal letter indicates that there were wider matters operating in the respondent's mind – as does Mr McGowan's comment in submissions that the bank run was 'the last straw'. It was never properly explained to Mr Wilhelm what these matters were and it follows that he was given no opportunity to put forward his position on them.

55. I conclude that no reasonable employer, even a small one such as this, could have failed to obtain Mr Wilhelm's version of events before reaching a decision and on that basis the second and third limbs of the **Burchell** test are not met.

56. I also conclude that the sanction of dismissal was outside the band of reasonable responses in the circumstances of this case. Mr Wilhelm was a long-serving employee who had held, on the face of it, a clean disciplinary record since 2012. This was at most a minor disciplinary offence which merited at most a warning.

57. The respondent followed no disciplinary process. This was in clear contravention of the requirements of their own company handbook as well as in clear contravention of the ACAS Code of Practice. There was nothing in the circumstances of this case which justified a departure from those standards. I fully accept that the respondent is a small employer and as such that it may not be expected to have procedures in place which are as thorough or complex as those found in larger organisations. I also recognise that a minor deviation from accepted standards might be expected in an organisation of this size and type. However, what is absolutely fundamental is that an employee faced with a misconduct charge, particularly one which may result in dismissal, be given the opportunity to put forward their version of events and answer that charge. Mr Wilhelm was denied that opportunity in the very brief suspension meeting; he was denied that opportunity by not being invited to a disciplinary meeting and he was denied that opportunity when no appeal meeting was convened despite the right to appeal being offered in the dismissal letter, and Mr Wilhelm writing back expressly seeking to take up that offer. No reasonable employer, however small, would have conducted itself in such a manner.

58. It follows from the reasoning I have set out above that the dismissal was unfair.

59. I considered whether the compensation should be reduced in accordance with the principles set out in **Polkey**, in particular having regard to the fact that the dismissal was unfair (at least in part) due to procedural defects. However, this is a case where the flaws with the procedure were so fundamental and where the rationale around the underlying reason for dismissal so unconvincing that I am unable to find that there was any material prospect of the employer dismissing Mr Wilhelm if the procedural errors are set aside.

60. Similarly, I considered whether any reduction should be made in respect of contributory fault. Although it is accepted that Mr Wilhelm did refuse to do the bank run on 13 July, I am unable to make a finding, on the evidence available to me, that that refusal was culpable. Again, therefore I am unable to make any deduction in respect of contributory fault.

61. I am also content that, even taking the respondent's case at it's highest, this was not a true case of gross misconduct. The claim of wrongful dismissal also succeeds and the claimant is entitled to be awarded notice pay (although his compensatory award will not reflect losses in the notice period, as he is not entitled to paid twice for the same loss). I did not hear submissions from the parties as to the amount of notice pay that would have been due, so this will also be determined at the remedy hearing.

Next Steps

62. At the conclusion of the liability hearing I arranged a date for a provisional remedy hearing with the parties. This remedy hearing will now take place on 30 April 2020.

63. Also as discussed with the parties, I have set the following directions to ensure that the parties are fully prepared for the remedy hearing:

(1) On or before 16 March 2020 the claimant is to send the respondent:

(a) an updated Schedule of Loss;

(b) copies of any documents relevant to the loss of earnings he is claiming, which may include for example details of payments he has received in alternative employment;

(c) applications he has made for other job roles;

(d) a short witness statement setting out the way in which he has calculated the losses that he is claiming and the attempts he has made to find work; and

(e) anything else relevant to the question of remedy.

(2) If there are any additional documents which the respondent wishes to rely on at the remedy hearing they should be served on the claimant by 30 March 2020 and both parties should bring at least three additional copies of any documents that they wish to rely on along to the hearing on 30 April 2020.

64. If the parties are able to settle the matter between themselves before 30 April 2020 (including with the assistance of ACAS) then the remedy hearing need not go ahead. The Tribunal should be informed promptly of any settlement.

Employment Judge Dunlop

Date: 06.02.20

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

18 February 2020

FOR THE TRIBUNAL OFFICE

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