EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr. M. Myles v Invicta Gas Limited

Heard at: London South (Ashford) On: 5 & 6 March 2020

Before: Employment Judge Mason

Representation
For the Claimant: In person
For the Respondent: Mrs. A. Beattie, Litigation Manager (Croners)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant was unfairly dismissed and his claim for unfair dismissal succeeds.

2. The Respondent is ordered to pay the Claimant a Basic Award of £908.13 and a Compensatory Award of £16,826.71 to include £350.00 in respect of loss of statutory rights (see Annex A).

3. The Recoupment Regulations apply (see Annex B).

REASONS

Background, issues and procedure at the Hearing

1. In this case Mr. Myles ("the Claimant") claims that he has been unfairly and wrongfully dismissed. The Respondent denies that the Claimant was unfairly dismissed and says that he was fairly dismissed by reason of conduct.

2. The Claimant presented this claim on 1 July 2018. The Respondent lodged a response on 7 August 2018.

3. I agreed with the parties at the outset that the issues to be determined by the Tribunal are as follows:

3.1 Was the Claimant dismissed on:

(i) 16 April 2018; or

(ii) 6 June 2018?

3.2 Was the Claimant dismissed for a potentially fair reason in accordance with s.98(1) of the Employment Rights Act 1996 ("ERA")? The Respondent relies on conduct which is a potentially fair reason (s.98(2)(b) ERA).

3.3 Did the Respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the Claimant? This is to be determined in accordance with equity and the merits of the case (s98(4) ERA).

3.4 In accordance with the test in ***British Home Stores v Burchell [1980] ICR 303,*** has the Respondent shown that:

(i) It had a genuine belief that the Claimant was guilty of misconduct?;

(ii) It had in its mind reasonable grounds upon which to sustain that belief?; and

(iii) at the stage at which that belief was formed, it had carried out as much investigation into the matter as was reasonable in the circumstances?

3.5 Did the procedure followed and the decision to dismiss fall within the range of reasonable responses open to a reasonable employer in the same circumstances?

3.6 If the Claimant's dismissal was unfair, is the Claimant entitled to a Basic Award and/or a Compensatory Award, and, if so, should there be any adjustments:

(i) a reduction in the Compensatory Award on the basis the Claimant failed to take all reasonable steps to mitigate his loss to include consideration of any offer of re-engagement/reinstatement from the Respondent?;

(ii) any adjustment to the Compensatory Award as a consequence of any failure to follow procedure under the ACAS code?;

(iii) any reduction or limit in the Compensatory Award to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors accordingly made no difference to the outcome in accordance with *Polkey?*; and/or

(iv) any reduction in either award to reflect any contributory fault on the Claimant's behalf towards his own dismissal?

3.7 Breach of contract/ Unlawful deduction from Wages and Extension of Jurisdiction claims

(i) Was the Claimant dismissed without notice in circumstances where he was entitled to notice?

(ii) If so, what was his contractual entitlement to notice and how much is he entitled to taking into account any mitigation including any offer from the Respondent?

4. I was provided with the following:

4.1 A joint bundle of documents [1-132];

4.2 Witness statements for the Claimant and the Respondent's witnesses; and

4.3 A Skeleton Argument from Mrs. Beattie and copies of the decisions in ***Martin v Yeomen Aggregates Ltd [1983] WL 215898*** and ***Sandle v Adecco UK Ltd UKEAT/0028/16***

5. Having retired to read the witness statements and the bundle, I heard from Mr. Terry Wallder ("TP") (Respondent shareholder and sole director), Mr. David Blackmore ("DB") (former Respondent Finance and Business Development Director and TW's nephew) and Mrs. Diane Wallder ("DW") (Respondent Company Secretary and DW's wife). On the second day I heard from the Claimant.

6. On conclusion of the evidence, I heard submissions from Mrs. Beattie and the Claimant. I reserved my decision which I now give with reasons.

Findings of fact

7. Having considered all the evidence I make the following findings of fact having reminded myself that the standard of proof is the balance of probabilities.

8. The Respondent company was founded by TW in 1983. It supplies, installs, services and repairs gas appliances, fires, solid fuel stoves and surrounds. The shareholders are TW and his wife, DW. TW is the sole director and DW is the Company Secretary. From 1992, the Respondent operated from premises at 28 Oxford Street Whitstable ("Oxford Street") which consisted of a showroom with offices underneath. In around September 2017, the offices moved to 45B Joseph Wilson Estate, Whitstable ("JW Estate") and in February 2018, the showroom also moved from Oxford Street to JW Estate. The Respondent still owns the Oxford Street premises; it has not traded from there since February 2018 but there is still a significant amount of stock stored there.

9. At the relevant time (April 2018) the Respondent had 7 staff working in the offices at JW Estate: TW, DW, DB (former Finance and Business Development Manager and TW's nephew), the Claimant, Nicholas Wallder (Manager of Technical Sales and son of TW and DW), Lisa and Cara. The Respondent also employed four engineers.

10. On **21 September 2015**, the Claimant commenced employment with the Respondent as Purchasing and Administration Clerk reporting to DB.

10.1 On 3 June 2016, the Claimant signed Terms and Conditions of Employment [pages 38-46]; this refers to the Disciplinary Procedure set out in the Respondent's Employee Handbook [pages 30-36].

10.2 His Job Description dated 1 June 2016 [page 37] sets out his duties which included keeping the stores tidy and organised and security of the stock.

10.3 He was also responsible for returning to suppliers any materials/stock brought back by the engineers. He was not solely responsible for ordering boilers; others ordered them direct.

10.4 The Claimant was a key holder for a locked room in the warehouse where high value goods were stored. He was the only key holder but a spare key was kept in a key safe in TW's coded entry office.

11. At some point (dates unknown) the Claimant expressed concerns about the temperature in the offices and the privacy aspects of internal CCTV cameras. However, it is not in dispute that the Respondent did not have any significant issues

with the Claimant's conduct or performance prior to 13 April 2018 and TW accepts that the Claimant did a good job [TW w/s para. 12].

12. With regard to the culture of swearing at the Respondent, I accept that there was a general culture of swearing amongst the engineers, less so in the offices and showroom. I do not accept that it was common place for TW to be subjected to bad language by employees in an abusive or aggressive manner; the Claimant has asserted this but provided insufficient evidence.

13. On **3 March 2018**, TW collapsed and was then off sick until Wednesday 11 April. He worked part-time on 11 and 12 April and his first full day back at work was Friday 13 April. During his absence, all staff, including the Claimant, were advised to refer any issues to NW or DB.

14. The Respondent's financial year ends on 31 May and in 2018, a stock take needed to be carried out at both 28 Oxford Street and JW Estate by the end of May. I accept DB's evidence [w/s para. 4] that around the beginning of April 2018, DB told the Claimant that they would need to go to Oxford Street to carry out a stocktake after DB's return from annual leave in April. Whilst the Claimant was at Oxford Street, it was the Respondent's intention that his duties would be covered by TW and others including DW (TW verbal evidence, re-examination). I find that the initial count on site at Oxford Street would take about 3 or 4 days and then the data would be entered onto a spreadsheet by DB.

Friday 13 April 2018

15. I find that events on 13 April 2018 unfolded as follows:

15.1 This was TW's first full day back at work.

15.2 The Claimant arrived 10 minutes early for work. TW, engineers and contractors were on site including Bob Willoughby and his son Bobby Willoughby. TW asked the Claimant about two boxes containing central heating boilers which had been left about 3m inside the security roller door. There were no identifying labels or delivery notes attached to the boxes to help identify which customer the boilers had been ordered for and the Claimant told TW he did not know what they were doing there.

15.3 There then followed a mutually heated exchange along the lines of the following:
TW: "*oh come on, it's your job to know*".
Claimant: "*If I'm not told the information how am I expected to know?*"
TW:"*You need to ask people".*
Claimant: "*Or people could do their job and label and give me information";*
Claimant continued: "*I'm fucking pissed off taking the blame for other people".*
TW asked the Claimant to move the boxes. I accept that the Claimant agreed to do so as soon as he had put his bag and coat down at his desk. When he returned with the keys, TW said *"Give me the fucking keys I'll do it myself".* The Claimant handed over the keys and TW moved the boxes. The Claimant then returned to his desk and carried on with his work for the rest of the day. An engineer later returned the keys to the Claimant. TW accepted in verbal evidence that he was angry.

15.4 At about 16.30, TW called the Claimant into his office for an informal chat about the earlier altercation. The Claimant says it was a brief chat and it is not in dispute that TW concluded by saying he was not happy with the Claimant's conduct and he would deal with it on Monday 16 April as he wanted DB involved (DB having been on holiday and due to return on 16 April).

Monday 16 April 2018

16. I make the following findings with regard to events on 16 April:

16.1 When the Claimant arrived for work, TW, NW and DB were in a meeting in TW's office. At around 9.00 the Claimant was called in. DW had left by this point.

16.2 I accept that the exchange that took place was along the following lines:
TW: "*Friday, totally unforgivable, I want you to clear your desk."* [TW confirmed in verbal evidence that he probably said this].
After a pause TW then said: *"What were you thinking?"*
The Claimant interrupted TW and asked if there was any point in continuing if TW had already made his decision. TW did not reply and the Claimant asked if he should clear his desk straight away; TW replied "*Yes*" [this is confirmed by DB [page 47]). The Claimant asked if he was free to go and TW said "*yes"* [confirmed by TW in verbal evidence].
After a brief pause, the Claimant placed his store keys on TW's desk. He then left TW's office and went to his desk; he swiftly returned with the external keys and alarm fob which he also handed over. The Claimant then left the meeting.

16.3 The Claimant was upset, but I do not accept TW's account that the Claimant "*stormed out*" or that the Claimant was aggressive at the meeting; DB was clear in verbal evidence that the Claimant was not aggressive. For the same reason, whilst TW says the Claimant raised his hand at one point in an aggressive manner, I find that if he did so, this was not an act of aggression.

16.4 DB followed the Claimant to his desk and observed him collecting his personal belongings which consisted of personal items of stationery. The Claimant asked DB if he would receive a month's pay to which DB replied that he would. DB accompanied the Claimant to the car park. The Claimant said to DB something along the lines of "*That was unfair*" and "*I didn't deserve that*". The Claimant asked DB if he should return his uniform; it is not in dispute that DB replied "*You can burn it for all I care*" [confirmed by DB [page 48] and in verbal evidence].

16.5 At 17.10 the Claimant received an email from TW [page 50] (drafted by DW). The subject line states "Disciplinary Meeting". TW stated:
"Once again, your behaviour in the work place has been disgraceful. I asked you into my office to discuss your future not for you to jump up at the first sentence I said and say I am not staying here for this.
You are aware that stocktake is currently being done. It had been arranged for you to be with a member of staff to carry the stocktake out during which time we would have evaluated your behaviour. You were requested to clear your desk whilst you carried out the stocktake and your performance and behaviour was reviewed. At that point your future contract would have been considered.
You are expected to attend another meeting. At this time you would be able to bring someone with you. I have allocated an appointment for Thursday 19th April 2018 at 10.00 am.
Should you be unable to attend please advise giving a reason and time you are available. If you do not attend without good reason I will regard this as Gross Misconduct again and will terminate your employment from that date."

16.6 Later the same day, the Claimant exchanged text messages with DB [51-54]. DB initiated the exchange by sending the following message at 17.37:
"*Hi Michael hope you are ok. Any chance you would consider coming back"*
The Claimant made it clear to DB that despite receiving TW's email (above), he had been dismissed "*as the months money and dispose of uniform was agreed*" and that TW was now backtracking because he realised he had unfairly dismissed the Claimant. He said it was "*possible*" he would return depending on what was agreed but "*after being sacked*" he had reservations and would need "*both give and take*". DB replied that was understandable.

17. Tuesday **17 April 2018:**

17.1 The Claimant did not report for work.

17.2 Having taken advice, the Claimant emailed TW [page 55] to say:
"*Following advice from acas I can confirm I will be attending the meeting at the proposed time. I will be bringing someone with me."*

17.3 DB showed TW the text messages he had exchanged with the Claimant the previous day [TW w/s para. 46]. TW was therefore aware that the Claimant considered himself dismissed.

18. Wednesday **18 April 2018**,

18.1 The Claimant did not report for work.

18.2 TW phoned the Claimant and they spoke at 16.16. TW told the Claimant the meeting scheduled for Thursday 19 April 2018 was postponed and that he was required to return to work on 20 April. On TW's own evidence [page 66], the Claimant told TW during this conversation that he would not return to work because he had been dismissed.

18.3 DW then took over "*dealing with the Claimant*" [w/s para. 18] and exchanged emails with Claimant [pages 56-57]:
DW to Claimant 16.46 Wednesday 18 April 2018:
"*Following on from the conversation you had with [TW] this afternoon. We would like you to return to work on Friday 20th April at 8.30am to conduct stock take with [DB] at 28 Oxford Street. You will meet [DB] there and uniform is not necessary*"
Claimant to DW 16.53 18 April 2018:
"*Following my brief conversation with [TW] you will be aware that after dismissal on Monday there needs to be a meeting to discuss what terms and conditions apply in a possible return to work."*
DW to Claimant 07.40 19 April 2018:
"We can confirm that the scheduled meeting for today Thursday 19th April has been called off as per the conversation with [TW] yesterday."

19. Friday **20 April 2018:**

19.1 The Claimant did not report for work (or the previous day, 19 April).

19.2 DB wrote to the Claimant [pages 58-59] to advise him that as he had not returned to work on 20 April, he was required to attend an Investigation Meeting on Monday 23 April 2018. The Claimant's absence was *"deemed unauthorised".* DB states:
"The purpose of this meeting is to give you the opportunity to provide an explanation for the following matters of concern:

- *Failure to attend work on Friday 20th April 2018*
- *Failure to follow a reasonable, lawful management instruction 13th April 2018 when you were asked to remove a boiler.*

- *Acting inappropriately and with aggression when you were shouting and swearing at a senior manager on 13th April 2018.*
- *Leaving a meeting without allowing progression.*
- *Ordering errors.*
- *Poor management of the Stores Department leading to financial loss relating to materials.*

I would stress that this is not a disciplinary hearing and therefore the statutory right to be accompanied does not apply.

I will be accompanied by [DW] who will make a written record of the meeting.

20. Monday **23 April 2018**,

20.1 The "Investigation Meeting" took place. The Claimant attended. DB conducted the meeting and DW took notes. DW's notes are in the bundle [pages 62- 64]; the Claimant also made notes [pages 64A-64B].

20.2 The Claimant handed to DB a letter dated **22 April 2018** [pages 60-61]. At the start of that letter, the Claimant said:

"*I am attending this meeting with a view to resolving issues and suggesting ideas that may enable a way forward to enable me to resume my employment with Invicta Gas. I will, out of courtesy, answer the allegations put forward ... but this is not an investigation meeting as investigations are to take place before disciplinary meetings and certainly before decisions such as dismissal are made*."

He then addresses the points raised in DB's letter.

He said that he did not attend work on Friday 20 April because he had been dismissed on Monday 16 April and "*no issues resolved regarding my return".*

He refers to his reaction on 13 April as "*inappropriate"* but says this was from frustration.

He concludes:

"*As stated earlier at this point I see no benefit on expanding on these issues, I have been dismissed and as can be seen by my response I disagree with the points raised. I have no desire for any argument arising from these differences of opinion but seek to find ways forward as it appears by asking me to return last Friday there may be circumstances that will allow a resumption of my employment"*

"I have outlined some requests to be considered below before any possible return to work. These are simply a point from which discussions can be made, if any agreement is made we would need to formalise the correct wording of a signed agreement.

1. *My employment is to be continuous, therefore if a return is possible I will not be under any special reviews terms.*
2. *If a return is agreed it is accepted my conduct was a one off and the only note on file will be a formal agreement written up after discussion of these proposals.*
3. *Procedures will be implemented whereby information is passed so that there is no repeat of the type of event that triggered this incident.*
4. *Sufficient leave time for agreements to be formalised, procedures to be implemented, tempers to calm and my in-tray cleared so I am not returning to the stress of a backlog of work.*

I look forward to receiving your views on the above points and remain available and willing to attend meetings, with sufficient notice, to discuss the way forward whether this is between ourselves or in conjunction with a mediation service."

20.3 At the meeting, the Claimant made it clear he disagreed that this was an investigative meeting given that the decision had already been made.

20.4 With regard to the meeting on 16 April, the notes show the Claimant said:

"*I stress I did not leave without asking a couple of times if I was being dismissed. I asked if I would be getting a month's money and you said yes and when I asked what I should do with my uniform you said I should dispose of it."*

DB: "Or words to that effect"

20.5 The Claimant made it clear that he had been dismissed but would be willing to return under certain conditions although it would be hard as "*people will still have memories".* He said until it was acknowledged that he had been dismissed it would be hard to put right.

21. After the Investigation Meeting, TW provided a statement as part of the "investigation" [pages 65-66].

21.1 He gave his account of the altercation on 13 April and also the meeting on 16 April.

21.2 With regard to 16 April, this statement (written in the third person) states that it was TW's intention to move the Claimant away from his desk for the purposes of assisting with the annual stock take at 28 Oxford Street; this would give TW the opportunity to investigate the cause(s) of the Claimant's "outburst". The statement states:

"*However, when [TW] asked [the Claimant] to "clear his desk" so that he could carry this out [the Claimant] put his hands out and said "hold on, are you sure?".TW replied yes and was about to deliver instructions on the task when [the Claimant] put his hands out again and interrupted [TW] and said "I do not want to listen to this monologue for half an hour am I free to go" the reply from [TW] was "yes". [The Claimant] then handed his keys in and left the building after shouting further abuse at other members of staff. While an employee [DB] was watching as [the Claimant] cleared his desk in the office [the Claimant] asked "do I get a month's wages?". The reply from my employee [DB] was "yes you will be paid as normal" then he asked "what do I do with my uniform?". The reply from my employee [DB] was "I don't know, burn it if you want".*

When [the Claimant] got up from his chair [TW] believed he had decided to take matters into his own hands and leave the company. [The Claimant] walked out of the room and ... spoke to [DB] who gave him answer's to [his] questions where at the time he believed he was correct. However [DB] has no authority in these issues and his comment totally unfounded."

22. DB concluded there was a "*case to be answered*" [page 81].

23. Wednesday **25 April 2018**

23.1 The Claimant did not report for work.

23.2 Having taken "HR advice" DW sent to the Claimant by email a letter [68-69] calling him to a "disciplinary hearing" to take place on 2 May 2018 to be conducted by an external employment consultant with DW present to take notes.

23.3 DW states that the following allegations would be considered:

- *On the 13th of April 2018, you failed to follow a reasonable and lawful management instruction when you were asked by [TW] Director to move a boiler. When challenged you proceeded to conduct yourself in a highly inappropriate and aggressive manner when you shouted and swore directly at a Director.*
- *During a meeting on 16th April 2018 you were questioned about your misconduct on 13th April. At the meeting you became controlling and dictatorial towards [TW], Director, aiming to control the meeting. You then left the meeting and the works premises without prior permission.*
- *On 20th April 2018, you failed to follow a further management instruction when you did not return to work nor did you report your absence. You were informed during a telephone discussion on 19th April that you had not been dismissed and therefore should return to work but you chose to ignore this instruction"*

23.4 DW enclosed various documents including notes of the meeting on 23 April 2018; witness statements of Bob Willoughby [page 73], and Bobbie Willoughby [page 74] with regard to the altercation on 13 April 2018; a statement from NW regarding 16 April 2018; and TW's "Account of Incident [pages 76-77].

24. On **27 April 2018**, the Claimant replied [page 82] to confirm he would be attending the "disciplinary hearing".

25. On **1 May 2018**, the Claimant wrote to DW requesting information under the DPA 1998.

26. On **2 May 2018**, the "Disciplinary Meeting" took place (notes [pages 87-93] and the Claimant's notes [pages 94-99]):

26.1 The meeting was conducted by Helen Lockett ("HL") of Croner. The Claimant attended and was accompanied by Ernest Griffin ("EG"]. DW took notes.

26.2 The Claimant handed to HL a letter dated 1 May 2018 addressed to HL [pages 83-84]. With regard to the allegation that he had walked out of the meeting on 16 April the Claimant pointed out that neither TW nor DB had called him back and the reason he did not attend work on 20 April was because he had been dismissed. The dismissal was not "heat of the moment" as it was on the Friday and TW had had the rest of Friday 13 April and all of the weekend to consider; TW had also discussed this with DB and NW.

26.3 The allegations against him were then discussed.

27. On **15 May 2018**, DW sent to the Claimant a letter from TW advising him of the outcome of the Disciplinary Hearing on 2 May [pages 100-103]:

27.1 With regard to the meeting on 16 April, TW stated as follows:

"*Looking at all the evidence associated with this meeting, there appears to be a lack of communication and understanding on both parties. The intention was to discuss your attitude and behaviour from the incident above [13 April], explaining that it was unacceptable and that we were planning to move you to the other site with another person to carry out the annual stock take. Instead, [TW] started by saying about clearing your desk and before he finished, you had taken this to mean you were being dismissed, which was NOT the case and thus you reacted accordingly.*

Unfortunately, no one tried to rectify the misunderstanding at the time, and [DB] escorted you off the premises under the assumption that you had resigned.

Based on the facts we are of the view that you did appear to be dictatorial in the meeting, but we believe this was in response to the incorrect conclusion you had come to without reaching the end of the meeting. And in your own words you stated you would rather go than listen to [TW].

[TW] tried to rectify this later in the day with an email, which was incorrectly titled Disciplinary Meeting which lead [sic] to further confusion as no formal procedure had taken place at this time.

We acknowledge that due to the communication issues that you did believe that you had been dismissed although the only people at this time that are authorised to agree a suspension or dismissal are [TW] or [DW]. However, as mentioned previously there was a telephone call reiterating to you that you had not been dismissed, you were still being paid in full and you had not had a confirmation of termination letter or a P45. Likewise, we thought that you had resigned rather than continuing with the meeting that we were having regarding your behaviour. We believe that this misunderstanding is down to the lack and break down of communication between both parties."

27.2 The letter concludes:

"On this occasion, the Company will not be issuing formal displinary proceedings in respect fo the above allegations due to the reasons outlined. However, I wish to restate the absolute unacceptability of your conduct relating to allegation 1 [13 April] ... . You should be aware that no further similar breaches of the Company's rules will be tolerated. Any future non-compliance with the Company's rules and procedures will be addressed using the formal Disciplinary Procedure.

You are required to return to work on Monday 21 May 2018 at 8am at [JW Estate]. Further details regarding your return to work arrangement will follow in a separate letter shortly."

28. On **18 May 2018**, TW wrote again to the Claimant [pages 105-106];

28.1 TW stated the Claimant's employment had never been terminated and therefore his employment was continuous.

28.2 TW addressed the points raised by the Claimant in his letter to DB dated 22 April 2018 [pages 60-61] (see para. 20.2 above):

(i) *"1. My employment is to be continuous, therefore if a return is possible I will not be under any special reviews terms."*

TW stated that as the Claimant's employment had never been terminated his employment would be continuous.

(ii) "*2. If a return is agreed it is accepted my conduct was a one off and the only note on file will be a formal agreement written up after discussion of these proposals."*

TW referred to his earlier letter of 15 May 2018.

(iii) "*3. Procedures will be implemented whereby information is passed so that there is no repeat of the type of event that triggered this incident."*

4. Sufficient leave time for agreements to be formalised, procedures to be implemented, tempers to calm and my in-tray cleared so I am not returning to the stress of a backlog of work.

TW confirmed there was no backlog and set out what would be expected of the Claimant with regard to checking past orders and carrying out stocktake.

(iv) TW explained that going forward the office temperature would be maintained at a suitable level and that CCTV was/would be installed where and when management decided. The Claimant would be required to confirm in writing his acceptance of both these terms.

(v) TW advised the Claimant he would be expected to assist DW with Sage (accountancy software) and would be responsible for keeping the prices up to date going forward.

(vi) TW said it was the Claimant's job to assist the engineers as required including identification of unused materials deposited in the stores (mostly unlabelled) and returning them to the correct suppliers.

(vii) The Claimant was required to be "a team player" and "flexible at all times".

29. On **21 May 2019:**

29.1 The Claimant wrote to DW [page 107]:

(i) He pointed out that there was now a "*new story*", specifically a belief that he had resigned.

(ii) The Respondent had failed to acknowledge any blame and had not apologised.

(iii) He felt like he had been given a final warning based on an assumption that his conduct on 13 April was directed at TW

(iv) Tasks had been added to his workload with time limits and he felt he was set up to fail.

(v) He concluded that he was dismissed unfairly and as no satisfactory resolution had been reached, he would not be returning to work and would be making an unfair dismissal claim.

29.2 DW responded [page 108]. DW reiterated that the Claimant had not been issued with a formal warning; that the Claimant had never been dismissed; that he was required to return to work the next day (22 May) and that failure to return would be treated as unauthorised absence which would be unpaid and a breach of company rules.

29.3 The Claimant replied briefly by email [109]:

"*As per numerous communications previously many issues remain unresolved, hence I refer you to the last paragraph of my previous email. Acas have contacted me so I guess you'll hear soon*".

30. On **22 May 2018:**

30.1 The Claimant did not report for work.

30.2 DW wrote to him [page 110] advising him that his absence was unauthorised and unpaid and that he was required to attend an investigation meeting on 25 May and that refusal to attend was potentially an act of gross misconduct

31. On **23 May 2018,** the Claimant emailed DW [page 111] to advise he would not be attending the meeting and stating his absence stemmed from "*unresolved issues*" from his unfair dismissal on 16 April.

32. On **1 June 2018**, DW wrote to the Claimant [pages 112-113] advising him that he was required to attend a Disciplinary Hearing on 6 June 2018 to be conducted by DW to consider the following allegations:
    "1. You have been absent without authority since 22nd May 2018 to date.
    2. Failure to follow the Company's absence reporting and certification procedure.
    3. Wilful refusal to comply with a reasonable and lawful instruction, to attend the investigation meeting on 25th May 2018"
    DW advised the Claimant that "*the Company considers this to be a matter amounting to Gross Misconduct and a potential outcome of this Hearing is your dismissal without notice".* DW informed the Claimant of his right to be accompanied and that failure to attend the hearing on 6 June would be a disciplinary offence.

33. On **5 June 2018**, the Claimant emailed DW [page 114] to advise he would not be attending because "*this all stems from the dismissal on 16th April*" and that the matter was now in the hands of Acas.

34. On **6 June 2018**, DW conducted the disciplinary hearing in the Claimant's absence. The minutes are in the bundle [page 115]. The three allegations were considered and DW concluded that the Claimant should be dismissed summarily for gross misconduct.

35. On **7 June 2018**, DW wrote to the Claimant [pages 116-117] to advise him of the outcome of the disciplinary hearing. She advised the Claimant that she had decided to dismiss him without notice for gross misconduct with effect from 6 June 2018. She advised him of the right to appeal to TW.

36. On **11 June 2018**, the Claimant emailed DW [page 118]. He referred again to his dismissal on 16 April and said he would return his uniform and chased up a response to his data protection act request .

37. The Claimant was issued with a P45 [page 119] showing a leaving date of 6 June 2018.

38. The Respondent paid the Claimant his usual salary on 30 April 2018 and on 31 May 2018 he received pay up to 22 May 2018 [payslips page 120]. On 30 June 2020, he received monies in lieu of accrued untaken holiday [payslip page 121].

39. The Claimant has provided details of jobs he applied for during the period 26 April 2018 to 23 July 2018 [pages 123-132]. He started a new job in January 2019; this finished in September 2019. I accept his verbal evidence that he has since applied for several jobs unsuccessfully; he has taken out a loan to retrain to be a lorry driver. He has

received Universal Credit at various times since 16 April 2018. I accept he has taken all reasonable steps to mitigate his loss in terms of looking for work elsewhere; Mrs Beattie confirmed the Respondent takes no issue with this.

40. Contributory conduct:

40.1 For the purposes of the unfair dismissal claim, it is essential that I do not substitute my own view but rather consider whether dismissal fell within the range of reasonable responses of a reasonable employer.

40.2 However, in order to assess contributory conduct, I am required to make findings of fact based on my own conclusions regarding the Claimant's conduct and culpability.

40.3 I find that the Claimant was certainly culpable to some extent:

(i) Whilst there was a general culture of swearing this was predominantly amongst the engineers and less acceptable from office staff such as the Claimant.

(ii) He accepted in his letter of 22 April 2018 [pages 60-61] that his reaction on 13 April was "inappropriate".

(iii) I accept that he was frustrated but cannot find any basis on the evidence before me for concluding that he was provoked by TW.

(iv) I accept his behaviour was not threatening or aggressive.

The Law

41. Dismissal

41.1 Dismissal is defined in s95 ERA and includes "*termination of the employment contract by the employer with or without notice"* (S95(1)(a).

41.2 The burden of proof falls on the employee to show a dismissal and the standard of proof is the balance of probabilities.

41.3 Unambiguous words of dismissal:

(i) Ordinarily, unambiguous words of dismissal may be taken at their face value and there is no requirement to consider what the employer actually intended or what a reasonable employee might have assumed the employer intended.

(ii) The general rule is that once notice to terminate a contract has been given it cannot be withdrawn unilaterally but only by agreement between the parties (***Harris and Russell Ltd v Slingsby [1973] ICR 454 NIRC***). Agreement of withdrawal can be inferred from the employee's conduct.

(iii) When the words are spoken in anger (in the heat of the moment) and immediately withdrawn, the tribunal is entitled to decide there was no dismissal (***Martin v Yeoman).***

41.4 The test as to whether ambiguous words amount to a dismissal is an objective one:

(i) All the surrounding circumstances must be considered including events preceding and subsequent to the incident and take account of the nature of the workplace.

(ii) If the words are still ambiguous, the Tribunal should ask itself how a reasonable employee would have understood them in the circumstances.

(iii) Any ambiguity is likely to be construed against the person seeking to rely on it.

42. Section 98 (1) ERA:

In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason (or if more than one the principal reason for the dismissal); and that it is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

43. Section 98(4) ERA:

43.1 Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer):

(i) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(ii) shall be determined in accordance with equity and the substantial merits of the case.

43.2 In accordance with the tests set out in ***Burchell*** the Tribunal must consider:

(i) did the Respondent believe the Claimant was guilty of misconduct?

(ii) did the Respondent have in its mind reasonable grounds upon which to sustain that belief? and

(iii) at the stage at which that belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances of the case?

43.3 Range of reasonable responses:

(i) When assessing whether the ***Burchell*** test has been met, the Tribunal must ask whether dismissal fell within the range of reasonable responses of a reasonable employer and this test applies both to the decision to dismiss and to the procedure. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

(ii) The starting point should always be the words of s98(4). In applying the section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer; it is not for the Tribunal to impose its own standards. The Tribunal has to decide whether the dismissal and procedure lay within the range of conduct which a reasonable employer could have adopted.

(iii) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

44. Unfair Dismissal Compensation

44.1 In addition to a Basic Award (section 119 ERA), s123(1) ERA provides for a Compensatory Award**:** "... *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".

44.2 Contributory conduct:

(i) S122(2) ERA:

"*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*"

(ii) S123(6) ERA states:

"*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complaint, it shall reduce the amount of the compensatory award by such proportion regard to that finding*".

44.3. Mitigation:

S123(4) ERA requires a claimant to mitigate their loss and a claimant is expected to explain to the tribunal what actions they have taken by way of mitigation. The Tribunal is obliged to consider the question of mitigation in all cases. What steps it is reasonable for the claimant to take will then be a question of fact for its determination.

44.4 **Polkey**:

Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a Tribunal could make. In some cases it may be clear that the employee would have been retained if proper procedures had been adopted. In such cases the full Compensatory Award should be made. In others, the Tribunal may conclude that the dismissal would have occurred in any event. This may result in a small additional Compensatory Award only to take account of any additional period for which the employee would have been employed had proper procedures been carried out. In other circumstances it may be impossible to make a determination one way or the other. It is in those cases that the Tribunal must make a percentage assessment of the likelihood that the employee would have been retained.

44.5 ACAS Code:

S207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code") provide that if it appears to the Tribunal that the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, the employer or the employee has failed to comply with that Code in relation to that matter, and that failure was unreasonable, the Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase or decrease the Compensatory Award by no more than 25%.

Submissions

Respondent

45. Mrs. Beattie relies on her written Skeleton Argument.

46. She submits that the Claimant was not dismissed on 16 April:

46.1 TW's words on 16 April "*I want you to clear your desk*..." were not a communication of an unequivocal intention to dismiss the Claimant.

46.2 Mrs. Beattie accepts that the test is not the intention of the speaker but rather how the words would have been understood by a reasonable listener in light of all the surrounding circumstances (***Martin v Yeoman*** and ***Sandle v Adecco*** para.26).
The Claimant was not a reasonable listener given his unreasonable and aggressive conduct towards TW on 13 April and at the meeting on 16 April.

46.3 In order to find that there was an implied dismissal by conduct, that conduct has to be "*inconsistent with the continuation of the employment contract and in circumstances where there were no other contraindication*" (para. 40 ***Sandle***).

46.4 "*Context is everything*" (para 42. ***Sandle)*** and the Claimant was aware that:

(i) he was to attend Oxford Street to carry out a stock take;

(ii) DW was to cover his duties at JW Estate whilst he was at Oxford Street;

(iii) DW no longer had a desk at JW Estate and would be sitting at the Claimant's desk whilst he was at Oxford Street;
But the Claimant did not wait until TW finished his sentence and put his keys on the desk, cleared his own desk and walked out.

46.5 In the alternative, if TW's words were an unequivocal communication of dismissal, the Claimant was not dismissed on 16 April as those words were used "in the heat of the moment" and withdrawn before any decisive action could be taken (***Martin v Yeoman Aggregates***). The surrounding circumstances must be considered (***Martin*** page 4). TW's words did not have the effect of a dismissal as the Respondent continued to treat the Claimant as an employee after 16 April 2018:

(i) on the same day [16 April] TW emailed the Claimant to invite him to another meeting thereby continuing to treat him as an employee [page 50];

(ii) the Claimant attended another meeting thereby indicating that he considered himself to be an employee [page 55];

(iii) on 18 April 2018, TW called the Claimant and told him he had not been dismissed and told him to attend work on 20 April 2018;

(iv) the Respondent invited the Claimant to attend a disciplinary hearing [page 68] which the Claimant attended;

(v) the Respondent issued the Claimant with a "line in the sand" letter following the disciplinary hearing;

(vi) the Respondent then took the Claimant through a disciplinary procedure for his continued unauthorised absence and paid the Claimant until 22 May 2018;

(vii) the Respondent held a further disciplinary hearing in the Claimant's absence on 6 June and he was then dismissed summarily.

47. If the Claimant was dismissed on 16 April:

47.1 He contributed 100% to his dismissal by his conduct on 13 and 16 April 2018.

47.2 He has failed to mitigate his losses by unreasonably refusing reinstatement having "*shut his mind*" to a reasonable assessment as to whether or not he should accept or refuse (***Martin*** page 5). The Claimant's failure to engage reasonably with the Respondent after 16 April and informing them on numerous occasions he had contacted ACAS and intended to initiate an unfair dismissal claim shows he "shut his mind" to returning.

48. Mrs Beattie submits that the Claimant was dismissed on 6 June 2018 by reason of his conduct, specifically his unauthorised absence and refusal to attend an investigation meeting.
48.1 The ***Burchell*** test is met – the Respondent had a reasonable and genuine belief in the Claimant's misconduct based on a reasonable investigation.
48.2 This was gross misconduct as set out in the disciplinary procedure [page 32].
48.3 Dismissal was within the band of reasonable responses and fair in all the circumstances (s98(4) ERA).
48.4 If the dismissal on 6 June 2018 was unfair:
(i) The Claimant contributed 100% to his dismissal by not attending work and not attending meetings he was invited to.
(ii) If the dismissal was unfair procedurally, the Claimant would have been dismissed on the same date in any event and compensation should be reduced by 100%
(iii) There should be no Acas uplift as the Respondent complied with the Acas code; on the other hand, the Claimant did not appeal so compensation should be reduced by 25%.

Claimant's submissions
49. The Claimant says he was unfairly dismissed on 16 April 2018.

50. With regard to events on the morning of 13 April:
50.1 There were no allegations that he had been aggressive, only that he had embarrassed TW. He did not raise his voice. There were no threats or name calling.
50.2 He swore out of frustration following provocation by TW. The fact that the Respondent was shocked that he swore shows he must have been provoked.
50.3 The Respondent accepts that engineers swear and the disciplinary procedure says precedent should be considered [page 31]. The disciplinary procedure applies to all staff.
50.4 This incident was blown up out of all proportion and he believes the situation was engineered to avoid making him redundant.

51. At the meeting on 16 April:
51.1 He was not aggressive (as confirmed by DB).
51.2 This was not a "heat of the moment" dismissal. TW spoke to NW over the weekend and then met with NW and DB prior to the meeting with the Claimant on 16 April.
51.3 He heard the words "*totally unforgiveable*" and "*I want you to clear your desk"* then silence (as DB confirms in his witness statement).
51.4 He was not called back to the office. DB agreed he would be paid monies in lieu of notice and that he could dispose of his uniform.

52. The exchange of text messages between him and DB show he believed he had been dismissed.

53. The email from TW later on 16 April [page 50] refers to his "*performance and behaviour*" being reviewed and that his "*future contract*" would then be considered. TW concluded

that his failure to attend a meeting on 19 April would be regarded as "*gross misconduct again*". So it was clear that TW had decided on 16 April that he had been guilty of misconduct on 13 April and had then dismissed him.

54. The Respondent first suggested that he had resigned on 16 April only about a month later. But as DB confirmed he said nothing on 16 April to indicate he was resigning.

55. After the 16 April, he engaged with the Respondent to some extent out of courtesy and to hopefully clear the air but having got nowhere he consulted Acas

56. He did not return to work for the Respondent because he felt that he was being set up to fail and had lost all trust and confidence in the Respondent.

Conclusions

57. Applying the relevant law to my findings of fact and having considered together all the circumstances of the case, I have concluded that the Claimant was unfairly dismissed.

58. I have concluded that the Claimant was dismissed on 16 April 2018 for the following reasons:

58.1 I accept that TW used ambiguous words on 16 April, specifically the words "*clear your desk"* and I have reminded myself that the test as to whether ambiguous words amount to a dismissal is an objective one.

58.2 I have taken into account all the events preceding and subsequent to 16 April:

(i) These words were not spoken in a vacuum but in the context of a heated altercation between the Claimant and TW; TW had made it clear at the end of the day on 13 April that he was angry and would be dealing with the matter on 16 April when he had had a chance to talk to NW and DB.

(ii) Immediately before instructing the Claimant to clear his desk, he told the Claimant that his conduct on 13 April was "*totally unforgiveable*". The obvious and ordinary meaning of these words is that TW had not and would not forgive the Claimant.

(iii) Immediately after this, the Claimant clarified with TW whether he was required to clear his desk straight away and TW confirmed that he was; the Claimant also asked if he was free to go and TW said that he was [TW's statement provided as part of the investigation [pages 65-66].

(iv) Neither TW nor DB made any comment when the Claimant handed over his keys.

(v) DB confirmed to the Claimant that he would receive a month's money.

(vi) When the Claimant asked about his uniform, DB said "*burn it for all I care*"

58.3 In light of these circumstances, the words are not in fact ambiguous but I have in any event gone on to ask how a reasonable employee would have understood them in the circumstances. I am entirely satisfied that a reasonable employee in these circumstances would have understood these words to mean that he or she was being dismissed. The fact that the Claimant knew he would be required to attend Oxford Street at some point to carry out a stocktake barely registers as relevant.

58.4 I do not agree with Mrs. Beattie that TW said these words in the heat of the moment. He may well have still been angry on 16 April but this is not the same thing. The incident on 13 April happened before 8.00 am, 3 full days before the meeting on 16 April.

58.5 As this was not a "heat of the moment" dismissal, the notice to terminate could only be withdrawn by agreement with the Claimant.

(i) The Claimant did not at any point expressly agree.

(ii) I accept that he attended meetings on 23 April and 2 May but he did so in the context of having made it very clear that he was maintaining that he had been dismissed on 16 April. I also accept that he accepted payment after 16 April until 22 May. However, on balance I find that agreement cannot be inferred from his conduct given his repeated assertion that he had been dismissed on 16 April.

59. I have then gone on to consider the fairness of the Claimant's dismissal on 16 April.

60. The Respondent has shown a potentially fair reason for the Claimant's dismissal, specifically conduct. I do not accept that his dismissal was engineered to avoid a redundancy as the Claimant has not proved this and this is based purely on his speculation.

61. However, I have concluded that the Respondent acted unreasonably in treating that reason as a sufficient reason for dismissing the Claimant:

61.1 I accept that TW had a genuine belief that the Claimant was guilty of misconduct and had reasonable grounds upon which to sustain that belief having witnessed that conduct first hand. However, at the stage at which that belief was formed TW had not carried out as much investigation into the matter as was reasonable in the circumstances. There had in fact been no investigation at all.

61.2 The procedure followed did not fall within the range of reasonable responses open to a reasonable employer. Not only was there no investigation, but the Claimant was not told that the meeting on 16 April was in effect a disciplinary hearing or advised of his right to be accompanied. He was ambushed and presented with a fait accompli.

61.3 The decision to dismiss did not fall within the range of reasonable responses open to a reasonable employer in the same circumstances. To find otherwise would be perverse given that the Respondent itself ultimately concluded that the Claimant's conduct on 13 April merited only a "line in the sand" letter.

62. The Claimant's dismissal was therefore unfair and his claim of unfair dismissal succeeds.

Compensation for unfair dismissal (see Annex A)

63. Basic Award:

63.1 The starting point is the statutory calculation. As at the date of termination, the Claimant was aged 48 years and he had two complete years service. The multiplier is therefore 3. His gross weekly pay was £403.61; 3 x £403.61 = £1,210.83.

63.2 Mitigation, ***Polkey*** and the Acas code do not apply.

63.3 I have then considered whether it is just and equitable to reduce the Basic Award on the basis the Claimant contributed to his own dismissal by his conduct (s122(2) ERA).

Unlike the Compensatory Award, I am not obliged to reduce the Basic Award. Mrs. Beattie submits the Claimant contributed 100% to his own dismissal. I disagree. I have found that he was to some extent culpable for the reasons explained above (para. 40) and have concluded the Claimant contributed 25% to his own dismissal. This then reduces the Basic Award to **£908.13.**

64. Compensatory Award:

64.1 The Claimant is entitled to a Compensatory Award:

(i) Immediate loss of net earnings suffered from 16 April 2018 to the date of the hearing (6 March 2020) (97 weeks):
The Claimant found new employment during the period January to September 2019. He has not provided details of how much he earned during this period and as the onus was on him to do so, I have discounted this period of 39 weeks leaving a period of loss of 58 weeks. Adopting the Claimant's weekly net figure [page 27] of £334.57, this produces a figure of £19,405.06 (£334.57 x 58).

(ii) Given the significant length of time between the 16 April 2018 and 6 March 2020, I have concluded it is not just and equitable in all the circumstances to award any additional future loss of earnings.

(iii) I am awarding **£350.00** in respect of loss of statutory rights. This increases the Compensatory Award to £19,755.06

64.2 From this figure, the Claimant must give credit for £1,806.57 he received from the Respondent (on a net basis) during the period 16 April to 22 May 2018. This leaves a figure of £17,948.49.

64.3 Mitigation
The Respondent has not taken issue with the efforts the Claimant had made to mitigate his loss to date other than with regard to his refusal to accept the Respondent's offer of reinstatement/reengagement. Taking into account all the circumstances of the case including the Claimant's subjective reasons for not accepting the offer, I have concluded that his refusal was reasonable. I accept that the Claimant had a well founded belief that there was a breach of the implied duty of trust and confidence. The meeting on 16 April completely undermined his trust and confidence in the Respondent as his employer going forward. This was a repudiatory breach of the implied term of trust and confidence which was compounded by the Respondent's subsequent actions in retrospectively describing the meeting on 16 April as a disciplinary hearing and then subjecting the Claimant to a further convoluted disciplinary process rather than admitting that he had been dismissed and making genuine attempts to find a resolution.

64.4 I am making no deduction in accordance with ***Polkey*** given that the Respondent's own view was that the Claimant's conduct on 13 April did not merit a formal disciplinary sanction.

64.5 The Respondent completely failed in many respects to follow the Acas code before dismissing the Claimant summarily on 16 April; there was no investigation or a formal disciplinary hearing. Accordingly an uplift of 25% (£4,487.12) is justified producing a figure of £22,435.61.

64.6 For the same reasons as set out above (para. 63.3) a 25% reduction (i.e. £5,608.90) is appropriate in respect of the Claimant's contribution to his dismissal which brings the figure down to **£16,826.71.**

65. The Basic Award of £908.13 and the sum of £350.00 awarded for loss of statutory rights are to be paid by the Respondent to the Claimant forthwith.

66. With regard to the balance of the Compensatory Award of £16,476.71, in accordance with the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("Recoupment Regulations") this is subject to recoupment whereby the state recovers from the Respondent the value of state benefits paid to the Claimant (see Annex B). As the Claimant has claimed Universal Credit on more than one occasion between 16 April and the date of hearing ("the Prescribed Period"), the Respondent is required to not pay the Claimant the balance until the DWP recoups from the Respondent the value of any benefits paid to the Claimant. Once the DWP has recouped the benefits from the Respondent, the balance must then be immediately paid by the Respondent to the Claimant.

67. For the purposes of rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues relevant to the claim are at paragraph 3 and all of these issues have been determined; the findings of fact relevant to these issues are at paragraphs 7 to 40; a statement of the applicable law is at paragraphs 41 to 44; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 57 to 66.

Employment Judge Mason
13 March 2020

ANNEX A

Unfair dismissal Compensation

	£	**£**	**£**
Basic Award			
Age at dismissal: 48 Length of service: 2 complete years Multiplier: 3 Effective Date of Termination: 16 April 2018 Weekly rate of pay (gross): £403.61			
3 x £403.61	1,210.83		
Less: 25% contribution	302.70		
Total Basic Award		908.13	
Compensatory Award			
From 16 April 2018 to 6 March 2020 58 weeks (97 less 39 weeks) at £334.57	19,405.06		
Add: loss of statutory rights	350.00		
	19,755.06		
Less: Monies from Respondent	(1,806.57)		
	17,948.49		
Add: ACAS code 25% uplift	4,487.12		
	22,435.61		
Less 25% contribution	(5 608.90)		
Total Compensatory Award		16,826.71	
Total compensation for unfair dismissal:			**£17,734.84**

ANNEX B

Claimant		**Respondent**
Mr M. Myles	**v**	**Invicta Gas Ltd**

ANNEX TO THE JUDGMENT OF THE TRIBUNAL

Statement Relating to the Recoupment of Unemployment etc Benefit

1. The following particulars are given pursuant to the Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations 1996, SI 1996 No 2349.

(a) Monetary award: £17,734.84

(b) Prescribed element: £16,476.71

(c) Period to which (b) relates: 16.4.2018 to 6 March 2020

(d) Excess of (a) over (b) £1,258.13

The Claimant may not be entitled to the whole monetary award. Only (d) is payable forthwith; (b) is the amount awarded for loss of earnings during the period under (c) without any allowance for unemployment benefit or supplementary benefit received by the Claimant in respect of that period; (b) is not payable until the Department of Employment has served a notice (called a Recoupment Notice) on the Respondent to pay the whole or a part of (b) to the Department (which it may do in order to obtain repayment of unemployment or social security benefit paid to the Claimant in respect of that period) or informs the Respondent in writing that no such notice will be served. The sum named in the Recoupment Notice, which will not exceed (b), will be payable to the Department. The balance of (b), or the whole of it if notice is given that no Recoupment Notice will be served, is then payable to the Claimant.

2. The Recoupment Notice must be served within the period of 21 days after the conclusion of the hearing or 9 days after the decision is sent to the parties, (whichever is the later), or as soon as practicable thereafter, when the decision is given orally at the hearing. When the decision is reserved the notice must be sent within a period of 21 days after the date on which the decision is sent to the parties, or as soon as practicable thereafter.

3. The Claimant will receive a copy of the Recoupment Notice and should inform the Department of Employment in writing within 21 days if the amount claimed is disputed. The tribunal cannot decide that question and the Respondent, after paying the amount under (d) and the balance (if any) under (b), will have no further liability to the Claimant, but the sum claimed in a Recoupment Notice is due from the Respondent as a debt to the Department whatever may have been paid to the Claimant and regardless of any dispute between the Claimant and the Department.