EMPLOYMENT TRIBUNALS

Claimant: Mr N O'Hare

Respondent: Q D Services Limited

Heard at: Liverpool **On:** 6 February 2020
17 March 2020
15 June 2020
(in Chambers)

Before: Employment Judge Benson
(sitting alone)

REPRESENTATION:

Claimant: Ms M Kponou - Solicitor
Respondent: Ms J Ferrario - Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed. This claim succeeds.

2. The respondent breached the claimant's contract by failing to pay the employer pension contributions which it had agreed. This claim succeeds.

2. The respondent did not fail to comply with the claimant's right to be accompanied at a disciplinary hearing. This claim fails and is dismissed.

3. The respondent did not breach the claimant's contract of employment by failing to provide him with notice. This claim fails and is dismissed.

4. The claimant did not have a fixed term contract. His claim of breach of contract therefore fails and is dismissed.

5. The claims of unlawful deductions from pay in respect of holiday pay and a failure to provide an itemised pay statement are withdrawn and are dismissed.

REASONS

Claims and Issues

1. The claims upon which I must decide are as follows:

   (1) Unfair dismissal

   (a) The claimant was an apprentice with the respondent. He claims he had a common law apprenticeship agreement. As such he claims he cannot lawfully be dismissed other than in very specific circumstances, which it is accepted do not apply in this case. In the alternative, if his contract is an approved apprenticeship agreement, that his dismissal was unfair contrary to section 98 of the Employment Rights Act 1996 ('ERA').

   (b) The respondent disputes that the claimant was employed under a common law apprenticeship agreement. It contends that it had the right to dismiss the claimant and that the reason for his dismissal was misconduct, or in the alternative, some other substantial reason. It says that a fair procedure was followed and that the dismissal was fair in all the circumstances. If it is found to have unfairly dismissed the claimant, it says that any award should be reduced under the Polkey principle and on the ground that the claimant by his conduct contributed to his own dismissal.

   (2) Breach of contract in respect of:

   (a) Pension contributions: The claimant says that he opted to join the auto-enrolment pension scheme but the respondent did not make its contributions. The respondent does not dispute the pension shortfall but says that because the claimant was dismissed he is not entitled to them.

   (b) Notice period;

   (c) Balance of a fixed term contract: The claimant relies upon his having a common law contract of apprenticeship and claims damages for the balance of his fixed term contract from 12 July 2019 to 30 June 2020.

   (3) A failure to be accompanied at a disciplinary hearing.

   The claimant says that the hearing on 12 July was a disciplinary hearing and he was unreasonably refused the right to be accompanied.

2. The claimant's claims of unpaid holiday pay and of a failure to provide an itemised pay statement were withdrawn at the hearing and are dismissed.

Evidence and Submissions

3. I heard evidence from the claimant and a statement was provided by Mr C O'Hare, the claimant's father. The respondent's witnesses were Mr Neil Johnstone and Mr Tony Colford, both directors and the owners of the respondent business. I was referred to a joint bundle of documents and additional documents were submitted during the hearing.

4. Many facts were agreed, however, where there were disputes on the evidence I have considered the oral evidence given by the witnesses together with documentary evidence to which I was referred.

5. Both Ms Kponou and Ms Ferrario provided written submissions supplemented by oral representations, for which I am grateful.

6. I have considered the authorities to which I was referred and which are relevant to the issues which I have to decide.

Findings of Fact

<u>The Claimant's Contract</u>

7. The respondent is a small business based in Bootle, Merseyside, specialising in control panel manufacture and heating and electrical maintenance. Its main source of work is schools across the North West of England. The business has two directors, Mr Johnstone and Mr Colford; two electricians (Neil Hugo and Chris Hudson) and seven other staff (comprising heating engineers, plumbing engineers and office staff). They have the assistance of an HR provider, Mentor, but do not have their own internal HR expertise.

8. On 30 May 2017, following an interview with Mr Johnstone and Mr Colford, the claimant was given a trial with the respondent to be considered for a role as an apprentice electrician. He successfully completed that trial and from 12 June 2017 started work on a casual basis with the respondent. From 30 June 2017, which was the first date which the claimant could legally be taken on as an apprentice, he began work as an apprentice electrician.

9. The respondent intended that the claimant be taken on under an apprenticeship agreement within the meaning of the Apprenticeship, Skills, Children and Learning Act 2009 ("ASCL"). In England, such agreement is referred to as an English Approved Apprenticeship.

10. On 30 June the claimant was sent to Hugh Baird College by the respondent and he was enrolled on the practical training course. That day he signed a tripartite training agreement between the respondent, Hugh Baird College and the claimant, which the respondent later signed. The claimant was later provided with a copy of this agreement.

11. The claimant was also provided with a written contract by the respondent in early July 2017. That contract confirmed:

    (a) The claimant was employed as an apprentice electrical engineer;

(b) That the agreement was entered into in connection with a qualifying apprenticeship framework under which he was being trained;

(c) That the agreement was governed by the laws of England and Wales and that this was an apprenticeship agreement within the meaning of the ASCL 2009;

(d) That the contract was a contract of employment and not a contract of apprenticeship;

(e) That it was for a fixed term and would terminate in June 2020;

(f) That either the respondent or the claimant could terminate the employment at any time before the expiry of the fixed term. If the respondent did so, then the claimant was entitled to notice of one week per completed year of service up to a maximum of 12 weeks;

(g) That the claimant would regularly attend at Hugh Baird College for training;

(h) That if the claimant failed to maintain the necessary standards of performance or conduct, the respondent may be required to take disciplinary action which may include dismissal;

(i) That the respondent would comply with the employer pension duties applicable to his employment under Part 1 of the Pensions Act 2008.

12. The respondent's disciplinary policy and procedure has examples of acts that are considered to amount to gross misconduct by the respondent. These include:

(a) Unacceptable use of obscene or abusive language;

(b) Serious insubordination;

(c) Bringing the company into disrepute;

(d) Refusal to carry out reasonable management instructions;

(e) Serious breach of health and safety policies and procedures;

(f) Smoking on a Company or a third party's premises.

13. The respondent's conduct and standards policy has a number of rules which apply to employees, including the claimant. These include:

(a) An expectation that the employees will arrive at work promptly ready to start at the contracted starting time;

(b) Complying with all reasonable management instructions;

(c) Ensuring the maintenance of acceptable standards of politeness;

(d) Taking all necessary steps to safeguard the company's public image and preserve positive relationships with all persons and organisations connected with the company;

(e) Keeping mobile phones off or on silent during normal working hours.

14. The claimant had queries about the contract and it was agreed that he would take it home to read through properly. When he returned it, he raised that it had been backdated (in that it had 30 June as the start date) and that the claimant's name had been misspelt. Mr Colford confirmed that he would sort that out. An amended contract was provided to the claimant on 18 August 2017 and at the respondent's request it was signed that day. The claimant did not receive a further copy but does not dispute the terms of the contract nor that the contract which has been produced for this hearing is that which he signed.

15. As an apprentice, the claimant was assigned to work with more experienced electricians. At times he worked with Neil Johnstone with whom he got on well. His relationship with Tony Colford was less friendly and the claimant felt that Mr Colford had less patience with him.

16. During one light-hearted exchange with Mr Johnstone by text message, when there was an issue with some work done on a fuse box, Mr Johnstone messaged the claimant saying, "Remember shit always flows down". This was meant and was taken by the claimant as a joke and it referred to any problems always being blamed on the apprentice.

17. Other than Mr Colford and Mr Johnstone the other engineers who the claimant was put to work with were Neil Hugo and Chris Hudson. At times he worked with the plumbing and heating engineers, in view of difficulties that he had working with Mr Hugo and Mr Hudson.

18. From early on in the claimant's employment, the respondent had problems with the claimant's attitude, and lack of respect for colleagues and customers.

<u>Complaints about the claimant</u>

19. Complaints were received from a number of the respondent's customers. These included:

    a. from Sue Slater, the former Kitchen manager Litherland Moss School, that the claimant was not welcome in her kitchen due to his attitude when working on a job in the school's kitchen;

    b. Mr Jim Fessey, a former school Business Manager at Litherland High School who complained that when he asked the claimant if he was ready for work, the claimant replied that he "can't be arsed".

    c. In January 2018, from Gemma Parker, who was the school Business Manager at Merefield School. She stated that complaints had been raised about the claimant's behaviour whilst he was working on their school site and she requested that the claimant not return to work at

their site. The details of that complaint were set out in a letter which was provided to the respondent in preparation for this hearing. The letter was sent in November 2019, though the letter itself had been backdated to 22 January 2018 which was when Ms Parker spoke with Mr Johnstone. An issue was raised during the hearing as to whether there was an intention by the respondent and/or Ms Parker to mislead the Tribunal in view of the letter being backdated, however I accept that was not Ms Parker's intention and that when the respondent sought evidence from her in preparation for this hearing, she put the date of the letter as at the date she had spoken to the respondent. What is relevant are the complaints which Ms Parker made about the claimant as at January 2018. Her concerns include the claimant chatting to his friends on his mobile phone, taking pictures of the school notice board, and ignoring instructions from the school staff not to do this as it was in breach of the school's GDPR health and safety and safeguarding processes. She was also concerned about the claimant's use of inappropriate language, and openly talking about his weekend behaviour, including the use of illegal drugs. Further, him providing a flippant response and failing to stop when asked by the school staff to do so. She considered that he was a danger to pupils and staff and that he was not welcome back in the school.

d. In June 2018, from the Site Manager at Bedford Primary School, another customer of the respondent. Mr Jones, the Site Manager, told the respondent that there had been an incident on the site that day between the claimant and Neil Hugo. When Mr Colford met with Mr Jones later that day, he told Mr Colford that he had witnessed the claimant shouting and acting aggressively towards Neil Hugo whilst they were working on site. He understood that from his perspective the claimant had reacted aggressively due to being told to do something by Mr Hugo.

e. On 26 June 2018, the claimant was working at another of the respondent's customers, Our Lady of Compassion School, when he spat on the floor in front of Dean Howton, who was the site manager. Mr Howton asked him to clean his saliva up and the claimant responded rudely. Mr Johnstone was on site that day at the school and Mr Howton informed him of what had happened. He spoke to the claimant and made it clear to him that his behaviour was completely unacceptable, particularly with it being at a customer site and a school with children around.

20. In approximately November 2018 Mr Hugo raised various complaints with Mr Johnstone about the claimant's behaviour and attitude and said that he no longer wanted to work with him. He was asked to put his complaints in writing and he did so by way of an email of 19 November 2018. Those complaints included the manner in which the claimant spoke to senior engineers, his persistent swearing on client sites and towards Mr Hugo, his disregard of instructions on work, his arguing with senior engineers in front of customers, his needlessly talking to colleagues/customers, and not working, his use of the mobile phone on customer premises, his lateness for pre-

arranged times to meet, his dismissive manner towards senior engineers and lack of respect and his failure to comply with data protection.

21. Following this complaint, Mr Johnstone spoke with the claimant. The claimant accepted in cross examination that Mr Johnstone had spoken to him on occasions during the course of his employment and told him to stop behaving like a child and that he should behave on site, and further that he should have respect for his colleagues. Neither Mr Johnstone nor the claimant could be specific about the dates when these conversations occurred but I accept that during these conversations, Mr Johnstone did not go into detail about the complaints that he had received from the customers, or the specific complaints mentioned by Mr Hugo in his email. Mr Johnstone wanted to encourage the claimant in getting back onto the right track, and sought to do this by encouragement rather than discipline. The claimant in cross examination however accepted that having had these conversations with Mr Johnstone, he knew that he needed to act in a more mature way.

22. In January 2019, Mr Colford was speaking with an engineer, Mr Morris, who worked with Mr Hugo and the claimant on a pool job for one of their customers. When talking about another matter, the engineer commented about the claimant and his behaviour, he told Mr Colford that the claimant was on the phone the whole time whilst Mr Morris was trying to speak with him about the job, and that his behaviour towards Mr Hugo had surprised him, in that when Mr Hugo had asked the claimant to get something from the van, the claimant had told him to “fuck off and get it himself”, while he sat down with his feet up whilst on the phone.

23. On 28 March 2019 the claimant was due to be assessed by his training officer, Mr Bob Hibbert, from North West Training Council. The normal process would be for Mr Hibbert to meet with the claimant, and then meet with the claimant and his supervisor, Mr Hugo, who would report on the claimant's progress. On that date Mr Hugo advised the claimant that he should come and get him when Mr Hibbert attended.

24. When Mr Hibbert attended the site, he met with the claimant and then asked to speak with Mr Hugo. The claimant contacted Mr Hugo but he told him he was busy, and therefore Mr Hibbert completed the form, stating that the respondent had no comments to make. Although there was some suggestion at a later date that the claimant had fraudulently completed the form, the respondent accepts that was not the case.

25. In spring 2019, Mr Hugo and the claimant were working at Lydiate School. A car was parked over a grid they needed to access so Mr Hugo told the claimant to go to the school reception and ask them to send out a message for the car to be removed. Mr Hugo told the respondent that the claimant bragged to him that he went to the reception and told the receptionist that car registration “NE1 4ABJ” needed moving. The claimant in this hearing alleged that he had not told the receptionist the full registration but rather that he had started saying “NE1” and then the receptionist had laughed. He had then reported this back to Mr Hugo. Whatever was said by the claimant to the receptionist, the respondent believed that the claimant had provided the full

registration and told the claimant that he was not to go back to the Lydiate School reception again.

26. On 25 April 2019 Mr Johnstone contacted Neil Hugo again to see whether the issues which he had with the claimant back in November 2018 had been resolved. Mr Hugo responded by way of email on 29 April 2019 with his comments on each of the areas which were of concern, and confirming that in many cases not only had it not improved, it had got worse. Mr Hugo gave examples of the claimant's attitude and behaviour, including his argumentative manner which had got worse, and when asking to use a piece of equipment, he was told by Mr Hugo that Mr Hugo was about to use it but the claimant took it, used it anyway, and when he was told that he should have waited, he argued with Mr Hugo. In respect of his dismissive manner when Mr Hugo tried to give help, he explained that the claimant says he knows how to do it, struggles with the task and then makes excuses as to why the task is not able to be completed. When asked why the task is not completed, he commented "don't know", "couldn't be arsed" or "nothing to do with me". In respect of his lack of experience, Mr Hugo stated that there was no improvement and that he did not respect other people's positions and experiences within the company.

27. Mr Johnstone spoke with the other electrical engineer, Mr Chris Hudson, on 26 April, and asked for his experiences with the claimant. Mr Hudson emailed Mr Colford with his concerns and these included, over the previous few weeks, the claimant's attitude towards Mr Hudson and more senior engineers, including arguing back, sulking, on the phone during working hours on customers' premises, his disregard of instructions on work, his attitude and manner to customers' staff, his lack of tools for the job and him not improving on the above despite being constantly told of the issues.

<u>The disciplinary hearing on 8 May</u>

28. On 2 May 2019, Mr Johnstone spoke with the claimant about the various complaints that he had received from the two electrical engineers and he wrote to the claimant setting out all of the misconduct issues, and requiring him to attend a disciplinary hearing on 8 May.

29. The letter referred to all of the issues of concern to the respondent (and later discussed at the disciplinary hearing), and included the extracts from the emails from Mr Hudson and Mr Hugo and advised that the issues raised, including good timekeeping and failing to maintain instructions by experienced engineers which could result in unsafe situations, was viewed by the company to be serious misconduct. He was warned that the outcome of the meeting may be that he was issued with a disciplinary warning and he was provided with the opportunity to be accompanied by a work colleague or trade union official.

30. Prior to the disciplinary hearing, the claimant spent some time preparing his response to each of the issues which were raised as concerns in the emails from Mr Hugo and Mr Hudson. He also prepared an opening and closing statement.

31. The disciplinary hearing was conducted by Mr Johnstone. Mr Colford was present and took notes. The claimant chose not to be accompanied by a trade union official or colleague. He had asked that his father attend, but this had been rejected. Minutes were taken of that meeting but these were not typed up until September 2019, and they are very much in the form of notes as opposed to verbatim minutes of what was said.

32. At the meeting, the claimant handed in his opening and closing statements which were short statements which did not provide any detail upon the allegations which had been made, however he also read from a prepared statement which gave his detailed responses to the complaints. In his written response, to which I have been referred, the claimant disputed many of the allegations, including:

    - that he disregarded instructions or work tasks;
    - that he did not believe that he had inappropriate interactions with clients or colleagues, and he referred to Neil Hugo having worse interactions;
    - that he was dismissive when help was given;
    - that he had a lack of respect towards management, senior engineers or co-workers;
    - that he failed to comply with data protection;
    - that he ever used the words “don’t know” or “couldn’t be arsed” or “nothing to do with me” when help was given;
    - that his attitude and manner in the way in which he spoke to caretakers and staff or clients was anything other than friendly and polite;
    - that his alleged “I know better” attitude was simply him asking questions to gain an improved knowledge or to provide suggestions from his experience as to how to make the job easier.

33. In respect of other allegations, the claimant alleged that the engineers, Mr Hugo and Mr Hudson, either did the same or were to blame.

34. In respect of his persistent swearing on client sites and attitude towards Mr Hugo, the claimant accepted that when working alone or together when things were going wrong with the job there could be swearing going on, and he also alleged that he suffered injuries while on site which had resulted in him swearing in pain.

35. In respect of inappropriate interactions, he alleged that Mr Hugo had behaved in inappropriate ways with other people including the topics of his conversation.

36. Further:

- in respect of the excessive use of his mobile phone, the claimant questioned why his personal mobile was rung for non-personal reasons and that he had not given permission for that, and that Mr Hugo had put him in danger by using his phone when he was in the van, which he had raised as a complaint;

- that the lateness to pre-arranged pickups was Mr Hugo's fault;

- that in respect of his dismissive manner when Mr Hugo tried to give him help was because Mr Hugo was patronising towards him;

- that Mr Hugo was being petty towards him when he wanted to use the tools first.

37. The claimant alleged that Mr Hudson had sworn at him when he tried to offer advice; that Mr Hudson constantly drove and texted on the phone and that the claimant carrying his tool bag from his house to the train station would cause him an injury.

38. The claimant's statement also questioned why, between the original concerns of Mr Hugo in November 2018 and his later email of April 2019, he had not been told about these things so that he could have improved. He also in his statement asked for more details of these allegations.

39. Mr Colford's notes which were eventually typed up in September 2019 noted the responses which the claimant gave to specific questions which were asked relating to these matters. In respect of:

    a. the way he spoke to senior engineers - the claimant's response was that there were slight arguments when working under pressure, and working with someone for a long length of time "you're bound to have arguments".

    b. the persistent swearing on client sites, (the respondent noted that he had been warned about it before) - he admitted to swearing and he "tried to calm it the best he can"; he swears when things are not going right or "if you got an electric shock, for example".

    c. disregarding instructions about work tasks and the reason he did not do as he was asked - he blamed other engineers for getting a shock, and said that he did what he was told and if he was told to do something he did it.

    d. his argumentative manner when instructed to do different work tasks – he said that he did not argue, it was the way other engineers took it. He offered suggestions, such as "why don't we do it this way?".

    e. inappropriate interaction with clients and colleagues, the claimant was asked why he walked away to talk to others - the claimant asked for an example and Mr Johnstone referred to the incident involving the car registration number. The claimant's response was that this was a joke between him and Mr Hugo.

f. excessive phone use, and being asked on several occasions to put it away - he said that he had been asked to use his personal phone to take pictures and that other engineers excessively used their phones and they should be showing him the correct way. The claimant was given a specific example of him being asked to put his phone away when someone was up a ladder - the claimant did not give any response to this at the hearing.

g. being late for pre-arranged times (examples were given) - the claimant denied that he was ever late. He referred to getting texts a short time before the meeting time, and also sometimes not receiving a text. On one occasion, he said that he had seen Mr Hugo driving away and that he had not waited for him.

h. his lateness for college - he accused the college of sometimes not marking him in.

i. his dismissive manner when guidance or help was offered, including the comments "I don't know", "couldn't be arsed", "nothing to do with me", he was given an example from Mr Hugo that when working with him he would never complete a small job and would move onto another, leaving the original. The claimant said that if he had been shown how to do it he would not need showing again and asked why this had not been brought up before. Mr Johnstone said that it had been brought up verbally and pointed out the concerns when the original email came in, and the claimant acknowledged this.

j. his lack of respect for other people's positions and experience within the company - the claimant referred to someone telling him that a cable was the wrong voltage and him receiving a shock, and that he did respect someone else's opinion and he was the only one who was able to tell Mr Johnstone that he did or did not respect them.

k. the incident where the college assessor attended at site, and the claimant was asked to bring Mr Hugo to meet him – the claimant produced a statement from the assessor which confirmed that it was the assessor who had signed on behalf of Mr Hugo. The claimant was asked why he did not take the assessor to reception and sign him in and take him to the boiler room to meet Mr Hugo, and the claimant said that it was up to the assessor.

40. Having heard from the claimant, Mr Johnstone wanted to look into a few of the matters the claimant had raised, including the letter from the college assessor, and adjourned the meeting. He confirmed he would get back to the claimant.

41. On 11 July 2019, the respondent received an email from the Senior Mechanical and Electrical Services Engineer at Sefton Metropolitan Borough Council concerning a complaint from the Office Manager at St John's Church of England Primary School, who was a customer of the respondent. The school complained that the respondent had been doing some work that week, and that they had been awful. She said that they had left rubbish about but more importantly screws around, with one child putting one in their mouth.

She considered that this was dangerous and she also felt that they could have been more professional, as one member of staff had to ask them to turn their radio down. They were asked to investigate. The claimant had attended that job with the plumbing engineer, Mark Boynton.

42. Following the disciplinary meeting, Mr Johnstone had asked Mr Hugo to keep a note of any issues of concern relating to the claimant. Mr Hugo had done so, and at Mr Johnstone's request he emailed them to him on 12 July. These included the following issues:

- On 21 May he had repeatedly asked the claimant to put his phone away or listen to his music through headphones.

- On 22 May the claimant was again asked to put his phone away or put his headphones on while working in the school. He had responded "why" with attitude.

- When asked to record temperatures he responded again with attitude, shaking his head saying angrily, "why, I don't see the point in that?". When Mr Hugo gave him an answer, his response was "whatever".

- He was instructed to not lock a door whilst he was working in a toilet. The claimant ignored him and re-locked the door.

- He went missing for some 20 minutes and was later found with his music playing on his phone with no headphones in. When asked to put his phone away, he said his earphones were not working properly. When asked then to turn the music off his reply was "why?".

- On 6 June the claimant was asked to collect barrier fencing from the boiler room but instead decided to collect his tools first. Mr Hugo felt that the claimant was trying to move away from where he was asked to go and instead talk to other people working in the area from a different building and to have a smoke. He felt that he was not paying attention and he was in the van on his phone when he should have been working.

- On 17 June the claimant was asked to test voltages and adjust a temperature to a kitchen supply whilst Mr Hugo was outside, communicating with him by phone. The claimant went off the phone and disappeared for a while such that it inconvenienced Mr Hugo, who had to ask him to go back and do what he was told to do.

- On 19 June the claimant had a visit from an assessor, and Mr Hugo gave an assessment to the assessor that the claimant needed to focus more on working than using his phone or talking to other people as he was easily distracted. After this the claimant became in a mood and had an attitude towards Mr Hugo.

- On 20 June the claimant went missing for ten minutes and he was found outside in a rear garden smoking and talking to Mr Boyton. When he was told off, he started to argue with Mr Hugo, who told him that he was the

person in charge, not Mr Boynton. Mr Hugo felt that the claimant had a smug look on his face.

12 July 2019

43. On 12 July, the claimant was making a drink prior to being picked up by the engineer. Mr Johnstone spoke to him about the complaint which had been received the day before from St John's Church of England Primary School. Mr Boynton was in the general office, and Mr Johnstone signalled for him to join the conversation. Mr Colford was also present. When Mr Johnstone raised the complaint with the claimant, he shrugged his shoulders dismissively. The claimant accepted that it was him playing loud music in the school via his phone but said it could have been him or Mr Boynton who left the screws on the floor. The claimant said something along the lines of "well the apprentice always gets the blame, shit falls down".

44. Mr Colford considered that this was the last straw, and faced with all of the other issues which had built up, he told the claimant that his attitude was appalling and that he should get his things from Mr Boynton's van and go as he had had enough. The claimant then left the premises.

45. The claimant gave a different version of that conversation. He states that Mr Colford and Mr Johnstone came into the workshop. Mr Colford said that the company had received another complaint. The claimant responded "right, OK" and Mr Colford said "Get your shit together, you're gone. We'll pay you for the next two weeks but we don't want to see you again."

46. I prefer the evidence of Mr Colford and Mr Johnstone. The respondent was aware of the need to hold disciplinary hearings, and I do not consider that the claimant would have been called in and dismissed in respect of the complaint without the respondent having put the allegations to him and asked for an explanation in a formal meeting. This is what they had done on 8 May, and although that had not yet been followed through, I consider that there must have been something over and above the complaint by the school which made Mr Colford react the way that he did. I accept that there was no intention by Mr Colford or Mr Johnstone prior to speaking to the claimant to dismiss the claimant that day.

47. The claimant later collected his final payslip. His dismissal was not confirmed in writing. The claimant was dismissed without notice.

48. Some of the documentation to which I have been referred is dated after the claimant's dismissal. As mentioned above, this was either collated for the purposes of this Tribunal, or unsolicited. In all circumstances, I am satisfied that it confirms the verbal complaints which were given to the respondent prior to the claimant's dismissal, rather than it being anything untoward.

Pension Issue

49. The respondent does not dispute that it had a contractual obligation to pay pension contributions towards the claimant's auto-enrolled pension. It has not

paid the full amount of those contributions. There is no good reason why they have not paid them.

Wrongful Dismissal – Findings of Fact

50. I accept that the allegations concerning the claimant's behaviour and attitude towards his colleagues and customers, details of which were given during the hearing before me and which are detailed in my findings of fact are, on the balance of probabilities, true. The nature of the complaints about the claimant from Mr Hugo, Mr Hudson, and from various customers are all very similar and show a pattern of behaviour repeated on different sites and over an 18 month period.

The Law

The Apprenticeship Issue

51. The relevant legislation is the Apprenticeships, Skills, Children and Learning Act 2009. Chapter A1 introduced approved English apprenticeships in May 2015. The meaning of an approved English apprenticeship is set out in section A1.

A1 (1) This section applies for the purposes of this Chapter.

(2) An approved English apprenticeship is an arrangement which—

(a) takes place under an approved English apprenticeship agreement, or

(b) is an alternative English apprenticeship,

and, in either case, satisfies any conditions specified in regulations made by the Secretary of State.

(3) An approved English apprenticeship agreement is an agreement which—

(a) provides for a person ("the apprentice") to work for another person for reward in an occupation for which a standard has been published under section ZA11,

(b) provides for the apprentice to receive training in order to assist the apprentice to achieve the approved standard in the work done under the agreement, and

(c) satisfies any other conditions specified in regulations made by the Secretary of State.

(4) An alternative English apprenticeship is an arrangement, under which a person works, which is of a kind described in regulations made by the Secretary of State.

(5) Regulations under subsection (4) may, for example, describe arrangements which relate to cases where a person—

(a) works otherwise than for another person;

(b) works otherwise than for reward.

(6) A person completes an approved English apprenticeship if the person achieves the approved standard while doing an approved English apprenticeship.

(7) The "approved standard", in relation to an approved English apprenticeship, means the standard which applies in relation to the work to be done under the apprenticeship (see section [F8ZA11]).]

52. Regulation 2 of the Appenticeships (Forms of Agreement) Regulations 2012 state:

Regulation 2 (1) The prescribed form of an apprenticeship agreement for the purposes of section 32(2)(b) of the [ASCL] is:

(a) A written statement of particulars of employment given to an employee for the purposes of the 1996 Act; or

(b) ….

The 1996 Act is defined as the Employment Rights Act 1996.

Unfair Dismissal

53. Section 98 of the Employment Rights Act 1996 reads as follows:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal and

(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this sub-section if it … relates to the conduct of the employee …

(3) …

(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

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

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

54. The reason or principal reason is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In Abernethy v Mott, Hay and Anderson [1974] ICR 323, Cairns LJ said, at p. 330 B-C:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

55. Conduct dismissals can be analysed using the test which originated in British Home Stores v Burchell [1980] ICR 303, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal.

56. The "Burchell test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

57. Since Burchell was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

58. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

59. If the three parts of the Burchell test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

60. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.

61. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer had

reasonable grounds for characterising the misconduct as gross misconduct. The position was explained by HHJ Eady in paragraphs 29 and 30 of Burdett v Aviva Employment Services Ltd [UKEAT/0439/13. Generally gross misconduct will require either deliberate wrongdoing or gross negligence. Even then the Tribunal must consider whether the employer acted reasonably in going on to decide that dismissal was the appropriate punishment.

62. In dismissals where the respondent pleads some other substantial reason (SOSR), the employer is required to show only that the substantial reason for dismissal was a potentially fair one. Once the reason has been established, it is then up to the tribunal to decide whether the employer acted reasonably under S.98(4) in dismissing for that reason.

63. To amount to a substantial reason to dismiss, there must be a finding that the reason could, but not necessarily does, justify dismissal.

Breach of Contract

64. Subject to certain conditions and exceptions not relevant here, the Tribunal has jurisdiction over a claim for damages or some other sum in respect of a breach of contract which arises or is outstanding on termination of employment if presented within three months of the effective date of termination (allowing for early conciliation): see Articles 3 and 7 of the Employment Tribunals (England and Wales) Extension of Jurisdiction Order 1994.

65. An employee is entitled to notice of termination in accordance with the contract (or the statutory minimum notice period under section 86 Employment Rights Act 1996 if that is longer) unless the employer establishes that the employee was guilty of gross misconduct. The measure of damages for a failure to give notice of termination is the net value of pay and other benefits during the notice period, giving credit for other sums earned in mitigation.

Unfair Dismissal Remedy

Polkey

66. There were three remedy issues which arose: a Polkey reduction, the ACAS Code of practice, and contributory fault.

67. The first arises out of the nature of a compensatory award for unfair dismissal under section 123(1) of the 1996 Act:

"(1) Subject to the provisions of this section and sections 124 and 126, 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."

68. It has been established since Polkey v A E Dayton Services Limited [1988] ICR 142 that in considering whether an employee would still have been

dismissed even if a fair procedure had been followed, there is no need for an all or nothing decision. If the Tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.

Contributory fault

69. The second is a reduction by way of contributory fault. It can apply both to the basic award and to the compensatory award by virtue of differently worded provisions in sections 122 and 123 respectively:

"Section 122 (2): Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly….

Section 123 (6): 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."

70. As to what conduct may fall within these provisions, assistance may be derived from the decision of the Court of Appeal in Nelson v BBC (No 2) [1980] ICR 110 to the effect that the statutory wording means that some reduction is only just and equitable if the conduct of the claimant was culpable or blameworthy. The Court went on to say (*per* Brandon LJ at page 121F):

"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."

ACAS Reduction

71. The third remedy issue related to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. An unreasonable failure to follow the Code by an employer can result in an increase of up to 25% in the compensatory award: section 207A Trade Union and Labour Relations (Consolidation) Act 1992. An unreasonable failure by a claimant can result in a reduction in compensation also limited to 25%.

The right to be accompanied

72. Under S.10 of the Employment Relations Act 1999 (ERelA), where a worker 'reasonably requests' to be accompanied at a 'disciplinary hearing', the employer must permit the worker to be accompanied by a 'companion'. The companion — chosen by the worker — may be a trade union representative or a fellow worker.

73. A disciplinary hearing is defined in the ERelA as a hearing that could result in:
    a. the administration of a formal warning — S.13(4)(a)
    b. the taking of some other action — S.13(4)(b)
    c. the confirmation of a warning issued or some other action taken — S.13(4)(c)

Decision and Conclusions

The Apprenticeship Issue

74. The first issue which I must decide is the nature of the apprenticeship contract upon which the claimant was employed. The claimant says it was a common law apprenticeship contract and the respondent says it was an approved apprenticeship agreement under the Apprenticeships, Skills, Children and Learning Act 2009 ('ASCL').

75. Although the claimant accepts that it was the intention of the respondent to employ him under an approved apprenticeship agreement, he contends that because it did not comply with two of the formalities under the ASCL, his agreement is a common law apprenticeship, such that the respondent cannot dismiss him in the circumstances relevant to this case. Those formalities are that in his interpretation of section 32 of the ASCL, the written apprenticeship agreement must be in place before the apprenticeship commenced on 30 June 2017 and further under Regulation 2 of the Appenticeships (Forms of Agreement) Regulations 2012, the respondent is obliged to provide him with a copy of the agreement,

76. Although Chapter 1 (which includes section 32) of the ASCL originally applied to apprenticeship agreements in England and Wales, in May 2015, the ASCL was amended to include Chapter A1. This introduced approved English Apprenticeships and replaced Chapter 1 in England. This regime was not introduced in Wales where Chapter 1 continues to apply. Chapter A1 does not have the same wording as Chapter 1. It does not state that the apprentice 'undertakes to work' for the employer under the apprenticeship agreement which is the wording relied upon by the claimant in his arguments. Although not put by the claimant, I do not consider that there is anything within Chapter A1 which specifically required that the written agreement is in place prior to the apprenticeship commencing.

77. Further, it is not a specific condition of an approved agreement within Chapter A1 that the apprentice be given a written statement of particulars of employment prior to his apprenticeship commencing, or that he be provided

with a copy of the agreement. This is because Regulation 2 the Appenticeships (Forms of Agreement) Regulations 2012 only provides the requirements of the 'prescribed form' for the purposes of section 32(2)(b) of the ASCL and no other section. In these circumstances, I find that the claimant's submissions on this point must fail. As there is no dispute that in all other respects the contract which the claimant was issued with and signed complies with the requirements of the Chapter A1 of the ASCL, I find that the claimant was employed under an approved English apprenticeship and not a common law apprenticeship.

78. Although in the list of issues the claimant includes an issue whether a change in training provider without agreed written amendment to the Apprenticeship Agreement, voids the agreement, this was not pursued in the hearing and Ms Kponou did not make submissions about it.

Unfair Dismissal

79. The burden is on the respondent to show the reason or principal reason that it dismissed the claimant and that it fell within one of the potentially fair reasons set out in section 98(2) ERA or that it was for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The reason upon which the respondent relies is the claimant's conduct. As an alternative, that the reason for the dismissal was some other substantial reason, being the refusal by the engineers to work with the claimant, customers refusing to have him on their site, and reputational risk.

80. In considering the reason or principal reason for a dismissal, I must consider the factors that operated on the respondent's mind so as to cause it to dismiss the employee.

81. It was Mr Colford who dismissed the claimant on 12 July 2019. Although there had been a disciplinary hearing on 8 May 2019, at that time it was not the intention of the respondent to dismiss the claimant. It is therefore for me to consider the factors that operated upon Mr Colford's mind so as to cause him to dismiss the claimant on 12 July.

82. In doing so, I must ask the three questions set out in Burchell above. If these three tests are met, I must then consider section 98(4) of the ERA and whether the decision to dismiss the claimant was within a band of reasonable responses open to a reasonable employer.

Did the respondent have a genuine belief in the guilt of the claimant?

83. I find that the respondent, through Mr Colford has shown that it had a genuine belief that the claimant was guilty of misconduct, and that this was the principal reason for the claimant's dismissal. Conduct is a potentially fair reason within section 98(2) ERA. This misconduct was that put to the claimant at the meeting on 8 May, together with the customer complaints, and the continuing issues recorded by Mr Hugo and including the claimant's response when spoken to by Mr Colford on 12 July. Although the claimant's behaviour

had an impact upon the claimant's colleagues and customers, a number of whom did not want to work with the claimant again or have him on site, having heard the evidence, I consider this was a consequence of the claimant's conduct, and therefore a factor in, rather than the principal reason for the dismissal itself.

Was that belief based upon reasonable grounds?

84. I go on to consider whether such belief was based upon reasonable grounds and following a reasonable investigation.

85. There was ample evidence of the claimant's poor attitude and misconduct available to Mr Colford. The customer complaints are documented and unsolicited and cover the majority of the claimant's employment. The nature of the complaints by Mr Hugo and Mr Hudson are consistent with each other, but are also consistent with those of the respondent's customers. This is not a situation where, as the claimant suggests, Mr Hugo was targeting him because he had made a complaint about him in December 2018. The issues which the customers raised are in the same vein as those raised by Mr Hugo, being the claimant's attitude and behaviour whilst on site.

86. The claimant was 16 when he joined the respondent and it was his first job. This was an apprenticeship arrangement in which training and development is an important element. When he received complaints about the claimant's attitude and behaviour, which he saw as immature, Mr Johnstone raised matters in an informal manner and attempted to encourage the claimant to improve and steer him in the right direction. It is possible therefore that the claimant did not realise the full extent and serious nature of the complaints from his colleagues, particularly the two electrical engineers who were training him or the serious concerns which the respondent had about his behaviour. On 8 May 2019 however all of these issues and their serious nature were brought to his attention in a formal manner.

87. At that hearing, the claimant, rather than being receptive to the issues raised and the need for improvement, was defensive and attempted to deflect any responsibility for his actions to others. He did not accept that the concerns might be true and take on board the criticism levied at him.

88. The issue which arose on 11 July was a serious one involving a health and safety issue in a school. Clearly the school felt a need to immediately raise it with the Local Authority who took it up with the respondent. The schools and local authorities are the respondent's customer and particularly as it was a health and safety issue, it was an issue which they had to take seriously. In raising it with the claimant, this was a reasonable step to take. Whether the claimant was or wasn't responsible for leaving the screw on the floor, it was the claimant's attitude which caused Mr Colford to react the way he did. Against a background of the formal meeting on 8 May, where Mr Colford was present, and the claimant's clear failure to have changed his attitude and behaviour, Mr Colford dismissed. I find that there were reasonable grounds to support Mr Colford's belief that the claimant was guilty of the misconduct alleged.

Did the employer carry out an investigation which was reasonable in all the circumstances?

89. The majority of the investigation into these allegations was carried out for the disciplinary hearing in May 2019. Evidence of the claimant's conduct was provided by Mr Hugo, initially in the form of a complaint in November 2018 but followed up by the respondent prior to the disciplinary hearing by obtaining an update from Mr Hugo as to whether the claimant's attitude and behaviour had improved, and also obtaining the views of the other electrical engineer Mr Hudson. At that stage although the customer complaints were known to Mr Colford and Mr Johnstone, these were mostly verbal and were not discussed in any detail at the disciplinary hearing. Following that hearing, Mr Johnstone had asked for an update from Mr Hugo, which was provided and showed that there had been little or no change in the claimant's behaviour. The views of those employees with whom the claimant worked most closely had been obtained and they had provided details of the issues of concern.

90. As part of any investigation, the procedure adopted by the respondent needs to be considered. A fair investigation requires the employer to follow a reasonably fair procedure. There is an obligation on an employer both within the ACAS Code of Practice and within this respondent's own disciplinary policy to give an employee warning and details of allegations against him in advance of any disciplinary action and to allow him the opportunity to respond to allegations against him in a meeting. Ms Ferrario argues that the meeting on 8 May and the documentary evidence which was provided to the claimant at that time fulfilled ACAS's requirements and the respondent's obligations. I do not consider this can be right. Although the meeting on 8 May did raise allegations about the claimant in respect of which he had the opportunity to and did respond, I consider that the issue raised on 12 July and the claimant's immediate dismissal that day was not simply an extension of the disciplinary hearing of 8 May.

91. My reasons for this view are that some two months after that hearing, Mr Johnstone had not issued any form of warning or sanction. Rather, he asked Mr Hugo to keep a note of whether he saw any improvement in the claimant's attitude and behaviour. Although Mr Johnstone says this was because it was a very busy time for the company, and this may have been a factor, it seems to me that Mr Johnstone having raised the serious concerns in a very formal setting, hoped that the claimant would raise his game and change his behaviour.

92. When the additional issue arose on 11 July, and Mr Hugo reported that the claimant's behaviour and attitude had not improved, these were new allegations and the claimant was entitled to have these allegations put to him in a further hearing. On 12 July, it was not Mr Colford's or Mr Johnstone's intention to dismiss the claimant, the issue was being raised informally initially and they were aware from the previous process that they needed to comply

with their own disciplinary processes, including the necessary procedural steps.

93. In dismissing the claimant as Mr Colford did, without any warning and without holding a formal meeting, denied the claimant the opportunity to provide his explanation for the additional issues which had arisen since 8 May. In this respect, the respondent did not comply with either the ACAS Code or their own disciplinary procedure. I therefore find that the investigation (specifically the procedure) undertaken by the respondent was outside the band of reasonableness.

94. Having reached this conclusion, the decision to dismiss must be outside a band of reasonable responses and I find that the dismissal was unfair.

95. This claim succeeds.

The right to be accompanied

96. A disciplinary hearing is defined in the ERelA as a hearing that could result in:
    a. the administration of a formal warning — S.13(4)(a)
    b. the taking of some other action — S.13(4)(b)
    c. the confirmation of a warning issued or some other action taken — S.13(4)(c)

97. For the right to arise, there needs to be a hearing. The meeting on 12 July was not intended to be a disciplinary hearing and I consider could not be described as one. Although the outcome was the claimant's dismissal, in order for the claimant to be able to request a companion to accompany him, he needs to be aware that a hearing was due to or was taking place. The events of 12 July were an informal conversation at which unplanned consequences occurred and did not amount to a hearing.

98. This claim fails and is dismissed.

Wrongful Dismissal

99. The claimant was dismissed without notice. The respondent says that the claimant's behaviour culminating in his dismissal on 12 July was sufficiently serious to allow them to dismiss without notice. There is clear evidence of misconduct of the type which is provided for as examples of gross misconduct with the respondent's own policy, such as serious insubordination, bringing the company into disrepute and a failure to follow management instructions. That is not an exhaustive list. The claimant's dismissive attitude on 12 July, when Mr Colford, a director and owner of the business, raised a serious health and safety complaint by a customer showed a clear lack of respect for authority. I find that the claimant's conduct was so serious as to amount to a fundamental breach of contract such that the respondent was entitled to dismiss summarily. This claim therefore fails and is dismissed.

Issues affecting Remedy

Polkey

100. Having found that the dismissal was unfair, I am asked by Ms Ferrario on behalf of the respondent to accept that had a fair procedure been followed, the claimant would have been dismissed in any event. She relies upon the principles in Polkey. Although the respondent did not issue the claimant with a warning following the disciplinary hearing, it would have been reasonable to expect the claimant to change his behaviour. He did not. Mr Hugo reported that the claimant's behaviour and poor attitude continued. The claimant's comment to Mr Colford on 12 July showed that he had learned nothing by the experience of the disciplinary hearing. I consider however that had a fair procedure been followed, in the calmer environment of a disciplinary hearing and with the influence of Mr Johnstone, who accepted that he probably wouldn't have dismissed the claimant on 12 July, the claimant would have been issued with a final written warning. Based upon the claimant's failure to change his behaviour after the hearing on 8 May, his attitude in that hearing and particularly his failure when cross examined by Ms Ferrario to accept that he had done anything wrong, I consider that it is highly unlikely that his behaviour would have changed. Following a period which I assess to be two months, during which the claimant's behaviour would have been monitored and a further disciplinary hearing taken place, I consider that he would have been fairly dismissed with notice, his conduct not having improved and there being further instances of unacceptable behaviour.

Contributory Fault

101. Ms Ferrario also asks me to find that the claimant had contributed to his dismissal by his conduct. The claimant's behaviour and attitude was the significant factor in his dismissal. His conduct was culpable and blameworthy and had continued throughout his employment. He was given a chance to change that behaviour but failed to take it. His only mitigation, and the reason that I do not find that there should be 100% contribution, is that although aged 18 when he was dismissed, he was 16 when he started work, and although the issues of concern had been raised with the claimant informally, the respondent did not bring their serious concerns about his behaviour and attitude to his attention formally until some two years into his employment. Had they done so earlier in his career he might have developed differently and learned how to behave in a work environment. As an apprentice, they had a responsibility to train and develop him, but their failure to address the issues directly and formally until 8 May 2019 allowed him to set out along the wrong path. Having said that, certainly from 8 May he was aware of the seriousness of the issues and did nothing to address his behaviour. I consider that the claimant's behaviour and attitude towards his colleagues (including towards Mr Colford on 12 July) and the respondent's customers was blameworthy conduct which contributed to his dismissal to the extent of 80% and it is just and equitable to reduce the basic and compensatory award by that amount.

ACAS Code

102. For the reasons set out above, the respondent did not comply with the ACAS Code. There was no effort by Mr Colford to do so. Although it is accepted that the decision to dismiss the claimant was not something which had been planned or intended, Mr Colford knew what the process was that he should have followed but failed to do so unreasonably. The claimant's award will be increased by 25%.

103. This matter will now be set down for a remedy hearing listed for one day.

104. I am conscious that there has been a delay in the preparation of this reserved judgment. This has been primarily caused by the Covid 19 situation.

Employment Judge Benson

Date: June 28 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
3 July 2020

FOR THE TRIBUNAL OFFICE