EMPLOYMENT TRIBUNALS

Claimant: **Mr S Ashmore**

Respondent: **Dibco Precision Engineering Limited**

HELD AT: **Leeds by CVP video link** **ON: 3 and 4 September 2020**

BEFORE: Employment Judge Lancaster

REPRESENTATION:

Claimant: **Mr P Sangha, Counsel**
Respondent: **Mr D Bunting, Counsel**

JUDGMENT having been sent to the parties on 21 September 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided, taken from the transcript of the decision given orally upon the conclusion of the hearing:

REASONS

1. This is a claim primarily for unfair dismissal, but also for wrongful dismissal. It is accepted that Mr Ashmore was summarily dismissed on the morning of 21 October of last year 2019 even though subsequently, by agreement, the parties treated this as a resignation effective from the 18th.

   Unauthorised deduction from wages; section 13 Employment Rights Act 1996

2. There is however a subsidiary complaint of a failure to pay wages. I shall deal with that briefly. I consider that claim as presented, I am afraid, to be misconceived. It is a claim that Mr Ashmore was not paid his "week in hand".

3. He started this period of employment with the respondent company, I accept, sometime in 2008. There are records of him having been issued with a P60 for years subsequent to that and therefore the entry of the date of 2011 on the claim form (ET1) is a mistake.

4. The claimant appears to believe that because he was paid "a week in hand" he somehow never caught up. However I look at the end of employment and it is abundantly clear to me that he has been paid at least up until 18 October which was the last full day that he worked.

5. Pay day was clearly on a Thursday. I have seen the respondent's bank details which show that the claimant, and indeed other employees, were paid on 24 October. That payment quite clearly relates to the week before up to Friday 18 October. There is a handwritten note prepared by Mrs Dibble - who carried out basic administrative and pay role functions for the respondent company - and that shows with an entry for 24 October, which is the pay date: the relevant calculations are of a weeks' pay at £381.69 together with five days accrued holiday £394, a total of £775.69 gross equating therefore to the £570.50 that was paid into the claimant's bank account on that date.

6. I can see from the clock cards produced also in the bundle that that calculation is clearly relating to the week ending the 18 October. So he was paid for the final week that he worked. There is absolutely no reason to suppose that somehow he has still carried over an unpaid week from the start of his employment in 2008. It is abundantly clear that if he is paid a week in hand on the following Thursday, whenever he started in 2008 he would have worked for that week, been paid for it the following Thursday and for each subsequent week he worked again paid a week in arrears on the next Thursday right up until the 24 October 2019.

7. The only part of this claim that does however succeed, although not specifically particularised in this way in the claim form, is the fact that he did not receive any payment at all for the final day that he went into work which was 21 October. And of course he is entitled to be paid for the entirety of that one day.

Dismissal

Background

8. Dealing with the more substantive complaints, as I have said I am satisfied that the claimant began this period of employment in around 2008. He had worked for a short time for the respondent as a teenager but then left to pursue other employment and I find his narrative account of those early working years to be plausible.

9. However throughout the course of his employment I am satisfied that there were a number of issues that led to the institution of disciplinary procedures. These are scantily recorded by the respondent but I accept that there must have been some written record, and from that Mrs Dibble has now produced a typewritten account at page 76 in the agreed bundle.

10. This therefore shows that the claimant received a verbal warning in November 2008, a written warning in December 2008, a written warning in November 2016 together with a verbal warning in June 2017 and again in March 2018. And there is produced within the bundle a copy of that first written warning going back to the very start of employment or thereabouts, 22 December 2008. I do not accept there is any evidence to substantiate the suggestion to put to Mr Dibble that that is a later fabrication. I am quite satisfied that this is genuinely a document prepared at the time and which still remains on the employee's file. I actually find corroboration from that in the fact that the second recorded written warning from November 2016 has not been found. If there were any evidence of a fraudulent attempt to bolster the case I would expect a similar document to be produced, and its absence indicates to my mind the genuineness of the admittedly incomplete records.

11. I also attach no importance whatsoever to the fact that subsequently that Mrs Dibble has recorded within the work's diary the dates of these purported issues of verbal or written warnings. It strikes me as entirely plausible that working from her scanty list of dates she has indeed, as is alleged by the respondent, then gone back and inserted details within the work's diary to correspondent to those dates. I do not accept that that is any evidence of an attempt fraudulently to bolster the claim by creating evidence. It is a genuine, though perhaps misguided, attempt to record the matters that are scantily reported elsewhere in the company documentation.

Facts

12. So that is the general history but I am, of course, particularly concerned with the events of 17 and 18 October 2019.

13. On 17 October there was an altercation between Mr Ashmore and Mr Dibble. In the course of that it is accepted, and I find of course therefore, that the claimant was what I can only properly describe as being abusive to Mr Dibble. He called him a "shit boss", "the worse boss ever2, he said he had "an enormous ego" and he made gratuitous references to a former partner of Mr Dibble who left the business many years before suggesting that that person, Mr Robinson, was in fact responsible for the successful obtaining of contracts and that it had nothing to do with subsequent work within that business of Mr Dibble.

14. And indeed as that altercation became heated it is now accepted that Mr Dibble indicated that he would issue a final written warning, the last in that series of warnings that I have already referred to. I accept the submissions of Mr Bunting on behalf of the respondent that it was that threat of the issue of the final warning that in fact prompted the claimant to offer an apology, which he did.

15. But even though he had apologised and thought he may have averted any disciplinary sanction, that conduct towards his employer on the 17th was clearly such that merited the issue of a warning of some nature. And on 18 October the following day the Friday, sometime in the afternoon, Mr Dibble did hand to the claimant a letter drafted on his instructions by his wife which contained the

form of a final written warning. That clearly related to the conduct on the previous day and it also made reference to at least one issue of a previous warning, even though that would have expired by effluxion of time at this stage.

16. There is no dispute that the claimant did not read the content of that final written warning. At most, and I cannot determine with certainty whether he did or did not do this, he opened it and saw the heading "final written warning". So either he saw that or he knew from the context when the envelope was handed over that that was what it contained. But he did not read the substance and, as I have said, because that related to the events of the previous day which certainly did warrant some disciplinary action his next behaviour is in my view wholly inappropriate. He simply tore that letter up and said words to the effect - as reported by Mr Dibble and corroborated by another witness - "that's what I think of your letter." And I have no doubt that may have been accompanied by an expletive as well. I find as a fact, because I accept the evidence of the respondent as being the more credible on this account, that on that occasion he also repeated the abusive comments about Mr Dibble being "a shit boss".

17. He then threw that letter into the bin and there was a further heated exchange before Mr Dibble left because he had a business appointment to attend to.

18. I am satisfied that that sequence of events over the 17 and 18 did indeed cause considerable distress to Mr Dibble such he considered that he had reached the end of his patience with Mr Ashmore. Whether or not the history as now recounted by the respondent' of abusive behaviour over a lengthy period is an exaggeration with hindsight or not, I do not need to say.

19. But I am satisfied and accept Mr Dibble's evidence that he himself was tearful when he thought he had reached the end of this relationship: and that is corroborated by the witness Mr Bates. I appreciate that Mr Bates is a relative of the Dibble family, the brother-in-law of Mr Dibble. But that of itself provides a good reason why I should accept the account that Mr Dibble went round to his house on the Friday because they had family business and work business to attend to. And Mr Bates corroborates the upset that he saw on the part of his brother-in-law. His evidence is therefore that he was told that the matter would be reviewed over the weekend and clearly that is what Mr Dibble did. Having reviewed it he formed certainly a provisional view that that behaviour was insupportable, and so on the morning of Monday 21 October - the next working day when Mr Ashmore was due to return to work - he certainly had in mind the distinct probability that he would then be dismissed.

20. On that occasion Mr Ashmore covertly recorded the conversation. Whether he caught the very start of it or not is unclear, but the first thing that was said to him when he arrived at work that day, by Mr Dibble, was "have you got owt to say about Friday". I accept that that is not an express invitation to apologise for the events of Friday, that is the tearing up of the final written warning letter with the expression that "that's what I think of your letter" and some associated offensive language.

21. The recorded response of the claimant to that general enquiry "have you got owt to say about Friday" was "no not a word, I don't want to say anything to you

no more" at which point Mr Dibble immediately said "you're sacked" and that therefore is effecting the dismissal.

The reason for dismissal: section 98 (1) and (2) Employment Rights Act 1996

22. I am satisfied therefore that the reason for termination was a potentially fair one relating to conduct. In January of this year written reasons for termination were given. The reason for that delay was largely as I have said that Mr Ashmore was allowed to put in a letter of resignation and it was treated as if he had left voluntarily. But subsequently he did request reasons and they were then provided, though in the event not until some three months after the actual dismissal.

23. Within those written reasons and within the factual matrix that I can establish from the evidence, I am quite satisfied that the reason for termination was principally the response to the issue of a written warning.

24. Of course it is correct that there was no procedure followed in issuing that warning as indeed there had not been on any previous occasion when warnings were issued in the course of employment. And that is a flaw on the part of the respondent, but it does not necessarily mean that that warning is as Mr Ashmore seemed to contend worth nothing, again using more colloquial language saying "your warning is worth shit". As I say it clearly related to inappropriate conduct and behaviour towards his employer on 17th.

25. And further it appears to me quite clear that although he had formed a very strong provisional view that that conduct warranted dismissal, Mr Dibble was at least potentially prepared again to be lenient, as he claimed he had been lenient over the course of many years employment when faced with insubordination and abuse in the past of the claimant. That is that if an apology had been tendered he may well have stepped back from that ultimate sanction.

26. That is supported by a comment he made later in the course of the conversation that was covertly recorded: when another employee Mr Needham came on the scene, Mr Dibble said "I'm sacking him because he won't apologise for what he did on Friday". So clearly Mr Dibble understood that his initial invite to say anything was expecting some form of apology even if he did not say so in terms. So the failure to respond appropriately and indeed to have said "no I don't want to say anything to you anymore" was then also part of the rationale for his decision to confirm the dismissal that he had been thinking about all weekend.

27. I am quite satisfied that this set of facts which I have recounted was the reason for dismissal. Mr Dibble of course had been actively involved in all incidents so he had his own evidence as to what had happened. This is a small family business. There is Mr Dibble, his wife dealing with administration, his son involved in the business, his brother-in-law Mr Bates and I think presently only two other employees and previously just one other employee, Mr Ashmore.

The fairness of the decision: section 98 (4) Employment Rights Act 1996

28. So within that contact having regard of course, as I must do on any unfair dismissal case to the size and administrative resources of the respondent employer, I consider that there was no necessary further investigation by Mr Dibble the owner of the business who had been actively involved.

29. But nonetheless he followed no procedure: he had not followed a procedure in issuing the final warning nor before issuing the notice of dismissal on the morning of the 21st. And for that reason, I do consider that it fell outside the range of reasonable responses open to a reasonable employee. Ordinarily a complete failure to follow any procedure - certainly when contemplating termination of someone who has worked for a significant period - would render the behaviour unreasonable, and on that ground I do make a declaration that this dismissal was unfair.

Contributory fault: section 122 (2) Employment Rights Act 1996

30. However the consequences of that unfairness are severely limited. I am quite satisfied that the claimant's behaviour prior to termination was both blameworthy and culpable such that there should be 100% reduction in the amount of the basic award. That is his abusive comments about his employer on the 17th, but more particularly, whatever he may have thought about the failure of procedure, the gross insubordination on the 18th in ripping up a document that purported to take him to task about inappropriate words (for which he had already accepted that he was required to issue an apology), and again the repeated abuse then directed towards his employer. This is coupled also with the fact that he was given the opportunity to say something about those events he instead then indicated "I don't want to say anything to you no more". That initial act of insubordination together with the blockading response to any invitation to discuss matters again is in my view culpable conduct exacerbating a situation. It is certainly conduct that is calculated or likely to seriously undermine the relationship of trust and confidence with his employer when he declares in express terms "I don't want to say anything to you at all".

31. That also answers the question of whether or not this dismissal was wrongful or not. I consider that that catalogue of behaviours over a short period cannot be described as anything other than gross misconduct justifying instant termination.

"Just and equitable" compensation sections 123 (1) and (5) Employment Rights Act 1996 ("Polkey") and uplifts: section 207A Trade Union & Labour Relations (Consolidation) Act 1992 and section 38 Employment Act 2002

32. Had there been a proper procedure, with the claimant being allowed to at least make representations before a final decision was taken, I consider however, on the evidence I have heard, that that would only have delayed the matter by a very short period. As I have said there is no reason at all why the person directly involved in this enquiry, the owner of the business, should not have conducted matters. Had he adjourned and given the claimant a warning and conducted a

meeting, at least the parties might have had time to reflect. I concur with Mr Sangha's description of the encounter on 21st as being more a confrontation than a meeting, but the fact remains that there was no other evidence to collat. The two people actually involved in the original altercation were both present, there was no further enquiry that was necessary and doing the best I can as a matter of impression on the evidence I am satisfied that it will indeed have made no difference in this case had that meeting then been convened after an appropriate short period.

33. The facts of what Mr Ashmore had done would have been the same and I have categorised those as gross misconduct. The effect upon his employer would have remained the same and I have recorded the distress witnessed by Mr Bates and reported by Mr Dibble immediately upon this incident, and indeed Mr Ashmore himself now concedes that effectively the trust and confidence within that relationship have come to an end, and I am also satisfied on balance that the claimant would not in fact have tendered any such adequate apology as would have enabled Mr Dibble to draw back from his initial conclusions that this relationship had reached the end of its life.

34. Even if not expressly invited to apologise to the outset of the interaction on the 21st, it was apparent subsequently that Mr Dibble was interested in a possible apology and the failure to tender any such was part of his reason for the claimant having been dismissed. Furthermore, there was then contact between Mr Ashmore and Mr Lee Dibble where Mr Lee Dibble has suggested that an apology may persuade his father to change his mind: and even if it is right that subsequently Lee Dibble then contacted the claimant and said you need not bother coming into work, that would still have not precluded him from making approaches to apologise. And of course in the course of this hearing he still accepts no responsibility for his inappropriate actions in seeking to undermine the authority of an employer trying to impose a warning for inappropriate conduct, and instead reasserts his reliance of the fact that a failure to follow a procedure justifies him in ignoring the content of that purported warning altogether.

35. So within this small business I consider that that further process would only have delayed matters by a week and that is the limit of the compensatory award that is appropriate.

36. Of course it is common ground that there was no issue of written terms of conditions of employment and the consequence of my rulings is that the claimant is entitled to an uplift on that award. However in the circumstances I am not minded to increase that above the mandatory two weeks. All parties have lived with the absence of written terms and conditions for some 11 years without any apparent problem and I see no reason therefore why I should make it four weeks rather than two.

37. So on that basis having considered at this liability stage issues of Polkey whether it is just and equitable to award an amount and contributory conduct, I conclude that I declare this dismissal to be unfair but there is no basic award because of the contributory conduct reducing that to zero. There is a limit on the extent of the compensatory award, following similar principles to those

outlined in **Software 2000 Ltd. v Andrews [2007] ICR 825** so that is limited to a very short period of one week. But that one week's additional pay is subject to an uplift initially in my view of two weeks' pay. Also, I consider that that award is liable to an uplift before applying that two weeks' pay because of the failure to comply with the ACAS Code of Practice I do consider that such a complete failure even for a small company is unreasonable. There has been no attempt to comply with any appropriate procedures and because the failure is so all encompassing I therefore consider that the appropriate uplift is not the maximum 25% but it is high it is 20%. So I will award an uplift of 20% on the week's net pay which is agreed to be £323.21.

38. I am not persuaded that I should also make an award for the loss of statutory rights: in circumstances where I consider the claimant's conduct has been entirely culpable he would therefore be liable to fair dismissal in any event. Similarly, I do not however reduce the compensatory award by reason of this contributory conduct, because that is already factored into the decision that he would still have been dismissed had a proper process been followed.

39. The other amounts therefore are the two weeks' award for failure to provide particulars two weeks at £394 so £788, and the one days' pay for 21 October is £78.80 gross.

Employment Judge **Lancaster**
Date 15th October 2020

REASONS SENT TO THE PARTIES ON
Date 16th October 2020.