THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs V Mitchell**

Respondent: **Five Star Taxis (Newcastle) Limited**

Heard at: **Newcastle Hearing Centre** **On:** **23 October 2020**

Before: **Employment Judge Morris (sitting alone)**

Representation:

Claimant: **In person**
Respondent: **Neither present nor represented**

JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The claimant's complaint under section 111 of the Employment Rights Act 1996 that her dismissal by the respondent was unfair, being contrary to Section 94 of that Act by reference to Section 98 of that Act is well-founded.

2. In respect of that unfair dismissal the respondent is ordered to pay to the claimant compensation of £8,075.44. That award comprising the following elements the detailed calculations of which are set out in the Reasons below:

   2.1 Basic award - £2,861.48
   2.2 Compensatory award - £5,213.96

3. The claimant's complaint that the respondent was in breach of her contract of employment by not giving to her the ten weeks' notice of the termination of her employment to which she was entitled in accordance with Section 86 of the Employment Rights Act 1996 is well-founded.

4. In respect of that breach of contract the respondent is ordered to pay to the claimant compensation of £2,834.10.

5. The claimant's complaint that the respondent made an unauthorised deduction from her wages in that it did not pay her at all in respect of the seven days during

which she was suspended from work (i.e. 21-25, 28 and 29 October 2019) contrary to Section 13 of the Employment Rights Act 1996 is well-founded.

6. In respect of the above unauthorised deduction the respondent is ordered to pay to the claimant £467.97.

7. The claimant's complaint that, contrary to Regulation 14 of the Working Time Regulations 1998, the respondent had not paid her compensation in respect of her entitlement to paid holiday that had accrued but not been taken by her at the termination of her employment was withdrawn by the claimant and is dismissed.

8. During the course of the claimant's employment up to and including the date upon which these proceedings were begun, the respondent was in breach of its duty under Section 1(1) of the Employment Rights Act 1996 to give the claimant a written statement of initial employment particulars. In this respect the Tribunal has increased the compensatory award referred to above by the higher amount of four weeks' pay: namely £1,346.44.

9. The award referred to in paragraph 4 above has been calculated by reference to the claimant's net pay and should there be any liability to income tax or employee's national insurance contributions in respect of that award, that shall be the liability of the respondent alone. The remainder of awards referred to above have been calculated by reference to the claimant's gross pay and, therefore, should there be any liability to income tax or employee's national insurance contributions in respect of those all, that shall be the liability of the claimant alone.

10. The Recoupment Regulations do not apply to any of the above awards.

REASONS

Representations and evidence

1. The hearing was conducted by way of the Cloud Video Platform. The claimant appeared in person and gave evidence herself. The respondent was neither present nor represented. In an e-mail sent by the respondent to the Tribunal on the afternoon before the hearing it informed the Tribunal that it had ceased trading and was "entering into voluntary liquidation". A search of Companies House conducted at the commencement of today's hearing revealed the company's status as being, "Active".

2. The evidence of the claimant was given by reference to a written witness statement that she had previously provided both to the Tribunal and to the respondent. I also had before me, first, a bundle of documents that had been prepared by the respondent comprising 56 pages and, secondly, additional documents submitted by the claimant under cover of her e-mail of 13 February 2020 in relation to issues of remedy. The numbers shown in parenthesis below refer to page numbers (or the first page number) of the documents in the respondent's bundle.

3. The respondent not being present or represented at the hearing, I have paid particular attention to the content of its formal response (ET3), the documents and audio recording it has provided and the witness statement of Mr Hutchinson, Managing Director of the respondent. Within the documents before me there are also statements from individuals who have provided information both against and in favour of the claimant. I have only been able to give limited weight to all such statements due to neither Mr Hutchinson nor any of those individuals being present at the hearing.

The claimant's complaints

4. The claimant's complaints were as follows:

    4.1 Her dismissal by the respondent had been unfair contrary to Section 94 of the Employment Rights Act 1996 ("the 1996 Act") by reference to Section 98 of that Act.

    4.2 The respondent had acted in breach of her contract of employment by terminating that contract without giving to her the notice of that termination to which she was entitled.

    4.3 The respondent had made an unauthorised deduction from her wages contrary to Section 13 of the 1996 Act in that it had not paid her wages during the seven days when she was suspended prior to her dismissal.

    4.4 Contrary to Regulation 14 of the Working Time Regulations 1998, the respondent had not compensated her in respect of her entitlement to paid holiday that had accrued but not been taken at the termination of her employment.

5. Although not a complaint by the claimant as such, it became apparent to the Tribunal during the course of the hearing that the respondent had never given the claimant a contract of employment or other written statement of the particulars of her employment contrary to its duty to do so under Section 1 of the 1996 Act, and that situation had continued up to and including the date upon which the claimant presented her claim to the Employment Tribunal.

6. The issues in this case had been identified for the purposes of the parties during a preliminary hearing conducted on 29 June 2020 (the claimant attending in person, the respondent being represented by Mr WJ Hutchinson) and do not need to be restated here.

Consideration and findings of fact

7. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral) and the relevant statutory in case law (notwithstanding the fact that, in pursuit of some conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by me on the balance of probabilities:

7.1 The respondent is a company providing taxi services. The claimant was employed by the respondent as a desk clerk. Her employment commenced on 2 March 2009 and continued until she was notified of her dismissal on 29 October 2019 by letter dated 24 October 2019.

7.2 In this respect the respondent suggests that while the claimant might have worked for it previously her most recent period of continuous employment started on 1 July 2016. In that regard it relies upon a letter of resignation from the claimant dated 23 May 2016 (2) and an HMRC form P45 dated 28 June 2016 (3). I accept the claimant's evidence, however, that although she tendered her resignation on 23 May 2016 giving four weeks' notice such that her last working day would be Friday 24 June 2016, with the respondent's agreement she withdrew her resignation prior to that termination date of 24 June 2016 and thus she has continuous employment from 2 March 2009. I accept the claimant's account in this respect given that it is corroborated by evidence including as follows:

7.2.1 payslips that she received from the respondent during the relevant time: e.g. 24 May 2016 (12), 31 May 2016 (13), 7 June 2016 (14);

7.2.2 the respondent having enrolled her into a NEST pension, as confirmed in an e-mail dated 4 June 2016 (29);

7.2.3 bank statements (39) showing payments from the respondent by way of wages on 29 April, 20 May, 27 May, 3 June, 10 June and 8 July 2016.

The claimant explained that the only gap in her work was for three weeks when she was selected for jury service from 6 June to 23 June 2016 (42) in respect of which she received payment from the Ministry of Justice on 4 June and 13 July 2016, and in that regard Mr Hutchinson had completed the necessary form to enable her to claim her lost wages.

7.3 Even on the basis of the information Mr Hutchinson has provided, I am satisfied that the claimant would have had continuity of employment from 2 March 2009 until being notified of her dismissal on 29 October 2019. This is because Mr Hutchinson states that her employment ended on Friday, 24 June 2016 and then commenced on 1 July 2016. Although that might appear to be a break in continuity, section 212(1) of the 1996 Act provides, "Any week during the whole or part of which an employee's relations with his employer are government by a contract of employment counts in computing the employee's period of employment". Further, in section 235(1) of the 1996 Act a week is defined as meaning "a week ending with Saturday". On the basis of the information provided by Mr Hutchinson, therefore, the claimant was employed by the respondent in the week ending on Saturday, 25 June 2016 and then was employed in the week immediately following, ending on Saturday, 2 July 2016. Since she was employed in each of those consecutive weeks she has continuity of employment notwithstanding the apparent gap of four working days

7.4 The claimant worked 41 hours each week (8 hours from Monday to Thursday inclusive and 9 hours on Friday) and was responsible for answering calls, taking bookings, despatching jobs, entering e-mail bookings and dealing with drivers and any queries. Although there had been some issues with the claimant's attitude in the past (example, Mr Hutchinson had submitted correspondence from the Transport and Travel Adviser at the Freeman Hospital dated 2 March 2015) I accept her evidence that she had not received any formal disciplinary warnings throughout her employment.

7.5 At approximately 9.45am on 18 October 2019 Mr Hutchinson called the claimant to inform her that he had received a complaint about her from a customer and that she was suspended on full pay while he investigated the circumstances. The complaint had been made by a customer regarding the claimant's alleged inappropriate conduct during the course of a telephone conversation that they had had regarding a taxi booking. Mr Hutchinson sent the claimant a letter confirming her suspension, which is dated 18 October 2019 (4).

7.6 In that suspension letter Mr Hutchinson explained that the reason for her suspension was "to consider your unacceptable attitude towards customers". Similarly, in a letter dated 22 October 2019, which the respondent has described in the index to the bundle of documents as being a "mediation letter" (5), Mr Hutchinson informed the claimant that her unacceptable attitude in the recorded telephone conversation that he had sent to her warranted her dismissal but he was prepared to reconsider that if she recognised that it was unacceptable and was willing to demonstrate ways to address her anger.

7.7 On 23 October 2019 the claimant noticed that she had missed a call from the respondent and immediately called Mr Hutchinson. He informed her that he would send her a recording regarding the complaint from a customer that had led to her suspension. He asked her to listen to the call and he would then telephone her again the following day. He confirmed that the claimant remained suspended.

7.8 The claimant denies ever having received the mediation letter either by post or e-mail. In this regard she drew my attention to the fact that the letter commences by stating that Mr Hutchinson had tried unsuccessfully to contact her by telephone but she had not had a 'missed call' notification from him on her telephone on 22 October. In addition she submitted that if the content of the mediation letter were to be accurate Mr Hutchinson would have mentioned it during the telephone conversation that he had with her on 23 October 2019 but he did not. I accept the claimant's evidence that she did not receive the mediation letter and that, had she done so, she would have been happy to engage with Mr Hutchinson's proposals so as to ensure that she did not lose her job.

7.9 The claimant explained in evidence that Mr Hutchinson had sent to her only part of the recording of the telephone call between her and the customer.

She had requested the full recording (21) but Mr Hutchinson explained to her that the full recording contained the personal details of the customer and that to provide such details to the claimant would be contrary to the Data Protection Act.

7.10 On 24 October 2019, Mr Hutchinson called the claimant. The claimant has provided a transcript of their telephone conversation. Mr Hutchinson confirmed with the claimant that she had received the audio recording of the telephone call with the customer. He then immediately told her, “we’ve had a meeting”, and that there were "a couple of options". It was for the claimant to make her decision. She could resign and receive a week’s pay and a reference regarding her working for the respondent or, if she chose not to do that, she would be dismissed for gross misconduct and that would take immediate effect. The claimant asked who had had a meeting. Mr Hutchinson initially declined to answer but then said that it was the owners of the business. The claimant responded that she was not going to give him a decision there and then and Mr Hutchinson pressed her to call him back that day. She then sent an e-mail to Mr Hutchinson that afternoon recording that he had given her “a choice to either resign or be dismissed. I can confirm I will not be resigning” (19).

7.11 Mr Hutchinson refers in his witness statement to the above transcript and a transcript of the telephone call he made to the claimant on 23 October. He comments that the calls were recorded without his knowledge, that it would be illegal for the claimant to share the recordings with a third party without his permission and that it could be deemed entrapment. He concludes that on principle, as this was done underhandedly, he does not give his permission for the calls to be used. He does not, however, challenge the accuracy of the transcripts.

7.12 Not having heard anything further from the respondent the claimant wrote by e-mail to Mr Hutchinson on 29 October asking what the position was (20). About an hour later she received a letter of dismissal dated 24 October 2019 (6) stating as follows: “Further to our disciplinary hearing today when we discussed options a decision has been made to dismiss you with immediate effect, on the grounds that the trust and confidence has been lost.” Having read through the transcript referred to above, I am not satisfied it can in any way be said that there was a disciplinary hearing on 24 October 2019

7.13 The respondent states in its ET3 that the claimant was “given multiple options, which were declined and constructed her own dismissal to favour a compensation claim”. It is clear, however, that she was only given two options and when she declined to resign she was dismissed. I do not accept that she **“**constructed her own dismissal”.

7.14 On 30 October 2019 (the day after she received the letter of dismissal) the claimant e-mailed Mr Hutchinson (21), enquiring when she would be receiving her wages. The claimant did not receive a reply to that email or to any of the several e-mails she sent to Mr Hutchinson during this period.

7.15 The claimant explained during the hearing that Mr Hutchinson had told her that the telephone recording indicated that she had been rude and aggressive towards the customer. She denied that. She explained that the customer had been enquiring about a booking which she had been unable to locate and that had taken a while. The customer had then become aggressive enquiring "is someone going to talk to me". She had replied that she was but that she was trying to look for the booking. Ultimately she identified that the booking had been made with another taxi company and she advised the customer to telephone that company. She explained that although she had had to raise her voice above that of the customer to make the point that she was trying to find the booking, she had never sworn, shouted at her or hung up on her. In the claimant's opinion, at most a warning would have been sufficient. She said that she had raised her voice only slightly out of sheer frustration at not being able to find the booking that the customer was calling about and so as to be heard by the customer who was talking over her while she was trying to do her best.

7.16 I have had the opportunity of listening to the recording that was provided to the Tribunal by Mr Hutchinson. I am satisfied that during the initial part of the telephone call the claimant conducted herself properly. There is then quite a long period of silence apart from the noise of a keyboard tapping, which could well be the claimant seeking to locate the booking about which the customer was calling. As the claimant said in evidence the customer can then be heard enquiring, "Is anybody going to talk to us?" The claimant is heard replying that she was talking to the customer but was looking for the job. Even accepting that the customer was being somewhat provocative in her comment, the claimant's tone could be described as being a little brusque. In my opinion, however, it did not warrant the customer's response of, "don't shout at me". The claimant then interrupted, talking over the customer to confirm that she was looking for the booking but until she could find it she could not comment on it during the course of which the customer can similarly be heard talking over the claimant. She then identified that the job was not one for her taxi company but had been booked with a different taxi company, which the customer said she would telephone. The call concluded reasonably.

The law

8. The principal statutory provisions that are relevant to the issues in this case are as follows:

Unfair dismissal – the 1996 Act

"94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer."

"98 General.

(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 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.

(2) A reason falls within this subsection if it—
.....
(b) relates to the conduct of the employee,
.....
(4) 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 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."

Deduction from wages – the 1996 Act

"13 Right not to suffer unauthorised deductions.
(1) An employer shall not make a deduction from wages of a worker employed by him unless—
(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

Holiday pay – the Working Time Regulations 1998

14 Compensation related to entitlement to leave

(1) This regulation applies where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

Breach of Contract – notice pay – the 1996 Act

Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, with reference to section 3(2) of the Employment Tribunals Act 1996, provides (at the risk of over-simplification) that proceedings can be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages for the breach of a contract of employment if the claim arises or is outstanding on the termination of the employee's employment

Application of the facts and the law to determine the issues

9. The above are the salient facts relevant to and upon which I based my judgment having considered those facts in the light of the relevant statutory law and the case precedents in this area of law.

Unfair dismissal

10. The issues arising from the statutory and case law referred to above that are relevant to the determination of the complaint of unfair dismissal (and are summarised at paragraph 7 of Case Management Summary arising from the preliminary hearing held on 29 June 2020) fall into two principal parts, which are addressed below.

What was the reason for the dismissal and was it a potentially fair reason?

11. The first questions for me to consider are what was the reason for the dismissal of the claimant and was that a potentially fair reason within sections 98(1) and (2) of the 1996 Act? It is for the respondent to show the reason for the dismissal and that that reason is a potentially fair reason for dismissal. By reference to the long-established guidance in Abernethy v Mott Hay and Anderson [1974] IRLR 213, the reason is the facts and beliefs known to and held by the respondent at the time of its dismissal of the claimant.

12. On the evidence before me I am satisfied that the respondent has discharged the burden of proof to show that the reason for the claimant's dismissal was related to her conduct, that being a potentially fair reason in accordance with section 98(1) of the 1996 Act.

Did the respondent act reasonably or unreasonably?

13. Having thus been satisfied as to the reason for the dismissal, I moved on to consider whether the dismissal of the claimant was fair or unfair under section 98(4) of the 1996 Act, which requires consideration of three overlapping elements, each of which I must bring into account:

    13.1 first, whether, in the circumstances, the respondent acted reasonably or unreasonably;

    13.2 secondly, the size and administrative resources of the respondent;

13.3 thirdly, the question "shall be determined in accordance with equity and the substantive merits of the case".

14. In this regard I remind myself of the following important considerations:

14.1 Neither party now has a burden of proof in this respect.

14.2 My focus is to assess the reasonableness of the respondent and not the unfairness or injustice to the claimant, although not completely ignoring the latter.

14.3 I must not substitute my own view for that of the respondent. This principle has been maintained over the years in decisions including Iceland Frozen Foods (re-confirmed in Midland Bank v Madden [2000] IRLR 288) and J Sainsbury plc v Hitt [2003] ICR 111. In UCATT v Brain [1981] IRLR 224 it was put thus:

> "*Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not*."

14.4 The decision in Polkey v AE Dayton Services Ltd [1988] ICR 142 firmly establishes procedural fairness as an integral part of the issue of reasonableness.

14.5 My consideration of whether the claimant's dismissal was fair or unfair is a single issue involving the substantive and procedural elements of the dismissal decision.

14.6 The 'range of reasonable responses test' (referred to in the guidance in Iceland Frozen Foods and Foley), which will apply to my decision as to whether the decision of the respondent to dismiss the claimant fell within the band of reasonable responses of a reasonable employer acting reasonably, applies equally to the procedure that was followed in reaching that decision: see Hitt.

15. The issues in this case are fairly standard in a case of this nature and arise from law that is relatively settled. In that regard while bringing into my consideration the decision of the EAT in Burchell (which has obviously stood the test of time for over forty years) I also took into account more recent decisions of the Court of Appeal, which reviewed and indorsed those authorities: ie. Fuller v The London Borough of Brent [2011] EWCA Civ 267, Tayeh v Barchester Healthcare Limited

[2013] EWCA Civ 29 and Graham, particularly at paragraphs 35 and 36 where Aikens L.J. stated as follows:

> *"In Orr v Milton Keynes Council [2011] ICR 704, all three members of this court concluded that, on the construction given to section 98(4) and its statutory predecessors in many cases in the Court of Appeal, section 98(4)(b) did not permit any second consideration by an ET in addition to the exercise that it had to perform under section 98(4)(a). In that case I attempted to summarise the present state of the law applicable in a case where an employer alleges that an employee had engaged in misconduct and has dismissed the employee as a result. I said that once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, 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 and, thirdly, did the employer have reasonable grounds for that belief.*
>
> *If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice. An appeal from the ET to the EAT lies only in respect of a question of law arising from the ET's decision: see section 21(1) of the Employment Tribunals 1996 Act 1996."*

16. I have brought the principles arising from the above case law into account in making my decision. From the above excerpt taken from Graham it will be apparent that the Court of Appeal takes as the first consideration the question of whether the respondent carried out an investigation into the allegations that was reasonable in the circumstances of the case. That reverses the order of these considerations as set out in Burchell and, with respect, has always appeared to me to be the more appropriate order to adopt as without a reasonable investigation, any grounds might be baseless and any belief might not be well-founded.

17. Thus the first element or question that I considered is whether at the stage that the respondent came to its decision to dismiss the claimant it had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. In its ET3 the respondent asserts "there was an internal meeting" but it is apparent that the claimant was not involved in any meeting that there might have been. Indeed when asked by the claimant Mr Hutchinson informed her that the meeting had been between the owners of the business only. The ET3 also records that "ACAS advised that there was no reason the disciplinary hearing could not be held over the telephone". That might be right in the circumstances of the current pandemic but there is no evidence there was any disciplinary hearing at all whether over the telephone or not. Quite simply, therefore, the claimant was not given any opportunity to explain her side of things. That is clear from the fact that on 23 October 2019 Mr Hutchinson sent her the recording of part of the conversation between her and the customer and, then, on the following day commenced the telephone call as set out above "We've had a meeting" before going on that there was a couple of options for her from which she could choose.

18. It is possible that the respondent might have carried out some type of investigation but it does not suggest that it did in its ET3 and even if it had investigated matters from one perspective it is patently unfair not to have considered matters from the claimant's perspective also. That is clear from the ACAS Code of Practice: Disciplinary and Grievance Procedures (2015) which provides the key features of what would constitute a fair disciplinary process. That involves informing the employee of the problem then, having allowed the employee a reasonable time to prepare their case, holding a meeting with the employee to discuss the problem and allowing the employee to be accompanied to the meeting; and, finally, allowing the employee to appeal against the decision that has been taken. Nothing of that sort whatsoever occurred.

19. For these reasons I am satisfied that with regard to the first element in Graham (the third element in Burchell), at the stage that the respondent made its decision to dismiss the claimant it had not carried out as much investigation into the matter as was reasonable in all the circumstances of the case. On this basis alone, therefore, I find that the claimant was unfairly dismissed. As such it is not necessary for me to continue my consideration of that complaint but I do so for completeness.

20. I turn, therefore, to consider the second and third questions in Graham of the belief that the claimant was guilty of misconduct and the reasonable grounds for that belief.

21. Quite simply, in the absence of any investigation let alone a reasonable investigation involving the claimant it is not possible that the respondent could identify reasonable grounds for its belief or could hold the belief that she was guilty of misconduct.

22. The final issue is the reasonableness or otherwise of the sanction of dismissal. Referring to established case law such as Iceland Frozen Foods (again as indorsed in Graham) there is, in many cases, a range or band of reasonable responses to the employee's conduct within which one employer might

reasonably take one view and another quite reasonably take another view. My function is to determine in the circumstances of this case whether the decision of this respondent fell within the band of reasonable responses that a reasonable employer might have adopted.

23. In this case I have taken great care to ensure that I do not fall into the trap referred to above of asking myself whether I would have dismissed the claimant and therefore substituting my own view for that of the respondent: Brain. Having considered the documentary evidence before me, the recording of the telephone call in question and the claimant's oral evidence I am satisfied that the dismissal of the claimant was not a decision that fell within the band of reasonable responses of a reasonable employer in these circumstances.

24. In summary, therefore, I am satisfied that, as is required of me by section 98(4), the respondent did not act reasonably in treating the reason for the dismissal of the claimant as a sufficient reason for dismissing her.

25. Thus, I find the claimant's complaint that her dismissal by the respondent was unfair to be well-founded.

26. The claimant is therefore entitled to a remedy in respect of her unfair dismissal. She opted for the remedy for compensation.

27. As to the basic award, as at the date of her dismissal on 29 October 2019 the claimant was aged thirty-eight years and had been employed by the respondent for ten complete years. That produces a 'multiplier' of ten. Her gross weekly pay was £336.61. Multiplying that sum by 10 produces the total of £3,366.10.

28. Section 122(2) of the 1996 Act provides that where a tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award it shall do so. In this regard, I have referred above to the claimant's tone being a little brusque, even accepting the customer's somewhat provocative comment, and the claimant then talking over the customer. I consider it to be relevant in this connection that the claimant stated in evidence that, in her opinion, at most a warning would have been sufficient. That is a clear indication that the claimant accepted that the manner in which she spoke to the customer was not wholly appropriate. In these circumstances, I consider it just and equitable to reduce the amount of the basic award by 15%: i.e. £504.92.

29. Hence I award the sum of £2,861.48 to the claimant as the basic award.

30. As to the compensatory award, on the basis of the claimant's oral evidence, supported as it is by certain documents (47 to 54), I am satisfied that from the date of her dismissal until she commenced alternative self-employment she did what she could to find alternative employment. That was a period of ten weeks up until 6 January 2020. The net pay that the claimant would have received had she not been dismissed would have been £283.41 per week. Multiplying that by 10 produces an initial compensatory award of £2.834.10.

31. The claimant decided to mitigate her loss arising from her dismissal by becoming self-employed as a taxi driver. To do so she had to pay out various costs as follows: taxi licence badge and DBS check, £216.00; car taxi test and licence plate, £247.00; radio fitting, £138.00; medical, £45.00. A total of £646.00, which I award as part of the compensatory award. I also award the claimant the sum of £350.00 in respect of the loss of the statutory rights that she had built up during her employment with the respondent. Thus, at this stage, a compensatory award with a subtotal of £3,830.10.

32. As indicated above, however, the respondent significantly failed to comply with the ACAS Code of Practice in respect of, for example, the investigation, meeting with the claimant to hear her side of things and offering an appeal against her dismissal. The respondent is a reasonably large employer with fifteen employees in its office together with approximately ten employed drivers undertaking contracts in relation to schools and the NHS with other taxi drivers being self-employed. It is reasonable that such an organisation would have done far more than it did in this regard. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that if, in the case of proceedings such as this, the employer has failed to comply with the Code and that failure was unreasonable, an employment tribunal may if it considers it just and equitable in all the circumstances to do so increase any award it makes to the employee by no more than 25%. Guidance in this respect was given by the Employment Appeal Tribunal in relation to the former statutory procedure in the case of Lawless v Print Plus EAT 0333/09, which I considered to be equally applicable in relation to the ACAS Code. That guidance includes that I should have regard to whether the procedures were applied to some extent or were ignored altogether, whether the failure to comply was deliberate or inadvertent and whether there were circumstances that mitigated the blameworthiness of the failure to comply. In this case, the respondent did fail to comply with the Code and I am satisfied that that failure was unreasonable and that it is just and equitable to increase the award to the claimant. In accordance with Section 124A of the 1996 Act that increase is to be applied to the compensatory award. Thus, taking the above sub-total of the compensatory award of £3,830.10 and increasing that by 25% (which I consider it is just and equitable to do in all the circumstances) produces an increase of £957.53. Adding that to the compensatory award thus far produces a figure of £4,787.63.

33. Also of relevance to the calculation of the compensatory is that the respondent did not give to the claimant a written statement of the particulars of her employment. That is contrary to section 1 of the 1996 Act, which provides, as set out above, that when an employee begins employment the employer must give to the employee a written statement of particulars of employment. As such, in accordance with Section 38 of the Employment Act 2002 this Tribunal is obliged to make an award of the minimum amount to the claimant and may, if it considers it just and equitable in all the circumstances, award the higher amount instead; that is unless there are exceptional circumstances which would make an award or increase unjust or inequitable. In the circumstances of an employer of the size of the respondent and the claimant having asked for a contract of employment to no avail I am satisfied that it is just and equitable to award the higher amount. The higher amount is four weeks' pay, that being a week's pay calculated in

accordance with the 1996 Act and subject to the maximum of a week's pay specified in Section 227 of that Act. In the circumstances of this case, the calculation is therefore made by reference to the claimant's gross pay of £336.61. Thus four weeks' pay is £1,346.44. I add that to the calculation of the compensatory award thus far: i.e £4,787.63 plus £1,346.44 makes £6,134.07.

34. Much as section 122(2) of the 1996 Act provides for the reduction of the basic award of compensation on account of what is sometimes termed 'contributory fault', section 123(6) of the 1996 Act provides that where a 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 as it considers just and equitable. In this respect I apply the principles set out by the Court of Appeal in the decision in Nelson v BBC (No. 2) [1980] ICR 110 For the same reasons as I have given in relation to the percentage reduction of the basic award, I consider it just and equitable to reduce the compensatory award by that same percentage of 15%: i.e. £920.11. Hence the total compensatory award becomes £5,213.96.

35. Thus the total award of compensation that I order the respondent to pay to the claimant in respect of her unfair dismissal is as follows: a basic award of £2,861.48 plus a compensatory award of £5,213.96 making a total of £8,075.44.

Wrongful dismissal

36. The issue in respect of the claimant's complaint of wrongful dismissal (failure to give her notice) is whether the respondent has shown that she fundamentally breached her contract of employment so as to entitle it to terminate that contract without notice. The issue of reasonableness, which is so important in the context of a complaint of unfair dismissal, does not apply. It is simply a matter for the Tribunal to determine whether it considers that the claimant was, in fact, guilty of misconduct amounting to a repudiatory breach of her contract of employment entitling the respondent to terminate that contract on grounds of gross misconduct without giving her the notice to which she would otherwise have been contractually entitled.

37. I have again brought into account the documentary evidence before me, the recording of the telephone call in question and the claimant's oral evidence. I acknowledge that Mr Hutchinson considered that the claimant had displayed an unacceptable attitude towards customers but, having listened to the recording of the telephone conversation, I accept the claimant's description that while she had to raise her voice slightly because the customer was talking over her and out of sheer frustration at not being able to find the booking, the manner in which she conducted the telephone conversation (even accepting that one of her remarks was somewhat brusque) cannot be described as being conduct amounting to a repudiatory breach by the claimant of her contract of employment entitling the respondent to terminate it without giving her contractual notice.

38. That being so, the claimant is entitled to be compensated for not having received the ten weeks' notice of the termination of her contract to which she was entitled in accordance with Section 86 of the 1996 Act. The net weekly pay of the

claimant prior to the termination of her employment was £283.41. Ten weeks' pay, therefore, comes to £2,834.10. I order that the respondent makes that payment of compensation to the claimant.

Unauthorised deduction from wages

39. As indicated above, the claimant was suspended on 18 October 2019 and was dismissed on 29 October 2019. She did not receive any pay during the period of her suspension. Had she been at work in that period she would have worked for five days of the week commencing 21 October and then on 28 and 29 October in the following week. As indicated above, claimant's hours of work are eight hours on Mondays to Thursdays inclusive and nine hours on a Friday. Thus in respect of each of the above six days when she was suspended, excluding Friday 25 October, she would have received £65.68 (£394.08) and she would have received £73.89 on the Friday. In this regard the suspension letter (4) clearly records, "you will receive your full pay during your period of suspension". That did not happen. Thus the claimant would have been paid, had she been at work, and should have been paid during her suspension the sum of £467.97.

Holiday pay

40. The claimant's complaint that the respondent failed to compensate her in respect of the entitlement to paid holiday that had accrued but not been taken by her as at the termination of her employment was withdrawn by the claimant and is dismissed.

Conclusion

41. In conclusion, my judgment in respect of the claimant's complaints is as follows:

    41.1 The reason for dismissal of the claimant was conduct but the respondent did not act reasonably in accordance with section 98(4) of the 1996 Act. As such, the claimant's complaint under section 111 of the 1996 Act that her dismissal by the respondent was unfair, being contrary to Section 94 of the 1996 Act by reference to Section 98 of that Act is well-founded.

    41.2 In respect of that unfair dismissal the respondent is ordered to pay to the claimant compensation of £8,075.44 the calculation of which is detailed above.

    41.3 The claimant's complaint that the respondent was in breach of her contract of employment in that it failed to give her the ten weeks' notice of the termination of her employment to which she was entitled in accordance with Section 86 of the 1996 Act is well-founded.

    41.4 In respect of that breach of contract the respondent is ordered to pay to the claimant compensation of £2,834.10.

    41.5 The claimant's complaint that the respondent made an unauthorised deduction from her wages in that, contrary to Section 13 of the 1996 Act, it

did not pay her at all in respect of the seven days during which she was suspended from work (i.e. 21-25, 28 and 29 October 2019) is well-founded.

41.6 In respect of the above unauthorised deduction the respondent is ordered to pay to the claimant £467.97.

41.7 The claimant's complaint that, contrary to Regulation 14 of the Working Time Regulations 1998, the respondent had not paid her compensation in respect of her entitlement to paid holiday that had accrued but not been taken by her at the termination of her employment was withdrawn by the claimant and is dismissed.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENTJUDGE ON 15 November 2020