EMPLOYMENT TRIBUNALS

Claimant: **Mr D Brooks**

Respondent: **Watson Gym Equipment Limited**

Heard at: **Bristol** **On:** **7, 8 and 9 December 2020**

Before: **Employment Judge Midgley**

Representation
Claimant: **Mr Jones, Solicitor**
Respondent: **Mr R Johns, Counsel**

JUDGMENT

1. The claim that the reason or principle reason for the claimant's dismissal was the making of a protected disclosure is not well founded and is dismissed.

2. The claim that the claimant was unfairly dismissed is well funded and succeeds. A fair process would not have resulted in the claimant's dismissal, but his conduct contributed to his dismissal and it is just equitable to make a reduction to the compensatory award of 20%.

3. The respondent unreasonably failed to comply with the ACAS Code of Conduct and it is just and equitable to increase the award by 20%.

4. The claim that the claimant was wrongfully dismissed is well-founded and succeeds.

5. The respondent is ordered to pay the claimant the agreed sum of £14,560.62 in compensation of his dismissal, consisting of:

   5.1. Basic award £5,626.94

   5.2. Compensatory loss £8,933.68

6. The respondent failed to provide the claimant with a written statement of employment particulars and is ordered to pay the claimant two weeks' pay amounting to £1,023.08.

7. The claimant did not receive benefits and therefore the recoupment provisions do not apply.

REASONS

The claim and parties

1. By a claim form presented on 12 November 2019, the claimant, Mr Brooks, who was born on 10 August 1970, brought claims of unfair dismissal contrary to s.98(4) and 111 ERA 1996, automatically unfair dismissal because the reason or principle reason for dismissal was the making of a protected disclosure contrary to section 103A 1996, failure to provide written particulars of employment contrary to s.1 ERA 1996 and breach of contract in respect of notice pay.

2. The claimant was employed by the respondent as a Welder/Fabricator from 1 September 2007 until his dismissal on 29 July 2019.

3. The respondent is a medium-sized company, which employed 33 employees at the time of the claimant's dismissal and which carries on business as a manufacturer and installer of gym equipment. Sean Watson is the owner and Managing Director and Nick Pang is employed as the Operations Manager.

Procedure, hearing, and evidence

4. I was provided with an agreed bundle of 168 pages, a statement from the claimant and for the respondent with statements from Mr Pang and Mr Watson.

5. Each of the witnesses gave evidence on oath and answered questions from the representatives and from me. I found the claimant and Mr Pang to be straightforward, truthful and credible witnesses. Mr Watson's evidence was less clear, particularly in relation to his approach his status as the appeal officer, but that is addressed in the findings and conclusions below.

6. Mr Jones and Mr Johns each provided concise written submissions, setting out their arguments, which each expanded on in their closing submissions. I was not referred to any case law, presumably on the basis that the law in relation to the claims is settled.

7. On the afternoon of 8 December 2020, I provided the parties with extempore summary reasons and the Judgment so as to enable the parties to agree compensation whilst I drafted the full written reasons. The parties were content with the approach and sent the agreed calculations to the Tribunal on 9 December 2020.

The Issues

8. The issues are set out in my case management order of 12 June 2020 and will not be repeated here. The respondent made several concessions in relation to those issues during the course of the hearing:

   8.1. The dismissal was procedurally unfair as no appeal was conducted;

8.2. The respondent failed to adhere to the ACAS Code of Practice on Disciplinaries and Grievances as it (a) did not set out the reasons for the claimant's dismissal in writing, (b) did not inform the claimant of his right of appeal, (c) did not permit him to appeal when he requested to do so, and (d) did not invite the claimant to a meeting to discuss his grievance, (e) investigate it or (f) provide him with an outcome.

9. At the outset of the hearing I identified a further issue, namely the claim under section 1 ERA 1996 and section 38 EA 2002 in respect of the respondent's alleged failure to provide written statement of employment particulars to the claimant which had been omitted from the list of issues. The issues to be determined in respect of that claim are as follows:

9.1. When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

9.2. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the tribunal must award two weeks' pay and may award four weeks' pay.

9.3. Would it be just and equitable to award four weeks' pay?

Factual background

10. At the time of the claimant's appointment he was one of only three employees. The respondent grew quickly, but regrettably it did not ensure that its practices were compliant with the appropriate statutory employment or health and safety regimes. In consequence the employees had no contracts of employment, there were no disciplinary or grievance policies, and the respondent did not risk assess the work of its employees or offer them any form of training in manual handling or safe systems of work.

11. At the time of the hearing Mr Watson did not appear to understand the respondent's obligations in those respects; he could not articulate what a risk assessment was, how it was produced or why it might be necessary. Those shortcomings in relation to the Health and Safety at Work Act (and similar legislation provisions) were surprising, given the requirement for his employees to manipulate, lift and carry heavy articles of gym equipment, and because those matters played a part in the events leading to the claimant's dismissal as described below.

12. The respondent took orders from clients for the manufacture of standard and bespoke items of gym equipment. Its employees would build, assemble and install that equipment in the client's premises. The respondent's practice was to assign one staff member to each installation unless a client was willing to pay an increased price for more staff to attend. Additional employees were only sent if the employee tasked with the installation raised concerns that more than one employee were required to install the equipment in question.

13. The respondent's practice was therefore to react to situations in which an employee identified risk, rather than proactively assessing risk and identifying the appropriate number of staff that would be required safely to install the product in question so as to reduce that risk to a reasonable level. This practice derived partly from the industry practice of offering a reduced installation price if only one employee were required to install the equipment in question and assistance was provided by the client themselves.

Employment contracts

14. On 4 October 2017 Dawn Chapman was appointed as a manager by the respondent. The claimant formed a positive relationship with her. Mrs Chapman resigned sometime between March and late April 2018.

15. Prior to her resignation, she drafted employment contracts for all of the respondent's employees. These were handed to the staff in the warehouse. On the day on which they were handed out the claimant was away from the site installing the respondent's products at a client's premises. He did not therefore receive a contract but heard that they had been provided to others. He continued to work on the basis of the terms of employment which he had previously been told.

16. In 2018 the claimant applied for a mortgage and needed to provide evidence of his employment and salary. He therefore he requested a copy of his contract from the respondent. He was told that one would be found; it was not, however, he managed to resolve the difficulty with the mortgage company without the need for that evidence.

17. At some stage during Mrs Chapman's employment the claimant dropped a bag of illegal drugs in the workplace. The respondent did not dismiss him or even issue him with a written warning.

The claimant's role and accidents at work

18. As indicated, the claimant's duties were broad. He had begun his career as a welder but had been moved to 'assembly' and 'installation'. At the time of his dismissal he was often required to weld, undertake deliveries and install the respondent's products at clients' premises.

19. In 2019 the claimant suffered a series of accidents at work. First, on 7 January 2019 the claimant's hand was crushed whilst operating equipment, and he required hospital treatment and was given codeine for the pain.

20. On 20 March the claimant suffered a head injury when his head was crushed whilst loading items into a shipping container. He was sent home and required a day off work because of a severe migraine.

21. On 1 May 2019, the claimant hurt his neck when he fell whilst carrying machinery on his shoulder. He required a further day off work.

22. On 10 May the claimant was instructed to install equipment at a client's premises, which required him to carry nine heavy pieces of equipment up

several flights of stairs and to assemble it. In consequence he suffered a lower back injury. He did not attend work the following day, having overslept as a consequence the medication he was taking to manage that injury.

23. Mr Pang, the respondent's Operations Manager, telephoned the claimant and advised him that he would be required to attend a meeting to discuss his attendance and that he would be given a letter explaining the meeting when

    he attended work. The claimant visited his doctor and obtained a medical certificate covering the period the 13 to 27 May and was instructed to rest his back.

24. On 17 May the claimant attended work to deliver the medical certificate to the respondent. He was given a disciplinary invitation letter in relation to late attendance. The letter did not specify the dates in question but it is logical to assume, in the absence of any evidence to the contrary, that they were those detailed above relating to the injuries at work.

The events of 28 June 2019

25. On 28 June the claimant was instructed to undertake three jobs, the latter two at some distance from the respondent's premises: first, a drop off in Bradford on Avon, secondly, an assembly in Cardiff, and finally an alteration in Newport. However, the parts and materials were not ready for the claimant to load onto his van at his arrival at work. The claimant's normal practice was to load the van by reversing it up to the doors of the warehouse before lifting the necessary equipment and materials into the rear of the van himself.

26. The claimant messaged Mr Pang, who was attending a seminar, asking which bolts were required for the jobs in question. Mr Pang was uncertain, so the claimant took an assortment. He accepts that he threw his tools into the back of the van, and boxes of assorted bolts. When loading the bolts into boxes he accepts that he dropped a number of bolts on the floor and did not subsequently clear them up. The claimant slammed the door of a cupboard containing bolts and equipment.

27. I am satisfied on the balance of probabilities that the claimant was angry, utterly exasperated and frustrated because he had been asked to undertake three deliveries which were a significant distance from the claimant's home and the respondent's business premises, and he rightly anticipated that that would necessitate a very long and arduous working day. His anger and frustration were clearly visible to those in the vicinity. He paced up and down, verbally complaining about the manner in which he was being treated and acted as described above.

28. The claimant suggested in his answers to cross examination that he loved deliveries. He may have done so, but I reject the suggestion that he was pleased with the significant number and length of deliveries that he was instructed to undertake on this occasion. The claimant's statement contains a number of complaints about the long days that he was required to work. I'm satisfied that he believed that Mr Watson had deliberately selected him for another long day, and that he was clearly unhappy, regarding this as further

bullying by Mr Watson and Mr Pang. I am satisfied that the claimant angrily threw items into the back of his van, including his own tools and boxes of bolts, and slammed the cupboard and van doors.

29. The claimant accepts that he slammed the door of the van, although I accept that that was necessary because the mechanism was temperamental (the claimant's account in that regard was unchallenged).

30. At the time there were six or seven employees in the immediate vicinity to the claimant, although none, with the exception of Mateusz Bakka, were within close proximity.

31. One of those employees, Janos Czovek, who worked on the assembly line, raised concerns with Mr Pang about the claimant's conduct that day when Mr Pang returned to work the following Monday. He produced a letter detailing those concerns. I will describe the nature of the complaint when I address the respondent's investigation.

The first protected disclosure

32. On his arrival at the client's site in Cardiff, the claimant was told that the client expected him to install a bespoke gym rig. Pictures of the rig were provided in evidence; it was a significant structure formed of six or seven metal struts approximately 3m in height, racking, pull-up bars and the client's branded signs on circular metal discs which were approximately 5 mm in depth.

33. The claimant sent a WhatsApp message to Mr Watson to enquire whether the respondent was aware that he was expected to install the rig. Mr Watson told him that he would speak to Mr Pang, who in turn would speak to the client, Sam. The claimant messaged Mr Pang stating "do you know I'm supposed to be putting this rig up and bolting it to the wall as well as everything else all on my own." Mr Pang replied, stating amongst other matters "if it needs to go on to the floor we can do that on another day but needs to go up." That was a clear instruction that work had to be carried out that day.

34. The claimant replied stating that it was "bloody crazy" and that he couldn't install the equipment without hurting himself. In his evidence, the claimant stated that he believed that raising his concerns was in the public interest the risk caused to members of the public who were walking through the gym if any of the equipment were to fall on them.

35. In the event the claimant was not required to undertake the installation; three additional staff were sent on another occasion to undertake the work in conjunction with the client, Sam.

The disciplinary investigation

36. On Monday 1 July 2019, Mr Czovek approached Mr Pang to raise his concerns about the claimant's conduct the previous Friday. He produced a letter detailing those concerns as summarized below.

37. First he made a general complaint that the claimant was emotionally unstable, reacted aggressively to instructions from Mr Watson and had on occasions threatened to commit suicide. In relation to the events of 28 June he suggested that the claimant was furious that he had been given the tasks in question and that he had thrown equipment and his tools onto the van, slammed a cupboard door and left bolts and nuts on the floor without bothering to pick them up. He described him as crying and complaining that he would not come into work on the Monday.

38. Mr Czovek complained that he feared for the safety of himself and others because of the claimant's aggressive and unpredictable behaviour.

39. The respondent has CCTV covering the assembly, office and production areas of the warehouse. Mr Pang reviewed the CCTV of the events in question. His view was that the CCTV was inconclusive because it did not show the claimant throwing items, but showed him pacing up and down and looking agitated and erratic. There was no sound on the recording.

40. It is unclear whether Mr Pang identified potential witnesses to the events from the CCTV from the differing areas that the claimant would have walked through (as he suggested during his evidence) or whether members of staff came forward to raise concerns (as he suggested in his statement.) In any event, three further statements were obtained. Mr Pang decided that they did not show that the claimant had committed gross misconduct; he regarded them as corroborative of the account given by Mr Czovek because they described the claimant as being angry and upset. In his view that was consistent with the Claimant's behaviour on the CCTV.

41. Two of the statements described the claimant as being upset, crying and angry, either suggesting that he would crash the company van on purpose or that the jobs could lead him to have a car accident and be killed and, if that were to happen, it would be Mr Watson's fault. One of the statements described the claimant stating that Mr Pang or Mr Watson had given him the tasks as a punishment because he had not attended work on 27 June (there is a clear typo in the statement, which references July). All of the statements express concern for the well-being and safety of the other employees, and one of them concern for the claimant's state of mind.

42. The final statement did not directly describe the events of 28 June, but was a general description of the author's view of the claimant's general attitude and demeanour at work.

43. On reading the statement of Mr Czovek, Mr Pang decided that the claimant should be dismissed because of the risk that he might injure other members of staff if he were to have another similar outburst in the future. He told me that having formed that view, there was nothing that the claimant could have said or produced as mitigation that would have altered his view.

44. Mr Pang looked at the cupboard in question but could see no evidence of damage. He formed the view that leaving bolts on the floor was not gross misconduct. Similarly, as he confirmed in his evidence, he was not concerned about minor damage to tools, or cupboard, which he did not regard as gross

misconduct. He told me that the issue of damage to the respondent's property played no part in his decision to dismiss.

45. The claimant had suffered sunburn over the weekend and did not attend work on 1 July. He telephoned Mr Pang to inform him, and was told that he was being suspended. Mr Pang did not explain the reason for his suspension at that time.

46. On 4 July the claimant was sent a letter by Mr Pang advising him that a disciplinary investigation would be conducted in relation to allegations of aggressive and erratic behaviour, damaging and abusing company property and premeditated absence. The claimant was invited to a investigation meeting and advised that he should not discuss the allegations with anyone

but should ensure that they remained confidential, and that any breach of confidentiality would be regarded as a further disciplinary matter. The claimant took that warning very seriously.

47. On 9 July Mr Pang wrote to the claimant inviting him to an investigation meeting and advised him of his right to be represented by a colleague or trade union representative.

48. The meeting took place on 10 July. The claimant was represented by an experienced HR consultant, Mrs Reynolds. Mr Pang attended with Mr Bird as a note taker. At the meeting the claimant was told that a number of employees had raised concerns with Mr Pang and he was asked to explain what he had done on 28 June. Mr Pang told that the claimant that he had been advised that the claimant had threatened to crash the company van and had acted aggressively and had thrown tools. The claimant denied that he had been aggressive, although accepted that he had rushed around muttering "what bolts? This isn't fair" and had slammed the van doors, arguing that he did so because they were difficult to shut, and that that might have been perceived as aggressive behaviour.

49. Mr Pang did not provide the claimant with the statements he had obtained, nor did he advise him that his conduct was said to have put people in fear of their safety.

<u>The disciplinary meeting.</u>

50. On 12 July 2017 the claimant received a letter inviting him to a disciplinary meeting on 16 July to answer allegations that he had acted aggressively and erratically on 28 June, "resulting in a number of employees fearing for yours and their own safety while at work." Again he was advised of his right to representation.

<u>The claimant's grievance</u>

51. On 15 July 2019 the claimant sent a written grievance to the respondent. Within the grievance he complained that the disciplinary allegations of aggressive behaviour were unclear, that despite 10 years unblemished service he had never been provided with any training, or issued with a contract of employment, or copies of the disciplinary and grievance procedures.

52. In relation to the events of 28 June he complained that he had been sent to Newport and expected to lift equipment weighing approximately 75 - 100 kg, which was more than three times the legal limit, before being required to install a rig weighing over 100kg per section by himself. He complained that that was a breach of the Health and Safety Act and had caused him physical injury. He complained that he had never received any manual handling training and that no risk assessments have ever been completed. He complained that he had been directed to undertake tasks which were unachievable and which put himself and others at risk. Finally, he complained that the respondent had not provided him with the paperwork Mrs Reynolds had requested.

53. On the same day Mrs Reynolds emailed Mr Pang requesting copies of the claimant's contract, and the disciplinary and grievance policies, together with the notes of the investigation meeting. Mr Pang replied stating "before sending over [the documents] having reviewed all the evidence it's likely that Daniel will be dismissed after tomorrow's disciplinary. I'm willing to offer Daniel three months' pay if you would wish to agree on this before we proceed to tomorrow's disciplinary hearing."

54. The claimant produced a telephone note of the call between Mrs Reynolds and Mr Pang. In that note Mr Pang suggested that the claimant should accept his offer because he had been told that the respondent was in a strong position because the statement suggested that staff were afraid to work with the claimant, and added "I can get more". He ended by saying "if it goes to court….We will bring everything up in court!"

55. On 29 July 2019, Mrs Reynolds again requested a copy of the claimant's contract from Mr Pang. In her email she noted "I have previously requested a copy of Daniel's contract which unfortunately you have admitted you have not got a copy of". It is clear, and I accept that, there were a number of conversations between Mrs Reynolds and Mr Pang, during which Mrs Reynolds not only requested those documents but also referred Mr Pang to the ACAS Code of Practice on disciplinary and grievance. She made explicit reference to it in her email of 29 July.

The disciplinary hearing

56. Mr Pang conducted the disciplinary hearing and was again supported by Mr Bird as a notetaker. The claimant attended and once more was represented by Mrs Reynolds.

57. At the outset of the hearing, Mrs Reynolds asked why the claimant was being disciplined. Mr Pang stated that during the investigation statements have been obtained from members of staff expressing worries about working in or in proximity to the claimant, and adding his "gross misconduct." Mr Pang then handed copies of the statements in an anonymized form to Mrs Reynolds. Mr Pang said that "due to the severity of the complaints and [the staff] displaying worries about working with the [claimant] we have no other choice." He was thereby conveying the claimant would be dismissed.

58. The claimant suggested that Mr Pang should have obtained statements from other employees, but Mr Pang replied "I believe it would be against him

anyway." The claimant suggested to Mr Pang that the fact that he had blown the whistle was the cause of his dismissal, and later referred to the text messages that he had sent. Mr Pang rejected that, he did not enquire into the allegation of whistleblowing at all.

59. It was clear that Mr Pang had made the decision that the claimant should be dismissed for gross misconduct and could not return to the workplace prior to the meeting itself. As he confirmed in his evidence there was nothing that the claimant could have said to him during that meeting that would have altered his mindset.

60. Mrs Reynolds asked what was to be done with the claimant's grievance, and advised Mr Pang that the ACAS Code suggested that it should be dealt with

at the disciplinary hearing. Mr Pang said he did not know and that Mr Watson would deal with the matter. He was asked whether there were any formal grievance procedures in place, and again stated he did not know. He was asked whether he had found the claimant's contract, and said he had looked but could not find it anywhere. Finally, Mrs Reynolds stated that the claimant was entitled to an appeal and asked what the procedure was. Mr Pang said he didn't know.

<u>The claimant's appeal</u>

61. By letter dated 5 August the claimant appealed on the grounds that he had not been given a fair hearing because he did not understand the detail of the disciplinary allegations, that the statements relied upon had been given to him at the start of the hearing, and that his grievance had not been addressed.

62. Also on 5 August Mrs Reynolds chased Mr Pang to explain what was to be done with the claimant's grievance and appeal, and for a copy of his contract of employment to be provided. At that time Mr Pang had found a copy of the respondent's disciplinary procedure, although he had not looked at it before making his decision to dismiss on 29 July.

63. Despite those requests the respondent took no action in relation to either the grievance or the appeal. Mr Watson, who was responsible for each of those decisions, provided inconsistent accounts for those failings which are addressed in the 'Discussions and Conclusions' section below.

The relevant law

<u>Protected disclosures</u>

64. The respondent conceded that the disclosures were disclosures of information and were qualifying disclosures in accordance with s.43B(1)(d) ERA 1996 because they contained information which in the claimant's reasonable belief tended to show that his or the publics health and safety had been put at risk. The remaining issues for me to determine were whether the claimant reasonably believe those disclosures were in the public interest and, if so, whether they were the cause or principle cause of his dismissal.

65. The requirement that the worker should reasonably believe that the disclosure is made in the public interest was introduced by an amendment effected by section 17 of the Enterprise and Regulatory Reform Act 2013 which came into force with effect from 25 June 2013. The purpose of this was to reverse the effect of the EAT decision in Parkins v Sodexo Ltd. [2002] IRLR 109, and to prevent complaints which relate purely to the claimant's own treatment, such as a breach of a claimant's contract with no wider public implications, from falling within the terms of the section.

66. There may not be a white line between personal and public interest, with any element of the former ruling out the statutory protection: where there are mixed interests, it is for the Tribunal to rule, as a matter of fact, as to whether there was sufficient public interest to qualify under the legislation (see the guidance provided by Underhill LJ in Chesterton Global T/A Chestertons v Nurmohamed [2017] EWCA Civ 979, at paragraphs 36 and 37).

67. In Chesterton the Court of Appeal noted that even where the disclosure relates to a breach of the worker's own contract of employment (or some other matter where the interest in question is personal in character) there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest, as well as in the personal interest of the worker. In this regard, the following factors suggested by N might be relevant:

67.1. the numbers in the group whose interests the disclosure served

67.2. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed 67.3. the nature of the wrongdoing disclosed, and

67.4. the identity of the alleged wrongdoer.

68. It does not matter whether the claimant's belief is wrong, if objectively his/her belief that he/she has identified a breach as detailed above is reasonable (Babula v Waltham Forest College [2007] ICR 1045, CA per Wall LJ at para 79 and Jesudason v Alder Hey Childrens' NHS Foundation Trust [2020] EWCA Civ 71 per Elias LJ at para 21.)

S.103A

69. Section 103A provides:

> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

70. The protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair (see Kuzel v Roche Products Ltd [2008] ICR 799 per Elias J at para 44.)

71. The principle reason for the dismissal is “a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee” (see Abernethy v Mott, Hay and Anderson [1974] ICR 323).

72. The focus must be on the knowledge, or state of mind, of the person who actually took the decision to dismiss, as, “In searching for the reason for a dismissal, courts need generally look no further than at the reasons given by the appointed decision-maker. …[however] If a person in the hierarchy of responsibility above the employee determines that, for reason A, the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts, it is the court’s duty to penetrate through the invention rather than to allow it also to infect its own determination.” Royal Mail Group Ltd v Jhuti [2019] UKSC 55, SC.

Unfair dismissal s.98(4) ERA 1996

73. The reason for the dismissal relied upon was conduct which is a potentially fair reason for dismissal under section 98(2) (b) of the Employment Rights Act 1996 (“the Act”).

74. I have considered section 98(4) of the Act which provides “…. 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”.

75. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as “s. 207A(2)”) and the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 (“the ACAS Code”).

76. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides: "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 the amount accordingly."

77. The compensatory award is dealt with in section 123. Under section 123(1) "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".

78. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides: "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."

79. The claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.

80. Under section 38 of the Employment Act 2002, if the employer was in breach of his duty to give a written statement of initial employment particulars and the employment tribunal finds in favour of the employee or makes an award to the employee, then the tribunal must increase the award by an amount equal to two weeks' pay, and may, if it considers it just and equitable in all the circumstances, increase the award by four weeks' pay instead.

81. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; Nelson v BBC (No 2) [1980] ICR 110 CA and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The Tribunal directs itself in the light of these cases as follows.

82. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair.

83. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

84. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral):

(i) that the employer did believe the employee to have been guilty of misconduct;

(ii) that the employer had in mind reasonable grounds on which to sustain that belief; and

(iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case.

85. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

86. Where an employer relies upon anonymous statements, it must take reasonable steps to try to maintain a balance of interest between protecting the anonymity of the informant and providing a fair hearing for the employee (see Linfood Cash and Carry Ltd v Thomson and ors [1989] ICR 518, EAT). In particular, a tribunal should consider whether some or all of the following steps would have secured the necessary balance:-

    86.1. informants' statements should be reduced to writing (although they might need to be edited later to preserve anonymity)

    86.2. in taking statements it is important to note the date, time and place of each observation or incident; the informant's opportunity to observe clearly and accurately; circumstantial evidence, such as knowledge of a system; the reason for the informant's presence or any memorable small details; and whether the informant had any reason to fabricate evidence

    86.3. further investigation should then take place, corroboration being clearly desirable

    86.4. tactful enquiries into the character and background of the informant would be advisable

    86.5. a decision must then be taken whether to hold a disciplinary hearing, particularly when the employer is satisfied that the informant's fear is genuine

    86.6. if the disciplinary process is to continue, the responsible member of management at each stage of the procedure should personally interview the informant and decide what weight is to be given to his or her evidence

    86.7. the informant's written statement — redacted if necessary to avoid identification — should be made available to the employee and his or her representative

    86.8. if the employee or his or her representative raises an issue that should be put to the informant, it may be desirable to adjourn the disciplinary proceedings so that the chair can question the informant

    86.9. it is particularly important that full and careful notes should be taken at disciplinary hearings when informants are involved

    86.10. if evidence from an investigating officer is to be taken at a hearing, it should be prepared in writing where possible. (Note that this final point is not limited to cases where an investigation has been started because of statements made by an informant.)

87. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole Taylor v OCS Group Ltd.

Wrongful dismissal

88. The test to be applied does not require the Tribunal to assess the reasonableness of the employer's decision to dismiss but rather to answer the factual question: Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract? (Enable Care and Home Support Ltd v Pearson EAT 0366/09).

89. An employer's right to summarily dismiss an employee is restricted to cases where there is repudiation or fundamental breach of contract by the employee (Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 WLR 698, CA). An act of gross misconduct is generally accepted to be an act which fundamentally undermines the employment contract or, put another way, which amounts to repudiatory conduct by the employee going to the root of the contract (Wilson v Racher [1974] ICR 428, CA).

90. The conduct must be a deliberate and willful contradiction of the contractual terms or amount to gross negligence (Laws v London Chronicle (Indicator Newspapers Ltd) [1959] 1 WLR 698, CA) and (Sandwell and anor v Westwood EAT 0032/09)

Contributory conduct

91. A Tribunal may reduce the amount of the compensatory award where it finds that the dismissal was to any extent caused or contributed to by any action of the complainant' (s123(6) ERA 1996).

92. A similar power is contained in relation to the basic award in s.122(2) ERA in relation to any conduct which occurred before the dismissal, however, that provision does not contain the same causative requirement which exists in s.123(6); the Tribunal therefore has a broader discretion to reduce the basic award where it considers that it would be just and equitable (see Optikinetics Ltd v Whooley [1999] ICR 984,EAT).

93. Three factors must be satisfied if the tribunal is to find contributory conduct (see Nelson v BBC (No.2) 1980 ICR 110,CA):

    93.1. the conduct must be culpable or blameworthy

    93.2. the conduct must have actually caused or contributed to the dismissal, and

    93.3. it must be just and equitable to reduce the award by the proportion specified

94. Provided these three factors are satisfied, the fact that the dismissal was automatically, as opposed to ordinarily, unfair is of no relevance (Audere Medical Services Ltd v Sanderson EAT 0409/12).

95. In determining whether particular conduct is culpable or blameworthy, the tribunal must focus on what the employee did or failed to do, not on the employer's assessment of how wrongful the employee's conduct was (Steen v ASP Packaging Ltd [2014] ICR56, EAT).

s.207A TULRCA 1992

96. S207A provides in so far as is relevant:

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the 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%

Discussion and Conclusions

S.103A 1996

97. The respondent conceded that each of the disclosures was a qualifying disclosure as the claimant reasonably believed that they contained information relating to one of the qualifying grounds in section 43B ERA 1996. The respondent argues that the claimant could not reasonably have believed that they were in the public interest.

98. Addressing each of the disclosures in turn, I have concluded as follows. In relation to the disclosure on 20 June 2019, the disclosure was made in circumstances where members of the public were walking through the gym in the location in which the claimant was working, constructing equipment from heavy metal items.

99. The disclosure contained in the grievance of 15 July 2019 was a postevent description of the events on 28 June 2019. It was made after the disciplinary process had begun, but reiterated the concerns from the disclosure of 28 June. It identified that there had been a breach of the Health and Safety Act, that there was a risk of injury to the claimant and to "others", which in the circumstances of the disclosure of 28 June 2019 can reasonably be understood to mean members of the public. It is clear that the claimant's self-interest was a more significant force in this disclosure, albeit there remained an element of concern for the public.

100. Taking all those matters into account, and addressing each of the criteria in Chesterton:

100.1. The numbers in the group whose interests the disclosures served included the claimant, the owner of the Jim (Sam), and members of the public as described.

100.2. The nature of the interest affected and the extent to which they were affected by the wrongdoing which claimant disclosed. This may best be described as the risk to the health and safety of those in the immediate vicinity of the equipment caused by the risk of a heavy item of equipment falling on them. That included the 3m joists and the 5 mm thick large circular discs. I am satisfied that if either item were to fall on a member of the public it could cause significant harm and it was reasonable for the claimant to form that view.

100.3. The nature of the wrongdoing disclosed – This was the failure to ensure a safe system of work during the construction of the gym equipment, so as to ensure there were sufficient employees to erect the construction safely. That, as the claimant identified, was a breach of the Health and Safety at Work Act and other similar legislation.

100.4. The identity of the alleged wrongdoer. The wrongdoer was the respondent, which was a medium sized business providing equipment to a number of gyms.

101. Taking all of those matters into account, I am satisfied on the facts that this case that the claimant had a reasonable belief that was a sufficient degree of public interest in the disclosures, notwithstanding that his personal interest in the disclosures may have been the primary or a significant cause of the disclosures, particularly in relation to the disclosure in July 2019.

102. Were the disclosures the reason all the principal reason for the claimant's dismissal? The claimant has produced sufficient evidence to establish that the disclosures may have been the reason principal reason for his dismissal. In particular the claimant relies upon the coincidence of his disclosure on 28 June and his suspension from 1 July, together with the respondent's failure to engage with or address the claimant's grievance or appeal. These are all matters from which a tribunal properly directing itself might reasonably draw an inference that the reason was the protected disclosures.

103. However, I am satisfied that the respondent has established its reason for dismissal, namely conduct. I have found that Mr Pang decided that the claimant should be dismissed because he formed a clear and unwavering view that the claimant's conduct would represent a significant risk to the health and safety of his co-workers if it were to be repeated, and that the only appropriate means of mitigating that risk was to dismiss the claimant. That is a reason unconnected to the disclosures that the claimant made, but focused upon the potential consequences of the claimant's conduct were to be repeated. That view was formed before the disclosure on 15 July 2019.

Unfair dismissal section 98(4) ERA 1996

104. For the reasons given in paragraph 103 above, I am satisfied that the reason for the dismissal was misconduct, namely throwing tools and bolts into the company van, and slamming and kicking closed doors. That, applying Abernathy, was the set of beliefs that Mr Pang had formed which led him to dismiss the claimant.

105. The respondent has conceded that the dismissal was procedurally unfair because it failed to allow the claimant an appeal against his dismissal.

106. Did the respondent genuinely believe in the misconduct? I find that it did. Mr Pang's evidence was clear on the point. He received a complaint from Mr Czovek which raised concerns about the claimant's conduct and the subsequent risk to the safety of those with whom he worked, and either selected staff to speak to who raised similar concerns, or those members of staff came forward to him with accounts which he regarded as corroborative of Mr Czovek.

107. Did the respondent have reasonable grounds for that belief? The respondent did have reasonable grounds in so far as it had statements from members of staff which were consistent with Mr Czovek's and with the claimant's conduct on the respondent's CCTV. The statements describe the claimant slamming doors and throwing bolts and tools into the van, and that he was in a very distressed, angry and agitated state. The respondent therefore had reasonable grounds for believing that the claimant may have acted as alleged.

108. Did the respondent conduct a reasonable investigation in relation to matters as was required in circumstances? In my judgement it did not. Whilst the statements identified there was some conduct that was a cause for concern, they also identified that the claimant was very distressed, was crying, and was upset because of the nature of the tasks that he had been allocated. The staff members concern was as much for his safety and state of mind as it was for theirs. However the respondent simply did not engage with those matters at all. Mr Pang failed to consider what the cause of the claimant's conduct was and whether it might amount to mitigating circumstances.

109. Similarly Mr Pang failed to consider whether there were other members of staff who should reasonably have been spoken to determine whether the descriptions that were provided were reliable. Whilst I accept that this was a reasonably small business, and that obtaining four statements might be reasonable, Mr Pang was unable to provide a satisfactory explanation as to why it was he obtained the statements from the individuals he did. As previously indicated, his answers on the point were inconsistent; at one stage he said that he spoke to "trusted employees." When pressed as to what he meant by that, he indicated that he meant loyal and long serving employees. What he did not do was seek to identify those who had the best view of the events, such as Mr Baka who assisted the claimant with loading the van. Instead he had closed him mind, and was not prepare to look for or consider any exculpatory evidence; thus he told Mrs Russell that "he could get more statements" which were damning to the claimant and told the claimant that if he had asked other employees for statements "they would all be against him."

110. The statements that Mr Pang did obtain were redacted by him to preserve the anonymity of their authors. The respondent did not suggest during its evidence or in its arguments that that anonymity had been requested by the witnesses. The statements themselves provided precious little detail as to the authors opportunity to observe clearly and accurately the matters they described. In those circumstances there was all the more need for some further investigation, even making allowance for the fact this was a relatively small medium sized employer.

Such investigations should reasonably have included asking the claimant whether there was anyone else who might be able to provide an account of the events, a step which was all the more important given that the claimant was not told of the anonymous witnesses during the investigation or provided with the statements until the day of the disciplinary hearing.

111. Was dismissal for that reason within a band of reasonable responses open to a reasonable employer? In my judgement it was not. The fundamental issue relating to the dismissal was Mr Pang's failure to consider whether the conduct itself could properly be regarded as gross misconduct, rather than misconduct, and if so whether the appropriate sanction were summary dismissal or final written warning or some other sanction. In circumstances where Mr Pang was not dismissing the claimant for what he did, which he did not regard as gross misconduct, but rather the risk of what he might do in the future, it was all the more important that Mr Pang engaged with that issue. That failure was compounded by the respondent's lack of a disciplinary policy at the time, or any document identifying what might be categorised as gross misconduct. I remind myself that I must not substitute my view that the employer, but in my judgement a reasonable employer would have considered the nature of the misconduct in question, and the likelihood of any recurrence before determining that it could properly be categorised as gross misconduct and that the only appropriate sanction was summary dismissal.

112. Here, Mr Pang did not regard the throwing of tools or bolts, or the slamming of doors as gross misconduct, but rather the consequent risk such conduct posed to the health and safety of other employees should the claimant react similarly on another occasion. Mr Pang candidly stated that in his view there was nothing that the claimant said that could have altered the decision that he had formed, even before the investigation meeting, that that he had to dismiss the claimant to ensure the risk did not materialise. In circumstances where the evidence that he had obtained clearly pointed to the claimant being incredibly distressed, upset and frustrated with the potential consequences of the long hours that he had been instructed to work, that need was all the more critical. It was outside the band reasonable responses not to engage with that issue at all and to reach a conclusion as to the nature of the misconduct and the appropriate sanction without regard to it.

113. Similarly, it was outside the band of reasonable responses for the respondent to adopt process by which the claimant was not informed of the details of the allegations which he faced, or provided with the statements which contained the evidence of misconduct until the disciplinary itself, by which time Mr Pang had formed the immovable conclusion that the claimant should be dismissed. That failure was compounded by the respondents failure to consider the claimant's appeal, at which time the claimant would have been able to identify other witnesses that the respondent might have spoken to, including Mr Baka, whose statement may have led to a different outcome.

<u>Polkey</u>

114. In my judgement had a fair process been followed the claimant would not have been dismissed. The reason for that conclusion is as follows: first, and most

fundamentally, a reasonable employer acting within the band reasonable responses would not have summarily dismissed the claimant for gross misconduct in circumstances where there was no disciplinary policy or other document identifying categories of misconduct or gross misconduct in place at the time of the events in question. The act of throwing his own tools and boxes of bolts into the van does not fit comfortably or at all into the definition of gross misconduct in the disciplinary policy which the respondent subsequently drafted. Thus, in so far as the respondent might seek to argue that the policy provided evidence of its employees' understanding of what constituted gross misconduct, it does not assist it. Furthermore, the respondent did not seek to suggest that other employees had been summarily dismissed or disciplined for similar conduct. That being the case, there was simply no basis on which an employee could understand the risk of summary dismissal in consequence.

115. In those circumstances, where Mr Pang's reason for the dismissal was the potential future risk to the health and safety of other employees, rather than the risk that occurred on the day in question, such an employer would have looked carefully at the evidence to identify the nature of the risk and the likelihood of recurrence. That necessary required consideration of the reason for the conduct which would have included whether there were mitigating circumstances, which might reduce the conduct or the sanction to be applied.

116. In this case there was substantial mitigation, given the arduous nature of the workload imposed on the claimant, the respondent's consistent failure to conduct risk assessments or to provide sufficient numbers of staff to safely undertake the task which relegated and the recent history of personal injuries which the claimant had suffered as a consequence of (preventable) accidents at work.

117. Finally, it was outside the band reasonable responses to conclude that the risk to other employees was such that the only permissible outcome was summary dismissal for gross misconduct. Mr Pang failed to consider whether a lesser sanction, such as a final written warning all morning, together with an undertaking to undertake anger management tool similar course, would prevent the risk occurring altogether reduce it to a reasonable level. He simply did not consider any alternatives at all.

<u>Just and equitable reduction (ss. 122(2) and 123(6) ERA 1996)</u>

118. The claimant's conduct was blameworthy and culpable. On 28 June he behaved aggressively, erratically and threw his tools and boxes of bolts into his van. He also slammed a cupboard door and the doors of the van. Such conduct was unusual for the claimant, he did not suggest that it had ever occurred before. I'm persuaded that the claimant would normally have collected any bolts that he had dropped, and it would certainly not be common for him to throw his own tools into his van. In acting in that way he created a risk to others, albeit a very small one given there is no evidence to suggest that any other employee was in the proximity to the van, to other employees. I must therefore ask whether it would be just and equitable to reduce either the basic award (applying section 122 (2)) or the compensatory award (applying section 123 (6)).

119. I deal firstly with the potential reduction under section 122 (2). The claimant was a long-standing employee, if not the longest standing employee, with 11 years' unblemished service. He had received no disciplinary warnings and had undertaken tasks beyond his job description and responsibilities. The respondent has not established that the conduct amounted to gross misconduct. In those circumstances in my judgement it would not be just and equitable to make any reduction to the claimant's basic award.

120. Section 123(6) requires a causal connection between the conduct and the dismissal. On the facts of this case I'm satisfied that there was such a causal connection. I have rejected the claimant's argument that the reason for his dismissal was the protected disclosure. Rather I have found that Mr Pang formed his conclusion that the claim should be dismissed upon receipt of the statement from Mr Czovek. That was the cause or trigger that put the claimant in the frame for disciplinary action. The other factors that led to his dismissal were Mr Pang's failure to consider whether the conduct could properly be categorised as gross misconduct, his failure to consider mitigation and his failure to interview other potentially relevant witnesses. In addition, Mr Watson failed to permit the claimant on appeal. In the circumstances, therefore, although it is a somewhat rough and ready method, it seems to me that it would be just and equitable to make a 20% reduction reflecting the fact that the conduct was 1/5 of the matters that led to the claimant's dismissal.

<u>Wrongful dismissal</u>

121. For the reasons set out in paragraphs 111 to 117 above, the respondent has not persuaded me on the balance of probabilities that the claimant committed gross misconduct.

<u>Section 207A TULRCA:</u>

122. The respondent failed to comply with the ACAS Code of Conduct in relation to disciplinary and grievances as it did not investigate the claimant's grievance, invite him to a meeting, or write to him explaining the outcome to his grievance. Instead it failed to engage the grievance at all. It has not provided any reasonable explanation for that failure. Similarly, the respondent failed to write the claimant providing him with a written outcome to the disciplinary, or to afford the claimant an appeal, despite his request. Again, it provided no reasonable explanation for that failure. Mr Walston's suggestion that he did not realise it was necessary is wholly inconsistent with his evidence that he kept himself apart from the investigation and disciplinary process because he recognised that he would be the individual who would need to deal with any appeal.

123. Conversely, the respondent did set out the allegations to the claimant, and invited him to a meeting to discuss those allegations before he was dismissed. He was permitted the right to be represented at the disciplinary hearing. However, the respondent did not engage with his arguments, as Mr Pang had already made the decision to dismiss. Those failures were unreasonable, all the more so because Mrs Reynolds drew the respondent's attention to the ACAS Code on several occasions. Therefore I must consider whether it be just and equitable to increase the award in consequence.

124. This was not the worst case of a failure to comply with the ACAS Code. I remind myself that the purposes of section 207A is not punitive. Nevertheless, it seems to me that it would be just inequitable to increase the award by 20% in all the circumstances.

Failure to provide written particulars of employment

125. I have found that the respondent did not provide the claimant with a written statement of employment particulars. However, the respondent had taken steps to draft contracts for all of its employees, which claimant accepts, and the reason that the claimant did not receive a copy of his contract was that he was not present in the office. Thereafter it appears that the claimant did request another copy of the contract in 2018, but in the event not required, and so neither party pushed to obtain a copy, until Mrs Reynolds requested it in 2019, when it could not be found.

126. In those circumstances, there are no exceptional circumstances which would justify a decision not to award the statutory 2 weeks' pay, and I am persuaded that it is just equitable to make an award of two weeks' pay.

Employment Judge Midgley

Date: 14 December 2020

Judgment sent to parties: 7 January 2021

FOR THE TRIBUNAL OFFICE