EMPLOYMENT TRIBUNALS

Claimant: **Mr James Fisk**

Respondent: **C&W Industrial Roofing Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **20 & 21 January 2021**

Before: **Employment Judge Barrett**

Representation
Claimant: In person
Respondent: Ms Grace Cullen, Counsel

JUDGMENT having been sent to the parties on 29 January 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was by videoconference (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Introduction

1. The Claimant, Mr James Fisk, worked for the Respondent, C&W Industrial Roofing Limited, until he was dismissed without notice on 27 March 2020. On 3 June 2020 he presented an ET1 form bringing a claim for unfair dismissal.

2. The Respondent says it dismissed the Claimant because of his conduct and that his dismissal was fair. Further, it argues if the Claimant was unfairly dismissed, his compensation should be extinguished because he would have been fairly dismissed had a better procedure been followed and because the dismissal was caused by his own conduct.

The hearing

3. The hearing was conducted over two days, 20 and 21 January 2021. The Respondent was represented by Ms Grace Cullen of Counsel and the Claimant represented himself.

4. The Tribunal was provided with an agreed bundle of evidence numbering 709 pages.

5. During the hearing, the Respondent added a further document showing that a letter dated 6 April 2020 was sent to the Claimant by email with attachments. No objection was made by the Claimant.

6. The following witnesses gave evidence on behalf of the Claimant:

   6.1. The Claimant himself;

   6.2. Ms Lisa Bulmer, the Claimant's partner;

   6.3. Mr John O'Hara, the Claimant's brother-in-law, who gave evidence regarding the Claimant's earnings since his dismissal.

7. The following witnesses gave evidence on behalf of the Respondent:

   7.1. Mr Matthew Clarke, CEO of the Respondent, who made the decision to dismiss;

   7.2. Mr Ellis Heeney, Foreman, who gave evidence regarding an occasion when he borrowed the Claimant's fuel card.

8. Ms Cullen provided a helpful skeleton argument in advance of the hearing. Both Ms Cullen and the Claimant made oral closing submissions.

Findings of fact

The Claimant's employment history

9. The Respondent is a company providing industrial roofing and cladding. The Claimant worked for the Respondent during three separate periods, the most recent commencing on 15 November 2017. His role in the company was Contract Manager, a senior role with hiring and staff management responsibilities. He also had a long-standing friendship with the Respondent's CEO Mr Clarke.

Investigation into the Claimant's use of fuel cards

10. The Respondent owns a number of company vehicles. Staff who need them for work are allocated vehicles. In addition, there are two pool vans. All company vehicles have vehicle trackers which means the Respondent has data on where they have been located at any given time.

11. Fuel for company vehicles is purchased using fuel cards. The Respondent issues staff with two types of fuel cards, All Star and BP. The fuel cards are issued with registration numbers to match the registration number of the relevant vehicle. The purchases made on the cards can therefore be matched to the staff member who is allocated with the vehicle with the matching

registration number. When staff need to book out the pool vans for any reason, they would continue to use their own allocated fuel cards.

12. Cards must not be used for non-company vehicles. Staff are not permitted to lend their fuel cards to each other. Staff are also not permitted to purchase premium fuel for company vehicles. These rules are well known by the Respondent's staff, although the Tribunal has not been shown them in written form.

13. The Claimant was issued with an All Star fuel card and a BP fuel card both with a registration number ending WJM, which matched the registration number of the company vehicle the Claimant drove at the time. The Claimant ceased to use this vehicle in approximately November 2019 when it was damaged in an accident. He used a pool van, with registration number ending FRO, as a temporary replacement until January 2020 when he was given the use of a Ford Ranger with registration number ending KKE. He continued to have the use of the same fuel cards throughout this period.

14. On or around 13 March 2020, the Respondent's accounts administrator Sue Cullen notified Mr Clarke that the Claimant's fuel card had been used to purchase premium fuel. Mr Clarke asked Ms Cullen to investigate the issue.

15. Ms Cullen obtained the fuel card invoice records and the vehicle tracker data relating to the Claimant's vehicle. Two or three days later, she spoke to Mr Clarke again and told him she had discovered that she had found on a number of occasions the Claimant used the card to purchase premium 'ultimate' fuel when the tracker data showed his company van was not present at the garage where the purchase was made.

16. Mr Clarke looked at the invoices and tracker data and saw it appeared that the Claimant had used his fuel cards to purchase fuel improperly on 3 or 4 occasions, including:

    16.1. On 21 April 2019 at a garage in Newquay. Mr Clarke was aware the Claimant had been on holiday in Cornwall on this date.

    16.2. The following day, 22 April 2019, at a garage in Reading. On this occasion, the garage had included the registration number of the car that had been filled up on the invoice. It ended OYL, which Mr Clarke knew was the Claimant's personal car not a company vehicle.

17. Mr Clarke formed the view that the Claimant had been using his fuel cards dishonestly to buy petrol for personal use using company funds. However, he took no immediate steps as he believed further investigation was required.

Email to Pexhurst

18. On 23 March 2020 at 4.46pm the Claimant wrote an email to Mark Loveday, Site Manager for a company named Pexhurst. Pexhurst was one of the Respondent's major clients. The Claimant was concerned about the safety of the Respondent's employees working on the Pexhurst site given the evolving lockdown situation. He wrote:

> "*How can we guarantee employee safety at a minimum of 2 metres.?*

> *… I'm only saying this and I would get shot down by my boss but 3 main contractors have closed sites today and I'm surprised Pexhurst haven't been the leader in [health and safety] like they normally are?"*
>
> (Please note all text quoted from the bundle of evidence reproduces the punctuation and spelling of the original.)

19. Following this, the Claimant texted Mr Clarke: *"I have just had to reply to Pexhurst and blind you in mate x"*

20. Mr Loveday replied that all Pexhurst sites would remain open with new safety rules. The Claimant forwarded his reply to Mr Clarke.

21. Mr Clarke, having seen the Claimant's email, responded by text message and email. He emailed the Claimant:

> *"Don't you ever send an email like that again to one of my clients*
> *You are literally asking them why they are not shutting down*
> *And what 3 sites have shut today then?*
> *James this has proper pissed me off"*

22. He texted the Claimant:

> *"I am absolutely fuming james*
> *You had no right whatsoever to send that email to pexhurst insinuating that they are the leaders in H&S and that we had 3 sites shut to today and asking how they will uphold safe distancing*
> *I don't know what's going on with you but you need to get a grip*
> *The last thing I need is you going to clients with emails like that*
> *Unbelievable!"*

23. The Claimant texted in reply:

> *"You are totally right and well in your right to sack me for grose misconduct… Hold my hands up I fucked up".*

24. The Claimant was speaking hyperbolically by way of apology. He did not really think he deserved to be sacked but he accepted he had done something wrong by emailing a client and implying they should shut down a work site.

25. Mr Clarke was very angry about this email and took the view the Claimant's actions amounted to misconduct, although not gross misconduct.

Text message to James Gentry

26. As the coronavirus pandemic unfolded, there were high levels of anxiety and uncertainty amongst the Respondent's staff. The Claimant had several conversations in his role as a senior manager with worried employees seeking clarity about their financial futures. He found this stressful and upsetting.

27. The Claimant learned that Mr Clarke had loaned money to a former employee named Mr James Kerry. On or around 26 March 2020, the Claimant sent a text message to Mr James Gentry, the Respondent's Managing Director. It stated:

> *"James Kerry just called me saying how great Matty is cos he gave him £1500 but he can't help me or his foreman that have been there for him.*

How about I tell our Foreman he couldn't help you out but jk gets sorted!!! Does he thing we are all idiots??? Bad mistake once they find out don't you think buddy?"

28. Mr Gentry responded to point out that Mr Clarke was paying 80% of wages "*which he had to pay and hope to get back from the government*". This was a reference to the furlough scheme. He added that the money to Mr Kerry was a loan and nothing to do with the company.

29. Mr Gentry showed the Claimant's text message to Mr Clarke. Mr Clarke formed the view that the Claimant was threatening to stir up discontent amongst the foremen, when the Claimant as a senior manager ought to have been trying to preserve morale. Mr Clarke thought the text message amounted to misconduct although it was not of itself a sackable offence.

Dismissal

30. On Friday 27 March 2020 at 8.44pm, Mr Clarke sent the Claimant the following text message:

"James

I have discussed with my solicitors today in depth about your conduct within the company and below is their conclusions and letters from the company will follow on Monday but due to new information afforded to me today I have been told to inform you now of the below actions I plan to take to ensure you don't damaged the , company name anymore

Your gross negligence with pexhurst (my client) was enough to remove you from the company but your unfounded threats to Jamie gentry (managing director of CWI) about Informing my staff of certain things and threats to cause disrupt amongst my staff because I lent an outsider (friend) money is now without doubt gross misconduct of your position within my company

So it is with regret that as of today's date I give you notice and remove you from all your duties within CWI with immediate affect

I request all your belongings along with your van are returned with immediate affect including all company cards etc

I also inform you of possible legal action I am considering against you as I have evidence from a garage forecourt showing you using the company fuel card to fill up your own Q7 vehicle.

This as I am sure you are aware is theft and I am well within my rights to prosecute you

Also if you decide to give my employees any false information about me again following this dismal I will be within my rights to sue you for defamation of character

I also give you notice to leave all cw/cwi what's app groups with immediate affect…"

31. The trigger for the dismissal was the Claimant's text message to Mr Gentry. The wording of the dismissal message expressed that the text message to Mr Gentry and the Pexhurst email together were the reason for the dismissal. The fuel card matter appeared to be referred to as an additional issue that may lead to further action. The reason why Mr Clarke formulated the dismissal message as he did was because he was aware further investigation was needed into the fuel card issue.

32. However, the dismissal message did not fully reflect the set of facts known to Mr Clarke at the time which caused him to dismiss the Claimant. In fact, Mr Clarke considered that the fuel card issue was sufficient in itself to amount to gross misconduct. He did not consider the email to Pexhurst or the text message to Mr Gentry would of themselves amount to gross misconduct, but he considered all three matters together certainly did. The fuel card issue was a central and operative reason why Mr Clarke decided to dismiss the Claimant.

Appeal process

33. Following the Claimant's dismissal, Mr Clarke came to regret having dismissed the Claimant summarily without having given him a chance to give his side of the story. He also wanted retrospectively to fix the problem that no proper procedure had been followed with regard to the Claimant's dismissal.

34. On 6 April 2020, the Claimant was sent two letters inviting him to attend an appeal hearing by Zoom. The appeal was intended to be a rehearing (although in fact it would have been the first hearing) rather than a review of the decision to dismiss. The manager tasked with hearing the appeal was Mr Gentry. He was junior to Mr Clarke, who had taken the decision to dismiss.

35. One of the invitation letters was sent by email, with attachments containing the tracker data and fuel card invoices relating to a number of occasions when fuel was purchased using the Claimant's fuel cards when the Claimant's company vehicle was stationary. The invitation letter drew attention to the two most recent occasions which were on 13 February and 15 March 2020.

36. The Claimant declined to attend. Mr Gentry wrote to him on 24 April 2020 confirming the decision to dismiss.

Further fuel card discrepancies

37. The Respondent continued to investigate the Claimant's use of fuel cards. During the course of this litigation, the Claimant suggested that he had lent his fuel cards to other employees who may have misused them.

38. The Respondent investigated this by comparing tracker data for all company vehicles with the invoices relating to the Claimant's fuel cards. It found that on 16 occasions there was no company vehicle in the location where the fuel card had been used.

39. All employees with company vehicles were asked if they had ever borrowed the Claimant's fuel card. The only one who had was Mr Heeney on a single occasion when he had taken a pool van to get serviced and forgotten to bring his own fuel card.

40. As the Respondent is arguing that the Claimant contributed to his own dismissal by his conduct, it is necessary for me to make findings of fact about the Claimant's use of his fuel cards.

41. I find the Claimant did use his company fuel cards to purchase fuel for personal use. His explanation that his cards were misused by others is not credible and does not fully explain the documentary evidence against him.

    41.1. Other than Mr Heeney, the Claimant has not provided any specific information about occasions he lent out his card or who to. The Claimant accepts his card was used at times when no company vehicle was at the garage. I do not accept that his card could have been borrowed and misused without his knowledge, at the very least, of who he had lent it to.

    41.2. The Claimant's explanation for the use of a fuel card in Newquay has been inconsistent. He suggested that he sought prior authorisation, then that he repaid the money. I accept Mr Clarke's evidence that the Claimant never sought authorisation or repaid the money and the news the Claimant had used his fuel card on holiday came as a shock to him.

    41.3. The Claimant's explanation for the use of a fuel card to fill up his personal vehicle in Reading has also been inconsistent. He said at first, he gave his personal registration number to the garage to ensure he paid the money back. He then said his partner was driving him in his personal car to a work site because he had hurt his ankle. When it was pointed out this was the day after he was in Newquay, he said he had had an accident in Newquay and hurt his ankle. His partner gave evidence that there was no such accident.

    41.4. The vehicle tracker and invoice data show frequent misuse of the cards going back to 2018 – it is not credible to suggest this can be explained away by the Claimant having lent his card to unnamed others.

The law

42. Section 94 Employment Rights Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by her employer.

43. Section 98 ERA provides so far as relevant:

> **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.**
>
> **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.**

44. Counsel for the Respondent reminds me that as per the EAT in *RSPB v Croucher* [1984] IRLR 425, section 98(4) remains the touchstone in cases of unfair dismissal arising from gross misconduct and the Tribunal must consider whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

45. The starting-point in misconduct cases is the well-known guidance in *Burchell v British Home Stores* [1980] ICR 303 at 304:

> **'What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case'.**

46. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at paras 16–17) held:

> **'… the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see Whitbread plc (trading as Whitbread Medway Inns) v Hall [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see J Sainsbury plc v Hitt [2003] ICR 111.'**

47. It is not for the Tribunal to make its own assessment of the credibility of witnesses on the basis of evidence given before it (*Linfood Cash and Carry Ltd v Thomson* [1989] ICR 518). The relevant question is whether an employer, acting reasonably and fairly in the circumstances, could properly have accepted the facts and opinions which they did. The Tribunal must have logical and substantial grounds for concluding that no reasonable employer could have assessed the credibility of the witnesses in the way in which the employer did.

48. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the Tribunal's view, have been appropriate, but rather whether dismissal was within the band of reasonable

responses. The fact that other employers might reasonably have been more lenient is irrelevant (*British Leyland (UK) Ltd v Swift* [1981] IRLR 91).

49. In cases where there is a procedural defect, the question that remains to be answered is whether the employer's procedure constituted a fair process. A dismissal will be held unfair either where there was a defect of such seriousness that the procedure itself was unfair or where the results of the defect taken overall were unfair (*Fuller v Lloyds Bank plc* [1991] IRLR 336; see also *Slater v Leicestershire Health Authority* [1989] IRLR 16).

50. Procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness, according to the decision of the Court of Appeal in *Taylor v OCS Group Ltd* [2006] IRLR 613.

Remedy principles

51. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it will reduce the amount of the basic and compensatory awards by such proportion as it considers just and equitable having regard to that finding (ss.122(2) and 123(6) ERA). In order for a deduction to be made, the conduct in question must be culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish or perverse or unreasonable in the circumstances (*Nelson v BBC (No.2)* [1980] ICR 110).

52. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness (the *Polkey* issue).

53. In *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 the EAT (Langstaff P presiding) noted that a *Polkey* reduction has the following features:

> **'First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.'**

54. In *Williams v Amey Services Ltd* EAT 0287/14 HHJ Eady gave the following further guidance:

> **'In making such an assessment the [employment tribunal] is plainly given a very broad discretion. In some cases it might be just and equitable to restrict compensatory loss to a period of time, which the [tribunal] concludes would have been the period a fair process would have taken. In other cases, the [tribunal] might consider it appropriate to reduce compensation on a percentage basis, to reflect the chance that the outcome would have been the same had a fair process been followed. In yet other cases, the [tribunal] might consider it just and equitable to apply both approaches, finding that an award should be made for at least a particular period during which the fair process would have been followed**

> **and thereafter allowing for a percentage change that the outcome would have been the same. There is no one correct method of carrying out the task; it will always be case-and-fact-specific. Equally, however, it is not a "range of reasonable responses of the reasonable employer" test that is to be applied: the assessment is specific to the particular employer and the particular facts.'**

55. The Claimant is required to mitigate the loss he suffers as a result of the unlawful act. Credit will be given for the sums earned in mitigation.

56. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 makes provision where in proceedings concerning a matter to which the ACAS Code of Practice on Disciplinary and Grievance Procedures applies (this includes unfair dismissal), and where the employer or employee has unreasonably failed to comply with the Code in relation to that matter, a tribunal may increase or decrease (as the case may be) any award it makes by no more than 25% if it considers it just and equitable to do so in all the circumstances. Section 124A ERA provides that this adjustment is applied to the compensatory award only and it is done immediately before any deduction for contributory fault.

Submissions

Claimant's submissions

57. The Claimant did not make extensive closing submissions, but I have taken full account of the points he made in giving evidence and cross-examining, including that:

    57.1. There is ample evidence he was a valued and trusted member of staff prior to his dismissal;

    57.2. Mr Clarke had made the decision to dismiss by himself late on a Friday and, the Claimant suggested, impulsively and emotionally;

    57.3. The Claimant maintained that the Respondent had not properly investigated the possibility someone else had misused his cards.

Respondent's submissions

58. The Respondent's counsel submitted that Mr Clarke had a genuine belief in the Claimant's misconduct on 3 counts: the card issue, the text to Mr Gentry and the Pexhurst email; which cumulatively amounted to the reason for dismissal. She referred to the documentary evidence in relation to each point.

59. It was submitted that the extent of investigation required is what is reasonable in all the circumstances, which in this case included the coronavirus lockdown and the immense stress this placed on the company and Mr Clarke in particular. Further, the Respondent had done its best to cure any procedural defect by offering a full hearing on appeal.

60. In relation to remedy, it was submitted that the Respondent would have dismissed the Claimant fairly based on the further information discovered by way of investigation after the dismissal. The Claimant's conduct is said to have been blameworthy and to have contributed to his dismissal by 100% such that his compensation should be reduced to nil. Further, the Respondent pointed to

evidence that the Claimant was back in work by September 2020 and submitted that any compensation awarded should end from that date.

Conclusions

Unfair dismissal

61. The first question to address is whether the Respondent dismissed the Claimant for a fair reason for the purposes of s.98(1) ERA. The Respondent relies on conduct, which is a potentially fair reason (s.98(2)(b) ERA).

    61.1. Did the Respondent have a genuine belief that the Claimant was guilty of misconduct? I accept from Mr Clarke's evidence that he did genuinely believe the Claimant was guilty of misconduct.

    61.2. Did the Respondent carry out as much investigation into the matter as was reasonable in the circumstances? The Respondent did carry out some investigation, by obtaining invoice and tracker data. However, as Mr Clarke himself stated in evidence, this showed the need for a thorough investigation to be conducted. It was not a complete investigation in itself. In relation to the text message to Mr Gentry and the Pexhurst email, there was less of a factual issue to investigate but the context and the Claimant's reasons for acting as he did ought to have been ascertained. The Respondent's investigation fell outside the reasonable range of responses. I take the Respondent's point that the circumstances at the time included the coronavirus pandemic. However, the Claimant – who would have been furloughed - could have been suspended while an investigation was carried out and asked to hand in his fuel cards during that period.

    61.3. Were there reasonable grounds for the Respondent to conclude that the Claimant had committed misconduct? There were grounds to suspect the Claimant had committed misconduct, in particular from the initial investigation into the Claimant's fuel card usage. However, without asking for the Claimant's explanation it was not reasonable to treat the evidence available at the time of the dismissal as sufficient to prove misconduct grounds for dismissal.

62. The next issue is whether the Respondent followed a fair procedure. Overall, the procedure followed was very poor. The investigation process did not include asking the Claimant for his explanation. There was no warning of the disciplinary charges. There was no disciplinary hearing. Although there was an effort to convene an appeal hearing, this was after the event. The Claimant could not have been reassured it was a fair or neutral process, given that the CEO had already decided on his dismissal. The offer of an appeal hearing was not sufficient to cure the defective procedure that had gone before.

63. The final question in relation to the unfair dismissal claim is whether the Respondent acted reasonably in all the circumstances in treating the alleged misconduct as a sufficient reason for dismissal (s.98(4) ERA).

64. The decision to dismiss was not reasonably open to the Respondent in the circumstances of this case. It was premature and no fair process was followed.

Mr Clarke acknowledged this openly at the very outset of his evidence saying that: "*Obviously I sacked him incorrectly on reflection I should have done it better*."

65. It follows that I conclude the Claimant was unfairly dismissed.

Remedy issues

66. Ordinarily a finding of unfair dismissal would result in the making of a basic award. However, s.122(2) ERA provides that "*Where the tribunal considers that any conduct of the complainant before the dismissal… was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*". In this instance I note the findings regarding Claimant's conduct in relation to his use of the fuel cards at paragraph 41 above. I conclude the Claimant's conduct was such that it would be just and equitable to reduce the basic award by 100%, resulting in a nil award.

67. Moving on to the compensatory award, the next issue to consider is whether it would be just and equitable for the purposes of s.123(1) ERA to reduce compensation to reflect the chance the Claimant could have been dismissed in any event had a fair procedure been followed (the *Polkey* principle).

68. I find there was a 100% chance that the Respondent would have dismissed the Claimant had a fair procedure been followed. The fuel card evidence pointed strongly towards the Claimant's guilt. I find that nothing the Claimant would have said in an investigation or disciplinary meeting would have changed Mr Clarke's mind. In evidence, the Claimant stated he would have made the same points as he made in Tribunal, namely that he had lent his cards out to other employees. The Respondent investigated that possibility after the dismissal and the results of that investigation served only to confirm Mr Clarke's belief in the Claimant's guilt.

69. It was Mr Clarke's evidence that it would have taken until approximately 7 April 2020 to arrange an investigatory interview with the Claimant and a further period of around 2 weeks to undertake thorough investigation into the Claimant's explanation and to convene a disciplinary hearing. Allowing for the additional difficulty of conducting the investigation during the early days of lockdown with staff on furlough, I find that it would have taken the Respondent a month to follow a fair procedure to dismissal.

70. It is therefore appropriate to assess the Claimant's losses at one month's net pay because of the premature dismissal, and nil compensation thereafter. The parties agree that the Claimant's monthly take home pay was £3,136 per month. The Respondent submits, and I accept, that had the Claimant not been dismissed his salary would have been reduced to 80% while he was on furlough, giving a monthly net figure of £2,509.

71. Should a further reduction be made to the compensatory award in respect of contributory fault? Section 123(6) ERA provides that "*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*". I note the factual findings I have made at paragraph 41 above.

However, while I accept the Claimant's conduct in relation to the fuel cards was blameworthy, the Claimant was not the cause of the lack of fair procedure, and it would not be just and equitable to reduce the compensation awarded in respect of the period he ought to have remained in employment while the disciplinary process ran its course.

72. In the circumstances it is unnecessary to make findings about the Claimant's mitigation earnings.

73. Finally, I conclude that there was a failure on the Respondent's part to comply with the ACAS Code of Practice. The Respondent dismissed the Claimant by text message without giving him any opportunity to respond to the allegations against him, contravening the most basic principles of procedural fairness. Even against the backdrop of the March 2020 coronavirus lockdown, this failure was unreasonable. It would be just and equitable to increase the Claimant's compensatory award by 20% to reflect the absence of procedural safeguards afforded to him.

74. As noted above, one month's net pay during furlough would have amounted to £2,509. After applying the 20% uplift, the total compensation which the Respondent must pay to the Claimant is £3,011.

Employment Judge Barrett
Date: 1 February 2021