Case No: 3300150/2020

EMPLOYMENT TRIBUNALS

Claimant: **Jason Duffell**

Respondent: **Prime Plumbing (Cambridge) Limited**

Heard at: Cambridge (via CVP) **On:** **26th January 2021**

Before: Employment Judge Mr A Spencer (sitting alone)

Appearances
For the claimant: Ms J. May (solicitor)
For the respondent: Ms. S. Bewley (counsel)

JUDGMENT

1. **The claimant was unfairly dismissed by the respondent**

2. **The respondent dismissed the claimant in breach of contract.**

3. **The respondent must pay to the claimant compensation/damages in the total sum of £13,412.10 in respect of:**

Basic Award (unfair dismissal)	**£1,837.50**
Compensatory Award (unfair dismissal)	**£10,594.60**
Additional award (s38 Employment Act 2002)	**£980.00**
Damages for breach of contract	**£nil**
Total:	**£13,412.10**

REASONS

Introduction

1. By a claim form presented on 8 January 2020 following a period of early conciliation from 14 November 2019 to 14 December 2019 the claimant bought claims for:

    1.1 Unfair dismissal. The claimant asserts that he was either expressly dismissed by the respondent on 5th November 2019 or alternatively that he was constructively dismissed by the respondent. The claimant originally asserted that he was automatically unfairly dismissed under section 104 Employment Rights Act 1996 (ERA) because he exercised his statutory right to request time off due to the illness of his daughter under section 57A ERA. Alternatively, the claimant said that his dismissal was a so-called "ordinary" unfair dismissal under the statutory test of fairness under section 98(4) ERA; and

    1.2 A claim for breach of contract for notice pay. The claimant brings a claim based on his statutory period of notice. He asserts that the respondent breached his contract of employment by dismissing him without giving notice or making payment in lieu of notice; and

    1.3 A claim under Regulation 14 of the Working Time Regulations 1998 for accrued but untaken holiday entitlement; and

    1.4 A claim for unpaid wages in the sum of £207.

2. The claimant confirmed that the outset of the hearing that the claim for unpaid wages was no longer pursued.

3. The claimant's advocate confirmed in closing submissions that the claimant was no longer asserting that the dismissal was automatically unfair under section 104 ERA and brought the claim as a complaint of "ordinary" unfair dismissal only.

4. In relation to the remaining claims the respondent's position is as follows:

    4.1 The claimant was not dismissed either expressly or constructively;

    4.2 The respondent did not breach the claimant's contract of employment in circumstances where the claimant resigned and was not dismissed. As such no notice pay is due;

    4.3 The claimant had taken all the paid holiday accrued up to the date of termination of his employment. No further payment is due.

5. The issues for me to determine are set out in the party's respective lists of issues.

Evidence

6. I took into account the following documents:

    6.1 a hearing bundle;

    6.2 the claimant's list of issues;

6.3 the respondent's list of issues;

6.4 witness statements for the two witnesses;

6.5 written submissions from the respondent's counsel and copies of the case law referred to therein

7. I heard evidence from the following witnesses:

7.1 The claimant;

7.2 Christopher Hill (a director and shareholder of the respondent company)

8. The hearing took place remotely via video link using CVP. No technical issues were experienced. The witnesses gave evidence under affirmation. I had the benefit of seeing the evidence tested under cross examination. I also took the opportunity to put questions to the witnesses myself.

9. I also took into account oral submissions from the parties' respective advocates.

10. I decided to give this reserved judgement due to the significant numbers of issues for determination.

Assessment of the witnesses

11. The claimant was the more impressive witness. In contrast, Mr Hill was less impressive. At times his evidence was vague. In some instances, his oral evidence was inconsistent with the contemporaneous documents. On one occasion Mr Hill sought to justify a view that he took at a particular time by suggesting that his view was informed by documents that he plainly did not see time and in one instance did not even exist at the time. Generally, I preferred the evidence of the claimant. That is not to say I accept the claimant's evidence on absolutely all conflicts of evidence. Where I depart from the claimant's evidence I set out my reasons for doing so below.

Findings of Fact

12. Having heard the evidence my findings of fact are as follows:

13. The respondent is a company in the business of installing plumbing, heating and air conditioning. The company is a small business. The directors and shareholders are Mr Christopher Hill and his wife Caroline Hill. The company employs six employees. Mr Hill is, by his own admission, unsophisticated in matters of employment law and practice. Prior to the claimant's dismissal Mr Hill never had cause to dismiss an employee. He admitted that he had no knowledge of disciplinary procedures and was unaware of the requirement to provide a written statement of main terms and conditions to his employees.

14. I accept the claimant's evidence that Mr Hill was, at times, prone to being short tempered.

15. The claimant was employed by the respondent as a plumber from 1 July 2014. The respondent provided the claimant with a van, mobile telephone and some tools. The claimant also had his own tools that were routinely kept in his works van.

16. At no stage prior to presentation of the claim form was the claimant issued with any written contract of employment or written statement of main terms and conditions of employment in compliance with section 1 ERA.

17. The claimant had a clean disciplinary record throughout his employment with the respondent. Despite this Mr Hill had concerns about the claimant's performance. In evidence Mr Hill confirmed that there were aspects of the claimant's work that he found unsatisfactory. Mr Hill held the view that the claimant had made several mistakes and that the quality of his work was unsatisfactory in some respects. Despite holding this view Mr Hill had only raised one instance of this with the claimant.

18. The claimant undertook other work "on the side" whilst he was employed by the respondent. He did so with the respondent's knowledge. However, it clearly irritated Mr Hill that the claimant did such work. Mr Hill held the view that the claimant was unreliable and was prone to take time off to the detriment of the respondent to undertake such other work.

19. The claimant has five children. On Sunday 3rd November 2019 the claimant's youngest child was admitted to Addenbrookes Hospital having presented with two days of vomiting and one episode of loose stool. She required a nasogastric tube briefly to rehydrate. She stayed in hospital overnight. By the morning of 4th November 2019, she was eating and drinking well with no vomiting. The claimant attended the hospital with his daughter. His wife remained at home to care for their other children.

20. The claimant was due to attend work on Monday, 4th November 2019 at 8:00am. The claimant was still in hospital with his daughter that morning. At 7:08am on 4th November the claimant sent a text message to Mr Hill to say "*I'm in Addenbrookes with Iris, she's been on fluids overnight so I won't be in today. Sorry*". Mr Hill did not reply. There was no further communication between the claimant and Mr Hill that day.

21. The claimant's daughter was discharged from hospital in about late morning of 4th November. She returned home with the claimant. The claimant was told that he would need to keep his daughter off nursery for at least 48 hours. The claimant's wife started a new job on 4th November and so the claimant would need to remain at home to look after his daughter. However, the claimant did not communicate this to the respondent on 4th November despite knowing that he would also not be attending work the following day.

22. It was not until 07:52am on Tuesday 5th November, some eight minutes before the claimant was due to arrive at work, that he sent a text message to Mr Hill to confirm "*Iris got out of hospital last night but she can't go back to childcare until tomorrow. I know it's inconvenient but I should be back in by tomorrow. Sorry again*."

23. Mr Hill responded to the claimant almost immediately by text message to say "*don't bother to* [sic] *late to text me now*".

24. Mr Hill's evidence was that he did not intend to terminate the claimant's employment at this stage. I do not accept this. Mr Hill was irritated by the claimant's conduct. Mr Hill confirmed that he generally got into work at 6:30am each day and was extremely busy until about 10:00am allocating jobs for the day. The claimant's conduct in confirming his absence at the last moment irritated Mr Hill at a time when he was particularly busy.

25. The claimant's text message confirmed that he should be back at work the following day (i.e. 6th November). In response Mr Hill replied, "*don't bother …*".

26. Mr Hill already had concerns about the claimant's performance and the claimant's approach to taking time off. In the circumstances, it is more likely than not that Mr Hill formed the view that he no longer wanted to employ the claimant and by sending the text message was telling the claimant that he need not come into work any further. This is also consistent with Mr Hill's conduct over the next few days until the time when he took professional advice.

27. The claimant showed Mr Hill's "*don't bother"* text message to his wife, telling her that he took the view that the message confirmed that he had been dismissed. The claimant's wife responded by saying not to be silly and to give Mr Hill an opportunity to calm down.

28. Mr Hill arranged for another employee, Scott Jakes, to cover the claimant's duties. He wanted to allocate the claimant's van and work phone to Mr Jakes.

29. Mr Hill sent a further text message to the claimant at 10:08am on 5th November 2019 to say "*Will pick up van and phone this afternoon*. "

30. The claimant responded to say, "*I haven't got time to clear my stuff out of it chris I'm looking after a sick child*".

31. Mr Hill responded to say "*We will clear out* "(referring to clearing out the van).

32. Mr Hill visited the claimant's home in the early afternoon of 5th November. The claimant was not home at the time. His son was. Mr Hill collected the claimant's van but was unable to collect the claimant's work phone.

33. The claimant did not attend work on 6th November 2019. I accept that he did so because he understood by this stage that his employment had been terminated by the respondent. Mr Hill's evidence was that by this stage he considered that the claimant's employment was continuing. I do not accept this. His conduct was not consistent with this. If he genuinely believed that the claimant's employment was continuing he would have contacted the claimant to ask him why he had not attended work on 6th November.

34. Mr Hill visited the claimant's home again on 6th November. Again, the claimant was not at home so the two men did not speak to each other. Mr Hill collected the claimant's work phone from the claimant's son.

35. The claimant did not attend work on 7 November 2019. This is entirely consistent with the claimant's understanding that he had been dismissed. Once again, Mr Hill took no steps to check why the claimant was not in work. This is inconsistent with Mr Hill genuinely believing that the claimant's employment was continuing.

36. Mr Hill sent a further text message to the claimant at 9:16am on 7th November 2019 to confirm "*Need to pick up paperwork and password for phone*". The claimant responded by asking "*what paperwork!*" to which the respondent answered "*Hanover*" (one of the respondent's main customers). The claimant answered "*I am at work, I'll have to go through all the bags I pulled out of the van when I get a chance* ". Mr Hill responded, "*so you don't work for me then*". The claimant replied to say, "*I'm at my Mums sorting her shower out in Kent, I was under the impression you had fired me on Tuesday after I took time off because Iris was in hospital*". Mr Hill did not respond. Again, his approach is consistent with him having dismissed the claimant. He did not take the opportunity to immediately tell the claimant that he had not been dismissed.

37. The claimant sought information from ACAS after which he sent an email to Mr Hill at 22:05 on 7th November 2019. In his email the claimant clearly asserted that his employment had been terminated. He also set out requests for various payments and other matters. He confirmed that he would refer the matter to an employment tribunal if his requests were not met by 28th November 2019.

38. After receiving the claimant's email Mr Hill took advice from an HR consultant. Having taken that advice Mr Hill sent an email to the claimant on 12th November 2019. Mr Hill's communications took a noticeable turn after he took advice. For the first time, he asserted that the claimant's employment had not been terminated. Mr Hill suggested that the claimant may have misunderstood his words and that he hoped the claimant would return to work the following day.

39. The claimant responded by email on 12th November 2019. His position was unchanged from his email dated 7th November 2019.

40. Mr Hill responded by email on 12th November 2019. His email was not as conciliatory as his earlier email. He asked the claimant whether he was resigning. He referred to the difficulties he had experienced because of errors with the claimant's work. He confirmed that if the claimant was to resign he expected the claimant to return tools and materials he had used for private jobs. He also indicated that he would use the company's vehicle trackers to see whether the claimant might have used the company van for private use.

41. The claimant responded by email on 14th November 2019 to confirm that "*I am not and have not resigned but I was summarily and unfairly dismissed without due cause or process on 5th November 2019*". The claimant also set out details of the payments he expected to receive if the matter was to be resolved.

42. On 19th November 2019 Mr Hill hand delivered a letter to the claimant's home. The letter was an invitation to the claimant to attend a disciplinary hearing. The disciplinary allegation was that the claimant has failed to attend work or to follow the company's absence reporting procedure. Confusingly, the letter did not confirm the date of the hearing. I understand that it was scheduled for 21st November 2019.

43. The claimant responded by email to Mr Hill on 19th November 2019. He made it clear that he no longer considered that he was employed by the respondent and would not be subject to any disciplinary process. He concluded his email by saying "*Further, and in the alternative, the actions by yourself on the 5th November, constitute constructive dismissal by virtue of the company's anticipatory breach of contract*".

44. The claimant did not attend the disciplinary hearing on the 21st November 2019.

45. Mr Hill wrote to the claimant on 22nd November to confirm the outcome of the disciplinary hearing. Rather oddly, the letter confirms both that:

    45.1 the claimant was given a disciplinary warning for not turning up for work"; and

    45.2 the claimant was "*now formally dismissed*" for "*not turning up for work and carrying out Private work while you were meant to be at work*".

46. Mr Hill had no evidential basis for reaching his conclusion about private work.

47. I accept the claimant's evidence that he applied for about 14 jobs in the period from his dismissal until February 2020. Details appear at page 96 of the hearing bundle.

48. The claimant also found a Gas Engineer to complete his work under supervision to enable him to obtain his Gas Safe certificate. The engineer paid the claimant £400 for his work.

49. The claimant secured a job offer with another plumbing company in December 2019 to begin work in January 2020. However, this offer fell through when the claimant explained his situation with the respondent and indicated that he would be unable to obtain a reference from the respondent. The claimant continued to seek other employment.

50. In about February 2020 the claimant secured an offer of employment at RAF Mildenhall. He did not begin work until 20th July 2020. The delay was caused in part by delays in the claimant obtaining security clearance and in part by the fact that in March 2020 the Covid-19 pandemic took hold and the first national lockdown began. The claimant did not work elsewhere during this period.

51. During the "lockdown" period from late March 2020 the respondent "furloughed" all but one of his employees for a period of two months. The respondent paid the "furloughed" employees 80% of their normal pay in this period. The claimant would have been "furloughed" in this way had he remained in the respondent's employment.

Discussion/Conclusions

52. I set out my conclusions on the disputed issues below.

Was the Claimant Dismissed?

53. The first and most fundamental issue in this case is whether the claimant was dismissed by the respondent.

54. A claimant who wishes to claim unfair dismissal must show that he or she has been dismissed within the meaning of section 95 ERA. There are two relevant possibilities in this case. The claimant must show either: –

    54.1 His contract of employment was terminated by the respondent with or without notice (s95(1)(a) ERA); or

    54.2 He was constructively dismissed (s95(1)(c) ERA).

55. Where the wording relied upon as giving effect to the dismissal is unambiguous the tribunal's task is simply to construe the words used. In this case the claimant relies on the words of the 5th November 2019 text message in which in response to the claimant saying that he would not be coming into work until the following day the respondent replied, "*Don't bother to* [sic] *late to text me now*". Those words are plainly ambiguous.

56. Where the wording relied on is ambiguous the tribunal must consider whether the ambiguous words amounted to a dismissal. The test is an objective one. The tribunal should consider all the surrounding circumstances (both preceding and following the incident) and the nature of the workplace. The tribunal should ask itself how a reasonable employee would have understood those words in the light of those circumstances.

57. Applying that analysis, I reached the following conclusions:

58. Any reasonable employee receiving the text message that stated, "*Don't bother*" would have understood that the respondent was saying "*don't bother coming in to*

work on 6th November". This understanding was a natural and reasonable understanding given that the respondent's statement was in response to the claimant saying that he would not be coming into work until 6th November. A reasonable employee in the claimant's position would have had this understanding. Such an employee would also have speculated as to whether the respondent meant more than this (i.e. asked themselves the question – "does he mean I am sacked?"). I do not consider that the "*Don't bother"* response on 5th November would, on its own, be understood by a reasonable employee in the circumstances to amount to a dismissal. The claimant's evidence of the reaction of his wife is telling in this regard.

59. I do not accept that a reasonable employee in the claimant's position would have considered themselves to have been dismissed merely upon receipt of the "*Don't bother*" message. Something more was required to convert that message into a dismissal. However, when that message is considered together with the subsequent messages there was sufficient for a reasonable employee in the claimant's circumstances to have understood that he had been dismissed. The following additional matters were sufficient for a reasonable employee to have taken that view:

    59.1 Mr Hill's text message to confirm that the van was to be collected. The suggestion that the van was being collected in the afternoon of 5th November was entirely at odds with the claimant's message that he was intending to return to work on 6th November. The clear implication was that the respondent considered the claimant's employment was over, the claimant would not be returning to work and would not require the van;

    59.2 The exchange between the claimant and Mr Hill about clearing out the van. Clearing out the van was entirely inconsistent with the claimant remaining an employee and returning to work the following day;

    59.3 When the claimant did not attend work on 7th November Mr Hill did not simply ask the claimant to explain where he was and why he was not at work. Instead Mr Hill arranged for the claimant's paperwork and mobile phone to be collected. Again, this is inconsistent with the claimant's employment continuing.

60. I conclude that by 7th November 2019 a reasonable employee in the claimant's circumstances would have understood that he/she had been dismissed.

61. In the circumstances, I find that the claimant was expressly dismissed by the respondent purposes of section 95(1)(a) on 7th November 2019. This was the effective date of termination of the claimant's employment.

62. In the circumstances, I do not need to consider the claimant's alternative argument that he was constructively dismissed.

63. It was suggested by the respondent's counsel that in circumstances where ambiguous words are used (in this case for dismissal), the recipient of those words had an obligation to check if the giver of the notice really did intend what he had apparently said. The respondent's counsel referred me in this regard to *Willoughby v CF Capital plc [2011] IRLR 985* (paragraphs 36 and 37) and to *East Kent Hospitals University NHS Foundation Trust v Mrs P Levy [2018] WL 04339499.*

64. Reference was made in those cases to the so called "special circumstances" exception to the general rule that a notice (whether of dismissal or resignation) is effective when it is communicated to the recipient and requires no acceptance to be effective. Where so-called "special circumstances" exist the giver of the notice

may be entitled to retract it and the dismissal or resignation will not take effect. Such special circumstances cases often involve dismissals or resignations in the heat of the moment. In such circumstances the recipient of the notice is well advised to either wait a reasonable period to see if the giver of the notice really intended it or to make enquiries of the giver of the notice to check whether they really meant to end the employment relationship. This is reflected in the wording set out at paragraph 37 of *Willoughby*:

> *"The 'rule' is that a notice of resignation or dismissal (whether given orally or in writing) has effect according to the ordinary interpretation of its terms. Moreover, once such a notice is given it cannot be withdrawn except by consent. The 'special circumstances' exception as explained and illustrated in the authorities is, I consider, not strictly a true exception to the rule. It is rather in the nature of a cautionary reminder to the recipient of the notice that, before accepting or otherwise acting upon it, the circumstances in which it is given may require him first to satisfy himself that the giver of the notice did in fact really intend what he had apparently said by it. In other words, he must be satisfied that the giver really did intend to give a notice of resignation or dismissal, as the case may be. The need for such a so-called exception to the rule is well summarised by Wood J in paragraph 31 of Kwik-Fit's case and, as the cases show, such need will almost invariably arise in cases in which the purported notice has been given orally in the heat of the moment by words that may quickly be regretted."*

65. I do not accept that this is a "heat of the moment" case which falls within the so called "special circumstances" exception. The respondent did make a snap decision to dismiss in the heat of the moment on 5th November 2019. However, I have found that it is the respondent's conduct over the period from 5th to 7th November inclusive that, taken together, was communication of the dismissal. I cannot see that actions taken over a period of three days when there is ample time to reflect can all be said to be "in the heat of the moment". Even if I am wrong on that point, I do not consider that in such cases there is an absolute requirement for the claimant to check with the respondent that they really intended to dismiss him. Nor do I accept that a failure to do so in some way renders the dismissal ineffective. The case law merely includes a salutary warning that those who do not make such enquiries in "special circumstances" cases may come to regret it where the dismissal or resignation is later retracted.

What was the Reason for the Dismissal?

66. Where a claimant establishes that there was a dismissal, the burden shifts to the respondent to demonstrate the reason for that dismissal and that the reason was a potentially fair reason within the scope of section 98(2) ERA.

67. It is clear to me from the evidence that Mr Hill chose to dismiss the claimant because of the claimant's conduct. Mr Hill's decision to dismiss the claimant was because the claimant had failed to attend work and had given the respondent insufficient notice of this. Furthermore, the decision was no doubt influenced by Mr Hill already holding the view that the claimant was unreliable with regard to his attendance at work and his perception that the claimant's work was substandard in some respects. All these matters combined to drive Mr Hill's decision. However, it was clearly the fact that the claimant had failed to attend work and gave insufficient notice of this that prompted the decision to dismiss.

68. The reason for dismissal is therefore a reason relating to the claimant's conduct and is a potentially fair reason for dismissal as it falls within section 98(2)(b) ERA. Thus, the respondent has demonstrated that there was a potentially fair reason to dismiss.

Was the Dismissal fair?

69. In the circumstances, the tribunal must apply the test of fairness under section 98(4) ERA. That requires me to consider whether the respondent acted within the so-called band of reasonable responses and to apply the test of fairness sunder section 98(4) ERA.

70. It is hard to envisage a more clear-cut case. This was plainly an unfair dismissal. No recognisably fair procedure was followed. The respondent undertook no disciplinary investigation and conducted no disciplinary process. There was no compliance with the ACAS Code of Practice in relation to disciplinary matters. Furthermore, whilst the claimant's conduct was not without blame no reasonable employer would have dismissed an employee in the circumstances. The claimant's absence from work on 4th and 5th November was entirely excusable given his daughter's hospitalisation and the claimant's domestic circumstances of the time. The claimant's conduct in giving the respondent so little notice of his absence was poor but no reasonable employer could have fairly dismissed the claimant in the circumstances, particularly as the claimant had an otherwise unblemished disciplinary record. The dismissal was both procedurally and substantively unfair.

Remedy Issues

71. A substantial number of issues relating to remedy were raised by the parties (primarily the respondent). Taking these in turn my conclusions are as follows:

The claimant refused to return to work on or after 12 November 2019? Did this represent a failure to mitigate on the part of the claimant and should the basic and compensatory awards be reduced pursuant to sections 122 and s123 ERA as a consequence?

72. I do not accept that the claimant unreasonably failed to mitigate his loss by failing to return to work on or after 12th November 2019. In the circumstances, compensation should not be reduced.

73. It Is right to say that the respondent's first email sent on 12 November 2019 was conciliatory in contrast to the emails sent before then. However, this conciliatory approach did not last. Thereafter the respondent behaved in a way that no reasonable employee in the claimant's position would have wanted to return to work. For example, the respondent's email sent at 19:19 on 12th November 2019 was not at all conciliatory. Mr Hill accused the claimant of poor workmanship and threatened the claimant with a further investigation into his use of the company vehicle.

74. The respondent then took disciplinary action against the claimant and quickly dismissed him with no justification.

75. I do not accept that the claimant behaved unreasonably in failing to mitigate his loss by failing to return to work for the respondent in those circumstances.

76. Had Mr Hill unequivocally accepted that he was at fault, accepted that he had made a mistake and acted in haste and said that he was willing to put the whole matter behind them the position may have been very different. He did not do so.

Would the claimant have been dismissed or left at some point after his dismissal and if so when and / by what percentage should the claimant's compensation be reduced?

77. In this regard the respondent relies on the fact that the claimant was dismissed on 22nd November 2019 in any event.

78. I do not accept that there was any likelihood of the claimant having left the respondent's employment of his own accord in the foreseeable future had he not been dismissed on 7th November 2019. The claimant was continuing to train for his gas certification. It was not in his interest to leave. I accept his evidence that he had no intention of leaving.

79. It is right to say that the respondent dismissed the claimant with effect from 22nd November 2019. However, the respondent did not have grounds to fairly dismiss the claimant in those circumstances. Even if the respondent had followed an immaculate procedure (which they didn't) the respondent would not have been in a position to fairly dismiss the claimant for his failure to attend work and his late notification. In choosing to dismiss the claimant Mr Hill also relied on the assertion that the claimant had carried out private work while he was meant to be working for the respondent. No evidential basis for this has been provided by the respondent. Mr Hill sought to rely on the fact that he had been provided with invoices by a plumber's merchant which suggested that the claimant had been purchasing products for other jobs. Only two invoices were provided. Both for trivial sums of money. One invoice was dated 16th November 2019. It is for approximately £15 worth of plumbing materials. The second invoice is dated 9 December 2019. This postdates the purported dismissal on 22nd November. It is for approximately £36 worth of plumbing materials. Neither invoice provide any evidential basis whatsoever for the conclusion that the claimant was undertaking paid work for others during his working time with the respondent.

80. On the evidence provided, the respondent was not in a position to have fairly dismissed the claimant at any stage after 7th November 2019. Consequently, no reduction to the award is made for this reason.

Has the claimant contributed to his dismissal in his actions and failures to act, if so, should his compensation be reduced further to sections 122 and/or 123(6) ERA?

81. Section 122(2) ERA provides:

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

82. Section 123(6) ERA provides:

> *"(6) where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

83. The tribunal has a duty to consider such a reduction in any case where there was blameworthy conduct on the part of the employee.

84. Culpable or blameworthy conduct is required before a reduction to compensation is made.

85. The only respect in which the claimant's conduct was blameworthy or culpable was the fact that the claimant gave the respondent such short notice of his absences.

It was unreasonable of the claimant to do this. He knew on 4th November 2019 that he was going for be absent for two working days. He did not inform the respondent until only a matter of minutes before his working day was due to begin on the two working days in question.

86. This conduct on the part of the claimant clearly contributed towards Mr Hill's decision to dismiss.

87. In the circumstances it is open to the tribunal to reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. Guidance on this issue was given by the EAT in *Hollier v Plysu 1983 IRLR 260*.

88. The claimant's conduct was at the lower end of the spectrum in terms of culpability and blameworthiness. It is conduct which one would describe as "slightly to blame". In the circumstances, I consider that a 25% reduction in both the basic and the compensatory award is just and equitable.

Did the claimant fail to mitigate his losses and, if so, to what extent should compensation be reduced?

89. There are two issues raised by the respondent in relation to mitigation:

    89.1 Did the claimant refuse to come back to work on after 12th November 2019? Is so, was this a failure to mitigate?

    89.2 Did the claimant take reasonable steps to seek to mitigate his loss by actively seeking alternative employment?

90. I decline to make reductions for failure to mitigate on both points.

91. It is right to say that the claimant failed to return to work after his dismissal on 7th November. The only conciliatory invitation to do so came from the Respondent on 12th November. However, the respondent quickly reverted to threats of disciplinary action and then to disciplinary action itself. The conciliatory tone of the respondent's first email on 12th November quickly disappeared. In the circumstances, it was not unreasonable of the claimant to have refused to return to work.

92. The claimant was aware that his employment had ended on 7th November 2019. The claimant actively sought other employment in November and December 2020. I accept the claimant's evidence that he made the job applications set out in his Solicitor's email dated 1 October 2020 which appears at page 96 of the hearing bundle.

93. By December 2019 claimant had already secured an offer of alternative employment. That fell through shortly thereafter.

94. The claimant continued to actively seek employment in January and February 2020. By this stage he had secured an offer of new employment at RAF Lakenheath. That employment did not commence until 20 July 2020. I accept the claimant's evidence that the delay was in part due to delays in obtaining security clearance and in part the due to the Covid 19 pandemic and the first "Lockdown". I do not find that there was a failure to mitigate. The claimant made sufficient efforts to seek alternative employment. Whilst those efforts ended in February 2020 it was reasonable for him to cease job seeking at this point as he had accepted an offer of employment.

95. I accept the claimant's evidence that he did not claim any form of welfare benefits because of the level of his wife's earnings.

Did the Claimant earn anything that should be taken into account as mitigating earnings?

96. The claimant accepted that he received a £400 payment from the gas engineer with whom he completed his gas portfolio. This was during his period of loss. This sum should be credited against the claimant's losses.

97. The respondent asserted that the claimant must have earned money from other work before his employment at RAF Lakenheath began in July 2020. The evidence for this is very limited. I am asked to infer that the claimant must have been earning money from other sources because he failed to claim welfare benefits. I reject this. I accept the claimant's evidence that the reason why benefits were not claimed was because of the level of his wife's earnings.

98. I am also asked to infer that the claimant must have been doing other work as he was purchasing products from suppliers of plumbing materials. The evidence of this is scant. I refer to the two invoices referred to in paragraph 79 above. Mr Hill has good relations with local plumber's merchants. They provided him with the invoices. It is more likely than not that had the claimant had been purchasing substantial amounts of plumbing supplies from the local plumber's merchants they would have provided Mr Hill with far more invoices than the two modest invoices concerned. There is insufficient evidence for me to conclude that the claimant was earning sums from other work during his period of loss. Nor is there evidence from which I can assess or infer the amount of such earnings.

Did the respondent unreasonably fail to comply with the ACAS code of practice on disciplinary matters? If so to what extent (if any) should compensation be increased?

99. The applicable statutory provision is section 207 Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA).

100. The respondent dismissed the claimant for a reason related to his conduct. In the circumstances, the ACAS Code of Practice on Disciplinary and Grievance procedures was applicable.

101. The respondent failed to comply with the Code in any respect before the dismissal took effect on 7th November 2019. There was no attempt made to establish the facts of the case, no attempt was made to inform the employee of the problem, no disciplinary meeting was held and no opportunity to appeal was given.

102. The respondent's failure to comply with the Code was unreasonable. There was no good reason to fail to comply.

103. The tribunal has a discretion as to what uplift (limited to 25%) would be just and equitable to reflect the respondent's unreasonable failure to follow the Code. I take into account:

103.1 The fact that the procedures under the Code were ignored altogether;

103.2 The failure was inadvertent. Mr Hill was unsophisticated in employment practice and was unaware of the Code;

103.3 The respondent was a small business with limited resources to spend on such matters.

104. In the circumstances I consider a 10% uplift to be just and equitable.

105. The adjustment applies to the compensatory award.

Did the claimant unreasonably fail to follow the ACAS code of practice on disciplinary matters? If so to what extent (if any) should compensation be reduced?

106. The respondent asserts that the claimant unreasonably failed to appeal against his dismissal or raise a grievance regarding the matter.

107. The respondent dismissed the claimant for a reason related to his conduct. In the circumstances, ACAS Code of Practice on Disciplinary and Grievance procedures was applicable.

108. I do not consider that the grievance aspects of the Code are applicable in this case. The case concerns dismissal for a reason related to conduct. As such it is the disciplinary aspects of the Code that apply and in particular paragraph 26 which states "*Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against that decision"*

109. The claimant plainly considered that his dismissal was wrong or unjust. However, he failed to comply with this requirement of the Code. He had received information from ACAS at the time. It is likely that he would have been aware of this obligation under the Code.

110. I consider that the claimant's failure to appeal against his dismissal was unreasonable. However, I consider that a modest reduction of 10% is just and equitable given that:

110.1 The respondent did not offer the claimant any right of appeal (itself a breach of the Code on the part of the respondent); and

110.2 The way the respondent had behaved indicated that an appeal was unlikely to be considered reasonably and fairly.

111. The net effect of the 10% uplift and the 10% reduction is that the two cancel each other out.

Holiday Pay

112. The parties agreed by closing submissions that:

112.1 The applicable holiday year was 1st January 2019 to 31st December 2019;

112.2 In the part holiday year beginning with 1st January 2019 and ending with the claimant's dismissal he had accrued a statutory entitlement to 23 days paid holiday.

113. The issue for me to determine was whether the claimant has taken all the leave he had accrued. The respondent asserted that all the accrued leave (and more) had been taken. The claimant asserted that he had 8 days of untaken leave.

114. I accept the respondent's evidence on this point. The respondent's case was supported by their annual leave planner in the hearing bundle. The claimant could not explain how he arrived at his figure of 8 days. When giving evidence he accepted this was no more than an estimate and accepted that the figure may be lower. He kept no records of his own.

115. On the evidence, I find that the claimant had taken all the paid leave he had accrued and that no payment is due under Regulation14.

Notice Pay

116. The claimant had five complete years' service with the respondent as at the date of his dismissal on 7th November 2019. As such his statutory minimum notice entitlement under section 86 ERA was five weeks.

117. The respondent summarily dismissed the claimant on 7th November 2019. The respondent was not entitled to summarily dismiss. As such the summary dismissal was a breach of contract on the part of the respondent and the claimant is entitled to an award of damages for the losses caused by that breach.

118. I make no separate award of damages for the breach as the claimant will recover the five weeks pay as part of the compensatory award for unfair dismissal.

Additional Award (Section 38 Employment Act 2002)

119. Section 38 Employment Act 2002 states that Employment Tribunals must award compensation to an employee where, upon a successful claim being brought under certain jurisdictions as set out in Schedule 5 to the Act it becomes evident that the employer was in breach of the duty to provide written particulars under section 1 ERA.

120. The respondent failed to provide such a statement to the claimant at any time. The conditions for such an additional award under section 38(2) are met.

121. In the circumstances, Section 38 requires the tribunal to increase the claimant's award by the minimum amount of two weeks' pay. I do not consider that the circumstances of this case make it just and equitable to award the higher sum of four weeks' pay. Particularly given the size and administrative resources of the respondent.

Calculation of Award

Supporting Information:

Claimant's date of birth:	13.01.1986
Claimant's age at dismissal:	33 years
Claimant's length of service at dismissal:	5 complete years
Termination date:	07.01.2019
Claimants gross weekly pay with respondent:	£490.00
Claimant's net weekly pay with respondent:	£407.36

Claimant's losses cease on 20.07.19 when he began new employment which is better remunerated than his employment with the respondent.

Basic Award (unfair dismissal)

5 x 1 x £490.00	£2450.00
Less Reduction of 25%:	£612.50
Adjusted Basic Award:	£1837.50

Compensatory Award (unfair dismissal)

Loss of Earnings:

Period of Loss: 08.11.2019 to 19.07.20 (36.4 weeks):

8 weeks at £325.89 per week (being 80% of claimant's normal salary to represent income from being "furloughed" had he continued in the respondent's employment)	£2607.12	
28.4 weeks at £407.36	£11,569.02	
Less mitigating income:	£400.00	£13,776.14
Loss of Statutory Rights:		£350.00
Total compensatory award before adjustment:		£14,126.14
25% reduction for contributory conduct:		£3,531.54
Total compensatory award after adjustment:		£10,594.60
Award under section 38 Employment Act 2002 (2 x £490.00)		£980.00

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Employment Judge: Mr. A. Spencer

Date: 3rd February 2021
JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE