EMPLOYMENT TRIBUNALS

Claimant: Mr A Kaminski

Respondent: Oxford Plastic Systems Limited

v

Heard at: Via CVP **On: 18 January 2021**

Before: Employment Judge Milner-Moore

Appearances
For the Claimant: Ms D Janusz
For the Respondent: Mr D Parry (Solicitor)

RESERVED JUDGMENT

1. The claim of unfair dismissal succeeds. The claimant was unfairly dismissed by the respondent.
2. The claimant's basic and compensatory award will be determined at a remedy hearing and on the following basis:
   2.1. had a fair process been followed the claimant's dismissal would have been delayed by two weeks;
   2.2. the claimant would have voluntarily left his employment in any event by 31 March 2019;
   2.3. the compensatory award referable to the period between 28 September 2018 and 31 March 2019 will be reduced by 75% to reflect the likelihood that a fair dismissal would have occurred had the respondent followed a fair process;
3. The claimant contributed to his own dismissal by blameworthy conduct and so the basic award payable to him will be reduced by 75% and the compensatory award payable to him will be further reduced by 75%.

RESERVED REASONS

1. This case was listed for a one day hearing to determine a complaint of unfair dismissal brought by the claimant. The following issues arose for determination:
   a. What was the reason for dismissal and was it a potentially fair reason?
      i. The respondent contends that the claimant was dismissed for misconduct.

b. Did the respondent believe the claimant to be guilty of misconduct?
c. Did the respondent have reasonable grounds for that belief?
d. Had the respondent carried out as much investigation as was reasonable in the circumstances when it formed its belief?
e. Did the respondent follow a fair procedure?
f. Was the decision to dismiss within the range of reasonable responses open to a reasonable employer in all the circumstances of the case?
g. Did the claimant receive the letter of dismissal?
h. Was the claimant advised of his right of appeal
i. Should any compensation awarded to the claimant be adjusted:
    i. to reflect the likelihood that the claimant would have been fairly dismissed had a fair procedure been adopted?
    ii. to reflect any contributory conduct on the part of the claimant?
    iii. to reflect an unreasonable failure on either side to comply with the ACAS Code of Practice?

2. The grounds of challenge advanced by the claimant to the fairness of the procedure were that the claimant believed that the company had decided to dispose of the metal that the claimant had been dismissed for taking and that the sanction of dismissal was therefore unduly harsh and that the claimant had not been provided with a right of appeal.

The hearing

3. The hearing took place remotely by video using the CVP platform. A face-to-face hearing was not held because it was not practicable given the COVID 19 pandemic, and all issues could be fairly and effectively determined in a remote hearing. The parties were able to use the technology effectively. A Polish interpreter was present to interpret what was said.

4. I heard evidence from the claimant and his friend Mr Kuznierz (who had accompanied the claimant to his disciplinary hearing). I heard evidence from Mr Cuthbert (who conducted the investigation and took the decision to dismiss the claimant). Mr Cuthbert had produced a witness statement and a supplementary statement. I also received a statement from Mr Usher (who had been present at the disciplinary and investigation meetings). Mr Usher had been made redundant by the respondent and did not attend to give evidence. I received an agreed bundle of documents of around 134 pages. I heard closing submissions from both parties. I have not set out the closing submissions separately but have addressed the points raised in this decision in so far as relevant.

Facts

5. The respondent is a company which runs a factory in Oxfordshire. The claimant was employed as a machine operative from 19 January 2012 until 27 September 2018.

6. The claimant's contract of employment references a staff handbook which contains a disciplinary procedure. The disciplinary procedure states that any alleged disciplinary office will be carefully investigated, if the manager concludes that there are reasonable grounds to believe that an individual is guilty of misconduct, a disciplinary hearing will take place. It states "you will not normally be dismissed for a first disciplinary offence (except for gross misconduct)". The disciplinary procedure contains a non-exhaustive list of the types of acts that will be regarded as gross misconduct. Theft is one of the matters specified.

7. The waste products which result from the respondent's manufacturing processes are separated in to various bins: pvc items are reused by the respondent, cardboard and paper products are separated out for recycling and metal items are put in to a scrap metal bin. The scrap metal bin is emptied in to a skip in the respondent's yard. Every few months the contents of this skip are collected by a scrap metal merchant which pays the respondent for the scrap value. Larger items such as defunct machinery are stored in the yard and, when necessary, are broken down to obtain spare parts for re-use before being scrapped.

8. The claimant worked on weekdays and was not expected to attend his workplace at the weekend. It is common ground between the parties that, on Sunday 23 September 2018, the claimant went to the respondent's premises, he took some scrap metal (cutting copper pipes out of a defunct chiller cabinet stored in the yard). The claimant did not seek permission to do so. The respondent was informed that the claimant had been on site taking items and became aware that some batteries stored in the yard were also missing.

9. On Monday 24 September 2018, the claimant was interviewed by Mr Cuthbert about this. The claimant was accompanied by a colleague who translated for him and Mr Cuthbert was accompanied by Mr Usher. There is a note of that discussion which records that Mr Cuthbert asked about why the claimant had left work without permission on 18 September. He also asked why the claimant had been on site on Sunday 23 September. The claimant answered that he had needed "some angle iron for a shelf at home". Mr Cuthburt asked why he had cut copper pipes out of an old chiller and whether he had taken some batteries from a trailer. The claimant admitted that he had taken the copper and said that he would bring it back. He denied taking batteries. Although the investigation notes do not record this, Mr Cuthbert's evidence was that, during this meeting, the claimant had told Mr Cuthbert that "it was scrap' that he had taken. Mr Cuthbert replied that it was not the claimant's scrap to take. Later that day the claimant was suspended on full pay.

10. On 25 September 2018, the claimant was sent a letter inviting him to attend a disciplinary hearing on 27 September 2018. The letter was sent by post and was also hand delivered to the claimant's address that same day by Mr Cuthbert. The disciplinary allegation was framed as "*taking of items from Oxford Plastics System Limited without permission and also being on site*

unauthorised and without wearing the appropriate personal protective clothing". The letter did not make clear that the respondent considered that, if established, such behaviour would be characterised as theft and an act of gross misconduct which might result in his being summarily dismissed. The letter informed the claimant of his right to be accompanied and explained that it was an opportunity for him to state his version of events and put forward any mitigating circumstances.

11. At the disciplinary hearing on 27 September 2018, the claimant was accompanied by Mr Kusnierz as translator. There is a note of the meeting which appears to have been fairly brief. Mr Cuthbert conducted the hearing and Mr Usher was again in attendance. The note records that Mr Cuthbert explained that the "*purpose of the hearing was to discuss an apparent theft from the company….AK had been on the company's premises from 16:00 to 18:00 on Sunday 23rd September 2018 and was seen on CCTV taking copper from the site, having removed it from a chiller. AC asked whether AK had anything to say about this, AK replied no. AC said that if AK had nothing to say in his defence then the theft must be regarded as gross misconduct and AC therefore had no alternative but to dismiss AK from Oxford Plastics and terminate his employment with immediate effect. AC reminded AK of his right of appeal and said this should be submitted to John Hall within the next week. AK said that he did not wish to appeal at this stage.*" As is apparent from the note, Mr Cuthbert announced his decision immediately. He did not adjourn the meeting to take some time to consider before deciding to dismiss. I asked him whether he had considered the possibility of imposing any alternate penalty, such as a final written warning. He said that he had been told by the Operations Director that, because theft was gross misconduct, the penalty was dismissal.

12. The claimant was not certain about whether he had been informed of his right to appeal during the disciplinary hearing. His witness statement said "*I thought that it was better for me to leave because I was not happy there, however I did not feel that this dismissal was fair. I do not recall if I was advised of any right of appeal. Even if I was advised of the right to appeal, I would not make it because I was not happy in the respondent's firm and wanted a fresh start."* In his witness statement, Mr Kusnierz said that the claimant was not informed of his right to appeal but, when giving evidence, he was less certain and said that he was unable to recall whether or not the claimant had been informed. Mr Cuthbert was quite clear that he had informed the claimant of his right to appeal during the disciplinary hearing. I consider it likely that the claimant was informed of his right to appeal during the meeting but that he does not now specifically recall this because the meeting was brief and he had quickly discounted the possibility of pursuing an appeal.

13. On 2 October 2018, Mr Cuthbert wrote to the claimant confirming the outcome of the disciplinary hearing and that he was being dismissed for gross misconduct, namely theft. He reminded the claimant that he had a right to appeal to John Hall and was required to submit any appeal by 4 October 2018. The claimant denies having received this letter but Mr

Cuthbert's evidence was that he personally hand delivered it to the claimant. I find that the letter was delivered to the claimant and that he was aware of his right to appeal but had decided against doing so.

Findings relevant to Polkey and contributory conduct

14. Mr Cuthbert's supplementary statement set out more detail about the respondent's practices regarding the disposal of waste and scrap metal in particular. The respondent generates revenue of around £7000 a year from selling its scrap. Mr Cuthbert's evidence was that all employees knew that they had to separate scrap metal out and that it was resold. He considered that the claimant, having worked for the respondent for 6 years, would also have known this.

15. When giving evidence, the claimant accepted that he was aware at the time of these events that scrap metal had a value. The claimant also said for the first time that Mr Cuthbert had previously seen him taking items from the scrap metal bin and had raised no objection to this. This was not an allegation that the claimant had made during the disciplinary process, or in his claim form or in his witness statement, which is surprising given that it would have been a significant point in the claimant's favour. I considered it unlikely to be true.

16. When giving evidence the claimant explained that he had been unhappy with his work at the respondent and that he had decided that he would leave soon. He thought it would be difficult to leave in the run up to Christmas as manufacturers would shut down over the Christmas period but he had decided that he would leave in the New Year.

Law

17. The statutory test for unfair dismissal is that set out at section 98 of the Employment Rights Act 1996 (ERA 1996). The burden is on the employer to establish that dismissal occurred for a fair reason asset set out at section 98(2) ERA 1996. If a fair reason is established, it is necessary to consider whether, in all the circumstances, dismissal was fair (section 984) ERA 1996) in that it fell within the range of reasonable responses open to a reasonable employer. The employer is not under a burden to prove the fairness of the dismissal.

> **98.— General.**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—

> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

> (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.

18. In a case where the dismissal is for misconduct it is necessary to consider the test set out in **BHS v Burchell** which may be summarised as (1) did the employer genuinely believe that the employee had committed misconduct (2) was that belief a reasonable belief (3) was it reached after the employer had conducted a reasonable and sufficient investigation. As **Iceland Frozen Foods Ltd v Jones** makes clear, the correct approach for a judge determining a complaint of unfair dismissal is to consider the reasonableness of the employer's decision making and not simply to consider whether the Judge considers the dismissal fair or whether the Judge would have adopted a different approach. In most cases there will be a "band of reasonable responses" to an employee's conduct, within which band one employer might reasonably take one view and another employer night reasonably take a different view. The judge's role is to assess, when considering the reasonableness of the disciplinary sanction and of the investigative and disciplinary processes followed, whether the employer's approach falls outside this band of reasonable responses. That assessment has to be made by reference to the facts known to the employer at the time of dismissal.

19. What is reasonable by way of investigation will depend on the circumstances of the case. In **A v B** [2003] IRLR 405 it was stated that

> "Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.
>
> This is particularly the case where, as is frequently the situation and was indeed the position here, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing

future employment in their chosen field, as in this case. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances."

20. Where conduct is admitted less by way of investigation is likely to be required to meet the standard of reasonableness. However, even in such circumstances, investigation may be necessary where it is said that there are mitigating circumstances in relation to the admitted misconduct.

21. The ACAS Code of Practice on disciplinary and grievance procedures provides guidance to fair process which Tribunals must have regard in assessing fairness. The ACAS Code sets out the following guidance

"4. That said, whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:

- Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- Employers and employees should act consistently.
- Employers should carry out any necessary investigations, to establish the facts of the case.
- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
- Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
- Employers should allow an employee to appeal against any formal decision made.

"5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."

22. An individual may be summarily dismissed for "gross misconduct". Gross misconduct involves "either deliberate wrongdoing or gross negligence" and which is sufficiently serious to be a repudiation of the contract (***Sandwell and West Birmingham Hospitals NHS Trust v Mrs A Westwood*** [2009]UKEAT/0032/09).

23. Sections 122 and 123 set out the statutory basis on which compensation payable for unfair dismissal may be adjusted.

"122.— Basic award: reductions.

(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.

123.— Compensatory award.
(1) Subject to the provisions of this section and [sections 124, 124A and 126] 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.
……

(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."

24. Where a dismissal is found to be unfair a Tribunal is required to make such compensatory award as is "just and equitable" in the circumstances. On that basis, where a dismissal is found to be unfair, it may be just and equitable to reduce the compensation awarded to reflect the outcome that would have occurred had matters been conducted fairly (***Polkey v Dayton Services Limited*** [1987] IRLR 530). As the EAT indicates in ***Software 2000 Ltd v Andrews and others***

"The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice"

25. If the Tribunal concludes that a fair dismissal would invariably have taken place, but would have occurred at a later date, it may be appropriate to limit compensation to the period in question or, if the Tribunal concludes that a fair process would not have affected the timing of the dismissal it may be appropriate to make no award of compensation. Alternatively, it may be appropriate to apply a percentage reduction to reflect the degree of likelihood that a fair dismissal would have taken place. Or it may be appropriate to apply a combined approach and to conclude, for example, that a claimant would not have been dismissed for the period of time required for a fair process to be conducted and that, thereafter, a percentage reduction should be applied to reflect the likelihood (but not the inevitability) that a fair dismissal would have occurred at the end of that process.

26. Where the claimant has engaged in blameworthy conduct which has caused or contributed to the dismissal then this may be reflected by the making of such reduction to the basic and compensatory awards as is just and equitable. In ***Hollier v Plysu Ltd*** [1983] IRLR 260 the EAT provided guidance to the effect that reductions would usually fall within the following broad categories employee wholly to blame (100% reduction), employee largely to blame (75%), employer and employee equally to blame (50%) and employee slightly to blame (25%).

27. Where, in proceedings relating to a matter covered by a relevant Code of Practice, a Tribunal considers that either an employer or an employee has

unreasonably failed to comply with the Code, any award made may be increased (in the case of a failure by an employer) or reduced (in the case of a failure by an employee) by up to 25% (section 207A TULRCA 1992).

Conclusions

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

28. The respondent has shown that it dismissed the claimant for gross misconduct because it believed that the claimant had stolen items on 23 September 2018. Misconduct is a potentially fair reason for dismissal.

Did the respondent genuinely believe the claimant to be guilty of gross misconduct?

29. I consider that the respondent did genuinely believe the claimant to be guilty of theft and that it considered this to amount to gross misconduct. The respondent's disciplinary policy makes clear that theft will be treated as gross misconduct.

Did the respondent have reasonable grounds for that belief? Had the respondent carried out as much investigation as was reasonable in the circumstances when it formed its belief?

30. The respondent had obtained CCTV footage which established that the claimant had come on to its premises on a day when he was not due to be at work. In the CCTV footage he could be seen removing items belonging to the respondent. He had not sought the respondent's permission before doing so. The claimant admitted when interviewed in the respondent's investigation that he had removed copper piping and other scrap metal although he denied the theft of batteries. His explanation was that he did not consider that he was doing anything wrong because he was only taking items that were being thrown away by the respondent.

31. The key question in the case was whether the Respondent had formed a reasonable view that the claimant was guilty of theft because he had behaving dishonestly in taking the material and whether it had given sufficient consideration to whether the Claimant reasonably believed that the material that he took was being thrown away by the respondent as rubbish. The respondent did not in my view take sufficient steps to investigate and consider this possibility. Leaving aside questions as to the precise formulation of the legal tests for theft and dishonesty, if the Claimant had honestly, albeit, mistakenly acted i the belief that what he was taking was rubbish which the respondent was disposing of it would have been a significant mitigating circumstance. That omission was connected to some failures of fair process by the respondent.

Did the respondent follow a fair procedure?

32. In some respects the processes followed by the respondent were fair and compliant with the ACAS Code of Practice. The procedures were followed promptly and without delay. The claimant was allowed to be accompanied at all meetings. Arrangements were made for someone to translate. I have found that he did receive the letter recording the fact of, and reasons for his dismissal, and that he was informed of his right of appeal both during the disciplinary meeting and in this letter.

33. However, there were aspects of the process which were in my view unfair to the claimant and which impacted on the overall fairness of the dismissal.

    a. The ACAS Code states that, where possible, the disciplinary and investigative stages should be conducted by different people. This is intended to be a safeguard of fairness in a disciplinary process. That separation means that the person who conducts the disciplinary hearing is in a position to review the outcome of the investigation impartially and to consider whether it was fair and sufficient to establish the disciplinary charges, or whether for example there are relevant matters that require further investigation. Mr Cuthbert accepted that there were other managers within the respondent organisation who could have conducted either the investigation or the disciplinary hearing so as to achieve this separation. The respondent therefore failed to comply with the ACAS Code in circumstances where it would have been practicable for it to do so. Not every failure will render a dismissal unfair. However, the fact that Mr Cuthbert dealt with both stages of the process meant that there was no scrutiny of the adequacy of the investigation. However, the investigation was, in my view, unreasonably limited in its scope.

    b. Mr Cuthbert's witness statement makes clear that the claimant did explain during the investigation meeting that he had taken the material because he believed that it was "just scrap". However, that explanation is not recorded anywhere in the investigation notes. The scope of the investigation was limited to interviewing the claimant and establishing that he had indeed taken some items without permission. No effort was made to investigate the claimant's explanation (i.e. that he believed that because what he had taken was "just scrap" and that there would be no problem with his taking it). Mr Cuthbert maintained in his supplementary witness statement that it was generally known by employees that the scrap metal was resold and that broken machinery might be reused for spare parts, such that employees would have known that these items were not simply rubbish of no value awaiting disposal. That belief underpinned the way in which Mr Cuthbert dealt with the Claimant. However, Mr Cuthbert did not, as part of his investigation, attempt to investigate whether the claimant did know, or should have known this. It was never specifically put to the claimant during the investigation stage that he knew, or should have known that the scrap metal was not

rubbish, or that parts of the chiller cabinet were of value because they might be re-used. Mr Cuthbert never produced a report summarising the facts established by his investigation so it was not clear to the claimant that the disciplinary hearing would proceed on the basis that the respondent considered it to be a matter of general knowledge within the workplace that scrap metal was not mere rubbish awaiting disposal and that the respondent was rejecting the claimant's explanation.

c. The claimant was dismissed for theft. The charge of theft indicated that the Respondent considered that the claimant had dishonestly taken material, i.e. that he knew, or should have known, that he should not take it. However, the letter inviting the claimant to the disciplinary hearing did not inform the claimant that he was being charged with theft or make clear that, if established, this could result in his summary dismissal. The letter indicated that the disciplinary charge was " *taking of items from Oxford Plastics System Limited without permission*". It was therefore perhaps unsurprising that the claimant said little in the second disciplinary hearing. The disciplinary charge set out in the letter ("taking items without permission") was one that he had already admitted to. It was only during the disciplinary hearing that the respondent made clear that it regarded this as theft. That failure to make matters explicit in advance of the disciplinary hearing placed the claimant at a particular disadvantage given that he is not an English speaker and was relying on a friend to translate for him.

Was the decision to dismiss within the range of reasonable responses open to a reasonable employer in all the circumstances of the case?

34. Mr Cuthbert's evidence was that he was told by the operations manager that the claimant must be dismissed in a case of theft, because theft was gross misconduct. He did not therefore give consideration to any lesser penalty. I consider that it was unreasonable for the respondent to have assumed that, if gross misconduct had been established, the penalty must invariably be dismissal. Whilst dismissal is likely to be a reasonable disciplinary sanction in most such cases, a reasonable employer would still consider whether there were mitigating circumstances. There were potentially mitigating circumstances here in that the claimant appeared to be maintaining that he had acted from an honest, albeit mistaken, belief. Given this failing and in light of the issues that I have identified above, I do not consider that the decision to dismiss was within the range of reasonable responses open to a reasonable employer in the circumstances of this case.

Should any compensation awarded to the claimant be adjusted: (1) to reflect the likelihood that the claimant would have been fairly dismissed had a fair procedure been adopted?(2) to reflect any contributory conduct on the part of the claimant? (3) to reflect an unreasonable failure on either side to comply with the ACAS Code of Practice?

35. I consider that it would be appropriate to adjust the compensation payable to the claimant to reflect likelihood of a fair dismissal and to reflect the claimant's contributory fault.

    a. I consider that had the respondent conducted a fair process, i.e. conducted a fuller investigation and appointed a separate decision maker for the disciplinary stages it is likely that this would have delayed the disciplinary hearing somewhat and that this is likely to have taken the respondent a further two weeks. The claimant should therefore receive full compensation for the two week period between 27 September 2018 and 11 October 2018.

    b. Thereafter, I consider that, had the respondent conducted a fuller investigation, placed the claimant clearly on notice of the disciplinary charges and given consideration to the mitigating circumstances, it was likely that the respondent would still have considered that the claimant had been dishonest in taking material and formed the view that dismissal was the appropriate disciplinary response and would have fairly dismissed the claimant. Mr Cuthbert was quite clear that employees did know that metal waste and defunct machinery were not mere rubbish. It is likely that, had this point been put to the claimant during the investigation, the respondent would not have accepted that the claimant was ignorant of this. The respondent is also likely to have drawn adverse inferences from the fact that the claimant had chosen to go in to the workplace at the weekend and to have inferred that he did so to avoid any management scrutiny of his actions because he knew that what he was doing was wrong. I do not think that this is a case which can be said to be so clear cut that the respondent would inevitably have fairly dismissed the claimant following a fair process that a 100% reduction in compensation is appropriate. However, I consider that it is highly likely that the respondent would have done so. I assess the chance of a fair dismissal having occurred at 75% and so a 75% reduction to the compensatory award is appropriate.

    c. I also consider that the period in respect of which the compensatory award should be made should be time limited on the basis that the claimant was quite clear that he was unhappy in the respondent's employment. He had always intended to leave after Christmas. Had the claimant not been dismissed and had he received a warning, I consider that he would have been still more motivated to leave his employment and that he would have done so by 31 March 2019 (i.e. within a few months of the Christmas shut down period).

    d. I also consider that the claimant did contribute to his own dismissal by blameworthy conduct. I did not accept the claimant's account that he had in the past been permitted by Mr Cuthbert to remove scrap metal. The claimant accepted that he knew that scrap had a value. I considered it likely that, even if he was not aware of the detail of the respondent's arrangements for reselling scrap, he did understand

that it was not disposed of as rubbish. I considered that it was likely that the claimant knew that he would not be given permission if he asked to remove copper piping and other scrap and that this was why he had chosen to do so at a weekend when there would be no manager around to challenge him. I therefore considered the claimant to be primarily responsible for his own dismissal and considered that a 75% reduction would be appropriate to both basic and compensatory awards to reflect this.

e. Pursuant to section 207A TULRCA 1992, I considered whether to make adjustments to the awards on grounds of failure to comply with the ACAS Code of Practice but decided against doing so. I considered that the claimant had failed to comply with the ACAS code by in failing to pursue an appeal and that his failure was unreasonable. I considered that that the respondent had failed to comply with the ACAS code by failing to carry out all necessary investigations and failing to put the claimant properly on notice of the disciplinary charges. Such failure was also unreasonable. I considered that the percentage adjustments appropriate to reflect the claimant's and respondents failures would have been of similar order and so would have cancelled each other out. I decided therefore not to make any adjustment.

Employment Judge Milner-Moore
Dated 2 March 2021

Date: ……..
24 March 2021
Sent to the parties on: .....

.....
For the Tribunals Office

Public access to employment tribunal decisions:
All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Note:
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.