EMPLOYMENT TRIBUNALS

Claimant: Mr T McNamara

Respondent: CM Faraday Building Contractors Limited

Heard at: Manchester **On:** 6 & 7 April 2021

Before: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Claimant: Mr K McNamara (father)
Respondent: Mr M Howson, consultant

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed;

2. The compensatory award should be reduced by 20% to reflect the possibility that the claimant would have been dismissed in any event had the respondent adopted a fair procedure (*Polkey*);

3. The respondent unreasonably failed to comply with the ACAS code of practice on disciplinary and grievance procedures and the compensatory award should be uplifted by 20%;

4. It is just and equitable to reduce the basic award because of the conduct of the claimant before the dismissal and the basic award should be reduced by 25%;

5. The claimant did cause or contribute to his dismissal by blameworthy conduct and it is just and equitable to reduce the compensatory award by 25% as a result;

6. The respondent did not make any unlawful deductions from the claimant's wages and the claim for unlawful deduction from wages is dismissed;

7. The respondent did not fail to pay the claimant sums due in respect of annual leave and the claim for payments for annual leave is also dismissed;

8. The claimant's claim for breach of contract does not succeed and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a Builder/Labourer from 2011 until he was dismissed on 9 November 2019. The claimant contended that his dismissal was unfair. He also brought claims for breach of contract regarding notice, unlawful deductions from wages, and in respect of accrued but untaken annual leave. The respondent contended that the dismissal was fair by reason of conduct and that the claimant had been paid all sums which he was due.

Claims and Issues

2. A preliminary hearing (case management) was previously conducted in the case, on 10 September 2020. At the preliminary hearing a List of Issues was identified, which was recorded at paragraph 3 of the case management order. At the start of this hearing it was confirmed with the parties that those issues remained the ones which needed to be determined. One additional issue which it was agreed also needed to be determined was identified as is recorded at 1.3.1 below.

3. The issues identified were as follows:

(1) Unfair dismissal under Sections 94 and 98 of the Employment Rights Act 1996.
   - 1.1. What was the reason for dismissal? The respondent will contend that the claimant was dismissed following an allegation of misconduct (originally summarily dismissed following an allegation of gross misconduct).
   - 1.2. Was the decision to dismiss a fair sanction, that is was it within the reasonable range of responses open to the respondent.
   - 1.3. Did the respondent follow a fair procedure?
     - 1.3.1. Did the respondent follow the ACAS Code of Practice on disciplinary and grievance procedures and, if not, should there be an uplift to any award as a result?
   - 1.4. Does the respondent prove that if it had adopted a fair procedure, the claimant would have been fairly dismissed in any event – Polkey -v- Dayton? If so to what extent and why.
   - 1.5. If the claimant is found to have been unfairly dismissed should any compensation be reduced or extinguished on the basis of the claimant's culpable conduct?
   - 1.6. Notice pay. Is the claimant entitled to any further notice pay?

(2) Unlawful deduction of wages under Section 13 of the Employment Rights Act 1996

2.1 Did the respondent make any deduction from the claimant?

2.2 If so, how much and when?

2.3 If so, were the deductions permitted by statute or consented to in writing by the claimant?

(3) Annual Leave (Holiday Pay)

3.1 Has the claimant been paid compensation for any accrued and untaken annual leave as at the effective date of termination?

4. The claimant' representative expressed concern about the reference to gross misconduct in the list of issues, as he contended gross misconduct had never been mentioned prior to the Employment Tribunal preliminary hearing.

5. In this Judgment the Tribunal has determined the liability issues only, but that has included the issues recorded at 1.3-1.5. The remedy due to the claimant will need to be determined at a later hearing.

6. For the money claims (issues 1.6, 2 and 3), at the start of the hearing the claimant's representative was unsure about what exactly was contended to be due, an issue which partly arose as a result of disagreement about when the claimant's length of service commenced and how much notice he was due (and how much was paid). When submissions were reached, the claimant's representative confirmed that it was accepted that the claimant had been paid what was due and he was focussing on his unfair dismissal claim. As a result, for issues 1.6, 2 and 3 findings did not need to be made by the Tribunal.

Procedure

7. The claimant was represented throughout the hearing by his father, who was not a legal representative. Mr Howson, a consultant, represented the respondent.

8. The hearing was conducted by CVP remote video technology, with both parties and all witnesses attending remotely.

9. An agreed bundle of documents was prepared in advance of the hearing. The bundle ran to 145 pages. The numbers in brackets in this judgment record the relevant page number in the bundle. I was also provided with witness statements for each of the witnesses. At the start of the hearing I read the witness statements and the documents in the bundle which were referred to in those statements. The claimant also provided an updated schedule of loss, but as this Judgment addresses liability issues only, the detail of the schedule was not considered.

10. At the start of the hearing it was identified that the claimant's witness statement contained reference to without prejudice discussions between the parties. In reaching my decision I have not taken into account any references to without prejudice matters. After the statements were read, I confirmed to the parties that I had crossed out and would ignore paragraphs 16 and 18 of the claimant's statement

and the last of the bullet points at paragraph 20, as their content was without prejudice.

11. The Tribunal heard evidence from: Mr Mark Faraday, the owner of the respondent; Mr Ian Bairstow, a Builder/Labourer employed by the respondent; and Mr Gary Burrow, a General Builder employed by the respondent. Each witness confirmed the truth of their statement, was cross-examined by the claimant's representative, and was asked questions by me (if required). In Mr Faraday's case, there was also brief re-examination. The claimant also gave evidence, was cross examined by the respondent's representative, asked questions by me, and was very briefly re-examined.

12. After the evidence was heard, each of the parties was given the opportunity to make submissions. Those submissions were made orally.

13. Judgment having been reserved, I provide the Judgment and reasons outlined below.

Facts

14. There was some dispute about when the claimant first commenced continuous employment with the respondent. He was first employed when he was 16 years old. The period of employment included an apprenticeship and a time when he was part-time, with some time each week spent at College. The claimant believed that his employment commenced in late 2010 and the Tribunal was shown a bank statement (124) which showed the claimant being paid by the respondent on 14 March 2011. Mr Faraday's evidence was that the start date was 29 July 2011. There was no dispute that the claimant had eight complete years of service at the date of termination of his employment. There was no evidence that he had nine years' service. I do not otherwise need to determine when exactly his employment commenced.

15. The respondent is a small family business operated from Mr Faraday's home address. He is the only director, Mrs Faraday being the only other officer. Mr Faraday had very little experience of, or knowledge about, employment matters. The company has only a handful of employees. The work undertaken by it is on customer's sites.

16. The claimant was issued a contract of employment by the respondent (103). That contained standard terms, but unhelpfully did not confirm the start date of the claimant's continuous employment, nor did it record the claimant's hours of work – save to record that the hours of work were the amount of hours that were required by the employer. It appeared to be common ground between the parties that the claimant's working day started at 7.30 am at Mr Faraday's house. The statement of terms included a provision regarding holidays. For longer servers, the notice required reflected the statutory minimum (one week for each complete year of employment).

17. The contract included sections on: disciplinary rules; and disciplinary procedure. The disciplinary rules (104) included the following:

"*Step 1 – statement of grounds for action and invitation to meeting*

- *The employer will put in writing the employee's alleged conduct or other circumstances which has led them to take disciplinary action against the employee or to consider dismissing the employee.*

- *A copy of the statement will be sent to the employee and the employee will be invited to a meeting to discuss the matter.*

Step 2 – meeting

- *The meeting must take place before action is taken…*

- *The meeting should not take place unless – (1) the employee has been told by the employer the basis for the statement outlined in step 1, and (2) the employee has had reasonable time to consider the response.*

- *…*

- *The employee will inform the employee of the decision after the meeting and will explain how to appeal if the employee is not satisfied with it"*

18. Step 3 contained similar provisions regarding an appeal.

19. The disciplinary procedure section included a statement that "*No disciplinary action will be taken until the matter has been fully investigated*". It explained what is meant by a first written warning, a final written warning and dismissal. It also contained a short and limited list of offences under the heading of gross misconduct for which "*you will be dismissed*" which includes physical assault. Nothing in the procedure specifically addresses lateness or describes it as potential gross misconduct, nor is there anything stated about other confrontational behaviour (short of assault)

20. It was apparent from his evidence that Mr Faraday had not read what was said in the contract about disciplinary rules or procedures before he took any of the disciplinary action which applied to the claimant. He appeared unaware of the procedures and processes which the respondent had explained to the claimant in the document.

21. Mr Faraday described the claimant as a good worker once he gets going, when he was interviewed as part of the procedures undertaken for the claimant's appeal. In his evidence to the Tribunal, Mr Faraday said that the claimant was a hard worker on site.

The first warning

22. The claimant returned to the UK on Sunday 16 June 2019 after a holiday abroad (and a period of absence from work on annual leave). He injured his heel while abroad. On Monday 17 June 2019 when preparing to go to work, he found that his safety boots were extremely painful and he couldn't put weight on his foot. At

7.08 am he texted Mr Faraday (31) to inform him of the injury. The claimant subsequently visited a hospital's accident and emergency department that morning and was advised to take some time off work on ill health grounds.

23. Whilst the claimant was off work, Mr Faraday issued the claimant with a written warning in a letter dated 20 June 2019 (32) which was put through the claimant's door. Prior to the warning being issued, there had been: no prior notification; no information provided to the claimant about the problem; no invite to a meeting; no meeting; and no opportunity for the claimant to put his case before a decision was reached. The claimant was not informed of his right to appeal (and did not know that he was able to do so). The warning was not even discussed with the claimant face to face after it was imposed. In his verbal evidence to the Tribunal, Mr Faraday described this as only a warning letter, not a disciplinary letter.

24. From Mr Faraday's evidence it was clear that the reason for the warning was because the claimant had only informed the respondent about his injury on the morning of Monday 17 June, that is the day he was due to return to work. Mr Faraday's evidence was that he had been aware of the claimant's injury on holiday during the previous week due to a social media post. The decision letter described the fact that the claimant had only informed Mr Faraday of the injury on the morning he was due back as being "*very disappointing*". The claimant's evidence was that it was only on that morning when he had become aware that he would be unable to work due to the injury, albeit he had originally been injured the previous week. Mr Faraday would not have been aware of the claimant's explanation at the time, as he was given no opportunity to explain prior to the warning being issued.

25. The catalyst for the warning letter of 20 June 2019 was the claimant's ill health, non-attendance at work, and failure to inform Mr Faraday about his injury prior to the morning he was due to return.

26. The warning letter itself also addressed "*promptness*" and lateness. It said "*I have given repeated verbal warnings and emails to you in the past regarding lateness, which doesn't seem to have an impact".* The Tribunal was not provided with any emails about lateness. The letter contained no reference to any specific date, occasion, or time when the claimant had been late. At the time that the warning was issued the claimant was off work on ill health grounds and had not been at work for approximately eleven days. The cause of the warning was not a specific occasion of lateness. The example given of lateness in the letter was not an example of lateness at all, being the occasion when the claimant had not attended due to ill health. The letter informed the claimant that he should take this as a formal written warning. It did not state how long the warning remained in force or what was expected of the claimant, save for a reference to disciplinary action if "*continuing what is stated above*".

27. I do not find that the warning was imposed due to lateness at all, it was imposed due to Mr Faraday's unhappiness about the claimant's ill-health absence and, in particular, that he was only informed on the first day about the ill-health absence. The warning was imposed without any process. It was imposed without the respondent following either its own procedure as spelled out in the contract, or any

procedure which adhered at all to the ACAS code of practice on disciplinary and grievance procedures.

Lateness

28. The claimant lived very close to Mr Faraday's house. His evidence was that it took four minutes to get to work. It was clear from the claimant's own evidence that he endeavoured to arrive on time and no earlier. There was a dispute between the parties about the frequency with which the claimant was late.

29. The claimant's evidence about his lateness was inconsistent. In his verbal evidence he denied that he was late. However, his witness statement: recorded that "*the only issues that the respondent had with me was my time keeping…I was occasionally merely a minute or two late but very rarely anything more than that*"; acknowledged that there was a minor issue with his timekeeping, relating the reason for his lateness to his dyslexia and saying he was always just a minute or two late and never significantly late; and he also stated that another employee (identified in the hearing as Mr Bairstow) would phone him in the morning to ensure that he was at work on time – something which would only be necessary if timekeeping was a potential issue.

30. Mr Faraday's evidence was that the claimant was often late for work, sometimes being late four out of five days each week. He had no records at all of when the claimant was late or what time it was that he arrived at work each day. He explained that he did not see the need for records. In the light of this evidence about the frequency of lateness over a long period of time, there was no real explanation from Mr Faraday about why lateness became a particular issue for him in 2019, if the claimant had continuously been late for work to the extent that he described.

31. Mr Bairstow's evidence to the Tribunal was that the claimant was often late for work, and his evidence was that he would on many occasions contact the claimant and pick him up from his home or on his way to work. In a statement made on 25 November 2019 for the respondent's internal procedures (109), Mr Bairstow described the claimant as being late to work on a regular basis. Mr Burrow also described the claimant as often late for work, both in his evidence to the Tribunal and in his statement for the respondent's internal appeal on 27 November 2019 (111).

32. I found the evidence of Mr Bairstow and Mr Burrow to be genuine and credible. I understand and appreciate the point made by the claimant, that as employees of the respondent they might be likely to say what the respondent required (something the claimant said that he would have done in their shoes himself), nonetheless having heard their evidence under oath I accept it as having been given truthfully. Their evidence to the Tribunal was consistent with what they said in November 2019. As explained above, the claimant's own categoric denials that he was ever late, were not consistent with what was contained in his own witness statement. However, I also note that: there is no genuine evidence that the claimant was ever late by more than a few minutes on any day; there was no record kept by the respondent which recorded lateness or the frequency of lateness; and the claimant's explanation was based on his dyslexia – being something which he was never given the opportunity to explain to the respondent, as no formal meetings

were ever held with him at which he was given the opportunity to explain his lack of timeliness.

14 September 2019

33. It was not in dispute that an incident regarding a ball being kicked against the claimant's parent's guest house on 14 September 2019, had led to a disagreement between Mr and Mrs Faraday and the claimant's parents. The claimant was not, himself, involved. The claimant's contention was that this incident led to a considerable change in Mr Faraday's attitude towards him. It was clear that this incident soured the relationship between Mr Faraday and the claimant. I note that it occurred after the first warning imposed in June 2019 and therefore does not entirely explain all of the events which preceded the claimant's dismissal. What immediately followed the dispute and the events of 14 September was that the respondent refused to continue emailing the claimant's wage slips to him (as they had done previously and as they did for Mr Burrow) and instead he was required to collect them. It was not clear to the Tribunal why the respondent took this decision, which did appear to have singled the claimant out as a result of the 14 September disagreement.

Second warning

34. The claimant was issued with a second warning letter on 11 October 2019 (33) from Mr Faraday. That said:

> "*Following on from the letter you received dated 20th June 2019. I am very disappointed in the fact that you still think it is acceptable on many occasions to not arrive at 7:30 prompt. It is not acceptable to stroll in late or even to expect colleagues to collect you from your house on their way to site…It is unfair on colleagues that do arrive promptly having to wait. If you can't comply with arriving before or on time to start work it will result in further disciplinary action up to and including employment termination. Please take this as your final warning*".

35. As with the previous letter, no meeting was held. The claimant was not given any information about the problem, nor any opportunity to put his case before a decision was reached. The claimant was not informed of his right to appeal (and did not know that he was able to do so). The final warning was not discussed with the claimant or the implications of non-compliance explained to him. Mr Faraday's evidence regarding the final written warning was that he didn't feel that meetings would have made a lot of difference. He posted the letter through the claimant's post box.

36. The Tribunal was not provided any evidence which explained why the final written warning was imposed on 11 October 2019 as opposed to any other time. Mr Faraday did not record the times that the claimant arrived at his house or the frequency of his lateness, so had no records which explained the warning being imposed at this time. There was also no evidence provided about why it was considered in October 2019 unacceptable for the claimant to be picked up on the

way to site, when Mr Bairstow's evidence was that it had been a relatively common occurrence for him to do so.

37. The claimant's evidence was that after this warning letter he made a determined effort not to be late for work.

4 November 2019

38. On 4 November 2019 the claimant had a heated discussion at the start of his shift with Mr Faraday. The claimant was unhappy about the fact that he had not been provided with a payslip. He accepted in evidence that he may have sworn at Mr Faraday in the course of a (brief) conversation.

39. Mr Faraday's evidence to the Tribunal was that the claimant was not on time that day and he had asked him why he was late, prior to the claimant asking about the payslip. However, in his statement as part of the respondent's appeal investigation (81), Mr Faraday said he did not know what time the claimant arrived as he didn't actually look at the time, albeit he described the claimant as being a few minutes late (without explaining how he knew that without looking at the time). I don't understand how lateness on this occasion can be identified as a reason for dismissal, when Mr Faraday (by his own admission in the conversation during the appeal investigation) did not look at the time to see what time the claimant arrived. Even if the claimant was late for work, the fact that Mr Faraday did not feel it important/relevant to identify what time the claimant had arrived or how late he was, does not support a contention that this particular occurrence of lateness was genuinely a reason why the claimant was dismissed.

40. The evidence about 4 November from the respondent's witnesses was inconsistent: Mr Faraday explained during the internal procedures (82) that the claimant wandered down the road with a cup of tea in one hand and toast in the other (suggesting nonchalance); Mr Burrow's evidence was that he "*stormed onto the front of the property*" (suggesting the opposite). As there was no suggestion that the claimant was dismissed for his manner on 4 November, I do not need to determine which account was accurate. In any event, no action was taken by Mr Faraday immediately following the 4 November conversation.

The discussion on 7 November

41. On Thursday 7 November an incident occurred when the claimant damaged the rear of the respondent's vehicle by touching it whilst wearing gloves. The claimant's evidence was that this was not done intentionally or maliciously and was purely accidental as he was using the rear of the vehicle to steady himself. This came to Mr Faraday's attention.

42. The parties differed in their accounts about the order in which things subsequently occurred.

43. Mr Faraday's account, as provided during the internal procedures, was that he had challenged the claimant about the damage. The claimant denied he had done anything wrong. Mr Faraday informed him that "*it's bang out of order*" (84) and asked

him to wash it off. The claimant picked up a bucket containing water, which could potentially have had stones in it, and threw it at the vehicle. It splashed Mr Faraday. He said to the claimant "*Right Tom, come here. Lets have a word. Let me have a word with you please*". He took him to one side, which is when the claimant approached him with what he considered to be potentially threatening behaviour, raised his shoulders and put his head back and said "*come on then. Come on then*". Mr Faraday then told the claimant to grow up and act as part of a team. He described the claimant's behaviour as how a child would behave. After the conversation the claimant took off his hat and threw it in disgust.

44. In his statement for the Tribunal, Mr Faraday described the claimant's body language as threatening and quite intimidating. Notably intimidating was not a word recorded as having been used during the internal process. In his verbal evidence and answers to questions he further emphasised the fact that he felt intimidated. In answer to a question in cross-examination, Mr Faraday described himself as being "*revved*" when he spoke to the claimant and emphasised that he felt that the situation he had been in with the claimant was not a position that anyone should be put in.

45. The claimant denied that the phrase "*come on then*" was said in the tone or manner described by Mr Faraday. In the internal procedures (59) he described the words as being said in the context of come on then let's have this chat, with Mr Faraday also saying "*come on then*" after shrugging his shoulders. He described the conversation as calm. In his statement to the Tribunal he stated categorically that it was not intended to be said to be menacing or threatening (and he apologised if it came across in that manner). He also said that he had been using the bucket which contained the water, and knew that it did not contain stones when he threw the water over the vehicle to clean it.

46. Mr Bairstow's statement for the Tribunal said that he heard Mr McNamara raise his voice and tell Mr Faraday to "*come on then*", describing him as sounding confrontational and as if he didn't have to answer to anything. In answers to questions, Mr Bairstow emphasised that he believed the conversation was none of his business, but if it had gone further he would have stepped in.

47. Mr Burrow described the claimant as puffing his chest out and almost shouting "*come on then*", which he felt was quite intimidating. I note that he described the claimant as almost shouting, suggesting that he was not shouting.

48. The claimant remained at work for the remainder of Thursday 7 November. He was not asked to leave the site. He attended work as usual on Friday 8 November, without incident.

49. Mr Faraday had a conversation with a person called Nagy (a boxfit instructor or class attendee) about the claimant, which Nagy reported to the claimant in a text message (120). That reported that Mr Faraday was "*kickin off*" referring to the claimant in derogatory language and "*sayin he wants to slap you and all that*". When the account recorded in the text was put to Mr Faraday, he described this was maybe him getting it off his chest and accepted that he shouldn't have said that to the third party, emphasising that it did not go any further. Mr Faraday did not deny

that he said what was recorded in the text message. I have found this to be important evidence about Mr Faraday's view of the claimant, and find what was said to be inconsistent with Mr Faraday's suggestion in evidence that he was intimidated by the claimant.

50. With regard to the events of 7 November, I do find that the claimant did become confrontational when speaking with Mr Faraday, based primarily upon Mr Bairstow's evidence, which I have found to be credible and true (for the reasons I have already explained). However, I also note that the claimant did not shout, based upon Mr Burrow's evidence. What the claimant actually said in the circumstances where he was being asked to come to the side for a conversation, was relatively innocuous. Mr Faraday, based on his own evidence, was also not entirely calm when commencing the conversation. I find, based on Mr Bairstow's evidence, that the conversation was not viewed by Mr Bairstow as being one which required him to step in to avert it becoming physical. The two accounts available from Mr Faraday which are closest to being contemporaneous (the investigation record and the text from Nagy) do not show him as, or record him as, being intimidated. What he said to Nagy suggests entirely the opposite. His description of the claimant behaving how a child would behave, to Ms Mangera, was not the language of being intimidated. I also find that the fact that the claimant attended at work and worked without incident on 8 November is inconsistent with Mr Faraday being as intimidated by the claimant as was suggested in his evidence to the Tribunal. I do not accept that he became intimidated when he considered the events later as he suggested in his evidence.

The dismissal

51. It was Mr Faraday's verbal evidence that the decision to dismiss the claimant was reached by him after a discussion with Mrs Faraday in the evening of Friday 8 November. I find that it was clear that Mr Faraday changed his view of the events of 7 November after he spoke to Mrs Faraday about them on the Friday evening. Mr Faraday wrote the decision letter (34) on 8 November and posted it through the claimant's letter box on Saturday 9 November. As was accepted by the respondent's representative, the dismissal would only have been effective on 9 November when the claimant read the letter which informed him he was dismissed.

52. I do not accept the evidence from Mr Faraday that the reason he did not arrange a meeting with the claimant prior to dismissing him was because he was intimidated by the claimant and, in particular, did not wish to invite him to his home. The previous warnings which Mr Faraday had imposed were done without any meetings. The dismissal, by letter without any process, simply continued the same approach. As confirmed above, I also do not accept that Mr Faraday was intimidated for the reasons given. In any event, it would have been possible to arrange an alternative venue for the meeting (as indeed occurred for the appeal) or it could have taken place by phone or some form of video. Dismissal by letter without any process, reflected what Mr Faraday believed to be an appropriate process when imposing a disciplinary sanction on an employee. It appears to have followed immediately from the conversation between Mr Faraday and Mrs Faraday, at which they decided that the claimant was to be dismissed (see, for example, the internal appeal account (85) where Mr Faraday describes the decision using "*we*").

53. No procedure whatsoever was followed prior to the claimant being dismissed. The claimant was dismissed by letter dated the 8 November (but delivered on the 9 November) (34). That letter said;

> "*I am writing to inform you that with numerous verbal warnings over the years been ignored. To issue two further written warnings, again not showing any guaranteed change. Never have I had an apology in either case. The attitude not only to parts of your daily routine, but towards me as your employer. To be confronted with the words "come on then!" when asked to come to one side to discuss the issue of your attitude/behaviour. No employer will accept these ways of being spoken to. On a number of occasions you have no respect for your employer, employer's property (i.e. tools/vehicles) the workplace or the business's reputation. I am disappointed it has come to this, I have put up with the above long enough and have given you more than enough chances to prove yourself, unsuccessfully. Therefore I am terminating your employment as of now (08/11/2019) on the above reasons."*

54. In cross examination of the claimant, the respondent's representative suggested that the reasons for the decision were clear from the letter. The claimant did not accept that was the case. I do not find the letter easy to follow, nor do I find that the reason for the decision is entirely clear from what is said. It is clear that the claimant's conduct on 7 November was a central part of the reason for the decision. The previous warnings are referred to. Mr Faraday's perception of the claimant's attitude appears also to be central to the decision from the content of the letter. No mention is made of lateness or punctuality. Mention is made of some things about which the Tribunal heard no evidence, such as tools. I asked Mr Faraday about the lack of reference to (or at least detail about) damage to the car in the letter, and he accepted that was not directly a part of his decision – rather he said it was about attitude and lateness.

55. I find that the principal reason for dismissal was the claimant's conduct on 7 November, when taken together with what Mr Faraday perceived to be the claimant's attitude generally. The principal reason was evidenced by the timing of the dismissal and what is the central part of the letter. The view of the claimant's attitude included his lateness and the absence of apologies following the two warnings. I find that the claimant was not dismissed for being late on 4 November, nor was he dismissed specifically for lateness generally (save to the extent that it contributed to Mr Faraday's view of the claimant's attitude). I also do not find that he was dismissed for damaging the vehicle on 7 November, something Mr Faraday accepted, albeit in any event evident from the lack of reference to it in the letter (or at least detail about it).

Appeal

56. The claimant's evidence was that the first time that he became aware that he was able to appeal a sanction, was after speaking to an advisor at the Citizens Advice Bureau shortly after his dismissal. I accept that as the reason why the claimant did not previously appeal the warnings given. I would observe that this is the reason why it is good practice to explain the right to appeal in any warning letter, that is to ensure that an individual is aware of that right. The respondent did not do

so for any of the decisions made (save for the appeal decision itself), despite the fact that the respondent's contract and disciplinary rules clearly state that it will (104).

57. The claimant appealed in two letters of 12 and 18 November 2019 (35 and 36). The appeal letters focus on procedure rather than the substantive reasons. The respondent submitted that I should draw the conclusion as a result, that the claimant accepted the substantive reasons for his dismissal. I do not do so – where there is a complete absence of any procedure, it appears appropriate to have focussed upon that in the appeal. In any event, the claimant's evidence was that what was included in the appeal letters was what the CAB advised him to include.

58. Mr Faraday responded to the appeal in a letter of 18 November (37). In my view this is an important letter, albeit little time was spent in the hearing addressing it. In the letter Mr Faraday responded by explaining his decision at some length. He concluded with the following:

> "*If you feel that you still have the need to have a meeting, a time and date can be agreed. However I would rather not waste your time and mine*."

59. What the letter made clear was that the claimant's appeal was not going to be upheld irrespective of what happened. Mr Faraday clearly spelt out that he had predetermined the outcome. As Mr Faraday was the ultimate decision-maker in the appeal even after the consultant was brought in to report on it, this letter made clear that his outcome was entirely pre-determined before any process was followed. When I asked why the Tribunal had not heard from Ms Mangera it was explained that was because she was not the decision-maker, it was Mr Faraday. A letter of 27 December 2019 (49) sent after the consultant's report, provided the outcome of the appeal and was sent by Mr Faraday. He recorded "*It is my decision that there are insufficient grounds to overturn the decision*".

60. On 2 December (41) the claimant was invited to an appeal hearing, to be conducted by a Face2Face consultant (who was Ms Mangera). That person was described as impartial, but was in practice a consultant engaged by the respondent on the advice of their HR advisors (and who was connected to those advisors). The letter stated that the appeal would be conducted by way of a rehearing. It then listed three allegations which had never previously been recorded in any documentation. There was no evidence presented about who wrote the allegations or how they had come about. The letter also listed some statements and photos which had been collated. The allegations were (in summary): that the claimant was late to work on 4 November; that he had damaged company property on 7 November; and that he had raised his voice and confronted Mr Faraday saying "*come on then*". As I have already identified, two of these allegations were not in fact the reasons why the claimant had been dismissed (the lateness on 4 November and/or the damage to the vehicle).

61. The appeal hearing was re-arranged and a further letter confirming details was sent on 6 December (46). A meeting took place with the claimant on 12 December 2019 at offices in Skipton (that is not the respondent's premises). The claimant was allowed to be accompanied at the meeting by his father, who as neither

a trade union officer nor an employee of the respondent, and therefore was not someone who the respondent was obliged to allow to attend the meeting.

62. A letter of 6 December 2019 sent by Mr Faraday (48) did invite the claimant to return to work if he wished to for what was (erroneously) described as the remainder of the notice period. That letter was written for Mr Faraday and not by him, and the content did not reflect his views about the claimant returning to work.

63. Statements were provided to Ms Mangera from Mr Faraday, Mr Bairstow (two) and Mr Burrow. After meeting with the claimant, Ms Mangera spoke by phone to Mr Faraday and Mr Bairstow. A report was compiled by her (50) on 24 December 2019. The report included a transcript of the conversations which Ms Mangera had undertaken. It is not necessary for me to record those in detail, as I have referred to what was said where it is relevant to my findings above. In addition, however, of particular note was:

a. At the start of her meeting with the claimant (53), Ms Mangera described the meeting as a "*re-hearing because procedure was not followed when you were handed your dismissal letter*";

b. Part way through the same meeting (71) she said "*the thing is, obviously they've realised, "Hang on a minute, we've not followed process and procedure" and that's the reason why I'm looking at it from a fresh perspective. For me, I'm looking at it as it's like, "Okay we are doing a disciplinary hearing right now"*";

c. The finding that the claimant was late for work on 4 November 2019 was upheld (75) albeit there is no finding of by how much or what time he arrived;

d. The finding that the claimant caused damage to the vehicle was upheld (75) as the claimant did cause damage to the vehicle;

e. With regard to the allegation about the conduct on 7 November (76), Ms Mangera found it to be partially upheld in that the claimant did say "*come on then*" however there was no further evidence to suggest that the tone used was intimidating nor was he seen as a threat (see para 42 of the report);

f. It was noted (77) that the correct process and procedure was not followed, but Ms Mangera went on to say (SMA being a reference to herself in the third person) "*However, SMA applies Polkey, in which despite this not being procedurally correct, SMA notes that the same outcome would have occurred*"; and

g. At paragraph 48 the recommendation given was Ms Mangera did not believe that there were sufficient grounds to overturn the original sanction.

64. The claimant was also provided with the transcripts of Ms Mangera's interviews with Mr Faraday and Mr Bairstow. As both the claimant and his

representative emphasised in the hearing, at the end of her conversation with Mr Faraday (88), Ms Mangera is recorded as saying that she had already spoken to Mrs Faraday (using her first name) after her meeting with the claimant, and had given her a bit of a summary of how the meeting (with the claimant) went.

65. It may have been helpful if I had heard evidence from Ms Mangera, as there were certainly a number of questions which I would have asked her had I been given the opportunity. The conversation referred to in the previous paragraph is not one which suggests that Ms Mangera was as independent an investigator as was held out. I am not entirely clear how and why Ms Mangera did not uphold an appeal brought on the grounds that the claimant did not agree with the procedure which had been followed as it did not comply with the procedure in his contract, when she herself appears to have agreed that it was not. It is also not clear why Ms Mangera explained her decision as recorded at paragraph 63g, when that is not the terminology of a genuine re-hearing, which is what she had told the claimant it would be. I am also not sure I understand what consideration was given by Ms Mangera to the sanction imposed. In the absence of her giving evidence in person, I find that it was Ms Mangera's decision that the dismissal was in fact unfair based upon the finding recorded at 63f – where **Polkey** is applied in the way recorded that follows a finding of unfair dismissal and is a decision based upon the remedy to be awarded. I do note what Ms Mangera found about the events of 7 November as recorded at 63e, being the one allegation which she was considering which I have found to be the principal reason for dismissal, and find her conclusion corroborates what I have found about whether the claimant intimidated Mr Faraday on 7 November. Ms Mangera's investigation was certainly not one which cured all of the defects present in the decision to dismiss. In the light of the fact that the appeal decision was Mr Farraday's and my finding that his decision was predetermined, it could not have done so in any event.

Language in the workplace

66. The Tribunal was shown text messages sent from Mr Faraday to the claimant which made it clear that swearing was common-place in communication between them. From the evidence of all the witnesses, it was clear that swearing occurred on the sites operated by the respondent, albeit Mr Bairstow emphasised that this depended upon who was present on site and it would not happen if children might be nearby. Mr Faraday drew a distinction between swearing generally and swearing directed at someone, and emphasised that the latter was what he objected to in the incidents with the claimant. I accept that as being an entirely valid distinction to draw. The evidence nonetheless showed a working environment in which robust language was common.

The Law

67. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

68. The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for misconduct. If the respondent fails to persuade me that it

had a genuine belief in the claimant's misconduct and that it dismissed him for that reason, the dismissal will be unfair.

69. If the respondent does persuade me that it held the genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. I must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

70. In conduct cases, when considering the question of reasonableness, I am required to have regard to the test outlined in **British Home Stores v Burchell [1980] ICR 303**. The three elements of the test are:

(1) Did the employer have a genuine belief that the employee was guilty of misconduct?

(2) Did the employer have reasonable grounds for that belief?

(3) Did the employer carry out a reasonable investigation in all the circumstances?

71. As highlighted by issue 1.2, the additional question is to determine whether the decision to dismiss was one which was within the range of reasonable responses that a reasonable employer could reach.

72. It is important that I do not substitute my own view for that of the respondent, **London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220** at paragraph 43 says:

> "*It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question- whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal*"

73. The appropriate standard of proof for the employer in reaching the decision, was whether on the balance of probabilities it believed that the misconduct was committed by the claimant. In considering the investigation undertaken, the relevant question is whether it was an investigation that fell within the range of reasonable responses that a reasonable employer might have adopted. Where considering fairness, it is important that I look at the process followed, as a whole.

74. I am also required to have regard to the ACAS code of practice on disciplinary and grievance procedures, which is relevant both: to determining the reasonableness of the dismissal in accordance with section 98(4); and, where there is an unreasonable failure to follow it, to determine whether there should be an increase (up to 25%) if it is just and equitable to do so (section 207A of the trade Union and Labour Relations (Consolidation) Act).

75. It would not be helpful for me to reproduce the entire code of practice in this Judgment, but I have considered it all. I would however emphasise that one of the core elements of the ACAS code is that 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. The code highlights the need to hold a meeting with the employee to discuss the problem and explains what should occur at that meeting. The contractual policy which the respondent had (but did not follow) entirely accords with the ACAS code and goes slightly beyond what the code requires as the ACAS code does not explicitly require an employer to inform an employee of the right to appeal.

76. In determining whether the respondent failed to adopt a fair procedure, the Tribunal can take into account both the ACAS code and the respondent's own disciplinary rules. As a general rule, whether a dismissal has been carried out in breach of a company's policy is a relevant factor in assessing whether it was reasonable, but it is not determinative.

Warnings

77. There is some guidance on the ability of a Tribunal to look at previous warnings when considering the fairness of a dismissal. The guidance may not strictly apply to this case as the respondent did not in fact dismiss the claimant for the same or similar misconduct relying upon the previous warnings in determining the sanction. The respondent's representative also did not submit that I should not consider the previous warnings or that I should not reopen them. Nonetheless as I have considered it in reaching my decision I will include the guidance on the issues which the Tribunal needs to determine for previous warnings outlined in **Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374** which says:

> *"The correct starting point for this appeal is Part X of the Employment Rights Act 1996. It enacts the law of unfair dismissal…As for the authorities cited on final warnings, Elias LJ observed, when granting permission to appeal, that the essential principle laid down in them is that it is legitimate for an employer to rely on a final warning, provided that it was issued in good faith, that there were at least prima facie grounds for imposing it and that it must not have been manifestly inappropriate to issue it. I agree with that statement and add some comments. First, the guiding principle in determining whether a dismissal is fair or unfair in cases where there has been a prior final warning does not originate in the cases, which are but instances of the application of s.98(4) to particular sets of facts. The broad test laid down in s.98(4) is whether, in the particular case, it was reasonable for the employer to treat the conduct reason, taken together with the circumstance of the final written warning, as sufficient to dismiss the claimant. Secondly, in answering that question, it is not the function*

of the ET to reopen the final warning and rule on an issue raised by the claimant as to whether the final warning should, or should not, have been issued and whether it was a legally valid warning or a 'nullity'. The function of the ET is to apply the objective statutory test of reasonableness to determine whether the final warning was a circumstance, which a reasonable employer could reasonably take into account in the decision to dismiss the claimant for subsequent misconduct. Thirdly, it is relevant for the ET to consider whether the final warning was issued in good faith, whether there were prima facie grounds for following the final warning procedure and whether it was manifestly inappropriate to issue the warning. They are material factors in assessing the reasonableness of the decision to dismiss by reference to, inter alia, the circumstance of the final warning."

78. More recently, and with reference to that case, what was said in **Bandara v BBC EAT/0335/15** was:

"Generally speaking, earlier decisions by an employer should be regarded by an Employment Tribunal as established background that should not be reopened. It should be exceptional to do so ... An earlier disciplinary sanction can of course only be open to criticism if it was unreasonable by the objective standard of the reasonable employer, but that is not enough, otherwise the Employment Tribunal would have to reopen and reinvestigate previous disciplinary sanctions whenever an employee was aggrieved by them. A threshold has to be set. An allegation of bad faith that has some real substance to it, as in Way, will be one example. So will the absence of any prima facie grounds for the sanction. So will something that makes the sanction manifestly inappropriate. I think a sanction will only be manifestly inappropriate if there is something about its imposition that once pointed out shows that it plainly ought not to have been imposed."

79. Accordingly these authorities establish that the correct starting point is the terms of section 94 itself, but in relation to a warning I need to determine whether that warning was: in bad faith; made in the absence of any prima facie grounds for the sanction; and/or manifestly inappropriate. If I determine that any of those categories were satisfied, I then need to go on and consider whether the dismissal was unfair more broadly in the light of those issues.

Internal appeals

80. The key authority on internal appeals and whether they can rectify failures at the disciplinary hearing is **Taylor v OCS Group Ltd [2006] IRLR 613**. In that case the Court of Appeal advised against getting caught up in technical distinctions between rehearing or review and instead emphasised the importance of focussing on the statutory test. It said:

"*This error is avoided if employment tribunals realise that their task is to apply the statutory test. In doing that, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to*

determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage. In saying this, it may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that section 98(4) of the Employment Rights Act 1996 requires the employment tribunal to approach its task broadly as an industrial jury. That means that it should consider the procedural issues together with the reason for the dismissal, as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss. So, for example, where the misconduct which founds the reason for the dismissal is serious, an employment tribunal might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee."

81. In **Khan v Stripestar Ltd UKEATS/0022/15/SM** the Employment Appeal Tribunal said (referring back to the passage I have just cited):

"*There are, in my view, no limitations on the nature and extent of the deficiencies in the first stage of the process that can be cured by a thorough and effective appeal. Where as here, an employee is summarily dismissed without proper investigation or inquiry, that dismissal will be unfair unless it can be shown that the subsequent procedure was sufficiently robust as to provide the overall fairness that the law requires. I note that in Taylor, at paragraph 48, Moore-Bick LJ suggests that a distinction may be drawn by employment tribunals between particularly serious misconduct, which may render a dismissal fair notwithstanding deficiencies in the process and that where the misconduct is of a less serious nature where procedural deficiencies may have a greater impact. The claimant in this case was on any view involved in dishonest conduct. The wholly defective first stage of the relevant disciplinary process did not prevent a fair dismissal at the second stage.*"

Polkey

82. In **Polkey v AE Dayton Services Ltd [1987] IRLR 503** the House of Lords held that the fact that the employer can show that the claimant would have been dismissed anyway (even if a fair procedure had been adopted) does not make fair an otherwise unfair dismissal. However, such evidence (if accepted by me) *may* be taken into account when assessing compensation and can have a severely limiting effect on the compensatory award. If the evidence shows that the employee *may* have been dismissed properly in any event, if a proper procedure had been carried out, I should normally make a *percentage assessment* of the likelihood and apply that when assessing the compensation. In applying a **Polkey** reduction I may have to speculate on uncertainties to a significant degree.

83. In **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274** the Employment Appeal Tribunal explained **Polkey** as follows:

> *"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 been 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."*

84. That Judgment emphasised that the issue is what the respondent would have done and not what a hypothetical reasonable employer would have done in the circumstances. The onus is on the respondent to adduce evidence to show that the dismissal would (or might) have occurred in any event. However, I must have regard to all the evidence when making that assessment, including any evidence from the claimant. There will be circumstances where the nature of the evidence on which the respondent seeks to rely, is so unreliable that I may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. Whether that is the position is a matter of impression and judgment. But in reaching that decision I must recognise that I should have regard to any material and reliable evidence which might assist me in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and I must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. (***Software 2000 Ltd v Andrews*** **[2007] IRLR 568**).

Contributory fault

85. Section 122(2) of the Employment Rights Act 1996 provides that the basic award shall be reduced where the conduct of the employee before dismissal was such that it would be just and equitable to do so. It is important to note that a key part of the test is determining if it is just and equitable to do so.

86. Section 123(6) of the Employment Rights Act 1996 provides that if I find that the claimant has, by any action, to any extent caused or contributed to his dismissal, I shall reduce the amount of the compensatory award by such amount as I consider just and equitable having regard to that finding. This test differs from the test which applies to the basic award. The deduction for contributory fault can be made only in respect of conduct that persisted during the employment and which caused or contributed to the employer's decision to dismiss.

87. There are three factors required to be satisfied for me to find contributory conduct: the conduct must be culpable or blameworthy; it must have caused or

contributed to the dismissal; and it must be just and equitable to reduce the award by the proportion specified. (**Nelson v BBC (No 2) [1979] IRLR 346**).

Conclusions – applying the Law to the Facts

Unfair dismissal

88. Mr Faraday dismissed the claimant on the grounds of misconduct. I have explained what I find his principal reason for dismissal to have been, in paragraph 55. The principal reason was the claimant's conduct on 7 November, when taken together with what Mr Faraday perceived to be the claimant's attitude generally. That reason is misconduct.

89. In submissions the claimant's representative argued that the claimant was dismissed because of the dispute on 14 September. I do not find that the claimant was dismissed for that reason, albeit as I have said at paragraph 33 it is clear that the incident soured the relationship between Mr Faraday and the claimant and therefore is part of the background to what took place on 7 November.

90. The next issue is for me to decide whether the dismissal was fair in all the circumstances of the case and as provided for by section 98(4) of the Employment Rights Act 1996.

91. The size and limited administrative resources of the respondent is an important factor in making this determination. The same rigour is not expected of a small family business as a larger employer. However, the size of the respondent does not exempt it altogether from following a full and fair process, its own disciplinary process, or the ACAS code.

92. For the reasons I have explained and as the principal reason for dismissal was the incident on 7 November, I do not find that the respondent dismissed the claimant based upon the previous warnings as determining the appropriate sanction, that is the claimant was not dismissed for a further act of similar misconduct because a final written warning had been imposed. However the warnings were part of the factors included in the dismissal letter and which constituted part of the background matrix to the decision reached.

93. The warning imposed on 20 June 2019 was manifestly inappropriate. The absence of any procedure whatsoever prior to it being imposed led me to that finding. I also find that there were no prima facie grounds for the sanction. The claimant was given the warning because he was absent on ill health grounds. Whilst I can understand that advance notice of absence assists any employer and is particularly important to a smaller business, the failure to give the respondent advance notice cannot be the basis for a warning. The procedural failings also impact upon the prima facie case, as the claimant was not given the opportunity to explain that he had hoped to attend work in spite of the injury until the morning when he found he was unable to return to work.

94. The warning imposed on 11 October 2019 was manifestly inappropriate due to the complete absence of any procedure before it was imposed. Had there been

any procedure, the claimant would have had the opportunity to raise with the respondent his dyslexia and why it impacted upon his timeliness and that could have been taken into account. In the light of my findings on lateness, the second warning does not have the same issue as the first regarding the reason why it was imposed (that is the prima facie reasons for it), but it was still manifestly inappropriate when no process whatsoever was followed.

95. As a result of those findings, had the claimant been dismissed for lateness on a totting up basis based upon the previous warnings, I would have found the dismissal to have been unfair. Having found that the claimant was dismissed for the 7 November events (or at least that was the principal reason for it), the findings on the warnings have less importance, but in any event any reliance upon them in maintaining that the sanction was correct would have been unfair.

96. The dismissal for the events of 7 November in the absence of any procedure was unfair. Prior to dismissal, there was no investigation, no explanation of the basis for the problem, no meeting, and no opportunity for the claimant to put his case before a decision was made. No process was followed whatsoever. Mr and Mrs Faraday simply discussed the matter and Mr Faraday decided that the claimant should be dismissed. The respondent did not follow its own procedure (or any of it). It did not follow any part of the basic procedure outlined in the ACAS code (indeed it is hard to think of a starker example of non-adherence to the code, prior to dismissal). That dismissal was unfair and unreasonable in all the circumstances of the case.

97. Relevant to that decision is consideration of the seriousness of the claimant's conduct on 7 November. As explained at paragraph 50, I have found that the claimant was confrontational but not intimidating. The claimant said "*come on then*". Ms Mangera found that there was no evidence that the tone was intimidating or seen as a threat. What occurred was not particularly serious misconduct which would/might rendered the dismissal fair notwithstanding deficiencies in the process (or an absence of one). It was misconduct of a less serious nature where procedural deficiencies have a greater impact. Whilst it is important that I do not substitute my view for that of the employer's, the complete absence of any process whatsoever and what occurred on 7 November, mean that the dismissal was unfair.

98. Based upon what I found occurred, I also do not find that dismissal was within the range of reasonable responses of a reasonable employer. Had the respondent followed a fuller process before dismissing it might have been possible to consider whether the decision was within the range of reasonable response based upon what the respondent found, but there is not sufficient process to reach such a decision. The decision letter, records that Mr Faraday's view at the time of dismissal was that being confronted with the words "come on then" when asked to come to one side to discuss the issue of attitude/behaviour, was a way of being spoken to which no employer would accept. I do not find that an employee with eight years' service speaking in such a way on one occasion, particularly in the context of a workplace where robust language appears to have been common place, was something for which dismissal was in the range of reasonable responses.

99. The respondent's primary contention appeared to be that the appeal process followed by the respondent rendered the dismissal fair. I do not find that to be the case. My primary reason for finding this is because I have found that the outcome of the appeal was predetermined as explained at paragraphs 58 and 59. However, even had I not found that to be the case, I do not find the dismissal to be fair because of the appeal in this case. The introduction of unexplained allegations to be investigated as part of the appeal, which had never been part of any previous case or process, was intrinsically unfair. As I have explained, two of the allegations I have not found to have been the reasons for dismissal and the third was only partially upheld by the appeal process. I have outlined at paragraph 65 a number of questions about the process and the decision reached. A fair appeal process would have inevitably upheld the appeal as the process which had been followed had been unfair (being non-existent). The finding of the appeal based upon **Polkey**, as I have explained, appear to be an acknowledgement that the dismissal was unfair. The conduct of the appeal, and in particular Ms Mangera's conversation with Mrs Faraday, raised questions about the open-mindedness of the process. The subsequent procedure in this case was certainly not sufficiently robust as to provide for the overall fairness which the law requires.

Would the claimant have been fairly dismissed in any event (Polkey)

100. Having determined that the dismissal was unfair, I do have to go on and consider whether the claimant would have been dismissed had a fair procedure been followed by this employer (**Polkey**). This is a case where it is a long way from being certain that the respondent would have fairly dismissed the claimant had a full and fair procedure been followed. As the claimant was confrontational on 7 November 2019, I am not certain that it would not. The case falls on the spectrum between the two extremes. The absence of any process whatsoever prior to dismissal makes it harder to be sure whether or not, on balance, this employer would have dismissed. It is inevitably a speculative exercise. I have decided that there is a 20% chance that the respondent would have dismissed the claimant for being confrontational on 7 November had a fair process been followed. In determining this percentage I have taken into account what was in fact determined about this allegation as part of the respondent's own appeal.

Failure to follow the ACAS code

101. I have already explained that the ACAS code of practice on disciplinary and grievance was not adhered to at all prior to dismissal. The failure to follow the procedure at all was unreasonable (whilst I accept that a small employer might follow a process which was not the same as one conducted by a large employer). It is just and equitable to increase the award. I have taken into account that an appeal process was undertaken and an appeal meeting arranged. That reduces the percentage increase below the maximum (25%), but in the light of the issues with the appeal such a reduction is limited. I have therefore decided that the award should be increased by 20%.

Contributory fault

102. In terms of contributory conduct, I have focussed on the claimant's conduct on 7 November as that was the reason for the dismissal. That caused or contributed to the dismissal and is what is relevant for the issue of contributory fault for the compensatory award. The test for the basic award is wider and therefore the claimant's lateness is a factor which can be considered for that award. The claimant being confrontational on the 7 November was blameworthy. I have therefore needed to decide whether it would be just and equitable to reduce the basic award and/or the compensatory award in the light of the conduct identified. I have decided that it is just and equitable to do so and they should be reduced by 25%. I have determined that the same reduction should apply to both awards (albeit the test is slightly different and the factors slightly wider for the basic award).

Summary

103. For the reasons explained above, I have found that the claimant was unfairly dismissed.

104. The claimant's basic award is to be reduced by 25% (due to contributory fault). His compensatory award is: reduced by 20% (**Polkey**); increased by 20% (failure to follow the ACAS code); and reduced by 25% (for contributory fault).

105. The claimant's other claims have not been upheld, having not been pursued by his representative.

Employment Judge Phil Allen
16 April 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
20 April 2021

FOR THE TRIBUNAL OFFICE