EMPLOYMENT TRIBUNALS

Claimant	Respondent
Mr K. White	Richard Preston & Son Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE (by Cloud Video Platform) ON 14-16 April 2021
EMPLOYMENT JUDGE GARNON (sitting alone)

Appearances
For Claimant in person
For Respondent Mr A Rees Former Managing Director

JUDGMENT

The judgment of the tribunal is the claim of unfair dismissal is well founded. I award compensation of £1575, being a basic award only so the Recoupment Regulations do not apply, and an uplift under s 38 of the Employment Act 2002 of £2100.

REASONS (bold print is my emphasis and italics are quotations)

1. Introduction and Issues

1.1. The claimant, born 11 September 1971, was employed by the respondent from 25 October 2015 until 8 November 2019 latterly as a Transport Manager. The claim was presented 12 December 2019. It was listed for a 1 day hearing at service and standard directions given. On 24 March 2020 it was to have had a full hearing in person but due to the Covid19 pandemic that was converted to a telephone private Preliminary Hearing (PH) which I conducted.

1.2. The respondent did not admit the claimant was dismissed saying he resigned verbally and it was entitled to accept he meant what he said. It wrote on 8 November 2019 accepting his verbal resignation. It also made some allegations against him. The claimant disagrees with many facts alleged and says any resignation was in the heat of the moment. The dispute concerns the relationship between the claimant and Mr Dave Joy, a colleague. The respondent's case was Mr Joy was not as bad as the claimant said but, even if he was, the claimant went about addressing his failings in an unacceptable way, so, if I find he was dismissed, that was the reason for it.

1.3. The issues are:

1.3.1. Was the claimant dismissed?
1.3.2. If so, what were the facts known to, or beliefs held by, the employer which constituted the reason, or if more than one the principal reason, for the dismissal?
1.3.3. Were they related to the claimant's conduct?
1.3.4. If so, having regard to that reason, did the respondent act reasonably in the circumstances:
(a) in having reasonable grounds after a reasonable investigation for its beliefs
(b) in treating that reason as sufficient to warrant dismissal
(c) in following a fair procedure?

1.3.5. If the employer acted fairly substantively but not procedurally, what are the chances it would nevertheless have dismissed if a fair procedure had been followed, and when?
1.3.6. If dismissal was unfair, has the employee caused or contributed to the dismissal by culpable and blameworthy conduct.

1.4. At a PH on 27 July 2020 both parties agreed the differences between them were so great the case should be decided on evidence tested by cross examination rather than any judicial assessment taking place. In preparation I ordered them to agree (a) a list of such facts as can be agreed, (b) an electronic core bundle of documents omitting pleadings orders and documents and correspondence with the Tribunal. They were to send to the Tribunal electronically (i) the core bundle (ii) all witness statements as Word documents. The parties did not, making it necessary to take evidence orally. However, the parties sent much correspondence which resulted in some "statements" being available for me to pre-read, which I did on 14 April.

2. **Relevant Law**

2.1. Section 95 Employment Rights Act 1996 (the Act) includes
(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—
(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

2.2. There is no general duty on an employer to ensure an employee using unambiguous words of resignation intended to resign, but in certain circumstances it might be wrong for words to be taken at face value especially if uttered in the heat of the moment. Martin-v-MBS Fastenings held, whatever the respective words and actions of the employer and employee at the time, the question is, "*Who **really** terminated the contract?"* If the respondent's words and conduct show **it** did, that will be dismissal under 95(1)(a). Where words and/or action are ambiguous, it is neither the subjective intention of the speaker nor the subjective interpretation of the person to whom the words are spoken which is determinative. It is what objectively an onlooker, **with knowledge of the facts and background** would have taken the words to mean (J&J Stern-v-Simpson 1983 IRLR 52).

2.3. Context is important. In Futty-v-Brekkes Ltd Mr Futty was a fish-filleter on Hull Docks who was having a bad day and griping constantly to all who would listen. Eventually his supervisor said "*If you don't like the job, fuck off*". Mr Futty took this as his dismissal. The High Court held the phrase was used more as a "*general exhortation*", not as dismissal, but meaning "*If you are complaining about the fish you are working on or the quality of it or if you do not like what in fact you are doing then you can leave your work, clock off, and you will be paid up to the time when you do so. Then you can come back when you are disposed to start work again."* A more recent, but very different, example is East Kent Hospitals University NHS Foundation Trust-v-Levy EAT 0232/17. Ms Levy gave 'notice" by letter referring to her last working day within the Records Department . She was expecting to take up a position in the Radiology Department but that offer was withdrawn. After taking advice from HR, the respondent wrote to confirm the date of termination of employment. The employment tribunal had to decide whether she resigned or was dismissed. It reminded itself it had to ask, 'who really ended the contract of employment?' and rejected the Trust's argument the words used in her letter were unambiguous. It found the letter could have been a notice of intended transfer. The Employment Appeal Tribunal(EAT) dismissed the appeal. Even if there had been no ambiguity, the tribunal had made a permissible finding that, in the special circumstances of the case, where the claimant was expecting to leave one job with the Trust and take up another, the letter had to be read in that context. The EAT held the tribunal was entitled to adopt an objective approach to the interpretation of the letter and to decline to take into account the parties' subjective views, but those views may be relevant to what a reasonable person with knowledge of the facts and

background would have thought the parties words and actions to mean. Where even unambiguous words, which cannot normally be retracted, are spoken under pressure or in the heat of the moment an employer should allow some time to check its understanding of what was said and done was correct, see Kwik-Fit GB Ltd-v-Lineham 1992 IRLR 156. In this case the history of the fraught relationship between the claimant and Mr Joy were clearly part of the relevant background

2.4. Section 98 of the Act includes:
"(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 dismissal
(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*** *..of the employee for performing work of the kind he was employed by the employer to do*
(b) relates to the ***conduct*** *of the employee."*
(3) In subsection (2) (a) –
(a)" capability" , in relation to an employee , means his capability assessed by reference to skill, aptitude ,health or any other physical or mental quality.

2.4. In Abernethy-v-Mott Hay & Anderson Lord Justice Cairns said the reason for dismissal in any case is a set of facts known to the employer or may be beliefs held by him which cause him to dismiss the employee. That is what the employer has to show. Sometimes an employer will "mis-label" the facts. In Abernethy it said the employee was redundant, which he was not. The proper label was found to be capability due to his unwillingness to change, a "mental quality".

2.5. Conduct and capability are sometimes hard to differentiate. Sutton and Gates (Luton) Ltd-v-Boxall held a reason related to capability if the claimant is trying his best and failing, but relates to his conduct if he is failing to exercise to the full such talents as he possesses. The respondent must show what it knew and believed.

2.6. In Ezsias-v-North Glamorgan NHS Trust 2011 IRLR 550 dismissal of an employee following the breakdown of the working relationship between him and his colleagues was held to be for "*some other substantial reason*". The tribunal was alive to the refined but important distinction between dismissing the claimant for his conduct in causing the breakdown of his relationships and dismissing him for the fact those relationships had broken down. The tribunal was entitled to find it was the latter was the reason for dismissal and the claimant's responsibility for that breakdown was incidental. I will deal later with the issue of what is called a "Polkey reduction" and, when speculating what might have happened had the respondent not "accepted" the "resignation", I must consider whether it may have fairly dismissed for such a reason, or for his inability to change

2.7. Section 98(4) of the Act says:
"Where an 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 all 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
(b) shall be determined in accordance with equity and the substantial merits of the case."

2.8. An employer does not have to prove, even on a balance of probabilities, the misconduct it believes took place actually did. It only has to show a genuine belief. The Tribunal must determine,

with a neutral burden of proof, whether it had reasonable grounds for that belief and conducted as much investigation in the circumstances as was reasonable British Home Stores-v-Burchell as qualified in Boys & Girls Welfare Society-v-McDonald.

2.9. Even an admission of some misconduct will not mean an employer can dispense with hearing what the employee has to say, as said in Whitbread Plc-v-Hall 2001 IRLR 275" *Although there are some cases of misconduct so heinous that even a large employer well versed in the best employment practices would be justified in taking the view no explanation or mitigation would make any difference, in the present case the misconduct in question was not so heinous as to admit of only one answer.*

2.10. McCall-v-Castleton Crafts held there is no magic in written warnings as to an intelligent man verbal ones may suffice. However, explaining the purpose of warnings in capability cases Sir Hugh Griffiths said graphically in Winterhalter Gastronome-v-Webb *"A man may not know he is capable of jumping the five bar gate until he hears the bull behind him"*. Retarded Childrens Aid Society-v-Day held if an employee is "*determined to go his own way*", it **may** be reasonable for the employer to conclude a warning would be futile. In all aspects substantive and procedural Iceland Frozen Foods-v-Jones, HSBC-v-Madden and Sainsburys-v-Hitt, held a Tribunal must not substitute its own view for that of the employer unless its view falls "*outside the band of reasonable responses*".

2.11. In Polkey-v-AE Dayton Lord Bridge said of employers who rely on misconduct
But an employer having prima facia grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural" which are necessary in the circumstances of the case to justify that course of action. Thus … in the case of misconduct the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or an explanation or mitigation…
If an employer has failed to take the appropriate procedural steps in any particular case, the one question the tribunal is not permitted to ask in applying the test of reasonableness ..is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction .. this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude the employer himself, at the time of dismissal, acted reasonably in taking the view, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness .. may be satisfied.
But if the likely effect of the appropriate procedural steps is only considered, as it should be, at the stage of assessing compensation, the position is quite different. In that situation as Browne-Wilkinson J puts it in Sillifant's case
"There is no need for an "all or nothing" decision. If the Tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment". (Such a reduction is known as a "Polkey reduction")

2.12. There are two elements to compensation: the basic award, which is an arithmetic calculation based on age and length of service set out in s 122, and the compensatory award explained in s 123 which as far as relevant says:
(1) Subject to the provisions of this section and sections 124 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 a tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding.

2.13. Section 123(6) explained in Nelson-v-BBC empowers a Tribunal to reduce a compensatory award if the claimant's **culpable and blameworthy** conduct caused or contributed to the dismissal. This can be done in addition to a Polkey reduction (Rao-v-Civil Aviation Authority). Section 122(2) empowers a Tribunal to reduce the basic award on account of any conduct of the claimant before the dismissal. In Steen-v-ASP Packaging Ltd the EAT held a tribunal must consider four questions (a) what conduct is said to give rise to possible contributory fault (b) was that conduct objectively blameworthy, irrespective of the employer's view on the matter (c) if so, did it cause or contribute to the dismissal (d) If so, to what extent would it be just and equitable to reduce the award? There can be no award for injury to feelings or interest.

2.14. Software 2000-v-Andrews 2007 ICR 825 updated for legislative changes , held .
1 The evidence from the employer may be so unreliable the exercise of seeking to reconstruct what might have been is too uncertain to make any prediction, though the mere fact an element of speculation is involved is not a reason for refusing to have regard to the evidence.
2.The employer may show that if fair procedures had been complied with, the dismissal would have occurred when it did in any event. *…*
3.The Tribunal may decide there was a chance of dismissal … in which case compensation should be reduced.
4.The Tribunal may decide the employment would have been continued but only for a limited period.
5.The Tribunal may decide the employment would have continued indefinitely because the evidence that it might have terminated earlier is so scant it can effectively be ignored.
Scope-v-Thornett held an element of speculation is involved and a tribunal must take into account the chance of events occurring. Where the chance is very high, or very low,it may well treat it as 100% or 0% Timothy James Consulting Ltd-v-Wilton UKEAT/0082/14).

2.15. Section 38 of the Employment Act 2002 empowers me to increase awards by two or four weeks pay if the employer has not, when the proceedings commenced, complied with s 1 of the Act by giving an employee a statement of terms and conditions. In cases where no employee is ever given one, I usually award the higher sum. For this purpose, and calculating the basic award the maximum amount of a week's pay at the time was £525.

3.Findings of Fact

3.1. I heard the claimant and read the statements of Mr Peter Brittain, Ms Allison Brooks, Ms Louise Jones and Mr Mark Lewis for whom Mr Rees had no questions. For the respondent, I heard Mr Allen Terence Rees, Mr David Joy, Mr Jake Preston, Mr David Rowntree and Mr Andrew Walker. Statements by Ms Pam Ableson, Ms Jackie Shaw, Mr Liam Sanders, Mr Jamie Godwin and Mr Andy Elgie-Scott were in the papers sent to me but did not go to the real issues I had to decide. The claimant would have challenged part of each statement but agreed if I did not take into account what they included, they need not be called.

3.2. The respondent is a road transport and warehousing company trading as Prestons of Potto. Its transport side uses flatbed and curtain-sided trailers, operating from four locations with Potto as Head Office and centre for the traffic planning. The claimant, as a Traffic Manager, planned work for the curtain sided vehicles. The team consisted of him, Dave Joy and Dave Rowntree. The claimant had major issues with Mr Joy, ways of working and raised concerns with the respondent over time but no action taken changed Mr Joy's conduct, which was placing the claimant under great stress.

3.3. Peter Brittain, a driver, would see Mr Joy standing talking to the mechanics, walking around the yard or outside having a conversation on his phone. When he was in the office he would see Mr Joy on the internet, usually the BBC sport page browsing football. When Radio 1 came to Middlesbrough, the claimant and Mr Rowntree were planning jobs with a lot of paperwork in front of them and Mr Joy was looking at the prices of beer at the event on the internet. When any member of management came into the room, he turned off the internet and went back to his work. If everything was running smoothly, Mr Joy was affable but if there were any problems he became quite snappy. Mr Brittain heard him talking to customers then slam the phone down and say 'fuck off'. In contrast the claimant was always fair with job allocation to all drivers, approachable, friendly, took his job seriously and had good rapport with customers and staff, except Mr Joy.

3.4. Allison Brooks is Operations Manager at Rolawn Ltd which meant daily contact with the traffic office as the respondent is one of its key hauliers. The claimant provided excellent customer service, was cheerful, had a positive attitude and was a pleasure to deal with. The other staff were not as helpful or knowledgeable. Louise Jones of Harlequin Logistics had contact with the claimant daily and found him friendly with a great work ethic. Mark Lewis a work colleagues found him conscientious, hardworking, effective under pressure, a good communicator with good manners. He got on with drivers and the back office admin team. When Mr Lewis suffered an episode of depression the claimant was always there to listen and offered to get him home if he needed, which was a great help as staying in an isolated vehicle made his depression worse. The respondent accepts the claimant was a good worker, competent in his role and, most of the time, got on well with people all apart from Mr Joy. The claimant says himself he had a good working relationship with all members of the team with the exception of Mr Joy. He still attempted to communicate effectively with Mr Joy but admits it was difficult due to his poor work ethic and communication skills.

3.5. The respondent says the claimant until some point mid-2019, integrated well with the traffic team, including Mr Joy. In the spring of 2019 there was an opportunity for him to take a different role but he stayed on curtain sided trailers showing he was not unhappy there at the time. From then, Mr Walker said the claimant developed a dislike of Mr. Joy but Mr Walker did not know why. In July, Mr Joy took sick leave due to depression he says was partly caused by the claimant's "bullying".

3.6. The claimant did not like the way Mr Joy worked especially his lack of communication about jobs he had "booked" without telling the claimant thus spoiling his traffic plan. It upset the claimant that when he and Mr Rowntree were very busy Mr Joy would be browsing the internet, watching You Tube or BBC Sport. Mr Rowntree once told the claimant if Mr Joy ever got the Operations Managers job "*he would be a cunt*.' Jamie Godwin (Director and grandson of the owners) once said '*there are two Daves here, productive Dave* (Mr Rowntree) *and unproductive Dave* (Mr Joy).'

3.7. On 13 August Jake Preston asked the claimant if he could provide some information about a delivery. Mr Joy heard the question, had an email open on his computer that would answer it so he interrupted. Mr Preston walked around to Mr Joy`s desk, got the answer and walked back to his desk. As he did so, the claimant pointed at Mr Joy and said something like "*he`s always getting involved, interfering*" and shouted at Mr Joy. Mr Preston asked him to calm down, told him to go home and cool off. The claimant says "*Jake asked me to leave after a heated discussion with himself due to Dave Joy rudely interrupting after I had directly been asked by name for information by Jake. This was one of many occasions Dave Joy would rudely interrupt my conversations with drivers and other members of staff. I found this to be bad mannered and disrespectful, undermining and devaluing my position when I was more than capable of answering questions or relaying information for myself."* Mr Rees called the claimant at 17.10 telling him to stay off work on 14 August due to Mr Rees being away that day at a meeting and come in on Friday 2019 at 9 am. Mr Rees told him then his outbursts were not acceptable.

3.8. Mr Rees accepts the claimant advised he had issues with Mr Joy and says the respondent was dealing with them. The claimant's viewpoint was at no point did Mr Rees feed back to him any plan of action or make him aware he had discussed concerns with Mr Joy or "*attempt to triangulate a meeting*" between the three of them. He adds "*This would have been really helpful, would have allowed both parties to be aware of the others concerns and work towards a solution. An action plan could have been devised and signed by both parties*". Mr Rees confirmed discussions Mr Joy were taking place however I agree it was not appropriate to discuss these with the claimant. Mr Rees arranged to speak to Mr Joy and the claimant together one Friday afternoon, but the claimant did not come as he was too busy. In many private discussions Mr Rees told the claimant his outbursts must stop, even if he had cause. At this hearing the claimant said he was "***frustrated***" which he said is different to being "***aggressive***". It is, but the first may trigger the second and I find often did.

3.9. Mr Rees gave the claimant some advice about trying to work with Mr Joy, saying he disliked a company (X) Preston's worked for and dreaded meetings with it but had to put a brave face on and pretend to like them for the company's benefit. Ever since then if he disliked a customer he imagined X was printed across their forehead and that helped him keep his manner civil because X were the worst. They laughed about it and the claimant said he would give it a go.

3.10. On 6 November 2019 Mr Joy went to see Mr Rees and discussed what extra work Mr Joy could take on and, in Mr Joy's words, him" *knuckling down*", mainly to "*help the day pass quicker*". My view on hearing Mr Joy was that he and the claimant were opposite extremes, the claimant found Mr Joy "*lazy*", and Mr Joy did not give me the impression he was energetic in performing his work, whilst the claimant was "driven" to provide good service . Mr Rees agreed Mr Joy could take on some tachograph infringement management duties. Mr Joy returned to the traffic office happier and gave Dave Rowntree a "thumbs up" sign. He and Mr Rowntree drive into work together and he knows how "down" Mr Joy had been. Mr Joy then went out to the warehouse. The claimant said to Mr Rowntree words like "*"secret thumbs up, are you two stitching me up, I'll take you both outside.*" The claimant denies the last part, but I prefer Mr Rowntree's evidence. Whatever the precise words, Mr Rowntree and other witnesses said the atmosphere in the office was awful. Of key importance to my remedy decision are the many times the claimant sought to **justify** expressing annoyance with Mr Joy but never recognise his "outbursts" were not acceptable and upsetting to those people who saw them, even though none of his anger or frustration was directed at them .

3.11. Later Mr Rees spoke to him about the phrase "take him outside". He responded he was referring to taking Mr Joy outside to tell him exactly what he thought, but Mr Rees was concerned it was more of a physical threat. However, he was given the benefit of the doubt but told any further behaviour like this would result in formal action. At about 16.30 Mr Walker heard a loud and aggressive voice he recognised as the claimant's saying words to the effect of "*if you don't sort it out, I will sort it outside*". The tone was that strong he could hear it from his office.

3.12. The claimant's version is not much different ("you" meaning Mr Rees) *"You have stated a comment was heard I would "take him outside and sort it out". This was a comment you yourself had heard as I was leaving your office and quite rightly state I was given the benefit of the doubt in my explanation. I explained at the time my only intention was to reason with Dave Joy and let him know where my concerns lay if Preston's did not take some action to address these issues. At this time my emotional and mental health was being seriously compromised on a daily basis and you kept putting me back opposite him to work, him being the root cause of my unhappiness. If you had rearranged the working environment to put some space between us that would also have been helpful.* Late on 6 November Mr Preston texted Mr Rees saying the claimant should be suspended. Mr Rees decided not to. The claimant was in work on Thursday 7 November.

3.13. On 8 November Mr Rees based himself in the traffic office to see for himself what the problems were. While he was out of the room, Mr Joy did not go missing for any length of time, which the claimant said was normal, and asked if the claimant wanted anything printing off. The claimant said *"don't start with that because you hardly speak to me, and you are only acting helpful because Allen is working behind me today, you two faced cunt".* Mr Joy said he had had enough, intended to go home and put his coat on. Mr Rees came in and took the claimant into his office and asked what was going on. The claimant told him and he replied '*you can't call people a cunt*'. It was a short meeting the claimant ended by saying "*bring him* (Mr Joy) *back and I'll quit*". The claimant took his SIM card out of his phone ,gave Mr Rees his door key collected his belongings and left.

3.14. Mr Rees followed him to his car and said *"Karl".* The claimant said "*if you want to speak get in the car"* as it was raining heavily. They had a chat where Mr Rees reiterated the claimant cannot keep getting frustrated. He replied it would help if something had been done about the concerns he had raised. Mr Rees replied he had spoken to Mr Joy. Mr Rees then said "*so you've quit*?" to which the claimant's response was "*do you really think I want to quit over him when I have a mortgage and a girlfriend having ongoing treatment for cancer*". The claimant says this should have made it clear he was unsure and under extreme stress and a cooling off period was needed. Mr Rees replied he could see he was wound up and upset and should take care driving home due to the weather.

3.15. They did not speak again that day. The response drafted by Mr Rees includes

"*Having discussed his actions and previous behaviour* ***with other members of staff****, it was clear this had made many people uncomfortable in the office particularly with the foul language and aggressive tone. I wrote to KW to formally accept his resignation.*

I also took the view that if he had resigned in the more traditional way he would have been expected to give one month's notice, however it was evident that he could not be allowed back into the office and I instructed payroll to pay him one month's notice. I was also aware that the alternative of formal proceedings would in all probability have resulted in gross misconduct which in turn could result in dismissal without notice.

On the basis we feel the situation was dealt with appropriately, KW failed to take basic instruction on numerous occasions about a basic working principle of behaviour in the workplace, we do not see the proposed settlement as being correct. By paying notice he has received over and above that which could have been and we therefore reject the claim.

3.16. The next morning the claimant had to sign for a letter from Mr Rees dated 8 November 2019. It stated the respondent had accepted his verbal resignation as it was aware of its obligations to ensure employees are not treated in an unacceptable manner by other colleagues.

3.17. On 18 November the claimant wrote to Mr Rees a letter which I quote extensively because it shows the stance the claimant has taken throughout, blaming others but not accepting his personal responsibility not to react as he did to any provocation. It included

In response to your letter dated 8th Nov 2019. I have contacted ACAS who are now advising me regarding the handling of the loss of my position as Transport Manager. There were many valid concerns brought to your attention by myself, over a sustained period of time. These issues arose prior to me making a verbal resignation on the 8th November, in the heat of the moment. I would appreciate your consideration in relation to the following workplace issues.

The timescales from resignation to the confirmation of acceptance letter received by myself from you was extremely prompt, without any cooling off period. Less than 24 hours had passed before I received a 'signed for' letter from yourself confirming your acceptance of my verbal resignation.

It didn't give any consideration to the fact we had a further discussion in my car after I had verbally resigned in your office. You asked me "you've quit haven't you" and my response was "do you really think I want to quit over him when I have a mortgage to pay and a girlfriend who is having ongoing

cancer treatment". At no time did I confirm that what I said in the heat of the moment was my considered and final decision.

As you are aware, I have clearly stated on numerous occasions the stress I felt I was under due to Dave Joy leaving myself and Dave Rowntree to do the majority of the work. Using the internet in work time for his own personal usage, viewing content totally irrelevant to his job. This was in front of drivers and me at times of extremely busy periods when as Senior Transport Manager he should have been fully involved to ease the pressure within the team.

Dave Joy continuously printed off Glassworks orders which were not urgent, hand delivering the orders individually across to the warehouse. This resulted in him going missing for considerable periods at a time. Having raised this issue with yourself previously and reiterating the stress this behaviour placed upon me you stated to me that "you were not getting a return from his role if he was doing this on a daily basis." Yet this was allowed to continue after my discussion with you and there was no noticeable change to his behaviour.

I made you aware that Dave Joy was continuously booking Tesco orders without any consultation as to suitability of booking times; he did this without any fore thought of work already booked on my traffic programme. This again caused me extreme stress and pressure on a daily basis. The role as a Transport Manager in a busy office is both stressful and highly intense, so team working and communication in that environment is key. To not have this support from the Senior Transport Manager had a serious negative impact upon my emotional wellbeing. Again a fact that I brought to your attention in numerous meetings we had, however there was no change to his behaviour.

I also found that Dave Joy undermined my confidence and ability as a Transport Manager by rudely interrupting on numerous occasions on a daily basis whilst I was conversing with drivers and colleagues within the office environment. He also refused to stop referring to me as 'mate' even after I informed him that I did not find it appropriate. This again placed a huge amount of additional pressure and frustration upon me. Again a fact that I brought to your attention in numerous meetings we had, however there was no change to his behaviour.

I can only conclude from this that there was no action plan put in place to safeguard myself as an employee and alleviate the extreme stress I was placed under. There was no tripartite meeting between myself, Dave Joy and higher management to discuss the issues I raised on numerous occasions.

I therefore wish it to be noted that your letter dated 8th November 2019 stated you are aware of your obligations to ensure that other employees are not put in a position of being treated in an unacceptable manner. However, having shown no reaction or appreciation of the issues I raised and failing to implement a plan to support my emotional health in relation to these issues, I feel that you have treated me in an unacceptable manner. In placing me back into the same situation without making changes each time I raised my concerns which you knew was causing me undue stress and was having a negative impact on my overall wellbeing.

I find that you chose to ignore my concerns without any reference to any procedure which should have been implemented by 'Prestons' to support an employee, to whom you had a duty of care. Only when the situation became untenable did you speedily accept my verbal resignation, given in the heat of the moment.

I have since received one month's salary in lieu of my notice period to which I did not formally agree and was not given the option to work after 8th Nov. I was not given a confirmed finish date in writing and am still awaiting sight of my contract of employment as previously mentioned in this letter.

You have also not requested or received a written resignation from myself but have assumed that it was my wish to no longer be employed by Prestons. This was actually not the case and as stated in phone calls to you since Nov 8th had you as a company reacted to the issues I raised and put in place an action plan I would not have suffered the emotional harm and loss of livelihood I have, as a result of your inaction.

I would appreciate a prompt reply in writing, in response to the issues I have raised in this letter.

3.18. After the PH on 24 March 2020, the respondent sent on 18 April 2020 a document including *The Company rejects any claim on the basis that the claimant resigned after having been warned about his behaviour on numerous occasions. Having discussed his behaviour with witnesses, it was felt inappropriate to allow him to return and he was paid a month's salary in lieu of notice. Having gone through this process t**he Company would accept that there may have been some procedural issues** such as the lack of a contract of employment, however the outcome of any different path would most likely have resulted in dismissal for gross misconduct and indeed the Claimant not being entitled to notice.* No Contract of Employment was ever given to him or any staff

3.19. The claimant says swearing by staff within the Traffic Office was *'par for the course* 'on a daily basis. I accept that, but swearing in general is not the same as swearing aggressively **at someone**.

4. Conclusions and Remedy

4.1. I find the claimant was dismissed. What he said and did on 8 November was not only ambiguous but also uttered in the heat of the moment. On the case law set out at 2.2-2.3 above his words and conduct did not really terminate his contract by resignation. Mr Rees' letter which the claimant received on 9 November 2019 ended the contract.

4.2. The facts known to, or beliefs held by, the employer which constituted the principal reason, for the dismissal related to the claimant's conduct in the form of his many outbursts.

4.3. However, although the respondent had reasonable grounds for its beliefs after a barely adequate investigation, consisting of Mr Rees talking to other staff on 8 November, and acted within the band of reasonable responses in treating that reason as sufficient to warrant dismissal, the respondent did not follow a fair procedure. It did not specify to the claimant exactly what he was accused of and gave him no chance to explain or mitigate.

4.4. If the respondent had followed a fair procedure, the chance it would nevertheless have dismissed was 100% and probably for gross misconduct without notice at the time it did. The claimant says he was given no given constructive advice when he asked for help on numerous occasions when attempting to resolve issues with Mr Joy and, if managers had instructed Mr Joy to improve his work ethic and answer his share of phone calls, the claimant would not have been working as hard as he was with no reprieve. He says he was not informed action would be taken in relation to Mr Joy's alleged behaviour. I accept the claimant was not told, or entitled to know, what action was being taken to get Mr Joy to "knuckle down" but steps were being taken. Because the claimant saw no change for the better he continued to erupt whenever Mr Joy annoyed him. It is not my function to adjudicate on the relative merits of the claimant and Mr Joy. I asked the claimant whether he was saying Mr Joy should have been dismissed and he said "No", he just needed to change his work ethic and methods. If Mr Joy could or would not the claimant would have carried on reacting as he did because he could or would not contain his frustrations and annoyance.

4.5. I find other members of staff felt uncomfortable with the claimant's outbursts, **rather than with him as a person**. It is very harmful to a working environment if those who are not directly involved

are “caught in the crossfire” between the claimant and Mr Joy. Had Mr Rees called him in to a meeting on Monday 11 November, I have no doubt he would have done exactly as he did before me 18 months later. If he had been given every opportunity to apologise, he would still have sought to justify erupting at work rather than recognise it was wrong and resolved not to do so again.

4.6. Two wrongs do not make a right. I can only conclude the claimant would, fairly, have been found incapable of containing his frustration, likely to continue as he had and been dismissed if not for misconduct then for his inability to restrain his conduct or the mere fact working relationships in the traffic office were intolerable and affecting others.

4.7. While he caused or contributed to the dismissal by culpable and blameworthy conduct, as I am making no compensatory award there is nothing to reduce, but I will reduce the basic award by 50% to reflect his contribution to the situation as being at least equal to Mr Joy’s. A full award would have been 6 week’s pay, which I reduce to 3 weeks at the statutory maximum of £525 per week.

4.8. Finally, I make the higher s.38 uplift of 4 weeks pay. The respondent is a long established and fairly large business. The requirement to give employees a statement of terms and conditions containing the information set out in s1 of the Act serves a purpose **for both parties** to an employment contract. Had there been one in this case, the claimant would have had no excuse for not raising a grievance. If the respondent had followed a process of staged formal warnings, they would have started earlier. The end result would not have changed in my view. Indeed, the claimant may have been fairly dismissed sooner. That is not the point. Section 38 is a penalty on an employer for not doing what the law requires and this employer, for no good reason, did not.

EMPLOYMENT JUDGE T. M. GARNON.
JUDGMENT AUTHORISED BY THE EMPLOYMENT JUDGE ON 19 APRIL 2021