EMPLOYMENT TRIBUNALS

Claimant: Mr K. Manir

Respondent: Computershare Services Limited

HELD: remotely by CVP **ON: 15 and 16 December 2020**

BEFORE: Employment Judge Rogerson

REPRESENTATION:

Claimant: In person
Respondent: Jamie Guyan (Solicitor)

JUDGMENT

1. The complaint made in relation to outstanding holiday pay is withdrawn and is dismissed.
2. The complaint of wrongful dismissal succeeds. The claimant is awarded £2,352.90 as damages for the wrongful dismissal.
3. The complaint of unfair dismissal succeeds. The claimant is awarded compensation in the total sum of **£5,727.68** calculated as follows:

		£	
3.1	Basic award (5 complete years x £470.58)		1,764.68
	£2,352.90 reduced by 25%		
3.2	Compensatory award:		
	3.2.1 Immediate loss: 27.1.2020-18.12.2020	**4,693.95**	
	3.2.2 Loss of statutory rights.	300.00	
	3.2.3 Future loss:18.12.2020- 18.3.2021	290.05	
			5,284.00

Less 25% reduction (contributory conduct **1,321.00**

3,963.00

Total Award **5,727.68**

3.2.4 The Recoupment Regulations apply. The prescribed period is 27.1.20-18.12.20. The prescribed amount is(**corrected to £3,745.46)** The total award less the prescribed amount= **£1,982.22** which is payable immediately.

REASONS

Issues

1. The claimant complains that his summary dismissal by letter dated 27 December 2019 (effective on 30 December 2019) was both unfair and wrongful. He seeks compensation for the unfair dismissal and damages (notice pay) for breach of contract. His holiday pay complaint was withdrawn at the beginning of the hearing and is dismissed upon withdrawal.
2. The respondent relies upon the claimant's conduct of being 'absence without leave' as the potentially fair conduct related reason for dismissal. The respondent says it treated the claimant's breach of procedure as 'gross' misconduct which entitled it to summarily and fairly dismiss the claimant.
3. The claimant denies that he was absent without leave. At the time of his dismissal the respondent knew he was absent from work due to long term sickness (anxiety). His absence was authorised and covered by fit notes issued by his GP. The claimant says the respondent was acting in bad faith advancing a false reason when the real reason for his dismissal was that senior managers had decided to dismiss employees on long term sick to get them out of the business. The claimant had a previous poor relationship with his line manager (Mr S. Pitts) which had resulted in a grievance and his manager had acted in bad faith. At the appeal stage although evidence was provided that the absence was part of a continuing absence which was covered by fit notes, the appeal failed to cure the earlier defects/unfairness in the process.
4. A list of issues was agreed and discussed at the beginning of the hearing.
5. I heard evidence for the respondent from: Ms H. Grey (line manager), Mr S. Pitts (line manager and dismissing officer), Ms H. Deary (appeals officer). For the claimant, from the claimant. I also saw documents from an agreed bundle of documents which were provided in electronic form. Most of the facts are not disputed and where there are disputes of fact I have set out those disputes before making my findings of fact.
6. From the evidence the Tribunal heard and saw the following findings of fact were made:

Findings of Fact.

7. The claimant was employed as a Customer Service Advisor from 3 November 2014 until his summary dismissal on 27 December 2019. The respondent is part of a group of companies operating throughout the world providing financial and other business services.

8. The claimant had no previous disciplinary record or any previous issues about his conduct/performance/attendance. The claimant was dismissed following a meeting on 27 December which he did not attend. He appealed the outcome on 13 January 2020 and his appeal hearing took place on 12 March. His appeal was unsuccessful and the appeal outcome was provided to him by a letter dated 20 March 2020.

9. From August 2015 to September 2018, the claimant was managed by Ms Rochelle Harness. The claimant enjoyed his job and describes having an excellent working relationship with Ms Harness. In December 2017, the contracts of all the Customer Service Advisers were changed to 'flexible working contracts'. The claimant was unable to commit to the changes made because he had caring responsibilities for his disabled mother and because his wife was due to have a baby. Instead, he agreed to be re-deployed and re-engaged on a new contract to work in the Customer Contact Centre as a call handler in the 'NRCS' department from 4 September 2018.

10. From October 2018, the claimant was managed by Mr Pitts. The NRCS department required a different skill set (skill set C) because the work undertaken by call handlers required a more detailed knowledge of the financial products that were offered by the respondent. Mr Pitts accepts the claimant did not have the required skill set when he joined the team. He recognised the claimant required additional training to perform the work to the required standard because it was a different type of work. He expected the claimant to 'upskill' to skill set C quickly with training.

11. When the claimant moved to the department he had not been informed that he was required to upskill to skill set C as part of the transfer. He was concerned about moving to new work which required a new skill set when he did not feel fully competent in that work and was not achieving the targets using his existing skills. In those circumstances, the claimant was unhappy about moving on to train for skill set C.

12. Mr Pitts did not know what the claimant had been told about the role before joining the department and was confident the claimant would quickly pick up the required skills. He arranged for the claimant to have some training on 18 February 2019. The claimant felt that Mr Pitts was not listening to his concerns and was being unsupportive. He called in sick on the training day feeling stressed and anxious. The claimant was absent from work from 18 February 2019 until he was dismissed on 27 December 2019.

13. For most of that period to December 2019 he was managed by Ms Grey. She confirms that the claimant provided the following 10 fit notes which identified the reason for his absence was anxiety/work related anxiety and covered the following periods:

    - 22 February 2019 to 11 March 2019
    - 11 March 2019 to 24 March 2019
    - 25 March 2019 to 14 April 2019
    - 14 April 2019 to 12 May 2019
    - 13 May 2019 to 23 June 2019
    - 23 June 2019 to 20 July 2019
    - 20 July 2019 to 16 August 2019

- 16 August 2019 to 16 September 2019
- 16 September 2019 to 15 October 2019
- 16 October 2019 to 10 November 2019

14. On 22 November 2019, the claimant informed Ms Grey that he had seen his GP on 20 November 2019 and had obtained a fit note covering the absence from 11 November until 22 December 2019.

The respondent's attendance at work policy

15. The respondent operates an attendance at work policy. It states that "*for extended periods of sickness absence, unless specified otherwise by the doctor, fit notes will be required on a weekly basis"*. And that: "*If you are absent without following the notification requirements of this policy you will be considered absent without authorisation and may be subject to disciplinary proceedings as set out in the disciplinary policy*".

The respondent's disciplinary policy

16. The respondent operates a disciplinary policy that applies to all employees. The policy lists "a **serious breach"** of the policy and procedures as an example of conduct that would "normally be regarded as gross misconduct".

Welfare meetings

17. The respondent arranged welfare meetings with the claimant during his absence in line with the attendance at work policy. The claimant initially attended those meetings with Mr. Pitts but after raising a grievance against Mr Pitts, Ms H. Grey became his new contact during his absence.

18. Ms Grey had a welfare meeting with the claimant on 12 September 2019. During this meeting the claimant was asked to ensure that he sent in fit notes on time because his previous fit note was submitted late. Occupational health advice was obtained which advised that any meetings with the claimant should take place outside the workplace to reduce his anxiety.

Invitations to capability meetings

19. Ms Grey wrote to the claimant on 23 October 2019 to invite him to attend a capability meeting on 25 October 2019 to discuss his level of sickness absence. The meeting was arranged at a coffee shop at 1pm. The letter advised the claimant that the purpose of the meeting was "*to discuss your levels of sickness absence, consider how it can be improved and agree any action you can take to address the absence. It may* ***also be necessary to obtain an occupational health report with your consent to assist in understanding the reason for your absence and any adjustments that may need to be made*****".** The letter was sent by special delivery and by first class post.

20. Ms Grey was late for the meeting. On arrival she waited for 20 minutes to allow for the claimant running late. She and the note taker walked round the coffee shop during that time and called the claimant four times but he did not answer. As a result, of the claimant's failure to attend the meeting, she wrote to the claimant on 14 November 2019 inviting him to attend another capability meeting at 1pm on 22 November 2019 which was to be held at the workplace.

21. The claimant contacted Ms Grey by telephone on 22 November 2019. The claimant advised Ms Grey that his father had signed for his mail and had not provided him

with the letter dated 14 November 2019 until that day (22 November 2019). He told Ms Grey he had attended the meeting at the coffee shop on 25 October 2019. He told her he had attended the coffee shop at around 12.50 to ensure he could get a quiet corner for the meeting. At around 1.05pm when no-one had turned up he decided to leave. He did not have his mobile phone with him as he had left it on charge at home as the battery was dead. The coffee shop was within walking distance from his home. The claimant states "*Hannah Grey was late and I did not have my phone with me to get her message and we had missed each other*".

22. Ms Grey confirms that the claimant called her on 22 November 2019 after close of business. He confirmed that he had attended the meeting on 25 October 2019 but had forgotten his phone. She says in her witness statement at paragraph 32 "*I do not think it is possible that Mr Manir was in the coffee shop because it was a small café and I am certain that I would have seen him if he had been there.* ***I did not say anything about this to him on the call"***. From the claimant's perspective there was no reason for him to believe that Ms Grey had not accepted the explanation he had given that he had attended that day and they had missed each other.

23. The claimant had also advised Ms Grey that his father had 'signed' for his mail and had not provided him with the letter dated 14 November 2019 until that day (22 November 2019). He explained to her that was the reason he had not attended the capability meeting arranged for that day. He queried why that meeting had been arranged without discussing it with him first, when he wanted his union representative to attend and occupational health had advised that meetings should be held away from his place of work. Ms Grey agreed and left the claimant to check his union representative's availability before rearranging the capability meeting. It was agreed he would call Ms Grey by Tuesday 26 November 2019. Ms Grey advised the claimant that his fit note expired on 10 November 2019. He informed her that he had attended his GP on 20 November 2019 and had collected a fit note which ran from 11 November 2019 to 22 December 2019. Ms Grey advised the claimant he should not be waiting a week to go to his doctor after his fit note expires. She advised him that he could bring his fit note to the capability meeting.

24. The claimant says that on the evening of 22 November 2019 his friend collected his fit note from him and dropped it off at reception in the same way as previous fit notes had been handed in at work.

25. On 25 November 2019, he called Ms Grey and informed her that he had spoken to his union representative and that they thought that it would be a good idea to await a response about the department and a possible role change before the capability meeting took place. Ms Grey agreed it was the best way forward. The claimant did not tell her that the latest fit note had been dropped off by his friend.

26. Ms Grey confirmed she had received a phone call from the claimant on 25 November 2019 advising her that he had not been able to speak to his union representative. She asked him to call back the next day. She then called him on 3 December. He did not answer and she left a message. She called the claimant again on 10 December 2019 and he did not answer. She left a message. His last fit note had expired on 10 November 2019 and as far as she was aware no updated fit note had been provided. She accepts the claimant had informed her on 22 November 2019 that he had obtained a fit note from his GP for the period 11 November 2019 to 22 December 2019 and she did not challenge that explanation at the time.

27. She wrote to the claimant on 11 December 2019 inviting him to a capability meeting on 17 December 2019 at the claimant's workplace (Crossflats). The letter states:

> "*As a result of your continued absence you are required to attend a formal capability meeting, in line with the Computershare attendance at work policy.*
>
> *I have attempted to arrange this meeting on two previous occasions and have not been able to contact you via telephone. Therefore, I am writing to you with this invite.*
>
> *This will be held on 17 December 2019 at 2pm at Crossflats in the present of Ian Maude who will act as note taker. If there are any adjustments that you believe need to be made so you are able to attend the meeting please call me by 16 December so that these can be considered.*
>
> *The* ***purpose of the meeting is to discuss your levels of sickness absence, consider how it can be improved and agree any action you can take to address the absence. It may also be necessary to obtain an occupational health report with your consent to assist in understanding the reason for your absence and any adjustments that may need to be made****. I must draw your attention to the fact that* ***your continued absence from work could lead to your dismissal under this stage of the Computershare attendance at work policy.****"*

28. It was clear at this stage that in managing the claimant's absence Ms Grey was treating the absence as part of a long-term sickness absence that was a continuing absence and was not treating the claimant's absence as an unauthorised absence under the disciplinary procedure.

29. She expected further occupational input would be required and warned the claimant that his continued absence could lead to dismissal under the attendance at work policy. She agreed the claimant had provided 10 fit notes for the period 22 February 2019 to 10 November 2019 and as at 22 November 2019, Ms Grey knew a fit note had been obtained from the GP on 20 November 2019. She expected the absence for anxiety related reasons would continue until at least 22 December 2019. Ms Grey also knew that the last fit note was late. She was expecting it to be produced at the next capability meeting and makes no issue of the fit note in her letter. The claimant had not informed her it had been dropped off by a friend. She did not raise any conduct issues about the claimant's failure to attend the meeting on 25 October 2019 or 22 November 2019, or about the late fit note. The claimant would have no reason to think that his manager was treating his 'conduct' as a disciplinary issue or that she did not believe his explanation or that his fit note had not been received. Ms Grey also knew that the claimant intended to attend that next capability meeting with a union representative and it would need to be rearranged away from the workplace. That was the position as at 11 December 2019. The claimant had clearly indicated to his manager his intention to attend any future meeting accompanied by his union representative.

30. Ms Grey was then advised by Ms Veneear, Employment Relations Consultant, that Mr Pitts would take over the management of the claimant's absence because the claimant's grievance made against Mr Pitts had not been upheld.

31. Ms Grey had a handover meeting with Mr Pitts on 16 or 17 December 2019. There was no record of the handover meeting or the information exchanged. Ms Grey did not speak to the claimant again. She was not involved in the disciplinary hearing and was not asked to provide any information for that hearing. On 18 March 2020,

she was asked to and provided some information that was requested for the claimant's appeal.

32. The claimant called Ms Grey on 10 and 16 December 2019 and left messages for her. On 17 December 2019, he received an email from Ms Veneear informing him that Mr Pitts would be his point of contact going forward. There was no reference in the email to any contact issues, any missing fit notes or missed meetings. The claimant received no contact from Mr Pitts and called him on 23 December 2019. He says there was no answer machine or voicemail options for him to leave a message and he left it at that. None of that evidence was challenged in cross-examination.

Absence without leave and disciplinary meeting

33. On 16 December 2019, emails were being exchanged between Ms G. Trees (Mr Pitt's line manager) and Miss Veneear requesting updates on the absence management process in relation to the claimant and another colleague in the team who was also on long term sick.

34. Mr Pitts then sent a letter to the claimant dated 17 December 2019 by recorded delivery and 1st class post. The letter is headed "**unauthorised absence first letter**" (page 133) says as follows:

> "*according to our records you have been absent from work since 18 February 2019. During this time, you have failed to attend the third re-arranged capability meeting today and* ***we have not received an up to date fit note when your previous one expired on 10 November 2019. Your unexpected and unexplained absence has caused considerable difficulties for your department, team and manager.*** *We are also concerned for your personal well-being and whereabouts.*
>
> *As you know, you are required to notify the company on the first day of any absence from work or as soon as is reasonably practicable, which you have not.* ***If the reason for your absence is illness, you are also required to provide the company with a doctor's certificate which has not been received.*** *I therefore require you to contact me as a matter of urgency by 12pm* ***on Friday 20 December to inform me of the reason for your absence and to arrange your capability meeting****.* ***The company regards your current absence from work as an unauthorised unpaid absence in contravention of the company's absent reporting procedures. You should be aware that the company views unauthorised absence without good cause as gross misconduct which may result in disciplinary action being taken against you including dismissal****."*
>
> (highlighted text my emphasis)

35. This is the first communication between the claimant and Mr Pitts after he had taken over managing the claimant's absence. In this first contact Mr Pitts decides to change the process from absence management to a disciplinary process. As at 17 December 2019 he was treating the claimant's absence as an unauthorised unpaid absence from work and potential 'gross misconduct'.

36. Miss Grey who had been managing the sickness absence knew of the existence of the yet to be received fit note covering the period up to 22 December 2019. Mr Pitts would have known the claimant's current absence was part of a long-term sickness absence for 'anxiety'. Mr Pitts also knew that the claimant had raised a grievance and perceived a poor working relationship existed between them.

Although that grievance was not upheld this was his first contact with the claimant since February 2019. In that first contact Mr Pitts clearly expressed his prejudgment that he already regarded the claimant's absence as an unauthorised unpaid absence.

37. Mr Pitts did not receive a reply to the letter. He did not attempt to phone the claimant. 3 days later he sent a letter inviting the claimant to a disciplinary meeting on 27 December 2019. The letter dated 20 December 2019 confirmed that the disciplinary meeting was to discuss the claimant's failure to comply with the attendance at work policy and that his 'unauthorised absence' may be treated as gross misconduct which could result in dismissal. The letter confirms that **if** the claimant failed to attend that meeting **without good reason**, the hearing would take place in his absence and that a decision could be taken to dismiss the claimant in his absence in accordance with the disciplinary policy principles. Those principles (page 58) state that "**matters will be dealt with promptly and without unreasonable delay**" and that employees "***will be given the opportunity to state their case***".

38. The claimant did not attend. It was decided that the hearing should proceed in his absence. The record of the hearing is at page 141. It records the start time of the hearing as 1pm. The attendees were Mr Pitts and Ms Trees, identified as the 'note taker'. HR had pre-prepared some questions for the claimant to answer about the absence, which include the question "*do you have a fit note covering your absence since your fit note expired on 10 November 2019*", what time frame the claimant considered was 'reasonable' to provide a fit note, whether the claimant understood the attendance management policy and to give him an opportunity to explain why he had failed to follow the procedures. The sort of questions that would be expected as part of a reasonable investigation identified to assist Mr Pitts in obtaining all the relevant information to make an informed decision.

39. It was odd, that when the claimant did not attend, no attempt was made to contact the claimant by telephone to try to get those questions answered. He decided 'against that' but could not explain why he had decided against it, when he was contemplating dismissal. He waited '*15 minutes or so*' and then made a telephone call to the HR advisors. The meeting was reconvened and the note made by Ms Trees record: "*all questions asked as Mr Manir did not attend the meeting. Outcome dismissal reached.*"

40. The claimant says he did not receive the letters of 17 December or 20th December 2019. The claimant relies on Royal Mail tracking data which confirms that the letter dated 17 December 2019 was lost in the post and the letter of 20 December was returned to sender and was not delivered to him. The respondent uses special delivery to ensure safe delivery of important letters and relies on the tracking data to confirm the safe receipt of the letters sent. The tracking data supports the claimant's explanation that he did not receive those letters. The claimant cannot explain how those letters which were also sent by first class post were not received by him when they were correctly addressed. He maintains that he did not receive them which is the only reason why he did not attend the meetings. The first time the claimant knew he had missed the meeting on 27 December was on 30 December 2019, when he received the dismissal letter dated 27 December 2019. I accepted the claimant's evidence. He had previously made clear his intention to attend any formal capability meeting with his representative and that he expected that meeting to be arranged away from the workplace. Given the importance of this

meeting and the potential consequences, I accepted his evidence that he did not receive the letter and if he had received it, he would have attended the meeting.

41. The claimant saw his GP on 2 January 2020 and got a further fit note from his doctor back dated from 22 December 2019 which ran until 5 January 2020. This was the last fit note issued by the GP. The claimant had not sent this fit note in earlier because he had to wait until 2 January 2020 to get an appointment with his GP. The claimant accepted in answer to my questions that he should have contacted Mr Pitts to inform him of the difficulties he was having getting an appointment with his GP, before the fit note expired so that Mr Pitts knew about the delay and the reason for it.

Dismissal Decision.

42. The dismissal letter sent to the claimant dated 27 December 2019 gave the following reasons for dismissal:

> "*Dismissal letter (unauthorised absence):*
>
> *I write further to my letter to you of 17 December 2019 and 20 December 2019. You were required to attend a disciplinary hearing on 27 December 2019, to discuss the* ***company's serious concerns about your absence from work and failure to comply with the company's absence notification procedure.*** *You did not attend for the hearing and we have had no contact from you to explain:*
>
> - *Your continued absence*
> - *Your failure to notify the company of the reasons for your absence*
> - *Your failure to respond to my previous letters or*
> - *Your failure to attend the disciplinary hearing.*
>
> *As a result,* ***we had no alternative but to hold the disciplinary hearing in your absence****. The hearing was chaired by S. Pitts. G. Trees was also present. At the hearing, your absence, its impact on the business and your failure to follow the company's notification procedures was discussed* ***on the basis of the facts known to us at the time****. You will be paid up to and including the last day you attended for work. You will not be paid for your current period of absence.*
>
> *I have decided that your conduct constitutes gross misconduct.* ***Due to your non-attendance at the hearing and because you did not provide a current fit note or explanation for your absence, I have made the decision based on the facts I had available at the time of the hearing.*** *Having taken all those facts and circumstances into consideration I have decided to summarily dismiss you from your employment with immediate effect. You will not be paid for your current period of absence. Payments if any owing to you will be confirmed in due course including your P45.*

43. The letter also identified Ms Trees as the person who would hear any appeal even though she was the note taker at the dismissal. At this hearing, the claimant expressed his concerns about the fairness of the decision-making process. He suggests Mr Pitts and Ms Trees conduct and involvement in the decision show 'bad faith' and the real reason for dismissal was that the business wanted to get rid of employees like him on long term sick quickly because they were viewed as an unnecessary burden on the business. The reason he believes this, is the email

communications that were sent before his dismissal, on the day of his dismissal and after his dismissal.

44. He relies upon emails exchanged between Ms Trees and her line manager Mr H. Cheema, Head of Mortgage Services. On 27 December 2019 at 16:01 an email was sent by Ms Trees which refers to the claimant's dismissal that day and states – "*Hi H, just a FYI today* ***we dismissed K. Manir through the AWOL process. He has been LTS since February 2019.*** *Thanks G.*"

45. Mr Cheema's reply sent on 27 December 2019 at 16:25 is:

> **"Thanks G, it is the right outcome and we need to continue to move some of the others on too."**

46. The 'others' referred to are the 'others' on long term sickness absence identified by Ms Trees. These communications appear to signal that dismissal through the AWOL process was the 'right' way to remove the claimant and four other employees identified as on long term sick absences (LTS).

47. In reply on 30 December 2019 at 08:37 Ms Trees emails Mr Cheema. "**Agree***. We have three remaining on LTS, one is currently only at CAP1, the other two are progressing through GIP so we are awaiting an outcome of these before any next movement.*" Then a reply from Mr Cheema on 2 January 2020 – "**thanks the sooner we can move them on the sooner the numbers start to drop and *we can get a truer reflection of the resource position***." (underlined text my emphasis)

48. The claimant is concerned about the reference to dismissal being the 'right' outcome when Mr Cheema would have had no knowledge of the particular circumstances of his dismissal to make that judgment. Ms Trees agreement to 'moving on' other employees on long term sick in the same way indicates a hidden agenda was in operation and bad faith in the dismissal process. He asserts pressure was being applied by senior managers in the business to dismiss the claimant and others identified as long-term sick (LTS) using any means possible and in his case by using the AWOL process in bad faith. To support this, he questions the undue haste to dismiss him and why it was necessary to have Ms Trees, a senior manager present in his dismissal meeting as a 'note taker'. Why did she stay on in the meeting after he did not attend, unless she was involved in the decision-making process? Unfortunately, Miss Trees was not called as a witness and did not give any evidence at this hearing to answer those questions or rebut the evidence the claimant relies upon to suggest bad faith.

49. Mr Pitts was adamant that he did not have 'any discussions' with Ms Trees about the decision, but could not explain why she needed to attend as note taker or why she remained in the meeting when the claimant did not attend. Mr Pitts could also not explain why Ms Trees refers to "we" in her subsequent email communication about the claimant's dismissal or why the letter of dismissal refers to "we" in relation to the decision to proceed with the hearing in the claimant's absence or why the decision could not be delayed for further enquiries to be made or why Miss Trees was appointed as the manager who would hear any appeal against dismissal.

50. A further piece of evidence that the claimant relies upon is the inconsistency in the oral evidence of Mr Pitts in relation to the timing of the call to Human Resources. Mr Pitts said that the meeting started at 1pm and he spent 15 minutes waiting for the claimant and then contacted Human Resources for advice before making his decision. The log of the call (page 325 in the bundle) records a call being made

on 27 December 2019 at 2:36pm. It was the respondent's case that the call was made when the hearing was adjourned for a decision to be made by Mr Pitts. His oral evidence was inconsistent with evidence and the contemporaneous documents. This evidence would suggest a discussion between Mr Pitts and Ms Trees lasting for over an hour, in the claimant's absence, before any contact with HR was made. Mr Pitts could not explain the inconsistency and maintained that he made the decision without any input from Ms Trees.

51. I did not find Mr Pitts to be a credible witness. I agreed with the claimant that the arrangements made in advance of his hearing for a senior manager to attend as a note taker and to decide to hear any appeal were highly suspicious and unusual. Ms Trees presence and her active and unnecessary involvement in the process and her subsequent communications with Mr Cheema indicate that she was part of the decision-making process, despite Mr Pitt's assertions to the contrary.

52. The claimant was not aware of these communications at the time but has now been made aware of them and uses that evidence to question the fairness of his dismissal. As the claimant says in his submissions, Mr Pitts could have tried to contact him on the date of the hearing if he had wanted him to participate, but did not do so, which suggests bad faith and a predetermined outcome. He did not carry out any investigations with Ms Grey to try to answer the questions identified which was odd, given her previous involvement and the fact she knew that the 'missing' fit note had been obtained on 20 November 2019 and no issue had been raised by Ms Grey as at 11 December 2019 in her last letter to the claimant because the absence had been explained to her. He also knew that from February 2019 to November 2019, the claimant's long-term sickness absence was for work related anxiety but was deliberately ignoring that evidence.

53. Mr Pitts confirmed that in making the decision to dismiss and in treating the absence as unauthorised, he did not consider any information about the previous absence history. He only considered the period from 11 November 2019 to the date the letter was sent to the claimant which treated the absence as AWOL (absence without leave). He was only using evidence that went against the claimant and did not consider any evidence that went in his favour. He did not offer the claimant an opportunity to provide a fit note for that period, or try to establish, if one existed. He did not make any enquiries with Ms Grey. He decided 'against' contacting the claimant on the day of the hearing but could not explain why he had decided against that when dismissal was contemplated. It was clear from the process Mr Pitts followed prior to and at the dismissal hearing that he had not carried out any investigation to establish the facts or taken any steps to ensure fairness to the claimant before dismissal. He had a closed mind and was acting in bad faith to achieve the predetermined dismissal outcome that he and Ms Trees desired from the outset.

54. On 6 January 2020, the respondent received the 'returned' letter from Royal Mail dated 11 December which had invited the claimant to the meeting on 17 December 2019 and confirmation that the letter sent on 20 December 2019 had not been collected from the sorting office.

The Appeal

55. On 13 January 2020, the claimant appealed the dismissal. The letter states "*the reason for my appeal is **I was not aware of the meeting** or the letter sent 17 or 20 December by S. Pitts. I believe these would have been sent by recorded delivery, so can the proof of signature be forwarded to me and my union rep. Could*

we both also have a copy of the meeting notes from 27 December 2019. ***I do have fit notes to cover the period of alleged unauthorised absence****. I await your response.*"

56. The dismissal letter identified Ms Trees as the appeals officer even though she was the note taker at dismissal. The claimant complained and requested another manager who had no previous involvement as that would be a 'far fairer approach' to take.

57. He also provided a fit note dated 2 January 2020 which covered the period 22 December 2019 to 5 January 2020 and a copy of the missing fit note for the period 11 November 2019 to 22 December 2019. All the fit notes the claimant provided in the period February 2019 to 5 January 2020 state 'work-related stress and anxiety'.

58. On 28 January 2020, Z. Shaw was appointed to hear the claimant's appeal and Ms Trees as the note taker at appeal. Again, it is unusual for such a senior manager to be asked to attend as 'note taker' at a disciplinary hearing and then again at the appeal hearing. Fortunately for the respondent, when Ms Shaw was not able to hear the appeal, Helen Deary stepped in as the appeals officer accompanied by a more junior employee, Helen Young, as note taker.

59. The appeal hearing was arranged for 12 March 2020 at 11am at a coffee shop. The handwritten notes of the appeal hearing are at pages 176 to 181 of the bundle. The notes were signed by the claimant to confirm their accuracy. The claimant was accompanied by his union representative Mr Muqit. The claimant confirmed that he had not received the letters of 17/20 December 2019. The first had not been delivered by Royal Mail. The second letter had not been collected from the sorting office and the claimant had not received notification of it. The claimant said he had not received either letter by ordinary post. Miss Deary checked that the address the claimant had provided was correct.

60. The claimant's alleged non-attendance at the meeting on 25 October 2019 was also discussed at the appeal hearing. In cross-examination, Mr Guyan pointed out the fact that the claimant had got his timings about that day wrong. At the appeal hearing he said he was there at 12:50 and in his witness statement he said he had been there at 1pm. The claimant accepted that he was wrong and must have made a mistake.

61. Miss Deary recalls (paragraph 28) that the claimant provided her with a copy of his fit note confirming he was not fit for work from 11 November 2019 to 22 December 2019 (page 122). The claimant told her a friend had handed this into reception on 20 or 21 November 2019. The claimant provided her with a copy his fit note which confirmed he was not fit for work from 22 December 2019 to 5 January 2020. Both fit notes confirmed the reason was anxiety (page 153).

62. Pausing there, Miss Deary accepts that at the Appeal hearing, the claimant had provided her with fit notes which covered the period when the claimant's absence had been regarded at the dismissal stage as an 'unauthorised' absence. Although that evidence exculpates the claimant, Miss Deary attached no weight to it. She did not consider whether the claimant's past long-term absence for anxiety might be an indicator of any future absence or might have explained a current unexplained absence. She did not consider whether the absence could properly be treated as an absence without leave or whether the absence was explained or her assess whether the conduct relied upon to dismiss was sufficiently serious to be treated as 'gross misconduct'.

63. The only enquiries she made with Mr Pitts and Ms Grey on 17 March 2020 were to address the points raised by the claimant at the appeal hearing (page 181). Miss Deary asked Ms Grey to confirm if the claimant's friend had dropped off a fit note which would cover his absence from 11 November to 22 December. She had already been provided with the copy fit note issued by the GP dated 20 November 2019 which was the fit note Ms Grey confirmed the claimant had told her about on 22 November 2019 which had not been received. This evidence was consistent with the claimant's account at the Appeal that he had obtained it from his GP at the time (20 November 2019) and Ms Grey had accepted his explanation and had not raised any issues about this fit note at the time with him or subsequently. Miss Deary asked Miss Grey if the claimant had been contacted by email. Miss Grey advised that she was not aware that email could have been used as a method of contact and as far as she was aware the claimant had never requested contact by email.

64. The claimant had also questioned Mr Pitts adjournment of the disciplinary meeting on 27 December 2019, in particular, the timing of it and the reason for it. Miss Deary reviewed the records and noted a telephone call was logged on the system confirming that Mr Pitts had contacted Employee Relations for advice on 27 December at 14:36 and she concluded that was the reason for the adjournment.

65. Miss Deary confirmed the dismissal in an appeal outcome letter dated 20 March (page 183). The letter states:

> "*Further to our meeting on 12 March 2020 when you appealed against your dismissal I write to confirm my decision. You were accompanied at the meeting by Mr Muqit.*
>
> *I have given careful consideration to the points you raised and decided that the decision made by Simon Pitts to dismiss you stands. The reasons for this are:*
>
> - *You stated you were not aware of the dates of the meetings that were booked. From reviewing the call logs and dates of letters issued, multiple attempts were made to advise you of the dates of the meetings. You were unable to explain why you didn't answer the telephone calls made to you, when at other times you have received calls on the same telephone number. Whilst you raised points around issues with 'post' delivery, you have received and responded to other correspondence issued to your home address, which was validated at the appeal hearing as being correct.*
> - *I have queried as to whether contact was attempted with your next of kin or union rep. Hannah Grey has confirmed she had previously tried to call your next of kin on 26 July 2019. However, there was no answer and due to the nature of the call she did not leave a message. Post this contact was maintained through calls with you confirming voicemail messages received. There is no note on the file to say that you agreed for Computershare to make contact with your union rep apart from the note taken in the appeal meeting requesting copies of future correspondence are provided.*
> - *You asked why copies of letters were not emailed to you. It is not usual practice for Computershare Loan Service managers to correspond with staff via personal email, Hannah Grey had confirmed that as contact had been maintained by phone call and letter and you had not requested that she correspond with you by email, this is why this had not taken place.*

- *You stated no agreed contact plan was in place which is why you had not kept in touch. I have reviewed welfare meeting notes signed by yourself whereas agreed between you and your manager that contact would be made each Friday.*
- *You stated that you believe that there has been insufficient duty of care taken. From reviewing your file in full, from the beginning of your period of sickness, Computershare have made every attempt to keep in touch with you through* ***various methods of contact which you had engaged with until the point the absence without leave started.*** *There are documented call logs of contact attempts and proof of posted letters. I believe that your managers made every effort to contact you to inform you of meetings that were booked and to check on your welfare,*
- *You stated that managers did not attend the meeting on 25 October 2019. I have reviewed the file notes and Hannah Grey had arrived at 1.02pm and you were not in attendance. Call logs detail the attempts to ring and locate you which were not answered. I note that you had not invited your union rep to attend the meeting on 25 October 2019 despite your statement in the appeal that you invited your union rep to attend every meeting with you. I believe that Hannah Grey did attend the meeting at the location that had been agreed.*
- *Regarding the sick note covering the period of 11 November 2019 you stated this was dropped off by your friend at Crossflats reception on 20 or 21 November. There is no record of this event taking place and I have queried as to whether CCTV is available, however CCTV records are stored for 90 days then deleted. Computershare Loan Services regularly handles important documents that need to be delivered within the business and I have no reason to believe that the sick note would not have been delivered to the correct department.* ***In addition, you spoke to Hannah Grey on 22 November 2019 and in the notes of the telephone conversation, whilst the sick note is referred to*** *no mention is made that this has been delivered to the Crossflats office.*
- *You asked for confirmation in the meeting notes stating the times of the adjournments. I can confirm your case notes that the meeting started at 1pm and an adjournment was made to consult with HR at 2.54pm.*
- *You stated that meeting notes referred to capability meetings, the invite letter clearly stated the matter was being considered as gross misconduct and this was also confirmed in your dismissal letter.*
- *You asked if the dismissal date and the dismissal letter needs to be changed as this was posted to you on 27 December 2019. I can confirm the date of dismissal is the date the dismissing manager's decision was made. It is reasonable to assume the letter would have been received on Saturday 28 December, Monday 30 December 2019 or Tuesday 31 December. Therefore, I do not uphold your appeal."*

66. Miss Deary did not investigate whether Mr Pitts had made any attempt to contact the claimant on the day of the hearing before proceeding with it or to establish what (if any) investigation had been conducted to answer questions posed by human resources which were left unanswered. She did not ask Mr Pitts if he had considered the claimant previous clean disciplinary record, his length of service

and the fact he had no previous history of performance/attendance issues. She herself does not refer to any of those mitigating factors in her outcome letter.

67. Miss Deary denied that she was influenced by Ms Trees or anyone else. She decided the claimant was not credible in the account he gave to her. She chose to attach no weight to the documentary evidence she had been provided which supported his account.

68. In cross-examination the claimant took Miss Deary to the emails which refer to the dismissal as the 'right outcome' and it was put to her that it was unlikely she would have reached a different and 'wrong outcome' at the appeal stage. She disagreed. She was asked if she had considered whether it was possible that there was an innocent explanation for the claimant's non-attendance at the 27 December hearing or that with the benefit of seeing his fit notes, his absence was authorised and wrongly regarded as unauthorised. She did not accept there could be any innocent explanation for the missing fit note or that the claimant could have had a good reason for not attending the dismissal meeting.

69. I found that Miss Deary's conducted the appeal with a closed mind. She ignored any past absence history any exculpatory evidence or explanation provided by the claimant or any mitigating factors. She was not open to the possibility of any innocent explanation or any outcome other than to confirm the dismissal.

Applicable law

70. Section 98(1) provides that it is for the employer to show the reason for the dismissal and that reason is a 'potentially' fair reason. Section 98(2)(b) provides that a potentially fair reason for dismissal is one relating to the conduct of the employee.

71. It is for the employer to show the reason. In Abernethy -v Mott, Hay and Anderson CA 1974 ICR 323 it was held that "a reason for the dismissal is a set of facts known to the employer or it may be beliefs held by him which cause him to dismiss the employee".

72. Section 98(4) provides that "where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

    (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
    (b) shall be determined in accordance with equity and the substantial merits of the case.

73. The guidelines established in **British Home Stores-v Burchell 1978 IRLR 379,** apply in conduct dismissals. Has the respondent shown it had a genuine belief that the claimant was guilty of the misconduct, and then applying a neutral burden of proof, did the respondent have reasonable grounds to sustain that belief at the stage it was formed, and was a reasonable investigation conducted?

74. Those guidelines are used regularly by Tribunals and have been upheld more recently by the Court of Appeal in **Graham v Secretary of State for Work and Pensions (Jobcentre Plus) 2012 EWCA Civ 903 2012 IRLR 75**. Aikens LJ provides a useful summary of how the Tribunal should approach its task:

> 35 '…*once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.*
>
> *36 If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider,* ***by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable.***

75. In the context of section 98(4) ERA 1996, the three relevant elements to consider are: Did the employer have reasonable grounds on which to sustain his belief; Had the employer carried out as much investigation as was reasonable; and was dismissal a fair sanction to impose in all the circumstances?
76. In deciding the fairness of the process Tribunals need to consider the whole of the disciplinary process including any appeal process and how the appeal is conducted, to decide whether it cures any earlier procedural defect. Whether the appeal is a review or rehearing, it is "*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, whether the overall process was fair notwithstanding any deficiencies at the early stage*" (Taylor -v- OCS Group Ltd (2006) EWCA Civ 702).
77. For the wrongful dismissal (breach of contract in relation to notice pay), a very different legal question must be answered because the Tribunal does have to decide on the balance of probabilities whether the claimant was in breach of contract to the extent that his conduct might be regarded as repudiatory which entitles the employer to summarily dismiss? It is only if the respondent was not so entitled, that the claimant is entitled to damages for the breach by way of notice pay.

Submissions

78. Both parties made oral submissions. Mr Guyan's submissions were very comprehensive. He helpfully provided a separate bundle of authorities which contained the applicable cases.
79. The claimant made brief oral submissions focussing on the matters he had raised during the hearing in his questioning of witnesses which he contends proves the dismissal was an unfair and wrongful.

Conclusions

80. The first issue I had to decide was the reason for dismissal? Was it the potentially fair conduct reason relied upon by the respondent or was there a 'rush' to dismiss the claimant using the AWOL process, as part of a hidden agenda by senior managers acting in bad faith to dismiss employees on long term sick? It was clear

that both Mr Pitts and Ms Deary were keen to exclude the long-term absence and only consider the most recent period of absence, in order to treat it as unexplained and unauthorised absence (AWOL) to dismiss. As at 17 December 2019, Mr Pitts had already decided he would regard the claimant's absence from 11 November 2019, as AWOL (see paragraph 34-35). His asserted reasons for dismissal (see paragraph 42) in the dismissal letter headed 'unauthorised absence' refer to the claimant not providing ***'a current fit note or explanation for his absence".***

81. The claimant has challenged that asserted conduct related reason on the basis it is factually incorrect and was not the real reason for dismissal. It is factually incorrect because the respondent knew his absence was explained. After a lengthy period of explained long term sickness absence managed by Ms Grey, Mr Pitts first decision was to change the absence management process to a disciplinary process for unauthorised absence without leave. From the outset of that process he treated the claimant's absence as unauthorised and unexplained. Ms Grey knew at that time that the absence was explained. She knew the reason for it, the dates of the fit note that had been obtained and that the absence was a continuation of a long-term absence which was supported by fit notes. Mr Pitt's decision made jointly with Ms Trees was to proceed with undue haste in the claimant's absence to dismiss him. Mr Pitts unexplained and deliberate failure to attempt to make contact with him, his failure to investigate the absence or to try to get answers to the questions which had been identified as necessary for a fair decision to be made were deliberately left unanswered. The continued presence and active participation of Ms Trees, as senior manager, in the decision-making process. Mr Pitts was acting in bad faith to the detriment of the claimant to achieve the predetermined desired outcome. The emails exposed a hidden agenda to 'move' employees on long term sick out of the business in the claimant's case by using AWOL as if it were a 'quick fix' for the business. Senior managers identified dismissal as the 'right outcome' before any appeal. These were all findings of fact, which support the claimant case that the respondent asserted conduct reason was not the real reason for dismissal (paragraph 42- 53). Mr Pitts and Miss Trees were acting in bad faith by dismissing the claimant for 'gross' misconduct as part of a hidden agenda to remove employees on long term sickness absence out of the business. The respondent has failed to prove a potentially fair reason, the dismissal is automatically unfair.

82. Even if it the dismissal was not automatically unfair, in the alternative I considered what the position was if it was a potentially fair conduct reason. Has the respondent shown it had a genuine belief that the claimant was guilty of gross misconduct, and then applying a neutral burden of proof, did the respondent have reasonable grounds to sustain that belief at the stage it was formed, and was a reasonable investigation conducted?

83. Mr Pitts jointly with Ms Trees was acting in bad faith in dismissing the claimant in the way that he conducted the dismissal meeting and by his approach to decision making. When Ms Trees informed her manager, that the AWOL process has been used to dismiss the claimant on 'long term sick since February'. Mr Cheema thanks her and tells her it was the 'right outcome' not only for the claimant but he suggests others on long term sick should also be moved on. He had no knowledge of the claimant's individual circumstances. The only fact he is given about the claimant is that he had been on long term sick since February 2019. Ms Trees response is to 'agree' to his suggestion of moving others along. These are senior managers in the business talking about the 'dismissal' of the claimant and potentially 'others' on

long-term sickness absence in a very cold and calculating manner referring to them as a 'resource' issue (paragraph 47).

84. My finding that Mr Pitts as the dismissing officer was acting in bad faith to the detriment of the claimant in the decision-making process goes to the heart of the equity and fairness of the dismissal. Mr Pitts had a closed mind from the outset. He did not want to give the claimant any opportunity to explain the absence or his failure to attend the hearing which might have avoided dismissal. When Mr Pitts sent the claimant the letter (20 December 2019) inviting him to a disciplinary, he knew the claimant's long-term sickness absence from February 2019 to 10 November 2019 was for 'anxiety'. He knew the claimant had provided previously provided 10 fit notes from his GP for anxiety/work-related anxiety. He knew that absence history was relevant background. He deliberately ignored that background to dismiss the claimant. Ms Grey knew on 22 November 2019 that the claimant had obtained a fit note from his GP on 20 November 2019, which covered the period 10 November 2019 to 22 December 2019 and she was expecting him to bring the fit note to the next capability meeting. She was treating his absence as authorised and managing it as a 'capability' issue not a 'conduct' issue. Mr Pitts did not attempt to call the claimant to try to find out why he had not attended or ask him if he had a copy of the fit note or to explain the absence, which had already been explained to Ms Grey. The claimant had no reason to believe that the explanation already provided had not been accepted. His absence should have been described as that stage as explained but awaiting a fit note. The reason Mr Pitts did not take any steps to investigate the absence was because he had already made his mind up. Mr Pitts had closed his mind to any evidence or explanation that would exculpate the claimant, because that did not fit in with the desired 'right' outcome he and his manager had decided to the detriment of the claimant. The bad faith of the decision makers permeates all aspects of the fairness of the decision which leads me to conclude that Mr Pitts did not conduct any reasonable investigation or have any reasonable grounds to or genuine belief that the claimant was guilty of gross misconduct.

85. At the appeal stage, the claimant's grounds of appeal were clear (paragraph 55), he did not attend the appeal because he did not get the invitation letter dated 20 December 2019 and requests proof of special delivery and he confirmed that he could provide fit notes to cover the absence that he believed had wrongly been regarded as unauthorised. The proof of delivery is the method the respondent uses to satisfy itself that important letters are received. This was relevant contemporaneous documentary evidence the respondent could consider to properly decide the appeal. An appeal process can cure any earlier procedural defect if the decision maker adopts a fair process, is thorough in the process followed and is open-minded. Miss Deary had closed her mind to any evidence or explanation that would exculpate the claimant (paragraph 69). While she is the decision maker and it is her role to assess the evidence and credibility, and to make findings of fact, she was not even open to the possibility of finding in the claimant's favour. She did not question the presence of Miss Trees a senior manager as a note taker at the dismissal or whether she was involved in the decision-making process. The contemporaneous evidence she had of the tracking data, the fit notes and other evidence was ignored. The claimant's previous 10 fit notes indicate a long term continuing absence for anxiety which had been managed under the attendance management procedure which the claimant had '*engaged with until the point the absence without leave started*' (paragraph 65). Ms Grey had confirmed to Miss Deary that the claimant had informed her of the fit note he had obtained

from the GP on 20 November. That evidence was consistent with the evidence she saw at the appeal hearing of the missing fit note for the period 11 November 2019-22 December 2019 issued on 20 November 2019. She also had the tracking data which supported the claimant's account. With all the evidence she still excluded any possibility of an innocent explanation for the claimant not attending the dismissal hearing or finding the absence had wrongly been treated as 'unauthorised'. Miss Deary did not adopt a fair and thorough process and was not open-minded. For those reasons the dismissal was procedurally and substantively unfair.

86. For the wrongful dismissal complaint, I have made my findings of fact that the claimant had not received the letter of 20 December 2020, which was the reason he did not attend the dismissal meeting. He only had knowledge of that meeting when he received the letter of dismissal on 30 December 2029. He had informed Ms Grey on 22 November of the fit note covering the period 11 November to 22 December 2019. She had accepted his explanation. The absence should not have been treated as an unauthorised absence particularly when a copy of the fit note issued by the GP on 22 November 2019 was provided to the respondent at the Appeal. The respondent has not proved the claimant committed a repudiatory breach of contract which would entitle the respondent to dismiss the claimant without notice or notice pay. The claimant is entitled to damages of 5 weeks' notice pay from 30 December 2019 (the date he received the letter informing him of his summary dismissal) which is the effective date of termination.

Remedy

87. The claimant last fit note expired on 5 January 2020. He was then fit for work and was in receipt of benefits (universal credit) for January – April 2020. He looked for work from 5 January 2020 until 6 April 2020 when he obtained new employment at a salary of £23,836. His salary with the respondent was £24,489.86. He also received fringe benefits of private medical insurance (PMI) £51.91 gross per month.
88. The effective date of termination is 30 December 2019. The claimant's gross annual salary with the respondent was £24,469.86. His weekly gross pay was £470.58. His weekly net pay was £382.38. His date of birth is 12.8.1987. He was under 41 years of age as at dismissal.
89. The clamant claims a basic award of £2,352.90 (5 complete years x £470.58) and a compensatory award leaving it to the Tribunal to decide any award as appropriate based on the annual difference in salary between his new and old job of £633.96 and £622.92 for loss of PMI (£51.91 x12) so an annual loss of £1,256.88. The pay differential was not in dispute.
90. Mr Guyan agrees the basic award figure but argues that the claimant has not mitigated his loss and could have found a job earlier than he did. The claimant says he made attempts to find work which were unsuccessful until 6 April 2019. He did not keep the records of the attempts he made because he did not think he had to. He says 3 months was not an unreasonable period given the climate at the time with COVID and the fact he had been dismissed for gross misconduct. He says he was lucky to find work as quickly as he did. It is the duty of the employee who has been dismissed to act reasonably in mitigating his loss. The respondent has not provided evidence of any jobs the claimant could have applied in that period and the claimant has no documentary evidence of the applications made he made. I accepted the claimants oral evidence that he had made attempts to find work. Given the climate at the time, the timing of his dismissal leaving him unemployed

after Christmas and the fact he had to explain to any prospective employer that he was dismissed for gross misconduct, the claimant has in my view taken reasonable steps to mitigate his loss.

91. Mr Guyan submission was that the dismissal was substantively and procedurally fair and in the alternative, he contends that a 100%, Polkey reduction should be made to reflect the chance the claimant would have been dismissed in any event. He submits the central issue was that the respondent believed the claimant was guilty of gross misconduct and that a different process would not have led to a different outcome. On that basis and with that level of certainty, he submits no compensatory award should be made. The claimant disagrees and suggests that there should be no reduction because the dismissal process was tainted by bad faith at senior management level and it could not be confidently predicted that a fair process would have achieved the same outcome.
92. It is for the employer to adduce evidence to support a Polkey reduction and in this case the 100% reduction is suggested. The dismissal was found to be substantively and procedurally unfair. While I do not agree that as at the date of dismissal the outcome would certainly have been dismissal given the finding of bad faith that is made it is difficult to speculate what would have happened absent bad faith going forward. I was not persuaded that it was just and equitable to make any Polkey reduction.
93. The respondent also argues that there has been contributory conduct by the claimant and any award should be reduced by 75% to reflect his blameworthy conduct which contributed to his dismissal. The claimant disagrees and says his conduct was not blameworthy and he has not contributed to his dismissal to any extent and it would not be just and equitable to reduce the award.
94. Mr Guyan helpfully included some authorities on this point in the authorities bundle he provided. In **Steen -v-ASP Packaging Ltd 2014 ICR 56**. The Employment Appeal Tribunal provided some helpful guidance. A tribunal is required to identify the conduct said to give rise to contributory fault and then to determine whether that conduct was blameworthy. That in so doing, the focus was on what the employee had done, not on the employer's assessment of how wrongful that conduct was: that whereas in making the basic award under section 122(2) the only question then was whether it was just and equitable to reduce the award, under section 123(6) assessment of the compensatory award required the Tribunal to consider whether the blameworthy conduct identified had caused or contributed to the employees dismissal to any extent and if so to decide the extent to which it was just and equitable to reduce the award. It is the dismissal and not the fairness of the dismissal that needs to be considered here. In **Nelson -v- BBC** the concept of blameworthiness conduct includes conduct which was "perverse, foolish or bloody minded as well as some but not all unreasonable conduct".
95. I considered the findings of fact that I have made that support a deduction on just and equitable grounds. The claimant had been told by Ms Grey in September 2019 and November 2019 that he needed to get his fit notes to the respondent in on time, He did not tell Ms Grey his friend had dropped off the fit note on 22 November 2019. He did not tell Mr Pitts he was having difficulty getting an appointment with his doctor when his fit note expired on 22 December. There was some onus on the claimant to do those things and be more proactive in making contact in good time and ensuring fit notes were provided on time and checking the information he was required to provide had been received by his employer. He could also have been more proactive in checking that post related to work was passed on to him from other family members if they had signed for it. Taking a broad common-sense view of the situation those are findings of 'blameworthy' conduct which in my view have

contributed to some extent to creating a situation which was then used in bad faith to dismiss the claimant. The claimant says his conduct is not blameworthy at all and the respondent puts it at 75% (that he is largely responsible). I do not agree given my finding of bad faith in the dismissal process that it is just and equitable to reduce the basic and compensatory awards to that extent or that no reduction in the award should be made. In my view 25% is the more appropriate level to reflect the level extent of the 'blameworthy' conduct and the amount that is just and equitable to reduce the basic and compensatory awards.

96. Applying that 25% reduction to the basic award of £2,352.90 in the sum of £588.22 reduces the award to £1,764.68
97. For the compensatory award. There are 2 periods of loss the immediate period of loss that runs from the end of the notice period (27 January 2020 to 18 December 2020 of 46 weeks) which is the prescribed period. In that period the claimant received universal credit of £1,229.67. This is benefit paid which would be deducted from any compensatory award by way of recoupment and the Recoupment Regulations apply. This means that part of any compensatory award (the prescribed amount) is not payable immediately and is only payable after a recoupment notice is served on the respondent which will confirm the actual amount of benefits the claimant has received in the prescribed period so that sum can be recouped before the balance is paid to the claimant. The total award less the prescribed amount is payable immediately to the claimant.
98. The claimant has then identified an annual pay and benefits differential between his new job and old job in the sum of £1,256.88. For the period 27 January 2020 to 6 April 2020(**10** weeks) the immediate loss is 5 x £382.38 = £1,911.90 (**corrected to 10 X £382.38=£3,823.80)**.
99. For the period 6 April 2020 to 18 December 2020 which is 36 weeks loss of the wage differential of 36/52 x £1256.88=£870.15.
100. The prescribed amount is £1911.90 + £870.15=£2,782.05. **(corrected to £3,823.80 + £870.15 = £4,693.95**) To that sum loss of statutory rights is added of £300 equalling £3,082.05 (**corrected to £4,993.95**) and a deduction of 25% is applied for contributory conduct of £770.51**(corrected to £1,248.49.)** making the total prescribed amount £2,311.54(**corrected to £3,745.46)**
101. As to future loss from the 18 December 2020 a further 3 months to compensate for the continued differential in earnings which I consider is just and equitable to award in the sum of 12/52 x£1256.88=£290.05 which is also reduced by 25% for contributory conduct. The calculation of the total award is set out in the judgment.

Wrongful Dismissal

102. The prescribed period would normally run from the 30 December (effective date of termination) to the date of this remedy judgment. However, for the wrongful dismissal award the recoupment regulations do not apply, so the prescribed period will begin from the end of the period in which damages are awarded (27 January 2020).
103. The claimant is entitled to 5 weeks statutory notice in respect of his 5 completed years of service. The EDT is 30/12/2019 so 5 weeks' notice runs to 27 January 2020 and is calculated as 5 x £470.58= £2,352.90 gross. The claimant had exhausted his entitlement to statutory sick pay prior to dismissal and it is therefore assumed that statutory sick pay has not been paid in this period to count towards meeting this liability.

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Employment Judge Rogerson
26 February 2021