Case Number: 2300685/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr H Ouedraogo	and	ABM Facility Services UK Ltd

Held by CVP on: 4 & 5 May, 26 July, 4 August, 5 October 2021 and 6 October 2021 (in chambers)

Representation
Claimant: Mr A Decker, Claimant's friend
Respondent: Mr A O'Neill, Solicitor

Heard by: Employment Judge Harrington, Mr J Hutchings and Mr S Townsend

JUDGMENT

1 The Claimant was unfairly dismissed by the Respondent;

2 The Claimant is awarded the sum of **£10,316.64** (ten thousand, three hundred and sixteen pounds and sixty four pence);

3 The amount of the prescribed element is **£8,425.98**;

4 The prescribed period is 25 November 2019 to 6 October 2021;

5 Of the total award of **£10,316.64**, the amount of **£1,890.66** exceeds the prescribed element.

REASONS

Introduction

1 By an ET1 received by the Tribunal on 19 February 2020 the Claimant, Mr Ouedraogo, brings a claim of unfair dismissal against the Respondent, ABM Facility Services UK Limited.

2 Previous Preliminary Hearings were held in this case on 31 July 2020 and in January 2021. By a Judgment dated 23 November 2020, the complaint of an unauthorised deduction of wages was dismissed upon withdrawal by the Claimant [57] and at the hearing in January 2021, a claim of indirect discrimination was struck out. Accordingly, the claim for unfair dismissal proceeded to this final hearing. At the start of the full merits hearing, the issues in the case were clarified and confirmed by the parties to be as follows:

2.1 Was there a potentially fair reason for the Claimant's dismissal in section 98(1) and (2) ERA 1996? The Respondent says SOSR section 98(1)(b);

2.2 Was this capable of justifying the dismissal?

2.3 Has R proved that this was in fact the reason for dismissal?

2.4 If not, was there any other reason capable of justifying the dismissal within Section 98?

2.5 Did the Respondent act reasonably in all the circumstances in treating that reason as sufficient section 98(4) ERA 1996.

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*."

The Claimant challenges the fairness of the dismissal with reference to the following issues:

i) C not notified properly of the meeting on 25 November 2019.
ii) C not notified about his right to be accompanied.
iii) C was not given prior notice to provide evidence of his status.
iv) C was not given a dismissal letter.
v) C was not notified of any internal rights of appeal against dismissal.
vi) R's refusal to reinstate C once the Home Office implemented the Immigration Tribunal's decision, requiring him to reapply which he declined to do.

2.6 Was the dismissal fair?

2.7 What compensation should be awarded?

2.8 Specific issues:

i) The award must be what is just and equitable in all the circumstances (*W Devis & Sons Ltd v Atkins [1977] IRLR 314, [1977] ICR 662*)

ii) Should there be a reduction for *Polkey?*

iii) Has C contributed to his dismissal? R says C wholly to blame for his dismissal.

iv) Has C failed to mitigate his loss? R refers to offers of employment starting soon after the termination

2.9 Is this a dismissal to which the ACAS Code of Practice on Discipline and Grievance applies? If so, has R unreasonably failed to comply with it? If so should there be any uplift?

3 The hearing was conducted remotely before a full Tribunal, on the dates set out above. The Claimant was represented by his friend, Mr Decker and the Respondent by Mr O'Neill, solicitor. The Tribunal heard evidence from the Claimant and from Mr Buttigieg, Mr Hutchinson and Ms Buckingham on behalf of the Respondent. Each witness provided a written witness statement. In addition to those statements, the Tribunal was referred to the following materials:

3.1 Tribunal Bundle, paginated 1 – 221;
3.2 Skeleton Argument from the Claimant dated 28 April 2021;
3.3 Authorities bundle paginated 1 – 60;
3.4 Respondent's written submissions dated 5 October 2021;
3.5 Chronology;
3.6 List of Issues.

4 At all times, the Claimant was assisted by a Tribunal appointed French interpreter. Both parties made closing submissions. Due to the need to complete the hearing within the allocated time, the Respondent was content that its written closing submissions did not need to be read out to the Tribunal in their entirety.

5 For the avoidance of doubt, the numbers appearing with the square brackets in this judgment refer to the trial bundle and, when prefaced with 'S', refer to the statement bundle.

The Facts

6 The findings of fact are set out below. The standard of proof is on the balance of probabilities, namely what is more likely than not.

From 23 January 2017 to 25 November 2019, the Claimant was employed as a multi skilled operative by ABM Facility Services UK Limited, a provider of cleaning, security, building maintenance, waste and facilities management services ('the Respondent'). The Claimant carried out relief security and, on occasion, cleaning work. He was based primarily at the Elephant and Castle Shopping Centre, although he did travel to other sites when required.

7 The Claimant was employed on a zero hours contract. He worked a fluctuating number of hours, including some overtime, alongside attending Lewisham College. For example, his payslip from January 2019 records 24 hours worked in 'Week 1' and 72 hours worked in 'Week 5' [150]. According to both parties, the Claimant's rate of pay was £11 per hour, although the Tribunal notes some differing hourly rates are referred to in the payslips in the bundle.

8 At all relevant times, the Respondent's deputy manager at the Elephant and Castle Shopping Centre was Daniel Hutchinson and the manager was Gavin Buttigieg. From around August 2019, Mr Buttigieg was promoted to the role of General Manager.

9 At the commencement of the Claimant's employment, the Respondent was provided with a copy of the Claimant's passport, which expired on 13 October 2019 [61] and a residence card, which stated that the Claimant was a family member of an EEA national. The residence card expired on 28 September 2018 [62]. The relevant context to these documents is that the Claimant entered the UK in 2012 with his wife (now former wife), who is a French citizen. He was issued with a residence card on 28 September 2013 and had previously been refused a permanent residence card in August 2018.

10 In or around November 2018 the Claimant moved house. The Tribunal heard evidence about the Respondent's system for changing the address of an employee on its systems and, from the Claimant, evidence that he had told managers on more than one occasion that his address had changed. The Tribunal is satisfied that it is more likely than not that the Claimant did inform the Respondent that he had moved – this information was probably provided to Alex (his previous supervisor), Mr Hutchinson or Mr Buttigieg. However, the change of address was not updated on the Respondent's HR system.

11 On 25 March 2019, the Claimant made a further application to the Home Office for permanent residence in the UK. His solicitor received a Certificate of Application dated 3 May 2019 [82]. This letter specifically referred to the Claimant's right to work,

You are permitted to accept offers of employment in the United Kingdom, or to continue in employment in the United Kingdom, whilst your application is under consideration and until either you are issued with residence documentation or, if your application is refused, until your appeal rights are exhausted.

The letter also had the following paragraph,

Note for employers
This document may form part of a statutory defence against liability to pay a civil penalty under section 15 of the Immigration, Asylum and Nationality Act 2006 for employing an illegal migrant worker. However,

it should only be accepted for this purpose if presented within 6 months of the date of issue and provided you can demonstrate that the document has been verified by the Home Office Employer Checking Service.

……..

We expect to decide applications for a Residence Card, Permanent Residence Card or Derivative Residence Card within six months from the date of application. After this date, the employee should be asked to present his or her Residence Card, Permanent Residence Card or Derivative Residence Card as evidence of continuing eligibility to take or continue in employment in the United Kingdom.' [82, 83]

12 The Respondent was aware of this document. In his witness statement, Mr Buttigieg refers to it providing the Respondent with a six month statutory excuse against liability for a civil penalty in respect of the Claimant's employment [S2]. On 23 May 2019 Ms Buckingham, one of the Respondent's HR advisors, conducted a Home Office Employer Service Check ('an ECS check'). This resulted in the issuing of a Positive Verification Notice [84]. The Notice confirmed that the Claimant had the right to work and that the check was valid for six months, expiring on 22 November 2019. The Notice gave the following instruction, '*You should carry out a follow-up right to work check on this person* ***on or before*** *this date*.' [84]

13 As a matter of fact, on 13 June 2019 a decision was made by the Home Office to refuse to grant the Claimant permanent residence in the UK.

14 By an email dated 22 October 2019, the Respondent's HR Compliance Manager asked Ms Buckingham for a copy of the ECS check completed earlier that year [102]. Ms Buckingham duly forwarded this to her later that day [101-102]. The Compliance Manager then sent a further email identifying that the ECS check was due to expire on 22 November 2019 [101]. This, in turn, prompted some communication between Mr Buttigieg and the Claimant.

15 In an email dated 9 November 2019 Mr Buttigieg forwarded a series of photographed documents which he had received from the Claimant [85 - 101]. They related to a hearing the Claimant had before the First Tier Immigration and Asylum Chamber ('the Immigration Tribunal') challenging the decision made on 13 June 2019. In particular, the Notice of Hearing confirmed the date for the hearing as 6 November 2019. In his email, Mr Buttigieg asks the following question, *'What are next steps as technically he has no RTW'* [101]; RTW referring to right to work.

16 In the event, another HR administrator conducted a further ECS Check, dated 16 November 2019. The outcome of the check is stated as follows,

'IMPORTANT: We are unable to provide you with a statutory excuse' [105]

17 It is clear from the entirety of this second ECS Check that the 'No Statutory Excuse Notice' does not mean that the Claimant does not have a right to reside and work in the UK but, rather, that the Home Office has not issued a Certificate of Application such that the Respondent, as employer, is provided with a statutory excuse against civil penalty.

18 Following the receipt of the second check, there were some further discussions between Mr Buttigieg and the Claimant. These took place on or around 18 November 2019. The Tribunal is satisfied that, at this stage, the Claimant was aware that the Respondent was very concerned about ensuring the Claimant had the right to work and that this issue was serious enough to risk his ongoing employment with them. In reaching this finding, the Tribunal referred to the Claimant's witness statement in which he describes sometimes hiding himself *'when at work to distract my manager's mind from me…'* and that he asked for an expedited judgment in his immigration appeal *'as the Immigration Judge was aware of the difficulties I was facing with my employer'* [S12].

19 Mr Buttigieg wrote a letter to the Claimant, dated 21 November 2019, inviting him to a further meeting on 25 November 2019 to discuss *'your ability to work in the United Kingdom'* [107]. In the letter, reference is made to earlier conversations on 9 and 18 November 2019 and the fact that the Claimant has been '*unable to provide valid right to work documents'*. The letter also includes the comment, *'You appealed the original decision from the court, however, you do not have a statutory excuse from 22nd November 2019.'* Of course, this statement demonstrates a misunderstanding of the Claimant's position. The Claimant was not appealing the original decision from the court. He had successfully appealed the Home Office's decision, made in June 2019, at the Immigration Tribunal.

20 The Tribunal accepts the Claimant's evidence that he did not actually receive the letter of invitation from Mr Buttigieg. This is because it was sent to his old address. The Claimant was therefore informed about the need to attend the meeting in a telephone call with Mr Buttigieg. The Claimant understood the reason for the meeting but the Tribunal accepts that, because he had not received the detailed letter, the Claimant was unaware that the Respondent had offered him the right to be accompanied to the meeting by a work colleague or trade union representative.

21 The decision in the Claimant's immigration appeal had been promulgated on 14 November 2019 and sent to him in the post. Shortly afterwards, and before the meeting on 25 November 2019, the Claimant also received a copy from his solicitor. By way of background, it is noted that on 13 November 2019 the appeal was allowed under the EEA Regulations. It was decided that the Claimant had retained rights as a family member of an EEA National and consequently has a right to permanent residence in accordance with Regulation 15 of the Immigration (EEA) Regulations 2016.

22 The meeting on 25 November 2019 was attended by the Claimant, Mr Buttigieg and Mr Hutchinson. Mr Hutchinson took notes [108-111]. The Tribunal has heard oral evidence from each of the attendees and there are differences in their recollections as to what was said in the meeting and what documents were produced. After considering this part of the factual matrix in detail, the Tribunal has made the following findings of fact:

22.1 The Claimant told Mr Buttigieg that there had been a court process and that he had been successful. Mr Buttigieg confirmed in his oral evidence that at the meeting the Claimant told him he had won his appeal and similar references are also included in the notes of the meeting.

22.2 It was a short meeting. This is supported by the modest length of the notes (just over 3 pages) and the Claimant's evidence that the meeting lasted approximately 15 minutes.

22.3 The Claimant took a copy of the Tribunal Judgment with him to the meeting [63-68]. In reaching this finding, the Tribunal noted that the Claimant understood that he needed a copy of the Judgment to show to his employer – this is why the Immigration Judge had been asked to expedite the production of the Judgment – and that he had received a copy prior to the meeting. In those circumstances, the Tribunal was satisfied that it was more likely than not that the Claimant would have taken it with him to the meeting.

22.4 Messrs Buttigieg and Hutchinson did not appreciate that the Claimant had a copy of the Tribunal's Judgment with him. In his evidence, Mr Buttigieg described the Claimant having some papers with him at the meeting but that he did not take copies of these nor did he record what these documents were. Mr Buttigieg referred to his understanding of the list of acceptable documents which the Claimant could provide (as advised to him by HR). In particular, Mr Buttigieg said he was looking for a biometric card or proof of his right to work. Mr Buttigieg was focused on the documents in that list and whether the Claimant could provide any of those. Mr Buttigieg also referred to some 'confusion' and, when he was asked about the written outcome of the appeal, he stated that he was 'no expert' and that was why he had proceeded to call the Home Office for advice. In answer to a further question about

this, Mr Buttigieg also accepted that the Claimant told him there was a decision letter from the Court.

22.5 Accordingly, the Tribunal was satisfied that it was more likely than not that the Claimant did have the Tribunal Judgment with him at the meeting but that Mr Buttigieg did not understand that this was an important and relevant document, that it proved the Claimant's appeal had succeeded and that he had a right to work. These findings are also consistent with Mr Hutchinson's recollection that there was a letter from a solicitor amongst the documents brought by the Claimant. The Tribunal considers that, again, this is likely to have been the Judgment of the Tribunal as we have not been referred to any other document which could be understood or mistaken for a solicitor's letter.

22.6 Mr Buttigieg had a limited understanding of the relevant legal position as to the Claimant's right to work. This is demonstrated by his mistaken statement in the letter inviting the Claimant to the meeting (that the Claimant was seeking to appeal the court's decision) and by the mistaken question he posed to the helpline (see further, paragraph 22.8 below). Mr Buttigieg did not understand that the Claimant had successfully appealed the Home Office's decision and that this, in turn, confirmed his ongoing right to work.

22.7 Through the meeting the Claimant made statements to the effect that he was waiting to get his '*right to work through'* [109]. With these statements he appeared to be describing the process of the Home Office now being required to issue the appropriate documents, following the Judgment of the Tribunal. This, no doubt, added to Mr Buttigieg's understanding that further confirmatory documents continued to be outstanding.

22.8 It is agreed by the parties that during the meeting, Mr Buttigieg made a telephone call in an attempt to seek advice about the Claimant's right to work. Whilst, during his evidence, Mr Buttigieg identified the number he telephoned as that of the Immigration Tribunal, the Tribunal was satisfied that it is likely that he telephoned a Home Office helpline. In reaching this finding, the Tribunal noted that both parties accept that a response was given to Mr Buttigieg's enquiry as detailed in the notes of the meeting. It is unlikely that such a response would have been given by an employee of HMCTS. Further, the meeting notes refer to the telephone call being answered as '*Hello this is visa and immigration …*' [110]. Calls to the Tribunal would not be answered in this way.

22.9 Having made contact with the helpline, Mr Buttigieg asked the following question,

'Hi there I have an employee here with me whos contesting his appeal that's been denied for his right to work. Is he allowed to work if he is contesting the decision of his appeal?' [110]

This, of course, was incorrect. The Claimant was not contesting the decision of his appeal. The Claimant had won his appeal.

22.10 Mr Buttigieg was told by the telephone helpline that the Claimant was unable to work until permission had been granted. Consequently, Mr Buttigieg then informed the Claimant that his contract of employment was being terminated. He also told the Claimant that if his right to work came through, he should let Mr Buttigieg know and he would get him back to work [111].

23 On 26 November 2019 the Claimant telephoned the Respondent's HR department to report his dismissal and the fact that his manager had not taken into account his court documents. He was provided with an email address to send in his documents. The concierge at the building where the Claimant was living helped him send an email with some attachments. This was sent on 28 November 2019 [113] with four pages of attachments [114-117]. It is clear from the emails within the bundle that that email was sent and received at 11.11am and that it was forwarded from the HR department that dealt with TFL, to the UK HR department team [113].

24 On that same day, 28 November 2019, the Claimant telephoned the HR department to see if the email had been received. He was told to telephone back later that day, which he did. The Tribunal heard evidence that the Respondent does not accept these phone calls were received from the Claimant, that HR were unable to open the attachments sent with the email and that it was not understood that that email concerned the Claimant. On balance, the Tribunal prefers the Claimant's account and accepts that the Claimant did make the phonecalls he describes. This account is consistent with the timing of the emails and the fact that an email was sent on his behalf on 28 November.

25 The Tribunal is also satisfied that it was understood by the Respondent that the email related to the Claimant and that Mr Buttigieg saw the attachments to the email, sent on the Claimant's behalf, shortly after it was received. In making this finding the Tribunal referred to Mr Buttigieg's answers to the Tribunal's questions on this point. He was asked whether he saw the Tribunal Judgment in the days following the meeting on 25 November 2019. Mr Buttigieg answered that he did see them in the days following, *'on an email'*. This evidence is, of course, also consistent with the Claimant's account that in the second phone call on 28 November, he was told that the manager had seen the documents but that they did not change the decision that the Claimant was dismissed. It is further noted that the letter confirming the Claimant's dismissal was dated 28 November 2019 [112] – although, again, this was not received by the Claimant at that point, due to the incorrect postal address being used. In the event, the Claimant saw this letter in February 2020, when he received copies of the documents from his HR file.

26 The letter confirming the Claimant's dismissal does not refer to any right to appeal the decision to dismiss him. It does refer to the Claimant being paid two weeks notice although, in the event, this was not paid.

27 Following the Claimant's dismissal, and in February 2020, the Claimant received written confirmation from the Home Office that he was to be issued with a permanent residence card [70].

28 There was some further contact between the Claimant and the Respondent after his dismissal. Of particular note, on 11 February 2020, it is agreed that the Claimant approached Mr Hutchinson at the Elephant & Castle site. Mr Hutchinson told the Claimant that he would need to provide his documents in order to return to work. The Claimant did not progress matters at that time. On 21 March 2020, some WhatsApp messages were sent between the Claimant and Mr Buttigieg [118-119]. During the WhatsApp messages, Mr Buttigieg confirmed to the Claimant,

'You can have your old job back doing cleaning/Security what ever you want but you still have go through paper work and RTW checks …I will meet you Monday at Victoria place shopping centre if want to start

… When you vetting comes back strat working on security again

You cannot work until you fill in new starter documentation and go through RTW process again and re vetting for security ..There will no issues once the documentation completed you will have the some hours and hours rate.' [118-119]

29 The Tribunal accepts that these messages were understood by the parties as explaining that if the Claimant filled out the required paperwork and followed the process, he would be able to return to work carrying out security work at the same hours and hours rate as before. Again, the Claimant did not progress a return to work for the Respondent in the way suggested.

30 The parties had further discussions concerning a return to work for the Claimant in July and August 2020 [131] but, in the event, the Claimant did not return to the Respondent's employ.

Closing Submissions

31 In summary, the Respondent submitted that the decision to dismiss the Claimant was fair, based on the evidence before it ,and that it was within the band of reasonable responses. Mr O'Neill referred to the Claimant's failure to act with due diligence with regards to the requirement to obtain the up to date right to work documentation. In

particular, it was contended that the Claimant did not attend the meeting on 25 November 2019 with a copy of the appeal Judgment.

32 With regards to the letter confirming the Claimant's dismissal, the Respondent accepts that the Tribunal is likely to be concerned by the omission to offer a right of appeal. However the Respondent submits that this omission made no difference as the Claimant was likely aware that he could bring an appeal as he had spoken to a number of advisors after his dismissal but that he did not, in fact, seek to appeal the decision and did not follow up the email sent by his friend on 28 November 2019.

33 The Tribunal was referred to the case of Afzal v East London Pizza Ltd (trading as Dominos Pizza) [2018] ICR 1652.

34 With regards to remedy, the Respondent made submissions on various issues including contribution, Polkey and Claimant's failure to mitigate his loss by returning to work for the Respondent.

35 On behalf of the Claimant, Mr Decker submitted that the Claimant's dismissal was not justified as the Claimant always had a right to work in the UK. He referred to the cases of Badara v Pulse Healthcare Limited UKEAT/0210/18/BA, Okuoimose v City Facilities Management (UK) Ltd UKEAT/0192/11/DA and Cooper Contracting Limited v Lindsey UKEAT/0184/15/JOJ. Mr Decker contended that whilst the Respondent was seeking to have a statutory excuse, this was a misguided approach. Further he submitted that, as accepted by the Respondent, the Claimant should have been given the right to appeal against his dismissal. With regards to the evidence on remedy, it was submitted that the Claimant had provided all evidence that he could, even obtaining documents directly from HMRC.

Legal Summary

36 Sections 98(1) and (2) of the Employment Rights Act 1996 ('the ERA 1996') set out the potentially fair reasons for dismissing an employee. An employer may dismiss for a reason not set out in Section 98(2) of the ERA 1996 if it amounts to 'some other substantial reason'. This will be an acceptable reason if the employer can show that it was some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held (section 98(1)(b) ERA 1996).

37 Dismissal for such a reason will be fair if it was within the range of reasonable responses and a fair procedure was followed.

38 Section 98(4) of the ERA 1996 deals with the fairness of dismissals. It reads in part as follows:

'(4)… where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's understanding) 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 the equity and the substantial merits of the case.'

39 Accordingly the Tribunal is aware that it is not for us to substitute our personal decision in this case. We must consider whether the Respondent acted reasonably and whether the decision to dismiss the Claimant in all of the circumstances fell within the band of reasonable responses. As detailed by Lord Denning MR in **British Leyland (UK) Ltd v Swift** 1981 IRLR 91, CA, the correct test is was it reasonable for the employer to dismiss the employee,

'If no reasonable employer would have dismissed him then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness within which one employer might reasonably take one view and another quite reasonably take a different view.'

40 The 'band of reasonable responses' test also applies to the procedure followed by the employer in reaching the decision to dismiss (see **Whitbread Plc v Hall** [2001] ICR 699).

41 It is always the case that what is required in respect of procedure will depend on the facts of the individual case, however the basic principles of natural justice require that an employee should know the accusations made against him, should be given an opportunity to state his case and that members of the disciplinary panel should act in good faith (see **Khanum v Mid-Glamorgan Area Health Authority** [1979] ICR 40).

42 Where a claimant is successful in his unfair dismissal claim, the usual remedy sought is an award of monetary compensation, ordinarily made up of a basic award and a compensatory award (section 118(1)(a) and (b) Employment Rights Act 1996). With regards to the compensatory award, pursuant to section 123(1) ERA 1996 the Tribunal shall award,

'…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'

43 Within the compensatory award, the heads of loss normally used include immediate loss of earnings (the loss incurred between the effective date of termination of the contract of employment and the date when the tribunal assesses the loss) and future loss of earnings (loss which may continue).

44 The claimant is under a duty to mitigate his loss and must take reasonable steps to obtain alternative employment (which may be starting up a business of the claimant's own if that was a reasonable thing to do). However the burden of proving a failure to mitigate is on the respondent. What employment the claimant is under a duty to accept is a matter to be determined by the tribunal. If the employee has not made reasonable efforts to find other work, his compensation will be reduced to reflect the tribunal's view of what would have happened if he had mitigated his loss. However the burden of proving a failure to mitigate is on the employer and the standard of what is reasonably required of the employee should not be set too high.

45 Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it will reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding (section 123(6) ERA 1996). In order for a deduction for contributory fault to be made for the employee's misconduct, that conduct must be culpable or blameworthy in the sense that it was foolish, perverse or unreasonable in the circumstances.

46 If an employee would have been dismissed, even if the employer had done all that he ought to have done, a tribunal will reduce the compensation by a percentage to take into account this possibility – the possibility that the employee would have been dismissed even if a fair procedure had been followed (Polkey v AE Dayton Services Ltd [1988] ICR 142).

Conclusions

47 The Tribunal carefully considered all the evidence it heard and to which it had been referred, including the witness statements and the documents within the bundle. The Tribunal also took into account the entirety of the closing submissions made by both parties.

48 The Tribunal concluded that the Respondent dismissed the Claimant because they were not satisfied that he had the right to work for them. This was an acceptable reason for dismissal as the Tribunal accepts that it was some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the Claimant held.

49 In reaching these conclusions, the Tribunal accepted the evidence from Mr Buttigieg as to why the Claimant was dismissed and noted that the Claimant did not seek to suggest any alternative reason for his dismissal. Rather, it was the Claimant's case that the Respondent did dismiss him because of their view that he had no right to work but that that view was entirely mistaken.

50 Next, the Tribunal considered whether the Claimant's dismissal for that reason was fair - was it within the range of reasonable responses and was a fair procedure followed? In its deliberation on these issues, the Tribunal looked at each of the particular challenges as to fairness raised by the Claimant.

51 The Tribunal was satisfied, as set out in our findings of fact, that the Claimant knew about the meeting on 25 November 2019 and that he understood the reason for the meeting and what was to be discussed before he attended. Whilst the Claimant has asserted that he was not given prior notice to provide evidence of his right to work, the Tribunal did not accept this. As stated, the Claimant knew about the meeting and knew it was to discuss his right to work and what documentation he had to demonstrate this to the Respondent. The Claimant's understanding of this is expressly acknowledged by him in his witness statement [paragraph 29, S12]. In terms, the Claimant expresses in his statement how delighted he was to receive the written outcome of his appeal, as he understood how crucial this was to his ongoing employment. Further, of course, it is the Claimant's case (as accepted by the Tribunal) that he took a copy of his appeal judgment with him to the meeting in any event.

52 The Claimant refers to the fact that he was not notified of his right to be accompanied to the meeting as a further element of unfairness. The Tribunal accepted that the Claimant did not know he could attend the meeting on 25 November 2019 with a work colleague or trade union representative. Although this had been set out in the Respondent's letter of invitation to the meeting, the letter was not received by the Claimant and he was not told verbally that he could go the meeting with a colleague or Trade Union representative.

53 The requirement to be accompanied to a meeting of the type held on 25 November 2019 is not mandated by the ACAS Code of Practice, which covers disciplinary and grievance procedures. The Tribunal concluded that the Respondent's intention to offer the Claimant the right to be accompanied, as set out in its letter, was good practice but its failure to do so was not a breach of the ACAS Code. Taking into account the circumstances of this case, the Tribunal did not consider that the failure to inform the Claimant of a right to be accompanied resulted in an unfair procedure being followed. The Respondent's procedure, up to this point, of organising a meeting, informing the Claimant about the meeting and what was to be discussed, was a process which fell within the band of reasonable responses.

54 The Claimant's remaining challenges to the fairness of the dismissal refer to him not receiving written notification of his dismissal, not being notified of his internal rights of appeal against his dismissal and the alleged refusal by the Respondent to reinstate him.

55 The Tribunal accepts that the Claimant did not receive a copy of the letter of dismissal at the relevant time. Again, this was due to the Respondent sending the letter to the Claimant's old address. The Claimant was also not told that he had a right to appeal against his dismissal. The Claimant was not informed of this verbally at the meeting on 25 November 2019 (and although he never received the letter, it is noted that there was no reference to a right to appeal in the letter).

56 Having given careful consideration to this issue, the Tribunal is satisfied that the failure to offer the Claimant an appeal against his dismissal did amount to a procedural defect sufficient to undermine the fairness of the dismissal as a whole for the purposes of section 98(4) of the Employment Rights Act 1996. In the context of this case, an appeal process was fundamental to the fairness of the dismissal and the Respondent's decision to dismiss, without the inclusion of an appeals process, fell outside the range of reasonable responses.

57 The importance of an appeal in this case is striking. There were deficiencies in Mr Buttigieg's understanding of the relevant position at the November meeting – namely, that the Claimant had successfully appealed to the Immigration Tribunal and that he had a right to work. The Tribunal is satisfied that, it is more likely than not, the confusion present in the November meeting would have been cleared at an appeal hearing which, inevitably, would have taken further time to consider all the relevant documents and evidence prior to reaching an appeal outcome. With this additional layer of process, including the Claimant having another opportunity to provide his information, and the resulting fuller understanding of the matter, with professional advice being sought if required, it is likely that the Claimant's ongoing employment with the Respondent would have been confirmed. The Tribunal was satisfied that the Claimant would have taken up his right to appeal if this had been offered to him. The Tribunal accepted the Claimant's evidence on this point and noted that it was consistent with the Claimant questioning his dismissal after the November meeting demonstrated by his telephone calls to HR and attending the site directly to see Mr Hutchinson.

58 Following these conclusions, the Tribunal proceeded to consider the issues of whether the unfairness made any difference (Polkey), contributory fault and the alleged failure to mitigate.

59 With regards to Polkey, the Tribunal has concluded that the failure to offer an appeal did make a significant difference to the eventual

outcome in this case. The Tribunal is satisfied that it is more likely than not that if an appeal had been offered, the Claimant would have retained his employment with the Respondent. Such a process would have necessitated a representative from the Respondent looking again the information leading to the Claimant's dismissal and by carrying out that further examination, it is likely that the Claimant's successful Immigration appeal would have been properly understood.

60 The Tribunal does not make a finding of contributory fault in this case. Whilst the Claimant's understanding of his immigration position was limited, the Tribunal is satisfied that he took the Tribunal Judgment with him to the November meeting. We do not accept that the Claimant's limited ability to explain the importance of the Judgment or the limited explanation of his position at the November meeting was such that a finding of contributory fault is appropriate. The Claimant did his best to explain the position to the Respondent and took the relevant documents with him.

61 With regards to an alleged failure to mitigate his loss, the Tribunal carefully considered the chronology after the Claimant's dismissal. In particular, the Tribunal referred to the text message dialogue between the Claimant and Mr Buttigieg in March 2020. On balance, the Tribunal was satisfied that the Respondent has proved a failure to mitigate on the Claimant's part. The Claimant unreasonably refused the offer made to him to return to his duties at the same rate of pay working the same hours, as set out in the text at 4.50 pm on 21 March 2020. The Claimant was under a duty to act reasonably and, in these circumstances, that would have been to accept that offer. The texts refer to a proposed meeting on 23 March 2020. From this the Tribunal has concluded that the Claimant could have returned to work from, say, 30 March 2020; allowing a further week after that meeting.

62 The Tribunal then proceeded to consider the award of monetary compensation. The amounts of the basic award and for loss of statutory rights were agreed by the parties. The award for loss of earnings was, in the circumstances limited to a period of 18 weeks; from the date of dismissal to 30 March 2020 when the Claimant could have returned to work for the Respondent. The Tribunal calculated the loss using a net weekly wage figure of £468.11. This was calculated on the basis of the Claimant's earnings for 12 weeks in August, September and October 2019 (a total of £5,617.41). With regards to pension loss, the Tribunal concluded that the employer's pension contributions were 3% of gross earnings. Again, using the earnings period of August – October 2019, this amounted to £18.92 per week.

63 The following amounts are therefore awarded:

63.1	Basic award	£1,050.00
63.2	Loss of Statutory Rights	£500.00
63.3	Loss of earnings - 18 weeks x £468.11	£8,425.98;

63.4 Employer's pension contributions - 18 weeks x £18.92 £340.66

Total award **£10,316.64**

64 In the circumstances, the Tribunal was satisfied that this award was appropriate. It did not consider that any further amounts should be awarded, for example, for job seeking expenses or alleged breach of the ACAS Code. As already stated, the Code did not expressly apply and the Tribunal did not consider an award for job seeking expenses was made out on the evidence or following the Tribunal's finding of the Claimant's failure to mitigate his loss.

65 Finally, in his Schedule of Loss the Claimant refers to receiving some monies from the public funds (£1,948.05). The Tribunal was not addressed specifically on whether this was payment of a welfare benefit of the type that is subject to the relevant recoupment provisions. In the circumstances, the Judgment has been set out to enable a recoupment certificate to be produced if this is appropriate.

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Employment Judge Harrington
Dated: 10 October 2021