EMPLOYMENT TRIBUNALS

Claimants: Mr Dean Woodbridge

Respondent: Blease Landscapes Limited

Heard at: Manchester (by CVP) **On:** 16th July & 6th September 2021

Before: Employment Judge Newstead Taylor (sitting alone)

REPRESENTATION:

Claimants: Mr Dean Woodbridge

Respondent: Mr Jones (Counsel)

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant's claim that he was unfairly dismissed contrary to s.94 Employment Rights Act 1996 ("ERA") succeeds.

2. The claimant's compensation will be determined at a remedy hearing subject to the following:

    2.1. A 75% reduction will be made from compensation in respect of contributory fault.

    2.2. A 20 % reduction will be made from compensation under the principles set out in **Polkey v AE Dayton Services Ltd 1998 AC 344**.

    2.3. A 20% uplift will be applied for unreasonable failure to comply with the ACAS Code of Practice on Discipline and Grievance.

REASONS

Introduction:

1. The respondent, Blease Landscapes Limited ("BLL"), is a limited company. Its main business activity is landscape gardening and garden maintenance. On 19 February 2019, the respondent employed the claimant. On 10 March 2021, the claimant's employment ended. The claimant contends that he was dismissed. BLL contends that the claimant resigned. This claim is concerned with the termination of the claimant's employment.

The Tribunal Hearing:

2. The hearing took place on 16 July and 6 September 2021.

3. The claimant represented himself. He gave evidence on his own behalf. His mother, Ms Victoria Roberts ("VR"), also gave evidence on his behalf. At paragraph 5.1 of his witness statement, the claimant informed the Employment Tribunal ("ET") that he had left school at 11 and had learning disabilities. At the outset of the hearing, I asked the claimant what, if any, reasonable adjustments the ET could make to ensure that he was fully able to participate in the hearing and give his best evidence. The claimant requested more time to read documents. This reasonable adjustment was made throughout the hearing and, in particular, the claimant was given more time to read the documents to which he was referred in cross examination.

4. BLL was represented by Mr. Jones. BLL relied on the evidence of three witnesses. First, Mr. Anthony Blease ("AB"), being the respondent's Director and the claimant's uncle. Second, Mr. Gregory Blease ("GB""), being AB's son and an employee of the respondent. Third, Mr Lee Woodbridge ("LW"), being the claimant's brother and an employee of the respondent.

5. A joint bundle of 221 pages had been prepared for the ET. This contained two witness statements from the claimant and one witness statement each from

VR, AB, GB and LW. I read the bundle. I informed the parties that they should refer me to the documents on which they relied regardless of my reading and the cross references in the witness statements. References in square brackets in this Judgment are to the pages of this bundle.

The Claims & Issues:

7. This is a claim for unfair dismissal and failure to provide a written statement of terms and conditions.

8. As to the unfair dismissal claim:

8.1 BLL accepted, as confirmed by Mr Jones, that the claimant was an employee of the respondent; Ss. 94 & 230 ERA, and that he had been continuously employed for more than 2 years; s.108 ERA.

8.2 BLL denied that the claimant had been dismissed and contended that the claimant had resigned.

8.3 If, which was denied, the claimant had been dismissed then BLL contended that the dismissal was fair. The reason for the dismissal was conduct and/or some other substantial reason ("SOSR") which are potentially fair reasons.

8.4 BLL acted reasonably in treating the above as a sufficient reason(s) for dismissal.

8.5 BLL denied that the dismissal was procedurally defective. Alternatively, if it was defective, BLL contended that remedying the alleged defect would not have affected the outcome.

8.6 Further or alternatively, BLL submitted that if the dismissal was unfair then the claimant was guilty of blameworthy conduct which contributed to his dismissal and that it would be neither just nor equitable to award any compensation.

9. A list of issues was agreed with the parties at the start of the hearing, see Annex A.

Findings of Fact:

10. I make the following findings of fact.

11. In 1977, AB formed a family run landscape gardening and garden maintenance business ("the Business.")

12. In June 2007, BLL was incorporated. AB is the managing director. BLL is used as the vehicle through which to provide the Business. BLL is a small business. On average it has employed 2 employees in addition to AB. BLL does not have a Human Resources department. BLL has limited resources as shown by the Unaudited Financial Statement for the Year Ended 31 May 2020 which shows profit of £10,825.00 compared to £12,174 for the previous year.

13. In May 2016, following his return from Thailand, the Claimant started work for BLL. The Claimant worked for BLL until October 2018.

14. In October 2018, the Claimant resigned. There is a dispute between the parties as to the manner of the Claimant's resignation. The claimant says that, following incidents at work, he decided that he could no longer work for AB and he informed AB of his resignation by text message. The Claimant stated that he did not raise any grievances in relation to these incidents because he did not know the procedure. The Claimant was consistent in his evidence on this point. The text message was not adduced in evidence, unlike a number of other text messages. The reason for this was that this message was on an old phone. In contrast, AB's evidence was that the claimant simply walked off the job and was not seen again. In cross examination, AB was asked if in October 2018 he had received a text message from the Claimant informing him of his resignation. I discerned some hesitation from AB when answering this question. Specifically, AB's answer was that *'He did not think he received a text message, he never*

had anything.' In light of AB's hesitation and lack of certainty as compared to the claimant's clear recollection, I find that in October 2018 the Claimant sent a text message to AB informing him of his resignation.

15. Between October 2018 and March 2019, the claimant did not work for BLL.

16 On 17 February 2019:

> 16.1 AB sent a text message to the claimant offering him employment. I find that this offer of employment was made, primarily, out of family loyalty. AB is the uncle and godfather of the claimant. AB wanted to give the claimant the chance to work and earn money which he considered was beneficial for the claimant's self-respect and would keep him out of trouble.
>
> 16.2 The claimant accepted this offer. He informed AB that he would be away from 27 February 2019 to 2 March 2019, but would be available from 4 March 2019. The claimant accepted this offer because he needed to work and earn money. Also,he believed that AB felt sorry for what had occurred prior to October 2018 and was, in effect, offering to put their differences aside.
>
> 16.3 AB text messaged the claimant offering him work, namely laying a lawn and erecting a fence, on Tuesday and Wednesday. The Claimant accepted this work.
>
> 16.4 AB informed the Claimant that a work contract would be available for him at the end of the tax year i.e. April 2019.

17. I find that the Claimant's re-employment with BLL commenced on 19 February 2019, being the first Tuesday following AB's text message dated 17 February 2019. In reaching this finding I refer to and rely on the claimant's evidence that between 27 February and 2 March 2019 he was away in Prague and his earnings from this work helped with his holiday.

18. In February 2019, BLL employed 3 employees, namely AB, the Claimant and LW. On average, they worked 40 hours per week from 7.30am to 4pm with a 30-minute lunch break. I find that on a couple of occasions work commenced before 7.30am. However, I do not accept that this was a regular occurrence due to AB's regard for the law in relation to noise before 7.30 am. I also find that, between February 2019 and March 2021, work finished by 4pm save for on 2 or 3 occasions.

19. In or around January / February 2019, BLL provided LW with a work contract, terms and conditions and a supporting letter. The Claimant asked if he would get a contract too. AB said he would arrange it.

20. In April 2019, the Claimant asked about his contract and was told that AB had one for him to sign, but he never received the contract.

21. In July 2019, BLL was attending a garden on Grosvener Road. Whilst there, the Claimant was involved in an incident with an individual who was undertaking painting work inside the property. This individual was known to the Claimant. The parties' recollections of this incident differ. The Claimant contends that he was trimming a holly bush in the garden when he was threatened by this individual. The Claimant told this individual to go away. LW told this individual to 'fuck off.' The individual went back inside the property. AB's evidence was that he heard the incident, but did not see it. Notably, he had to ask LW what had happened. He was told that the Claimant had been having 'fisticuffs' with the individual. I find that this incident involved the Claimant shouting at the individual whilst working in a customer's garden, but I do not accept that this incident involved any physical violence. I note that AB did not himself see any physical violence. Further, I find that following the incident AB did not reprimand the Claimant in any way. In fact, he never spoke to the Claimant about the incident. Instead, AB chose, in effect, to ignore the incident and picked the Claimant up for work as usual the next day.

22. In September 2019, the Claimant became involved in legal proceedings which had a substantial impact on his availability to work for BLL. In particular, the Claimant needed periods of time off work including early finishes. BLL granted the Claimant the time off he required. In fact, on one occasion BLL paid the Claimant for his time off even when he had used up all of his holiday entitlement. Once AB, on behalf of BLL, enquired if the claimant's early finish could be moved later, but this could not be done and BLL accepted this.

23. On 15 October 2019, AB, LW and the claimant were travelling home from work in AB's van. AB was driving. The claimant was sat in the front outside seat, being nearest to the passenger door. An incident occurred whilst the van was stationary at traffic lights. This incident involved the same individual that was involved in the July 2019 incident. Once again, the parties' versions of this incident differ, specifically as to whether or not the claimant was fighting. I find that the individual got out of a vehicle behind the van. The claimant got out of the van. The claimant and the individual started fighting. AB tried verbally to calm the situation, but his involvement was limited as he was driving the van and remained in the driver's seat. LW intervened. The individual returned to his vehicle, drove up to the driver's side of the van and started shouting abuse at AB. He then drove off. In response to the Claimant's statement that he would report the incident to the Police, AB told the Claimant to forget about it and move on. The claimant called AB a 'wanker,' got out of the van and closed the door roughly. The claimant called VR who came to collect him. VR, at the claimant's request, messaged AB to explain the impact of the other proceedings on the claimant. BLL did not reprimand the claimant following this incident. BLL wanted to keep the claimant in employment. AB collected the claimant for work the following day as if nothing had happened and never raised the incident with the Claimant.

24. Further and for the avoidance of doubt, I find that AB threatened the Claimant's job if he reported the incident on 15 October 2019 to the Police. In reaching this contested finding, I refer to and rely on the following:

> 23.1 I discerned some hesitation on the part of LW when he was cross examined on this point. In response to the claimant's questions, LW denied that AB threatened the claimant's job. However, I asked LW what, if anything, AB said in response to the Claimant's comment about reporting the matter to the Police. LW told me that AB tried to calm matters and told the Claimant to forget about it and move on. LW sought to stress that he didn't know what this comment was said in response to. However, this was inconsistent with my question which specifically asked what, if anything, AB had said in response to the claimant's comment about reporting the matter to the Police.
>
> 23.2 VR's evidence that this is what the claimant told her. The claimant had no reason to tell his mother that AB had threatened his job if he had not done so. I find that he told his mother this because it was the truth. VR, who was prepared in cross examination to make appropriate concessions when she did not know the answer to questions, had no reason to confirm this evidence in these proceedings, which clearly cause her distress, unless it was the truth. She confirmed this evidence.
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> 23.3 VR's text message, dated 15 October 2019. Whilst I note that no express reference is made in this text message to AB threatening the claimant's job, I find that one of the reasons for VR to send that explanatory text message was the threat made to the claimant's employment.

25. In March 2020, GB started working for BLL. He worked approximately 4 days per week. His working days were flexible so as to enable him to continue his studies.

26. In August 2020, the claimant again enquired about his contract and, again, AB said he would sort it. However, at no stage, did BLL provide the claimant with a contract and/or a written statement of terms and conditions.

27. On 30 September 2020, an incident occurred in relation to a strimmer. Again, the parties' versions of events differ, albeit that the difference is principally related to whether or not the claimant was aggressive and called AB a cripple. I find that the claimant was aggressive and did call AB a cripple. In reaching this finding, I note that the claimant's evidence was that things got pretty heated, but he couldn't recall calling AB a cripple. In contrast, AB, GB and LW all confirmed that the claimant was aggressive and called AB a cripple. In particular, I have considered the text message sent by GB to his brother after the incident. I note that the responses from GB's brother are not in the bundle as he asked for them to be left out. I have taken this into account. However, I rely on GB's text messages. These are contemporaneous, being sent by GB whilst he was travelling in the van immediately after the incident. I find as a fact,

as confirmed in GB's text messages, that the claimant *"squared up to"* GB and called AB a cripple. However, I do not accept that the claimant drove off in the sense of ceasing to work. I find that he simply drove to the next job where he met up with AB, GB and LW and continued to work. No disciplinary action was taken by BLL against the claimant as a result of this incident.

28. Around the end of January 2021, the claimant gave AB notice of his impending paternity leave which would start on the day the baby was born.

29. On 1 March 2021, the claimant returned to work after a 6-week absence. BLL contends that the claimant was aware that this week marked the two -year anniversary of his employment and that, as a result, he was acting up in an attempt to goad BLL into dismissing him. The claimant denies that he was acting up. He notes that he had been off work for 6 weeks, had a new baby on the way and needed the money. In light of my finding that the claimant's employment actually re-commenced on 19 February 2019, the claimant's 2-year anniversary had already elapsed. However, I accept that the claimant considered that his 2-year anniversary fell that week.

30. In respect of BLL's contention that the claimant was acting up, the respondent relies on 4 specific allegations.

> 30.1 First, that the claimant threw expensive decking on the driveway. I do not accept that the claimant threw the decking. There is no evidence from anyone who saw the claimant throwing the decking. As conceded by AB, it is simply AB's assumption that the decking was thrown.
>
> 30.2 Second, that he would put tools and equipment away from 3pm. I accept that the claimant would start packing up from 3pm even on days when he was not finishing early.
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> 30.3 Third, that he cut timber for balustrading too short. There is no evidence that this was done deliberately. In fact, the claimant contends that he was given the wrong measurements. I find that this could have been a mistake and/or an accident. AB accepted this.
>
> 30.4 Fourth, he laid flags incorrectly and they had to be re-laid by another member of staff. I find that the claimant did wrongly lay the flags, but he re-laid them. AB's sworn witness statement is incorrect when it states that the flags were re-laid by another member of staff. In response to my questions on this point, AB said that he meant they were re-laid under supervision. This is not what AB's witness statement said. I do not accept AB's evidence on this point.

31. Further and for the avoidance of any doubt, BLL did not institute any disciplinary proceedings against the claimant in respect of any of these allegations. Accordingly, save for packing tools away from 3 pm, I do not accept that the claimant was acting up. Also, I do not accept that he was doing so in an attempt to goad BLL into dismissing him

32. On 4 March 2021, BLL did not finish work at a customer's garden until after 16.20. By 16.20, the majority of the tools had been packed away. The claimant asked AB if he would be paid over time. AB thought the claimant was joking and said as much. The claimant was unhappy, started shouting at AB and walked away from the discussion. I do not accept that the claimant walked off the job as suggested by the respondent. The job was being packed up. GB had put his tools away. LW, if still working, packed up within 10 minutes. The claimant walked away from the discussion with AB and waited in his car as he was giving LW a lift home. All parties left the job no later than 16.45.

33. On the journey home with LW, the claimant discussed the fact that he was unhappy about not being paid for overtime. LW agreed that it was unfair that they had worked late without being thanked. The claimant said to LW that he was going to do BLL for unfair dismissal, but LW did not believe him. The claimant also informed LW that he would not be picking him up in the morning. LW's evidence is that the Claimant said *"in no uncertain terms that he had had enough of working and would not be returning the next day or indeed at all."* The claimant denies this. I find that the claimant did not say this. I find that the claimant said words to the effect that he was not coming back in and that LW should make his own way into work the following day. In reaching this conclusion, I refer to and rely on the following:

> 33.1 In evidence, LW retreated from his evidence, quoted above. He confirmed that the claimant referred to not coming back in, but did not specify any period. LW did not ask any questions about the period of time in which the claimant was not coming in to work. LW assumed that the claimant meant permanently i.e. that he was resigning. This was LW's assumption and not what the claimant had said.
>
> 33.2 The claimant needed the job in order to earn money as he had a new baby on the way.
>
> 33.3 The Claimant had recently requested paternity leave which is inconsistent with a desire to terminate his employment.

34. I also find that, as accepted by LW, the claimant's state at the time was very erratic. LW's evidence was that the claimant was erratic most of the time. LW said that he what the claimant was saying and got what he meant. However, bearing in mind that LW did not believe the claimant's statement that he was going to do BLL for unfair dismissal I find that the claimant's comments about his not coming back in were said in the heat of the moment and were not reliable. LW took no steps to confirm the claimant's intention whether on the day or thereafter.

35. On 5 March 2021 at 6.34 am, AB texted the claimant with details of the starting location that day. The claimant did not attend work that day and did not contact AB to advise him that he was not attending and the reason for this. In fact, the claimant used this day to research how to make a grievance. On his

arrival, LW informed AB that the claimant had made it clear that he would not be returning to work for BLL. However, the claimant had not asked LW to pass on any message to AB. Notably, AB did not, during 5 March 2021 or at any time prior to 10 March 2021, contact the claimant to seek confirmation of his purported resignation.

36. Thereafter, the 6 – 7 March 2021 was a weekend. The claimant had pre-arranged leave from 8 -10 March 2021. Accordingly, the claimant's first day back in work after his absence on 5 March 2021 was due to be 11 March 2021.

37. On 10 March 2021:

> 37.1 Around lunchtime, AB contacted BLL's accountant and requested that a P45 was sent to the claimant. AB's evidence was that he did not consider it relevant to contact the Claimant prior to sending the P45 in light of his conduct in the week leading up to 5 March 2021.
>
> 37.2 On the evening of 10 March 2021, AB received the Claimant's grievance letter dated 7 March 2021. The claimant had not contacted BLL at all in the period from 5 March 2021 to 10 March 2021. He thought it better to send the letter. However, it is clear from this letter that the claimant did not consider that he had resigned, notably he was requesting a meeting to try and resolve the issues.
>
> 37.3The claimant received, by email, his P45 without any explanation.

38. On 16 March 2021, the claimant received BLL's response to his grievance letter. BLL declined the claimant's request for a meeting stating that *"Your actions of Friday 5th March and the subsequent days, confirm to me that you have resigned and as such, this is accepted."* AB's evidence was that to the best of his recollections this letter was sent before he received the Claimant's letter dated 16 March 2021, see below.

39. On 16 March 2021, the claimant wrote to BLL requesting an explanation for his dismissal and confirmation that his employment had officially ended. BLL did not respond to this letter. AB's evidence was that this letter was overlooked.

40. On 17 March 2021 the claimant referred the matter to ACAS and received the ACAS certificate the same day.

41. On 22 March 2021, the claimant issued the ET1.

Law:
(i) Resignation v Dismissal:

42. A resignation is the termination of a contract by the employee. The employment contract will not terminate until the employee has communicated his or her resignation to the employer by words or conduct; ***Edwards v Surrey***

Police **1999 IRLR 456 EAT.** S. 86 (2) ERA sets down minimum periods of notice of termination. Specifically, employees who have been continuously employed for one month or more are required to provide at least one week's notice. However, this is the minimum period required and the employment contract can provide for a longer period which will apply instead. An effective resignation should be clear and unambiguous. It must, expressly or impliedly, contain an ascertainable date on which the resignation will take effect. If the resignation is in 'the heat of the moment' then an employer who fails to allow a reasonable period of time to elapse before accepting the resignation runs the risk of being found to have dismissed the claimant; ***Kwik-Fit (GB) Ltd v Lineham*** **[1982] ICR 183 EAT.** Once a clear notice of resignation has been given and, if required, a reasonable period of time has elapsed, it is effective. A resignation does not have to be accepted by the employer nor can it be unilaterally withdrawn; ***Dootson v Stoves*** **Ltd EAT 486/90.** However, the employment contract remains in full force and effect during the notice period.

43. An employee is dismissed by his or her employer if the contract under which s/he is employed is terminated by the employer whether with or without notice; S.95 (1) (a) ERA. The burden of proof is on the claimant to show that there was a dismissal.

(ii) Unfair Dismissal:

44. If the claimant was dismissed, the burden of proof lies on BLL to show, on the balance of probabilities, what the reason or principal reason for dismissal was and that it was a potentially fair reason under S. 98 (2) ERA.

45. S.98 ERA states:

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

46. If, which is denied, the claimant was dismissed then BLL contends that the reason for dismissal was the claimant's conduct in the week starting 1 March

2021 or SOSR which are both potentially fair reasons within Ss. 98 (1) (b) & (2) (b) ERA.

47. If the respondent shows a potentially fair reason for dismissing the claimant then the question of fairness is determined by s.98 (4) ERA which states:

> *"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
>
> *(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b)shall be determined in accordance with equity and the substantial merits of the case..."*

48. Further, when considering the question of fairness, the correct approach is based on **British Home Stores v. Burchell [1980] ICR 303** and **Sainsbury's Supermarket Ltd v Hitt [2003] IRLR 23**. In addition, the Tribunal should also have regard to the ACAS Code of Practice on Disciplinary & Grievance Procedures 2015 and take account of the whole process including any appeal; **Taylor v OCS Group Ltd [2006] IRLR 613.**

49. In conduct cases, when considering the question of reasonableness, I am required to have regard to the test outlined in **British Home Stores v. Burchell** and **Sainsbury's Supermarket v Hitt.** The questions for me are:

49.1 Did the employer genuinely believe that the employee was guilty of misconduct?

49.2 If so, was that belief based on reasonable grounds?

49.3 Did the employer carry out a reasonable investigation in all the

circumstances?

49.4 Did the employer follow a fair procedure?

49.5 Was dismissal within the band of reasonable responses?

50. Also, ***Sainsbury's Supermarket v Hitt*** **2003 ICR 111** confirmed that the 'band of reasonable responses' test applies equally to the employer's conduct of an investigation as it does to the employer's decision on sanction. Whilst an employer's investigation need not be as full or complete as, for example, a police investigation would be, it must nonetheless be even-handed, and should focus just as much on evidence which exculpates the employee as on that which tends to suggest he is guilty of the misconduct in question.

51. In summary, these decisions require that I focus on whether the respondent held an honest belief as to the conduct of the claimant and whether it had a reasonable basis for that belief. However, I must not put myself in the position of the respondent and decide the fairness of the dismissal based on the what I would have done in that situation. It is not for me to weigh up the evidence as if I was conducting the process afresh. Instead, my function is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses open to an employer.

52. Section 123(6) ERA provides that: Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. S.122(2) makes a similar provision in respect of the basic award.

53. Under the principle in *Polkey v A E Dayton Services Ltd* 1988 AC 344 the Employment Tribunal may reduce the amount of compensation payable to the claimant if it is established that a fair dismissal could have taken place in any event – either in the absence of any procedural faults identified or, looking at the broader circumstances, on some other related or unrelated basis.

54. The law in relation to compliance with the ACAS Disciplinary and Grievance Code 2015 is set out in section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A"), which states:

"(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a)the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b)the employer has failed to comply with that Code in relation to that matter, and

(c)that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

55. In summary, where a claim concerns a matter to which a relevant Code of Practice applies, if the employer fails to comply with the Code of Practice and that failure is unreasonable the Tribunal may, if it just and equitable, increase any award by up to 25%.

(iii) Written Statement of Terms and Conditions:

56. Section 1 ERA and Section 38 Employment Act 2002 ("EA") state:

" 1. *Statement of initial employment particulars.*

(1) Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment..."

"38.

(*1) This section applies to proceedings before an employment tribunal relating to a claim by [F1a worker] under any of the jurisdictions listed in Schedule 5....*

(3) If in the case of proceedings to which this section applies—
(a)the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and

(b)when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 or (in the case of a claim by a worker) under section 41B or 41C of that Act,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead..

(4) In subsections (2) and (3)—

(a)references to the minimum amount are to an amount equal to two weeks' pay, and

(b)references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable."

57. In summary, s.1 ERA and s.38 EA, require, at the start of employment, that the worker is provided with a statement of terms and conditions, and, in default, Section 38 of the Act provides that the sanction is 2-4 weeks' pay.

Discussion & Conclusions:

58. As to whether the claimant resigned or was dismissed, I find that the claimant did not resign. He was dismissed. In reaching this conclusion, I refer to and rely on the following points:

58.1 In October 2018, the claimant terminated his employment with BLL. Specifically, he sent a text message to AB clearly and directly informing AB, being the director of BLL, of his resignation. Accordingly, the claimant understood and had experience of resigning. In March 2021, he did not follow this procedure.

58.2 On 4 March 2021, the claimant did not expressly tell LW that he was intending to resign. He told LW that he was not coming back in and that LW should make his own way into work the following day. LW assumed that the claimant meant he was not coming back in permanently. The claimant did not say this. LW took no steps to check.

58.3 The claimant's comments to LW on 4 March 2021 were said in the heat of the moment, following the altercation with AB about over time, and at a time when the claimant was in an erratic state. In the circumstances, LW could not reasonably rely on the claimant's comments. This is clear from the fact that LW did not believe the claimant meant what he said about 'doing BLL for unfair dismissal.' Further, LW could not reasonably rely on the claimant's comments without allowing a reasonable period of time to elapse before seeking to confirm them with the claimant. LW did not do so.

58.4 The claimant did not ask LW to inform BLL that he had resigned. LW chose to recount his understanding of the claimant's words to AB.

58.5 The claimant failed to attend work on 5 March 2021 without explanation. Specifically, the claimant did not reply to AB's text message timed at 6.34am on 5 March 2021 which informed him of the location of that day's work. Further, the claimant took no steps to contact BLL in the period 6 –9 March 2021. However, the 6-7 March 2021 were a weekend and on the 8-9 March 2021 the claimant had pre-arranged leave. Therefore, the 10 March 2021 was the first working day after the claimant's non-attendance on 5 March 2021.

58.6 BLL took no steps in the period 5 – 10 March 2021 to contact the claimant to ask if LW's account was correct and the claimant had resigned and/or to seek an explanation for the claimant's absence on 5 March 2021. BLL chose to rely on the second-hand account provided by LW alongwith the claimant's non-attendance on 5 March 2021.

58.7 On 10 March 2021, BLL received the claimant's grievance. In this letter, the claimant requested a meeting, at which he would be accompanied by an independent advocate, to discuss a number of specified issues. It is clear from the terms in which the letter is written that the claimant did not consider himself to have resigned.

58.7 BLL chose to issue the claimant's P45 without making any enquiries of the claimant at all. Further, BLL sent the claimant his P45 without any explanation. I find that any reasonable person receiving a P45 in such circumstances would understand that they had been dismissed.

59. Accordingly, I find that there was no effective resignation. Specifically, there was no clear and unambiguous statement of resignation that was communicated either by the claimant or at the claimants' request to BLL. Instead, BLL chose to rely on second hand information without taking any steps to check the veracity of that information. Also, BLL chose to interpret the claimant's non-attendance on 5 March 2021 in the light of that information again without making any enquiries. On 10 March 2021, BLL sent the claimant his P45 and by so doing terminated the claimant's employment contract in accordance with S. 95 (1) (a) ERA.

60. As to the principal reason for the claimant's dismissal and whether it was a potentially fair reason. BLL's ET3 contends that the reason was conduct and/or SOSR. However, in closing submissions Mr Jones contended that the principal reason was SOSR informed by conduct with a lower case 'C.' I find that the principal reason for the claimant's dismissal was his conduct in the week commencing 1 March 2021, specifically his conduct on 4 March 2021, and not SOSR. In reaching this conclusion, I refer to and rely on AB's letter, dated 15 March 2021, where he stated that *"However, there have been countless occasions in which your direct actions to me would have warranted dismissal, but I have kept you in my employ for familial reasons. Unfortunately, following*

the incident on 4 March 2021, our relationship is such that now I am unable to extend you another opportunity to continue to work for my business." [50] It is clear from this statement that whilst there had been long running issues between the parties the principal reason for the dismissal was the claimant's conduct on 4 March 2021. This is a reason relating to conduct and a potentially fair reason within s.98 (2) ERA.

61. I find that BLL genuinely believed that the claimant was guilty of misconduct and that this belief was based on reasonable grounds. Specifically, I note that AB was present at the incident on 4 March 2021 and that the altercation was between the claimant and AB.

62. However, I find that BLL did not carry out a reasonable investigation in all the circumstances or any investigation and did not follow a fair procedure or any procedure. It was at the very least necessary for BLL to investigate the events on 4 March 2021 including collecting statements from those present and for any discrepancies to be considered and resolved. Instead, no investigation took place at all. The claimant was not afforded the opportunity to put forward his version of events at either a disciplinary hearing or an appeal hearing. Therefore, this vital step was missing. I consider that no reasonable employer, even a small one like BLL which had limited resources and no HR department, could have failed to obtain the claimant's version of events before reaching a decision. Accordingly, BLL fails on the second and third limbs of the **Burchell** test.

63. I also conclude that the sanction of dismissal was outside the band of reasonable responses in the circumstances of this case. The claimant had been employed since 2019. There had been a number of incidents that had never resulted in any disciplinary sanction. Therefore, the claimant had, on the face of it, a clean disciplinary record. In respect of the conduct in issue, on 4 March 2021 the claimant had shouted at AB. In the circumstances, this did not merit the sanction of dismissal as is clear from BLL's actions on 5 March 2021 when AB texted the claimant the location of the day's work without reference to the events of the previous day. In fact, the incident on 4 March 2021 appears to have been forgiven or at least forgotten by AB by 5 March 2021.

64. It follows from the reasoning I have set out above that the dismissal was unfair.

65. In breach of the ACAS Code of Practice, BLL followed no disciplinary process. There was nothing in the circumstances of this case which justified a wholesale departure from those standards. I accept that BLL is a small employer and as such that it may not be expected to have procedures in place which are as thorough or complex as those found in larger organisations. I also recognise that a small deviation from accepted standards might be expected in an organisation of this size and type. However, it is essential that an employee faced with a misconduct charge, particularly one which may result in dismissal, is given the opportunity to put forward their version of events and answer that

charge. The claimant was denied that opportunity. No reasonable employer, however small, would have conducted itself in such a manner. I find that there should be a 20% uplift for BLL's failure to follow the ACAS Code of Practice.

66. Further or alternatively, if I am wrong and the principal reason for dismissal was SOSR then given that, as submitted by Mr Jones, the other substantial reason was conduct with a lower case 'c' then I find that BLL would have been required to collect evidence as to that conduct, put that evidence to the claimant and allow him an opportunity to answer prior to the making of a decision. BLL failed to do so and, consequently, the dismissal would also be unfair if the principal reason was SOSR.

67. As to contributory fault, I have considered whether or not any reduction should be made. I remind myself that the question at issue under s.122 (6) ERA is simply whether it is just and equitable to make such a reduction. However, under s. 123 (6) ERA I am concerned with any action of the claimant that caused or contributed to the dismissal to any extent. I find that it is just and equitable to make a reduction and that the following actions of the claimant directly caused or contributed to his dismissal. Specifically, the claimant packing up tools early in the week commencing 1 March 2021, the incident on 4 March 2021 when he shouted at AB and his failure to attend for work on 5 March 2021 without explanation. I have also considered whether the dismissal was caused or contributed to by the historic incidents involving the claimant, specifically: the incident in the garden in July 2019, the incident at the traffic lights on 15 October 2019 and the incident with the strimmer on 30 September 2020. I note on the one hand that none of these incidents resulted in disciplinary proceedings, but on the other hand that it is BLL's position that the events in March 2021 were the last straw in a series of incidents. I remind myself that when considering contributory fault I am entitled to rely on a broad view of the claimant's conduct, meaning that I can take into consideration behavior that did not relate to the main reason for dismissal but played a material part in the dismissal. I find that the historic incidents whilst not thew main reason for dismissal played a material part. I consider that the claimant's conduct, being the historic incidents and/or the incidents in March 2021, is culpable and blameworthy in accordance with **Nelson v BCC (No 2) 1980 ICR 110 CA**. It is conduct of which BLL was aware at the time of dismissal. In all the circumstances, I consider it just and equitable to reduce the claimant's award by 75% to reflect contributory fault.

68. As to **Polkey**, I must look at what is just and equitable bearing in mind the 75% reduction for contributory fault. I note that prior to March 2021 there had been a number of incidents involving the claimant that had not resulted in any disciplinary sanction. AB's evidence was clear being that he had kept the claimant in employment for familial reasons. Notably the incident on 4 March 2021 was initially treated like all previous incidents in that nothing was said about it. Specifically, AB texted the claimant on the morning of 5 March 2021 providing the details of the day's work without reference to the incident the

previous day. However, I note the respondent's contention that the events in March 2021 were the last straw. This is clear from the extract quoted from BLL's letter dated 16 March 2021 in paragraph 60 above. In all the circumstances, I do not accept that the claimant's employment would necessarily have been terminated after a flawless procedure. However, there is clearly a risk that he might not have remained in employment. In the circumstances, I find that the claimant's compensatory award should be reduced by 20% to reflect the chance that his employment would still have been terminated after a flawless procedure in accordance with the principles in **Polkey v A E Dayton Services Ltd.**

69. As to the failure to provide the claimant with a written statement of terms and conditions, at the start of these proceedings BLL conceded that the claimant had not been provided with a written statement of terms and conditions. Therefore, I must increase the award by the minimum of two weeks' pay. I have considered whether it is just and equitable to increase the award to the maximum of four weeks' pay. I consider that it is because the claimant was employed for a not insignificant period, being just over two years. The claimant requested an employment contract on more than one occasion and was promised that one would be provided. BLL provided an employment contract to GB in early 2019. BLL was therefore able to prepare employment contracts, but failed and/or refused to do so for the claimant despite his requests. There was no good reason for this failure.

70. In light of my decision, a remedy hearing will be listed and a notice of hearing and case management directions will be sent in due course.

Employment Judge Newstead Taylor
Date: 18 November 2021

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON
25 NOVEMBER 2021

FOR THE TRIBUNAL OFFICE

ANNEX A

Agreed List of Issues

Dismissal v Resignation:

1. Did the claimant resign or was he dismissed?

    a. The claimant denies that he resigned and contends that he was dismissed by being sent his P45.

    b. The respondent says the claimant resigned.

Unfair Dismissal:

1. If the claimant was dismissed, what was the reason or principal reason for the claimant's dismissal and was it a potentially fair one?

    a. The respondent contends that the reason was conduct / SOSR.

2. Was the dismissal fair or unfair in all the circumstances in accordance with equity and the substantial merits of the case? Relevant to this will be:

    a. Did the respondent have a genuine belief in the misconduct which was the reason for the dismissal?

b. Did the respondent hold that belief in the claimant's misconduct on reasonable grounds?

c. Did the respondent carry out a reasonable investigation in all the circumstances?

d. Did the respondent follow a fair procedure?

e. Was the decision to dismiss a fair sanction, that is was it within the reasonable range of responses of a reasonable employer?

3. If the dismissal was unfair did the claimant cause or contribute to the dismissal by any blameworthy or culpable conduct and, if so, to what extent?

4. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any award to reflect the possibility that the claimant would still have been dismissed in any event had a fair and reasonable procedure been followed?

5. Did the respondent fail to comply with the ACAS Code of Practice on Disciplinary & Grievance Procedures? If so, would it be just and equitable in all the circumstances to increase the compensatory award and/or any other award and if so by what percentage up to 25%?

Written Statement of Terms & Conditions

1. Did the respondent provide the claimant with a written statement of terms and conditions in accordance with Ss. 1-3 ERA and S.38 of the Employment Act 2002?

    a. The respondent accepted that it had not provided the claimant with the required written statement of terms and conditions and, accordingly, was in breach of Ss. 1-3 ERA.

2. If the claimant succeeds on the claim, the Employment Tribunal must make an award of 2 weeks' pay and may make an award of 4 weeks' pay.

    a. Is it just and equitable in all the circumstances to increase the award to the higher amount of 4 weeks' pay?