EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110997/2021

Held at Aberdeen on 8, 9 and 10 December 2021

Employment Judge W A Meiklejohn

Mr Donald Annan	**Claimant** **In person**
W H Smith Retail Holdings Ltd	**Respondent** **Represented by:** **Mr P Manson – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is as follows –

(a) The claimant was unfairly dismissed by the respondent and the respondent is ordered to pay to the claimant the sum of **FIVE HUNDRED AND EIGHTY- SEVEN POUNDS AND FORTY PENCE (£587.40)**.

(b) The claimant's dismissal was in breach of contract and the respondent is ordered to pay to the claimant the sum of **TWO THOUSAND ONE HUNDRED AND THIRTY- SIX POUNDS (£2136.00)**.

REASONS

E.T. Z4 (WR)

1. This case came before me for a final hearing to deal with both liability and remedy. The claimant appeared in person. Mr Manson represented the respondent and participated remotely by means of the Cloud Video Platform.

Procedural history

2. A number of case management orders were made (by Employment Judge Hosie) on 27 October 2021. These covered the provision by the claimant of a schedule of loss and preparation of a joint bundle of documents.

3. A closed preliminary hearing took place on 19 November 2021 (before Employment Judge Kemp) at which it was agreed that the claims brought by the claimant were for unfair dismissal and breach of contract. EJ Kemp directed the respondent to clarify their position on a number of points. The respondent did so by lodging further and better grounds of resistance.

4. EJ Kemp noted at the preliminary hearing that the claimant was seeking reinstatement. The claimant confirmed at the start of the final hearing that this remained his position.

5. There was discussion at the preliminary hearing about the claimant using an aide memoire when giving his evidence at the final hearing. The claimant complied with EJ Kemp's direction that he should send this to the respondent in advance of the final hearing. Mr Manson confirmed that the respondent took no issue with this.

Evidence

6. For the respondent I heard evidence from Mr C McIntosh, who was the Cluster Manager for seven stores in Aberdeenshire, and Mr C Sinclair, who was the Area Manager for Scotland and The Lakes. I also heard evidence from the claimant.

7. There was a joint bundle of documents extending originally to some 130 pages, supplemented by additional documents lodged during the hearing.

Findings in fact

8. The claimant was employed by the respondent as a Post Office Clerk at their store in the St Nicholas Shopping Centre in Aberdeen. His employment commenced on 4 November 2012 and continued until his summary dismissal on 5 May 2021. At the time of his dismissal the claimant worked 30 hours per week and his gross weekly pay was £267.

Statutory excuse

9. The respondent is required to comply with the Immigration, Asylum and Nationality Act 2006 ("IANA"). The following provisions of IANA are relevant –

"***15 Penalty***

(1) It is contrary to this section to employ an adult subject to immigration control if –

(a) he has not been granted leave to enter or remain in the United Kingdom, or

(b) his leave to enter or remain in the United Kingdom –

(i) is invalid,

(ii) has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise), or

(iii) is subject to a condition preventing him from accepting the employment.

(2) The Secretary of State may give an employer who acts contrary to this section a notice requiring him to pay a penalty not exceeding the prescribed maximum.

(3) An employer is excused from paying a penalty if he shows that he complied with any prescribed requirements in relation to the employment.

(4) But the excuse in subsection (3) shall not apply to an employer who knew, at any time during the period of the employment, that it was contrary to this section…."

"***25 Interpretation***
In sections 15 to 24 –
….(c) a person is subject to immigration control if under the Immigration Act 1971 he requires leave to enter or remain in the United Kingdom…."

10. Under section 19 IANA the Secretary of State was required to issue a Code of Practice specifying factors to be considered by him in determining the amount of a penalty imposed under section 15. When the claimant's employment began, the relevant Code of Practice was the one dated February 2008 (27-43) (the "Code of Practice"). A further code of practice was issued in May 2014 (44-53) – this applied (a) where employment commenced on or after 16 May 2014 and (b) where a repeat check on an existing worker was required to be carried out on or after 16 May 2014 to retain a statutory excuse.

11. The Code of Practice provides at paragraph 2.4 –

"*Under the 2006 Act, an employer may establish a statutory excuse by checking original documents presented by a potential or existing employee. Details of what documents are acceptable and how to do this are provided in Appendix 1."*

12. Appendix 1 to the Code of Practice contains two lists of documents (List A and List B) which provide an employer with a statutory excuse if he takes "*reasonable steps to check the validity of the original document and that the person presenting the document is the rightful holder"* and then makes a copy of the relevant page or pages before employing that person. List A includes –

"8 A full birth certificate issued in the United Kingdom which includes the name(s) of at least one of the holder's parents, ***when produced in combination with*** *an official document giving the person's National Insurance Number and their name issued by a Government agency or a previous employer (e.g. P45, P60, National Insurance Card)…."*

Commencement of employment

13. Prior to starting his employment with the respondent, the claimant was interviewed by Ms M Mathieson, Post Office Manager. The claimant's recollection was that he produced to Ms Mathieson his Right to Work ("RTW") documents. These were (a) his birth certificate, (b) his driving licence and, he believed, (c) a Government headed letter containing his National Insurance Number.

14. The claimant said that he handed these documents to Ms Mathieson. She took them away, photocopied them and gave the originals back to the claimant.

15. The claimant was issued with a statement of terms and conditions of employment (67-73). This was signed by the claimant and Ms Mathieson on 15 November 2012. It recorded the claimant's start date as 5 November 2012 as opposed to 4 November 2012, being the date in the claimant's ET1 which was agreed by the respondent in their ET3. This discrepancy was not material.

16. The statement of terms and conditions of employment issued to the claimant contained, at paragraph 34, a reference to the respondent's Disciplinary and Dismissal procedures –

"The Company has Disciplinary and Dismissal Procedures that will be followed in cases of alleged or suspected misconduct. The Company reserves the right to suspend you on full pay in order to carry out a proper investigation…."

Previous RTW check

17. Some four years prior to the events leading to his dismissal, the claimant (in common with other staff) had been approached by Ms Mathieson about providing his RTW documents. The claimant had been surprised by this and did some online research. He became aware of the statutory excuse and the

checklist which included List A documents. He understood his own position to be that further information was not required and there was therefore no need for him to resubmit his documents.

18. The claimant spoke to Mr McIntosh who, according to the claimant, was "perplexed". Mr McIntosh was not able to recall this conversation but I accepted the claimant's evidence that it took place. The claimant thought that he had spoken to Ms Mathieson and told her that the RTW information she had requested was not required. No further action was taken. The claimant's evidence was that he *"took it that my assertion that further information was not required was accepted".*

RTW check in 2021

19. In early 2021 the respondent commenced a review of their RTW processes and procedures. As part of this they required all of their stores to check the RTW documentation held within employee files. They produced a document headed *"Checking an Employees Right to Work"* (58-61). This read more like a managers' guide than a policy and Mr Sinclair was uncertain during his evidence as to whether this was the relevant policy. However, I was satisfied that this document was one of those enclosed with the undated letter from Ms D Sim to the claimant (91-92) inviting him to a disciplinary hearing, under the description "*Policies relevant to the alleged misconduct offence".*

20. The document commenced as follows –

"*As you are aware WHSmith are legally required by UK law, Immigration, Asylum & Nationality Act 2006 to be able to demonstrate for each employee we recruit that they have the legal right to work in the UK.*

This applies to all employees who commenced employment after 27th January 1997. An employer may be liable for a civil penalty if they employ someone who does not have the right to undertake the work in question.

They may be excused if they have undertaken the correct checks at point of recruitment, known as a statutory excuse.

To maintain compliance with the Immigration, Asylum and Nationality Act 2006 we are implementing improved processes and procedures to enable full visibility across WH Smith."

21. Around the beginning of March 2021 the claimant was approached by his line manager, Mr M Nott. Mr Nott asked the claimant about his RTW in the United Kingdom. According to the claimant, Mr Nott said it was a company review of RTW documentation and mentioned *"passport and/or birth certificate".* The claimant was unsure whether Mr Nott had mentioned National Insurance Number. The claimant's response to Mr Nott was that he had provided this information before and did not require to do so again. Following his conversation with Mr Nott, the claimant revisited his online research into RTW to refresh his memory.

22. A few days later Mr Nott spoke to the claimant again. He told the claimant that the respondent held copies of his birth certificate and driving licence (114-115) but the information about his National Insurance Number was not there. Mr Nott asked the claimant for a Government headed document containing his National Insurance Number. The claimant's response to Mr Nott was to say again that the requested document was not required. Mr Nott made one or two further approaches to the claimant and the claimant gave the same response. The claimant then told Mr Nott that he would only speak with his superior, who was Mr McIntosh.

Mr McIntosh meets with claimant

23. Mr McIntosh met with the claimant on 22 March 2021. Mr McIntosh prepared a file note of this meeting (74-75). This described the purpose of the meeting as "*Record of request for proof of NI number for right to work in the UK".* The file note included –

"*Company require to legally have right to work info in file.*

Asked Donald if he would provide Government document with NI No on it.

Donald: Reason for not supply is continuous statutory excuse. WHS has this.

I have requested that Donald provides documentation with[in] one week of this file note."

24. The file note concluded by recording a request by the claimant that what the company were asking of him should be put in writing on company headed paper. This did not happen.

25. Prior to his meeting with the claimant on 22 March 2021, Mr McIntosh emailed the respondent's RTW team and was advised that provision by the claimant of his National Insurance Number was a legal requirement (78-79). Shortly after his meeting with the claimant, Mr McIntosh emailed the RTW team again, including the following –

"*I asked the employee if he could produce the documentation in order to bring his records up to date.*

He said he did provide 8 years ago when he started and his reason for not resubmitting is that WH Smith has a continuous statutory excuse and does not need to resupply."

26. Mr McIntosh met with the claimant again on 31 March 2021. As before, he prepared a file note (80-81). After recording that the respondent was undertaking an internal audit to identify gaps in documentation and that a gap had been identified in the claimant's case, the note continued –

"*There is no statutory excuse, now or in the future with reobtaining however it will satisfy our internal audit policies….*

We must see an original copy of government authorised document to verify and sign and retain on file.

Failure to meet this deadline could be seen as failing to carry out a reasonable management request.

Deadline for producing this right to work required document/NI number is 7/4/21."

27. Mr McIntosh met with the claimant for a third time on 8 April 2021. The file note of this meeting (82) recorded that the claimant had not brought his RTW document and, when asked the reason for not supplying this, replied –

"*Fault lies with company failed in their duty of care to look after document previously provided."*

Claimant is suspended

28. Following his third meeting with the claimant Mr McIntosh sought advice from HR. That advice, provided by email on 12 April 2021 (82.2), was to suspend the claimant until he could provide the required documentation.

29. Mr McIntosh met with the claimant again on 14 April 2021 and suspended him. The record of suspension (83) described the allegation in these terms –

"*Failure to supply requested right to work documentation.*

Failure to carry out a reasonable management request."

30. Mr McIntosh confirmed the claimant's suspension in writing (84), his letter being dated 13 April 2021 in error. Mr McIntosh expressed the reason for suspension in exactly the same terms as noted in the record of suspension. He invited the claimant to an investigation interview.

Investigation meeting

31. Mr McIntosh held an investigation meeting with the claimant on 23 April 2021. Despite the claimant's objection, Mr Nott acted as notetaker (85-88). The bundle also included a typewritten copy of the notes (89-90). The claimant believed that there was a discrepancy between the handwritten and typed versions of the notes in relation to the point at which there was an exchange between the claimant and Mr McIntosh about the claimant not being allowed to read the notes. I did not regard this as material.

32. The investigation meeting was for the most part a rehearsal of Mr McIntosh's previous meetings with the claimant. The claimant told Mr McIntosh that the company had a statutory excuse. Mr McIntosh replied that the company did not have a statutory excuse without the documents. The claimant said that it was the respondent's fault if the documents had not been retained correctly.

33. The meeting concluded with Mr McIntosh telling the claimant that he had *"not given a reasonable excuse for not carrying out a reasonable request".* Mr McIntosh told the claimant that matters would move forward to a disciplinary hearing.

Disciplinary hearing

34. Ms Sim was appointed to conduct the disciplinary hearing. She issued an invitation letter to the claimant (91-92) which began as follows –

"*Following requests for you to supply documents to confirm your eligibility to work in the UK, and the subsequent investigation interview held on 23/04/2021, I am writing to advise you that you are required to attend a disciplinary hearing on 05/05/2021 at WH Smith Aberdeen St Nicholas centre at 10.30am. DW Sim Manager @ WHSmith Elgin will be chairing this hearing and an appropriate employee will also be present to take notes.*

At this hearing the question of disciplinary action against you will be considered, in accordance with the Company's Disciplinary Policy, with regard to:

Breach of Statutory Duty specifically no valid right to work in the UK

If you are unable to prove your eligibility to work in the UK, then unfortunately WH Smith has no alternative but to terminate your employment immediately on the grounds detailed above."

35. With her letter Ms Sim sent the claimant a number of enclosures which were described as –

"*Disciplinary Policy and Procedure*
All relevant investigation meeting notes
Policies relevant to the alleged misconduct offence
All other documents being provided to the Disciplining Chair"

Ms Sim's letter advised the claimant of his right to be accompanied by a fellow employee or union representative.

36. The disciplinary hearing took place on 5 May 2021. Mr Nott was the notetaker (93-96). The claimant attended the meeting alone but asked to have a *"witness"* present and after a short adjournment Ms L Watson joined the meeting. The notes then recorded the meeting proceeding as follows –

"DS So this hearing is because of breach of valid duty of right to work in UK.
This was discovered in company follow up checks .
You were asked informally and you were asked during investigation hearing on 20/04/21.
Can you provide these documents?

DA Can I, Yes.
Will I, No.

DS At this time as you are unable to prove your right to work in the UK.
Unfortunately WH Smith has no alternative but to terminate your employment immediately on the grounds detailed in your invitation to disciplinary hearing.
Is there anything you would like to add?"

37. The notes continued –

"DA Which statutory right
When is right to work established?

DS I'm going to end this meeting.

DA Are you denying that right?"

38. The notes then recorded an exchange between Ms Sim and the claimant about RTW, including –

"*Donald is not giving DS time to answer questions.*

DA Interrupts again.

DA interrupts.

DA This is not a meeting.
You are over your head.
What law is it that I am in breach of."

The notes recorded Ms Sim attempting on two further occasions to bring the meeting to an end. According to the notes, the meeting lasted 23 minutes including the adjournment to bring Ms Watson in.

39. Ms Sim wrote to the claimant on 6 May 2021 (97-99) confirming his dismissal. She stated the circumstances which led to her decision in the same terms as per her invitation letter (see paragraph 34 above – wording in bold type). She set out the reason for dismissal in these terms –

"*As a company we are legally required to evidence valid documentation to confirm that employees have the right to work in the UK. Unfortunately you have been unable to provide me with a valid document to prove your right to work in the UK and therefore based on this [and] I have made the decision to dismiss you from the business.*

You will be paid up to and including 05/05/2021. As this was a dismissal in regards to a breach of a statutory duty you are not entitled to receive payment for notice…."

Claimant appeals

40. Ms Sim advised the claimant of his right of appeal. The claimant exercised that right by his email of 11 May 2021 (100). His grounds of appeal were expressed in these terms –

"*As well as being denied the opportunity to ask questions or provide evidence, which is my right under WH Smith Disciplinary Policy and Procedure, I believe the sanction imposed is disproportionate to the alleged act of misconduct and that my dismissal did not amount to gross misconduct entitling the Company to summarily dismiss me."*

41. Mr Sinclair dealt with the claimant's appeal. He wrote to the claimant on 21 May 2021 (103.1) inviting him to an appeal hearing on 25 May 2021. The appeal took place on that date with Mr D May attending as notetaker (104-107.1).

42. The notes recorded the following exchange at the start of the appeal hearing –

"DA It was a misdemeanour if anything, What is it I was dismissed for?

CS Failure to follow company policy.

DA I got told it was for a breach of statutory duty. When I asked about it I got a blank expression….I wasn't allowed to present evidence. I wanted to ask a question.

CS So you didn't ask?

DA No, I was told end of."

43. There was then a discussion between Mr Sinclair and the claimant about the relevance of an existing employee providing evidence of RTW where there was a gap in the RTW paperwork. Mr Sinclair acknowledged that they were not going to agree on this point.

44. Later in the meeting Mr Sinclair asked the claimant if he had looked at the company policy. The discussion continued as follows –

"DA Where is it and how can I look at it?

CS The policy is available to all on the intranet [to all].

DA I didn't know it was available, no one said.

CS I thought with all the time you have spent on the government website you would have taken time to look at the company policy.

DA I looked at the law.

CS So at investigation you hadn't looked at company policy.

DA No, the company can't dictate the law.

CS I'm talking about policy not law.

DA It's law not policy."

45. Mr Sinclair then asked the claimant if he understood the reason for his suspension. That led to this exchange –

"DA Didn't say anything about company policy. The company can't be fined as I have right to work. It contradicts the law, why does the company do it?
CS Employment law, we are subject to fines.

DA No you are not.
CS I'm not a lawyer I'm here to talk about policy. Due diligence showed gaps we need to plug them. Gaps in records were fixed.
DA You can't be fined if you don't have NI number. Only fined if you have illegal immigrants not allowed to work in the UK."

46. Mr Sinclair then asked the claimant to talk him through the disciplinary hearing. The claimant said that Ms Sim had told him *"meeting over"* for having *"no valid right to work in the UK".* The claimant showed Mr Sinclair his dismissal letter and continued –

"*DA It [is] a breach of statutory right. Where does it say company policy?*

CS We need these documents. In the meeting you were asked can you provide them and you said yes, you were then asked will you and you said no. So you opted not to provide them.

DA I would not provide regardless.

CS But you knew you would lose your job?

DA Yes but I thought I could ask a question and see evidence. My info could be in someone else's file. It's nothing I have done."

47. Towards the end of the meeting the claimant asked Mr Sinclair to speak to his witness, Ms Watson. Mr Sinclair did so, with Mr May as notetaker (109-110). Ms Watson told Mr Sinclair that *"we had all been asked I think to provide but he was the only one that refused"* (meaning the claimant). In relation to whether the claimant had had the chance to present his case and ask questions, Ms Watson said –

"*No time was given to respond. As soon as the question was asked he's [he'd] ask another one. Dawn couldn't get a word in."*

Appeal outcome

48. Mr Sinclair wrote to the claimant on 28 May 2021 (111-112) with his decision. He set out the claimant's grounds of appeal as follows –

- *The sanction imposed was disproportionate to the alleged act of misconduct*

- *You were denied the opportunity to ask questions or provide evidence*

49. Mr Sinclair provided his appeal outcome in these terms –

"

- *The sanction imposed was disproportionate to the alleged act of misconduct:*
    - *It is a condition of your employment that you provide the business with your Right to work documentation.*
    - *Legally, you must provide the business with your Right to work documentation.*
    - *You have admitted to having the correct Right to work documentation but have refused to provide it.*
    - *In accordance with the company policy, Breach of Statutory Duty is deemed Gross Misconduct.*
    - *You have failed to follow company policy by not providing your Right to work documentation.*
- *You were denied the opportunity to ask questions or provide evidence:*
    - *From reviewing both investigation and disciplinary notes, I can see that you asked a number of questions in both meetings.*
    - *Witnesses to your disciplinary hearing have suggested that you were provided with ample opportunity to ask any questions and/or provide evidence to support your case however, you did not.*
    - *Witnesses to your disciplinary hearing noted that you spoke over the disciplinary chair and was at points, not allowing her to speak.*
    - *Based on the aforementioned finding, I would suggest that you had the opportunity to ask questions and/or provide evidence however you chose not to do so.*

Therefore, after carrying out a full and thorough investigation into your grounds for appeal made at the appeal hearing, I have decided to uphold the original decision to dismiss and therefore your dismissal stands."

50. In the course of his evidence Mr Sinclair accepted that the reason for dismissal (*"Breach of statutory duty specifically no valid right to work in the UK")* was incorrect. He said that the underlying issue was the claimant's

refusal to provide documents, and the disciplinary allegation should have been refusal to comply with a reasonable management request. Mr Sinclair accepted that the claimant was entitled to understand that the reason for his dismissal was as stated in Ms Sim's letter of 6 May 2021 (97-99) and that the disciplinary hearing *"could have been better".*

51. Mr Sinclair also accepted that he had not picked this point up before the appeal (ie the reason for dismissal). The claimant had raised the issue of the reason for his dismissal at the start of the appeal hearing (see paragraph 41 above). Mr Sinclair agreed that he had told the claimant that it was *"failure to follow company policy".* Mr Sinclair agreed that the claimant would have been confused as to the reason for his dismissal.

52. Mr Sinclair also agreed that, on reflection, he should have investigated the claimant's assertion that the respondent was wrong in law. The claimant was telling him that the respondent did not need the documentation being sought and he *"should have done more with the information the claimant was providing".* Mr Sinclair added that he felt "*irrespective of what the law says, an employee should comply with company policy".* Mr Sinclair accepted that *"breach of statutory duty"* was not on the list of examples of offences normally regarded as gross misconduct under the respondent's Disciplinary policy (57) whereas "*unreasonable refusal to carry out reasonable duties or instructions"* was included. Ms Sim's outcome letter had been wrong in relation to what was found to have been gross misconduct.

Evidence relating to remedy

53. In his ET1 the claimant had ticked the box at section 9.1 indicating that he wanted reinstatement. In the course of his evidence the claimant confirmed that reinstatement remained his preferred remedy. However, he also said that he would not be happy that someone else would lose their job to allow him to go back.

54. Mr McIntosh's evidence was that he had recruited to fill all vacancies in the two Aberdeen stores with Post Offices which he managed so that taking the claimant back would mean an overspend, and potentially would lead to a redundancy exercise. Mr McIntosh said that he had no concerns about the claimant's work but was concerned about (a) how the claimant would fit in with the team and (b) having to tread carefully with regard to reasonable requests to the claimant in the future.

55. Mr Sinclair echoed Mr McIntosh's concern about what the next "*reasonable request"* issue might be. He said that he would not want "*to put Mr McIntosh through this again".*

Mitigation

56. The claimant provided a schedule of loss (125-127) from which it was apparent that he had completed only one job application since his dismissal, and that had been unsuccessful. He remained unemployed. He had obtained Jobseeker's Allowance from 23 June 2021. He was ineligible for Universal Credit by reason of his savings.

57. A few days after his dismissal the claimant had suffered an epileptic seizure, his first for almost ten years. He was conscious of the need to avoid jobs where his own safety and that of others could be affected. He did not drive.

Comments on the evidence

58. It is not the function of the Tribunal to record every piece of evidence presented during the hearing and I have not attempted to do so. For example, I noted the claimant's evidence about contacting the Home Office helpdesk but did not consider it necessary to record it here. Similarly, I heard evidence about an incident which occurred not long before the events which led to the claimant's dismissal where he had been trapped in a lift at work. This had clearly been a distressing experience for the claimant. However, it was not relevant to the fairness or otherwise of his dismissal.

59. All of the witnesses were credible and truthful to the best of their recollection. The claimant was sometimes a little argumentative and tended on occasion to answer a question with a question of his own. However, he was conducting his own case in an unfamiliar environment and it would be harsh to be over-critical.

60. Mr Sinclair was a refreshingly candid witness. The dismissing officer, Ms Sim, was no longer employed by the respondent and Mr Sinclair had in effect to defend what she had done. He did not hesitate to accept where things might have been handled better and that was to his credit.

Submissions - respondent

61. Mr Manson invited me to consider three questions –

(a) Was it reasonable for the respondent to ask the claimant for his RTW documentation?

(b) Was it reasonable for the claimant to refuse to provide this?

(c) Was it reasonable for the respondent to use that refusal as grounds to dismiss him?

62. Mr Manson invited me to answer questions (a) and (c) in the affirmative and question (b) in the negative. He argued that the claimant had acted unreasonably and not in a spirit of cooperation. The respondent had good reasons for carrying out the RTW audit exercise. It was a company-wide process to rebase the RTW documentation. There had been no *"singling out"* beyond those who were found on audit to have incomplete documentation.

63. Mr Manson said that the claimant was a man of principle but had shown himself to be dogmatic, particularly as regards the respondent's ability to request RTW documentation. He had fallen into error. It had been

reasonable for the respondent to ask for the documentation so as to have it on file.

64. Prior to the claimant being invited to the disciplinary hearing, Mr Manson submitted that there had been a fair process. The claimant had been spoken to both informally and then formally. He had been asked to provide his RTW documentation and had resolutely refused to comply.

65. In the invitation to the investigation meeting the reasons for that meeting had been made clear, namely the failures (a) to supply the requested RTW documentation and (b) to carry out a reasonable management request. The claimant, Mr Manson argued, had been entirely aware of the issue in hand and the step he had to take to avoid escalation.

66. Turning to the disciplinary hearing invitation, Mr Manson submitted that the purpose had been clear from the opening words of Ms Sim's letter notwithstanding the words which appeared in bold type (see paragraph 34 above).

67. At the disciplinary hearing, the fundamental point was raised and put to the claimant, ie can you provide the documents? The claimant's response was an act of defiance. While the claimant felt that the respondent had breached a duty of care over the safekeeping of his RTW documentation, he should have acted in line with his ongoing duty of cooperation with his employer.

68. The claimant had repeatedly agreed that he would refuse to provide any RTW documentation. This was a failure to follow a reasonable management request. If all of the letters sent by the respondent to the claimant had been entirely correct, it would have made no difference to the outcome.

69. Mr Manson referred to ***Brito-Babapulle v Ealing Hospital NHS Trust [2014] EWCA Civ 1626***. He made reference to paragraph 17 of the Judgment in

that case but I suspect he may have intended to direct me to paragraph 11 where the Employment Appeal Tribunal said this –

"*The label attached to a reason for dismissal may be "conduct", "capability", "some other substantial reason", etc, but it is well recognised that the reason for dismissal is more than just a label which subsumes within it a variety of circumstances. The reason is a set of facts, or it may be beliefs, known to or held by the employer which causes it to dismiss."*

Mr Manson argued that the claimant had been under no illusion. Whatever label was attached, the claimant knew what the fundamental problem was.

70. Mr Manson then referred to ***Willow Oak Developments Ltd t/a Windsor Recruitment v Silverwood and others 2006 IRLR 607.*** In that case the employees were dismissed when they refused to accept variations to their contracts which imposed arguably unreasonable post-employment covenants. The Employment Tribunal did not accept that a refusal to sign up to a covenant which was unreasonably wide could amount to a potentially fair reason for dismissal. The Court of Appeal in England said this (Buxton LJ at paragraph 15) –

*"The EAT in the present case disagreed with that approach, which disqualifies any unreasonable covenant from counting as a reason which comes within the terms of section 98(1). I respectfully agree. The clue to this issue is that the question asked by section 98(1) is whether the employer's reason is **of a kind** such as to justify the dismissal. That language clearly indicates that the question is whether the reason falls within a **category** of reason that is not excluded by law as a ground of dismissal; or, as Burton P put it slightly differently in **Scott v Richardson [EATS/0074/04, 26 April 2005, unreported]**, whether the reason for which the dismissal took place **could be** a substantial other reason. Accordingly, if the reason is whimsical or capricious or dishonest (see Lord McDonald in **Harper v NCB [1980] IRLR 260**), or is based on an inadmissible ground such as race or sex, then it will be excluded by section 98(1). But if, as in our case, the category into which the reason falls, an employee's refusal to accept covenants proposed by the employer for the protection of his legitimate interests, is one that can in law form a ground for dismissal, then it is necessary to proceed to the second stage of considering whether the employer has, under section 98(4)(a), acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee."*

Accordingly, Mr Manson submitted, if the respondent had shown a reason within a category that could form a ground for dismissal, the Tribunal must proceed to section 98(4).

71. Finally, Mr Manson referred to ***Baker v Abellio London Ltd 2018 IRLR 186*** where the facts were similar to the present case. A mistaken belief can form the basis of a reason falling with some other substantial reason. This was supported by ***Bouchaala v Trusthouse Forte Hotels Ltd [1980] ICR 721*** and ***Hounslow London Borough Council v Klusova [2008] ICR 396***. The Employment Appeal Tribunal said this (at paragraph 29) –

"*The some other substantial reason expressed by the Employment Judge in her Judgment was, at paragraph 51, "that the claimant refused to obtain the relevant evidence to prove that he could work". However, on a fair reading, I take this to mean a finding that the Respondent believed it would be a contravention of the law if they employed the Claimant without being provided with the documents which they believed to be required. In my judgment, on the basis of* ***Bouchaala*** *and* ***Klusova****, this can amount to some other substantial reason for dismissal within section 98 of the ERA, and in this regard the Employment Judge made no error of law in so finding."*

72. Mr Manson invited me to find that the respondent had shown a fair reason for dismissal, had acted reasonably and had shown sufficient reason to dismiss, and that the claimant's dismissal was fair. The respondent's position was that there had been a fair dismissal for gross misconduct, failing which for some other substantial reason.

73. Turning to the claimant's wrongful dismissal claim, Mr Manson argued that if the claimant's summary dismissal was fair, there could be no entitlement to notice pay.

74. I indicated to Mr Manson that he did not require to address me on the application in this case of ***Polkey v AE Dayton Services Ltd [1987] UKHL 8***. Mr Manson submitted that there had been substantial contributory conduct on the part of the claimant, and that it could be just and equitable to award no compensation if the claimant's dismissal was found to have been unfair.

75. Turning lastly to mitigation of loss, Mr Manson said that there had been almost an entire failure to mitigate on the part of the claimant, arguable from at least the beginning of July 2021. It was not reasonable on the claimant's part to have applied for only one job.

Submissions – claimant

76. The claimant said that he had pointed the respondent in the right direction in relation to RTW where he had a better knowledge of the law. The risk to the respondent of criminal liability was arguably greater than the risk of an Employment Tribunal. That meant RTW checks should be done at the right time, which was at the start of employment.

77. Responding to Mr Manson's point that all this could have been avoided if he had provided one A4 sheet of paper confirming his National Insurance Number, the claimant argued that it could equally have been avoided by a simple email from the respondent to the Home Office, or they could have called the immigration hotline.

78. The claimant submitted that any concern on the part of the respondent about discrimination – which I understood to relate to the need to check all employees' RTW documents – was not well founded. The obligation to obtain RTW documents arose at the start of employment. Once done, where the employer had a continuous statutory excuse, the employee did not have to provide anything else. It was different in the case of employees with a time limited statutory excuse, and not discriminatory to check only those affected.

79. Referring to ***Brito-Babapulle***, the claimant argued that it was clear that Ms Sim did something wrong. The *"label"* she applied to the disciplinary allegation – breach of statutory duty – was poles apart from that now advanced, being failure to comply with a reasonable management instruction. The claimant said that the allegation of breach of statutory duty *"threw me".* It had not been explained even at the appeal stage.

Applicable law

80. The right not to be unfairly dismissed is found in section 94 of the Employment Rights Act 1996 ("ERA") which provides –

"*(1) An employee has the right not to be unfairly dismissed by his employer."*

81. The fairness or otherwise of a dismissal is addressed in section 98 ERA which provides as follows –

"*(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 –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3)….

(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…."

82. The ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) (the "Code") provides guidance and sets out principles for handling disciplinary and grievance situations in the workplace. It includes the following at paragraph 9 –

"If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. The notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."

83. At paragraph 12 the Code provides –

"….*At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses…."*

84. In the case of a conduct dismissal the Tribunal will normally remind itself of what Arnold J said in ***British Home Stores Ltd v Burchell 1978 IRLR 379*** –

"*What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief, that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further."*

85. In ***British Leyland UK Ltd v Swift 1981 IRLR 91*** the Court of Appeal in England (per Lord Denning at paragraph 11) said this –

"*The correct test is: Was it reasonable for the employers to dismiss him? 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: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him."*

86. In ***Iceland Frozen Foods Ltd v Jones [1983] ICR 17*** the Employment Appeal Tribunal, after quoting the above passage from ***British Leyland UK Ltd v Swift***, said –

"….the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

87. In ***Abernethy v Mott, Hay & Anderson [1974] ICR 323*** the Court of Appeal in England (per Lord Cairns) said this –

"*A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason."*

Discussion

Unfair dismissal

88. I deal firstly with the claimant's unfair dismissal claim. The starting point here was the reason for dismissal. It was for the respondent to show (a) in terms of section 98(1)(a) ERA what that reason was and (b) in terms of section 98(1)(b) ERA that it was a reason falling with in section 98(2) ERA or some

other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held.

89. I reminded myself of what the Court of Appeal said in ***Abernethy*** which was echoed by the Employment Appeal Tribunal in ***Brito-Babapulle***. What was the *"set of facts….or….beliefs"* which had caused the respondent to dismiss the claimant? I agreed with Mr Manson's assertion that the claimant "*knew what the fundamental problem was".* He knew that if he did as he was being asked and produced a document on Government headed paper confirming his National Insurance number that "*problem"* would go away.

90. The difficulty which the respondent created for itself was that it moved from Mr McIntosh's clear articulation of the issue (see paragraph 28 above) to something markedly different. Mr McIntosh set out the allegation against the claimant in these terms –

"Failure to supply requested right to work documentation.

Failure to carry out a reasonable management request."

91. Unfortunately, when Ms Sim invited the claimant to a disciplinary hearing, she expressed the allegation in rather different terms –

"***Breach of Statutory Duty specifically no valid right to work in the UK***"

Her letter then advised the claimant that if he was unable to prove his eligibility to work in the UK "*then unfortunately WH Smith has no alternative but to terminate your employment immediately on the grounds detailed above".*

92. Mr Manson drew attention to the opening words of Ms Sim's (undated) letter (91-92) – "*Following requests for you to supply documents to confirm your eligibility to work in the UK…."* but the claimant had been entitled to focus on the alleged "*breach of statutory duty".* The fact that this was set out in bold type in Ms Sim's letter served to emphasise that this was the allegation he required to answer.

93. That this led to an unsatisfactory disciplinary hearing was not surprising. The claimant clearly wanted to discuss the statutory duty he was alleged to have breached – see paragraph 37 above. He no doubt wanted to assert that there had been no breach because he had been asked for and had provided his RTW documentation when he started work with the respondent, and this gave the respondent a statutory excuse. Any reasonable employer would have allowed the claimant to explain his position at the disciplinary hearing and would have had regard to that explanation when deciding whether the allegation was made out and, if so, what sanction should be imposed. Ms Sim did not do that.

94. Ms Sim expressed the reason for the claimant's dismissal in the terms set out at paragraph 39 above. Ms Sim told the claimant –

"*….you have been unable to provide me with a valid document to prove your right to work in the UK and therefore based on this I have made the decision to dismiss you….*"

The statement that the claimant had been *"unable"* to provide an RTW document was inaccurate. When he was asked by Ms Sim if he could do so, the claimant had answered "Yes" (see paragraph 36 above).

95. The letter of dismissal went on to say –

"*As this was a dismissal in regards to a breach of a statutory duty you are not entitled to receive payment for notice."*

That language conveyed to the claimant that he was being dismissed for gross misconduct as otherwise he would have been entitled to notice or pay in lieu of notice. His statement of terms and conditions of employment (67-73) advised the claimant (at clause 10) that the respondent reserved the right to terminate his employment without notice or payment in lieu of notice and referred him to the Employee Handbook.

96. The claimant's statement of terms and conditions of employment was dated 15 November 2012. The respondent's Disciplinary Policy and Procedure (54-57) was dated August 2013. I considered it was reasonable to assume that this superseded the provisions of the Company Handbook relating to disciplinary matters.

97. The respondent's Disciplinary Policy and Procedure contained (at section 7) provisions relating to gross misconduct. Employees were advised there that *"the normal consequence will be dismissal".* The Policy then set out a list "*which is not exhaustive"* of examples to offences normally regarded as gross misconduct. The list did not include breach of statutory duty.

98. As I have said above, Mr Sinclair was a refreshingly candid witness. He recognised that the disciplinary hearing "*could have been better"* and, in effect, that he had not taken the opportunity to put things right at the appeal. He accepted that he had not recognised the "*reason for dismissal"* issue in advance of the appeal hearing. When this issue was raised by the claimant at the start of the appeal hearing, Mr Sinclair told him the reason was "*Failure to follow company policy".* Mr Sinclair accepted that the claimant would have been confused as to the reason for his dismissal.

99. Mr Sinclair also accepted that he should have investigated the claimant's assertion that the respondent was wrong in law (in terms of requiring the claimant to prove his RTW in the UK). In fairness to Mr Sinclair, he was getting closer to how Mr McIntosh had described the allegations which led to the disciplinary process. Mr McIntosh referred to "*Failure to carry out a reasonable management request".* The *"management request"* related to the RTW check in 2021. Notwithstanding his uncertainty during his evidence (see paragraph 19 above) I was satisfied that this was the *"company policy"* to which Mr Sinclair was referring at the appeal hearing.

100. I found that the *"set of facts….or….beliefs"* which caused the respondent to dismiss the claimant was that (a) they required as a matter of legal obligation

to obtain RTW documentation from existing employees including filling any *"gaps"* and (b) the claimant was unwilling to provide the documentation requested from him. This was flawed in the sense that obtaining from the claimant a document containing his NI number would not provide the respondent with a statutory excuse. That could only be achieved by getting the appropriate documentation before employment started.

101. However, reflecting what Buxton LJ said in ***Willow Oak Developments***, it was a reason "*of a kind"* such as to justify dismissal and I considered that the *"kind"* came within the category of conduct. The dismissal was therefore potentially fair. As I was satisfied that the respondent had shown that conduct was the reason for the dismissal, I did not believe it was necessary to consider the alternative of some other substantial reason. I moved on to consider the application of section 98(4) ERA.

102. This required me to decide whether the respondent had acted reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing him. I had to (a) take account of the circumstances (including the respondent's size and administrative resources) and (b) make my determination in accordance with equity and the substantial merits of the case. This included deciding (per ***British Leyland*** and ***Iceland Frozen Foods***) whether the dismissal fell with the band of reasonable responses.

103. I decided this question in favour of the claimant. I did so for the following reasons.

104. Firstly, the respondent's belief that they required as a matter of legal obligation to obtain RTW documentation from the claimant was flawed (as explained in paragraph 100 above). That was not of itself fatal in determining the fairness or otherwise of the dismissal. However, as I have stated at paragraph 93 above, any reasonable employer would have allowed the claimant to explain his position at the disciplinary hearing and would have

had regard to that explanation when deciding whether or not to dismiss. The respondent failed to do so.

105. Secondly, the respondent failed to articulate to the claimant with sufficient clarity the allegation against him both at the disciplinary hearing and at the appeal. Under the Code, the respondent ought to have provided the claimant with sufficient information about the alleged misconduct to enable him to prepare to answer the case (see paragraph 82 above). An employee facing the prospect of dismissal for an alleged disciplinary offence should not be in doubt as to the nature of that offence. Between Ms Sim referring to *"Breach of statutory duty specifically no valid right to work in the UK"* and Mr Sinclair referring to *"Failure to follow company policy"* it was unsurprising that the claimant was confused. Any reasonable employer would have set out the disciplinary allegation against the claimant in clear, consistent and unambiguous terms. The respondent failed to do so.

106. Thirdly, the respondent did not carry out as much investigation as was reasonable in all the circumstances of the case (per ***Burchell***). Neither Ms Sim nor Mr Sinclair looked into the argument the claimant was putting forward to explain why he was unwilling to provide the documentation confirming his National Insurance number. Any reasonable employer would have done so.

107. Fourthly, the procedure followed by the respondent at the disciplinary hearing fell short of what any reasonable employer would have done. Ms Sim asked the claimant only one question before telling the claimant that the respondent had no alternative but to terminate his employment. It was clear from the note of the meeting that when Ms Sim asked the claimant whether there was anything he would like to add, the claimant began to address the "*Which statutory right"* point. Any reasonable employer would have given the claimant an opportunity to set out his case (see paragraph 83 above). The respondent failed to do so. This could have been addressed at the appeal but was not (see paragraph 52 above).

108. Accordingly, I found that the claimant had been unfairly dismissed by the respondent. I deal next with remedy. The claimant sought reinstatement.

109. Before considering whether reinstatement was appropriate in this case I considered (a) ***Polkey*** and (b) contributory conduct. In ***Polkey*** Lord Bridge of Harwich quoted with approval the following passage from the judgment of Browne-Wilkinson LJ in ***Sillifant v Powell Duffryn Timber Ltd [1983] IRLR 91*** –

> "*There is no need for an "all or nothing" decision. If the industrial tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment."*

110. In the present case the claimant made his position very clear, both at the time of his dismissal and during his evidence. His exchange with Mr Sinclair at the appeal hearing, recorded at paragraph 46 above, confirms this. He would not have provided the documentation requested of him "*regardless".* When I asked the claimant whether it would have made any difference if the respondent had taken him through each stage of the disciplinary process, giving him a series of warnings before dismissal, he indicated that it would not. He would have maintained the position that he was not prepared to provide any documentation.

111. I found that this meant that even if the respondent had acted in the way that a reasonable employer would have done, the outcome would still inevitably have been dismissal. This was a case where the chance of dismissal was 100%.

112. That rendered it academic, in terms of calculation of a compensatory award, to consider contributory conduct but I did nevertheless apply my mind to this because it was relevant in the context of (a) whether reinstatement (or re-engagement) was the appropriate remedy and (b) calculation of the basic

award. I reminded myself of the tests for contributory conduct set out in ***Nelson v British Broadcasting Corporation (No 2) [1980] ICR 110*** –

(a) Was there conduct in connection with the unfair dismissal which was culpable or blameworthy?

(b) Was the unfair dismissal to some extent caused or contributed to by that conduct?

(c) Was it just and equitable to reduce the assessment of compensation by the amount proposed?

113. I took account of section 122 ERA (**Basic award: reductions**) and section 123 ERA (**Compensatory award**) and in particular the following provisions –

"

(a) Section 122(2) ERA provides as follows –

"*Where the tribunal considers that any conduct of the complainant before the dismissal….was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."*

(b) Section 123(6) ERA provides as follows –

"*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."*

114. I found that the claimant had by his own conduct contributed substantially to his own dismissal. The claimant's answer to Ms Sim "*Can I, yes. Will I, no"* (see paragraph 36 above) confirmed that he had been in a position to provide the document he was being asked for. He could have avoided dismissal by doing so, but chose not to.

115. Mr Manson described the claimant as a *"man of principle"* and I could agree with that up to a point. However, to refuse to provide a document which was

available on the basis that the respondent had, in the claimant's opinion, no valid reason for requiring its provision could be regarded as obstinate and unreasonable behaviour. I did not believe that most employees would have regarded it as a matter of sufficient importance to merit putting their continued employment at risk.

116. The other side of that coin was whether it could be said that any reasonable employer would have dismissed an employee who acted as the claimant did, particularly if they had taken the time to look into the claimant's assertion that what he was being asked for was unnecessary in the sense that it would not give the respondent a statutory excuse. I came to the view that (a) for the purpose of section 122(2) ERA the conduct of the claimant was such that it was just and equitable to reduce the amount of the basic award and (b) for the purpose of section 123(6) ERA the dismissal was caused or contributed to by the conduct of the claimant and that it was just and equitable to reduce any compensatory award.

117. Looking at the tests in ***Nelson*** –

(a) I was satisfied that the claimant's conduct in refusing to provide the requested documentation was blameworthy. It was obstinate and unreasonable.

(b) I was satisfied that the dismissal was to a significant extent caused or contributed to by that conduct. I regarded this as sufficiently self-evident to require no further explanation.

(c) As stated in the preceding paragraph, I came to the view that it was just and equitable to reduce the assessment of compensation.

118. I decided that in both cases (ie under sections 122(2) and 123(6) ERA) the appropriate level of reduction was 75%. In so finding I considered that it was

not inevitable that the claimant would have been dismissed if the respondent had given due consideration to the argument he was putting forward. I believed there was some prospect that the respondent might have accepted that the claimant was right and made an exception to their policy in his case. The claimant's assertion that there was no risk of the respondent facing a civil penalty in relation to his RTW in the UK might have persuaded the respondent that dismissal would be too harsh a sanction. Looking at matters in the round, I came to the view that there was a 25% chance that the respondent would have been persuaded not to dismiss the claimant and accordingly a reduction of 75% was appropriate.

119. I next considered whether reinstatement was the appropriate remedy. I reminded myself of the relevant statutory provisions in sections 113-116 ERA which, so far as relevant, are as follows –

"***113 The orders***

An order under this section may be –

(a) an order for reinstatement (in accordance with section 114), or

(b) on order for re-engagement (in accordance with section 115),

as the tribunal may decide.

114 Order for reinstatement

(1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.

(2) On making an order for reinstatement the tribunal shall specify –

(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement.

(b) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(c) the date by which the order must be complied with….

115 Order for re-engagement

(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment.

(2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including –

(a) the identity of the employer,

(b) the nature of the employment,

(c) the remuneration for the employment,

(d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement,

(e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(f) the date by which the order must be complied with…."

"***116 Choice of order and its terms***

(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account –

(a) whether the complainant wishes to be reinstated,

(b) whether it is practicable for the employer to comply with an order for reinstatement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

(3) In so doing the tribunal shall take into account –

(a) any wish expressed by the claimant as to the nature of the order to be made,

(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement,

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.

(4) Except in a case where the tribunal takes into account any contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as reasonably practicable, as favourable as an order for reinstatement.

(5) Where in any case the employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of subsection (1)(b) or 3(b), whether it is practicable to comply with an order for reinstatement or re-engagement.

(6) Subsection (5) does not apply where the employer shows –

(a) that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement or –

(b) that –

(i) he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and

(ii) when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement."

120. I understood Mr McIntosh's evidence about having recruited *"to fill all vacancies"* (see paragraph 54 above) to indicate that the respondent had engaged a permanent replacement for the claimant. I reminded myself that in considering whether or not to order reinstatement or re-engagement, I had to disregard the fact of engagement of that replacement in deciding whether it was practicable for the respondent to comply with an order for reinstatement or re-engagement (per section 116(5) ERA).

121. Approaching matters in the order mandated by section 116 ERA, I first considered whether reinstatement was appropriate. Addressing the matters which I required to take into account –

(a) I noted that the claimant wished to be reinstated.

(b) I found, having regard to section 116(5), that it would be practicable for the respondent to comply with an order for reinstatement. The respondent did not argue the section 116(6) exception. I was not persuaded that the concerns expressed by Mr McIntosh and Mr Sinclair about the claimant's response to a subsequent *"reasonable request"* were sufficient to render reinstatement impracticable. That was because the claimant's unwillingness to provide his RTW documentation was specific to that issue and not necessarily indicative of a wider reluctance to comply with management instructions.

(c) I found that extent to which the claimant had caused or contributed to the dismissal meant that it would not be just to make an order for reinstatement. The level of contribution in this case was high at 75% (see paragraph 118 above). I believed that this tipped the scales against reinstatement being the appropriate remedy.

122. Having decided that an order for reinstatement was not appropriate, I next considered re-engagement. I required to take into account broadly the same matters as I have covered in the preceding paragraph. Having done so, and for the same reasons, I came to the same conclusion, namely that re-engagement would not be appropriate. As with reinstatement, the level of the claimant's contribution to his dismissal tipped the scales against re-engagement.

123. That left compensation as the only remedy available for unfair dismissal in this case. I deal firstly with the basic award. Section 119 ERA, so far as relevant, provides as follows –

"*(1) Subject to the provisions of this section, sections 120 to 122 and section 126 the amount of the basic award shall be calculated by –*

(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,

(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and

(c) allowing the appropriate amount for each of those years of employment.

(2)In subsection 1(c) "the appropriate amount" means –

(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,

(b) one week's pay for a year of employment (not within paragraph(a)) in which he was not below the age of twenty-two, and

(c) half a week's pay for a year of employment not within paragraph (a) or (b)…."

124. The claimant was aged 62 at the date of his dismissal. He had been employed continuously for 8 years. His gross weekly pay was £267.00. The calculation of the basic award was therefore 8 x 1.5 x £267.00 which equals £2136.00. This required to be reduced by 75% to reflect my finding of contributory conduct - see paragraph 118 above. The reduced amount of the basic award was therefore £534.00.

125. Unfortunately for the claimant, my finding in relation to the application of ***Polkey***, namely that the chance of dismissal was 100% (see paragraph 111 above), meant that there could be no compensatory award. The total amount of the award of compensation for unfair dismissal is accordingly £534.00.

126. I considered whether this award should be adjusted in respect of the respondent's failure to comply with the Code. Section 207A of the Trade Union and Labour Relations Act 1992 includes the following –

"*(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%."

127. I found that (a) there had been failures by the respondent to comply with paragraphs 9 and 12 of the Code, (b) those failures were unreasonable and (c) it was just and equitable for there to be an uplift in compensation by reason of those failures. My view was that there had not been a disregard of the steps which an employer should take to comply with the Code, but the matter had been handled in a clumsy and muddled way. Because of that, the failures were unreasonable. Looking at matters in the round, I decided that the appropriate level of uplift was 10%. The basic award is therefore increased by £53.40 to a total of £587.40.

Breach of contract

128. I move on to deal with the claim of breach of contract. As noted above, it was agreed at the preliminary hearing on 19 November 2021 that breach of contract was one of the claims brought by the claimant in this case. This meant that, in contrast to the claim of unfair dismissal where I should not substitute my own view for that of the respondent, I had to decide whether the respondent's dismissal of the claimant has been in breach of contract.

129. I approached this by looking again at the reason for the claimant's dismissal. As recorded at paragraphs 100-101 above, I found that the reason for dismissal came within the category of conduct. This meant that I had to decide whether the claimant's conduct had been such that the respondent was entitled to terminate the contract of employment without notice. Put another way, if the claimant was guilty of gross misconduct then the

respondent was entitled to dismiss him without notice. If the claimant was not guilty of gross misconduct then the respondent was not so entitled, and the dismissal without notice was in breach of the claimant's contract of employment.

130. In the context of dealing with contributory conduct above (see paragraph 117) I described the claimant's conduct as *"obstinate and unreasonable".* However, looking at this in the context of whether it amounted to gross misconduct, I came to the view that it did not.

131. My view was that the claimant's conduct here reflected his conviction that he was correct in his interpretation of the law applicable to the statutory excuse. I believed that the claimant's interpretation of the law was indeed correct. The only time at which the respondent was legally obliged to check the claimant's RTW in the UK was prior to the commencement of his employment. They did so and, having done so, the respondent acquired a statutory excuse in respect of the claimant and it was up to them to retain the evidence provided by the claimant.

132. The provisions of IANA and the Code of Practice do not cover retrospective provision of RTW documentation. The claimant was not obliged under IANA and the Code of Practice to provide the documentation requested from him. That said, I could understand that the respondent would as a matter of company policy want to hold on file copies of all of the documents which they might be asked to produce to demonstrate the RTW status of each of their employees. It was a pity that they presented this to the claimant as a matter of legal necessity when he was aware that production of the document for which he was asked would not achieve the stated objective.

133. I found that the respondent would have been entitled to dismiss the claimant for persistently refusing to provide his RTW documentation to comply with company policy but, given that there was no legal necessity underpinning that policy in the particular case of the claimant, they had not been entitled to

dismiss him summarily without notice. If the respondent had stuck to the line taken by Mr McIntosh – that this was a failure to carry out a reasonable management request – and had gone through each stage of their disciplinary process, I might well have come to a different view. However, I had to base my decision on the breach of contract issue not on what the respondent might have done but on what they actually did.

134. Accordingly, I decided that the claimant's dismissal was in breach of contract. The measure of damages to which the claimant was entitled was the pay he would have received if he had been dismissed with notice. The respondent did not have a contractual right to pay the claimant in lieu of notice (or at least clauses 10 and 11 of the claimant's contract of employment made no such provision). The measure of the claimant's loss was the net pay he would have received if he had been given 8 weeks' notice (being his contractual entitlement to notice).

135. I did not have any information as to the claimant's net weekly pay. I have therefore decided to award the claimant the sum of £2136.00 which represents 8 weeks' gross pay but I direct that the respondent shall be entitled to satisfy this award by paying to the claimant such sum as represents the net pay the claimant would have received if dismissed with 8 weeks' notice (accounting to HMRC for the amount deducted to produce the net pay figure).

Employment Judge **W A Meiklejohn**

Date of Judgement **7 January 2022**

Date sent to parties **11 January 2022**