EMPLOYMENT TRIBUNALS

Claimant: Mr B Mellor

Respondent: Lunar Automotive Limited

HELD AT: Manchester **ON:** 19 January 2022 and 2 February 2022 (in chambers)

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: Ms J Duane, counsel
Respondent: Mr D Bloom, lay representative

JUDGMENT

The judgment of the Tribunal is that:

1. The respondent is ordered to pay to the claimant damages of £1833.47 in respect of the breach of contract about failure to pay expenses.

2. The respondent is ordered to pay damages to the claimant of £16,322.65 for breach of contract in relation to failure to give notice of termination.

3. The respondent is ordered to pay to the claimant compensation of £4823.78 for constructive unfair dismissal, including an uplift to the compensatory award of 15% for failure to comply with the ACAS Code of Practice on Discipline and Grievance.

4. The Recoupment Regulations do not apply to the award of compensation for unfair dismissal.

REASONS

Issues

1. This was a remedy hearing, following a judgment on liability sent to the parties on 15 November 2021. A certificate of correction was sent to the parties on 6 January 2022, correcting an error in the judgment.

2. The hearing was to determine the remedy for the complaints which succeeded at the liability hearing. These were: the complaint of constructive unfair dismissal; the complaint of wrongful dismissal (breach of contract for failure to give notice); and breach of contract for failure to pay company car fuel expenses.

3. The claimant's representative had prepared a list of issues with which the respondent was largely in agreement. In discussion with the parties, I made some changes to this. The issues to be determined were as follows:

4. Constructive unfair dismissal

4.1. What basic award should be paid to the claimant? The amount, according to the statutory formula, was £4478.78.

4.2. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal?

4.3. If there is a compensatory award, how much should it be? The Tribunal will decide:

4.3.1. What financial losses has the dismissal caused the claimant?

4.3.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

4.3.3. If not, for what period of loss should the claimant be compensated?

4.3.4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

4.3.5. If so, should the claimant's compensation be reduced? By how much?

4.3.6. How much had the claimant been overpaid in wages, which had not already been recovered by the respondent by deductions from wages and holiday pay, and should this be deducted from losses attributable to action taken by the employer, in arriving at an amount of compensation which the Tribunal considers just and equitable in all the circumstances?

4.3.7. Did the respondent unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures by delay in dealing with the grievance and failing to provide an outcome to the grievance?

4.3.8. If so, is it just and equitable to increase any award payable to the claimant? By what proportion, up to 25%?

4.3.9. Did the claimant cause or contribute to his constructive dismissal by blameworthy conduct?

4.3.10. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

4.3.11. Does the statutory cap of £86,444 or fifty-two weeks' pay (if lower) apply?

5. Wrongful dismissal (breach of contract for failure to give notice)

5.1. The parties agree that the claimant was entitled to 12 months' notice under the terms of his contract.

5.2. What damages should be awarded? The Tribunal will decide:

5.2.1. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

5.2.2. If not, for what period of loss should the claimant be compensated?

5.2.3. Is the respondent entitled to set off against damages any overpayment of wages received by the claimant, not already recovered by the respondent. If so, how much is the outstanding overpayment to be set off?

6. Breach of contract in respect of failure to pay expenses

6.1. The Tribunal concluded in its liability judgment that the respondent was in breach of contract by not reimbursing the claimant for £1,833.47 of company car fuel expenses.

6.2. Is the respondent entitled to set off against damages any overpayment of wages received by the claimant, not already recovered by the respondent? If so, how much is the outstanding overpayment which is to be set off?

Application to postpone the hearing

7. Mr Bloom made an application on behalf of the respondent to postpone the hearing on the basis that it would not be fair to proceed today, the claimant having provided only the night before an amended witness statement and schedule of loss. This added a claim of compensation for loss of the company vehicle and associated costs for a 12 month period.

8. I refused the application for postponement. Whilst I considered it unsatisfactory that the claimant had made such changes at such a late stage and brought forward additional evidence, I considered that the respondent could deal with this at this hearing after, if necessary, a relatively short further adjournment. It was for the claimant to prove loss. If the respondent considered he had not done so, the

respondent could deal with that in submissions. I considered it to be in the interests of justice that the remedy be dealt with without further delay.

9. After giving my decision refusing the postponement, I offered Mr Bloom an adjournment of around half an hour to consider the further material before cross-examining the claimant. Mr Bloom refused the offer, saying he was ready to proceed.

Evidence

10. I heard evidence from the claimant. There was a written witness statement for him which had been amended, with the addition of paragraph 23, on 18 January 2022. There was a bundle of documents for the remedy hearing running to 128 pages. There was a small additional bundle of documents of six pages provided by the claimant on 18 January 2022. In addition, I was referred by Mr Bloom to the 2019 accounts of Lunar Holdings Ltd, a document which had been put in evidence, although not included in the main bundle, for the liability hearing.

Facts

11. I rely on facts found in the judgment from the liability hearing. References to paragraph numbers are to paragraphs in the reasons for the judgment on liability.

12. I make the following additional findings of fact.

13. The claimant was aged 62 at the effective date of termination, which was 15 January 2020.

14. The claimant had intended to work for the respondent until he was ready to retire. He was not intending to retire early. The claimant did not give evidence as to the age he expected to retire, but I find that this would not have been before age 65.

15. The claimant did not look for any other work after his resignation. He was occupied in dealing with matters for Lunar Holdings Ltd (LHL), of which the claimant is a director and majority shareholder. The respondent's licence to occupy premises at Sherdley Road, owned by LHL, came to an end on 13 February 2020. LHL decided, after advice from their accountants and discussions with the lender of the mortgage loans on the Sherdley Road premises, to arrange for the main factory to be sold and to rent off as much as possible of the remaining factory buildings. LHL needed to tidy the site to make it suitable to attract interest from potential purchasers or tenants. The claimant spent a very substantial amount of time from 13 February 2020 up to around May 2020, clearing rubbish from the site and then refurbishing the premises to get them into a state to let or sell. There is a dispute between the parties as to how much rubbish there was, whether it was created by the respondent or was already on site when the respondent took occupation of the premises, and as to whose responsibility it was to clear that rubbish. It is not necessary for me to decide on the respective responsibilities in relation to the rubbish and I do not do so.

16. The claimant was then occupied in matters to do with letting parts of the site and the sale of the main factory site, which was completed on 30 November 2021. A charity took a rent-free lease on some of the premises from 19 October 2020 and Hermes Parcelnet Ltd took a five year lease on part of the premises, completed on 13 January

2021 but taking effect from 2 October 2020. The claimant told me that he continued to work at least 40 hours per week on matters connected with the site owned by LHL until the first week in January 2022 and he continues to spend time at the site. Having regard to the tasks described by the claimant, I consider it likely that he has overestimated his time commitment after the initial rubbish clearing and refurbishment phase. However, I am not able, on the evidence before me, to make any accurate determination of how much time has been spent.

17. The claimant asserted in his witness statement (paragraphs 8 and 18) that, had he not been constructively dismissed, he would not have been forced to make the decision to seek to sell the premises and would not, therefore, have been required to carry out clearance and other works on the site. I heard no evidence to support this assertion. The claimant's position as an employee of the respondent was distinct from his position as a director and shareholder of LHL. The claimant had made this distinction himself in relation to his actions in locking the gates of the premises during his employment, which he said was in his capacity as a shareholder of the landlord of the premises, LHL. The claimant could have remained an employee of the respondent even if the respondent's licence to use the premises at Sherdley Road had come to an end and the respondent had moved its operations elsewhere. In those circumstances, the claimant would have been obliged to carry out his duties as an employee of the respondent in addition to any activities he felt he had to carry out as a director and shareholder of LHL.

18. The claimant was also involved in closing down a trading subsidiary of LHL in Germany.

19. The claimant has also spent a substantial amount of time related to litigation, not only in these employment tribunal proceedings, but in litigation or threatened litigation between LHL and the respondent e.g. trademark litigation.

20. I accept the claimant's evidence about difficulties for the caravan market since 2018 and that prospects of senior appointments in the caravan industry since that time have been poor.

21. The claimant did not claim any state benefits after his resignation.

22. The claimant's salary with the respondent was £681 gross per month (weekly equivalent £157.15). The net monthly pay was £340.50 per month (weekly equivalent £78.58), taken from the claimant's payslip for June 2019.

23. The claimant, whilst working for the respondent, had the private use of a fully expensed company car. After his resignation, he did not purchase or lease another vehicle, but used his wife's car. At the time of his dismissal, he was provided with a Land Rover Discovery HSE. I accept the claimant's evidence that the lease on this was approximately £1,450 per month. I accept the claimant's evidence, supported by the quotes he provided, that the cost of insuring himself on an equivalent vehicle would be £781.94 per month and the road tax would be around £475 per month.

24. The claimant should have been paid £681 gross, £340.50 net per month for July 2019 until the termination of his employment on 15 January 2020. Instead, the claimant was paid £7611.24 gross and £3322.99 net in July 2019 and £20,371.68 gross and

£9447.99 net in August 2019. The claimant was not paid any wages for the period 1 September 2019 to 15 January 2020. When his employment ended, he had 1.5 days' accrued holiday, for which the gross payment due was £51.38.

25. The claimant had completed 19 years' continuous service and was age 62 at the effective date of termination.

Submissions

26. Mr Bloom provided a written skeleton argument in advance of the hearing. This was provided to the claimant's representative at the start of the hearing and she had time to read this before we started to hear evidence. Mr Bloom made additional oral submissions.

27. Mr Bloom, in his written and oral submissions, submitted that the respondent ought to be entitled to set off sums overpaid against any award.

28. Mr Bloom submitted that compensation for unfair dismissal should be reduced because of the claimant's conduct. Mr Bloom referred to the claimant's conduct in directing that he should be paid increased salary from July 2019 and other payments in August 2019, submitting that this was culpable conduct. Mr Bloom submitted that it was these payments which led to a breakdown of trust and confidence between the claimant and Mr Marks and, therefore, lead to the events ending in the claimant's constructive dismissal.

29. Mr Bloom submitted that, in circumstances in which the tribunal found that the claimant had received money to which he was not entitled and the respondent incurred tax liability which it paid in September 2019 in consequence, it would be just and equitable that this sum should be set off against compensation awarded to the claimant.

30. Mr Bloom questioned the truth of what the claimant had written about the respondent having left the factory with significant levels of rubbish which he then had to clear. He questioned whether this was being used to disguise the absence of any effort to find suitable employment.

31. In relation to the evidence submitted at a late stage about the company car, Mr Bloom submitted that the tribunal ought not to consider the last minute addition to the claimant's witness statement without evidence to support it. He suggested that AA, RAC or HMRC tables should have been produced in relation to the value of the car benefit and questioned the methodology in the claimant's witness statement. Mr Bloom noted that the claimant had been able to operate using his wife's car at no cost to him.

32. Mr Bloom submitted that the claimant could have been fairly dismissed on or after 30 September 2019. There was no role for him in the business; he was never going to be MD. He was offered a role looking after properties but did not want this. Mr Bloom submitted that the claimant could have been fairly dismissed as a result of the lock out. He submitted that the claimant could have been fairly dismissed on 30 September 2019 for breach of his fiduciary duties. He submitted that disrupting the business for 10 days was clearly a breach of fiduciary duties and would have entitled the respondent to dismiss the claimant fairly.

33. Ms Duane made the following submissions on behalf of the claimant. She noted that the respondent does not dispute the calculation of the basic award.

34. In relation to mitigation of loss, Ms Duane submitted that the standard should not be overly stringent. The burden is on the respondent to show that the claimant acted unreasonably in not taking steps to mitigate his loss. She submitted that the respondent had failed to prove this.

35. Ms Duane submitted that this was an appropriate case for career loss damages, considering the claimant's age and circumstances but then clarified that the claimant was seeking loss for 12 months after termination, as set out in his schedule of loss. When invited to make submissions as to whether the schedule of loss showed double counting for the 12 months in the award for unfair dismissal and damages for breach of contract, Ms Duane submitted that 12 months from termination in the schedule meant 12 months from when the claimant's employment could have been terminated on notice. Mr Bloom responded that that was not clear to them that that was what had been sought and the claimant should be held to what had been specified.

36. In relation to the car, Ms Duane submitted that the claimant had a contractual entitlement to this and that loss of the value of this could be included in the calculation of compensation.

37. Ms Duane submitted that the respondent had failed to show that the claimant would have been dismissed in any event. The respondent was not entitled to rely on the lockout. This was unrelated to the termination of the claimant's employment. This was the only reason advanced by the respondent for dismissal. She argued that he could not contribute by this act to his dismissal. Ms Duane referred to the respondent's argument that there was no role for the claimant, saying that this was a new reason advanced as to why the claimant would have been dismissed. This had not been pleaded. She submitted that no **Polkey** reduction should be made.

38. In relation to contributory fault, Ms Duane submitted that, if it was suggested that the claimant would have been dismissed for overpayment, the respondent had not shown deceit. At its highest, the claimant was mistaken. Overpayments arise from time to time and the respondent did not suggest that an overpayment would give rise to gross misconduct. She submitted that it could not be said that the claimant had contributed to his constructive dismissal.

39. Ms Duane submitted that no deduction should apply for **Polkey** or contributory fault.

40. Ms Duane invited the tribunal to apply an uplift of 25% for failure to follow the ACAS code.

41. Miss Duane submitted that, if the tribunal was minded to set off overpayments against compensation, the claimant's position on the tax position should be adjusted accordingly. The respondent could seek recompense from HMRC.

42. In relation to the claim of breach of contract for notice, the claimant was entitled to 12 months' notice.

43. Miss Duane submitted that there should be a payment equivalent to interest to take account of the delay in payment. She referred to the Court of Appeal decision of **Melia v Magnor Kansei** 2005 EWCA 1547 as authority for this.

44. In reply, Mr Bloom submitted, in relation to the uplift, that a 25% uplift would be for a particularly egregious breach. Here, he suggested, it was just a bit of delay in the grievance procedure. The suggested that, if there was a breach of the ACAS code, this was a fairly minor breach and any uplift should be at the lower end of the scale.

45. In relation to interest, he submitted that the tribunal had found the claimant was sitting on monies he should not have received, and interest should be applied to that.

Law

Compensation for unfair dismissal

46. Section 122(4) Employment Rights Act 1996 provides that the amount of any basic award shall be reduced by any redundancy payment awarded by the tribunal or any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy.

47. Section 122(2) Employment Rights Act 1996 provides: "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) 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."

48. Section 123(1) Employment Rights Act 1996 provides that the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

49. Section 123(6) Employment Rights Act 1996 provides: "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."

50. In accordance with principles set out by the House of Lords in *Polkey v AE Dayton Services Limited [1988] ICR 142***,** a tribunal may reduce a compensatory award for unfair dismissal by up to 100% if there is evidence to suggest the claimant might have been fairly dismissed, either at the time the claimant was dismissed or at some later date.

51. The EAT in *Software 2000 Limited v Andrews [2007[ICR 825* said at paragraph 53 in relation to applying the *Polkey* principle, "The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice."

52. If the respondent has not complied with the ACAS Code of Practice on Discipline and Grievance, the Tribunal may, in accordance with section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992, increase the compensatory award for unfair dismissal by up to 25%, if it considers it just and equitable to do so in all the circumstances.

Damages for breach of contract

53. The purpose of damages is to put the claimant in the position he would have been in had both parties to the contract performed their obligations according to that contract. In wrongful dismissal cases, the employee's loss will be the net wages he would have earned, together with the value of any fringe benefits he was contractually entitled to during the damages period.

54. Where a defendant to legal proceedings has a claim against the claimant for a sum arising from the same transaction, or a closely related transaction, as the debt owed, the defendant has a right of equitable set-off, to set the sum owed to the defendant against the amount owed to the claimant.

Duty to mitigate loss

55. In relation to loss claimed as part of a compensatory award for unfair dismissal and damages for wrongful dismissal, a claimant has a duty to take reasonable steps to mitigate (or reduce) his loss. The burden of proof lies on the employer to show that the employee failed to mitigate loss.

Conclusions

Damages for wrongful dismissal

56. The claimant was entitled to notice of 12 months. The starting point for damages for breach of contract for failure to give the required contractual notice of termination is, therefore, 12 months of wages plus the value of contractual benefits for that period. For the most accurate assessment, damages should be calculated on a net basis then grossed up to take account of the tax payable. Since the information before me is insufficient to do an accurate calculation of the tax likely to be payable, I use the gross pay in my calculation to arrive at the best approximation I can in the circumstances of damages which, after deduction of tax, will leave the claimant with the correct amount of net damages. 12 x £681 = £8172.

57. The claimant had the use of a fully expensed company car which he could use for private use. The cost of the lease, insurance and road tax should, therefore, be included in the calculation of damages. The cost of these are together £18,656.94 for a 12 month period (£17,400 lease, £791.94 insurance and £475 road tax).

58. I have considered whether the claimant failed to take reasonable steps to mitigate his loss during this 12 month period and, if he did, whether his loss was likely to have been less if he had taken such steps as were reasonable. I conclude that the claimant did not take reasonable steps to mitigate his loss. The claimant did not make any effort to obtain alternative work. This was because he was engaged in sorting out the premises at Sherdley Road and because he was heavily involved in litigation, of which

these employment tribunal proceedings were only a part. The claimant's role in sorting out the premises and in the litigation (other than the employment tribunal proceedings) was because of his role as a director and shareholder of LHL and not because he was an ex-employee of the respondent who had been wrongfully dismissed. The claimant himself had been careful to distinguish, in the liability hearing, when he was acting as a shareholder of LHL in locking the gates to the premises, rather than acting as an employee of the respondent. In these circumstances, I conclude that activities in his LHL capacities, cannot excuse the claimant from the duty to take reasonable steps to mitigate his loss of earnings by looking for alternative work.

59. If the claimant had taken reasonable steps to mitigate his loss, I conclude that he would not have been able to mitigate his loss within the 12 month period. It would have been reasonable for the claimant to begin his job search in the field he knew best: the caravan trade. Those were difficult times for that trade. The claimant's age, despite the existence of age discrimination legislation, was also likely to make it difficult for the claimant to secure comparable alternative employment. I conclude that the claimant was unlikely to have been able to mitigate his loss within the 12 month period. The respondent has produced no evidence of suitable jobs the claimant could have applied for during that period. I make no deduction, therefore, from the damages for wrongful dismissal due to failure to mitigate loss.

60. The total amount of damages, prior to the set off because of the overpayment to the claimant, is £26,828.94 (£8172 + £18,656.94).

61. I consider it is appropriate to make a deduction from damages to take account of the outstanding amount overpaid to the claimant in July and August 2019. I consider that the respondent is entitled to set off the outstanding amount against damages payable.

62. The parties have urged on me different approaches to calculating how much overpayment, if any, should be set off against awards which would otherwise be made. The respondent has urged me to include elements paid to the claimant as grossed up tax in August 2019. I conclude that the method most likely to do justice is to use the net amounts paid to the claimant in calculating the overpayment and, therefore, the amount to be set against the damages which I would otherwise have awarded. If the respondent has paid too much tax to HMRC as a result of the overpayments, I consider that is a matter which the respondent can address with HMRC.

63. Using this method, I calculate that the following amounts were overpaid to the claimant:

> In July 2019, the claimant was paid £3322.99 net but should have been paid £340.50 so he was overpaid by £2982.49.
>
> In August 2019, the claimant was paid £9447.99 net, but should have been paid £340.50 so he was overpaid by £9107.49.
>
> In total, during those two months, the claimant was, therefore, overpaid by £12,089.98 (£2982.49 + £9107.49).

64. From 1 September 2019 to 15 January 2020 (a period of 19.5 weeks), the claimant was not paid at all. He should have been paid £1532.31 (19.5 x £340.50) wages and £51.39 for accrued holiday. I am using the gross amount for accrued holiday since I do not have an accurate figure for what the net amount would have been but consider any inaccuracy in the calculation due to this to be so minor as to be insignificant. The total amount due to the claimant for wages and holiday pay which was not paid was £1583.69 (£1532.31 = £51.39).

65. By not paying the claimant for the period 1 September 2019 and for accrued holiday pay, the respondent recouped £1583.69 of the amount by which the claimant had been overpaid. This leaves a balance of £10,506.29 (£12,089.98 - £1583.69) still owing to the respondent.

66. £10,506.29 deducted from the damages of £26,828.94 which would otherwise be payable, leaves a total of £16,322.65 damages to be paid by the respondent to the claimant and I order that this be paid.

67. Ms Duane suggested that some increase should be made to the damages equivalent to interest, due to the claimant having not had the benefit of the payments when they should have been paid. Whilst I accept that such an increase is possible, I do not consider it appropriate in these circumstances. The amount of time during which the claimant has been without the amount due is not a very long period. Interest rates have been low during that time. The claimant has also had the benefit of the overpayment during that period.

Compensation for unfair dismissal

68. The respondent has not challenged the calculation of the basic award in the claimant's schedule of loss, using the statutory formula, on the basis of gross weekly pay of £157.15, 19 years' service and his age of 62 at the effective date of termination. The calculation is 1.5 x 19 x £157.15 = £4,478.78.

69. The respondent has submitted that the basic award should be reduced because of the claimant's conduct. The respondent referred to the claimant's conduct in directing that payments be made to him to which he was not entitled. In my judgment on liability, paragraph 178, I concluded that the respondent had not satisfied me that the claimant acted deceitfully, rather than mistakenly, in directing these payments. Given this conclusion, I do not consider it just and equitable to reduce the basic award payable to the claimant because of this conduct. I do not consider it to be just and equitable to reduce the basic award because of any other conduct on the part of the claimant.

70. Turning to the compensatory award for unfair dismissal, I conclude that an award of £300 for loss of statutory rights is appropriate. This is the amount sought by the claimant in his schedule of loss.

71. In dealing with damages for wrongful dismissal, I concluded that the claimant had not taken reasonable steps to mitigate his loss, since he had not looked for alternative employment. I rely on the same reasons for concluding, in relation to the compensatory award, that the claimant did not take reasonable steps to mitigate his loss.

72. I concluded, in dealing with damages for wrongful dismissal, that the claimant would not have been able to mitigate his loss within 12 months from the effective date of termination. However, I consider that, had he taken reasonable steps to mitigate his loss, he would have been able to mitigate his loss in full by 12 months from the effective date of termination. I consider it would have been reasonable, towards the end of the initial 12 months, to look outside the caravan trade for employment and, if he had done so, he would have been likely to be able to find alternative employment with a comparable remuneration package. His wages were modest but his company car expensive. Together, the elements of his remuneration package amounted to £26,828.94 per annum. This is below median earnings in the UK for full-time employees in 2021. I conclude that the claimant would have been able to obtain employment at this level of remuneration by 15 January 2021, had he taken reasonable steps to mitigate his loss.

73. I have awarded damages for the 12 months beginning 16 January 2020 as damages for wrongful dismissal. The claimant has, therefore, been compensated for loss of earnings in this period and has no financial loss for this period to be compensated for as part of compensation for unfair dismissal.

74. Had I awarded compensation for financial loss for 12 months as part of the compensatory award for unfair dismissal, rather than as damages for wrongful dismissal, I would have deducted the overpayment of wages in arriving at a just and equitable amount of compensation to be paid. If the claimant had remained in employment with the respondent, the respondent would have been entitled to recoup the overpayment from wages over time.

75. Since I have awarded loss of earnings under the heading of wrongful dismissal, rather than as part of the compensatory award for unfair dismissal, it is not necessary for me to decide the **Polkey** issue i.e. whether there was a chance that the claimant would have been fairly dismissed at some point and, if so, when. However, I note that the evidence referred to at the liability hearing indicated that the claimant had very few duties for the respondent during the time he was employed by them after the TUPE transfer. In these circumstances, there must have been a reasonable chance that the claimant would have been dismissed by reason of redundancy at some point. Whether there was a chance that the claimant would have been fairly dismissed because of conduct relating to the lock out is more uncertain and I make no comment on this, since it is not necessary for me to do so.

76. For the same reasons given in relation to whether the basic award should be reduced because of the conduct of the claimant, I conclude that it would not be just and equitable to reduce the compensatory award because of any conduct on the part of the claimant.

77. The compensatory award is the award of loss of statutory rights only i.e. £300.

78. The claimant seeks an increase to the compensatory award for failure to comply with the ACAS Code of Practice on Discipline and Grievance (the Code). As noted in paragraphs 157 and 158 of my decision on liability, the respondent delayed in dealing with the claimant's grievance, submitted on 26 September 2019, and did not provide the claimant with an outcome to his grievance, heard on 13 November 2019, prior to

his resignation on 15 January 2020. I concluded that the delay in dealing with his grievance and failure to provide him with an outcome contributed to a breach of the implied duty of mutual trust and confidence. The grievance was not acknowledged until 30 October 2019 and the first date offered for the grievance hearing was 5 November 2019.

79. Paragraph 33 of the Code provides that employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received. I conclude that there was a breach of this element of the Code by not offering a meeting until 5 November 2019.

80. Paragraph 45 of the Code provides that the outcome of the appeal should be communicated to the employee in writing without unreasonable delay. I conclude that there was a breach of this element of the Code by not providing the claimant with an outcome to his grievance, following the meeting on 13 November 2019, prior to his resignation on 15 January 2020.

81. I conclude that these were not minor breaches of the Code. There was not, however, a complete failure to comply with the Code. In the circumstances, I consider an uplift of 15% to the compensatory award of £300 to be just and equitable i.e. an uplift of £45.

82. The overpayment has been set off in full against the damages for wrongful dismissal, so there is no further amount to be taken into account in calculating the compensation for unfair dismissal.

83. The total award of compensation for unfair dismissal, including the uplift, is £4823.78 (£4478.78 basic award + £300 compensatory award + £45 uplift to compensatory award).

84. Since the claimant did not claim any state benefits, and additionally, no compensation has been awarded for loss of earnings as part of the compensatory award for unfair dismissal, the Recoupment Regulations do not apply to the award of compensation for unfair dismissal.

Compensation for breach of contract (failure to pay car fuel expenses)

85. I concluded in my judgment on liability, paragraph 151, that the respondent was in breach of contract by not reimbursing the claimant for petrol costs of £1833.47.

86. The overpayment of wages has been set off in full against the damages for wrongful dismissal, so there is no further amount to be taken into account in calculating damages for this breach of contract. I, therefore, order the respondent to pay the full amount of these expenses as damages for this breach of contract.

Employment Judge Slater
Date: 3 February 2022

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON
4 February 2022

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2400550/2020**

Name of case: **Mr B Mellor** v **Lunar Automotive Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 4 February 2022

"the calculation day" is: 5 February 2022

"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.