EMPLOYMENT TRIBUNALS

Claimant: Mr G Allen
Respondent: Elhance Ltd

Heard at: Nottingham by Cloud Video Platform
On: Monday 18 January 2021, Monday 15 and Tuesday 16 March and Tuesday 23 March 2021 (Remedy)
Before: Employment Judge Britton (sitting alone)

Representation
Claimant: Mr N Bidnell-Edwards of Counsel
Respondent: Ms C Sketchley, Solicitor

CORRECTED JUDGMENT

1. The claim for unfair dismissal succeeds but the Claimant is found first to have 80% contributed to his dismissal. Second, it is found that the employment would not have lasted for more than 12 weeks post the effective date of termination. Thus, for reasons as set out in the remedy element of the reasons, the Claimant is awarded for the unfair dismissal £2,837.99. The Respondent is accordingly ordered to pay him compensation in that sum.

2. The claim for breach of contract failure to pay notice pay succeeds. The Respondent is ordered to pay the Claimant damages of **£4,695.60.**

3. For the avoidance of doubt, this makes a total award of **£7,533.39.**

4. As the Claimant claimed no state benefits during the period of the award, the recoupment provisions do not apply.

CORRECTED REASONS

Introduction

1. The Claim (ET1) was presented to the tribunal by the Claimant's Solicitors on 17 September 2020. It was a claim for unfair dismissal; wrongful dismissal; and a failure to provide written particulars of employment. There were full grounds by way of particularisation to the Claim. In due course, a Response

(ET3) was provided, by which the Claim in some detail was defended. Before me I had a list of issues which are straightforward and I have those in front of me.

2. For the purposes of this hearing, I received sworn evidence, in each case evidence in chief by a written statement, in the following order, thus:-

- Mark Robinson who is one of the two Directors of the Respondent Company.
- Interposed for the Claimant, John Pearce, a farmer.
- Paul Lawrie, who has an HR consultancy, and who was commissioned to undertake the appeal for the Respondent.
- The Claimant
- The Claimant's wife, Sue-Helen.

3. Put before me for the Claimant was a statement of Gary Waite, who was not called by the Claimant. I was asked to give such weight to that statement as I consider appropriate in accordance with the usual approach.

4. I also had before me an agreed bundle and the written opening submissions of Mr Bidnell-Edwards which accurately set out the law in particular engaged in determining whether the dismissal was unfair pursuant to s98(4) of the Employment Rights Act 1996 (the ERA)..

Finings of fact

4. The Respondent Company has 11 employees. It has two Directors, Mark Robinson and Adam Johnson. It is in the business of steel erection and roofing, from what I can see this being mainly industrial work. Much of the actual construction work is done by sub-contractors. A much valued long standing sub-contractor is Gary Wait (GW) and who always works with his labourer/assistant Simon Woodford (SW).

5. The Claimant had been employed as the Operations Manager of the Respondent from more or less its inception. He started his employment for my purposes on 5 October 2012. His was a wide-ranging and responsible role. He told me how he had undertaken some very substantial contracts over the years for the Respondent. He had a close working relationship with in particular Mr Robinson. They might for instance go for a drink on a Friday. The Claimant had an unblemished record of service and was clearly very proud of his achievements. He is a plain speaking man and perhaps less sophisticated than Mr Robinson, but that is merely an observation. It is not a criticism.

6. Included in the roles that he undertook for the business was being the senior port of call for issues to do with health and safety. I am aware that given the high levels of injuries that certainly used to occur in the construction industry, health and safety is paramount. The concomitant to that is that if an accident occurred which in turn was attributable to a failure to provide appropriate

health and safety, then that could be a very serious matter for the Respondent.

7. In terms of custom and practice, so to speak, the Claimant had over the years from time to time undertaken small-scale jobs off his own bat, for instance for friends. On the evidence as I have it before he did, he would discuss that with Mr Robinson. The primary reason obviously being to make sure there was not a conflict, in other words was this work that the Respondent business itself might wish to undertake.

8. In the run up to 21 March 2020, young Mr Pearce, who is the one who gave evidence before me, had talked to the Claimant (a very old friend) about that he wished to re-roof an extensive lean-to to one of the barns. From what Mr Pearce told me this was about 200ft long and 40ft wide; somewhere around 14ft high with a slight pitch to said roof. Piecing it together, into the equation also comes Mr Pearce's father who was alive at the time but died in December 2020. He sounds to have been quite a character and very much the parochial head of the family business, which ran two relatively small acreage farms. The core bit being, and here I take on board what the Claimant told me, and it fitted with what young Pearce said, is that by and large they undertook their own work. Indeed, I learned how they might even make their own steel and hew their own timber for the purposes of construction work and in the past had built their own barns. They always bought their own materials, and they were parsimonious when it came to using external contractors. In other words there would not be much of a earner so to speak for the Respondent.

9. Young Mr Pearce canvassed with the Claimant, who had known the family since he was about 14 and is now in middle age, as to whether he might be prepared to measure up the amount of roof sheeting that would be needed for the proposed works. The Claimant was used to going to the farms; he had even worked there when he was a 14 year old; and he would take his grandson from time to time to have a look at such as the cattle in the dairy herd. So, he agreed as a friend to measure up the job, which he did. Mr Pearce also asked him if he could recommend any labour to do the job. The Claimant gave him the phone number, he says, of Gary Waite (GW) and possibly Simon Woodward (SW).

10. As the evidence developed before me and cross-referencing to the interview that Mr Lawrie in due course had with the Claimant in the context of the Appeal and the latter's own evidence, and at the moment not dealing with conflicting issues, I can at least establish on that evidence that the Claimant told GW about the possibility of being approached by the Pearce's to do the work and assured him that the farmers would be a good payer. That is to say they would not pay them. Second, in request from GW as to what they should ask for in terms of the rate for the job, he said "day rates".

11. I gather from what he was saying that this would be somewhere around the

£250 to £300 mark on the basis that the Respondent charges them out at about double that rate which is its mark up. The work would take about two days and so, says the Claimant, at most it would have been worth to the Respondent £700 in terms of the mark up. Thus it would never have been work the Respondent would want.

12. In any event, I will take it at this stage, without as I say getting into the controversies, that as a result of that, the Pearce family engaged GW and SW. As to who dealt with the money, well it turned out from young Mr Pearce that he does not deal with things like that, or rather did not when his father was alive, because dad always dealt with the money.

13. So, coming to the morning of 21 March 2020, GW and SW turned up on site. There were no health and safety precautions set up for the work at all around the barn. I am well aware that farmyards can be dangerous places with lots of machinery about the place, often narrow alleyways, mud etc. Furthermore, the farm is some 300ft above sea level and, as Mr Pearce told me, the wind can get up. To assist them in the work young Mr Pearce provided a tele-lift, so that GW in particular could get up to the roof level and take up with him the sheets for pinning to the roof once they cleared it of the old sheets, which of course would be the first stage. As it is, the sheets which had been ordered and delivered by Mr Pearce's builders merchants were not all of the right size.

14. Therefore, matters came to a bit of a halt and Mr Pearce Junior 'phoned the Claimant and asked if he could come and look at the sheets which had been delivered and as to which ones would need to be sent back and which ones would be used. Not in dispute is that in due course, the builders merchant came and collected the sheets which were not of the right size and supplied Mr Pearce with replacements, which I understand was free of charge.

15. So, along came the Claimant in a car, it seems with his daughter Leigh in a second car. As they arrived, GW was up on the roof and was either taking off or putting down a sheet when the wind got up. It blew him off that roof and he fell face forward. He tried to protect himself by putting out his arms and in the process fractured some ribs, damaged his hands, and knocked out some teeth. He was temporarily rendered unconscious. The Claimant saw this happen and at that stage quite properly tried to get an ambulance. However, because of course it was the COVID-19 pandemic and one was not going to be available for some time, he took GW to the hospital.

16. On Monday the 23rd, Mrs Waite telephoned Mr Robinson. She was clearly extremely upset as she thought that GW had been injured in the course of work being undertaken for Mr Robinson's business. I would detect that this is because she thought that her husband and SW had been put to work on the project via the Claimant. Mr Robinson sent her an email which, whilst expressing sympathy, made quite plain that this was not a job undertaken by the Respondent. "*The responsible client is the farmer under CDM Regulations … Gary Allen is your husband's employer*".

17. That same day Mr Robinson called the Claimant off what I think must have been a site and asked him to come to the office. This was a difficult discussion which lasted 30 to 45 minutes. There are no notes of said meeting. Piecing it together, I would detect from the evidence I have heard that Mr Robinson put the allegation to the Claimant as per what he had heard from GW's wife and wanted to know what had been going on. The Claimant's stance I think from the very beginning was essentially as I have put it, namely he had simply done the farmer a favour by measuring up what was the materials and thence providing him with the contact details of GW and SW, and thus how could he be held responsible. Mr Robinson's position in summary was first that these were highly valued sub-contractors due as the Claimant well knew to start a job for the Respondent on the Monday. Second that the Claimant was on an "earner" and should have discussed it with the Respondent before taking on the work. Third, and to me on the evidence most important, that he had been "cavalier" in putting GW and SC on that site without undertaking a health and safety survey and thus making sure that there was a safe site to work on. The net result was first that GW had suffered serious injury, This meant he and SW could not undertake the work planned for the Monday and for some time to come until GW was healed. Also there was the possible reputational damage given the community in which they worked. As I say this is a summary. He suspended the Claimant.

18. The Claimant then went home followed by Mr Robinson who collected the Company vehicle. I have no doubt that the Claimant was very hurt indeed by the actions of Mr Robinson and thought that he was quite wrong to suspend him and because he had not done anything wrong. That is at the heart of this case.

19. The Claimant's wife was very upset that this had happened to her husband. She had thought for some time that he was exploited by the Respondent as was clear from her evidence to me. She said how they would often call him over Christmas to do things for the business, causing frictions in the family; and that he had not been properly rewarded and had not even given him a cost of living pay rise in the previous 3 years. She 'phoned Mr Robinson. I have no doubt, because it was so obvious from her evidence and indeed that of Mr Robinson, that she was furious. He could not get a word in. The crucial point then becomes as per his witness statement paragraph 5:

"*I received a rather angry 'phone call from the Claimant's wife in which she confirmed that her husband had been responsible for organising the job. She justified this by stated that he needed the money as he had not had an inflation related pay rise in 3 years. She actually told me that he was entitled to earn money where he could. I was quite astounded. …*"

20. Before me, Mrs Allen, who I found to be a very loyal supporter of her husband, told me that that is not what she actually said. What she had said was:

"*If Gary had done this who could blame him as he hasn't had a cost of living rise … I did not say he had done it and he knew Gary's dad not long out hospital. He had been with dad when called over to the farm".*

21. Well the last bit does not matter, it is the first bit about what she said to Mr Robinson and those words "*If … had done … then*". What do I make of this? On the one hand I have that Mr Robinson (who I have no reason to disbelieve) was calm and collected and just listened because there was nothing else he could do. On the other hand, there is no doubt that Mrs Allen was very upset indeed when she had that conversation with him and was holding forth. Therefore, would her recollection now of what she thought she said be reliable given how she was in that conversation?

22. I prefer the evidence of Mr Robinson. Therefore, I do conclude that she did tell him such that he would believe that the Claimant had actually undertaken paid work and including putting GW and SW on the site.

23. What then followed was a letter dated 25 March 2020 (Bp[1]49-50) from Mr Robinson to the Claimant requiring him to attend a disciplinary hearing on the 31 March at 10am. In terms of there being alleged ACAS Code of Practice breaches in this case, that is not one of them. The letter meets best practice in terms of what is required, ie the Claimant knew the charges he had to meet. He was given the opportunity to be accompanied by a trade union representative or a work colleague. He was told that if he wished to he could bring a written statement; that he would be given a full opportunity to state his case. But did this demonstrate letter a closed mind of Mr Robinson? In setting out the charges, it said:

"*1. Your attendance in privately setting up a construction site (to be clear a construction site that had no connection to the business of the Company) at which one of Elhance's top operatives was severely injured and is not now available to work (along with his working partner), if at all, and certainly for some months thus causing significant disruption to the business of the Company.*

2. The consequences of the above is that Elhance has ***lost all trust and confidence in your behaviour and judgement***[2] *and as a result your role as Operations Manager appears to be untenable.*

3. Your behaviour as demonstrated gives us concern regarding your integrity as Operations Manager in conducting business of the Company.

4. This meeting will form part of the Company's disciplinary process regarding your integrity as Operations Manager in conducting the business of the Company."

[1] Bp=bundle page.

[2] My emphasis

24. Ms Sketchely valiantly argues that this does not show that Mr Robinson had a closed mind and thus if one goes to the disciplinary hearing, the questioning of him by the Claimant demonstrates that.

25. Mr Bidnell-Edwards on the other hand argues that this fatally tainted the entire process, even if there was any justification to dismiss the Claimant, which he challenges. Well, I have looked at the notes of the disciplinary hearing commencing at Bp61. Mr Robinson was asking questions of the Claimant as was to be expected given the issues. So, he dealt with the whole process of the friend and measuring the sheet sizes and then began to probe him about cladding the roof. The argument of the Claimant was as it had always been that this was nothing to do with him, other than: "*he (*Mr Pearce*) enquired about labour and I provided Gary Waite and Simon Woodford's details".* He was then asked about the conversation that Mr Robinson had with the Claimant's wife, which one might think is very important. He said: "*your wife she said you had a monetary interest in the job".* The answer he got from the Claimant was: "*as a mate he sorted me out*". Mr Robinson then said: "*your wife told me that because you had not had a pay rise in 3 years, you were entitled to earn money where you could".* GA[3]: "*I did not ask my wife to ring you, she was distraught as was Gary Waite's wife*". MR: "*this is what your wife said to me, are you saying this is not true".* GA: "*I don't know what my wife said to you Mark".* So that part of the conversation continued. Albeit Mr Robinson might have come with a closed mind, on the other hand he was clearly asking the right kind of probing questions.

26. I am troubled by the answers of the Claimant. He was evasive as is clear from those answers. This was not an easy conversation between them. I think the Claimant resented being questioned in the first place. He thought none of this had anything to do with the business and he was smarting from the way in which he had been suspended.

27. Having said that, this was a disciplinary hearing. Now was the opportunity to set his case out clearly, after all he had with him a colleague, Mr Johnson. Second, why did the Claimant not raise a point that came out of the evidence of Mr Pearce when he gave his evidence which was that as the Claimant was an old friend and would do them favours, he was not going to get paid any money, albeit Mr Pearce told me that would be down to his dad who was much closer to Gary anyway, but what would happen is that he would be given a bit of meat if he asked for it as and when and maybe some eggs and of course would be allowed to bring his grandson to see the new milking shed once it was finished. Well, that is a lovely answer, isn't it? So, why not give it?

28. I was totally unsatisfied by the evidence of the Claimant in that respect.

[3] The minute refers to Mr Robinson as MR and the Claimant as GA.

29. So that was the disciplinary meeting. The Claimant basically was in denial and would not accept that he did anything more than do his mate a favour by providing the measurements for the roof and giving the contact details for GW and SW. Otherwise it was only by happenstance that he was present because of the wrong delivery of some of the sheets when the accident occurred. He then added that as to GW falling off the roof, well that was his problem. He was a grown man, skilled, and ought to know what he was doing.

30. Mr Robinson's view on that point was that he was cavalier and particularly I detect because of the need to have some responsibility for what were seen in effect as Company assets in terms of GW and SW, and because of also the potential reputational damage.

31. Mr Bidnell-Edwards throughout this case has eloquently in cross-examination and otherwise in his closing submissions argued the following.

32. This was outside work. There was nothing in the Claimant's contract of employment that prevented him from undertaking work for himself outside working hours. There was no restrictive covenant in the contract of employment. Simply to do his friend a favour, including giving him the contact numbers of GW and SW, is not anything remotely like breaching either an implied term of the contract or in some other way so fundamentally undermining the modus operandi of the Respondent as to constitute an offence of misconduct let alone gross misconduct.

33. I will come back to that. So, the Claimant was dismissed without notice by Mr Robinson and the letter of dismissal dated 8 May 2020 is atBp75-77. He focussed on those words "as a mate he sorted me out". He took that to mean, given it is common vernacular, that it meant he would he remunerated:

"*This, together with the fact that you also engaged two contractors that worked with our business to also work on the job, demonstrated a lack of respect towards the business and also breaches your implied responsibilities to perform duties for the business and not for self-benefit, using the Company's "materials and resources*".

34. Stopping there, and in terms of whether or not there was some unreasonable leaping to conclusions here by the employer, there is no evidence at all that the Company's materials were used on this job. But, I take it that the word "*resources*" is intended to cover GW and SW. He then dealt with the health and safety implications of the accident and that overall in terms of what had occurred, this constituted a serious breach of the Company's rules and procedures:

"..*serious incidents where your professional conduct is unacceptable, together with the fact that there is a breakdown in trust and confidence we have in you to work within organisation, all lead to the fact that this amounts to "Gross Misconduct" and immediate termination of your employment"".* He

was offered a right of appeal.

35. Stopping there, this could not be a breach of his actual terms of his contract of employment because they did not preclude him from undertaking work outside his employment. He had not used "Company materials". So, in that sense the findings are unsustainable. On the other hand, the Claimant had been evasive on the subject of "as a mate he sorted me out": But did the employer have evidence that sustained at that stage a reasonable belief in the gross misconduct of the Claimant?

36. It is a balancing exercise and bearing in mind the burden of proof is upon the employer apropos the first stage of the ***Burchell*** [4] test to establish on a the balance of probabilities that it had a genuine belief in the guilt of the employee and, at the time that it did so, that it had in its mind reasonable grounds on which to sustain that belief and at the stage at which their belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

37. The second stage, if there is a reasonable belief that holds up, ie as to misconduct is as to whether the employer, having regard to its size and administrative resources, equity and the substantial merits of the case, acted fairly in dismissing the Claimant within the range of reasonable responses.

38. It is perhaps self-evident that if the belief in gross misconduct is sustainable, then it will be very difficult to see how the dismissal can be outside the range of reasonable responses.

39. I then finally factor in, because Mr Bidnell-Edwards has raised it quite properly, that bearing in mind the career threatening implications for the Claimant, the Respondent could be expected to undertake a "*most careful investigation*", albeit it is not to be judged by the standards of a criminal court[5].

40. Going back to what Mr Robinson had, he had first the evidence that he had been given by the highly emotional Mrs Allen. Then he had the first explanation of the Claimant at the meeting on 23 April . The Claimant then put in a submission penned for him by his daughter for the purposes of dismissal hearing, albeit he might not have been able to give in to Mr Robinson because the meeting ended in somewhat difficult circumstances and Mr Robinson may have got up and left. This may be because the Claimant himself was being combative in that meeting. That statement so to speak runs exactly along with the lines of Mr Allen's defence that I have already gone to. Mr Robinson had the phrase "*as a mate* he *sorted out*" and the Claimant not providing any more detail on that, even when pressed. On the other hand, Mr Robinson did not ask him for the identity of the friend

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[4] ***British Home Stores v Burchell [1978] ICR 303 EAT***.

[5] ***A v B (2003) IRLR 405 EAT***

but, of course,the Claimant never volunteered it.

41. It follows that this is a very difficult case for this Judge, who has given it a great deal of thought. I have the following observations to make. Mr Robinson did have the services on standby so to speak of Mr Lawrie so, even before it got the appeal stage, why not send Mrs Allen a record of what she had said in order that she could confirm or deny it? Why not take a note of what she said on 24 March. The answer to that from Mr Robinson is that he was just into the throes of Corona and he was having to deal at very short with how to handle the current contracts, employees, furlough and matters of that nature. He was firefighting. I have some sympathy for that position. But why at the disciplinary hearing did he not then ask the Claimant "who was your friend"? Perhaps the Claimant would have realised the significance of the question and volunteered the details. Third, why not get a statement from GW? Mr Robinson told me that he remembers having some discussion with GW, but he could not really thrown any further light because he could not remember what had happened to him once he hit the deck. But, that is not the point. He did not ask GW as to the circumstances in which he came to do the work. In other words, was he actually hired by the Claimant even if it was for Mr Pearce.

42. Those are matters he should have asked; they are fundamental. It follows that I do conclude that he failed to undertake a undertook a full investigation.

43. It follows that the dismissal was procedurally unfair at least.

44. The final point that I wish to factor in is that in the run up to the dismissal and starting around 25 April, so that is between the disciplinary hearing and the outcome, Mr Robinson had been exploring with the Claimant what might objectively be seen as a way out. This led to a without prejudice meeting[6] which took place on 1 May and then a job offer on 4 May, which is at Bp 133. As to the job description of that job, which is described as Managing Surveyor and was on a salary which is about £9,000 a year less, albeit there was an opportunity to obtain bonuses if targets were met, it is argued by Mr Robinson that this was a lesser role because health and safety overarching responsibilities were removed from the Claimant and resumed by Mr Robinson. The latter saw this as an opportunity to "corral" the Claimant and allow him time to reflect on where he had gone wrong. He would be on a three-month probationary period and at the end of it if things went well, he would have got to a position where trust was restored.

45. Mr Bidnell-Edwards submits to me as to how can there be such a fundamental undermining of trust and confidence, which is part and parcel of the dismissal letter of 8 May, when there had been this opportunity to be retained in the business in a senior role, because that is what it still was. As it is, the Claimant rejected said role because he was not prepared to take a demotion

[6] Privilege, if it existed, has in effect been waived by the parties.

and in that sense the loss of salary. By now he too had lost trust and confidence.

46. As at 16 May, Mr Allen was about forming his own limited company in competition with the Respondent and went on to do just that.

47. But, it comes back to the reason for the dismissal. How can the employer have had a reasonably held belief that there was no longer any trust and confidence in the Claimant when it had offered him a job which still had an element of a health and safety in that the Claimant would still be responsible for all matters to do with the contracts he might win? It is a fundamental issue. I do think that Mr Robinson was looking at a way to try and rescue the position because the Claimant had been an important employee and had contacts and doubtless there might very well be a loss to the business and one that might threaten it if he went and set up in competition, given there was no restrictive covenant. But, that is an entirely different issue from no longer having any trust and confidence and because if he did not, he would not have ever offered the Claimant a job at all.

48. Mr Lawrie undertook the appeal; the Claimant having lodged his grounds of appeal on 12 May (Bp 78). Apart from saying that the penalty was too severe, Mr Allen's defence was entirely upon the lines as I have put it before, namely: "It was nothing to do with me; all I did was help a friend".

49. The appeal hearing took place on 21 May 2020. The minutes thereof start at Bp102. The Claimant again had along with him Mr Johnson. The Claimant's grounds of appeal had been drafted for him, again by his daughter – Bp 78.

50. In passing, I learned during the hearing that the Claimant is quite severely dyslexic and that is doubtless why some of the paragraphs in his extensive witness statement prepared for him by his solicitors were statements that he did not want to take ownership of. I think that is because he had not really been able to read them previously, or certainly not enough to take them in.

51. I want to take up another issue at this stage which comes into the equation. It is the question of whether there was, as Ms Sketchley would put it, a breach of the duty of fidelity. That is to say, to act as a senior employee of the Respondent in good faith and not for instance to engage in personal work opportunities which conflict with that obligation to the employer. This engages the value of the work for farmer Pearce and whether or not the Respondent should have been offered first refusal by the Claimant.

52. Put briefly, the following is the scenario. Historically, and thus it seems to me as a custom and practice, when the Claimant was offered the opportunity to do a job on the side, for instance for a friend, he would first put it past Mr Robinson. They were after all quite close as I have already said and worked hand in glove. If Mr Robinson evaluated the job as not being worth the

Respondent's while, then the Claimant had a free hand to undertake it. But there was never any evidence that I have been given until we get to the events of 21 March 2020 that in the past the Claimant had used sub-contractors of the Respondent's business and of course there had never been an accident.

53. On this occasion the Claimant did not put it past Mr Robinson, because he did not think it was something he would ever be remotely interested in being worth at most to the Respondent £650 - £700. I have already set out why.

54. Mr Robinson eventually accepted before me that if that had been the only issue, then it would not have warranted dismissal although he thought it might still be misconduct. In that respect given the pre-existing practice, I do conclude that the Claimant should have told him. That it was of small value is not the point. It had not stopped him informing Mr Robinson in the past. And if he had so informed Mr Robinson, there might well have been discussion about who was going to do the work.Thus that it was to be GW and SW might well have emerged. If so, I have no doubt that Mr Robinson would have been strongly opposed for the reasons I have gone to. In which case it is more likely that not that they would not have been deployed and thus the accident would not have occurred. This engages contribution and to which I shall return.

55. So that deals with that issue. Otherwise going back to the grounds of appeal and the Claimant, it was the same theme, paraphrased by me – "I cannot be responsible for what happened and what I did was outside the remit of my employment".

56. So, we come last to Mr Lawrie and the conduct of the appeal. I find no fault with the manner in which he conducted it. What he quite properly did was to address each of the grounds of the appeal that the Claimant had raised and allow the Claimant to elaborate upon the same.

57. The Claimant never volunteered Mr Pearce; it was suggested in cross examination that Mr Lawrie should have asked him in that respect. Yes it would have been better if he had but, on the other hand, he had before him a Claimant who had prepared via his daughter full grounds of his appeal. Before me the Claimant, who is plain speaking, was fully capable of asserting his case and holding his own when questioned. As is now obvious, he had been doing so before Mr Robinson. He was not reticent at the appeal hearing. Therefore he had every opportunity to volunteer in his defence and therefore name Mr Pearce, perhaps even better to have got a statement from him. Why not? After all he called Mr Pearce to this hearing. Also, he did not volunteer what I might describe as the meat and a few eggs reward issue. He did not therefore seek to contradict what the employer could reasonably conclude was the implication of "*as a mate he sorted me out*". He repeated, however, that all he had done was to measure up the materials, give the contact details for GW and SW and leave the rest to the unnamed farmer, and that would never have been back there on the 21st but for the wrong materials.

58. What came out of the hearing before me is that having adjourned out the appeal hearing, Mr Lawrie tried to contact SW twice. Both times he got the answer "not possible to connect your call" so he could not even leave a voicemail. That does not trouble me because it seems to me that Mr Robinson had encountered the same problem in trying to make contact with the elusive Mr Woodford. What he did do is to get hold of GW and he eventually was able to speak to him. Mr Lawrie in his email reporting back to Mr Robinson dated 29 May 2020 (Bp142a) said:

"*I asked how the job came about? He said it was sorted through Gaz*[7] *as he knew the farmer and Gaz made the arrangements. This was cash, based on a day rate that Gaz sorted. …Gary did not know the farmer and was just there as labour only.*"

59. So, Mr Lawrie who was sending this email to Mr Robinson before he had actually announced his decision, which in part goes to how independent he actually was, went on to observe:

"*This gives a little difference to the story that GW and SW had liaised directly with the farmer. In fact, they just turned up when they were told to!! So did GA arrange it, so it appears!!*
I will look at drafting a suitable letter to GA to initially issue the minutes of the meeting and then followed by my decision letter to uphold the decision!
Have a good weekend!
Paul"

60. So, that was dated 29 May and the letter by which the appeal was dismissed was dated 4 June and is at Bp149-152. The obvious point to make is that Mr Lawrie ought to have provided a copy of that conversation with GW to the Claimant in case he wished to comment, before deciding finally his decision on the appeal. He did not. That is a shortcoming.

61. On the other hand, GW on the face of it contradicts the Claimant because of course the latter had said to Mr Robinson and also to Mr Lawrie, and in his written submissions, that all he had done was to pass the contact details of GW and SW to the farmer.

62. The point then is that the Claimant put in a statement for GW before me which seeks to contradict to some extent that which he is reported to have said in the conversation with Mr Lawrie. Why not call GW? Why just put his statement in? The explanation from the Claimant is that GW does not want to get involved. He is actually now undertaking work in the main for the Claimant but on the basis that if he has not got work from him, then he would look to get work from the Respondent.

63. But, on the other hand, if he was fearful of some sort of repercussion, then

[7] The Claimant's nick name.

the Claimant through his solicitors could have applied for a witness summons which would have given him protection before the tribunal; and it would be a stupid employer, or potential one, who then sought to refuse him work on the basis he had given evidence before a tribunal and because of the potential liability such action would expose it to. Also if he by implication was fearful, why is it that he was prepared to allow his statement to put before me?

64. So, I am sceptical as to why GW was not here. Without that sworn evidence I am not persuaded by his statement because it contradicts to some extent what he told Mr Lawrie, and I have no doubt as to the integrity of the latter in terms of the truth of what he recorded in that email as to what GW had said.

65. Mr Lawrie dismissed the appeal and upheld the decision to summarily dismiss the Claimant for gross misconduct. His reasons inter alia adopt the trust and confidence issue, but this is not a case where, for reasons I have now gone it, given the offer of the alternative employment, this really is a case of breakdown of trust and confidence. What it means is that Mr Lawrie does not in that sense cure the fault in the reasoning and belief therefore of Mr Robinson.

66. So, I am still with that I find that the Respondent does not satisfy me on the balance of probabilities that it therefore had a reasonable belief in the misconduct as being so serious as to fundamentally undermine trust and confidence.

Conclusion

67. Thus the dismissal was unfair.

Contribution

68. However, I am now going to come to contribution. This engages first section 122(2) of the ERA in terms of the basic award:

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

69. As to the compensatory element of any award engaged is s123(6):

" 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 contributory award by such proportion as it considers just and equitable having regard to that finding,"

I make the following additional findings.

70. The Claimant is in denial or naïve if he really thinks that in this scenario there was not the prospect of an adverse impact upon the Respondent. First of all, he would have known that GW, and, to a lesser extent, SW but then they work as a two man team, were a crucial labour resource for the Respondent and obviously undertook a great deal of work for it and were trusted. The rendering hors de combat of GW was bound to have a disruptive impact upon the business: the last thing it wanted when trying to deal with the implications of Corona.

71. There was every prospect of reputational damage. After all, GW's wife thought that because the Claimant was so well-known as a leading figure in the Respondent's business, that her husband must have been used by the business on the day of the accident. That is why she rang Mark Robinson. Think about how this might have impacted upon the Respondent if the prospect that it might have been down to the Respondent's business via the agency so to speak of the Claimant, had led to some sort of investigation or the attraction of the media. The latter did not think when doing his friend a favour about the implications of what he was actually doing. He should have stopped, thought about it, and realised it would not be responsible behaviour by him to his employer to in effect place these two on the site, because that is what he was really engineering, even if they were free to decide how they did the work. It was foreseeable that an accident could occur in the environment of that farm and without any regard to health and safety. I consider that to be an extremely serious piece of contributory behaviour.

72. I have therefore decided that applying both sections, I am going to reduce the basic and compensatory awards by 80%.

73. The concomitant claim that the contract of employment that the Claimant was given in April of 2003 (Bp45) is in breach of section 1 of the ERA because it should have been given within 2 months of the start of the employment, is in itself correct. But cross-referencing to any penalty that I might consider should be imposed apropos section 38 of the Employment Act 2002, for the reasons I have now made plain I consider this to be an exceptional circumstance whereby it is not just and equitable to award compensation.

Breach of contract claim

74. As I have found that the employer did not have a reasonable belief in gross misconduct when it dismissed the Claimant, it follows that I cannot find that the Claimant repudiated the contract of employment so as to thus not be entitled to his notice pay. There is no provision in terms of common law for reducing what otherwise follows by way of contribution. Therefore, it would mean that the Claimant is entitled to his notice pay. Mr Bidnell-Edwards has pointed out that he does not need to give credit for any loss of earnings applying the well-known ***Norton Tool v Jewson*** line of authority.

75. Given the hour, further consideration of therefore the calculation of the amounts payable by the Respondent to the Claimant is adjourned. The hearing will continue in that respect, including the issue of whether or not the Claimant has or has not mitigated his losses and whether there is in fact any loss other than the notice pay and the basic award, at the next hearing, which is hereby scheduled for Tuesday 23 March.

Hearing on 23 March 2021 to determine the amount of compensation

76. For the purposes of the remedy hearing, I had the witness statement in respect thereof of the Claimant and he was cross-examined. I had a counter statement from Mr Robinson, although it was not necessary for him to give evidence for reasons I shall come to. I heard at length the submissions of Mr Bidnell-Edwards for the Claimant and Ms Sketchley for the Respondent. Essentially, there are four heads of loss sought and I will deal with them in the following order.

Furlough reduction

77. As per the schedule of loss, there is a claim for £630.30 based on the proposition that the Claimant's salary was only reduced from 1 April onwards purportedly because of furlough and the impact of Corona virus to avoid paying him in full when he was suspended.

78. But there is a significant problem in that claim. First of all, it relates to the period before he was dismissed. Thus it would be claim of unlawful deduction from wages, but there is no such claim. Second, the Claimant received a letter from the employer in terms of implementation of the furlough provisions which the Government had introduced as a result of the pandemic, setting out that he was being placed on furlough from 31 March 2020 and as a result he was asked to signify his agreement to a change in his salary during the period of furlough so that he would be paid 80% of his usual earnings or £2,500 per month as a maximum. This letter is at Bp55-56.

79. The point is that the Claimant signed his acceptance ton 2 April 2020. There is no argument put before me that he did so in circumstances of duress. Thus, it follows that there has in any event been no unlawful deduction from wages and therefore any argument that he should receive his pre furlough wages as it was a device in terms of benefitting from his suspension by manipulating the furlough rules is otiose because he agreed to the variation of his said contract. It follows that this claim cannot engage and Mr Bidnell-Edwards does not seek to dissuade me to.

The measure of compensation

Basic Award

80. The calculation is accurate as per the schedule of loss and is not disputed by the Respondent. But of course I am only going to award 20% of the same because of my decision on contribution. The award is thus **£1129.80**

The compensatory award

81. As to the amount of any such compensatory award, subject of course to contribution which I have dealt with, it is capped at 52 weeks' pay from the effective date of termination and, if that exceeds £88,519, then it is capped at that amount.

82. Before I get into what actually could be said to be the loss sustained, I need to take out of the equation the following post the evidence of the Claimant. Thus, on the schedule of loss the Claimant was claiming for the loss of the use of the Company credit card for fuel at £100 per week for 52 weeks. But he accepted that he only ever used it for fuel for the Toyota Hilux pickup truck which he used in the course of his duties, and he never used that vehicle outside work, preferring to use his personal motor car, other than taking it to the local garage to fill it up with fuel for the purposes of the work.

83. It thus follows that he has suffered no loss in terms of the use of the credit card and therefore I discount that claim. It also follows that his claim for loss of the use of the Company car at £7,638.36 for the year simply cannot engage. He was not taxed as this being a personal benefit under the relevant HMRC rules and that is because it was only used for work. Thus, it does not engage and therefore I also reject that part of his schedule of loss. By the end of the hearing, Mr Bidnell-Edwards was not seeking to dissuade me.

84. Thus, what it means is that we start off with a weekly loss of £630.32, plus the loss of the benefit of BUPA private healthcare, which the Claimant has stated to be at £50 per month. That equates to approximately £11.53 per week giving a weekly loss therefore of £641.85. Over a spread of 52 weeks, that will be £33,376.20.

85. The Claimantset up a limited company, namely Gary W Allen, Roofing and Exteriors Ltd, which was registered with Companies House on 19 May 2020. He accepted that this would not have happened overnight, and he gave evidence to the effect that it was about 2 or 3 weeks prior thereto that he started to take steps to form it. He has 60% of the shares; his wife has the remaining 40%. Before me were spreadsheets using an IT software programme known as Zero. Since the business started trading, which looks to me to have been by June of 2020, working in the business is his daughter,

Leigh, who gave evidence before me. She was able to assist me on how the spreadsheet worked, it having been set up for the business by their accountant. Essentially, looking at the spreadsheets and cross-referencing to the invoices, what happens is that the business posts as a sale when it obtains a contract. Whether that is when the actual cash comes in, it seems to me to be debatable because I was told that as is often the case in business and with a small enterprise such as this, there can be a significant delay time in actually receiving the money. Otherwise what the spreadsheet shows is what I might describe as the costs of those sales, ie payments out to sub-contractors, and reflects indeed how Mr Robinson's business also worked. Thence set out are expenditures on such things as payroll, wages, insurance and so on and so forth.

86. To cut a long story short, what this shows is that the business began to post sales (otherwise known as credit collections) in July 2020 and a substantial contract on that occasion with a cash value of £52,941. Looking at the bottom, we get reference to cash flow surplus and such things as cash balances. Those show me that the business began to generate cash balances from August 2020, which would of course reflect on the delay time between a job and getting in payments. Looking at the closing cash balances along the bottom of the page, ie Bp 166, and then flowing through over to March 2021 at Bp 167 on the face of it there was a closing cash balance of £153,742. Taken at face value, thus these spreadsheets show there is as of March 2021, a net profit of £91,105. But cross-reference to the latest bank accounts that came in during this remedy hearing, and as at 19 February 2021 the credit in the bank account for the business stood at £32,263.99.

87. I then need to take into account that in order to finance this business, the Claimant and his wife were able to obtain loans from the family of about £32,000. That is because they did not have the wherewithal to get a facility from a bank. It also explains why they have no overdraft facility at present. Finally I factor in that the Claimant was not able to get a trade account which would enable him to get discount because he had not been in business previously. So, in that respect the business needs to keep a substantial capital reserve.

88. The second point, which brings me to dividends, is that it was very clear from Leigh in particular that the family would have taken a very dim view indeed if Mr and Mrs Allen had taken out by way of say a loan from the business or a dividend anything substantial given its fledgling state and that the family had lent them the starter capital. The business has yet to reach its year end and so there no signed off accounts.

89. What then becomes relevant is that looking at the spreadsheet and cross-referencing to the bank statements, the Claimant only first started to take a wage from the business around the end of August 2020. His wife also took a modest wage, it seems of about £400 per month. She otherwise has a part-

time job.

90. On the face of it I am with Mr Bidnell-Edwards that I cannot take into account what she may have been earning because she is not the employer for the purposes of this case. The net wage that the Claimant received commencing as I say about the end of August, because this went through PAYE, was £930.40. But also, and from what I can gather from the evidence which is not that clear, he began to also then take an advance dividend from about October 2020 of £600 per month.

91. Stopping there, I am well aware of this practice, which is not unlawful tax evasion. That is to say that in small businesses like this, advance dividend is paid out and then at the end of the financial year, from whatever dividend is declared those advanced payments are in effect recouped from what is otherwise paid and the dividends attract tax at 20%. So, the argument advanced by Ms Sketchley, and very much in the evidence of Mr Robinson in his statement, is that what is going to happen here is that as soon as this case is over and at latest by the financial year end, the Directors (and for which in particular read the Claimant as controlling shareholder) and also bearing in mind that Mrs Allen is also getting a dividend I gather of about £400 per month, will simply declare a large dividend out of the profits of this business and thus meaning that the Claimant has sustained no loss and therefore should not receive any compensation.

92. The counter argument as I have already put it from Mr Bidnell-Edwards and Leigh, I accept that Mr Allen has little or no financial knowledge in that respect, is that this just would not have occurred. To turn it around another way, it is far too early. The crucial thing at present is to sustain working capital particularly as they go for larger contracts and which may mean a substantial outlay in materials and paying such as subcontractors before the money has been got in. Of course, I am well aware of the concept of overtrading and that a paper profit does not mean that a business may not turn into disaster if it fails to retain sufficient funds.

93. So, what do I make of this intriguing and unusual scenario? On balance, I would conclude that as of now there are actual losses for the Claimant which equate to the difference between the net salary he is taking from the business plus the dividends, which is today's date total £7,980.41 from August 2020 and of course no wages from the date of dismissal, because I do not take into account the notice pay and to the first net payment of salary at the end of August 2020. Thus, doing my best and then adding in the pension loss as per the schedule of loss at £1,468.20 and the BUPA at £600, and to which I have referred, there is an approximate net income that he would have received from the Respondent up to today's date of circa £31,800. Less the payments out of the business, this means that he has suffered a loss of earnings of circa £23,800.

94. However, that leads me now to the Software 2000 point. Thus, I now factor

in the well-known Judgment of Mr Justice Elias (as he then was) in ***Software 2000 Ltd v Andrews & others [2007] ICR 825 EAT***:-

"*In assessing compensation for unfair dismissal, the Employment Tribunal must assess the losses flowing from that dismissal which will normally involve an assessment of how long the employee would have been employed but for the dismissal.*"

95. This inevitably engages a degree of informed speculation:-

"*The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make an assessment with sufficient confidence about what is likely to have happened using its common-sense experience and sense of justice.*"

96. I find the following and it takes me back to my principal findings of fact. First it is obvious from my findings that the Claimant never accepted that he had done anything wrong at all or in that sense accepted therefore any responsibility for what had occurred and its impact upon the Respondent. I have no doubt whatsoever that the first meeting on 23 March 2020 was a very difficult one and that he resented matters, and this is perhaps borne out by what his wife did on 25 March in her conversation with Mr Robinson and about which she could not really recollect before me. Although the Claimant may say to me that he did not know that she was going to do that and he loved his job, nevertheless that he was resenting what had occurred is so obvious. It is self-evident from the run up to the disciplinary hearing and the statement to which I referred last time and his attitude within that hearing on 14 April. And how does one get round that he said: "*He would sort me out*" and then the reference at Bp61 when Mr Robinson said he would make his own enquiries was: "*Do what you like*". This defiant stance also shows up on 20 April (see Bp65

97. What it means is that the employer would have been entitled, and well within the range of reasonable responses if it had thought about it, to have imposed a disciplinary sanction short of dismissal but of course that did not happen because it dismissed the Claimant. In his evidence before me, the Claimant stated that he could have continued in the employ, despite his deep resentment at the way he had been treated from 23 March onward, by distancing himself from Mr Robinson and just going about his job and limiting contact. But then I factor in that they had been friends up until the unfortunate circumstances; they would go for a drink on a Friday. Thus would this employment have really lasted? Indicative is his reference at the Appeal hearing to what had happened to him as "*a kick in the teeth*" and that he had lost faith in the business and he *"felt crushed*". And what does significantly impact upon my finding is that of course the Claimant had set the limited company up by 19 May and he accepted that it would have taken at least two to three weeks prior thereto to do that. Second, the speed in which he was able to get substantial business for the new company, and I have referred to

this and the spreadsheets, first pays testimony to the regard in which he was held in the roofing business and to his extensive contacts built up over some 30 years of work; but also to that he clearly went about using those contacts, and very successfully, to get business in. Also, he engaged and used almost exclusively the services of Gary Waite, as to which see the spreadsheets. In other words, he was very successful in poaching work and resources away from the Respondent. He is of course perfectly entitled to do that. There were no restrictive covenants and he had been dismissed.

98. So, I factor that in. That Claimant has told me that he was very reluctant to go it alone being that he was 62 and may not have been in the best of health. On the other hand, I have the undoubted support that he received from his wife and her feelings that he had been exploited and anger at how he had been treated on 23 March; the fact that his family were prepared to support him; and finally that he clearly had the ability to get in the business and start a company which has the potential currently to be very successful.

99. So, if I factor that in to what I think was a deeply damaged working relationship from 23 March and wherein in that respect Mr Robinson was not acting unreasonably in suspending the Claimant whilst he thought about what to do, then I conclude that the likelihood, doing my judicial speculative best is as follows.

100. The Claimant might have soldiered on had there not been the dismissal for a period but with this deep seated anger and resentment at what had occurred, and given the clear confidence in his abilities within his family and knowing as he did that he had a well of goodwill and the loyalty of Gary Waite. I come to the conclusion that he might have put off setting up his limited company and going off to trade in competition for the Respondent for a short while, but then nevertheless he would have done so.

101. What I have therefore concluded applying the guidance in ***Software***, is that the Claimant would have left his employment no later than 3 months from the effective date of termination. Thus, it means that I limit his losses before deducting for contribution to 12 weeks. Thus as follows:

Net Weekly wage	£630.32
Plus pension loss stated to be £1468.20 per annum divided by 52	£28.29
Plus BUPA stated to be £50 a month equals £600 per annum divided by 52	£11.53

Thus total weekly wage for the purposes of the calculation is £670.08 x 12 = £8,040.96 reduced to 20% equals **£1,608.19.**

102. I am then asked to award loss of statutory rights. The current figure in the

region is £500 less 80% = **£100**.

103. Thus, total so far = **£ 2837.99**

104. That then brings me to the next and final topic which is the claim for uplift for a breach of the ACAS Code of Practice as per section 207A of TULRCA 1992. It reads:

> ***"207A Effect of failure to comply with Code: adjustment of awards***
>
> *(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.* (That includes unfair dismissal).
>
> *(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%.*
>
> *…"*

105. If I were to make an award, it would be subject to the 80% reduction for contribution. Before dealing with the point, I will cross-reference to the code of practice, the relevant code being: The ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

106. It is important to stress that this is concerned primarily with matters procedural. Thus, if I take the requirements in turn commencing at 4.4 in the Code: Was there such investigation as was necessary prior to the dismissal hearing?

107. In that respect, the Claimant did not help himself. He did not deny he might have received some remuneration, he said: "*He said he would sort me out*". He would never elaborate further. He did not divulge Mr Pearce's identity at any stage. That the accident had happened was fact. Yes, Mr Robinson had a closed mind, but it is not the same thing as saying that there was not on

face of it an investigation, which at that stage would mean that it itself was unreasonable in compliance with the Code. More important is 6: "*In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing*".

108. What became engaged is Adam Johnson, the Co-Director. The Claimant said that he would not have objected to Mr Johnson hearing the disciplinary. On the other hand Mr Robinson's evidence was that he thought about that and it was untenable because the Claimant and Mr Johnson, who worked in different divisions of the business, had not got on for years. The Claimant himself said that they had had their run ins but it did not mean that they could not work alongside one another.

109. On this point, I prefer the evidence of Mr Robinson; I found him convincing. It follows that it was not in that sense practicable for anyone other than Mr Robinson in this very small business with no HR team to hear the disciplinary, bearing in mind that already it seems to me there was in reserve the using of Mr Lawrie if needed as an external HR consultant at the appeal.

110. Reverting to the Code, the Claimant knew the case he had to meet and the letter inviting him to the disciplinary hearing set out the charges and what would be relied upon in what a very limited investigation; and that he had the right to be accompanied; and a potential consequence could be his dismissal. So that complies with that element of the Code and, of course, he had a hearing.

111. Finally, as to the Code, he was offered the right of appeal and this was conducted by Mr Lawrie.

112. What it means is that applying section 207A, the non-compliance with the Code to the extent that I have found it to be applicable is such that in the circumstances I do not consider that failure was unreasonable. Second I find, given the level of contribution of the Claimant, that it would not be just and equitable to make an award in any event.

Summary of the award

113. Basic award - £5649 less 80% contribution = £1,129.80
Compensatory award in respect of which I have already factored in the contribution = £1,608.19.

114. Therefore total award for the unfair dismissal is **£2,737.99**.

115. I should make it plain that in terms of the 12 weeks that I am awarding for, as that would start with the effective date of termination, namely 8 May, it comes before the Claimant starts to take any earnings out of the limited company which he set up. Thus, that is not engaged.

116. For reasons I have already made plain, the Claimant is awarded his notice pay. This was wrongly calculated in the schedule of loss because it failed to take account of the pension and BUPA elements of his remuneration. As already calculated by me, as the weekly wage becomes £670.80, thus the notice entitlement becomes £670.80 x 7 = **£4,695.60** and so I make that award.

_____

Employment Judge P Britton

Date: 20 May 2021

JUDGMENT SENT TO THE PARTIES ON

22/10/2021.....
.....
FOR THE TRIBUNAL OFFICE

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