EMPLOYMENT TRIBUNALS

Claimant: Mr A Morgan-Jones

Respondent: Jelthat Limited (t/a Newport Mazda)

Heard at: Cardiff (by video) **On:** 18 and 19 July 2022, and 20 July 2022 (in Chambers)

Before: Employment Judge S Jenkins

REPRESENTATION:

Claimant: Mr J Walters (Counsel)
Respondent: Mr R Kohanzad (Counsel)

RESERVED REMEDY JUDGMENT

1. The Respondent is ordered the pay the Claimant the gross sum of £7,439.27 in respect of his claim of unauthorised deductions from wages.

2. The Respondent is ordered the pay the Claimant the gross sum of £3,964.30 in respect of his claim of breach of contract relating to bonus.

3. The Respondent is ordered the pay the Claimant the gross sum of £5,172.80 in respect of his claim relating to payment for accrued but untaken holiday.

4. The Respondent is ordered the pay the Claimant the gross sum of £15,519.72 in respect of his claim of wrongful dismissal.

5. The Respondent is ordered the pay the Claimant the sum of £13,387.50 in respect of the unfair dismissal basic award.

6. The Respondent is ordered the pay the Claimant the sum of £67,252.12 in respect of the unfair dismissal compensatory award.

7. The Respondent is ordered the pay the Claimant the sum of £1,050.00 in respect of section 38 of the Employment Act 2002.

REASONS

Background

1. The hearing was a remedy hearing to consider the compensation to award the Claimant following a Judgment issued by Employment Judge Ryan on 25 October 2020 under rule 21 of the Employment Tribunal Rules of Procedure, i.e. due to the fact that the Respondent had failed to present a Response.

2. The Respondent applied for reconsideration of Judge Ryan's Judgment, and for an extension of time for the submission of its Response, but, following a hearing on 18 March 2021, those applications were rejected and the initial Judgment was confirmed.

3. That Judgment was that various claims brought by the Claimant succeeded. They were: unfair dismissal, wrongful dismissal, unauthorised deductions from wages, holiday pay, and breach of contract relating to payment of commission and bonus.

4. A preliminary hearing for case management purposes took place before Employment Judge Frazer on 12 December 2021, during which applications were made on behalf of the Claimant for the instruction of two experts. The first was for an opinion to be obtained on whether or not it was commonplace in the industry, the motor trade, to sell vehicles at below trade price to third party trade sellers. However, the Respondent accepted at that hearing that there was indeed such a custom and practice and therefore there was no need for an expert to be instructed.

5. The second application was for a medical opinion. It was submitted that the Claimant had suffered injury in consequence of the dismissal, which had prevented him from undertaking any form of work. Judge Frazer noted that the question was whether the Respondent was liable for this pursuant to the dicta in **Seafield Holdings Ltd t/a Seafield Logistics v Drewett [2006] UKEAT 0199/06** and **Devine v Designer Flowers [1993] IRLR 517**.

6. Judge Frazer ordered the instruction of a joint medical expert to report on whether the Respondent caused or materially contributed to the Claimant's ill health by dismissing him, such that he was precluded from mitigating his loss.

7. I heard evidence from the Claimant on his own behalf and from Mr Shane Harris, Managing Director, and Mr Daniel Ludlow, formerly Retail Manager, on behalf of the Respondent.

8. I considered the documents in a hearing bundle spanning some 180 pages to which my attention was drawn, together with some additional documents produced during the hearing. I also considered the parties' closing submissions.

Issues

9. The issues I had to address had been set out by Judge Frazer as follows:

(1) What is the extent of the Claimant's full loss for unfair dismissal?

(2) Should the Claimant's basic award be reduced to any extent under section 122(2) ERA 1996? If so, to what extent?

(3) Should the Claimant's compensatory award be reduced under section 123(6) ERA 1996? If so, to what extent?

(4) Whether, had the Respondent carried out a fair process, it would have fairly dismissed the Claimant for gross misconduct in any event? If so, when would this have occurred and what is the percentage chance that he would have been fairly dismissed?

(5) Insofar as it is relevant to issues (1)-(4) above:

5.1 It is accepted by the Respondent that there was a custom and practice in the motor trade that second-hand vehicles were habitually disposed of by motor vehicle retailers at less than market value to third party trade sellers. The issue is whether by informing his immediate family members to purchase such vehicles at such rates the Claimant was acting dishonestly/fraudulently.

(6) In determining (1) above and the question of mitigation, the Tribunal will need to determine whether the Claimant's health was adversely affected by the Respondent's dismissal of him.

(7) In particular what impact does the Claimant's health and its causation have on the claim for loss of earnings?

(8) What is the extent of any ACAS uplift?

<u>Other heads of loss</u>

(9) Is the Claimant entitled to an award for unpaid bonus/commission? If so, how much?

(10) Is the Claimant entitled to notice pay for wrongful dismissal? If so, how much?

(11) Is the Claimant entitled to holiday pay accrued but untaken upon termination? If so, how much?

10. Mr Kohanzad clarified at the outset of the hearing with regard to issues (6) and (7), that the Respondent maintained that the focus, arising from the expert medical report, was whether any losses arising from the Claimant's ill health derived from his dismissal or, as the Respondent maintained, arose from earlier events and therefore fell within what he contended to be the **Johnson**

exclusion zone, applying the House of Lords Judgment in **Johnson v Unisys [2001] ICR 480**.

11. Mr Walters, on behalf of the Claimant, contended that the medical report suggested that the Claimant had been fit to work following dismissal and therefore that the **Johnson** case had no application.

12. Although not covered by Judge Ryan's Judgment or Judge Frazer's List of Issues, it was apparent that section 38 of the Employment Act 2002 was also relevant as the Claimant contended that, when the proceedings were begun the Respondent had been in breach of its duty to the Claimant under section 1(1) and 4(1) of the Employment Rights Act 1996 ("ERA"). That meant that if I found in favour of the Claimant and/or made an award to him in respect of any of his claims (all of them falling within the scope of schedule 5 of that Act), then I would be obliged, unless I considered there were exceptional circumstances which would make an award or increase unjust or inequitable, to award or increase an award by a minimum amount of two weeks' pay, and could, if I considered it just and equitable in all the circumstances, award or increase the award by a higher amount of four weeks' pay.

The Law

Unfair Dismissal

Basic Award

13. With regard to the basic award, section 119(1) ERA notes that a basic award is to be calculated by:

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

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

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

Section 119(2) then notes that the "*appropriate amount*" is one and a half week's pay for each year of employment above the age of 41, and one week's pay for each year of employment between the ages of 22 and 40. Section 227 ERA notes that a "*week's pay*" is subject to a cap, which, at the time of the Claimant's dismissal, was £525.00.

Compensatory Award

14. With regard to the compensatory award, section 123(1) ERA 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 claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".

15. Section 124(1ZA) ERA then provides that the amount of a compensatory award shall not exceed either a specified maximum (£86,444 at the time of the Claimant's dismissal), or an amount equivalent to 52 weeks' pay.

16. A week's pay for these purposes is dealt with in Chapter II of Part XIV ERA. Sections 221-223 address the position of an employee with normal working hours, which I considered the Claimant to be. Section 221(3) notes that if the employee's remuneration varies with the amount of work done in the period then the amount of a week's pay is, "*the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of the period of twelve weeks ending with … the last complete week before the calculation date*". For these purposes, section 221(4) notes that, "*remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount*".

17. Section 223(2) provides that, if no remuneration is payable in the twelve-week period referred to in section 221(3), then remuneration from earlier weeks is to be taken into account to bring the number of paid weeks taken into account up to twelve.

18. Remuneration for these purposes includes salary as well as regularly paid commission and contractual bonuses.

19. A key element for me to consider for the purposes of my assessment of the compensatory award under section 123(1) was whether the loss sustained by the Claimant in consequence of the dismissal was loss that was attributable to action taken by the employer. The Claimant has not worked since his dismissal and was in receipt of statements of fitness to work from his GP for the period between August 2020 to April 2022, with only a gap in January and February 2022. He had also been certified as unfit to work in March 2020, just prior to his dismissal, although no fit note covering that absence was before me.

20. Mr Kohanzad on behalf of the Respondent, referring to the House of Lords decision in **Johnson**, contended that, as the Claimant had started to suffer from ill health in January 2020, i.e. before his dismissal in April 2020, any inability on his part to obtain alternative employment due to his ill health should not be considered as part of his compensatory award, but could instead be pursued by him as a separate civil claim. In those circumstances, he contended that the Respondent did not have to address the issue of mitigation, as the Claimant's losses were not caused by his dismissal but by an anterior breach.

21. Mr Walters on behalf of the Claimant contended that this was not a **Johnson** case, as the expert medical report noted that the Claimant had been fit to work during the period since his employment ended and therefore there was no causative connection between the Claimant's ill health and his inability to find other employment. The question therefore boiled down to whether the Claimant had failed to take reasonable steps to mitigate his losses or not.

22. The question of what impact, if any, the Claimant's dismissal had had on his health and his ability to seek alternative employment was therefore relevant. Three cases have provided guidance in respect of the approach to be adopted by a tribunal in these circumstances.

23. In **Dignity Funerals Limited v Bruce [2005] IRLR 189**, the claimant, who had been dismissed for gross misconduct, was diagnosed with reactive depression, a condition from which he had also suffered for five years before dismissal. The Court of Session noted that the Tribunal should have decided "*whether the depression in the period after the dismissal was caused to any material extent by the dismissal itself; whether, if so, it had continued to be so caused for all or parts of the period up to the hearing; and, if it was still caused at the date of the hearing, for how long it would continue to be so caused*".

24. In **R & M Gaskarth v Mooney & anor (UKEAT/0196/12)**, an employment tribunal found that the Claimant and her husband had been unfairly dismissed when their contracts, under which they had been employed as live-in pub managers, were terminated with immediate effect and they, along with their four children, were required to leave the premises. The loss of her job and home caused the claimant to develop depression, rendering her unfit for work. Independently from the depression, the claimant also began to suffer from severe abdominal pain caused by hydronephrosis and gallstones. At the date of the remedy hearing, over a year later, the claimant was still unable to work; she was awaiting surgery for her physical conditions and continued to suffer from depression. The Tribunal concluded that the claimant's inability to work "*was attributable in no small part to the Respondent's opportunistic and unscrupulous actions*" and awarded her full loss of earnings to the date of the remedy hearing and six months beyond.

25. The EAT upheld the Tribunal's award on appeal. It noted that the medical evidence before the Tribunal did not set out the extent to which the claimant's psychiatric symptoms on the one hand and her physical symptoms on the other had caused her absence from work at any particular time. Although "in a perfect world" or in a case involving "greater stakes" it might have done so, the EAT held that the evidence supported the tribunal's conclusions that the claimant's depressive condition was caused by the dismissal and that the claimant's absence from work was "in no small part" attributable to that condition. There was no evidence that the claimant's depression had improved such that she would have been fit for work had it not been for her physical complaints. Although the Tribunal had failed to ask whether the Claimant's unfitness for work was "to any material extent" caused by her dismissal, the test established by the Court of Session in **Dignity Funerals Limited**, its finding that the Claimant's unfitness for work was "in no small part" so attributable was, if anything, a more stringent application of that test. Therefore, the Tribunal could not be criticised for failing to apply the correct test.

26. In **Acetrip Ltd v Dogra (UKEAT/0238/18),** the EAT provided a framework for determining how compensation should be assessed where the claimant alleges that the employer's actions, including dismissal, have caused, contributed to or exacerbated his or her ill health.

27. The EAT identified a number of different permutations. At one extreme, even if a previous illness had run its course by the time of dismissal, a further illness following dismissal might be found to be wholly attributable to it. At the other extreme, a dismissal might have no additional impact on a previous indisposition or ill health, which might simply continue before and after, exactly as it would have done regardless of the dismissal. That was easy to imagine, for example, in a case where the pre-dismissal absence is caused by a physical injury that merely continues post dismissal.

28. The EAT went on to note that, between those extremes, there will be cases where the dismissal is found to have exacerbated or prolonged a pre-existing illness. The task of the employment tribunal in such a case is to assess as best it can what difference the dismissal has made, compared with how matters would have unfolded had there been no dismissal, and hence to identify the additional loss or impact attributable to the dismissal itself. It also noted that, in principle, it would make no difference to the tribunal's task that the original illness was caused by earlier conduct by the employer which then goes on to carry out the dismissal. The question is whether the pre-dismissal conduct and the act of dismissal are part of the same indivisible act or are two separate and successive acts with distinct impacts.

29. With regard to the compensatory award generally, section 123(4) ERA provides that in ascertaining the loss sustained by the Claimant, the common law duty to mitigate loss applies. In that regard the EAT, in **Window Machinery Sales Limited (t/a Promac Group) v Luckey (UKEAT/0301/14)**, confirmed that it "*is for the employer, not the injured employee, to establish that there has been a breach of the duty to mitigate and the extent of that breach. The duty upon an employee is to act reasonably in order to mitigate his loss. … The test is an objective one, based on the totality of the evidence, taking into account all relevant circumstances. The Tribunal must not be too stringent in its expectations of the injured party*".

30. The EAT went on to say that an Employment Tribunal may, "*have to decide: (1) what steps it was reasonable for the Claimant to have to take in order to mitigate loss; (2) whether the Claimant did take reasonable steps to mitigate loss; and (3) to what extent, if any, the Claimant would have actually mitigated his loss if he had taken those steps.*"

31. The EAT noted further that, "*the burden of proof is on the employer on all these questions. If the employer shows that there were many jobs available, it is easier for an Employment Tribunal to conclude that the employee ought to have engaged in a search for them. If the employer adduces no evidence at all on that question, it may well be difficult for an Employment Tribunal to conclude that an employee was required to engage in a substantial search for jobs*".

32. The assessment of the compensatory award by reference to the loss sustained by the Claimant in consequence of the dismissal attributable to action taken by the Respondent also involves assessment of potential deductions. Two potential deductions arose in this case. The first arose from the application of the principle set out by the House of Lords in **Polkey v A E Dayton Services Limited [1987] IRLR 503** i.e. the question of whether a fair dismissal would

nevertheless have occurred and, if so, when that would have taken place, or how likely, in percentage terms, it would have been. The second involved contributory conduct, which also had a potential bearing on the basic award.

33. With regard to contributory conduct, the ERA includes two similar, albeit not identical, provisions which may potentially lead to deductions from the awards made to a claimant in light of his or her conduct. With regard to the basic award, section 122(2) states that where the tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of a basic award to any extent then it shall be reduced accordingly.

34. Section 123(6) then provides, with regard to the compensatory award, that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

35. The Court of Appeal, in **Nelson v BBC (No. 2) [1979] IRLR 346**, set out three factors which must be present for the compensatory award to be reduced. These were:

- that the Claimant's conduct must be culpable or blameworthy;
- that it must actually have caused or contributed to the dismissal; and
- that the reduction must be just and equitable.

36. The EAT, in **Steen v ASP Packaging Limited (UKEAT/23/11)** outlined a very similar approach in relation to the basic award.

37. The Court of Appeal in **Rao v Civil Aviation Authority [1994] ICR 495**, confirmed that it is permissible to make both a **Polkey** deduction and a contributory conduct deduction, but that in assessing the latter the Tribunal should bear in mind the former.

38. Furthermore, the EAT in **Dee v Suffolk County Council (UKEAT/0180/18)** noted that the two potential deductions should be assessed in turn, i.e. **Polkey** followed by contributory conduct, and that the Tribunal should then stand back and look at the matter as a whole to avoid double counting and to ensure that the final result is overall just and equitable.

Wrongful Dismissal

39. With regard to the wrongful dismissal claim, the Claimant was summarily dismissed i.e. without notice. The question for me therefore was whether the Claimant had committed a repudiatory breach of contract, i.e. an act of gross misconduct, such as to justify the Respondent treating the contract at an end and summarily dismissing him.

40. The EAT in **Sandwell & West Birmingham Hospitals NHS Trust v Westwood (UKEAT/0032/09)** indicated that the Tribunal must consider both

the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct. That is an objective test on the facts of the case considered on the balance of probability.

Other Claims

41. The legal principles in relation to the Claimant's other claims of: unauthorised deductions from wages, accrued holiday pay and breach of contract, relating to commission and bonus, were straightforward and largely encapsulated in the issues set out by Judge Frazer. During the hearing the Respondent accepted that some commission payments were due to the Claimant in January and February 2020, in relation to sales effected by him in December 2019 and January 2020. The Claimant contended that the Claimant's suspension in January 2020 had been unlawful, i.e. in breach of contract, such that he should be compensated by way of damages to reflect the commission he would have earned had he remained in employment up to the effective date of termination.

42. The issue of the Claimant's bonus, in addition to featuring as part of the Claimant's claim for a compensatory award, arose as part of his breach of contract claim, relating to a bonus the Claimant contended he should have received in relation to performance in the 2019 financial year (the Respondent's financial year being the calendar year), having received bonuses in respect of previous years. The Respondent contended that, as bonuses in respect of previous years had been paid after the year end, on occasions some considerable way into the following year, for example in November 2018 and June 2019, the Claimant had lost entitlement to any such bonus, as he was not employed at the time any bonus would have been paid, having been dismissed at the start of April 2020.

43. The Respondent confirmed that no contractual term existed requiring the Claimant to be employed up to a specific date or at the time a bonus fell to be paid, and instead relied on what was said to be the custom and practice of bonuses not being paid unless the employee was in employment. The High Court, in **Rutherford v Seymour Pierce Limited [2010] IRLR 606**, confirmed that a term to that effect should not be implied into the contract of the employee as it was not necessary in order for the contract to operate satisfactorily, would be manifestly unreasonable, could not be said to "go without saying", and was not "notorious".

Findings

44. My findings relevant to the identified issues, made on the balance of probability where there was any dispute are set out below. Overall, my conclusion in relation to the evidence I read and heard was that the Claimant provided evidence which was comprehensive and frank. His answers to questions whilst under cross-examination were often rather guarded, but I did not perceive that that was through any desire to obfuscate but reflected a tendency on his part to be sure of the terms on which he was answering. The evidence on the part of the Respondent was rather less comprehensive, with only brief witness statements being produced by Mr Harris and Mr Ludlow. In addition, there were indications that the Respondent's approach to disclosure had been rather

less than comprehensive, with reliance being placed on assertions on many occasions. Overall therefore, I largely preferred the evidence of the Claimant.

45. The Respondent operates a Mazda dealership in Newport, selling new and used cars. Up until approximately the time when the events leading to the termination of the Claimant's employment arose, it had two directors, Mr Melvyn Harris, who ran the Accounts Department, and Mr Adrian Evans who ran the Sales Department. The Claimant, having started work with the Respondent initially in June 1999, had been the Sales Manager for many years, responsible for the sale of new and used cars. He worked directly with and for Mr Evans. By 2019, however, due to ill health, Mr Evans did not regularly attend at the dealership. The Claimant worked with one other sales colleague, a Sales Executive.

46. In May 2019 Mr Melvyn Harris' son, Mr Shane Harris, was brought into the business. He made changes to the way the Sales Department operated, bringing in a new staff member, Mr Daniel Ludlow, to take charge of all aspects of used car sales, and taking over the Respondent's marketing functions himself. By the end of 2019 relationships between Mr Harris and the Claimant were strained, although both were at pains to stress in their evidence that they operated professionally at all times.

47. On 9 January 2020, Mr Harris provided the Claimant with a document entitled "Sales Department Pay Structure 2020" which provided for a revised commission and bonus structure and had space for signature by the Claimant as "Sales Executive". Mr Harris in his evidence indicated that this was going to be applicable to the Sales Executive and not to the Claimant as Sales Manager, and had simply been given to him for information. However, I did not consider that it was likely that the Respondent would have produced what was described as the 2020 Mazda Newport Sales Plan purely for the Claimant's colleague and not for the Claimant himself. I was therefore satisfied that it was presented to the Claimant as something he would work to during the 2020 year. The Claimant indicated he wished to take advice on the proposals and did not agree to it.

48. Prior to that, and, as he did not accept any proposed changes, the situation which continued to prevail up to the dismissal of the Claimant in April 2020, the Claimant's remuneration package was made up of basic salary of £22,000 per annum, commission in respect of sales effected by himself at the rate of 15% of the profit, payable monthly, and additional commission on all sales in the department of 2½% of the profit made, again payable monthly. He had also in previous years received an annual bonus of 5% of the Sales Department's annual profit.

49. The Claimant was not issued with any contract of employment or terms and conditions of employment. A document purportedly sent to the Claimant on 19 March 2015 was included in the bundle which appeared to set out the majority of the terms required by section 1 of the ERA. However, the Claimant denied ever seeing such a document and, whilst the document had space for the employee to sign by way of acceptance, which would have been particularly important as the document purported to introduce a restrictive covenant

restricting the Claimant from competing with the Respondent for two years following the termination of his employment, it was not signed. I considered that had the document been issued then the signed version would have been retained by the Respondent.

50. Shortly after the discussion between Mr Harris and the Claimant about the revised departmental pay structure, Mr Harris hand delivered a letter to the Claimant's home, dated 11 January 2020 but delivered on 13 January 2020. The letter was headed "*Invitation to Disciplinary Hearing*" and referred to it being believed that the Claimant had been involved in "*several cases where fraudulent activity has been carried out with various internal trade transactions*". The letter confirmed that the Claimant was required to attend a disciplinary hearing on 29 January 2020 which would be conducted by Mr Harris, with Mr Ludlow taking notes. The Claimant was notified of his entitlement to be accompanied by a work colleague or trade union representative. No information was provided of the allegations said to amount to fraudulent activity. The letter also confirmed that it was considered best that the Claimant be suspended from work until the hearing and that he would receive his salary during that period.

51. The Claimant took advice on the letter and sent a response on 20 January 2020 raising various concerns. He referenced the removal of benefits such as his company car as well as his access to the Respondent's IT systems as indicating that a decision had already been made. He also referenced his expectation that his benefits should remain in place and that his wages should reflect commission for vehicles already sold. He went on to note that he had been advised that the Respondent was obliged to provide written details of the alleged fraudulent behaviour and the reasons why the Claimant was believed to be responsible for it in order that he could prepare for the hearing. He stated that he should also have access to all the information the Respondent had, including documents and statements from any witnesses. He also noted that he felt that he had been unfairly treated for a long period due to the consistent and increasing undermining of his job as Sales Manager, and that he would like to formally raise a grievance about that unfair treatment.

52. In response, Mr Harris sent the Claimant a letter, also dated 20 January 2020 noting that the disciplinary hearing had been intended to be an investigation meeting and that a new invitation letter was in the process of being drafted to explain that. Mr Harris went on to say that, in the circumstances, it would be appropriate to address the grievance matter through the company's grievance procedure, and therefore that, instead of an investigation meeting, a consultant from the Respondent's advisers would consider the grievance on 29 January 2020.

53. That meeting took place as scheduled and the consultant produced a report on 7 March 2020 in which the consultant concluded that all four individual elements of the Claimant's grievance should be upheld or partially upheld.

54. Then, on 10 March 2020, Mr Harris wrote again to the Claimant requiring him to attend an investigation meeting on 12 March 2020, the purpose being to give the Claimant the opportunity to provide an explanation for "*Fraudulent activity in*

regards to cars on (date)". On that day, the Claimant was diagnosed as suffering with shingles. He did not then attend the proposed meeting on 12 March 2020. That led to Mr Harris writing to him on 16 March 2020 to inform him that, as he had failed to attend the meeting without good reason, the suspension had been changed to being unpaid as he was in breach of the terms of his suspension. Mr Harris went on to say that the investigation process was ongoing, and that the Claimant would be informed of the outcome.

55. Whilst no documentary evidence of it was before me, the Claimant in his witness statement referred to an investigation meeting taking place between himself and Mr Harris on 23 March 2020 by telephone. Mr Harris made no reference to this meeting in his witness statement. The Claimant's evidence, which was not challenged, was that Mr Harris asked questions about five ,particular cars which had been bought by the Respondent in part exchange for new vehicles, with the Claimant having been involved in those transactions. It transpired that the contention was that those vehicles had been sold on to a trade dealer at a financial loss and, in three of the cases, were then subsequently purchased from that trade dealer by members of the Claimant's family.

56. The Claimant's evidence, in his written witness statement and under cross examination, which tied in with the Respondent's concession made at the preliminary hearing before Judge Frazer, was that cars bought in part exchange, which were not of a type or age to be sold on directly by the Respondent as used cars, would be sold on to other trade dealers. Those sales would often be at a loss, i.e. for less than the Respondent had notionally paid to the customer by way of part exchange. That was often due to the need to clinch the overall deal with the customer, where, rather than agree a reduction in the purchase price of the new car, the amount to be paid to the customer for the old car by way of part exchange would sometimes be inflated. This would not lead to any greater profit and consequently commission for the salesperson, as profit on which commission would be calculated would be based on the entire "deal" with the customer, the customer being allocated a single number. The commission would be the same whether the purchase price for the new car was reduced or the price paid for the part exchanged car was increased.

57. The valuation of a car in part exchange would be undertaken initially by way of the use of trade software, but would then be adjusted to take into account any specific reconditioning work that would be needed in order to make the vehicle attractive to sell on.

58. The Respondent did not provide any documentary evidence relating to the particular cars which were alleged to have been dealt with fraudulently by the Claimant, whether during the disciplinary investigation and hearing or for the purposes of this Tribunal case. There were some references to the particular vehicles in minutes from the disciplinary hearing within the bundle, and the Claimant also made reference to the vehicles in his witness statement, on which he was not materially challenged.

59. The Claimant accepted that three vehicles which had been sold on by the Respondent to a third party trader, and had been sold to the trader in each case at less than had been paid for them, had subsequently been purchased by members of his family. Taking into account the information contained in the disciplinary hearing minutes and the Claimant's witness statement, the position appeared to be as follows.

60. One car had been sold to a trader in April 2018 and had been purchased directly from the trader by the Claimant's son around a month later, paying significantly more than the amount paid to the Respondent by the trader. A second car was sold to a third party trader in October 2018 and that vehicle was subsequently bought by the Claimant's daughter in early 2019 from the trader, again at a cost significantly above the amount paid for the vehicle by the trader. A third vehicle was sold to a trader in May 2019 and was also bought by the Claimant's daughter around a month later, again at a significantly higher price than had been received from the trader. The Claimant explained that the first car bought by his daughter had developed a fault and she had therefore decided to change that car a few months later.

61. The Claimant was also challenged about two other vehicles which had been seen parked on the Claimant's drive, indeed there was a photograph of the two vehicles, which I presumed to have been taken when they were on the Claimant's drive, in the bundle. The Claimant explained that a friend of his wife had visited in December 2019 and that her car had developed a fault at that time. She asked if the Claimant could help with a replacement, but was not looking to spend a sum which would purchase a used car from the Respondent directly.

62. The Claimant instead contacted a contact at a local trade dealer who confirmed he had two Mazda cars in stock that fitted the budget. He drove the cars over to the Claimant's house for the friend to consider and they were left there over the Christmas period. Early in the New Year the friend's wife confirmed that her car had been repaired and that she was not going to replace it. The cars were then collected by the trader. Whilst these two vehicles were referred to within the dismissal letter as having been purchased by the Claimant or a family member, no evidence was provided by the Respondent to contradict the Claimant's contentions that the vehicles were never, in fact, purchased by the Claimant or anyone connected to him.

63. Late on 31 March 2020 the Claimant received an email from Mr Harris, with a letter inviting him to a disciplinary hearing at 4.00pm on the following day. All that was included with that letter were minutes of the investigation meeting and the photograph of the two cars on the Claimant's drive. The Claimant contested that he needed longer notice and also that it would be inappropriate for Mr Harris to be involved. He noted that he had been told by another employee at the Respondent that a new Sales Manager had started and therefore that Mr Harris could not be impartial having already decided on the outcome. Mr Harris replied saying that he could not share information about the cars due to data protection rules and that the meeting would go ahead.

64. Despite further objections by the Claimant, it was confirmed that the hearing would continue. It then took place by telephone with Mr Ludlow, with Mr Harris taking notes. Following the hearing, Mr Ludlow concluded that the Claimant was guilty of gross misconduct, but Mr Harris confirmed that the ultimate decision was his, and that he decided that the Claimant should be dismissed summarily. That was confirmed by Mr Harris in a letter to the Claimant dated 3 April 2020, with dismissal taking effect from the following day.

65. The Claimant confirmed the Claimant's right to appeal and the Claimant did appeal, by letter dated 9 April 2020, noting that he categorically denied the allegations put before him, and that there was no evidence to support Mr Harris' accusation. He also stated that the process had been flawed and biased, that there had been a failure to apply the ACAS Code of Practice, that the Respondent had not acted in a reasonable manner by suspending him for an extended period and then suspending him without pay, and with the dismissal hearing being rushed through. He also noted that he felt that a decision had been made to pre-empt the outcome by appointing someone into his former role. No action was ever taken by the Respondent to deal with the Claimant's appeal.

66. In addition to the circumstances leading to the Claimant's dismissal and the processes followed to effect that dismissal, I made other relevant findings of fact.

67. With regard to the person the Claimant asserted had been appointed into his role, documentary evidence was provided by both parties during the course of the hearing. The Claimant produced screenshots of the person's Facebook page and LinkedIn profile, both of which referred to the person having worked at Newport Mazda from March 2020, one specifically referring to 23 March 2020.

68. In response, the Respondent produced an employee record showing the individual as having started on 22 June 2020, and pay submission details for HMRC from May 2020 and June 2020, showing the individual as not being listed in May 2020 but listed in June 2020.

69. As the dismissal of the Claimant had already been judged to be unfair, the issue was not of direct relevance for me when calculating remedy. However, on balance, I preferred the evidence advanced by the Claimant, which derived from the individual himself. Whilst I had no reason to doubt the documentary evidence produced by the Respondent, it was conceivable that the individual may not have been formally taken on as an employee until June 2020 having been engaged informally before that. Overall, I did not consider it likely that the individual himself would have made a mistake in two separate social media entries, in one of which he included the specific day that he started with the Respondent.

70. In relation to the sums paid by the Respondent by way of purchase of part exchanged cars, the Claimant confirmed, in unchallenged evidence, that the practice adopted was that he and his Sales Executive colleague would consider the valuation of cars together.

71. In terms of the Claimant's salary and benefits whilst employed by the Respondent, he received an annual gross salary of £22,000, but received a significant part of his earnings by way commission. Payslips in the bundle indicated that his total pay in the year to 31 March 2017 was just under £86,000, in the year to 30 March 2018 it was just over £76,500, and in the year to 29 March 2019 it was just under £74,500. His annual bonuses in relation to 2016, 2017 and 2018, payable in May 2017, November 2018 and June 2019 respectively, were £6,551, £2,351.35 and £3,964.30.

72. The Claimant was also entitled to the use of a demonstrator car throughout his employment. No P11D was provided to show the value of that benefit for tax purposes but in his Schedule of Loss the Claimant had put a value at an assessment of 1% of the value of the lowest level car that he regularly drove. That figure was accepted by the Respondent in its counter schedule.

73. The Claimant was a member of the Respondent's auto-enrolled pension scheme but with a low level of contribution, assessed by the Claimant as amounting to £10.29 per week.

74. Both parties confirmed that the holiday entitlement for employees was the statutory Working Time Regulations amount of 28 days, to include Bank Holidays. The Claimant contended that he had not taken any holiday, other than some Bank Holidays, during the 2019/20 year. It was put to him under cross-examination that he had taken a week's holiday in France in 2019. The Claimant responded that he did not recall taking such a holiday but that if he had, he had done so effectively as time off in lieu, having not always taken off the anticipated three days a fortnight. The Claimant indicated that that was an arrangement that he had operated with Mr Evans and with his agreement.

75. Mr Harris in his evidence referred to he and his father having raised the issue of time off in lieu with the Claimant with a view to it ending, but there was no documentary evidence before me to confirm that. I considered that had there been a clear indication that the Claimant could not take leave in the way asserted, i.e. effectively as TOIL, there would have been some documentary confirmation of that. I considered that it had been agreed that the Claimant could take leave in that way, and that any leave that he had taken in the relevant holiday year had been taken on that basis. I therefore accepted the Claimant's Schedule of Loss which indicated that he had 20 days' accrued but untaken holiday at the termination of his employment.

76. In terms of notice periods, as no formal contract or statement of terms and conditions had been issued to the Claimant, his notice entitlement was governed by the statutory provisions set out in section 86(1) ERA. By reference to his length of service, that meant that that had the Claimant been dismissed with notice he would have been entitled to 12 weeks' notice. That was the figure also included by the Claimant in his Schedule of Loss.

77. In terms of mitigation efforts, the Claimant's evidence in his witness statement, which was not challenged, was that as he had been dismissed just at the time as the country went into lockdown in light of the COVID-19 pandemic, obtaining

alternative employment was very difficult. He was also suffering from anxiety and depression at the time.

78. In relation to the Claimant's medical situation, I have already noted that Certificates of Fitness for work were issued in respect of him for virtually the entire period after the termination of his employment. The expert medical report, produced in May 2022, noted, as a Summary, as follows:

"*The Claimant had already developed a Depressive Episode (or alternatively an adjustment disorder) prior to his dismissal. His dismissal did not in my view lead to a deterioration in terms of severity of the depressive episode, though arguably has been one of several perpetuating factors contributing to it not having settled in a way that mi [*sic*] I would have expected had the situation at work resolved. While Mr Morgan-Jones appears to me to have been genuinely affected and distressed, in my view his mental health has not been so severely affected as to have prevented him from working.*"

79. The Claimant also described an incident on 11 May 2020 when police officers arrived at his home to arrest him and to undertake a search of his house. The Claimant was interviewed in the afternoon on that day and ultimately released without charge. The police subsequently confirmed on 20 July 2020 that no further action would be taken as they had found no evidence of the accusations Mr Harris had made to them.

80. Shortly after that, the Claimant reached out to contacts within the industry but, due to the circumstances of his dismissal, the accusations against him, and information which had circulated about his arrest, no options were available. His health had deteriorated to the extent that he revisited his GP on 18 August 2020 and was subsequently certified as unfit for work due to anxiety with depression for a significant period.

81. The Claimant noted in unchallenged evidence that, due to the nature of his dismissal, he had been unable to gain a reference from the Respondent covering a 21-year career, and that due to the circumstances surrounding his dismissal obtaining an alternative position in the industry is unlikely. Any alternative position would be likely to be at a Sales Executive level, with earnings of roughly half those he enjoyed in his Sales Manager role with the Respondent.

82. In terms of the Respondent's position, it was obviously impacted significantly by the pandemic and the periods of lockdown. The business was locked down to customers from 23 March 2020 through to 1 July 2020. At that time the person appointed as Sales Manager returned to work, the opportunity originally having been offered to the Sales Executive who had refused. There were then further lockdowns between 23 October and 9 November 2020, and again from 25 December 2020 until 22 March 2021. Staff were furloughed during the periods of lockdown, but the replacement Sales Manager worked at all other times. Mr Harris in his evidence indicated that car sales in 2020 and 2021 had been at 70% of pre-pandemic levels.

83. No documentary evidence in terms of sales figures or accounts was put before me, and I considered that it would have been straightforward for the Respondent to have produced such documentation. I considered that the lockdown of the Respondent's business for roughly a quarter of the financial years 2020 and 2021 would have been bound to have had an impact on its overall turnover and profit, and concluded that the impact would have been more likely to have been of the order of a 15% downturn as opposed to the 30% asserted by Mr Harris.

Conclusions

84. Applying my findings and the applicable legal principles to the issues I had to consider, my conclusions were as follows. I first considered the broad issues of the application of the **Johnson** case, the application of **Polkey**, contributory conduct, and the ACAS uplift, before considering the mechanics of the awards.

Johnson and the impact of the Claimant's ill health

85. With regard to the **Johnson** case, I noted Mr Kohanzad's contention that the inability on the part of the Claimant to obtain alternative employment due to illness should not be considered as part of his compensatory award, as his ill health arose from something that happened prior to his dismissal, and therefore, if it had been caused by the Respondent, had arisen from an anterior breach. However, I did not agree that the Judgment in **Johnson** provided the authority that Mr Kohanzad suggested that it did.

86. Having considered the House of Lords decision in that case again following the completion of the parties' submissions, it was clear to me that its *ratio* is that it is not possible to recover damages for the manner of dismissal. In this case however, whilst the Claimant clearly contends that the dismissal and indeed its manner was unfair, I did not consider that his contentions in relation to the compensatory award were based on the manner of dismissal. They were instead based on the wording of section 123(1) ERA, and were that he contended that he had suffered loss in consequence of his dismissal which was attributable to action taken by the Respondent, that action being its dismissal of him.

87. The approach in the context of cases where it is contended that the actions of the Respondent caused or exacerbated a Claimant's ill health is that advanced in the line of cases discussed at paragraphs 23 to 28 above, i.e. the cases of **Dignity Funerals**, **Gaskarth** and **Acetrip**. The approach was also discussed in the two cases referenced in Judge Frazer's summary of the preliminary hearing, those of **Seafield Holdings Limited (t/a Seafield Logistics) v Drewett [2006] ICR 1413** and **Devine v Designer flowers Wholesale Florist Sundries Limited [1993] IRLR 517**.

88. In the last of those cases, the EAT noted that an employee can only recover losses attributable to action taken by their employer, that the fact that the employee's incapacity was caused by the unfair dismissal did not necessarily mean that they were entitled to compensation for the whole period of incapacity, and that it was for the Tribunal to decide how far an employee's

losses are attributable to action taken by the employer and to arrive at a sum that is just and equitable.

89. The **Seafield** case confirmed that the "but for" approach adopted by the Tribunal, i.e. that "but for" the actions of the employer the Claimant would have been able to return to work, was appropriate for the assessment of loss between the date of dismissal and the Tribunal hearing, but was not suitable in relation to the determination of future loss.

90. As I have already noted, the **Dignity Funerals** case noted that the Tribunal is to assess whether a claimant's illness was caused to "any material extent" by the dismissal itself, and the **Gaskarth** case referred to the ill health being "in no small part" attributable to the condition caused by the dismissal.

91. The most recent case of **Acetrip** noted that the task of the Tribunal in such cases is to assess as best it can what difference the dismissal has made, compared with how matters would have unfolded had there been no dismissal, and hence to identify the additional loss or impact attributable to the dismissal itself. It noted that the question was whether the pre-dismissal conduct and the act of dismissal were part of the same indivisible act or were two separate and successive acts with distinct impacts.

92. I noted Mr Kohanzad's contention of there being an anterior event, in essence the commencement of the Claimant's condition of anxiety and depression in January 2020, arguably in light of the Respondent's conduct up to that point. In that regard, I noted from the medical report that the Claimant's first diagnosis of anxiety with depression was on 22 January 2020, just over a week after his suspension. There was therefore an anterior event which impacted on the Claimant's health. It seemed to me that there was also a superior event in the form of the Claimant's arrest in May 2020. Between those two events there was also the Claimant's dismissal in April 2020.

93. My overall view was that the Respondent's pre-dismissal conduct was part of one indivisible course of conduct and was a material cause of the Claimant's subsequent ill health, applying the test adopted in many areas of "material" having a meaning of "more than minor or trivial".

94. In that regard I noted the content of the medical expert's report provided in May 2022 that the Claimant had, in the expert's view, in fact, not been so severely affected so as to have been prevented from working. However, I noted that the Claimant obtained Fit Notes from August 2020 through 2021 and into 2022 confirming that he was unfit for work. It seemed to me that, whatever the subsequent analysis of the Claimant's condition by the medical expert, the reality for the Claimant at the time was that he was unfit and, as I have noted, I considered that that lack of fitness to work was materially caused by the dismissal. I noted in that regard the conclusion of the medical expert that, although in his view the dismissal did not lead to a deterioration in terms of severity of the Claimant's depressive episode, it had arguably been one of several perpetuating factors contributing to it not having settled in a way that he would have expected had the situation at work resolved. Overall therefore I

was satisfied that the Claimant's inability to work post dismissal by reason of ill health was materially caused by his dismissal.

Polkey

95. With regard to **Polkey**, I noted that Mr Kohanzad contended that I should apply **Polkey** and make deductions from the compensatory award on two bases. The first was his contention that, notwithstanding that there were accepted procedural deficiencies in relation to the dismissal, had those deficiencies not existed, and had a fair procedure been followed, then a fair dismissal would have ensued. The second was on the basis that, regardless of the specific events and processes which led to the dismissal of the Claimant, his relationship with the Respondent, and in particular with Mr Harris, was strained, was likely to deteriorate further, and would therefore have led to the ending of the relationship on a fair basis in any event at some point in the future.

96. In relation to the first contention, I did not consider that a fair procedure would have been likely to have led to a fair dismissal. There was no meaningful attempt to undertake an even-handed investigation or to consider the Claimant's arguments in defence of the allegations against him. Whilst the knowledge on the Respondent's part of the purchase of the vehicles by members of the Claimant's family may have flagged up a concern which may potentially have been sufficient to justify suspension, no attempt was made to understand the Claimant's case or to look for and consider evidence which might have exculpated him during the subsequent investigation. Acutely, no attempt was made to obtain, whether from the Claimant's children or the third party trader, evidence about the amounts paid for the vehicles by the Claimant's children. The indication, which the Claimant's undisputed evidence suggested such an investigation would have given, was that the Claimant's children had paid substantially more for the vehicles than the dealer had paid. In my view that would have led a reasonable employer acting reasonably in the circumstances to conclude that the Claimant would not have been dismissed.

97. With regard to Mr Kohanzad's second contention, I noted the events in the latter part of 2019 and into 2020 which had certainly caused a strain in the relationship between the Claimant and Mr Harris. The Claimant in his evidence indicated that he would have been able to take any actions taken by Mr Harris in relation to his duties in his stride and to have carried on working. Indeed, the evidence suggested that he did precisely that in the latter part of 2019 in that he continued to undertake his duties, notwithstanding Mr Harris' appointment of Mr Ludlow to take charge of used vehicle sales, and notwithstanding Mr Harris' assumption of marketing duties. In addition, the Claimant seemed, in the way he delivered his evidence, to be a phlegmatic individual who may have continued to shrug off any managerial actions taken by Mr Harris which impacted upon him.

98. I did however note that the Claimant was disturbed by Mr Harris' introduction into the organisation and by the changes he had made. I also noted that Mr Evans, who appeared to have acted as something of a protector of the Claimant, was no longer in regular contact. I considered that that would have led to the Claimant feeling somewhat exposed, and I also considered that it

was likely that Mr Harris would have continued to look to make changes to the way the Respondent's business was run.

99. I did therefore consider that there was a realistic prospect that the relationship might have ended, and ended fairly, at some point in the future. It was however far from clear that that would have taken place with any certainty. Doing the best I could, I felt that there was a 25% chance of the Claimant's employment ending fairly in the foreseeable future, and I therefore considered that the Claimant's compensatory award should be reduced by 25% to reflect that.

Contributory conduct

100. Turning to contributory conduct, I was conscious that I needed to assess objectively whether, on balance of probability, the Claimant had been guilty of culpable or blameworthy conduct which caused or contributed to his dismissal. My view was that he had not. When the allegations were considered, all that ultimately happened was that the Claimant's family members had subsequently, in each case at least a month after the sale on by the Respondent, bought cars from a trader that had been acquired from the Respondent in transactions with which the Claimant had been involved. As I have noted, whilst that may have caused the Respondent to wish to investigate to see whether there was anything underhand about what had occurred, I considered that a reasonable investigation would have allayed any concerns.

101. I noted that the vehicles involved were not of the type or age that would have been considered appropriate to have been sold on directly by the Respondent as used vehicles. There was therefore nothing untoward about the sale of the vehicles to a third party trader. In addition, I noted the Respondent's accepted position that the sale on of such vehicles to a third party would often be at a loss in comparison to the amount paid for such a vehicle by way of part exchange. I then noted that the Claimant's unchallenged evidence was that the cars were purchased by his family members at a substantially higher price than had been received from the third party trader. I considered that had there been any intention to defraud the Respondent then the arrangements would have been structured in such a way that the family members would have gained from the transaction, i.e. by paying no, or little, more than the sum paid by the trader, when there was no indication that they did. Overall therefore I was not satisfied that any deduction should be made to reflect contributory conduct on the part of the Respondent, whether to the basic award or the compensatory award.

ACAS uplift

102. With regard to the question of whether the compensatory award should be increased by reference to the Respondent's failures to comply with the ACAS Code of Practice, I noted that there were several very clear deficiencies on the part of the Respondent. Paragraph 5 of the ACAS Code notes that it is important to carry out necessary investigations of potential disciplinary matters to establish the facts of the case, and I did not consider that the Respondent came close to establishing the real facts of the case.

103. In addition, paragraph 6 of the Code notes that, where practicable, different people should carry out the investigation and disciplinary hearing, and yet Mr Harris undertook the investigation and, whilst Mr Ludlow chaired the disciplinary hearing, it was Mr Harris who made the ultimate decision to dismiss.

104. Paragraphs 26-29 then note that an employee should be given the opportunity to appeal against a disciplinary decision and that any appeal should be heard without unreasonable delay, should be dealt with impartially, and that the employee should be informed in writing of the results of the appeal hearing as soon as possible. In this case, whilst the dismissal letter noted that the Claimant had an ability to appeal, no action whatsoever was taken to deal with the appeal that the Claimant subsequently submitted.

105. There were therefore several significant breaches of the ACAS Code which, had matters been dealt with properly, could, and indeed in my view, in relation to a reasonable employer acting reasonably, would, have led to a different outcome. I considered therefore it would be appropriate to order the maximum 25% increase to the compensatory award applying the provisions of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

Mitigation

106. As I noted at paragraphs 29 to 31 above, the **Luckey** case noted that it is for an employer to establish that there has been a breach of the duty to mitigate and the extent of that breach. The EAT in that case also noted that where an employer adduces no evidence on the question, it may be difficult for a tribunal to conclude that an employee was required to engage in a substantial search for jobs. In this case, the Respondent did not adduce any evidence of any failure by the Claimant to take reasonable steps to mitigate his losses.

107. However, I was mindful of the EAT guidance in **Luckey** that a tribunal may have to decide what steps it was reasonable for the employee to have to take, whether reasonable steps were taken, and to what extent losses would have been mitigated had those steps been taken. In this case, I noted the impact of the Claimant's health on his ability to look for work, and also the impact of his summary dismissal and his arrest. I also noted the impact that Covid-19 would have had on a business such as the Respondent's in any event.

108. I concluded that the Claimant had not failed to take reasonable steps to mitigate his losses, and therefore that the compensatory award should extend up to the date of this hearing, and should extend for a further period of 3 months, being the lower end of the period the medical expert considered would be applicable for the Claimant's recovery following the resolution of this case. Even then however, I considered that it would not be likely that the Claimant would obtain a position enjoying the same level of overall remuneration, and that the best he could anticipate would be a job which would provide him with remuneration at 75% of his previous level.

Week's pay

109. It was also appropriate for me to conclude what a "week's pay" was for the purposes of the potential cap on the Claimant's compensatory award, and to consider whether there was a need to apply the cap on the amount of a week's pay for the purposes of the basic award. As I have noted, sections 221-223 ERA require an averaging of the remuneration received by an employee in the last twelve weeks of his employment, or over a longer period if he did not receive remuneration for all or any of that period, so that twelve weeks could be counted in total.

110. In that regard, I noted that the Claimant did not receive his full remuneration during the months of January, February and March 2020. It was not therefore possible to use the last twelve weeks of the Claimant's employment for the purposes of the required calculation.

111. I did not have complete information about the period prior to the end of 2019, but within the bundle were payslips from June 2019 and from December 2019. The former recorded that the Claimant's gross pay up to the end of June 2019 for the particular financial year was £27,160.20 whilst the latter recorded that the Claimant's gross pay up to the end of December 2019 was £60,768.50. I considered it appropriate to take the difference between those two sums, i.e. £33,626.30 and to divide that by 26 in order to provide the best possible assessment of the week's pay for the purposes of the application of the statutory cap on the amount of the compensatory award. That led to the calculation of a week's pay as £1,293.31 which, multiplied by 52, led to a maximum compensatory award of £67,252.12.

112. As the weekly sum exceeded the statutory cap on the amount of a week's pay for the purposes of the basic award, that fell to be calculated by reference to the applicable cap at the time of the Claimant's dismissal, which was £525.00.

113. However, for the purposes of the compensatory award, I need to assess the Claimant's weekly net loss. In that regard, the Claimant's losses up to the date of the remedy hearing spanned three separate tax years. That led to slightly different net weekly sums; £916.00 for the year 2020/21, £917.00 for the year 2021/22, and £911.00 for the year 2022/23.

Wrongful dismissal

114. With regard to the Claimant's wrongful dismissal claim, I needed to undertake a broadly similar approach to that I undertook in relation to the assessment of contributory conduct. That was to assess whether I considered objectively, on balance of probability, that the Claimant had committed an act of gross misconduct in relation to the allegations against him.

115. For very much the same reasons as informed my conclusions in relation to contributory conduct, I did not consider that the Claimant had committed an act of gross misconduct. I concluded therefore that the Claimant should have been dismissed with notice and would therefore be entitled to compensation to reflect the 12-week notice period that should have been served.

Unauthorised deductions from wages

116. With regard to the Claimant's claim in respect of unpaid wages, it was accepted by the Respondent during the hearing that there were some payments due to the Claimant in relation to his remuneration for January and February 2020, to reflect the Claimant's commission arising from his sales, and that of his team, in December 2019 and January 2019, which would have included some sales carried over from the month before. I also considered that the Claimant would have remained entitled to the 2.5% departmental commission in respect of sales in January, February and March 2020.

117. No figures were put before me in relation to the amounts of commission, and I therefore considered it appropriate to calculate the commission due by reference to the Claimant's December commission figure of £4,275.45. I considered it appropriate to award compensation referable to that amount for the period of six weeks, to cover the commission the Claimant would have earned in respect of sales in December 2019 and the first half of January 2020, i.e. up to his suspension.

118. In relation to the departmental commission, I noted that 15% of net profit would arise from the Claimant's own sales and he would retain the benefit of 2.5% of profit in respect of all cars sold through the Sales Department. Using that as a ratio, that suggested that departmental commission made up some 14% of the Claimant's total commission, and therefore I considered that it would be appropriate to order the Respondent to pay commission at 14% of the December level for the Claimant's remaining eleven weeks of employment.

Holiday pay

119. With regard to holiday pay, I was satisfied that the Claimant had 20 days' accrued but untaken holiday at the point of his dismissal and that he should therefore be paid in respect of those.

Breach of contract

120. Finally, with regard to the Claimant's breach of contract claims, I noted that there was no contractual term which required the Claimant to be in employment at the time bonuses were paid in order to remain entitled to it. Applying the guidance of the **Seymour Pierce** case, I did not see any basis on which any term should be implied into the contract to that effect. The Claimant was in work throughout the financial year 2019 and therefore earned the bonus in respect of that year.

121. There was no indication of the amount of bonuses paid to other staff in respect of the 2019 year, but equally there was no indication from the Respondent that there were any restrictions on bonuses paid in respect of that year. In terms of the calculation of such a bonus, I noted that the Claimant had received a bonus in respect of 2018 in the sum of £3,964.30 gross. I noted that his earnings up to the end of December 2019 would, if annualised, amount to a figure slightly higher than his earnings in the previous year. I appreciated however that the bonus would not have been referable only to the Claimant's sales activities.

Overall therefore, I considered that it would be appropriate to award bonus at the same level as the Claimant received in respect of the 2018 year.

122. I then considered the Claimant's contention that the failure to pay him commission whilst suspended, even though he could not then undertake sales activities, was a breach of contract. As I have noted, whilst the Respondent may have explored other options at the time of suspension, I did not consider that suspending the Claimant was an unjustifiable act, and although there was some delay in completing the investigation, even to the limited extent undertaken by the Respondent, the largest part of that related to a delay whilst the Claimant's grievance was dealt with.

123. In the circumstances, I did not consider that the Claimant's inability to earn commission as a result of his own sales from his suspension in January onwards involved a breach of contract. I did not therefore consider that it would be appropriate to award any compensation to the Claimant in respect of that, over and above the departmental commission that I have dealt with above in relation to the unauthorised deductions from wages claim.

Compensation payable

124. In light of my conclusions, the Respondent is required to pay the Claimant the sums set out below in respect of his claims. I dealt first with the monetary claims not capable of falling within section 402B of the Income Tax (Earnings and Pensions) Act 2003, i.e. the £30,000.00 exemption, and have expressed those orders as gross payments, from which tax will be required to be deducted. I then dealt with the unfair dismissal basic and compensatory awards, which are capable of falling with section 402B. In relation to the compensatory award, I have dealt with the net sum grossed up, as directed by the EAT in the **Acetrip** case, in which it was noted that it is better, where possible, to start with net figures and to perform a grossing up calculation. I then finally considered the application of section 38 of the Employment Act 2002.

Unauthorised deductions from wages

125. I noted at paragraphs 117 and 118 above that the Respondent is required to compensate the Claimant in respect of the commission he earned in the six week period covering December and the first half of January, and to reflect the departmental commission he should have been paid for the remaining eleven weeks of his employment.

126. In respect of the former period, that led to a gross sum of £5,919.84, and in respect of the latter period a gross sum of £1,519.43, making a total gross payment of £7,439.27.

Breach of contract

127. As I noted at paragraph 121 above, I concluded that the Claimant should have received a bonus in respect of the 2019 year at the same level as he received in respect of the 2018 year. That gave rise to a gross sum of £3,964.30.

Holiday pay

128. I noted at paragraph 119 above that the Claimant had 20 days' accrued but untaken holiday at the termination of his entitlement. At a gross daily rate of £258.94, that gave rise to a total award of £5,172.80 gross.

Wrongful dismissal

129. Although the Claimant would have been furloughed for a significant portion of his notice period, i.e. the period of twelve weeks running from the effective date of termination, the furlough rules did not apply to notice periods at the time, and therefore the Claimant would have been entitled to his full remuneration in respect of his notice entitlement. As I noted at paragraph 115 above, the Claimant was entitled to a 12-week notice period, and therefore the Respondent is required to pay the Claimant the gross sum of £15,519.72 by way of compensation for his wrongful dismissal.

Unfair Dismissal

Basic Award

130. The Claimant was employed for twenty complete years of service, in respect of eleven of which he was aged over 41, being under that age for the remaining nine. That led to an entitlement of 25.5 weeks' pay, capped at £525.00, which led to a total basic award of £13,387.50.

Compensatory Award

131. I first considered the Claimant's losses up to the date of the remedy hearing. I noted that the first twelve weeks after the Claimant's dismissal were covered by the wrongful dismissal award. Thereafter, there were periods of furlough in 2020/21 totalling some 15 weeks, and 25 weeks at full pay. Those gave rise to net sums of £6,930.00 and £22,900 respectively, a total net sum for 2020/21 of £29,830.

132. In relation to 2021/22, the net sum for the period was £47,684.00, and in relation to the fifteen weeks in 2022/23 up to the date of the remedy hearing the net sum was £13,665.00. Those sums totalled £91,179.00. Whilst I had ordered adjustments, negatively and positively, to reflect **Polkey** and the ACAS uplift, those were of the same magnitude and therefore netted off against each other.

133. At that stage of my computations, I could see that, notwithstanding that a little over half of the £30,000 exemption remained available to be applied, I would need to gross up a significant proportion of the sums assessed to reflect grossing up. That would significantly inflate a sum which was already comfortably above the applicable cap of £67,252.12. In the circumstances, there was no point in my factoring in other elements of loss or any future losses, and the compensatory award therefore stood at the maximum level of £67,252.12.

Section 38 Employment Act 2002

134. As awards had been made in favour of the Claimant which fell within Schedule 5 of the 2002 Act, and as, when the proceedings were begun, the Respondent had been in breach of its duty under section 1 of the ERA, section 38(3) of the 2002 Act applied. That provided that, unless there were exceptional circumstances which would make an increase unjust or inequitable, then I must increase the award by the minimum amount of two weeks' pay, and may, if I considered it just and equitable in the circumstances, increase the award by the higher amount of four weeks' pay.

135. I did not consider that there were any exceptional circumstances which would make any increase unjust or inequitable. Equally however, as the Respondent was a relatively small employer, as the Claimant did not appear ever to have complained about the lack of a compliant written statement of particulars of employment, and as the failure to provide such a statement did not appear to have had any material impact on the Claimant, I did not consider it appropriate to increase that award by the higher amount. I therefore ordered that the Claimant's awards should be increased by the minimum amount of two weeks' pay.

136. The cap on the amount of a week's pay applies to awards under section 38 of the 2002 Act, which meant that the minimum award in this case was £1,050.00.

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Employment Judge S Jenkins
Date: 16 August 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 16 August 2022

FOR THE TRIBUNAL OFFICE Mr N Roche