Case No: 2301846/2019

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**
sitting alone

BETWEEN:

Mr C Lockitt

Claimant

and

Dignity Funerals Ltd

Respondent

ON: **6-9 March 2023 (partly by video)**

Appearances:
For the Claimant: **Ms C Hunt, Counsel**
For the Respondent: **Mr K Zanam, Counsel**

REASONS FOR THE JUDGMENT
SENT TO THE PARTIES ON 22 March 2023
provided at the request of the respondent

1. In this matter the claimant complains that he was unfairly and wrongfully dismissed. His claim of disability discrimination was dismissed on withdrawal in 2021.

Evidence

2. For the respondent I heard from:
   a. Mr C Wilson, business manager;
   b. Mr W Muir, business manager;
   c. Mr M Keysell, area manager; and
   d. Mr W Hanson, area manager.

3. For the claimant I heard from:
   a. himself;

b. his daughter Ms C Lockitt; and
c. Ms J Goulding; former funeral services arranger for the respondent (by video).

4. There was an agreed bundle of documents and both Counsel made oral submissions on the evidence.

Relevant Law

5. By section 94 of the Employment Rights Act 1996 ("the 1996 Act") an employee has the right not to be unfairly dismissed by his or her employer.

6. In this case the claimant's dismissal was admitted by the respondent and accordingly it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2). If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

7. In this case the respondent relies upon conduct and therefore the Tribunal must consider whether the respondent acted reasonably in treating the claimant's conduct as sufficient reason for dismissing him.

8. In that exercise, the Tribunal is guided by the principles set out in British Home Stores Ltd v Burchell [1978] IRLR 379, affirmed by the Court of Appeal in Post Office v Foley [2000] ICR 1283. Accordingly the Tribunal will consider whether the respondent by the standards of a reasonable employer:
    a. genuinely believed the claimant was guilty of misconduct;
    b. had reasonable grounds on which to sustain that belief; and
    c. at the stage at which it formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

    Any evidence that emerges during the course of any internal appeal against dismissal will be relevant in that exercise but otherwise material not before the employer at the relevant time is irrelevant.

9. Further, the Tribunal must assess - again by the standards of a reasonable employer - whether the respondent's decision to dismiss was within the band of reasonable responses to the claimant's conduct which a reasonable employer could adopt (Iceland Frozen Foods v Jones [1983] ICR 17 and Graham v S of S for Work & Pensions [2012] IRLR 759, CA). The band of reasonable responses test also applies to whether the respondent's investigation was reasonable (Sainsbury's Supermarkets v Hitt [2003] IRLR 23). One factor to consider is whether the respondent has acted inconsistently in its treatment of employees but only where those employees are in "truly parallel circumstances". The EAT emphasised in Hadjioannous v Coral Casinos Ltd ([1981] IRLR 352) that flexibility must be retained and

employers are not to be encouraged to think that a tariff approach to misconduct is appropriate.

10. When considering the procedure used by the respondent, the Tribunal's task is to consider the fairness of the whole of the disciplinary process. Any deficiencies in the process will be considered as part of the determination of whether the overall process was fair (OCS Group Ltd v Taylor [2006] ICR 1602). The Tribunal will also take account of the ACAS Code of Practice on Disciplinary and Grievance procedures (2015).

11. In coming to these decisions, the Tribunal must not substitute its own view for that of the respondent but to consider the respondent's decision and whether it acted reasonably by the standards of a reasonable employer.

12. If the dismissal is found to be unfair and a re-employment order is not made (and none was sought by the claimant in this case), the remedy is limited to compensation by way of basic and compensatory awards calculated in accordance with sections 118-124 of the 1996 Act.

13. The basic award is calculated by reference to a statutory formula. The parties agree that for the claimant the relevant award amounts to £14,986. This amount is potentially subject to any finding of contributory fault on the part of the claimant – see below.

14. As far as the compensatory award is concerned, the starting point is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the claimant subject to his duty to act reasonably in order to mitigate that loss. The burden of proof is on the respondent to show that the claimant has failed to mitigate (Bessenden Properties Ltd v Corness [1974] IRLR 338) but it is a question of fact for the Tribunal to resolve by assessing when the claimant, if he was acting reasonably in his job search, will find or would have found suitable alternative employment and at what level of income. Choosing to become self-employed is not in itself an unreasonable step.

15. The relevant calculation of compensation is then subject to various possible adjustments.

16. First, where the Tribunal concludes that the dismissal was unfair on procedural grounds but that the claimant would have been dismissed even if a fair procedure had been followed (Polkey v AE Dayton Services Limited [1988] ICR 142).

17. Second, compensation may be increased or decreased by up to 25% according to whether a party complied with the principles of the ACAS Code. The Tribunal must make an express finding that a failure to follow the Code was unreasonable before making an adjustment. Merely not following the Code is not sufficient in and of itself (Kuehne and Nagel Ltd v Cosgrove UKEAT 0165/13).

18. In particular the Code provides the following:

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

19. The focus when deciding upon whether to award an uplift needs to be upon the failures to comply with the Code as opposed to unfairness or conduct generally (Lawless v Print Plus (Debarred) UKEAT/0333/09). The circumstances which will be relevant will vary from case to case but will include:
    a. whether the procedures were ignored altogether or applied to some extent;
    b. whether the failure to comply with the procedures was deliberate or inadvertent; and
    c. whether there are circumstances which may mitigate the blameworthiness of the failure.

20. If the Tribunal does find an unreasonable breach of the Code, it must follow the four-stage approach set out in Slade v Biggs and Stewart ([2022] IRLR 216):
    a. Is the case such as to make it just and equitable to award any ACAS uplift?
    b. If so, what does the Tribunal consider a just and equitable percentage, not exceeding although possibly equaling, 25%?
    c. Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the Tribunal's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?
    d. Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the Tribunal disproportionate in absolute terms and, if so, what further adjustment needs to be made?

21. Third, if it is just and equitable, a reduction having regard to any blameworthy conduct of the claimant that contributed to the dismissal to any extent (sections 122(2) & 123(6)). A reduction to the basic award is not mandatory even if there is culpable conduct (Optkinetics Ltd v Whooley [1999] ICR 984) but it is very likely (though not inevitable) that any reduction to the compensatory award will be applied in the same or similar way to the basic (Steen v ASP Packaging Ltd [2014] ICR 56).

22. In order to justify a specific reduction, the Tribunal has to find:
    a. culpable or blameworthy conduct of the claimant in connection with the unfair dismissal;
    b. that that conduct caused or contributed to the unfair dismissal to some extent;
    c. that it is just and equitable to make the reduction (Nelson v BBC (No 2) [1979] IRLR 346).

23. Langstaff P in Steen advised Tribunals to approach this issue by identifying:
    a. the conduct in question;
    b. whether it was blameworthy;
    c. whether it caused or contributed to the dismissal (in relation to the compensatory award); and
    d. to what extent the award should be reduced.

24. In making this assessment the Tribunal forms its own view as to what happened rather than the reasonableness or otherwise of the respondent's view.

25. As to the amount of any reduction, case law suggests that there are four appropriate categories:
    a. where the employee was wholly to blame – 100%;
    b. where the employee was largely responsible – 75%;
    c. where both parties were equally to blame – 50%;
    d. where the employee is to a much lesser degree to blame – 25%. (Hollier v Plysu [1983] IRLR 260).

26. The statutory cap (in this case being the claimant's gross annual salary) is then applied to the calculation of the compensatory award by sections 117(1) & (2) and 123 of the 1996 Act.

Findings of Fact

27. Having assessed all the evidence, both oral and written, and the submissions made by the parties I find on the balance of probabilities the following to be the relevant facts.

28. The claimant was employed by the respondent, and its predecessor companies, as a funeral director commencing 1 October 1988. He was based at the Broadstairs office, managed by Mr Robson, but travelled around the general area covering various offices. He is a very experienced funeral director conducting approximately 150 to 200 funerals per year.

29. The claimant's dismissal arose out of the processes followed for the funeral of a deceased person, KM, held on 9 July 2018.

30. One of the issues that must be decided in advance of any funeral is whether jewellery and other personal effects will be removed from the deceased prior to cremation/burial.

31. The respondent operates in a highly sensitive industry. Caring for both the deceased and their family with dignity and respect is clearly an integral part of their operation. Any reputational damage could have a very significant impact on their business.

32. The respondent has a Jewellery and Personal Effects Procedure ('the J&P procedure'). It sets out in detail where responsibility lies for dealing with the deceased's effects and the various steps that have to be taken and how they are recorded. At eight pages it is a lengthy document.

33. In particular the procedure provides that:
    a. it is mandatory;
    b. if it is not possible to comply with the procedure then the immediate supervisor must be informed immediately and instructions obtained before proceeding;
    c. jewellery and personal effects on or with the deceased must be recorded on the deceased record card and in the mortuary register;
    d. prior to the deceased being placed in the coffin and again prior to the coffin being closed, checks must be made on all items against the deceased record and any special instructions regarding jewellery and personal effects must be checked to have been carried out and the deceased record signed; and
    e. any discrepancies at any stage must be reported immediately to the line manager and recorded on the deceased record.

34. The claimant signed to acknowledge that he was trained on that policy and procedure in November 2016.

35. In the respondent's disciplinary policy and procedure, failure by employees to carry out any aspect of caring for the deceased or funeral activity in accordance with the relevant procedure and failure to take proper care of jewellery and other property and failure to observe the wishes of the family of the deceased concerning the same, are listed as examples of gross misconduct which may result in summary dismissal. In relation to the disciplinary process, the policy states that sufficient information about alleged misconduct and its possible consequences must be given to the employee to enable them to prepare to answer the case at the meeting.

36. As well as the deceased record card, other relevant standard paperwork includes:
    a. a funeral director's client contact log;
    b. an arrangements form;
    c. mortuary register;
    d. conductor's notes for funeral; and
    e. jewellery & personal effects form (which is part of a booklet that includes the deceased record card and arrangements form).

37. The funeral of KM was booked with the respondent on 6 June 2018 and allocated to the claimant on the same day. The funeral was arranged for Monday 9 July at 1pm.

38. The contact log shows that the claimant contacted the client on 11 June and 20 June and noted that 'all OK'. The claimant was then absent on holiday between 21 June and 3 July.

39. On 25 June it was noted on the mortuary register that the deceased was wearing jewellery.

40. On the arrangements form Ms L Robson, funeral arranger, noted 'jewellery to stay on' i.e. that it should remain on the deceased when buried/cremated.

41. On the conductor's notes prepared by Ms Robson she noted in respect of personal effects: 'return all to family'.

42. There was therefore a discrepancy between the arrangements form and the conductor's notes as to whether the jewellery should stay on the deceased.

43. Upon the claimant's return to work from holiday he says, and I accept, that he was very busy including being on call over the weekend of 7/8 July. This was also corroborated by Ms Robson's comments in her later investigatory meeting.

44. When the claimant looked at the paperwork for KM's funeral he noted the discrepancy regarding what should be done with her jewellery. His evidence is that he telephoned the family to find out what they wanted. He had difficulty getting hold of them but he says spoke to the widower's sister on the afternoon of Friday 6 July. The claimant's mobile phone logs that he later produced and the contact log support this evidence and I find that this call was made. I have no reason to doubt the claimant's evidence that the sister said she would check the position and get back to the claimant but did not do so.

45. The claimant says now, as he did in the disciplinary process, that he made further attempts to contact the family on Sunday 8 July and the morning of the funeral but his calls went to voicemail. There is no evidence in either the mobile phone logs or the contact log to support the claimant's account that he made these further efforts. The claimant did confirm that he would usually record in the contact log by noting 'AP' (standing for answerphone) if he had left a message. He would use one of several phones, either his mobile, home phone or other office phones. I find that it is more likely than not that the claimant made at least some efforts to speak to the family by telephone over that weekend. I am less persuaded and find that he did not try to telephone them on the morning of the funeral given his evidence about how he was particularly busy at that time.

46. In the absence of being able to confirm the family's instructions he had to make 'a fast judgement call' about what to do with the jewellery and decided that the most sensible course of action was to remove the jewellery which could then be returned to the family if they wanted or could be buried with the deceased's ashes. Accordingly he instructed Ms Robson to remove the jewellery and either add it to the ashes or return it to the family.

47. He returned to the office shortly before having to set off for KM's funeral. He asked Ms Robson if everything was done and she said it was. He then initialled the conductor's form to confirm specifically that he had checked all details with the funeral arranger and that he had checked for any special instructions or requests. This was inaccurate.

48. The claimant's oral evidence, although it did not appear in his witness statement, was that it had not been possible for him to confirm the position with the family when he met them at the crematorium immediately before the funeral as it had not been possible 'to get near them'.

49. The respondent's witnesses evidence was that in their professional experience this statement in particular was wholly implausible. I accept that evidence and find that the claimant at the very least failed to make sufficient attempts at the funeral to clarify the position.

50. Elsewhere in the arrangements form, the claimant had also signed to indicate that he had checked the jewellery & personal effects both on 26 June when the deceased was placed into the coffin and on 9 July when the coffin was closed. Again, this was inaccurate.

51. The claimant's evidence was that he believed everything had been taken care of, that Ms Robson would deal with the outstanding issue and he thought no more about it.

52. Elsewhere in the mortuary register Mr Allardyce, hearse driver, signed on 9 July to say that the jewellery had been returned to the family.

53. On 2 August the claimant suffered a back injury and took two days off work because of back pain. His injury became worse and he was subsequently signed off work by his GP for 12 weeks in total commencing 28 August. He was prescribed heavy doses of pain medication (co-codamol) and sleeping tablets (amitriptyline). The claimant's evidence is that this medication made him feel fatigued and affected his concentration and ability to focus. Notwithstanding the medication he was experiencing pain which he says made him feel disoriented.

54. On 23 August Mr Helyar, trainee funeral manager, found a jewellery pouch, containing a yellow metal necklace. He contacted the deceased's widower to let him know that the necklace was still with the respondent. He was very upset and informed Mr Helyar that the necklace had been meant to remain on the deceased. The necklace was returned to the deceased's widower and Mr Helyar informed Mr Wilson of the situation.

55. On 24 August Mr Wilson commenced investigating an allegation that the personal effects of KM had been removed prior to the funeral taking place even though the client had instructed that all personal effects were to remain with the deceased. He considered copies of the mortuary register, deceased record card, arrangements form and all other paperwork associated with funeral. He concluded that he needed to interview the claimant, the relevant ambulance crew, the hearse driver and the funeral service arranger.

56. On 31 August Mr Helyar emailed Mr Wilson confirming the circumstances in which he had found the jewellery pouch and the return of it to the widower. He also confirmed that the widower had said 'it was one of those things and didn't want to get anyone into trouble'.

57. All the investigatory interviews were arranged for 2 October although three, including the claimant, were postponed to 31 October due to sickness.

58. The letter inviting the claimant to the investigatory meeting was not in the bundle. I find that it is more likely than not that the invitation letter would have identified the funeral in question but, given the later lack of detail provided to the claimant in the invite to the disciplinary meeting, I do not find that there was any more detailed information than that given to the claimant at that stage. Certainly he was not provided with any supporting documents when invited to the investigatory meeting.

59. At the investigatory meeting, held while the claimant remained on sick leave, cursory enquiries were made by Mr Wilson as to his well-being prior to the meeting formally starting. There was no reference to the claimant's health or his ability to participate noted in the transcript of the meeting (which was recorded).

60. The meeting was relatively short - 15 minutes. At the beginning of the meeting the claimant was advised that the investigation concerned failure to follow the personal effects procedure correctly on the transfer of and funeral of KM.

61. The claimant was passed a copy of the conductor's notes and asked to 'have a quick look at them' which it is clear he did and then returned them to Mr Wilson. When the claimant was asked whether he just used conductor's notes or had a copy of the funeral arrangement he said that he could not remember that far back (by then more than three months ago) and that he had been on holiday for most of the arrangement. The claimant gave an obviously confused account of which day he had gone on and returned from holiday. The language he used does seem to indicate that he was having difficulty in recalling the exact details - for example 'I'm just trying to bring it up now''. He also spoke about the sixth of July being a Monday and was corrected by Mr Wilson who said it had been a Friday.

62. When asked about whether he had removed the jewellery from the deceased, the claimant asked to see a copy of the client record and it was shown to him. Subsequently he said that he did not remove the jewellery and that he believed it had been removed before, on the day of the funeral.

63. The claimant also confirmed that he had spoken to the widower's sister on 6 July and that she was happy with everything and that he had tried to speak to the family again on the Monday but it had gone straight to answerphone.

64. When asked whether he had done the checks on the deceased the claimant said that he had and that he had not noticed any jewellery. He also later said he saw a copy of the note that all jewellery was to remain when he went into the office but that there had been a change and that it had to come off, so it had already been taken off but he did not know who took it off.

65. Mr Wilson completed investigatory interviews with all of the relevant employees during which Mr Allardyce was asked if he saw the claimant remove the jewellery but he said he did not. Ms Robson was not asked who had removed the jewellery

66. Mr Wilson completed an investigatory report. He concluded that there had been numerous errors in completion of the relevant the paperwork including the discrepancy described above regarding what was to happen with the deceased's jewellery. The report included a statement that the claimant had removed the personal effects and did not receipt them or fill in the relevant section of the deceased record card. Given that the claimant had expressly told Mr Wilson during the investigatory meeting that he had not removed the jewellery and Mr Allardyce's evidence, it is difficult to see the basis for that conclusion. Mr Wilson accepted, during cross examination, that he was not sure what evidence he had in fact based it on apart from the fact that the jewellery had been removed, should not have been and it is the funeral director's overall responsibility to check that the paperwork has been properly completed.

67. Mr Wilson concluded that there had been several breaches of the J&P procedure and recommended that both the claimant and Ms Robson go forward for a formal disciplinary hearing after failing to adhere to the client's wishes and for various breaches of procedure. Ms Robson resigned from her employment before that process completed. He recommended no formal further action to be taken in respect of the other employees.

68. The claimant returned to work from sick leave from 26 November initially on a phased return. He attended a return to work interview with Mr Muir where it was noted that his absence of 59 working days was due to back pain, that he had consulted a medical practitioner in August and that he was taking co-codamol. It was confirmed that he had not fully recovered but was signed fit for work subject to doing no heavy lifting.

69. Mr Muir was appointed as disciplinary officer and wrote to the claimant on 6 December requiring him to attend a formal disciplinary hearing to consider the allegations of:
    a. failing to adhere to the client's wishes;
    b. failure to receipt of log the removal of personal effects; and
    c. failure to correctly sign the deceased out of the mortuary register.

    In cross examination Mr Muir accepted that these were general descriptions of the issues and did not give sufficiently detailed information to the claimant to allow him to properly prepare for the hearing.

70. Copies of notes the various investigatory meetings and the disciplinary policy were enclosed with the letter. Mr Wilson's investigatory report was not provided to the claimant as at the time it was not the respondent's policy to do so. The various documents relevant to the funeral arrangements (the deceased record card, conductor's notes etc) which had been shown to the claimant during the investigatory meeting copies were also not copied to the claimant at this stage. The claimant was advised that the allegation if proven would be considered gross misconduct and his employment may be summarily terminated. He was also informed of his right to be accompanied.

71. Prior to the disciplinary interview Mr Muir established, by looking at the relevant holiday form, that the claimant had returned to work from his holiday on Wednesday 4 July.

72. At the disciplinary interview held by Mr Muir with the claimant on 13 December, the claimant was unaccompanied. There was a discussion about when the claimant had returned to work from his holiday. Mr Muir put it to the claimant that in the investigation he said he had returned on Friday 4 July (a non-existent date that year). In the conversation that followed it is clear that the claimant was in error about the days and dates he was referring to which included him saying that he was back at work on Monday the ninth but also Friday the fourth. Mr Muir did not tell the claimant that he had checked the attendance record and in fact the claimant had returned to work on Wednesday the fourth.

73. When Mr Muir asked the claimant when he had first spoken to the client, the claimant indicated that Mr Muir had the conductor's notes. They were then shown to the claimant who commented on them.

74. Separately, Mr Muir referred to Mr Wilson's statement that the claimant had removed the jewellery and that Mr Muir adopted that conclusion.

75. When the claimant was asked to talk Mr Muir through his recollection of what happened, he started talking about phoning the sister on Sunday the eighth. When Mr Muir referred the claimant to the records that show he spoke to her on the sixth, the claimant agreed that he phoned her on Friday the sixth. When asked another question the claimant said 'I went through the… can I borrow my notes for a minute?' and was shown them.

76. The claimant also said that when he spoke to the sister and she said she would have to ask about the jewellery he said he would phone her on Sunday or Monday. He said that he did phone her on the Sunday but she was not in. And that he was also unable to get hold of her on the Monday.

77. Mr Muir and the claimant discussed what happened at the funeral itself. The claimant said that he thought it was Mr Allardyce who removed the jewellery but when asked by Mr Muir how sure he was he said 'a lot has gone on since then, I can't be sure'.

78. Mr Muir read a statement from Mr Crowhurst, a member of the office team, which said the claimant told Mr Allardyce to remove the jewellery and he would deal with it later. Mr Muir confirmed that the jewellery was definitely removed which the claimant confirmed and that he thought it was removed by Mr Allardyce, that the claimant then put it in the pouch and left it in the desk.

79. Mr Muir then read from a statement from Ms Robson who said that the claimant had arrived at the office with the jewellery bag.

80. Mr Muir subsequently read an extract from Mr Helyar's email about his contact with the widower. He read the part that he was very upset because

the jewellery was meant to go in the coffin. He did not read the part about 'these things happen' etc. When asked how he felt about it, the claimant said 'I am gutted that I have [not] sorted it before the funeral'.

81. Mr Muir then showed the mortuary register to the claimant and they discussed whether a particular entry was the claimant's writing or not. The claimant said it was not.

82. The jewellery and personal effects section was then shown to the claimant. The claimant accepted that information was missing from the deceased record because he had not had sufficient time due to other work commitments that morning which had made him late back to the office.

83. Mr Muir asked the claimant if he thought between him and Ms Robson they have done enough to find out exactly what was going on. The claimant said he could not do any more that day and he had phoned up on the Friday and the Sunday and twice on the Monday morning.

84. They then discussed again what happened at the funeral and the claimant said there was not much conversation, he saw the daughter-in-law as they were about to go in and after the service they looked at the flowers and walked straight off to the cars and he was not able to get near them or discuss it at the time.

85. When asked if he personally could have done any more than he did the claimant said he could have done a bit more if he had had the time but time was a factor. He accepted the responsibility 'lies with me in the end being the funeral director'.

86. Shortly before the meeting concluded Mr Muir asked the claimant if there was anything he wished to add in the claimant said:

    'No I am sorry for the gentleman himself for the distress but I feel that I couldn't do anymore at the time before the funeral'

87. Sometime after conclusion of the disciplinary meeting, Mr Muir asked the claimant if he had any records to show the phone calls he says he made to the family. The claimant obtained copies of his personal mobile phone calls and posted them to Mr Muir in the respondent's internal post. Mr Muir's evidence was that he did not recollect seeing those logs.

88. Mr Muir discussed with and took advice from HR as to the correct approach to take in the matter. No notes were made of these discussions and there was no reference to them in his witness statement.

89. Mr Muir completed a disciplinary officer report on 14 December in which he made a number of findings including a reference to the claimant saying he returned to work on 9 July when he actually returned on 4 July. Given that Mr Muir had the attendance record that showed the claimant was potentially simply making a mistake about the date/day of his return but did not share that information with the claimant, this was less than transparent. He also

found that the claimant said he had contacted the sister-in-law on 8 July but there were no records showing that call despite the logs having been sent to him which did show a call on the sixth and the contact log. In fact it is clear from the notes of the meeting that the claimant revised that statement to say that he spoke to her on the sixth. Mr Muir also noted that the claimant had been 'very laid-back' during the hearing and did not show any remorse. The claimant accepted in his oral evidence that he had been laid-back (he put this down to his medication and pain) but said that he did express remorse. As noted above it is clear that he did say he was gutted and that he was sorry for the distress caused.

90. In the conclusion section of his report Mr Muir found that there had been a failure to take proper care of the deceased's jewellery and other property, a failure to observe the wishes of the family and a failure to adhere to the procedure and the claimant was responsible as funeral director for those failures. Mr Muir again referred to the claimant's statement that he had returned to work on Monday the ninth. He also specifically referred to the claimant failing to provide any substantial explanation as to the inconsistencies regarding his client contact and having provided three different accounts as to the conversations he had held with them. He found that the claimant had failed to complete the necessary paperwork having made the decision to remove the jewellery and did not discuss this with the client at the funeral which could have resolved the issue. He also noted that the claimant had attended the relevant training in 2016.

91. Mr Muir wrote to the claimant on 28 December 2018 informing him that the allegations were substantiated and that he was summarily dismissed on the grounds that his conduct amounted to gross misconduct. He set out his findings and conclusions as described above and also stated that the claimant had not offered any mitigating circumstances to explain his actions and that his account of events leading up to the day of the funeral were inconsistent with the evidence available. The claimant was advised of his right of appeal against dismissal.

92. The claimant indicated his intention to appeal against dismissal by letter dated 29 December. He requested copies of a number of documents (including a transcript of the disciplinary meeting, his holiday forms for the year, the arrangement form, conductor's notes, deceased record card, client record and mortuary register) in order to formulate his appeal. Those copy documents were sent to the claimant on 7 January 2019. The claimant did not request copies of the investigation or disciplinary reports. He had no way of knowing that these documents existed. Despite the respondent's internal policy being that these were not routinely disclosed to employees, I have no doubt in finding that they should have been. They were clearly relevant documents.

93. The claimant wrote to Mr Muir on 9 January commenting on some of the documents provided and seeking clarification of certain matters. Mr Muir replied on 15 January.

94. On 13 January the claimant wrote to Mr Keysell setting out the grounds of his appeal against dismissal which in summary were:
    a. the evidence did not support the finding;
    b. no allowance made for his ongoing illness, medication and dyslexia;
    c. no proper account was taken of the pressure he was under on his return from work;
    d. it did not amount to gross misconduct;
    e. there should have been a lesser sanction;
    f. his length of service;
    g. there had been pressure to dismiss him due to a pending restructure; and
    h. he had continued to discharge full duties during the disciplinary process.

95. On 18 January Mr Keysell wrote to the claimant inviting him to an appeal hearing on 5 February, reminded him of the right to be accompanied and agreed that a family member could perform this role. The appeal hearing in fact took place on 7 March and the claimant was accompanied by his daughter.

96. At the commencement of the appeal the claimant's daughter read out a prepared statement which developed the grounds of his appeal and in particular:
    a. alleged disability discrimination due to his dyslexia;
    b. gave his general account of what had happened in the run up to and day of the funeral;
    c. that he had been very busy; and
    d. a lack of regard to his length of service.

97. Mr Keysell acknowledged during the appeal hearing that the whole process had not run as smoothly as it should have done and that he agreed that some of the information should have been provided to the claimant earlier.

98. It is clear that towards the end of the appeal meeting the claimant told Mr Keysell that he believed his investigation meeting had been affected by the medication he was taking and that Mr Wilson would have known that because of the discussions they had had about arranging the meeting.

99. Mr Keysell wrote to the claimant on 25 March informing him that his appeal had not been upheld. He confirmed that there was no record of the claimant's dyslexia on his personal file and that no managers were aware of his condition. Therefore it could not be taken into account and how it affected his work. He confirmed that he had listened to the recordings of the investigatory and disciplinary meetings and considered that they were not unduly rushed or pressurised. Also that he had confirmed the side effects of amitriptyline on the NHS website but noted that in the return to work interview on 26 November no mention was made of that. He stated that without making the company aware of the medication and any side effects it was difficult to see how they could have taken that into account. He therefore did not uphold any part of the appeal with regard to allowance for medical conditions or dyslexia, either when the incident occurred or

during investigation or disciplinary process, due to the fact that the company were not fully aware of his conditions.

100. As far as documentation was concerned he agreed that the claimant may have been inadequately prepared for the disciplinary meeting as he had not had copies of all the relevant documents however he was satisfied that these were provided prior to the appeal hearing.

101. He concluded that the questions in the meetings had not been inappropriate or leading but simply of the sort of direct questions that are sometimes necessary to ask and there was no foundation to the claimant's belief that the planned company restructure had any impact on the decision.

102. With regards to the funeral itself, Mr Keysell stated that the claimant's version of events 'has many inaccuracies throughout the course of the investigation, disciplinary and appeal meetings and your explanations about your attempts to contact the family are confused with you trying to confirm your return to work date after annual leave' but this had not been addressed during the appeal meeting despite the fact that it was by then clear that he had in fact returned on 4 July.

103. He referred to the fact remaining however that the jewellery was removed which was not in accordance with the family's instructions and whilst he acknowledged the explanation that the claimant had had a busy morning, he had signed the deceased record without adequately explaining or completing the section indicating that it had been removed. He noted that as funeral director the claimant had ultimate responsibility for ensuring everything was correct, the paperwork completed and that this had not been done without any explanation or justification. He also stated the claimant had not accepted any responsibility for the error and the disciplinary procedure clearly states failure to take care of jewellery etc is a gross misconduct issue.

104. As to sanction, he stated that the decision to dismiss had not been taken lightly but Mr Muir had felt it was the correct decision on the information available at the conclusion of the disciplinary process and that whilst it was regrettable for 30 years of service to end in that way, the decision would stand. In his oral evidence Mr Keysell accepted that there was no evidence before him to suggest Mr Muir had considered other sanctions but said that he 'assumed' that Mr Muir had followed procedure and that knowing him as he did he had no doubt he would have considered those other options. In respect of mitigation Mr Keysell, in evidence, said that he could not explicitly see any mitigating factors.

Conclusions

105. It is clear that conduct was the reason for the dismissal, namely a failure to comply respondent's J&P procedure with the result that jewellery that should have remained on the deceased was removed prior to cremation. It is equally clear that there were reasonable grounds for that belief - the claimant admitted that the mandatory procedure had not been fully complied

with and that he had made mistakes - and it is also self-evident that the jewellery was not treated properly and the client's wishes not complied with.

106. As to whether at the stage that belief was formed the respondent had carried out a reasonable investigation, I conclude that they had. By the end of the disciplinary process all of the relevant individuals were interviewed and the necessary documentation obtained and reviewed.

107. I am not satisfied however that the procedure followed by the respondent was a reasonable one. It had a number of significant flaws:

a. First, and very significantly, the claimant was not provided with copies of relevant documents at appropriate stages of the process. I am not overly troubled by the failure to provide all of the necessary documents in advance of the investigation meeting. It is not in itself unreasonable for a respondent to ask for an explanation of matters of concern without an awful lot of prior notice or prior information being given. However the respondent must ensure that all of that relevant information is given to the individual before the disciplinary hearing and further, that any gaps or confusion in the initial explanation given at the investigatory meeting are considered in light of the fact that the individual did not have all the relevant information.

b. In particular the claimant did not receive copies of the critical paperwork - the deceased record card, jewellery record etc - until he requested it after he had been dismissed and prior to the appeal hearing, which was a review rather than a rehearing. Although he had been shown some of these documents during the course of the earlier meetings this was insufficient. In particular the investigatory meeting was short and the transcript suggests that the claimant's opportunity to review the documents was brief. Even leaving aside whether the claimant has dyslexia such as would affect his ability to process documents in this way, this would be an unreasonable approach by the respondent for any individual. I also note that it was a breach of the respondent's own disciplinary process that he was not given all this information. Also, as already indicated, he clearly also should have received investigation report and disciplinary report which he did not receive until disclosure in this claim.

c. Not only did the claimant still not have all of the relevant information but it is clear that in the disciplinary and appeal meetings, his less than clear and consistent answers given at the investigatory meeting and in comparison to the answers at the disciplinary meeting, were held against him. Further, even though Mr Muir had a copy of the relevant attendance record (also not shown to the claimant) he did not take the opportunity to correct the claimant's obvious confusion about not only the date of his return to work after leave but also what the actual dates were on specific days of the week. It must have been apparent to Mr Muir that the claimant was simply wrong in his recollection of what date certain days of the week were.

d. I do not find however that the way the investigatory, disciplinary and appeal meetings were conducted was inappropriate. I have no doubt that they were uncomfortable for the claimant and robust questions were asked - that is the nature of the process - but there is no evidence to suggest that Messrs Wilson, Muir or Keysell acted in any way improperly. Indeed latitude was shown to the claimant in agreeing that his daughter could attend the appeal meeting with him

e. Similarly I do not find that there was any element of predetermination on the part of the respondent. Whilst Mr Muir came to a conclusion about removal of the necklace that was clearly not based on any logical evidence and also did not look at the call logs he had asked for and been sent, overall I accept that the managers involved in the disciplinary process went into it with a sufficiently open mind. However, as a consequence of the procedural failings (i.e. the claimant not receiving the full information that he should have received when he should have received it) and his, at least in part, resulting confusion being held against him, this may have given the impression of predetermination to the claimant.

f. I also do not find that the failure by the respondent to expressly consider the claimant's medical position at investigatory and disciplinary stages was unreasonable. Although there certainly were warning signs - not least that the claimant was still on sick leave at the time of the investigatory meeting - the fact remains that he did not tell the respondent about the particularly strong medication he was on until appeal stage. Unfortunately at that stage however Mr Keysell did not give this proper consideration which he should have done.

g. Whilst I agree with the claimant's submissions that he should have received a copy of the disciplinary policy and the charges could have been more specific, I do not find these failings to be overly worrying.

h. However the failing with regard to documentation was sufficiently serious to undermine the fairness of the whole dismissal and they are failings which were not remedied at appeal stage . Even when the claimant requested certain documents – which were provided – the opportunity was not taken to provide the remaining missing documents and certainly I cannot conclude that they were failings that if remedied would have made no difference to the outcome. I cannot be confident that if the claimant had been given all the relevant documents at the right time with sufficient time to consider them before giving his explanation, he would still have been dismissed.

108. I turn then to the substantive issues of whether the finding of gross misconduct and the penalty of summary dismissal were within the band of reasonable responses by the respondent.

109. Whilst I accept the claimant's submission that breach of the J&P procedure is not described in the disciplinary policy as automatically gross

misconduct. I find that in all the circumstances not only was it reasonable for the respondent to regard it as gross misconduct but I also find that it was gross misconduct. It is clear that the claimant did fail in his very important and serious duties and he had overall responsibility for ensuring that all procedures for the funeral had been properly observed. I have accepted the claimant's evidence that he was very busy both in the run up to and the day of the funeral. However he did not seek to escalate the issue or advise anyone more senior that he was too busy to properly carry out his functions.

110. Also, although the individual widower in this case apparently did not apparently complain as much as he could have done, this does not detract from the overall seriousness of the situation and the possibility of future reputational damage.

111. Whilst I agree with the claimant's submissions that the exact findings made by the respondent as to the exact culpability of the claimant could have been clearer, there is no doubt that overall they found that a very important and, for good reason, mandatory procedure had not been complied with and the claimant had overall responsibility for that. It was well within the bands of reasonable responses to conclude that this was gross misconduct even in the absence of a finding of dishonesty or deliberate disregard of the policy. Attempts to categorise his failure as simply a paperwork error are misguided. In this sort of situation paperwork matters.

112. That takes me to sanction. I do find that this is one of those unusual cases where despite a finding of gross misconduct the sanction of summary dismissal was outside the band of reasonable responses. This is principally because of the absence of dishonesty and deliberate disregard, the original error was that of Ms Robson, the claimant was very busy at the time, he did try to contact the family prior to the funeral and, to a lesser extent, because of the claimant's length of service and clean disciplinary record (although I would observe that a clean disciplinary record and long service are not enough to counteract a finding of gross misconduct in themselves). In contrast, both Mr Muir and Mr Keysell found at the time that there were no mitigating circumstances and they maintained that position at the hearing which I find very surprising.

113. As to whether the claimant expressed remorse, the respondent's view is that he did not. The transcripts of the relevant meetings do show that he at least said he was gutted and also that he was sorry for the distress of the widower. Conveyance of remorse is something that can only be assessed by reference not only to the words somebody says but how they say them and their body language. Both Mr Muir and Mr Keysell formed their view based not only on the words said by the claimant but his whole approach during the interviews. The claimant himself acknowledged that he would have appeared laid-back during at least one of those interviews. In those circumstances I do not find that the respondent's conclusion that the claimant did not show remorse was an unreasonable one. Therefore I am not taking that into account in making my finding of unfair dismissal.

114. I do find however that the respondent's witnesses did not give sufficient consideration to alternative sanctions. I am not persuaded by the evidence of Mr Muir regarding his discussions with HR about alternative sanctions. This did not appear in his written witness statement and did not feature in his disciplinary report or dismissal letter. Further, it is clear that Mr Keysell worked simply on an assumption that Mr Muir would have considered alternative sanctions. This failure is both procedural and substantive.

115. A reasonable employer taking all of the relevant matters into account would not have summarily dismissed the claimant. A disciplinary penalty would have been applied, and probably the most serious alternative form of penalty short of dismissal, which under the respondent's disciplinary policy would have been a final written warning.

116. Accordingly I find that the claimant was unfairly dismissed.

117. I reach that conclusion without having to consider the circumstances of another funeral director, Ms Strangeway, the comparator employee relied upon by the claimant. In 2019 disciplinary proceedings were taken against her as due to error she had not carried out the wishes of the deceased and a watch had not been removed from the body when it should have been. She had nine years' service and was issued with a final written warning by Mr Fordham, business manager. Although comparison cases have to be scrutinised very carefully as they do need to be truly similar cases, I do find that the Strangeway case is sufficiently similar to be relevant to this claimant's case. The fact that Ms Strangeway was given a final written warning only reinforces the decision that I have made in the claimant's case.

118. In terms of remedy it becomes a moot point whether the claimant was also wrongfully dismissed. Initially it is straightforward that if an employee has committed an act of gross misconduct then as a contractual matter the respondent is entitled to summarily terminate. It can be argued, of course, that to do so without taking into account all the relevant mitigation (which is what I have found to be the case here) can be a breach of one or more implied terms of the contract. Submissions were not made on that basis. I therefore proceed on the basis that the claimant was not wrongfully dismissed. However, as I have said, it makes no difference to remedy.

119. <u>Findings relevant to remedy</u>

120. I find that the claimant would have continued in employment until his expected retirement at age 67. He had worked for the respondent for some 30 years and there was absolutely no indication that he had any plans to seek work elsewhere or retire early.

121. I also find that the claimant took reasonable steps to mitigate his loss. Although the respondent is right that there is limited contemporaneous documentation available regarding his job applications following dismissal, he did obtain employment in a care home for a short period of time reasonably quickly after his dismissal but was unable to continue due to his health. I find it was also reasonable for him to set up his own funeral

business. I note that the claimant's case is that earnings in that business have been limited by his poor health. Although this point was not pursued in submissions, I briefly considered whether that means his baseline earnings that he would have received from the respondent should be reduced in some way but concluded that would be too speculative a process and, in any event, due to the impact of the statutory cap probably of little relevance.

122. For the reasons set out above there will be no Polkey reduction.

123. There will however be an uplift as a result of the ACAS Code being breached. In particular the provisions referred to above which set out the responsibility to inform the employee of the problem. I find it is appropriate to uplift the award although in setting the percentage I take into account the fact that the Code was not ignored altogether. Those failures were however a mixture of deliberate (in particular it was the respondent's policy at the time to not disclose investigatory and disciplinary reports) and inadvertent. I do not find that there were any particular circumstances which mitigate the blameworthiness of the failure. Taking all those matters into account I find it is appropriate to uplift the compensatory award by 15%.

124. Turning to contributory fault, this is clearly a case where the claimant did contribute to his own dismissal by his own blameworthy conduct and I conclude that it is just and equitable to make a reduction to both the basic and compensatory awards given that it was the claimant's own actions that led to breach.

125. In assessing the level of reduction, my findings as to culpability are relevant as opposed to the respondent's. My finding is that the claimant was guilty of culpable conduct when he failed to adequately establish and check the position regarding what was to be done with the deceased's jewellery (and in particular failed to do so at the crematorium) and part of that was his failure to communicate effectively with Ms Robson. He also failed to properly complete the respondent's paperwork which forms an important record. However, I take into account that it was Ms Robson's original error that significantly contributed to if not completely caused the problem and the fact that I accept the claimant was very busy at the time and that he did in the end make the best decision that he felt he could and indeed the respondent's witnesses acknowledged that.

126. It is difficult assessing where blame lies for the unfair dismissal. Although the claimant's conduct led to the disciplinary process it was the respondent's failings during that process that led to the outcome being dismissal which I have found to be unfair. Therefore I assess the respondent was more responsible for the unfair dismissal than the claimant and the appropriate finding of contributory fault is 40% which shall apply to both the basic and compensatory awards.

127. Finally, I agree with an award for loss of statutory rights at £500 and I agree with the method proposed in the schedule of loss for calculating pension loss.

128. Having communicated those findings to the parties they agreed the calculation of total compensation due to the claimant which appeared in the short form of Judgment.

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Employment Judge K Andrews
Date: 23 March 2023