



EMPLOYMENT TRIBUNALS

Claimant

Mr R Benson

v

Respondent

APM Nationwide Ltd.

Heard at: Watford (via CVP)

On: 27th October 2022 and 28th March 2023

Before: Employment Judge S. Evans

Appearances

For the Claimant: Ms. L. Whittington (Counsel)

For the Respondent: Mr. S. Ryan (Representative)

RESERVED JUDGMENT

1. The Claimant's claim of unfair dismissal is well-founded and succeeds.
2. The Respondent was in breach of contract by dismissing the claimant without the full period of notice to which he was entitled. The complaint of wrongful dismissal is well-founded and succeeds.
3. The Respondent failed to provide the Claimant with a written statement of the particulars of employment.
4. The Respondent is ordered to pay the Claimant a total of £10,896.94 made up as follows:
Unfair Dismissal Basic award - £1096.14
Unfair Dismissal Compensatory award - £6949.76
ACAS uplift on compensatory award of 20% - £1389.52
Failure to provide s.1 statement - £1461.52
5. The Recoupment provisions do not apply.

REASONS

Introduction

1. The Claimant's date of birth is 4th May 1995. He was employed by the Respondent as a maintenance technician from 1st October 2018 to 18th November 2021. The date and fact of dismissal were agreed between the parties.
2. The Claimant referred his matter to ACAS Early Conciliation on 25th November 2021 and ACAS certificate R193246/21/87 was issued on 13th December 2021. The Claimant's ET1 was issued on 11th February 2022, bringing claims of wrongful dismissal and unfair dismissal.
3. The Respondent filed an ET3, received on 4th April 2022. contesting the claims made by the Claimant.

Procedure, documents and evidence heard

4. The Claimant's claims were listed to be heard in full on 27th October 2022. In the event, the time allowed was not sufficient to complete the hearing. By the end of the sitting day the respondent's evidence was concluded but there was no time to hear evidence of the claimant's case. The hearing was therefore adjourned part-heard. For reasons set out in my Order of 16th January 2023, the hearing was completed on 28th March 2023. Judgment on liability and, if relevant, quantum, was reserved as there was insufficient time for me to review the evidence and make my decision on the day.
5. A bundle of 65 pages was before the Tribunal, The parties were directed to refer specifically to any pages to which the Tribunal should have regard in reaching its decision. Page references below are to pages in the bundle. The Tribunal also had witness statements from the Claimant and from Mr. David Hammett, Mr. Matthew Ballard, Mr. Nathan McAlindon and Mr. Paul MacAllister for the Respondent. Mr. McAlindon's statement was not initially available due to an administrative error by the Respondent. The Tribunal heard representations from Ms. Whittington objecting to Mr. McAlindon giving evidence. After considering the position of both parties and weighing the balance of prejudice, Mr. McAlindon was permitted to give evidence.
6. Oral evidence was taken from the Respondent's witnesses at the hearing on 27th October 2022. The Claimant's oral evidence was taken at the resumed hearing on 28th March 2023. Oral submissions were made by both representatives at the conclusion of the hearing.
7. There was a degree of conflict on the evidence. I heard the witnesses give their evidence as identified above and reminded myself of the evidence taken on the first hearing date before sitting on 28th March 2023. I find the facts below proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and the submissions made on behalf of the respective parties.

The Issues

8. The parties agreed at the outset that the claimant's claim related to unfair dismissal and notice pay.
9. The issues to be determined were as follows:

Unfair dismissal

- 9.1 What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.
- 9.2 If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will decide, in particular, whether:
 - 9.2.1 there were reasonable grounds for that belief;
 - 9.2.2 at the time the belief was formed the Respondent had carried out a reasonable investigation;
 - 9.2.3 the Respondent otherwise acted in a procedurally fair manner;
 - 9.2.4 dismissal was within the range of reasonable responses.

Remedy for unfair dismissal

- 9.3 If there is a compensatory award, how much should it be? The Tribunal will decide:
 - 9.3.1 What financial losses has the dismissal caused the Claimant?
 - 9.3.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - 9.3.3 If not, for what period of loss should the Claimant be compensated?
 - 9.3.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - 9.3.5 If so, should the Claimant's compensation be reduced? By how much?

- 9.3.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 9.3.7 Did the Respondent or the Claimant unreasonably fail to comply with it?
- 9.3.8 If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?
- 9.3.9 If the Claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
- 9.3.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
- 9.3.11 Does the statutory cap of fifty-two weeks' pay or £89,493 apply?
- 9.4 What basic award is payable to the Claimant, if any?
- 9.5 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?
- Wrongful dismissal / Notice pay
- 9.6 What was the Claimant's notice period?
- 9.7 Was the Claimant paid for that notice period?
- 9.8 If not, did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?
- Failure to provide a statement under s.1 Employment Rights Act 1996
- 9.9 Did the Claimant receive a written statement of the terms of his employment in accordance with the employer's duty under s.1 Employment Rights Act 1996 prior to the commencement of this claim?
- 9.10 If not, should the Tribunal award two or four weeks' pay if the claim of unfair dismissal or wrongful dismissal is well-founded?

Findings of Fact

10. On 29th October 2021, the Claimant was working with Mr. David Hammett. Mr. Hammett has worked for the Respondent since June 2021 as a general maintenance engineer. The Respondent's case is that the Claimant made various comments to Mr. Hammett whilst they were travelling together on that date in a works van and that the comments could be damaging to the business. Their case is that Mr. Hammett then told Mr. Matthew Ballard that the Claimant

had made these comments. Mr. Ballard was employed by the Respondent as a Maintenance and Project Manager until April 2022. The comments reported were that some tools that the Claimant had had stolen should have been replaced by the Managing Director of the Respondent company, Nathan McAlindon, and secondly that Mr. McAlindon was running the company into the ground so he would not pay suppliers and would start up a new company. For the reasons set out below, I find that the Claimant did not make the comments alleged by Mr. Hammett.

11. Although Mr. Hammett had only been employed by the Respondent for around five months, he and Mr. McAlindon had been friends for some 40 years.
12. On 29th October 2021, Mr. McAlindon was on holiday, returning to work in early November. After Mr. McAlindon's return to work, Mr. Hammett told him of the alleged comments made by the Claimant. He then wrote a statement to Mr. McAlindon (page 40) setting out his allegations. The statement is undated but begins "As discussed on 3rd November 2021..." so I find that it was made after this date.
13. After speaking with Mr. Hammett, Mr. McAlindon decided to carry out an investigation. There were two managers who could have conducted the investigation : Mr. Ballard and Claire Noakes. Mr. McAlindon chose Mr. Ballard to carry out an investigation of the allegations made by Mr. Hammett. Mr. Ballard and Mr. McAlindon had known each other for about seven years and were friends. Mr. McAlindon says he chose Mr. Ballard as he thought he would have more time than Ms. Noakes who worked 9am – 2.30 pm each day.
14. Mr. Ballard reported the result of investigation to Mr. McAlindon on 12 November 2021 (page 41). That report states "I have questioned the individual (Rob Benson) and also read the statement from Dave Hammett on the 11 November 2021 regarding the allegation...".
15. In evidence, Mr. Ballard stated that he was instructed by Mr. McAlindon to begin his investigation on 29th October 2021 and that he spoke with the Claimant on that date. This was contradicted by the evidence of Mr. McAlindon and the evidence of the Claimant. I find that Mr. Ballard's evidence as to the date and detail of the conversation with the Claimant is unreliable. The only time he spoke to the Claimant about this matter was on 11th November 2021.
16. During that conversation, the Claimant was asked if he had spoken to anyone about the company and its performance. The Claimant replied that he had not. That was the totality of the conversation. Mr. Ballard did not tell the Claimant that he was conducting an investigation or give any further details of the allegations. He took no notes contemporaneously or subsequently. He had known Mr. Hammett for seven years and his prior knowledge of Mr. Hammett caused him to prefer his account of the events of 29th October 2021 over the denial of the Claimant.
17. The only other person spoken to by Mr. Ballard as part of his investigation was Mr. Hammett. Mr. Ballard made no written record of the conversation he had with Mr. Hammett about the allegations.

18. In evidence, Mr. Ballard said he had left it to Mr. McAlindon to decide whether disciplinary proceedings should be brought but page 42 shows he stated “on the balance of probability advise that a disciplinary meeting should be carried out at this point.” The result of Mr. Ballard’s investigation was to recommend the matter should proceed to a disciplinary hearing.
19. The evidence of the Respondent’s witnesses, Mr. David Hammett, Mr. Matthew Ballard and Mr. Nathan McAlindon was contradictory in many respects. There was conflicting evidence on several matters including the date the investigation began and the detail of the comments allegedly made by the Claimant. The Claimant’s evidence on these matters was clear and consistent. He steadfastly maintained that he did not make any of the alleged comments to Mr. Hammett and that he was spoken to only once by Mr. Ballard on 11th November 2021. Where the evidence of the Claimant and that of the Respondent’s witnesses differed as to the van journey on 29th October and the investigation by Mr. Ballard. I prefer the evidence of the Claimant for the reasons I have given. I find therefore that the Claimant did not make any of the comments to Mr. Hammett as alleged. I also find that Mr. Ballard’s investigation did not begin on 29th October 2021 but at some point after 3rd November 2021 and that the only time he spoke with the Claimant was on 11th November 2021. On that date of 11th November, the Claimant was asked a single question as to whether he had spoken to anyone about the company and its performance. The Claimant replied that he had not.
20. After Mr. Ballard reported to Mr. McAlindon on 12th November, a letter was sent to the Claimant dated 16th November 2021 inviting him to a disciplinary hearing at 11am on 18th November 2021 (page 42-43). The letter stated:
- “ As you are aware, the business instructed Matthew Ballard to undertake an investigation into concerns we had about action you have taken which may have contributed towards a breach in a APM Nationwide Ltd’s policy and has the potential to cause significant, wider business risk to APM Nationwide Ltd. Matthew Ballard’s investigation on the 11th November 2021 concluded that he felt there were sufficient grounds for the matter to be escalated to a formal disciplinary hearing.
The purpose of the meeting is to discuss your conduct whilst working your contracted hours for APM Nationwide Ltd.
I have outlined my concern below.*
- *Defamation of APM Nationwide Ltd”*
21. A copy of the written statement from Mr. Hammett was enclosed and the letter advised that the disciplinary hearing would be conducted by Mr. McAlindon “*and Claire Noakes who will be in attendance as a witness on behalf of APM Nationwide Ltd and to take notes.*” No other documents were sent to the Claimant.
22. The letter did not refer to the consequences or sanctions that may be imposed and there was no reference to the possibility of dismissal. Mr. McAlindon accepted in evidence that the Claimant was not aware that he may be dismissed

23. The letter of 16th November was the first time the Claimant was aware of the allegations made against him by Mr. Hammett.
24. The Claimant attended the disciplinary hearing on 18th November. The notice of hearing letter (page 43) had advised him of his right to be accompanied to the hearing but he attended alone.
25. The notes of the hearing (pages 44 – 45) are brief and are not a verbatim account of what was said. They show that Mr. McAlindon explained the purpose of the meeting. He told the Claimant that he would read the statement made by Mr Hammett and “circumvent to the conversation being had with Matthew Ballard.” The Claimant was told that he would be given the opportunity to comment and then asked to confirm that he had spoken with Mr Ballard and to confirm his answer to the question Mr Ballard had asked. The claimant replied that he did not say what was being suggested.
26. During the course of the disciplinary hearing, Mr McAlindon confirmed there was no other evidence against the Claimant other than the statement of Mr Hammett. The Claimant was given an opportunity to ask further questions and asked about the process for raising a grievance. In answer to that question Mr. McAlindon explained the appeal process to the Claimant. The Claimant felt that Mr. McAlindon had already made up his mind to dismiss him whatever the Claimant said.
27. The hearing was adjourned. The notes at page 45 show an adjournment for 10 minutes and the meeting reconvened at 11:31. This was contested by Mr. McAlindon in evidence who said the adjournment was for 30 – 40 minutes. He did not offer an explanation as to why the notes at page 45 referred to a ten minute adjournment other than that the timing was wrong. The Claimant’s evidence accords with the documentary evidence at page 45. The only other person who could assist with evidence of the length of that adjournment was Claire Noakes. No evidence was produced from Ms. Noakes by the Respondent. I accept the evidence of the Claimant corroborated by the written note at page 45 and find that the hearing was adjourned for ten minutes for Mr. McAlindon to make his decision.
28. After the adjournment, Mr. McAlindon confirmed that he had considered the evidence and had made a decision to dismiss the Claimant due to defamation of the company. The Claimant asked what defamation of character meant and the notes record the explanation given by Mr. McAlindon.
29. A letter, confirming the dismissal and the appeals procedure and signed by Mr. McAlindon. was handed to the Claimant at the hearing (page 46). Mr. McAlindon’s witness statement did not refer to the time at which the letter was prepared but he gave oral evidence that he prepared the letter during the adjournment. This is disputed by the Claimant who says that the letter must have been written before the hearing given the length of the adjournment.
30. Mr. McAlindon’s witness statement, at paragraph 8, says that, during the hearing, he gained “*more than a reasonable belief that Robert Benson had indeed undertaken wilful acts that would be deemed to be defamation of the business with the intention of harming the business and after consideration of the*

information gained at the meeting, the decision was taken to dismiss Robert Benson on the grounds of gross misconduct.” In oral evidence, Mr. McAlindon said that the Claimant did not say a lot at the hearing. The Claimant did deny that he had made the comments alleged by Mr. Hammett (page 44) and he did ask whether Mr. McAlindon had any other evidence against him, to which Mr. McAlindon answered “no”.

31. None of the evidence produced by the Respondent shows that the Claimant said anything at the hearing which would cause Mr. McAlindon to form the belief described in paragraph 8 of his witness statement. He gave evidence that, ahead of the hearing, he had decided that he had no reason to disbelieve the statement of Mr. Hammett as he had known him for a number of years. It was Mr. McAlindon’s decision to proceed with the disciplinary hearing. Due to the evidence I heard and the length of the adjournment, I find on the balance of probabilities that Mr. McAlindon had decided the outcome of the hearing before it took place and prepared the letter in advance of the hearing.

32. The dismissal letter referred to the presence of Claire Noakes as a “witness on *behalf of APM Nationwide Ltd*” but there appears no dispute between the parties that she was present as a note-taker only. There is no evidence from her for the purpose of this hearing.

33. The dismissal letter stated:

“Your employment with APM Nationwide Ltd will be terminated with immediate effect due to the following –

- **Gross misconduct due to defamation of APM Nationwide Ltd.**

You are entitled to the right of appeal, which must be submitted in writing within the next 7 working days to Mr Paul MacAllister - Senior Property Manager.”

34. At the time of the Claimant’s dismissal, the Respondent did not have a disciplinary and grievance policy in place. The Respondent relied on the ACAS website and advice from a friend of Mr. McAlindon.

35. In his witness statement, Mr. McAlindon referred to an earlier incident in October 2021 when an unnamed employee had told him that the Claimant was unhappy with his salary and was intending to disclose his salary to clients and customers. This was not pursued by Mr. McAlindon at the time. He said this was because the company was busy and the employee had asked him not to pursue the matter. Mr. McAlindon conceded in evidence that when Mr. Hammett raised the allegations of 29th October 2021, the earlier allegation from the unnamed employee had “started a small fire underneath” so that when Mr. McAlindon heard from Mr. Hammett, he decided the allegation needed to be escalated. The earlier allegation from the unnamed employee was not raised with the Claimant before or at his disciplinary hearing. Mr. McAlindon denied it was unfair not to have raised it with the Claimant stating in evidence “I haven’t used it in any evidence apart from my statement.” The fact that it was referred to in his statement, some considerable time after the dismissal, causes me to conclude that it was in the mind of Mr. McAlindon when he took the decision to dismiss the Claimant.

36. Mr. McAlindon accepted that that he was not neutral as the allegations made by Mr. Hammett related to him and his wife personally. He disagreed that a neutral person should have made the decision to dismiss the Claimant. His evidence was that it would have been unfair to have another member of staff conducting the disciplinary hearing. He also stated that the only other person could have conducted the disciplinary hearing would have been his wife who he described as less detached and more emotionally involved.
37. In reaching his decision, Mr. McAlindon believed the statement of Mr. Hammett. There is a conflict of evidence as to whether Mr. McAlindon told the Claimant at the disciplinary hearing that he had no reason to disbelieve Mr. Hammett as they had been friends for over 40 years. This point is not in the notes of the hearing (page 44) but there is reference to "*Nathan highlighted the strong will behind DH statement.*" In evidence, Mr. McAlindon said he did not recall and did not accept that he said he had no reason to disbelieve Mr. Hammett because they had been friends for 40 years. On a balance of probability, I prefer the evidence of the Claimant that this statement was made during the disciplinary hearing. Mr. McAlindon's recollection was vague whereas the evidence of the Claimant was clear and supported by the early reference to the comment in his appeal letter of 18th November 2021 (page 47).
38. At the time of making the decision to dismiss the Claimant, apart from the allegation made by Mr. Hammett, there was no evidence that the Claimant had made any comments to other colleagues, customers, clients, suppliers or anyone else. There was no evidence that any damage or impact had been suffered by the respondent. The Claimant was not asked whether he had made any such statements and there was no evidence to suggest that any comments would be made in future. No-one else was interviewed to ask if the Claimant had made any comments to them.
39. Mr. McAlindon accepted that the Claimant had no history of lying and that he did not give any consideration to the Claimant's length of service nor his good disciplinary record in reaching the decision to dismiss. He believed it was appropriate to dismiss the Claimant for gross misconduct and that termination was the appropriate sanction.
40. The Claimant appealed the decision to dismiss by letter of 18th November 2021 (page 47). The appeal hearing was conducted by Mr. Paul McAllister on 24th November 2021. Mr. MacAllister is the brother-in-law of Mr. McAlindon. He works as a Senior Property Manager and, other than possibly one appeal about five years ago, had no experience of hearing appeals for his own company or the Respondent before the Claimant's appeal. He did however have experience of conducting disciplinary hearings as a manager in previous positions.
41. Prior to the appeal hearing, Mr. MacAllister read the statement of Mr. Hammett (page 40) and the notes of the disciplinary hearing (page 44 – 45) and the outcome letter (page 46). He also spoke with Mr. Hammett to ask him to talk Mr. MacAllister through Mr. Hammett's statement (page 40). Mr. MacAllister spoke with Mr. Ballard and Mr. McAlindon. He said he did that so he "*completely*

understood” what he needed to do and so that he *“didn't misinterpret any of the information.”* No written records were made of any of these conversations and the Claimant was not told of them because Mr. MacAllister did not consider that to be necessary as he believed the meetings were clarification for his purposes

42. The grounds of appeal set out in the letter of 18th November (page 47) were:

- *“You have not proved your case that I have done anything wrong at all much less anything that would constitute “gross misconduct.”*
- *You confirmed there was no further evidence obtained during an investigation which spanned 8 days which proved Mr. Hammett's assertion was any more credible than my assertion that I had not made the alleged statements. Mr. Hammett's statement is merely hearsay.*
- *The fact that you have known Mr. Hammett for over 40 years does not constitute acceptable “evidence” in a hearsay situation an in fact suggests that your opinion was biased and you should have recused yourself from this investigation as you were too close to the witness in question.”*

43. The letter went on to comment that as the appeal officer was Mr. McAlindon's brother-in-law, Mr Paul McAllister, the claimant did not expect his appeal to be *“any more unbiased.”*

44. The notes taken at the appeal hearing are at page 51. They do not record the length of the meeting. It was described by the Claimant as “brief”. Mr. MacAllister began by confirming to the Claimant that his relationship with Mr. McAlindon which have no bearing on the outcome of the appeal and the notes record that he did this due to the Claimant's concerns as stated in his letter of appeal. The notes at page 51 support the Claimant's evidence that Mr. MacAllister did not go through the points of appeal raised in the letter at page 47. Instead he asked the Claimant why the decision to terminate his employment was wrong and why he was appealing that decision. The Claimant was taken aback by this questioning as his grounds of appeal were set out in his letter of 18th November but he reiterated his points.

45. Mr. MacAllister's evidence was that the Claimant did not want to discuss anything further. The Claimant's evidence that he did revisit the reasons for his appeal are accepted and is supported by the notes of the hearing (page 51).

46. Mr. MacAllister gave evidence that he *“wouldn't say I didn't consider”* the Claimant's length of service. I found this reply to be evasive. No reference was made in the minutes or the outcome letter to consideration of length of service or consideration of the individual points of appeal. I find that Mr. MacAllister did not consider the detailed points of appeal, did not consider lesser sanctions and did not take account of the Claimant's length of service or good disciplinary record.

47. Mr. MacAllister misunderstood his role as the appeals officer. He believed that it was for the Claimant to produce further information to show why the decision was wrong and that it was not his role to revisit the making of the original decision. He felt he could not comment on issues because *“ I know Mr. McAlindon and Mr. Hammett but don't know Mr Benson.”*

48. An outcome letter was sent to the Claimant dated 24th November 2021 (page 52). No reasons are given in the letter for the decision to uphold the original decision to dismiss.
49. In December 2021, the Claimant requested a copy of his offer letter and terms and conditions of employment. By letter of 16th December 2021, the Respondent replied (page 56A) that it did not hold a copy of the Claimant's offer letter and that the Respondent never received a signed copy of the Claimant's terms and conditions from him. The Claimant's evidence, which was not challenged, was that he did not receive a copy of his terms and conditions (page 36 – 39) until after the proceedings were begun in the Tribunal. He was not given a written contract of employment nor written particulars of the terms of employment prior to the issue of proceedings.
50. After his dismissal, the Claimant sought alternative employment. This was difficult. The proximity of Christmas meant that temporary positions had already been filled and employment opportunities were scarce due to the adverse effect that the COVID-19 pandemic was still having.
51. The Claimant began working as a self-employed person in January 2022. He has advertised his business but has not received any direct bookings from customers to date. His main source of work is from a company called ENM Civils Ltd. but the work is not guaranteed and is often cancelled at short notice. ENM Civils Ltd. also periodically undertakes work for the Respondent. When this happens no work is available for the Claimant at the Respondent's insistence. He is also restricted as he does not drive.
52. The Claimant did not apply for benefits after his dismissal because he was looking for employment and did not believe that he would be eligible for benefits as his wife was working so the family had some income
53. At the time of his dismissal, the Claimant was paid £19,000 a year gross. His weekly gross earnings were £365.38 and his weekly net earnings were £318.88. The Respondent paid pension contributions of 2% of gross pay.
54. The Claimant has received a total of £10,332.00 income from his self-employment since the date of his dismissal.

The Law

Unfair Dismissal

55. Section 94 of the Employment Rights Act 1996 ("ERA") provides that employees have the right not to be unfairly dismissed. They can enforce that right by complaining to the Tribunal under section 111 ERA. The burden of proof lies with the employee to show that he was dismissed by the Respondent under section 95 (1) ERA. It is then for the employer to show what the reason for dismissal was and that it was one of the reasons set out in s.98 (1) or (2). Dismissal because of the employee's conduct is one of those reasons.

56. Section 98(4) ERA provides that, where the employer has established the dismissal was for one of the reasons set out in s.98 (1) or (2):
“the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case.”

57. Applying *Iceland Frozen Foods Limited v Jones* [1982] IRLR 439, the starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer’s conduct, not simply whether it considers the dismissal to be fair. In many cases there is a band of reasonable responses to the employee’s conduct within which one employer might take one view, and another might quite reasonably take another. The tribunal must not substitute its own view. Instead, its function is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band, it is unfair.

58. The duty of the Tribunal where an employee has been dismissed because the employer suspects or believes that he has committed an act of misconduct is expressed by Arnold J., in the case of *British Home Stores Ltd v Burchell* [1978] IRLR 379, 380, as follows:

“What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question ... entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time ... First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief and ... thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate on the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.”

The burden of proof is neutral in this regard.

The case of *J Sainsbury plc v Hitt* [2003] IRLR 23 held that when considering whether an employee has been unfairly dismissed for alleged misconduct, the 'band of reasonable responses' test applies as much to the question of whether the employer's investigation into the suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss the employee for a conduct reason.

59. A dismissal may be unfair if there has been a breach of procedure which the tribunal considers as sufficient to render the decision to dismiss unreasonable. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole (Taylor v OCS Group Ltd [2006] EWCA Civ 702) and must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. The case of Adeshina v St George's University Hospitals NHS Foundation Trust and Ors. [2017] EWCA Civ 257 held that a sufficiently thorough re-hearing on appeal can cure earlier shortcomings.

Compensation

60. The provisions relating to the basic award for unfair dismissal are contained in ERA sections 119 to 122 and in section 126. Such an award is calculated using a formula which provides for the payment of a tax-free sum based on the number of full years' service the employee has before dismissal. The employee receives half a week, a week's or a week and a half's gross pay for each full year of service dependent on their age in that year. The amount of service that can be taken into account is limited to 20 years so the highest possible multiple (which would be age dependent) is 30 weeks' pay. A week's pay is subject to a statutory maximum (s.227 ERA) which, at the time of the Claimant's dismissal stood at £544.
61. The principles relating to the compensatory award begin in s.123 (1) ERA which states that the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. Section 123 (2) ERA provides that the loss shall be taken to include—
- (a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
 - (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.
62. A compensatory award is intended to compensate for loss actually suffered and not to penalise the employer for its actions : Optimum Group Services plc v Muir [2013] IRLR 339. The relevant questions are:
- whether the loss was occasioned or caused by the dismissal;
 - whether it is attributable to the conduct of the employer; and
 - whether it is just and equitable to award compensation.
63. Permissible heads of loss include: past and future loss of earnings, loss of pension and fringe benefits, expenses incurred in looking for other work, and compensation for loss of statutory rights and accrued statutory notice. This last head of loss reflects the fact that the dismissed employee will have to work for 2 years in new employment to reacquire the right not to be unfairly dismissed and will have to "re-earn" their minimum statutory notice period; the award is generally for a conventional amount somewhere in the region of £350 - £500.

64. In determining the amount of an employee's loss, the Tribunal must decide what would have happened but for the unfair dismissal. The probable consequence in some cases would have been no dismissal but for the unfairness and in others the probability is that the employee would have been dismissed in any event. In the former case losses will be open-ended (subject to it being just and equitable to award them and the statutory cap discussed below); in the latter losses will be limited to the period in which a fair process would have been completed and, in some instances, may be nothing at all (see *Credit Agricole Corporate and Investment Bank v Wardle* [2011] IRLR 604). Inevitably, as the assessment is of events which did not occur, it requires the Tribunal to exercise its judgment based on the inferences it is reasonable to draw from the primary facts.

The relevance of Codes of Practice

65. Under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 an award of compensation for unfair dismissal can be increased by up to 25% if the employer has unreasonably failed to comply with a relevant Code of Practice issued by ACAS or the Secretary of State (there is a corresponding power to reduce awards by up to 25% where an employee unreasonably failed to comply with a relevant Code). This power to increase or reduce applies only to the Compensatory Award for unfair dismissal and not to the Basic Award (see ERA sections 118 and 124A).

Deductions

66. If there is a defect of procedure sufficient to render dismissal unfair, the tribunal must then, pursuant to the case of *Polkey v A E Dayton Services Ltd* [1998] ICR 142, determine whether and, if so, to what degree of likelihood the employee would still have been fairly dismissed in any event had a proper procedure been followed. If there was a chance that the employee would have been dismissed fairly in any event had a fair procedure been followed, then a reduction may be made to any compensatory award. Tribunals are required to take a common-sense approach when assessing whether a Polkey reduction is appropriate and the amount of any such reduction (*Software 2000 Limited v Andrews* [2007] IRLR 568).

67. The Tribunal can reduce a basic award, under s.122(2) ERA when it is just and equitable to do so on the ground of any conduct on the employee's part that occurred prior to the dismissal (or prior to notice being given). A Tribunal is entitled to consider any conduct of the employee in this context and not simply matters known at the time of dismissal but the employee must in some sense be culpable or blameworthy in respect of the conduct to justify a deduction (see *Langston v Department for Business Enterprise and Regulatory Reform* [2009] UKEAT/0534).

68. In addition, under s.123 (6) ERA where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the employee, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. The section requires the Tribunal to decide whether the employee contributed to her own dismissal, not simply to

its unfairness. The employee's conduct need not be the sole, principal or even the main cause of her dismissal as the words "to any extent" are deliberately broad (see *Carmelli Bakeries Limited v Benali* [2012] UKEAT/0616). That said, the conduct must be "culpable or blameworthy" and not simply some matter of personality or disposition or unhelpfulness on the part of the employee in dealing with the disciplinary process in which she has become involved (see *Bell v The Governing Body of Grampian Primary School* [2007] All ER (D) 148).

69. An employee who has been unfairly dismissed is under the same duty to mitigate her losses as all claimants in any civil proceedings. The duty to mitigate only arises after the dismissal and it requires the employee to take reasonable (and not all possible) steps to reduce her losses to the lowest reasonable amount. This is a question of fact and the burden of proving a failure by a claimant to mitigate lies on the respondent (see *Wilding v British Telecommunications plc* [2002] ICR 79 and *Cooper Contracting Limited v Lindsey* [2015] UKEAT/0184).

Wrongful Dismissal (dismissal in breach of contract)

70. An employer will be in breach of contract if they terminate an employee's contract without the contractual notice to which the employee is entitled, unless the employee has committed a fundamental breach of contract which would entitle the employer to dismiss without notice.
71. Section 86 (1) ERA provides that the minimum periods of notice is not less than one week's notice for each year of continuous employment if the period of continuous employment is two years or more but less than twelve years.
72. The aim of damages for breach of contract is to put the claimant in the position they would have been in had the contract been performed in accordance with its terms.

Requirement to provide written statement of particulars of employment

73. Section 1 ERA requires an employer to give a worker a written statement of particulars of employment not later than the beginning of the employment. Where an employer fails to comply with that requirement, under s.38 of the Employment Act 2002 if the Tribunal makes an award in relation to a claim (including claims of unfair and wrongful dismissal) and, when the proceedings were begun, the employer was in breach of its duty under s. 1 ERA, the tribunal must increase the award by an amount equal to two weeks gross pay and may, if it considers it just and equitable in all the circumstances, increase the award by an amount equal to four weeks' gross pay. This does not apply if there are exceptional circumstances which would make the increase unjust or inequitable.

Conclusions

74. It was not disputed that the Claimant was dismissed, without notice, on 18th November 2021 nor that he was eligible to bring a claim of unfair dismissal.

75. The Respondent relies on the potentially fair reason of conduct, relying on the allegation made by Mr. Hammett that the Claimant made comments about the Respondent and its Managing Director, Mr. McAlindon.
76. I have made a finding of fact that the allegation was untrue : that the Claimant did not make those comments. Nevertheless, the issue, in relation to unfair dismissal, is whether at the time of the decision to dismiss, the Respondent had an honest belief in the misconduct of the Claimant, whether there were reasonable grounds for that belief and whether it was formed after a reasonable investigation. I remind myself that the 'band of reasonable responses' test applies as much to the question of whether the employer's investigation into the suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss the employee for a conduct reason.
77. I find that Mr. McAlindon, as the dismissing officer, did on a balance of probability, have a genuine belief that the Claimant had made the comments alleged. I find however that this was not a reasonable belief formed after a reasonable investigation in all the circumstances. Mr. McAlindon's belief was fuelled by the earlier allegation made against the Claimant by the unnamed employee. As this allegation was untested and the Claimant had not had an opportunity to comment on it, it fell outside the band of reasonable response for Mr. McAlindon to have taken that allegation into account.
78. Furthermore, the allegation of 29th October was made by a personal friend of Mr. McAlindon, Mr. Hammett. The decision was then taken to entrust the investigation to another personal friend, Mr. Ballard despite another manager, Ms. Noakes, being available. The investigation carried out by Mr. Ballard was minimal. He approached the Claimant and, without context or explanation, asked him if he had spoken to anyone about the company and its performance. The Claimant replied that he had not. Apart from an oral conversation with Mr. Hammett, this was the totality of the investigation. Mr. Ballard made no other enquiries.
79. I remind myself that the correct consideration is whether the extent of the investigation, in the circumstances, fell within the band of reasonable responses. I find that it does not. The decision to ask Mr. Ballard to investigate may have fallen within the band of reasonable responses having regard to the size of the company and the number of managers available. However, the limited extent of the investigation and the decision that, at the end of it, there was sufficient evidence to proceed to a disciplinary hearing, fell outside that band of responses that might come from a reasonable employer.
80. The Claimant was not given an opportunity to comment on the allegations or given any context to the single question he was asked by Mr. Ballard. At the end of the investigation therefore, Mr. Ballard had the statement of Mr. Hammett and the denial of the Claimant. An employer acting within a band of reasonable responses would have taken the decision to make further enquiries and/or to speak further to the Claimant before determining that there was sufficient information to recommend a disciplinary hearing. This was particularly so as Mr. Hammett had worked for the Respondent for some five months whereas the

Claimant had three years of service with a clean disciplinary record. Aside of the personal friendship between Mr. Hammett and Mr. Ballard, there was no reason to prefer one uncorroborated account over another. A reasonable employer would have recognised this and made further investigations or determined to take no further action.

81. The inadequacies of the investigation were compounded by the decision that Mr. McAlindon was to conduct the disciplinary hearing. He conceded that he was not neutral but did not accept that a neutral person should have been appointed. His evidence that his wife was the only alternative officer, was incorrect, Ms. Noakes was a manager and clearly available at the time of the hearing as she attended as a note-taker. No evidence was given that she would not have been a suitable alternative hearing officer.
82. The comments under investigation were about Mr. McAlindon and he also had in his mind, but not shared with the Claimant, the earlier allegation made against the Claimant. A reasonable employer would not have appointed someone so closely involved with the allegations as the disciplinary officer, particularly when alternative personnel were available, such as Ms. Noakes. Equally, it fell outside the band of reasonable responses to stand as the disciplinary hearing officer when the account of Mr. Hammett was untested and he was a personal and longstanding friend of Mr. McAlindon.
83. In notifying the Claimant of the disciplinary hearing, the Respondent took steps to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures as notice of the hearing was given in writing, with some disclosure of evidence in the form of Mr. Hammett's statement and the Claimant was told of his right to be accompanied.
84. However, there was no indication given of the possible consequences and sanctions and no warning that the hearing could result in dismissal. The Claimant had less than two days to prepare for the hearing and started from a position that he had no knowledge of any allegations against him until he received the invitation to the disciplinary hearing on 16th November.
85. During the course of the hearing, the Respondent took steps to comply with the ACAS Code in explaining the complaint and reading Mr. Hammett's statement. The Claimant was given the opportunity to ask questions and give his denial of the allegations. Mr. McAlindon was of the view that the Claimant did not say much but beyond denying the allegation and asking if there was any further evidence, there was not much he could add. As he said, he could not produce evidence, beyond his own word, to show he did not say something.
86. Mr. McAlindon had decided the outcome of the hearing before it began and prepared the dismissal letter accordingly. The evidence of what happened at the hearing simply does not support his evidence that he made his decision as a result of the information obtained during the hearing. The adjournment of ten minutes was too short to properly consider all the issues, reach a reasoned decision and prepare the dismissal letter. The outcome was pre-determined: he had decided that the allegation was true, that it amounted to gross misconduct and that dismissal must follow. He conceded he gave no consideration to any

other sanction and no consideration to the Claimant's length of service and good disciplinary record. The basis upon which he made his decision and his failure to consider these matters took his decision-making outside the band of reasonable responses.

87. The Respondent's outcome letter followed the ACAS Code of Practice in offering the Claimant an appeal.

88. The Claimant's letter of appeal identified specific concerns that he had, namely:

- *"You have not proved your case that I have done anything wrong at all much less anything that would constitute "gross misconduct."*
- *You confirmed there was no further evidence obtained during an investigation which spanned 8 days which proved Mr. Hammett's assertion was any more credible than my assertion that I had not made the alleged statements. Mr. Hammett's statement is merely hearsay.*
- *The fact that you have known Mr. Hammett for over 40 years does not constitute acceptable "evidence" in a hearsay situation and in fact suggests that your opinion was biased and you should have recused yourself from this investigation as you were too close to the witness in question."*

He also expressed the belief that the appeal might be biased as the appeals officer, Mr. MacAllister is Mr. McAlindon's brother in law.

89. At the appeal, Mr. MacAllister reassured the Claimant that his relationship with Mr. McAlindon would not have a bearing on the outcome and that the appeal would be conducted fairly. This was not the case as Mr. MacAllister failed to disclose that he had met with each of Mr. Hammett, Mr. Ballard and Mr. McAlindon before the appeal hearing. He was influenced by the fact that he knew each of these three men but did not know the Claimant. Mr. MacAllister did not conduct the appeal hearing impartially and wrongly decided that the purpose of the appeal was for the Claimant to produce further information to show why the decision was wrong and that it was not his role to revisit the making of the original decision. Mr. MacAllister did not go through the points of appeal raised in the letter at page 47 with the Claimant. I find that he concluded the appeal on the basis that the Claimant had done nothing to persuade him that the original decision was wrong. He did not consider the detailed points of appeal, did not consider lesser sanctions and did not take account of the Claimant's length of service or good disciplinary record. He gave no reasons for his decision to uphold the original decision to dismiss. The flaws identified in relation to the disciplinary hearing were not corrected on appeal.

90. The reasons given above lead me to the conclusion that the dismissal of the Claimant was both substantively and procedurally unfair and fell outside the range of responses of a reasonable employer. The investigation, disciplinary and appeal processes were flawed and tainted by the close personal relationship between each of the Respondent's witnesses. The Respondent had no disciplinary policy in place but determined, without any reason other than personal friendship, that the allegations were true when there was a clear conflict between the two accounts available and an inadequate investigation. From there, there was an immediate decision that the Claimant was guilty and that instant

dismissal was the inevitable outcome. The facts showed a pattern of decision-making throughout that fell outside the range of responses of a reasonable employer. The complaint of unfair dismissal is well-founded and upheld.

91. I have made a finding of fact that the allegation against the Claimant was untrue. The Claimant was not guilty of gross misconduct and the summary dismissal was in breach of contract. The Claimant's claim of wrongful dismissal is well-founded and succeeds.
92. The Respondent's representative did not make any submissions relating to a Polkey deduction. As I have to determine what compensation is just and equitable, I have considered the chance that the Claimant would have been fairly dismissed in any event, if a fair procedure had been followed, as zero.
93. The Respondent's representative did submit that the Claimant's conduct contributed to his dismissal, arguing he made little attempt to state his case. There is no dispute that the Claimant denied the allegation at the disciplinary hearing and asked whether there was any further evidence. Beyond this, there was nothing else he could do. I find that the Claimant's conduct did not contribute to his dismissal. There shall be no deduction to any basic or compensatory award for contributory fault.
94. In relation to the remedy for the claim of unfair dismissal, the Claimant did not seek reinstatement or re-engagement. The basic award is calculated on the basis that he was employed for three years and was aged 26 at the date of dismissal. His gross weekly pay was £365.38 resulting in a basic award of £1096.14.
95. The Respondent submits that the Claimant failed to mitigate his losses after his dismissal by not claiming benefits, not doing enough to look for work and misrepresenting the amount of work he has done as a self-employed person. I remind myself that the burden is on the Respondent to prove a failure to mitigate. No evidence was produced to the Tribunal to discharge this burden : there was no evidence to show the Claimant was eligible for benefits, no evidence to prove available jobs and no evidence to substantiate the allegation that he was misrepresenting the amount of money earned from his self-employment. I am satisfied that the Claimant did take reasonable steps to mitigate his loss in seeking alternative employment and then setting up his business. It is just and equitable to make a compensatory award in the sum of £6949.76 representing 52 weeks net pay of £318.88, £380 pension contributions and £320 for loss of statutory rights. This totals £17,281.76 from which £10, 332 has been deducted as the Claimant's earnings since the date of dismissal.
96. I have made findings of fact that the Respondent did endeavour to follow aspects of the ACAS Code of Disciplinary and Grievance Procedures but my overwhelming impression from the evidence was that this was approached as a "tick box" exercise. The fundamental aspects of impartiality and fairness were not reflected in the investigation, the disciplinary hearing or the appeal process for the reasons I have given. I therefore consider an uplift of 20% to be appropriate. The amount of the uplift applied to the compensatory award is £1389.52.
97. The Respondent did not provide the Claimant with any written document setting out the detail required by s.1 ERA until after these proceedings had commenced.

The Claimant has succeeded in his claim of unfair dismissal. He was without a written statement of the terms of his employment for over three years and it is just and equitable to award an amount equal to four weeks' gross pay for this failure in the sum of £1461.52.

Employment Judge S. Evans

Date: 1 May 2023

Sent to the parties on

5 May 2023

For the tribunal office