EMPLOYMENT TRIBUNALS

Claimant: Mr A Calvert

Respondent: John Steward Transport Limited

Heard at: **London South (via CVP)** **On:** **3 August 2023**

Before: **Employment Judge Varnam**

Representation
Claimant: In person
Respondent: Mr S Hoyle, consultant

JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.

2. The Respondent breached the *ACAS Code of Practice on Disciplinary and Grievance Procedures*, and, pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, the Tribunal considers it just and equitable to increase the Claimant's compensatory award by 10%.

3. The Respondent breached its duty to provide the Claimant with a statement of main terms and conditions, and the Tribunal awards the sum of two weeks' pay, pursuant to section 38 of the Employment Act 2002.

4. A reduction of 25% is made to both the basic and compensatory awards to reflect contributory fault by the Claimant.

5. The Respondent is ordered to pay the total sum of **£10,090.15** to the Claimant. This sum comprises:

    (1) Basic Award: £3,211.88.

    (2) Compensatory Award: £6,878.27.

6. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply. Pursuant to regulation 4 of the said regulations, it is certified that:

    (1) The total monetary award is £10,090.15.

    (2) The amount of the prescribed element is £5,099.35.

(3) The period to which the prescribed element is applicable is 11 October 2022 to 14 February 2023.

(4) The amount by which the total monetary award exceeds the prescribed element is £4,990.80.

The attached Recoupment Annex explains the operation of the Recoupment Regulations.

REASONS

Introduction

1. Following a hearing on 3 August 2023, I gave judgment in favour of the Claimant in the above terms. As it is entitled to, the Respondent orally requested written reasons at the conclusion of the hearing. These are hereby provided.

2. At the outset, I wish to apologise to both parties for the delay that has occurred in issuing this judgment and reasons. In broad terms, this derives from my own substantial workload, but I appreciate that both parties have faced a lengthy delay in receiving this judgment.

Outline Facts

3. The Respondent is a haulage company. It employs around 35 drivers, as well as several managers and various other staff. It is not a large company, but neither is it an extremely small one. Its eponymous director is Mr John Steward.

4. The Claimant was employed by the Respondent as an HGV driver between 1 March 2017 and 11 October 2022. A key dispute between the parties is whether the Claimant's employment ended by dismissal or resignation.

5. The Claimant commenced ACAS early conciliation on 20 December 2022. This concluded on 19 January 2023, and he issued his ET1 on 23 January 2023. There is no dispute that the claim was brought in time. The Respondent subsequently issued a timely ET3.

Procedural Matters

6. On 6 February 2023 the Tribunal gave the parties notice of today's hearing, and made case management directions. These directions provided that documents relevant to the case should be disclosed by 20 March 2023, and that witness statements should be exchanged by 17 April 2023. Both parties to some extent failed to comply with those, although I did not conclude that these acts of non-compliance imperilled the fairness of the hearing. In particular:

(1) The Claimant provided disclosure, but did not produce a witness statement. He had, however, set out his account of events in section 8.2 of his ET1, and I permitted him to give evidence with section 8.2 standing as his evidence-in-chief. Given that the core factual issues were relatively narrow, I did not consider that the Respondent was disadvantages by this, and Mr Hoyle was indeed able to fully cross-examine the Claimant.

(2) The Respondent provided some documents in time, but in the week of the hearing produced a bundle, which included around six documents that had not previously been disclosed. These included in particular the letters summarised at paragraph 10 below. I did not consider that there was material prejudice to the Claimant from admitting these documents, to which he was able to respond. However, I did bear in mind that the Claimant might have been able to mount a fuller response to these documents had he seen them sooner, and had the documents proved more substantially relevant than I found them to be, this might have affected the weight that I could place on them.

(3) The Respondent also produced three witness statements, which I understood were each written two or three days before the hearing. They are each only one page long, and I admitted them, being satisfied that the Claimant was in a position to address the points that they raised.

7. One of the witness statements from the Respondent was produced in the name of Mr Mathew Wilkins, the Respondent's compliance manager. As is set out below, Mr Wilkins was an important witness, but he did not attend the hearing because, as I understood it, he was on holiday. The statement in Mr Wilkins' name is unsigned, and does not bear a statement confirming that the facts within it are true. These factors alone rendered it very difficult for me to be satisfied that Mr Wilkins (i) endorsed the statement, and (ii) did so understanding the importance of accuracy in such a statement. Besides the absence of a signature or statement of truth, I was conscious that it appeared to have been produced very recently, and that both of the witnesses who gave evidence on behalf of the Respondent had some difficulty remembering all the details relevant to their evidence. It was therefore quite possible that had Mr Wilkins given oral evidence similar limitations of recollection would have been apparent, which might have meant that certain aspects of his account proved less clear or emphatic at the conclusion of the evidence than they were on paper. As the Claimant was prevented from cross-examining Mr Wilkins, I had no way of knowing whether this would prove to be the case or not, but the combination of the above factors meant that I gave little weight to the statement in Mr Wilkins' name.

8. I heard oral evidence from the Claimant on his own behalf, and on behalf of the Respondent from Mr Steve Cole, workshop manager, and Mr John Steward, director. I am grateful to all witnesses for their assistance. By agreement with the parties, I heard evidence at the same time on both liability and remedy. This seemed sensible, given that Mr Hoyle confirmed that he had only a limited number of questions relating to remedy, and it was likely to be quickest and simplest for those to be asked alongside cross-examination on liability issues.

Findings of Fact

9. As I have observed, the Claimant was employed by the Respondent as an HGV driver from 1 March 2017. An issue between the parties was whether the Claimant was ever provided with a written statement of the terms and conditions of his employment. The Claimant has consistently denied that he was. In his evidence, Mr Steward said that he believed that the Claimant had been provided with a written contract of employment. However, no copy of the contract was produced by the Respondent, which should have been in a position to produce the contract, if it existed. Nor was I shown a template of the kind of contract that was said to have been given. Moreover, Mr Steward confirmed that he himself would not have been responsible for issuing contracts, and the person who would have been was not called to give evidence. As such, I considered that there was little in the way of direct evidence to gainsay the Claimant's clear denial that he received any statement of terms and conditions, and I accordingly accepted the Claimant's account that nothing compliant with section 1 of the **Employment Rights Act 1996** was provided to him.

10. In his evidence, Mr Steward characterised the Claimant as a good worker, albeit one who (as Mr Steward evocatively put it) 'had difficulty keeping eight corners on a lorry'. However, during the hearing the Respondent relied on three letters, which were said to show that the Claimant was an employee who regularly disregarded health and safety and who had substantial difficulties controlling his temper. Those letters were as follows:

    (1) A letter dated 28 September 2018, addressed to the Claimant from the then compliance manager, Mr Roy Bage, relating to an incident where the Claimant received an on-the-spot fine from the police as a result of driving with an unsecure load. The letter is unclear as to whether it imposes any disciplinary sanction – it initially says that a written warning is being given, but goes on to say that the incident will be investigated and disciplinary action up to dismissal may follow. I was not shown anything to suggest that further action was taken.

    (2) A letter dated 15 October 2021, addressed to the Claimant from Mr Wilkins, giving the Claimant a verbal warning (albeit one apparently provided in writing) in respect of various occasions when he had driven for longer than was permitted without taking a rest break.

    (3) A letter dated 7 April 2022, addressed to the Claimant from Mr Wilkins, giving the Claimant a written warning in respect on an incident in which it appears that the Claimant, having been cut up by a middle-aged woman driving a Ford Focus, pursued the Ford Focus in his lorry. When the Ford Focus had to stop in traffic, the Claimant left his vehicle, and (on his own admission) berated the driver through her window. The letter also alleges that he kicked the Ford Focus.

11. Mr Hoyle cross-examined the Claimant on the content of these letters. The Claimant said that he had not received any of these letters, and he pointed out that they were all sent to an old address of his. However, he did not dispute that the incidents described occurred, albeit that he did not accept

that they showed a blasé attitude to health and safety. As to the first two incidents, he accepted that they had happened, but said, in respect of the first, that he had raised a concern about the security of the load on his lorry, and that the Respondent had nonetheless sent him out, but had subsequently paid the fine that he received. As to the second incident, he said that he was very busy, and that the Respondent's drivers regularly exceeded their maximum hours without a break. As regards the third incident, he accepted the account given in the letter, save that he denied kicking the Ford Focus.

12. In resolving the key issues in this case, I drew little assistance from these incidents. As is set out below, the most fundamental question that I must resolve in this case is whether the Claimant resigned or was dismissed. The matters in the letters have little relevance to that. Nor, in my view, do these previous incidents, which were dealt with at the time, have any material relevance to questions such as the fairness of any dismissal, or contributory fault.

13. I add that I do not accept that the first two incidents in the letters, being two incidents in the course of 5.5 years of employment, indicate that the Claimant acted with general disregard to health and safety, particularly in light of the Claimant's explanations.

14. The incident with the woman in the Ford Focus was concerning. Had the Respondent dismissed the Claimant because of this, then any unfair dismissal case that might have ensued might not have been difficult for the Respondent to defend. However, the Respondent did not dismiss, or even issue a final written warning. I do not consider that the incident has any direct bearing on the key issues in this case – at most, it shows me that the Claimant can in some cases become very angry, which in my view was established in any event by the evidence of both the Claimant and Mr Cole, on which I touch below.

15. Before turning to deal with the events that resulted in the termination of the Claimant's employment, I must give some more detail about the vehicles that the Claimant and his colleagues drove. Each of the lorries had a crane on it, for use in moving large numbers of bricks and other materials. I accepted the Claimant's evidence that his job involved using both the lorry and the crane.

16. There were two types of crane. The type that was affixed to the lorry that the Claimant routinely drove was described as manually controlled, and I was informed that it operated with a series of multiple levers. Some other lorries operated with what was described as a remote-controlled crane. These operated with fewer levers, and could be controlled using a combination of hand-and-foot controls. The full extent of the differences between them was not extensively explored before me, but I accept the Claimant's evidence that the differences were substantial.

17. The Claimant was qualified to operate both manually-controlled and remote-controlled cranes, and in February 2021 he passed a refresher course using a remote-controlled crane. But he told me that he did not in practice ever use a remote-controlled crane. In his evidence, Mr Steward said that the

Claimant had on occasions used lorries equipped with remote-controlled cranes, most recently in August 2022. However, this evidence was put forward late in the day, and was unsupported by documentary evidence. Given that the Claimant could be expected to know what sort of cranes he operated, I accepted his evidence on this point.

18. The Claimant also told me that he was concerned about using remote-controlled cranes, particularly given his inexperience with them and the fact that at around the time he passed the refresher course in February 2021, he was asked to use a remote-controlled crane in the Respondent's yard, and dropped a large number of bricks while doing so. I found that the Claimant's concerns were genuine and reasonable. Equally, from the Respondent's point of view, it was reasonable to consider that the Claimant was qualified to use both types of crane, and could accordingly be expected to do so.

19. On 11 October 2022, the Claimant arrived at the Respondent's yard at 7am. The lorry that he usually drove, which was fitted with a manually-controlled crane, had developed a fault affecting the crane. It appears that this fault had been known about for around two weeks, that a replacement part was ready, and that the part was about to be fitted, such that the crane (and therefore the lorry) was unavailable.

20. One of the Respondent's mechanics was working on the Claimant's lorry. The Claimant was told by the mechanic that the work required to his lorry would be a one-hour job. I accept that, as Mr Cole explained in his evidence, mechanics can sometimes underestimate the length of time required for a job; this is simple commonsense. Nonetheless, it appears that the work required to the Claimant's vehicle was not substantial, and that the fault itself was not major.

21. Mr Cole, the Respondent's workshop manager, arrived at the yard at around 7.40am. The Claimant went to see Mr Cole in his office, to explain the issue with the Claimant's lorry. It appears that at that stage the communications between the Claimant and Mr Cole were civil. Mr Cole told the Claimant to wait, while he looked into the matter.

22. The Claimant and Mr Cole were in part agreed as to what happened thereafter, but there were also some inconsistencies between their accounts. Where there were inconsistencies, I have in general preferred the Claimant's evidence, for the following reasons:

    (1) The Claimant has been consistent and very clear in his account. The Claimant's account was first set out in a letter dated 5 December 2022. It has not materially altered since then, nor was the Claimant's evidence in the hearing before me materially different. I also note that the Claimant's letter of 5 December 2022, in which he first set out his account, postdated the events in question by only two months. As such, while it was not entirely contemporaneous, it was written fairly close to the events in question, when memories would have been fresh. The Claimant then set out his account again in his claim form in January 2023.

(2) By contrast, Mr Cole's account was written, as I understand it, three days before the hearing (i.e. on 31 July 2023). By this time, around 9.5 months had passed since the events of 11 October 2022. This was a considerable period, and I must have regard to the fact that memories do fade and become less reliable over such a period.

(3) During the course of his cross-examination, it appeared that Mr Cole simply did not remember and could not be sure about the precise events of 11 October 2022. This may well reflect the lack of any contemporaneous or near-contemporaneous record made by him, and the fact that, in the absence of any such record, he was attempting to remember things that had happened many months before. To give some examples in respect of matters which will be addressed more fully below, Mr Cole was unable to remember one way or the other whether (i) the Claimant had mentioned concerns about the crane on the Claimant's vehicle, or (ii) what he (Mr Cole) had later said to Mr Steward about the reasons for the Claimant's concerns. Mr Cole was also unsure whether he had asked the Claimant to hit him (something that the Claimant alleged was said six or seven times), although he thought that he might have said this once.

I should say that I do not think that Mr Cole was making any effort to mislead me about the events of 11 October 2022, but I am satisfied that his recollection of those events was considerably poorer than the Claimant's. In the course of his evidence, Mr Cole explained that he worked in a busy and stressful job, and that he hadn't realised until shortly before the hearing that he would be required to give an account to the Tribunal. It is, in my view, understandable that Mr Cole should have a less complete recollection than the Claimant, who, like many people who come before the Tribunal as both parties and witnesses in their own claim, I would anticipate will have been regularly reliving the events giving rise to the claim.

23. Having regard to the matters set out in the preceding paragraph, I accept the Claimant's evidence that on the morning of 11 October 2022, Mr Cole came into the Respondent's workshop, and fairly brusquely told the Claimant to drive a lorry normally used by one of the Claimant's colleagues named Lewis. I also accept that Mr Cole probably threw the key to Lewis's lorry at the Claimant, although I note Mr Cole's denial that he would normally act in that way.

24. The Claimant did not want to drive Lewis's vehicle. This was for two reasons. First, the Claimant was concerned that Lewis's vehicle was unsafe. The Claimant seems to have based this view on the fact that Lewis's vehicle was of the same make as the Claimant's own vehicle, with which he had experienced the problems set out above. Moreover, Lewis had himself told the Claimant about problems that he had experienced, similar to those experienced by the Claimant with his own lorry.

25. In cross-examination, the Claimant accepted that he had no evidence of extant problems with Lewis's lorry, and also that he had not carried out a pre-use check, of the kind which would normally be conducted to see where a vehicle was ready to be driven before using it. Accordingly, I do not regard

the Claimant's concerns derived simply from the fact that the vehicle was Lewis's vehicle, and was of the same kind that the Claimant himself ordinarily drove, as being reasonable. In order for such concerns to be reasonable, I would expect that they would be based on an assessment or inspection of the particular vehicle on the occasion on which it was to be driven, and no such inspection or assessment had been carried out.

26. The Claimant was also unhappy with the fact that Lewis's vehicle was equipped with a remote-controlled, rather than a manually-controlled, crane. As is set out above, the Claimant was qualified to use a remote-controlled crane, but his experience in practice was overwhelmingly with manually-controlled cranes. As I have already said, in my view the Claimant's concerns about using a remote-controlled crane were understandable and reasonable from his point of view. It follows that I consider that the Claimant was unreasonably concerned about the idea that there was particular lack of safety affecting Lewis's lorry, but was reasonably concerned about driving a lorry with a remote-controlled crane.

27. I accept that the two reasons identified above were genuinely the reasons for the Claimant's reluctance to use Lewis's vehicle. I also accept that the Claimant's told Mr Cole of these reasons when Mr Cole asked him to use Lewis's vehicle. There would be no reason for the Claimant to refrain from stating these reasons. I also note that there was confusion on the part of the Respondent's witnesses as to what was the Claimant's stated reason for not wishing to use Lewis's vehicle. I come back to the details of this confusion, but the existence of this confusion does lead me to doubt the overall reliability of the Respondent's evidence on this point.

28. The parties agreed that, following the discussion in which the Claimant informed Mr Cole of the problems with his own vehicle and Mr Cole asked the Claimant to drive Lewis's vehicle, a confrontation between the Claimant and Mr Cole occurred in Mr Cole's office. For the reasons set out at paragraph 22 above, I again accept the Claimant's account as to what occurred during this confrontation, where his account differs from Mr Cole's.

29. The Claimant's account, set out in his ET1, was as follows:

> *I went into the office, and [Mr Cole] started to threaten me that he would hit me, and I said "If you hit me, I will knock you out". [Mr Cole] said "Hit me!" about 6-7 times. Despite I wanted to, I did not, as I knew that is straight dismissal. Mat (transport manager) and Freddie (truck mechanic) split us up, as we were arguing.*

30. I accept that that amounts to an accurate summary of events. These events described did not reflect well on either Mr Cole or the Claimant. Mr Cole should have known better, as a manager. But the Claimant also contributed to the situation. In particular, he escalated the situation by mentioning the possibility of knocking Mr Cole out. Thereafter, both the Claimant and Mr Cole took part in what I can only describe as squaring up to one another (hence the need for the transport manager and truck mechanic to split them up). Both men should have known better, and I accept that the Claimant lost his temper and was probably somewhat aggressive, as, I find, was Mr Cole.

31. The transport manager and the truck mechanic escorted the Claimant out

of Mr Cole's office.

32. Mr Cole and the Respondent's compliance manager, Mr Wilkins, then telephoned the Respondent's director, Mr Steward to ask him what they should do. The conversation took place on speakerphone.

33. Having heard the Respondent's evidence, it is not clear to me precisely what Mr Steward was told about what had occurred. In his witness statement, Mr Steward said that he was told that the Claimant would not drive Lewis's vehicle because of the smell. However, under cross-examination, Mr Cole denied having said this. In the course of his oral evidence, Mr Steward said that concerns about smells were a common reason for drivers to complain about using other drivers' vehicles (he particularly mentioned odours derived from cigarettes, as well as the smell of the bedding area). I accept that in general terms this is likely to be correct, but it was not clear to me from Mr Steward's oral evidence whether this was said to be the reason why, in this particular case, the Claimant would not use Lewis's vehicle.

34. Mr Steward then said to Mr Cole and Mr Wilkins words to the effect that if the Claimant was not willing to take Lewis's vehicle, then he should go home. I accept that Mr Steward was not, thereby, intending to convey a dismissal. Mr Steward did, however, accept in the course of his evidence that had the words used been 'pack his stuff and go home', or something along those lines, then that would have been close to the language of dismissal. He said, however, that he would not have dismissed the Claimant in the circumstances that had arisen. At most, he said that if the matter had not resolved itself, he would have issued a formal warning letter, which might have been a final warning letter.

35. However, Mr Steward did not then go and speak to the Claimant. Neither did Mr Cole. Instead, it was Mr Wilkins who went to speak to the Claimant following the telephone call to Mr Steward.

36. I have been provided with what was described as the statement of Mr Wilkins. This describes the conversation with the Claimant as follows:

> *I took the spare vehicle keys from the office and went to find [the Claimant]; he was standing in the workshop on his own.*
>
> *I approached [the Claimant] with the keys and said "don't shoot the messenger but John [Steward] says either take this truck or go home".*
>
> *[The Claimant] just looked at me and said "I've had enough of this shit" he turned around and walked out of the door. The next thing I saw was him driving past in his car.*

37. The Claimant's account, as set out in his ET1, was slightly different:

> *Then I went back to the workshop. [Mr Wilkins came] up to me about 10 minutes later and said "Don't shoot the messenger, but John [Steward] has said 'Either take the truck out now, or you can pack your stuff and go'". I did not resign voluntarily, but I was given an ultimatum.*

38. The two accounts are very similar, with the main difference being that the Claimant alleges the use of the expression 'pack your stuff and go', whereas the statement in Mr Wilkins' name only refers to 'go home'.

39. I accept the Claimant's version of events. As I have observed already, Mr Wilkins did not attend the Tribunal hearing to give oral evidence, and the statement in his name was not even signed by him. As such, I consider that I can only give it very limited weight, as I cannot be satisfied that Mr Wilkins in fact endorses it, he having not signed it, nor can I be satisfied as to how he might have responded to questions about the differences between his account and the Claimant's.

40. By contrast, the Claimant gave oral evidence, and was consistent in his account on this issue. Moreover, I consider that the use of the expression 'don't shoot the messenger', which both statements say was used, is supportive of the Claimant's account. 'Don't shoot the messenger' is consistent with unwelcome news being delivered, and (as I will set out below) the terminology 'pack your stuff and go' seems to me to be more obviously likely to be unwelcome news (therefore necessitating the warning against shooting the messenger) than merely asking the Claimant to go home.

41. I accordingly accept that the words used by Mr Wilkins to the Claimant were *'don't shoot the messenger, but John has said "either take the truck out now, or you can pack your stuff and go"'*.

42. The Claimant then left the Respondent's depot. He has not worked for the Respondent since, and both parties agree that his employment came to an end on 11 October 2022. They do not agree whether the circumstances described above amounted to the dismissal of the Claimant, or to his resignation.

43. On and shortly after 11 October the Claimant sent a series of Facebook messages which were relied on by Mr Hoyle. These included:

    (1) On 11 October itself, the Claimant wrote:

        > *After 5½ years have left Steward Transport. Now searching new Job New horizons.*

        Mr Hoyle put to the Claimant that the words 'left Steward Transport' indicated that his departure had been voluntary. The Claimant did not accept this. I tend to agree with the Claimant. In my view, 'left' does not necessarily indicate a voluntary departure. One can leave voluntarily or involuntarily. The inference (if any) to be drawn from the word 'left' is ultimately dependent on all the surrounding circumstances, and there is little doubt in my mind that the Claimant genuinely believed that he had been dismissed. Whether he was right or not is a matter for me.

    (2) In response to the Claimant's message, Lewis Saidi Kamundi (who I assume to be the same Lewis whose lorry the Claimant had refused to drive) messaged the Claimant to ask him why he had left. The Claimant's

response was:

no choice mate ultimatum and I chose right option.

This seems to me to support the Claimant's case that, when he used the word 'left' in his previous message, he was not thereby indicating that he had voluntarily resigned his employment. Quite clearly, when the Claimant expressly commented on the circumstances in which he left, he was indicating that his departure was involuntary.

(3) Also on 11 October, the Claimant sent a text message to one of the Respondent's administrators, asking him to delete the Claimant's number from the system 'as I have left Steward'. Again, Mr Hoyle suggested that this language indicated a voluntary decision to leave, something which the Claimant disputed. For the reasons I have set out above, I do not consider that the language used takes me much further.

44. The Claimant did not take action immediately following the termination of his employment. On the evening of 4 December 2022, however, the Claimant e-mailed the Respondent, enclosing a letter dated 5 December 2022. In his letter, the Claimant set out his account of the events of 11 October, and alleged that he had been unfairly dismissed.

45. On 20 December 2022, the Claimant commenced ACAS early conciliation. This concluded on 19 January 2023, and the Claimant thereafter issued his claim, to which the Respondent responded in a timely manner.

The Issues

46. The Claimant's claim alleges that he was unfairly dismissed. In order to decide whether that claim succeeds, I must consider the following issues:

(1) Was the Claimant dismissed?

The Claimant says that he was dismissed on 11 October 2022. However, the Respondent contends that the Claimant resigned from his employment. I must decide which is correct. I note that in this regard the Claimant bears the burden of proving to me that his employment ended by dismissal, and he must do so on the balance of probabilities. This means that if the Claimant satisfies me that there is a more than 50% chance that his employment ended by dismissal, then I must find that there was a dismissal, but if I consider that the chance that there was a dismissal is 50% or less, then there was no dismissal. If there was no dismissal, the Claimant's claim must fail.

(2) If the Claimant was dismissed, was that dismissal unfair?

This issue gives rise to the following relevant sub-issues:

(i) Was the Claimant's dismissal automatically unfair, contrary to section 100(1)(d) of the **Employment Rights Act 1996**?

Section 100(1)(d) provides that an employee shall be

regarded as unfairly dismissed if, in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work.

(ii) If the Claimant's dismissal was not automatically unfair, has the Respondent proved a potentially fair reason for dismissal?

(iii) If the Respondent has proved a potentially fair reason for dismissal, did the Respondent act reasonably in all the circumstances in dismissing for that reason?

(3) If the Claimant was unfairly dismissed, then I will need to consider questions of remedy. The Claimant seeks a financial remedy. The following issues of principle will affect the level of remedy:

(i) Whether the Claimant contributed to his dismissal, such that a reduction in the Claimant's compensatory and basic awards should be made (and, if so, what the reduction should be)?

(ii) Whether there is a possibility that the Claimant would have been fairly dismissed in any event, such that a reduction in the Claimant's compensatory award should be made (and, if so, what that reduction should be)?

More generally, if the claim succeeds I will need to consider general questions of the calculation of compensation, but I will address those issues in more detail when I come to consider remedy.

47. Each of the questions that I have identified above give rise to issues of law. I set out a summary of the relevant law in relation to each issue when I come to consider that issue.

First Issue: Was the Claimant dismissed?

48. This issue is in part a question of pure fact, in that I must decide what precisely occurred and was said and done on 11 October 2022. I have set out above my factual findings, reached on the balance of probabilities.

49. The question that then arises is whether, in light of my findings, the events of 11 October 2022 amounted to a dismissal. This is also a question of fact, albeit that it involves drawing inferences from my findings of primary fact.

50. Ultimately, the key question that I must consider was identified by the Employment Appeal Tribunal in *Martin v MBS Fastenings (Glynwed) Distribution Ltd* [1983] IRLR 198, at paragraph 15 (emphasis added):

> *The [Employment] Tribunal had to make up its mind whether, on the evidence, the reality of the situation was that the employer terminated [the employee's] employment or that [the employee] did…Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question*

always remains the same, 'Who really terminated the contract of employment?'

51. Where a question arises as to the meaning to be given to words used by the employer (here, the words '*don't shoot the messenger, but John has said "either take the truck out now, or you can pack your stuff and go"'* used by Mr Wilkins) then I must consider what those words would mean to a reasonable listener possessing all the background information available to the parties: see *Harvey on Industrial Relations and Employment Law*, Division DI, [230]. The mere fact that Mr Wilkins (or, ultimately, Mr Steward) may not have intended to dismiss the Claimant is not determinative of the question of whether there was a dismissal. What matters is whether, in fact, the words used should reasonably be construed as words of dismissal.

52. Ultimately, these issues are a question of fact which I must resolve.

53. I emphasise that in resolving these issues, it is important to separate the question of how the employment relationship came to an end (and, crucially, by whom it was ended) from the merits of the respective parties' actions.

54. Overall, I conclude that it was the Respondent that ended the employment relationship. In other words, I find that by the use of the words '*don't shoot the messenger, but John has said "either take the truck out now, or you can pack your stuff and go"*', Mr Wilkins, on an objective analysis of the type explained at paragraph 52 above, was communicating to the Claimant that he was dismissed. I form this view for the following reasons:

    (1) The language used – 'pack your stuff and go' – is, in my view, and as Mr Steward agreed in the course of his oral evidence, the language of dismissal. It is not simply telling someone to leave, which may imply that they will be welcome to come back the next day. It is, by telling them to 'pack their stuff', an instruction to remove their entire physical presence from the workplace.

    I accept that Mr Steward had not instructed Mr Wilkins in these terms, and that Mr Steward did not wish to dismiss the Claimant. However, the message communicated by Mr Wilkins was, in my view, one of dismissal. Since Mr Wilkins was a manager with authority to communicate with the Claimant on behalf of Mr Steward/the Respondent, it is what Mr Wilkins said that matters.

    (2) I note that the words that I have found to be words of dismissal were purportedly conditional. In other words, the literal meaning of what Mr Wilkins said was that the Claimant had a choice of either using Lewis's lorry, or leaving. It might, therefore, be argued that if he left, that was his choice.

    But I think that such an analysis would disregard the context of the communications between the parties. At the time that Mr Wilkins (as I find) dismissed the Claimant, the Claimant was agitated. This was the result of a situation created, in large part, by another of the Respondent's managers, Mr Cole (see my findings at paragraphs 29-30 above). The Claimant had a reasonable (at least from his perspective) basis for refusing to use Lewis's lorry. He had communicated that, and the

Respondent was not engaging at all with his reasons for objecting to using Lewis's lorry. Through Mr Wilkins, the Respondent was essentially giving the Claimant a choice of either getting in Lewis's lorry and driving it, which he had made clear he was not willing to do, or of leaving his employment. This was not, in my view, a true choice, particularly in the absence of any effort to address the Claimant's concerns about Lewis's lorry.

(3) Sticking with the context of the communications between the parties, I note that the Respondent was or should have been aware that the Claimant was in an agitated state. Mr Wilkins' 'don't shoot the messenger' comments suggest that he did in fact know of the Claimant's state of mind. As such, the Respondent should have been aware that giving the Claimant an ultimatum (the Claimant's term, which I find well expressed what was said) to either do the thing that he was unwilling to do or pack his stuff and go, would be highly likely to be construed as words of dismissal. How the Claimant construed the words is not the test. However, the Claimant's agitation, and the likelihood that the words would be construed as ones of dismissal, is in my view relevant to an assessment of what they meant, objectively and in context.

55. If I summarise what occurred, I find that the Respondent, through Mr Wilkins, used words that would ordinarily convey a dismissal, in the language of an ultimatum, giving the Claimant the choice of doing something that he had indicated a deep unwillingness to do, or of leaving his employment. I can only construe this as a dismissal. Adopting the question asked in *Martin v MBS Fastenings*, I find that it was the Respondent that really ended the employment relationship.

56. As I have observed, Mr Hoyle's cross-examination and submissions relied on some of the post-termination communications, particularly those highlighted at paragraphs 43 above. In essence, Mr Hoyle argued that the terminology used by the Claimant, particularly his statements that he had 'left' the Respondent's employment, indicated that his employment had ended voluntarily.

57. The Claimant's post-termination communications do not lead me to in any way change the view set out above. In the first place, the question of whether the Claimant was dismissed depends on my objective assessment of the language used by the Respondent on 11 October 2022. I do not derive assistance in assessing the Respondent's language from terminology subsequently used by the Claimant. If the events transpired as I have found that they transpired, then in my view the Respondent used the language of dismissal, and was the party that terminated the employment relationship. Subsequent comments from either party cannot change that. Moreover, as I have set out at paragraph 43, I do not consider that the language used by the Claimant really assists my understanding in any event.

58. Mr Hoyle also relied on the following words in section 8.2 of the Claimant's ET1:

> *I've left because it is the only way I could save my pride, not because I wanted to.*

I do not consider that the Claimant's reference to his pride changes my conclusions. The Claimant's comments in the sentence quoted must be considered as part of his ET1 as a whole, where he sets out the account to which I have referred above. In my view, the one-off reference to pride does not change the general interpretation of the events that took place.

59. Overall, I conclude that it was the Respondent which ended the employment relationship. As such, I find that the Claimant was dismissed.

Was the Claimant's dismissal unfair?

60. I begin by considering whether the Claimant's dismissal was automatically unfair, pursuant to section 100(1)(d) of the **Employment Rights Act 1996**, to which I have referred above.

61. I have essentially quoted the wording of section 100(1)(d) at paragraph 46(2)(i) above. As summarised at paragraph 21 of *Rodgers v Leeds Laser Cutting Ltd* [2023] ICR 356, the questions that I must consider in assessing whether the Claimant's dismissal was contrary to section 100(1)(d) are as follows:

(1) Did the employee believe that there were circumstances of serious and imminent danger at the workplace? If so:
(2) Was that belief reasonable? If so:
(3) Could they reasonably have averted that danger? If not:
(4) Did they leave, or propose to leave or refuse to return to, the workplace, or the relevant part of the workplace, because of the (perceived) serious and imminent danger? If so:
(5) Was that the reason (or principal reason) for the dismissal?

If the answer to questions 1, 2, 4, and 5 is yes, and the answer to question 3 is no, then the Claimant will have been unfairly dismissed pursuant to section 100(1)(d).

62. I note that in *Rodgers*, it was held that an employee need only to have reasonably perceived that there were circumstances of serious and imminent danger. It is not necessary that such circumstances did in fact pertain.

63. Nonetheless, I do not consider that the first two elements of the five-stage test spelled out in *Rodgers* is made out. Put simply, I do not consider that the Claimant at any time believed that there were circumstances of serious and imminent danger, still less that any such belief was reasonable. The Claimant's concern was concerned with his own lack of experience in using remote-controlled cranes, such as that which was fitted to Lewis's lorry. I do not consider that the Claimant believed, simply because he was not experienced in using cranes of this type, that there was any serious and imminent danger. Certainly, any such belief would have been unreasonable – the Claimant, waiting in the workshop to take a lorry out, could not in my view reasonably have perceived any imminent danger, serious or otherwise, merely because at some point down the line he might be expected to use a type of crane which he was qualified to use, but was unfamiliar with. He

could not be said to be conceivably in danger in the workshop.

64. It follows that, in my view, the Claimant's dismissal was not automatically unfair contrary to section 100(1)(d) of the **Employment Rights Act**.

65. I accordingly turn to consider whether the dismissal was unfair on 'ordinary' principles. As noted above, the first question is whether the Respondent has proved a potentially fair reason for dismissal. In my view, the Respondent has proved a potentially fair reason, namely the Claimant's conduct. In particular, the Respondent has satisfied me that the Claimant was dismissed because of his refusal to use Lewis's lorry. I note that the previous incident with Mr Cole also played a part in how matters transpired, but in my view the reason why the Respondent dismissed the Claimant was his refusal to use Lewis's lorry. I take this view, because when Mr Steward instructed Mr Wilkins to tell the Claimant to take the lorry or go, and when Mr Wilkins subsequently told the Claimant to take the lorry or pack his things and go, the focus was very much on the use of the lorry, and there was no focus on the Claimant's confrontation with Mr Cole.

66. In consider whether the Respondent acted reasonably in dismissing the Claimant, the Tribunal must apply the 'range of reasonable responses' test. This requires the Tribunal to consider whether the Respondent's decisions were within the range of responses open to a reasonable employer, acknowledging that in many situations a variety of different actions and decisions may all be reasonable. It is an error of law for a Tribunal to substitute its own view of what would have been reasonable for that of the Respondent's decision-makers: see the judgment of the Court of Appeal in *Sainsbury's Supermarkets Limited v Hitt* [2003] IRLR 23. Putting that another way, the mere fact that I might have acted differently had I been in the position of Mr Wilkins does not mean that his action in dismissing the Claimant was unreasonable or that the decision to dismiss was unfair. Rather, I must consider whether a reasonable employer could act in the way that Mr Wilkins acted. In the following paragraphs, when I use the word 'reasonable', it must be considered by reference to the range of reasonable responses.

67. Specific guidance concerning the approach to be adopted by a Tribunal considering a dismissal for a reason relating to an employee's conduct was laid down by the Employment Appeal Tribunal in *British Home Stores Ltd v Burchell* [1978] IRLR 379. In particular, following *Burchell*, I should consider the following matters:

    (1) Whether the Respondent genuinely believed that the Claimant was guilty of the misconduct alleged.

    (2) Whether the Respondent had reasonable grounds on which to sustain that belief.

    (3) Whether the Respondent had carried out a reasonable investigation into the allegations against the Claimant.

    (4) Whether dismissal was a reasonable sanction in the circumstances.

68. As a more general point, I must consider the reasonableness of the procedure conducted by the Respondent, as part of my consideration of the fairness of the dismissal.

69. Applying the *Burchell* test, I find as follows:

    (1) Clearly, the Respondent genuinely believed that the Claimant had refused to use Lewis's lorry. Equally, the Respondent had reasonable grounds for that belief – this conclusion is inescapable, given that the Claimant had in fact told the Respondent's management that he was refusing to use the lorry.

    (2) However, in my view there has been a wholesale failure of investigation, and failure to engage in any disciplinary or investigatory procedure. In particular, there was no engagement at all by the Respondent with the Claimant's reasons for refusing to use Lewis's lorry. The Respondent made no effort either to understand or to respond to these reasons. In my view, the dismissal of the Claimant, without any attempt to engage with the reasons for his conduct amounted to a failure of investigation and procedure. Not every failure of investigation and procedure means that a dismissal will be unfair, and the assessment of reasonableness must assess the dismissal as a whole. However, here the failure was total, and in my view it did render the ultimate decision unreasonable and unfair.

    (3) I add, moreover, that the wholesale procedural/investigatory failings meant that the Claimant had no opportunity to state a case against his own dismissal (including any mitigating factors). This also renders the dismissal unfair.

70. For these reasons, my view is that the decision to dismiss fell outside the range of reasonable responses. Had the Respondent wished to dismiss, it should at least have engaged with the Claimant's reasons for his actions, to assess whether they were reasonable, and to assess whether, in light of the Claimant's reasons, his actions truly merited dismissal. The failure to do these things rendered the dismissal unfair.

Contributory Fault

71. Pursuant to subsection 123(6) of the **Employment Rights Act 1996**, if I find that any action of the Claimant caused or contributed to his dismissal, to any extent, then I must reduce any award that I make to him by such proportion as I consider just and equitable having regard to my finding of contribution. Although subsection 123(6) does not state this in terms, a reduction should only be made where the Claimant's actions that have caused or contributed to his dismissal were culpable or blameworthy.

72. The assessment of contributory fault will involve me determining (i) whether the Claimant had engaged in any blameworthy conduct, and (ii) if so, whether that had caused or contributed to his dismissal. If I find that the Claimant has engaged in blameworthy conduct that has caused or contributed to his dismissal, then it will be necessary for me to assess the extent to which such conduct had contributed to the dismissal, and I would

ordinarily then make a deduction from the Claimant's compensatory and basic awards to reflect this contribution. Any such deduction would, however, be subject to the overarching need to make an award of compensation that was just and equitable.

73. There seemed to me to be two matters in respect of which the Claimant might be criticised:

    (1) First, there was his refusal to use Lewis's lorry. Clearly the Claimant refused to use Lewis's lorry. It also seems clear that that refusal directly contributed to his dismissal. So the key question is whether I consider that the Claimant's actions in this regard were culpable or blameworthy in some way. In this regard, I consider that it is not possible to say that they were, at the time at which the Claimant was dismissed. It is true that the Claimant was employed to drive lorries, and was on paper at least qualified to both drive Lewis's lorry and operate the crane attached to it. As such, it was reasonable for the Respondent to expect him to do this. But equally the Claimant had clear concerns about the particular lorry (and, more materially, the crane attached), and I accept that those concerns were also reasonable, given his lack of practical experience, and the unfortunate fact that he had dropped a load when trying to use a similar crane. Where the Claimant reasonably had concerns that had some factual basis, in my view good industrial practice required the Respondent to take some suitable steps to allay them (these could, for example, have consisted of discussing the Claimant's concerns to see whether he could be persuaded to use Lewis's lorry; given that it does not appear that the work being done to the Claimant's lorry was a substantial job, reasonable steps to allay the concerns could have included waiting for the Claimant's lorry to become ready, and sending him out in that). Had the Respondent taken reasonable steps genuinely aimed at allaying the Claimant's concerns, then had the Claimant persisted in refusing to drive Lewis's lorry, a degree of culpable conduct on his part might very well have been established. However, where the Respondent took no such steps, I do not find that the Claimant's maintenance, over a relatively short period, of a refusal to drive Lewis's lorry amounted to culpable or blameworthy conduct.

    (2) Where, in my view, the Claimant was at fault is in the way he communicated with the Respondent's managers (particularly Mr Cole) on 11 October. I find that the Claimant was unnecessarily confrontational towards Mr Cole. While I accept that it was Mr Cole who first made threats of violence, the Claimant escalated this by threatening to knock Mr Cole out. He and Mr Cole also squared up to one another, which was unacceptable conduct in the workplace. I find that Mr Cole was the primary instigator of the conflict with the Claimant, but the Claimant also played a part in the unsavoury row that erupted between them, and certainly the Claimant was at fault in that the way he engaged with Mr Cole made the whole situation more difficult, and made finding an amicable resolution less easy.

74. The Claimant's conduct towards Mr Cole in my view did contribute to his dismissal. In particular, as I have noted, it made an amicable resolution less likely. Moreover, the way in which the Claimant acted fed into (i) the decision

to refer the matter to Mr Steward, and (ii) Mr Steward's decision to send the Claimant home which, in the manner in which it was conveyed to the Claimant by Mr Wilkins, I found to amount to a dismissal. The conduct towards Mr Cole was not, however, the reason for the dismissal itself (see paragraph 65 above).

75. In the circumstances, it is appropriate to make a reduction in compensation to reflect contributory fault on the part of the Claimant. Mr Hoyle urged me to reduce compensation by 100%. This goes too far. While I have found that the Claimant's conduct was blameworthy and contributed to his dismissal, I consider that the majority of the fault in what transpired rests with the Respondent. In the first instance, it was Mr Cole who was, I find, the primary instigator of the confrontation with the Claimant in the workshop (Mr Cole, for example, was the first to threaten violence). Subsequently, the Respondent did not (as noted above) take steps to allay the Claimant's concerns about using Lewis's vehicle, and ultimately the Claimant's dismissal came about because of the way in which Mr Wilkins relayed Mr Steward's decision. These were not matters that were the fault of the Claimant.

76. Overall, I assess the extent of the Claimant's contribution to his dismissal at 25%, having regard to his role in creating the situation in which he was dismissed. It is in my view just and equitable to reduce both the compensatory and the basic award by 25%.

Polkey **reduction**

77. In circumstances where I have found that the dismissal was unfair on procedural grounds, it is necessary for me to consider whether, had a fair procedure been followed, the Claimant might still have been dismissed fairly. Pursuant to the judgment of the House of Lords in *Polkey v A. E. Dayton Services Limited* [1988] 1 AC 344, the chance of the Claimant being fairly dismissed should be made in percentage terms, and a percentage reduction may be made from the Claimant's compensatory award to reflect the percentage chance that she would have been fairly dismissed in any event.

78. In this case, any consideration of a *Polkey* reduction will turn on the question of whether the Respondent would, acting fairly, have dismissed the Claimant because of his actions on 11 October. In other words, it will arise from facts very closely-connected to those which have led me to make a contributory fault reduction. This being so, I must have regard to the possibility that the Claimant might be punished twice (by means of both a contributory fault and a *Polkey* reduction) for the same conduct, and should only make two reductions if it would be just and equitable to do so: see the comments of Mrs Justice Laing, sitting in the Employment Appeal Tribunal in *Lenlyn UK Limited v Kular* (2016) UKEAT/0108/16, at paragraph 81.

79. In my view, the facts of this case do not merit a *Polkey* reduction. This is primarily because I do not consider that, had a fair procedure been followed, the Claimant would have been dismissed. The key point is that, as he accepted during his oral evidence, Mr Steward himself did not consider that what the Claimant had done merited dismissal. Indeed, Mr Steward's

evidence, which in this respect I accepted, was that he did not intend for Mr Wilkins to dismiss the Claimant. In my view, that is strongly indicative that there is no likelihood that a fair procedure (and better communication) would have resulted in the Claimant being dismissed.

80. It may be that other employers might have taken a less benevolent view, even had a full and fair disciplinary procedure been implemented. However, I am assessing what would have happened here had a fair procedure been followed, and Mr Steward's evidence was that matters would not have gone beyond (at most) a final written warning. Indeed, in any event, even had the Respondent been minded to dismiss, it would have had to take into account mitigating factors, and those would have included the peremptory and confrontational manner in which Mr Cole gave the Claimant his instructions to use Lewis's lorry, and the genuine concerns that the Claimant had about the lorry, which the Respondent had taken no steps to allay. I accordingly do not consider that dismissal would have been likely to be a reasonable response in any event, but given Mr Steward's evidence it simply does not seem to me that there was any likelihood of dismissal, had a fair procedure been followed.

81. Even if I were wrong in that finding, however, I would not consider it appropriate to make a *Polkey* reduction, because, having regard to the judgment in *Lenlyn UK Limited v Kular*, it seems to me that this would amount to punishing the Claimant twice for the same conduct, since the only basis for a *Polkey* reduction would be the matters that led me to make a contributory fault reduction. I do not consider that it would be just and equitable to make two reductions.

Quantum

82. Having concluded that the Claimant was unfairly dismissed, but that both the compensatory and the basic award should be reduced by 25% to reflect contributory fault, I turn to calculate the quantum of the Claimant's claim.

Basic Award

83. The Claimant had worked for the Respondent for five years at the time of his dismissal. He had been aged over 41 throughout that period, and as such he should receive 1.5 weeks' gross pay for each of his five years of employment (i.e. a total of 7.5 weeks' gross pay). Gross weekly pay at the time of the Claimant's dismissal was capped at £571, and I am satisfied on the evidence before me that the Claimant was earning considerably more than that. It follows that the basic award should be:

    7.5 x £571 = £4,282.50.

84. This is of course subject to the 25% contributory fault reduction. Applying this reduction leaves the basic award as **£3,211.88**.

Compensatory Award

85. The Claimant's compensatory award consists primarily of loss of earnings (as well as some loss of employer's pension contributions). There is also the question of the usual award in respect of loss of statutory rights.

86. In addition, it will be necessary for me to consider whether to make an uplift, pursuant to section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992**, to reflect any failure by the Respondent to comply with the *ACAS Code of Practice on Disciplinary and Grievance Procedures*. If I do make an uplift, it will be necessary for me to determine what it should be.

87. I will also need to consider whether, in light of my finding that the Claimant was not provided with a written statement of the terms and conditions of his employment, an additional award should be made to reflect this, pursuant to section 38 of the **Employment Act 2002**.

Loss of earnings and pension contributions

88. I begin by setting out certain facts and figures that are necessary to the calculation of the Claimant's award for loss of earnings:

    (1) On my calculation, the Claimant's average net weekly pay with the Respondent was £860.32. I reach this figure using the breakdown of the Claimant's taxable pay for the months of April to October 2022, which is at page 21 of the Claimant's bundle. This shows that in the period, which began on 1 April 2022 and ended with the Claimant's dismissal 28 weeks later on 11 October 2022, the Claimant's total gross pay was £31,868.41. From this deductions of tax and national insurance totalling £7,779.38 were made, leaving a net total of £24,089.03 over the course of 28 weeks. When £24,089.03 is divided by 28, it yields the figure of £860.32.

    (2) I add that the Claimant's schedule of loss calculated his own gross weekly pay at £1,090.32. This figure was not challenged, and I adopt it.

    (3) The Claimant was unemployed following his dismissal until 7 November 2022, when he got a job working for Explore Transport Ltd. He was thus unemployed for four weeks.

    (4) Having commenced work at Explore Transport, the Claimant was initially earning less than with the Respondent. However, he limited his claim to thirteen weeks during the period that he had worked for Explore Transport.

89. Mr Hoyle helpfully confirmed that it was agreed that the Claimant had adequately mitigated his loss. As such, the calculation of loss of is a simply mathematical calculation.

90. I begin with the first five weeks following the Claimant's dismissal (that is, the period from 11 October 2022 to 15 November 2022). Having been employed by the Respondent for five full years, the Claimant should have been entitled to a five-week notice period. In *Norton Tool Company Limited v Tewson* [1972] ICR 501, it was held that where an employee was

dismissed without notice, and was subsequently found to have been unfairly dismissed, he was entitled to recover loss of earnings for what would have been his notice period, without being obliged to give credit for any sums received during that period from alternative employment. As such, while the Claimant began working for Explore Transport four weeks after his dismissal by the Respondent, he is not obliged to give credit for the pay received in his first week at Explore Transport. The Claimant is accordingly entitled to recover five weeks' net pay without deductions. The calculation is as follows:

5 x £860.32 = £4,301.60.

91. That takes the Claimant up to 15 November 2022. Thereafter, the Claimant claims thirteen weeks' loss of earnings, and this is clearly loss flowing from his dismissal that he is entitled to recover. This covers the period from 16 November 2022 to 15 February 2023.

92. Thirteen weeks' net pay at the weekly rate of £860.32 amounts to £11,184.16. However, the Claimant was employed at Explore Transport throughout the thirteen-week period identified above, and in respect of these thirteen weeks he is obliged to give credit for his earnings from Explore Transport. I have the Claimant's pay records with Explore Transport, and on my calculation, using his net pay figures in the thirteen weeks from 25 November 2022 to 17 February 2023, he earned the net sum of £9,111.88. When this is deducted from the £11,184.16 that he would have earned with the Respondent, his loss is shown to be £2,072.28.

93. The Claimant also claimed for thirteen weeks' pension loss. His loss in this regard is the pension contributions that the Respondent would have paid. I was informed by the Claimant that he had an auto-enrolment pension, and it appears that the Respondent contributed 3% of the Claimant's gross pay to this pension. As I have noted above, the Claimant's gross weekly pay was £1,090.32. 3% of this is £32.71, which gives the weekly rate of the employer's pension contributions. When this figure is multiplied by thirteen, the result is £425.23. That is the sum that (subject to the contributory fault deduction) I would award for pension loss.

94. The total sums due in respect of earnings and pension contributions are accordingly:

    (1) Five weeks' loss of earnings, with no credit given for earnings from Explore Transport: £4,301.60.
    (2) Thirteen weeks' loss of earnings, with credit given: £2,072.28.
    (3) Thirteen weeks' loss of pension contributions: £425.23.

    The total loss is therefore £6,799.11.

Loss of Statutory Rights

95. The Claimant is entitled to a sum representing the fact that it will take him a period of time in his new employment before he regains the full range of employment rights that he had while employed by the Respondent. I award £500 in respect of this.

96. When this £500 is added to the figures for loss of earnings and pension loss, the total becomes £7,299.11.

Breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures

97. I am satisfied that the Respondent was in breach of the ACAS Code. As such, I should increase the compensatory award figure of £7,299.11 by up to 25%, if I consider it just and equitable to do so. This was a wholesale breach – no procedure whatsoever was followed when dismissing the Claimant. I accept that there was to some extent a mitigating factor, in that the Respondent had not planned to dismiss the Claimant, albeit that I find that the words used by Mr Wilkins were words of dismissal, and accordingly Mr Wilkins should have ensured that the property procedures were followed before he used them. However, I consider that it would be just and equitable to add an uplift to the compensatory award.

98. The Claimant's schedule of loss limited his claim for an uplift to 10%. Had it not been for this, I would have awarded 15%, as being the sum that in my view adequately reflected both the substantial nature of the breach and the mitigating factor that I have identified. However, where the Claimant has limited his own claim, I too will limit the award to a 10% uplift.

99. 10% of £7,299.11 is £729.91.

Failure to provide statement of terms and conditions of employment

100. As is set out above, I am satisfied that the Respondent did not provide the Claimant with a statement of the main terms and conditions of his employment, as required by section 1 of the **Employment Rights Act 1996**. As such, I must, unless there are exceptional circumstances, increase the award by two weeks' pay, and may, if I consider it just and equitable to do so, increase the award by four weeks' pay (I refer to this award as a 'section 38 award', because it is awarded pursuant to section 38 of the **Employment Act 2002**). A week's pay is capped for these purposes at £571.

101. I do not consider that there are any exceptional circumstances here. As such, the question is whether I award the starting point of two weeks' pay, or whether it would be just and equitable to award four weeks' pay. Overall, I consider that two weeks' pay would adequately reflect the Respondent's failure to provide a statement of terms and conditions. I accordingly award two weeks' pay, which at the capped weekly rate of £571 is £1,142.

Compensatory Award: Summary

102. The sums that I have awarded in respect of the compensatory award are accordingly as follows:

(1) Loss of earnings and pension contributions: £6,799.11.
(2) Loss of statutory rights: £500.
(3) 10% uplift: £729.91.
(4) Section 38 award: £1,142.

103. These sums total £9,171.02. They are then subject to a 25% contributory fault reduction. That takes the total compensatory award down to £6,878.27.

Quantum: Conclusion

104. Once the contributory fault reduction has been applied, the sums awarded are as follows:

(1) Basic award: £3,211.88.
(2) Compensatory award: £6,878.27.

These total **£10,090.15**, which is the total of the award to the Claimant for unfair dismissal.

Employment Judge **Varnam**
23 February 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
26th February 2024

FOR THE TRIBUNAL OFFICE