EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100641/2026

Held in Edinburgh on 8, 9 and 10 June 2026

Employment Judge McCluskey

Mr G Nelson	**Claimant** **Represented by:** **Mr F Tait -** **Solicitor**
SWAT International Limited	**Respondent** **Represented by:** **Mr A Kelly -** **Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

1. The complaint of unfair dismissal is well founded. The claimant was unfairly dismissed.

2. The respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 and it is just and equitable to increase the compensatory award payable to the claimant by 25% in accordance with s 207A Trade Union & Labour Relations (Consolidation) Act 1992.

3. The respondent is ordered to pay the claimant the following sums:

    (i) a basic award of £5,033.

    (ii) a compensatory award of £9,250.59 (£7,400.47 x 25% ACAS uplift).

    (iii) an award for loss of statutory rights of £500.

    Note: These are the actual the sums payable to the claimant after any deductions or uplifts have been applied. The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply.

4. The complaint of breach of contract was withdrawn by the claimant and is dismissed.

5. The complaint of failure to pay holiday pay was withdrawn by the claimant and is dismissed.

REASONS

Introduction

1. At the outset of the hearing the claimant withdrew the complaints of breach of contract and holiday pay. The claimant makes a complaint of unfair dismissal. He seeks compensation by way of remedy.

2. The claimant's employment terminated on 22 November 2025. ACAS early conciliation began on 1 December 2025 and ended on 5 February 2026. The claim was presented on 31 March 2026.

3. The claimant gave evidence on his own behalf. Mr Andrew Kelly, a statutory director and sole shareholder of the respondent, gave evidence on behalf of the respondent.

4. There was a joint file of productions extending to 130 pages.

5. Helpfully, the parties agreed the wages figures in the updated schedule of loss prepared by the claimant. The respondent maintained that the claimant had failed to take reasonable steps to mitigate his loss as it asserted that the claimant could have started a new job sooner.

Issues

6. At the outset of the hearing, the issues to be determined were discussed. The Tribunal reminded parties of these issues during the hearing.

7. The liability issues to be determined are:

    (i) 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.

    (ii) If the reason was misconduct, did the respondent act reasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will decide in particular whether: the respondent believed there was misconduct; there were reasonable grounds for that belief;

at the time the belief was formed the respondent had carried out a reasonable investigation; the respondent otherwise acted in a procedurally fair manner; dismissal was within the range of reasonable responses.

8. The remedy issues to be determined are:

(i) What basic award is payable to the claimant, if any?

(ii) If there is a compensatory award how much should it be?

(iii) Would it be just and equitable to adjust the claimant's basic or compensatory award and, if so, to what extent?

Findings in fact

9. The Tribunal made the following essential findings in fact, necessary to determine the claim.

10. The claimant was employed by the respondent from 10 February 2020 to 22 November 2025. At the time of his dismissal, he was employed as a steeplejack/ roofer and the general foreman in the respondent's business.

11. The respondent is a steeplejack and roofing company.

12. On 18 November 2025 the claimant was instructed by Mr Kelly to power wash the roof at the respondent's premises. The job involved working at height. Mr Kelly approved the use of power wash equipment which the claimant needed to hire for the job. Mr Kelly was at the respondent's premises for some of the time on 18 November 2025 when the power wash job was being set up.

13. Mr Kelly returned to the premises in the afternoon of 18 November 2025. The power wash job was done and the claimant was getting ready to leave. Mr Kelly could see that the claimant was wet. Mr Kelly commented on this. There was no further discussion between them.

14. After the claimant left Mr Kelly asked Mr Dennis, another employee, if the claimant straddled the roof when doing the power wash job. Mr Dennis nodded.

15. On 19 November 2025 Mr Kelly sent the claimant and Mr Dennis to a job in Edinburgh. The job involved working at height. On 20 November 2025 Mr Kelly sent the claimant and Mr Dennis back to do some further work at height at the same job in Edinburgh. The claimant and Mr Dennis returned to the respondent's premises around lunchtime.

16. On 20 November 2025 in the afternoon, Mr Kelly and the claimant decided to go up to the respondent's old site as there was an office there, and it was private. They wanted to have a conversation.

17. At the old site the claimant told Mr Kelly about concerns he had with the work of another employee of the respondent called Michael. The claimant and Michael had been working together on a job in Inverness. The conversation became heated.

18. Mr Kelly and the claimant discussed the power wash job on 18 November 2025. The claimant told Mr Kelly that he had climbed up the scaffolding, climbed onto the roof ladder and then traversed across the apex of the roof by straddling it, to carry out the power wash job. The conversation remained heated.

19. Later on 20 November 2025, Mr Kelly emailed a suspension letter to the claimant. The letter included the following *"As discussed today there are a number of recent events that have culminated in our meeting today, which you abruptly left without listening to the conclusion of the meeting or outcome. You are therefore suspended on full pay with immediate effect to allow us to complete a full investigation into recent events.... It would be our intention to interview any relevant parties as soon as practical, while events are fresh and conclude the investigation".*

20. On 21 November 2025 Mr Kelly called the claimant. Mr Kelly said he was wrong about the work on the Inverness job and the claimant was correct. Mr Kelly apologised to the claimant. Mr Kelly asked the claimant why he was on the roof on 18 November 2025, and why he had not got Mr Dennis to go up on the roof instead. The claimant said he went on the roof because he wanted to *"lead from the front".* Mr Dennis was a junior member of staff. Mr Kelly said he would see the claimant on Monday 24 November 2025 at the respondent's premises, and they could *"pick it up from there".* Mr Kelly also sent the claimant an email to this effect. Later, on 21 November 2025, Mr Kelly climbed the scaffolding and looked at the roof of his premises.

21. On 22 November 2025 Mr Kelly emailed a dismissal letter to the claimant. The letter included the following: *"On Tuesday 18th November in the early afternoon you traversed across a dated cement asbestos fragile roof without adequate due care risking yourself and those around you. In our subsequent meeting on Thursday 20th November you indicated that your approach was based on your knowledge, training and 28 years experience and that you appeared to not recognise the potential failures and risk. Having had an opportunity to review the event in full we have concluded your actions are an act of gross misconduct and contrary and a breach of best practice, working at height regulations, fragile roof working, our Health and Safety Policy,*

Steeplejack and IRATA best practice, all of which you are very knowledgeable and experienced in". The claimant was given a right of appeal.

22. Between the claimant's suspension on 20 November 2025 and his dismissal on 22 November 2025 Mr Kelly did not "interview any relevant parties" as set out in the suspension letter.

23. On 25 November 2025 Mr Kelly emailed the claimant. He offered to engage the claimant on a self-employed basis straight away and for the coming months. He ended his email "Give it some thought – I'm always looking for good guys".

24. On 27 November 2025 the claimant emailed Mr Kelly. He said he want to appeal against his dismissal and asked about the appeal process. Mr Kelly replied by email the same day. Mr Kelly directed the claimant to send his appeal in writing. Mr Kelly wrote *"The appeal will be reviewed and a decision will be given to you in writing within seven days with reference to any relevant information available".* On 28 November 2025, the claimant sent his written appeal against termination of his employment. He set out four grounds of appeal.

25. On 30 November 2025 Mr Kelly emailed the claimant a letter. The letter was headed *"Investigation to gross misconduct charge / Disciplinary meeting Wednesday 3 December 2025".* The letter invited the claimant to a disciplinary meeting about his actions on 18 November 2025.

26. On 3 December 2025 before the meeting the claimant emailed Mr Kelly. He said he was unable to attend the meeting. He said that the disciplinary meeting should have taken place before his dismissal.

27. Mr Kelly's email of 27 November 2025 said the claimant's written appeal would be reviewed and a decision given to the claimant in writing. No appeal decision was given to the claimant.

28. The respondent has a written disciplinary policy. No copy was provided to the claimant prior to his dismissal. Mr Kelly did not consult the respondent's disciplinary policy prior to dismissing the claimant. Mr Kelly knew about and had responsibility for the respondent's disciplinary policy as the owner of the respondent.

29. At the time of the claimant's dismissal, he had an unblemished disciplinary record.

30. There were other employees of the respondent who had previously been working on the roof. They had been in direct contact with the roof, as had he claimant. Mr Kelly knew this when he dismissed the claimant. Those employees had not been disciplined or dismissed.

31. When the claimant was dismissed, he phoned various companies looking for a new job. This included Pendrich Height Services Ltd ("Pendrich"). They said they would get the ball rolling to offer him a position. He had to go through an onboarding process. On 19 December 2025 the claimant was given an employment contract with Pendrich with a start date of 12 January 2026. The construction industry closes down over the festive period. Pendrich offered the claimant a start date of 5 January 2026. He could not start that week as he was on holiday. The claimant usually took holiday at that time of year due to the festive shut down. The claimant started work with Pendrich on 12 January 2026 when he returned from holiday. His earnings with Pendrich are greater than his earnings with the respondent.

32. The claimant was age 45 at the time of his dismissal. He had five years of continuous service with the respondent at the time of his dismissal. His net weekly earnings with the respondent were £1057.21. There was a period of seven weeks between the claimant's employment with the respondent ending and his new employment with Pendrich starting. The claimant did not receive any state benefits or other earnings during that period.

33. When the claimant was power washing the roof on 18 November 2025, he was wearing PPE, including a safety harness which was secured to the roof ladder. If the claimant had slipped, he would have been caught by the safety harness secured to the roof ladder. Mr Kelly did not know the claimant was using a safety harness when he dismissed the claimant.

Observations on the evidence

34. This judgment does not seek to address every point upon which the parties have disagreed. It only deals with the points which are relevant to the issues the Tribunal must consider, to decide if the claim succeeds or fails. If the Tribunal has not mentioned a particular point, it does not mean that it has overlooked it. It is simply because it is not relevant to the issues.

35. The standard of proof is on balance of probabilities. This means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then it is satisfied that the event in fact occurred. Likewise, if the Tribunal considers that, on the evidence, an event's occurrence was more likely not to have occurred, then it is satisfied that it did not occur.

Relevant law

36. Section 94 ERA provides that an employee has the right not to be unfairly dismissed.

37. Section 98 ERA sets out that for a dismissal to be fair, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98 (1) or (2) of the ERA.

38. A reason relating to the conduct of the employee is one of the potentially fair reasons for dismissal (section 98(2)(b) ERA).

39. In terms of section 98(4) ERA, if the Tribunal is satisfied that the respondent has established a potentially fair reason for dismissal, it must then determine the question of whether the dismissal is fair or unfair having regard to the matters set out in section 98(4) (a) and (b): whether taking into account the size and administrative resources of the employer, it acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee and the equity and substantial merits of the case.

40. Once it is established that the claimant was dismissed for a potentially fair reason relating to conduct the test of the substantive fairness outlined in *British Home Stores Limited v Burchell 1978 IRLR* 380 is relevant to the question of whether it was reasonable for the respondent to treat that reason as sufficient to justify dismissal.

41. When applying the Burchell test, the Tribunal should consider three issues: a. whether the employer genuinely believed that the employee was guilty of misconduct; b. did the employer have in its mind reasonable grounds on which to sustain that belief; and c. at the stage at which the employer formed the belief on those grounds had the employer carried out as much investigation into the matter as was reasonable in the circumstances?

42. The ultimate test in determining the application at section 98(4) is whether the dismissal fell within the "band of reasonable responses", a test which reflects the fact that inevitably there may be different decisions reached by different employers in the same circumstances (see *British Leyland (UK Limited) v Swift 1981 IRLR 91*).

43. In applying section 98(4) ERA, the Tribunal must not substitute its own view of the matter for that of the employer but must apply an objective test of whether the dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer (see *Iceland Frozen Foods Limited v Jones [1982] IRLR 439, Post Office v Foley and HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] IRLR 827CA*).

44. The range of reasonable responses test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached (*J Sainsbury plc v Hitt 2003 ICR 111, CA*). This includes whether the investigation carried out by the employer fell within the range of reasonable responses that a reasonable employer might have adopted.

45. Where there is a substantial issue as to failure to mitigate, a Tribunal should ask itself (i) what steps were reasonable for the claimant to have to take in order to mitigate his loss;(ii) whether the claimant did take reasonable steps to mitigate loss; and(iii) to what extent, if any, the claimant would have actually mitigated his or her loss if he or she had taken those steps (*Gardiner-Hill v Roland Berger Technics Ltd 1982 IRLR 498, EAT; Savage v Saxena 1998 ICR 357, EAT*, and *Window Machinery Sales Ltd t/a Promac Group v Luckey EAT 0301/14*).

46. The respondent must prove that the claimant has acted unreasonably, in relation to mitigation. The claimant does not have to show that what he did was reasonable (*Ministry of Defence v Mutton 1996 ICR 590, EAT*). What is reasonable or unreasonable in this regard is a question of fact. It is the tribunal's own assessment of reasonableness not the claimant's that counts.

47. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides: *"207A Effect of failure to comply with Code: adjustment of awards (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2. (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,(b) the employer has failed to comply with that Code in relation to that matter, and (c) that failure was unreasonable the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%. …(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes."*

48. The relevant Acas Code of Practice is the Code of Practice on Disciplinary and Grievance Procedures published on 11 March 2015.

49. In considering whether the has been a failure to comply with the Acas Code the Tribunal should take account of the following factors: whether there has been a breach of the Acas Code and, if so, to what extent. This will nearly always involve consideration of which provisions of the Acas Code have been breached and which, if any, have been complied with. This is an objective question, and a matter of substance. The circumstances which will be relevant will inevitably vary from case to case and cannot be itemised, but they will certainly include: (a) whether the procedures were ignored altogether or applied to some extent (b) whether the failure to comply with the procedures was deliberate or inadvertent; and (c) whether there are circumstances which may mitigate the blameworthiness of the failure; whether the failure was unreasonable. It is not sufficient for section 207A TULR(C)A to apply that

there has been a failure to comply with the Acas Code. It is also necessary that the failure was unreasonable (*University of Exeter v Dr Annette Plaut [2024] EAT 159*).

Submissions

50. The claimant and the respondent both made oral submissions. The Tribunal considered the submissions of both parties during its deliberations. The Tribunal has dealt with the points made in submissions, where relevant, when setting out the facts, the law and the application of the law to those facts in reaching its decision. It should not be taken that a submission was not considered because it is not part of the discussion and decision recorded.

Discussion and decision

Unfair dismissal

Reason for dismissal

51. The first issue is what was the reason for dismissal? The Tribunal is satisfied that the reason for dismissal was that on 18 November 2025 the claimant straddled and traversed across the respondent's roof when carrying out the power wash job. That was the reason given by Mr Kelly in the dismissal letter of 22 November 2025. That was the evidence of Mr Kelly to this Tribunal. The reason relates to the conduct of the claimant.

52. A reason relating to the conduct of the employee is one of the potentially fair reasons for dismissal (section 98(2)(b) ERA).

Misconduct investigation

53. The next question is the three stages of the *BHS v Burchell* case.

54. First, did Mr Kelly believe that the claimant was guilty of misconduct.

55. The Tribunal was satisfied that Mr Kelly did believe that the claimant was guilty of misconduct. Mr Dennis told him on 18 November 2025 that the claimant had straddled the roof. The claimant told Mr Kelly on 20 November 2025 that he had straddled and traversed across the roof. On 21 November 2025 Mr Kelly climbed on the scaffolding and looked at the roof. Having looked at the roof, he decided that straddling and traversing across the roof was misconduct.

56. Second, did Mr Kelly have in his mind reasonable grounds on which to sustain the belief that the claimant was guilty of misconduct.

57. The Tribunal found that Mr Kelly did not have in his mind reasonable grounds on which to sustain that belief. On 21 November 2025, which was the day

before dismissal, Mr Kelly asked the claimant on a phone call why he was on the roof on 18 November 2025 doing the power wash, and why he had not got Mr Dennis to go up on the roof to do the power wash instead. The claimant said he wanted to *"lead from the front*". There was no evidence led that that explanation by the claimant had been challenged by Mr Kelly at the time. As Mr Kelly's enquiry the day before dismissal was about why a more junior member of staff was not up on the roof doing the power wash instead of the claimant, the Tribunal was not satisfied that Mr Kelly had in his mind reasonable grounds to sustain a belief that the claimant was guilty of misconduct by straddling and traversing the roof. Mr Kelly's evidence was that after the phone call with the claimant on 21 November 2025 he looked at the roof of his premises and decided that straddling and traversing the roof was misconduct as it was unsafe. This was the roof of the respondent's own premises. It is the roof of premises owned by Mr Kelly as the sole shareholder of the respondent. There was unchallenged evidence that other employees had previously done work on the roof, which required them to be in direct contact with the roof. Mr Kelly knew that. On the phone call on 21 November 2025 Mr Kelly already knew that the claimant had straddled and traversed the roof. The Tribunal found that Mr Kelly dd not have in his mind reasonable grounds on which to sustain a belief that the claimant was guilty of misconduct by straddling and traversing across the roof.

58. Thirdly, the Tribunal also considered whether if Mr Kelly did have in his mind reasonable grounds to sustain a belief that the claimant was guilty of misconduct by straddling and traversing across the roof, at the stage at which he formed that belief he had carried out as much investigation into the matter as was reasonable in the circumstances.

59. The Tribunal found that Mr Kelly had not carried out as much investigation into the matter as was fair reasonable in the circumstances. The Tribunal found that there was no investigation. In the suspension letter of 20 November 2025 Mr Kelly said that suspension would allow the respondent to *"complete a full investigation into recent events....It would be our intention to interview any relevant parties as soon as practical, while events are fresh and conclude the investigation".* No documented investigation took place thereafter. There was no investigation with the claimant. There was no interview with relevant parties as the respondent said it would do in its suspension letter. The Tribunal found that a reasonable employer would have carried out an investigation, as the respondent said it would do in its suspension letter.

Procedure generally

60. As regards procedure generally, the Tribunal found that the respondent had not acted in a procedurally fair manner. The respondent had not carried out a reasonable investigation. The claimant was not invited to a disciplinary

hearing before his dismissal. The claimant was not told of the allegations and any supporting materials or documentation to be relied upon before his dismissal. The claimant was not given an opportunity to state his case in a disciplinary hearing before his dismissal. After his suspension on 20 November 2025 there was no consultation with the claimant whatsoever before the decision was taken by Mr Kelly on 22 November 2025 to terminate his employment. On the evidence of Mr Kelly, he did not even consult the respondent's own disciplinary procedure, which he knew about as he had responsibility for the policy, before deciding to dismiss the claimant. Thereafter the claimant was told that his appeal would be reviewed by the respondent and an appeal decision given in writing within seven days. No appeal decision was given to the claimant.

61. The Tribunal found that applying the Burchell test and in considering procedure generally, the respondent had not acted reasonably in its dismissal of the claimant.

Band of reasonable responses

62. The Tribunal reminded itself that the question it must ask is not whether it would have dismissed the claimant. It must ask whether the respondent's decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted (*Iceland Frozen Foods Ltd v Jones 1983 ICR 17*).

63. Having done so, the Tribunal found that the respondent acted unreasonably in treating the claimant's conduct as a sufficient reason for dismissing him. The Tribunal was not persuaded that summary dismissal fell within the band of reasonable responses of a reasonable employer. Before the call with the claimant on 21 November 2025 Mr Kelly knew that the claimant had been straddling and traversing the respondent's roof. Yet he then asked the claimant on a telephone call that day why the claimant was on the roof on 18 November 2025 not Mr Dennis. Mr Kelly knew on 18 November 2025 that the claimant had been straddling the roof of the respondent's premises. That was of concern to him. Yet he instructed the claimant to carry out other jobs at height on the two subsequent days. Mr Kelly knew that other employees of the respondent had previously been working on the respondent's roof, in direct contact with it and that they not been disciplined or dismissed. Three days after the claimant's summary dismissal Mr Kelly offered to take the claimant back on, on a self employed basis.

64. The Tribunal found that the respondent's decision to dismiss the claimant fell outside of the band of reasonable responses which a reasonable employer might have adopted.

Conclusion

65. The Tribunal found that, in the circumstances of this case, the dismissal was unfair.

Remedy

66. The claimant sought an award of compensation.

67. He is entitled to a basic award which is based on his age at the date of dismissal (45), length of service (5 years) and weekly pay (£719 statutory cap) which amounts to £5,055 (7 weeks x £719) (multiplier of 7 based on age bands x £719).

68. The claimant was out of work after 22 November 2025 until his new employment started on 12 January 2026. That is a period of 7 weeks. The claimant's net weekly pay was agreed as £1057.21. His loss of wages for 7 weeks is £7,400.47 (7 weeks x £1057.21).

Mitigation

69. The respondent submitted that the claimant had failed to mitigate his losses as he had been on holiday in the week beginning 5 January 2026 and was not able to start with Pendrich until the following week. The respondent submitted that the compensatory award of £7,400.47 ought to be reduced accordingly. It is for the respondent to show that the claimant has acted unreasonably in failing to mitigate.

70. The claimant was offered a new job with Pendrich to start on 5 January 2026. He could not start that week as he was on holiday. The claimant usually took holiday at that time of year due to the festive shut down. The claimant started work with Pendrich on 12 January 2026 when he returned from holiday.

71. The Tribunal was satisfied the claimant did not act unreasonably in his approach to mitigation. He was on holiday in the week beginning 5 January 2025, as he usually did during the festive period, and could not start that week. He started one week later when he returned from holiday. The Tribunal found that it was not just and equitable to reduce the compensatory award of £7,400.47.

Polkey

72. The Tribunal considered whether compensation should be reduced in accordance with the principle in in *Polkey v AE Dayton Services Ltd 1988 ICR 142. The* Tribunal was not persuaded that in all the circumstances of this case a Polkey deduction would be just and equitable. The claimant's dismissal was found to be unfair because summary dismissal was outside the "band of

reasonable responses”. The decision to dismiss the claimant was made without a reasonable investigation, without a disciplinary hearing and with no appeal decision in response to the claimant’s appeal against his dismissal. This was not a case in which the Tribunal was satisfied that it was possible to conclude that but for procedural irregularities the claimant would have been dismissed in any event.

ACAS Code of Practice on Discipline and Grievance

73. The ACAS Code of Practice on Discipline and Grievance (ACAS Code) sets out the minimum procedure to be followed in the circumstances of this case. The relevant paragraphs of the ACAS Code are as follows.

74. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing (paragraph 5 ACAS Code).

75. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification (paragraph 9 ACAS Code). At the meeting workers have the statutory right to be accompanied where the disciplinary meeting could result in a disciplinary sanction (paragraph 13 ACAS Code)

76. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct (paragraph 23 ACAS Code),

77. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place (paragraph 26 ACAS Code). Employees should be informed in writing of the results of the appeal hearing as soon as possible (paragraph 29 ACAS Code).

78. The Tribunal found that none of the ACAS Code procedures had been followed. The Tribunal considered whether the ACAS Code procedures were ignored altogether or applied to some extent. The Tribunal found that there was no attempt at compliance. The suspension letter set out what would happen next, which did not then happen. The respondent said it would

provide an appeal outcome in writing to the claimant but did not do so. The Tribunal found that the failure to comply with the ACAS Code procedures was deliberate. The Tribunal also found that there were no circumstances which might mitigate the failure. The respondent has a disciplinary policy. Mr Kelly as the owner of the business accepted that he has responsibility for the disciplinary policy and for updating it. He knew about the disciplinary policy when dismissing the claimant but did not consult it. The disciplinary policy was not produced to the Tribunal. The Tribunal found that the failure by Mr Kelly to comply with the ACAS Code was unreasonable (*University of Exeter v Dr Annette Plaut [2024] EAT 159*).

79. The Tribunal considered whether it was just and equitable to increase the award of compensation made to the claimant. Any uplift to the compensatory award must reflect all the circumstances including the seriousness of the breach. The respondent failed to comply with the ACAS Code of Practice, from the investigation stage right through to the appeal stage. That failure was deliberate. The respondent did not consult its disciplinary policy. Mr Kelly knew about the policy and had responsibility for it. The respondent knew what it needed to do by way of investigation, said it would do so but then did not. The respondent said it would provide an appeal outcome in writing to the claimant but did not do so. The respondent identified some of the ACAS Code procedures but then chose not to follow them. The Tribunal found that this was a most serious breach. There is no overlap with any other award *(Baronet Hamilton v Biggs Stewart Aethelbert Ltd [2022] IRLR 216*).

80. The Tribunal found that it was just and equitable to increase the award of compensation made to the claimant. The breaches of the ACAS Code were significant and most serious. They were not done out of a lack of knowledge by the respondent, but rather because the respondent deliberately chose not to follow them. The Tribunal considered the percentage uplift to apply. The Tribunal considered whether it was just and equitable to award an ACAS uplift of 25%, as submitted by the claimant. Applying a sense check, the Tribunal considered the absolute value of the uplift (*Acetrip v Dogra UKEAT/0238/18*). An uplift of 25% is £1,850.12. This was not a disproportionate sum in absolute terms. The Tribunal found that in all the circumstances an uplift of 25% was just and equitable.

Contributory conduct

81. In terms of section 123(6) ERA where a Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

82. The Tribunal accepted the claimant's evidence that he was wearing PPE, including a safety harness which was secured to the roof ladder. The Tribunal accepted the claimant's evidence that if he had slipped, he would have been caught by the safety harness secured to the roof ladder. Mr Kelly accepted in evidence that when he dismissed the claimant, he did not know that he was wearing a safety harness.

83. The Tribunal was not persuaded that the claimant had caused or contributed to his dismissal. The Tribunal found it was not just and equitable to reduce the compensatory award.

Conclusion

84. The Tribunal concluded that in all the circumstances of the case the claimant was unfairly dismissed by the respondent and should be awarded a basic award of £5,033, a compensatory award of £9,250.59 (£7,400.47 x 25% ACAS Code uplift) and an award of £500 for loss of statutory rights.

85. The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply as the claimant was not in receipt of any state benefits because of his dismissal.

Date sent to parties : 3 July 2026